

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).

NO. 4-10-0116

Filed 1/19/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
TRAVON WESLEY,)	No. 06CF145
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the
judgment.

ORDER

Held: We grant OSAD's motion to withdraw as counsel and affirm the trial court's dismissal of defendant's postconviction petition as frivolous where MSR is not an unconstitutional (1) deprivation of liberty, (2) violation of due process, or (3) violation of the separation of powers because (a) the legislature is authorized to enact mandatory sentencing provisions, (b) MSR terms are statutorily required, and (c) any additional time defendant may be forced to serve if he violates the terms of his MSR does not violate due process because MSR is part of the original sentence by operation of law and not a second sentence.

This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). For the following reasons, we agree and affirm the trial court.

I. BACKGROUND

In March 2006, the State charged defendant, Travon Wesley, with aggravated discharge of a firearm (count I) (720 ILCS 5/24-1.2(a)(2) (West 2006)), aggravated battery with a firearm (count II) (720 ILCS 5/12-4.2(a) (West 2006)), and mob action (count III) (720 ILCS 5/25-1(a)(1) (West 2006)).

In September 2006, defendant pleaded guilty to count I. In exchange, the State dropped counts II and III and agreed to a sentencing cap of seven years' imprisonment. The trial court admonished defendant as follows:

"Count One, aggravated discharge of a firearm, is a Class One felony. It's punishable by four to fifteen years in the penitentiary,--It could be 15 to 30 years if there were aggravating factors present for extended-term sentencing--two years of mandatory supervised release [(MSR)], up to four years on probation, and up to a \$25,000 fine."

In December 2006, the trial court sentenced defendant to 54 months' imprisonment, a sentence which carried 2 years' MSR. See 720 ILCS 5/24-1.2(b) (West 2006) (aggravated discharge of a firearm is a Class 1 felony); see also 730 ILCS 5/5-8-1(d)(2) (West 2006) (the MSR term for a Class 1 felony is two years).

Defendant did not file a posttrial motion or appeal the judgment.

In February 2007, defendant wrote a letter to the trial court requesting documentation because he thought his sentence was subject to day-for-day credit instead of the 85% the Department of Corrections (DOC) was requiring him to serve.

In July 2007, defendant filed a pleading labeled, "Petition for Writ of Relief of Judgment," pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2006)), arguing MSR is an unconstitutional violation of the separation-of-powers doctrine and due process. Defendant requested either (1) his sentence of 4 1/2 years include the two year term of MSR or (2) he be released early. The trial court apparently treated defendant's pleading as a postconviction petition.

The theories set forth by defendant supporting his argument are not entirely clear. According to defendant's petition, (1) upon serving his determinate sentence, he should not have to serve a term of MSR, (2) the "multitude of after care programs, including home detention" subjects an offender to restrictions and limitations on his liberty, (3) the "myriad of conditions" the prison review board may impose regarding "where you may work a real job, and where you may go, and who you may go with and for how long" deprives him of his liberty, (3) by requiring MSR, the legislature impermissibly increases the trial

court's sentence, thereby (a) depriving an offender of his due-process rights and (b) violating the separation-of-powers doctrine.

On August 27, 2007, the trial court dismissed defendant's petition as being frivolous and patently without merit, stating "[MSR] is not unconstitutional."

Thereafter, defendant filed a *pro se* notice of appeal, which was file stamped September 27, 2007. Defendant's unverified proof of service shows he mailed the notice on September 17, 2007. However, for reasons not in record, the circuit clerk did not forward the notice to this court until February 2, 2010.

OSAD has filed a motion to withdraw as counsel, asserting no issues of arguable merit warrant appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities by July 30, 2010. Defendant filed none. After examining the record consistent with our responsibilities under Finley, we agree, grant OSAD's motion to withdraw as counsel on appeal, and affirm the trial court's dismissal of defendant's petition.

II. ANALYSIS

OSAD moves to withdraw as counsel in this case because it argues an appeal would be frivolous. We agree with OSAD.

A. Standard of Review

The issue in a first-stage dismissal of a defendant's

postconviction petition is whether the petition is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 247, 757 N.E.2d 442, 447 (2001). "A post[]conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'" *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). The petition need only present a limited amount of detail and not the claim in its entirety. Further, the petition need not include legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. This court reviews the dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002).

B. Defendant's Petition

Defendant's petition alleges MSR is unconstitutional where it is a (1) deprivation of liberty, (2) violation of due process, and (3) violation of the separation of powers. We disagree.

"Legislative enactments, including those which declare and define conduct constituting a crime and determine the penalties imposed for criminal conduct, are presumed constitutional." *People v. Dunigan*, 165 Ill. 2d 235, 244, 650 N.E.2d 1026, 1030 (1995). The party challenging a statute has a heavy burden of

establishing a clear constitutional violation. *People v. Ruiz*, 342 Ill. App. 3d 750, 762-63, 795 N.E.2d 912, 924 (2003).

We understand defendant to be arguing section 3-6-3(a)(2)(iv) of the Unified Code of Corrections (Unified Code) violates the separation-of-powers doctrine because the legislature lacks the power to enact mandatory sentencing provisions. However, section 3-6-3(a)(2)(iv) does not violate separation of powers because the legislature is authorized to enact mandatory sentencing provisions. See *People v. Taylor*, 102 Ill. 2d 201, 207-08, 464 N.E.2d 1059, 1062-63 (1984).

In section 3-6-3(a)(2)(iv) of the Unified Code, the legislature mandated those convicted of aggravated discharge of a firearm serve 85% of their sentences. See 730 ILCS 5/3-6-3(a)(2)(iv) (West 2006). In section 5-8-1(d), the legislature also mandated MSR as part of the original sentence. See 730 ILCS 5/5-8-1(d) (West 2006) (terms of MSR are included in a trial court's sentence as though they were already written in); see also *People v. Whitfield*, 217 Ill. 2d 177, 200-01, 840 N.E.2d 658, 672 (2005) (MSR terms are statutorily required and the court has no power to withhold such a period in imposing the sentence). In enacting sections 3-6-3(a)(2)(iv) and 5-8-1(d) of the Unified Code, the legislature was exercising its power to legislate punishments for statutory crimes and was not infringing upon the judicial function of sentencing. Thus, no separation-of-powers

violation exists.

Further, section 3-6-3(a)(2)(iv) of the Unified Code does not violate due process or double jeopardy. Defendant appears to argue the MSR term constitutes a second term imposed after his full sentence has been served. As stated, MSR is not a second sentence. Instead, it is part of the original sentence by operation of law. See *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194, 361 N.E.2d 1108, 1109 (1977). As MSR is part of the original sentence, any additional time defendant may be forced to serve if he violates the terms of his MSR does not violate due process. See *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980) (holding parole revocation does not violate double jeopardy because parole is part of the original sentence).

After carefully reviewing the record and the trial court's conclusion, we find the court properly dismissed defendant's postconviction petition.

III. CONCLUSION

Accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

Affirmed.