

No. 1-09-3022

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THIRD DIVISION
March 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 05 CR 4642 |
| |) | |
| ROBERT UPSHAW, |) | Honorable |
| |) | Michael Brown and |
| Defendant-Appellant. |) | Thomas J. Hennelly, |
| |) | Judges Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

O R D E R

HELD: Summary dismissal of the defendant's post-conviction petition was proper where circuit court's admonishment about mandatory supervised release substantially complied with Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997) and *People v. Whitfield*, 217 Ill. 2d 177 (2005), as required by

People v. Morris, 236 Ill. 2d 345, 366-67 (2010).

Robert Upshaw, the defendant, appeals from the summary dismissal of his petition for post-conviction relief, contending that he was not adequately admonished about mandatory supervised release during his guilty plea and sentencing proceedings. Defendant requests reduction of his sentence from 10 years to 7 years, or, alternatively, remandment for second-stage post-conviction proceedings. We affirm.

Pursuant to a negotiated guilty plea on October 15, 2008, defendant was convicted of aggravated battery with a firearm, and was sentenced to a 10-year prison term with 1,366 days of credit for time he spent in presentence custody.

The factual basis for the plea disclosed that on September 21, 2004, defendant drove to the vicinity of 5001 South Loomis in Chicago, where he argued with Betty Johnson, produced a gun, and shot Walter Thomas in the right thigh. Joanne Barker and Uthant Johnson also were present, and they, along with Walter Thomas, subsequently identified defendant in a lineup.

During the guilty plea proceeding, the circuit court (Judge Thomas Hennelly) admonished defendant as follows about mandatory supervised release:

"THE COURT: This is a Class X felony and

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I can sentence you [from] 6 to 30 years in the Illinois Department of Corrections. If your background warranted, it that [sic] could be extended from 30 to 60 years. You're and [sic] not entitled to probation under this charge. I can fine you up to \$25,000 as well. If you go to the penitentiary you must serve three years mandatory supervised release, which used to be called parole upon your release from the penitentiary. That's the possible penalty that you face in this charge. Do you understand what you are facing.

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about that?

THE DEFENDANT: No."

The court also admonished defendant of his rights, but did not re-admonish defendant about mandatory supervised release during the sentencing phase of the plea proceedings and did not refer to mandatory supervised release when it imposed sentence.

Defendant did not file a motion to withdraw the guilty plea or a direct appeal.

In September 2009, defendant filed a *pro se* petition for post-

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conviction relief, supported by his affidavit, alleging that he agreed to a 10-year sentence, that he was informed only of the possibility of mandatory supervised release, and that mandatory supervised release meant that his sentence was actually 13 years. The circuit court (Judge Michael Brown) summarily dismissed the petition as frivolous and patently without merit on September 25, 2009.

On appeal, defendant contends that the circuit court referred to mandatory supervised release only when discussing the possible sentences for aggravated battery with a firearm, and did not admonish him that mandatory supervised release would apply to the terms of his negotiated plea and be added to his actual prison sentence. Defendant argues that summary dismissal was inappropriate because there was an arguable factual basis for his allegation that he was not admonished in a manner that he could comprehend what was said about mandatory supervised release. He also maintains that his legal arguments cannot be characterized as indisputably meritless.

Citing *People v. Whitfield*, 217 Ill. 2d 177 (2005), and *People v. Morris*, 236 Ill. 2d 345, 366 (2010), defendant suggests that his actual total sentence was 13 years, in violation of the plea agreement for 10 years, because the circuit court did not properly admonish him that a three-year term of mandatory supervised release

would be added to and would follow the negotiated 10-year prison term.

A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it lacks an arguable basis in law or in fact, meaning that it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (1009); see also *People v. Mendez*, 402 Ill. App. 3d 95, 98 (2010). The applicable standard of review for the summary dismissal of a post-conviction petition is *de novo*. See *People v. West*, 187 Ill. 2d 418, 426 (1999); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997) requires the circuit court to provide various admonishments to a defendant who pleads guilty, including an admonishment about the minimum and maximum sentence.

In *Whitfield*, 217 Ill. 2d at 180, 195, 201, 205, neither the circuit court nor the prosecutor told the defendant during the plea hearing that he would have to serve three years of mandatory supervised release following his negotiated 25-year prison sentence for murder. The Illinois Supreme Court reversed the judgment, vacated the sentence, and remanded to the circuit court with directions to impose a prison sentence of 22 years, to be followed by a three-year term of mandatory supervised release. *Whitfield*,

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217 Ill. 2d at 205.

In *Morris*, 236 Ill. 2d at 366, the Illinois Supreme Court ruled that *Whitfield* applies prospectively to post-conviction petitioners whose convictions were finalized after December 20, 2005, the date that the *Whitfield* decision was issued. The court in *Morris*, 236 Ill. 2d at 366, also stated that it was clarifying *Whitfield*. The court stated that, pursuant to *Whitfield*, the defendant must be advised that a period of mandatory supervised release will be added to the actual, agreed sentence, in exchange for the guilty plea. *Morris*, 236 Ill. 2d at 367. However, the court also stated that "there is no precise formula in admonishing a defendant" about mandatory supervised release, that the admonishment "need not be perfect" (*Morris*, 236 Ill. 2d at 367), and that it is sufficient if it substantially complies with Supreme Court Rule 402 and case law precedent. *Morris*, 236 Ill. 2d at 367.

Although the districts are divided over what constitutes a *Whitfield* violation after *Morris* (see the discussion in *People v. Dorsey*, No. 4-07-0572, slip op. at 10-17 (Ill. App. Oct. 15, 2010)), the first district has held that a constitutional violation under *Whitfield* occurs only where there is no mention of mandatory supervised release. See *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010).

Here, *Whitfield* applies to defendant because his October 15,

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2008, conviction occurred after the date that *Whitfield* was issued. Defendant acknowledges that the circuit court did admonish him about mandatory supervised release, but he complains that the admonishment occurred only in the context of possible penalties and that therefore the admonishment was ambiguous as to whether mandatory supervised release was merely a possible penalty or whether it would be added to the actual 10-year prison sentence. Defendant does not discuss substantial compliance until his reply brief, where he alleges that the admonishments did not substantially comply with *Whitfield* or *Morris* because the circuit court failed to link mandatory supervised release to the actual sentence, failed to reiterate that mandatory supervised release would follow the 10-year prison sentence, and failed to record mandatory supervised release in the mittimus.

However, unlike *Whitfield*, this is not a case where the circuit court was absolutely silent about mandatory supervised release. See *Davis*, 403 Ill. App. 3d at 466. Instead, the circuit court substantially complied with *Whitfield* and Rule 402(a)(2) because it clearly admonished defendant that if he were sent to the penitentiary, he would have to serve a three-year period of mandatory supervised release upon his release from the penitentiary. The circuit court also admonished defendant that probation was not an available sentence. The clear meaning of the

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admonishments was that defendant would receive a penitentiary sentence to be followed by three years of mandatory supervised release. Under these circumstances, defendant failed to allege the gist of a meritorious constitutional claim in his post-conviction petition, and the circuit court's summary dismissal of the petition was proper.

Finally, defendant cited *Santobello v. New York*, 404 U.S. 257, 262-63 (1971). Pursuant to *Santobello*, a defendant who pleads guilty pursuant to a plea agreement has a due process right to enforce the plea bargain. Defendant implies that his sentence should be reduced because he was denied the benefit of his plea bargain under *Santobello* and independent of *Whitfield*. However, *Morris* recognized that *Whitfield* relied on *Santobello*. *Morris*, 236 Ill. 2d at 361; see also *People v. Seyferlich*, 398 Ill. App. 3d 989, 993 (2010) (observing that the benefit of the bargain theory in *Whitfield* was "rooted in" *Santobello*). Therefore, *Santobello* is not independent of *Whitfield*, and defendant cannot avoid *Morris* by relying on *Santobello* instead of *Whitfield*. See *People v. Demitro*, No. 1-09-2104, slip op. at 4 (Ill. App. Dec. 17, 2010). We reject defendant's suggestion that the law applicable to his benefit of the bargain argument begins and ends in 1971 with *Santobello*.

We conclude that the circuit court correctly ordered the summary dismissal of defendant's post-conviction petition because

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the court's admonishment concerning mandatory supervised release substantially complied with *Whitfield* and Rule 402(a)(2) as required by *Morris*, and therefore the post-conviction petition was based on an indisputably meritless legal theory and a factual allegation rebutted by the record. See *Davis*, 403 Ill. App. 3d at 467.

The judgment of the circuit court is affirmed.

Affirmed.