FIRST DIVISION
May 31, 2011

No. 1-09-3541

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).

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. 97 CR 10247
	)	
RICKEY HARMON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concur with the judgment.

O R D E R

HELD: Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to present a cognizable claim for a reduction in his term of mandatory supervised release, filing fees and costs properly imposed against defendant for filing a frivolous petition.

Defendant, Rickey Harmon, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Defendant maintains he presented an arguable basis in law and that he was entitled to a three-year reduction in his sentence where he was not informed he would have to serve a three-year term of mandatory supervised release (MSR) in addition to his agreed-upon sentence. Defendant also contests the $105 in filing fees and costs imposed by the circuit court. We affirm.

The record shows that, in September 1997, defendant entered a negotiated plea of guilty to first-degree murder, attempted murder, and aggravated vehicular hijacking, and was sentenced to

concurrent prison terms of 34, 30 and 30 years, respectively. These sentences were ordered to be served concurrently with the three-year term of imprisonment imposed on defendant's guilty plea to a probation violation in a separate case.

At the plea proceeding, the circuit court admonished defendant that a Class X felony includes a 3-year term of MSR, and defendant can be sentenced from 6 to 30 years with a 3-year term of MSR on the attempted murder and aggravated vehicular hijacking offenses. The court asked defendant if he understood this, and he replied, "[y]es." The court accepted defendant's guilty plea and sentenced him in accordance with the terms of the plea agreement.

Defendant made no attempt to vacate his plea, or, otherwise, perfect an appeal from the judgment entered thereon. On May 18, 1998, however, defendant filed a *pro se* motion for modification of his sentence, requesting the circuit court reduce his sentence because it was imposed pursuant to the truth-in-sentencing statute which had since been rendered void. The court granted defendant's motion, and ordered he be given good conduct credit.

On July 2, 2008, defendant filed the instant *pro se* post-conviction petition that alleged he was not properly admonished by the circuit court or the State that he would have to serve a three-year term of MSR upon his release, citing *People v. Whitfield,* 217 Ill. 2d 177 (2005). The court summarily dismissed the petition in a written order. In doing so, the court found that the record showed defendant was admonished of the three-year term of MSR, and his claim was frivolous and patently without merit. Accordingly, the court assessed defendant $105 in filing fees and costs for the "clearly frivolous filing," and issued a separate written order to that effect.

On appeal, defendant first contends he presented an arguable basis in law and that the circuit court failed to admonish him that a three-year period of MSR would be added to his sentence. Defendant, thus, requests this court to reduce his sentence by three years, or, in the alternative, to remand his cause for second-stage post-conviction proceedings.

At the first stage of post-conviction proceedings, a *pro se* defendant need only present the

gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts that arguably assert a meritorious constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *Brown*, 236 Ill. 2d at 184.

In setting forth his MSR argument, defendant relies on *Whitfield*. In that case, the supreme court held that the trial court's failure to admonish defendant of the MSR term during a guilty plea proceeding amounts to a unilateral modification and breach of the plea agreement with the State entitling defendant to relief. *Whitfield*, 217 Ill. 2d at 190. The supreme court has since held, however, that this rule only applies prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced. *People v. Morris*, 236 Ill. 2d 345, 366 (2010).

Here, as noted, defendant entered a negotiated plea of guilty in 1997, and on May 22, 1998, the circuit court granted his *pro se* motion for modification of sentence to allow for good conduct credit. No further proceedings were pending at that time, nor motions filed until defendant filed the *pro se* post-conviction petition at bar on July 2, 2008. The record thus shows defendant's conviction was finalized long before the 2005 *Whitfield* decision, and that he is not entitled to retroactive relief under that case. *Morris*, 236 Ill. 2d at 366. It therefore follows that the circuit court properly dismissed defendant's post-conviction petition at the first stage of proceedings where he did not set forth a claim that had an arguable basis in law and in fact to warrant further proceedings under the Act. *People v. Mendez*, 402 Ill. App. 3d 95, 98 (2010).

In an attempt to avoid this result, defendant claims the supreme court decision in *Morris* regarding the applicability of the retroactivity bar set forth in *Teague v. Lane*, 489 U.S. 288 (1989), was wrongly decided. He maintains that *Whitfield* applied a long-standing principle that a plea

entered in exchange for a promise that cannot be fulfilled is not a knowing and voluntary guilty plea, and it would lead to similarly situated defendants being treated differently where *Whitfield* did not announce that it was non-retroactive. We note, however, the propriety of *Morris* is not before this court. We are bound by the decisions of the supreme court, and, as a result, no further discussion of this claim is warranted. *People v. Demitro*, No. 1-09-2104, slip op. at 3-4 (Ill. App. Dec. 17, 2010), citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009).

Defendant, nonetheless, claims that application of *Morris* to his case would be unjust because his appeal would have likely been decided prior to the January 2010 *Morris* decision, but for the circuit court clerk untimely sending him notice of the 2008 order dismissing his post-conviction petition in December 2009. As noted above, we are bound by the supreme court decision in *Morris* (*Demitro*, slip op. at 3-4), which provides for no exceptions to its holding. Furthermore, the purpose of requiring the clerk to notify defendant of the dismissal of his post-conviction petition within 10 days of the dismissal (725 ILCS 5/122-2.1(a)(2) (West 2008)), is to protect defendant's right to appeal. *People v. Robinson*, 217 Ill. 2d 43, 57 (2005). As there is no other purpose to this notice requirement, the only remedy defendant can request based on the clerk's untimely notice is to file a late notice of appeal, which he did and this court allowed.

Defendant further maintains that, based on the clerk's late notice, equitable interests and principles of fundamental fairness exist such that *Morris* should not apply, citing *People v Williams*, 301 Ill. App. 3d 210 (1998). Defendant essentially relies on the *dicta* in *Williams* in support of his contention that *Morris* should not apply. *Dicta* is not binding authority, and has no precedential value. *People v. Jamerson*, 292 Ill. App. 3d 944, 948 (1997). Furthermore, *Williams* does not suggest, by any means, that the appellate court may choose to ignore a supreme court decision that one of its prior decisions is non-retroactive based on an argument of unfairness.

Defendant also claims his argument that he did not receive the benefit of his plea bargain with the State is not barred by *Morris* because it is based on constitutional principles announced in

Santobello v. New York, 404 U.S. 257 (1971), independent of *Whitfield*, and the *Morris* retroactivity rule is an affirmative defense, like untimeliness, which should only be applied at the second stage. Consistent with our firm ruling on this matter, we continue to find, by citing to *Santobello*, defendant may not avoid the effect of its progeny *Whitfield* and its limitation to prospective application under *Morris* since the remedy in *Whitfield* was rooted in *Santobello*. *Demitro*, slip op. at 4. Moreover, *Morris* is a supreme court decision, not an affirmative defense, which is capable of being waived, and, thus, must be applied as a matter of law. *Artis*, 232 Ill. 2d at 164.

Defendant finally contends the imposition of $105 in filing fees should be reversed because his post-conviction petition was not frivolous for purposes of section 22-105 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2008)). He further maintains legislative history suggests this court should consider his innocent mental state in determining whether his petition was frivolous for purposes of imposing the fee.

The supreme court recently held that a post-conviction petition summarily dismissed as frivolous and patently without merit under section 122-2.1 of the Act (725 ILCS 5/122-1 (West 2008)) is subject to imposition of fees under section 22-105 of the Code. *People v. Alcozer*, No. 108109, slip op. at 8 (March 24, 2011). Citing its case law defining frivolous or patently without merit as having no basis in law or in fact and obviously without legal significance, the court determined the definition of frivolous and patently without merit under section 122-2.1 of the Act is included in the definition of a frivolous lawsuit under section 22-105 of the Code. *Alcozer*, slip op. at 8-9. In accordance with that reasoning, we find the imposition of $105 in fees and costs under section 22-105 of the Code was proper in this case where defendant's petition was summarily dismissed as frivolous and patently without merit under section 122-2.1 of the Act.

In light of the foregoing, we affirm the summary dismissal of defendant's post-conviction petition and the imposition of fees and costs by the circuit court of Cook County.

Affirmed.