

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).

2011 IL App (4th) 100181-U

Filed 8/16/11

NO. 4-10-0181

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JAY R. SCHWEITZER,)	No. 06CF229
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's judgment where counsel concludes no meritorious issues could be raised on appeal as to the following: whether (1) the trial court engaged in additional fact finding during a pre-sentencing hearing; (2) the trial court erred in requiring defendant to serve 85% of his sentence due to its finding of great bodily harm; (3) the trial court erred in ordering restitution; or (4) the term of mandatory supervised release (MSR) was improper.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2006, the State charged defendant, Jay R. Schweitzer, via information with one count of home invasion, a Class X felony (720 ILCS 5/12-11(a)(2) (West 2006)).

Specifically, the State alleged defendant entered the dwelling of James Bateman without authority, when he knew or had reason to know one or more persons were present, and caused Bateman injury in that dwelling. See 720 ILCS 5/12-11(a)(2) (West 2006). At the plea hearing in August 2006, the trial court advised defendant he was subject to a sentence of 6 to 30 years' imprisonment and a 3-year MSR term. The court found defendant had inflicted great bodily harm upon Bateman and advised defendant he would be required to serve 85% of any prison sentence he received under section 5-4-1(c-1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4-1(c-1) (West 2006)). Defendant then entered an open plea of guilty. The State's factual basis showed the following.

¶ 5 After a night of drinking with Bateman and Amber Crook, a woman with whom defendant had a prior relationship, defendant became angry when he saw Bateman and Crook kiss. Defendant left the bar to go home. Sometime later, defendant went by Bateman's apartment and saw Crook's car parked outside the building. Defendant tried the door to Bateman's apartment and, upon finding it locked, forced the door open with his shoulder. Defendant proceeded to the bedroom but found the door locked. Defendant kicked open the bedroom door and found Bateman and Crook in bed together. Defendant approached Bateman and began striking him about the head.

¶ 6 After repeatedly striking Bateman, defendant walked out of the apartment and called Crook's boyfriend, Adam Hawkins. Defendant told Hawkins he had caught Bateman and Crook in bed together and had beaten Bateman. Defendant then called a friend, James Zalesiak, and told him what had happened. Defendant informed Zalesiak he was afraid he had killed Bateman. Zalesiak urged defendant to turn himself in to the police, which defendant later did.

At the police station, defendant admitted entering the apartment and striking Bateman.

Defendant's attack caused several fractures in Bateman's jaw and face, as well as severe swelling and bruising.

¶ 7 At the conclusion of the factual basis, defendant admitted the State's version of events was substantially correct and persisted in his guilty plea. The trial court entered a judgment of conviction against defendant.

¶ 8 At the October 2006 sentencing hearing, defendant presented testimony and letters in mitigation. Defendant also made a statement to the trial court apologizing for his actions. The State requested the court impose a 20-year prison sentence, and defense counsel sought a sentence closer to the six-year minimum. In sentencing defendant, the court detailed the severity of the injuries defendant inflicted upon Bateman and specifically found they constituted great bodily harm. The court then sentenced defendant to six years and six months in prison, of which defendant was required to serve 85%. Relying on the presentence investigation report, the court also ordered defendant to pay restitution in the amount of \$23,116.90 (\$2,635.49 to Bateman and \$20,481.41 to Blue Cross, Bateman's insurer) for medical bills.

¶ 9 In October 2009, defendant filed a "Petition for Relief from Judgment Order of Disposition and Sentence Affidavit and Exhibits Attached" pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2006)) asserting his sentence was void because (1) the trial court engaged in additional fact finding during a presentencing hearing; (2) the court erred in requiring defendant to serve 85% of his prison sentence based on an erroneous finding of great bodily harm; (3) the court improperly calculated the restitution defendant owed; and (4) the term of MSR was improperly imposed. In December 2009, defendant supplied proof

of service of the motion upon the State's Attorney's office, as requested by the court. The court dismissed defendant's petition *sua sponte* for failing to state a claim upon which relief could be granted.

¶ 10 In March 2010, defendant filed a notice of appeal and OSAD was appointed as defense counsel on the appeal. In January 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by February 25, 2011. Defendant responded, and the State also responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. We agree.

¶ 13 "Section 2–1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1,7, 871 N.E.2d 17, 22 (2007). "A section 2–1401 petition's purpose is to bring before the trial court facts not appearing in the record that, if known at the time the court entered judgment, would have prevented the judgment's entry." *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004). The burden of proof is on the moving party and must be proved by a preponderance of the evidence. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986). Where the State fails to answer a section 2–1401 motion, all well-pleaded facts must be accepted as true by the trial court and the motion becomes ripe for adjudication.

Vincent, 226 Ill. 2d at 9-10, 871 N.E.2d at 23-24. A court may dismiss *sua sponte* a section 2-1401 motion that fails to plead legally sufficient grounds for relief. *Id.* at 8, 871 N.E.2d at 23. "[A] litigant whose cause of action has been terminated by the court *sua sponte* may bring an appeal, which invites *de novo* review of the legal sufficiency of the complaint." *Id.* at 13, 871 N.E.2d at 25-26.

¶ 14 Defendant initially claims the trial court engaged in additional fact finding and used those facts in aggravation during his sentencing. Though defendant's argument is somewhat hard to follow, he attached as an exhibit excerpts from the record pertaining to his guilty plea and the factual basis presented by the State. Defendant appears to claim hearing the factual basis constituted additional fact finding used against him at his sentencing hearing. This allegation is insufficient to obtain relief from the trial court's judgment. Illinois Supreme Court Rule 402 (c) (eff. July 1, 1997) required the trial court to determine whether a factual basis existed before it could accept defendant's plea. Further, defendant acknowledged the accuracy of the factual basis. Defendant did not meet his burden of pleading specific facts to form the grounds for relief. Thus, we agree with OSAD no meritorious argument can be made the trial court erred in dismissing this portion of defendant's motion.

¶ 15 Defendant next claims the trial court erred in finding he had inflicted great bodily harm upon the victim and requiring him to serve 85% of his prison sentence. See 730 ILCS 5/5-4-1(c-1) (West 2006). Defendant argues bodily harm is not an element of the crime of home invasion (720 ILCS 5/12-11(a)(2) (West 2006)) but is instead an element of the crime of aggravated battery (720 ILCS 5/12-4(a) (West 2006)). Because defendant was not charged with aggravated battery, he argues great bodily harm was not an element of the crime he pleaded

guilty to and he should not be subjected to enhanced sentencing provisions. Defendant's argument is belied by the record.

¶ 16 Initially, we note defendant appears to have the elements of the crime to which he pleaded guilty confused with the elements considered by the trial court in sentencing him. The court clearly made a factual finding on the record that defendant caused great bodily harm in commission of the crime of home invasion. In pertinent part, the court stated, "a CT Scan of the head and face [of the victim] *** revealed multiple facial fractures of the right mandible, right maxillary sinus, and the right orbit and nasal bone." The court went on to state, "[t]hat qualifies for great bodily harm under the statutory section [section 5-4-1(c-1) of the Unified Code]." Under section 5-4-1(c-1) of the Unified Code, because defendant caused great bodily harm to Bateman while committing the crime of home invasion, he is required to serve 85% of his prison sentence. 730 ILCS 5/5-4-1(c-1) (West 2006). We agree with OSAD no meritorious argument can be made regarding this issue.

¶ 17 Defendant next argued the trial court erred in ordering him to pay restitution without holding a hearing. Defendant claimed the court imposed "fines and fees under the guise of an 'Order of Restitution.'" In his additional points and authorities filed with this court, defendant argues the trial court erred in failing to hold a hearing on his ability to pay restitution and in ordering him to pay restitution to Blue Cross because it was not a "victim" of his crime.

¶ 18 A trial court has the authority to order restitution against a defendant for any economic loss proximately caused by his conduct. 730 ILCS 5/5-5-6(a) (West 2006). This amount is to include any out-of-pocket expenses to the victim, as well as any expenses incurred by an insurance company which insured the victim and incurred expenses as a result of

defendant's actions. 730 ILCS 5/5-5-6(b) (West 2006). In addition, this court has recognized "[t]here is no provision requiring consideration of the [defendant's] ability to pay when deciding whether restitution should be part of a sentence." *People v. Mitchell*, 241 Ill. App. 3d 1094, 1098, 610 N.E.2d 794, 797 (1993) (The "lack of ability of a defendant to pay *** is of no relevance."). In the instant case, Blue Cross provided health insurance to Bateman and incurred expenses as the result of defendant's attack. The trial court based the restitution amount on figures provided in the presentencing report and properly ordered defendant to pay this amount as part of his sentence. The court was not required to hold a hearing on defendant's ability to pay restitution prior to ordering it. We, therefore, agree with OSAD no meritorious argument can be raised regarding this issue.

¶ 19 Defendant last argued his term of MSR violates due process and equal protection. He further claims the imposition of MSR in this case violates prohibitions against *ex post facto* laws as well as bills of attainder. This argument is hard to follow, and the trial court dismissed it for failure to state a claim without elaboration. In his additional points and authorities, defendant clarifies his argument regarding MSR. Defendant claims under his enhanced sentence (85% of six years and six months), he will serve five years, six months, and nine days in prison, and when the three-year MSR term is considered, the total sentence he will be required to serve will amount to eight years, six months, and nine days, which he argues exceeds the trial court's sentence of six years and six months. This appears to be akin to a *People v. Whitfield*, 217 Ill. 2d 177, 203, 840 N.E.2d 658, 673-74 (2005), argument, *i.e.*, his prison sentence must be reduced by the length of the MSR term. This argument is based on defendant's erroneous interpretation of the MSR period as "part of a defendant's sentence." *People v. Elizalde*, 344 Ill. App. 3d 678,

681, 800 N.E.2d 859, 862 (2003), overruled on other grounds by *People v. Graves*, 235 Ill. 2d 244, 919 N.E.2d 906 (2009).

¶ 20 In accepting defendant's guilty plea, the trial court stated on the record: "At the end of any prison sentence for this offense [,] there is an additional three years of mandatory supervised release." Additionally, the judgment entered by the court included a sentence of six years and six months in prison for home invasion, a Class X felony (720 ILCS 5/12-11(c) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006)) and a three-year MSR term (730 ILCS 5/5-8-1(d), (d)(1) (West 2006) (Class X felony includes MSR term of three years "in addition to the term of imprisonment.")). The three-year MSR term was *in addition* to defendant's six year and six-month prison sentence. After serving five years, six months, and nine days in prison, he will serve three years of MSR. We further note while serving MSR, a defendant remains at liberty so long as he complies with its terms. The MSR period, while imposing some conditions on liberty, cannot be equated with time served in prison. We agree with OSAD defendant has failed to raise a meritorious argument on this issue.

¶ 21 Finally, we note defendant raises a procedural argument in his additional points and authorities. Defendant argues the trial court erred in dismissing his petition *sua sponte* without affording him "the opportunity to defend the petition, or present any additional matters." In support of his argument, defendant cites *People v. Pearson*, 345 Ill. App. 3d 191, 195-97, 802 N.E.2d 386, 389-91 (2003), in which the court found the defendant must be afforded the same notice and opportunity to respond when the petition is dismissed *sua sponte* by the trial court as he would have received had the State filed a response. However, as noted above, our supreme court has since addressed this issue in *Vincent*, 226 Ill. 2d at 10-13, 871 N.E.2d at 24-26, and

expressly found the defendant is not due any notice prior to the trial court's dismissal of a section 2-1401 petition *sua sponte* for failure to state a claim upon which relief can be granted.

Accordingly, defendant in the instant case was not due any notice prior to the dismissal of his section 2-1401 petition, where the trial court correctly found he failed to state a claim upon which relief could have been granted.

¶ 22 In a section 2-1401(f) petition for relief from judgment, the burden is on defendant to show he is entitled to relief based on well-pleaded facts. Defendant in the instant case has failed to do so in regard to all matters included in his petition.

¶ 23 III. CONCLUSION

¶ 24 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD defendant failed to raise any meritorious issues in his appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.