

No. 1-10-1633

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	99 CR 10738 (02)
)	
ANDRE FOSTER,)	Honorable
)	Jorge Luis Alonso,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Where a supreme court ruling contradicts a previous ruling by this court in the same case, the law of the case doctrine does not apply, and where *People v. Whitfield* cannot be applied retroactively and such non-retroactivity cannot be waived, the dismissal of defendant’s post-conviction petition at the second stage was affirmed.

¶ 2 On March 22, 2002, defendant Andre Foster pled guilty, pursuant to a plea agreement, to one count of first degree murder. After a hearing on aggravation and mitigation, the trial court sentenced defendant to 44 years to the Illinois Department of Corrections. During the sentencing

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hearing, the judge failed to admonish the defendant of the three years Mandatory Supervised Release (MSR) term following the 44 years sentence. Defendant did not file a direct appeal. Over four years later, in July 2006, defendant filed a *pro se* petition for post conviction relief in which he requested a modification of his sentence claiming the trial court failed to admonish him of the three-year MSR. The trial court dismissed the petition at its second stage after finding: (1) defendant failed to allege facts showing his lack of culpable negligence in filing an untimely petition; and (2) defendant failed to make a substantial showing of a constitutional violation. On appeal, we reversed and remanded for a third stage evidentiary hearing for defendant to show that he was not culpably negligent for the four-year delay between sentencing and defendant's filing of the post conviction petition. *People v. Foster*, No. 1-07-3168 (2009) (unpublished order under Supreme Court Rule 23). After remand, the trial court again dismissed defendant's petition based on the Illinois Supreme Court holding in *People v. Morris*, 236 Ill. 2d 345 (2010), finding the issue moot. Defendant now appeals the dismissal claiming that: (1) trial court's proceedings after remand ignored the remand orders, (2) State waived the affirmative defense of the non-retroactivity of *People v. Whitfield*, 217 Ill. 2d 177 (2005), in the earlier proceedings, and (3) the trial court erred by not finding a substantial showing of a constitutional violation because it contradicts United States Supreme Court precedent in *Santobello v. New York*, 404 U.S. 257 (1971).

¶ 3

BACKGROUND

¶ 4 Defendant was charged with multiple counts of first degree murder, armed robbery, armed violence, aggravated kidnapping, kidnapping, aggravated unlawful restraint and unlawful

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restraint for his participation in the August 17, 1996 shooting death of Ian McKenzie (victim). Defendant first pled guilty to one count of first degree murder in 1999. At the sentencing hearing, defendant received a sentence of 60 years as well as “a mandatory supervised release period of four years”. In 2001, defendant filed a “Motion to Vacate Judgment of Conviction” claiming his plea was involuntary due to coercive statements by the trial court. The trial court granted defendant’s motion and vacated defendant’s guilty plea.

¶ 5 In 2002, defendant again pled guilty to one count of first degree murder pursuant to a plea agreement. At the sentencing hearing, the trial court informed defendant that he “would be sentenced to 44 years in the Illinois Department of Corrections.” However, the trial court neglected to admonish defendant that he would also be required to serve a term of MSR. The trial court did inform defendant of the MSR terms with regards to the dismissed charges, stating that:

“I didn’t tell Mr. Foster what the other possible sentences were on the other charges. I think I’ll do that just so the record is absolutely complete. On the armed robbery, armed violence counts, sir, and also on the aggravated kidnapping count, I believe kidnapping counts, upon being sentenced to those, a possible sentence is from six to thirty years in the penitentiary with a mandatory supervised release term of three year[s] *** On the aggravated restraint, I believe that is a Class 3, and that would be a possible sentence of two to five years in the penitentiary. On the unlawful restraint, possible sentence is from one to three years. On the aggravated restraint and on the restraint, the mandatory supervised

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release term is one year.”

As noted, defendant did not file a direct appeal. However, over four years later, on July 12, 2006, defendant filed a *pro se* “Petition for Post Conviction Relief.” In the petition, defendant requested a modification of his sentence from 44 years to 41 years claiming the trial court had failed to admonish him of the three-year MSR term. Defendant also filed a *pro se* “Petition for Leave to File Late Petition for Post Conviction Relief,” claiming that he was not aware of the three-year mandatory supervised release term until he was informed by a prison counselor on June 28, 2006.

¶ 6 The trial court appointed a public defender to represent defendant in October, 2006. Defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in January 2007, indicating that he had consulted with defendant, reviewed the record, and determined that no amendment to defendant’s petition was needed.

¶ 7 On April 4, 2007, the State moved to dismiss defendant’s postconviction petition on timeliness grounds. The state argued that defendant’s postconviction petition had been filed over one year outside the three-year statute of limitations for postconviction petitions and the delay in filing was due to defendant’s culpable negligence.

¶ 8 At the trial court proceeding, the State did not dispute that the trial court failed to admonish defendant concerning the mandatory supervised release term at the time of defendant’s second guilty plea in 2002, but did argue that defendant was culpably negligent in filing the untimely postconviction petition. Defense counsel argued defendant was not culpably negligent because defendant did not become aware that he had to be admonished of his mandatory

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supervised release until his prison counselor told him in 2006 and that defendant filed his post-conviction petition promptly thereafter. Following the proceeding, and without holding an evidentiary hearing, the trial court granted the State's motion to dismiss. The trial court made the following findings: (1) that defendant failed to allege facts showing his lack of culpable negligence in filing an untimely petition; and (2) that defendant failed to make a substantial showing of a constitutional violation. The basis for the trial court's finding on the constitutional violation was that defendant had been previously admonished of a MSR term at the time of his 1999 plea, and that he had been informed of the MSR terms for the dismissed charges at the time of his 2002 plea. As a result he was aware that his sentence included the MSR term. Defendant then appealed the trial court's order that dismissed his post-conviction petition at the second stage.

¶ 9 On appeal, we reversed the trial court's dismissal of the postconviction petition and remanded the case to the trial court for an evidentiary hearing on the issue of whether defendant was culpably negligent in the untimely filing of his post-conviction petition. On the trial court's finding of insubstantial showing of a constitutional violation, we found that under *Whitfield*, "due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to that sentence." *Whitfield*, 217 Ill. 2d at 195.

¶ 10 After this case was remanded to the trial court, the State filed a "Motion to Forgo Evidentiary Hearing and Dismiss Post-Conviction Claims as Moot." The State argued that after *People v. Morris* was decided by the Illinois Supreme Court, defendant was no longer entitled to

relief under *Whitfield*, rendering his claim moot. *Morris*, 236 Ill. 2d 345. Defendant's postconviction counsel argued that the issue of the underlying claim was already resolved, and that we only remanded the case for a hearing on the very narrow issue of timeliness and culpable negligence. Following the arguments on the motion, the trial court granted the State's motion and dismissed defendant's petition. Defendant appeals the trial court's order that dismissed his post-conviction petition at the second stage.

¶ 11

ANALYSIS

¶ 12 The defendant appeals, arguing (1) that the trial court's proceedings after remand ignored the orders of the first reversal, (2) the State waived the affirmative defense of the non-retroactivity of *People v. Whitfield*, 217 Ill. 2d 177, in the earlier proceedings, and (3) the trial court erred by not finding a substantial showing of a constitutional violation because it contradicts United States Supreme Court precedent in *Santobello v. New York*, 404 U.S. 257.

¶ 13

I. Stages of a Postconviction Petition

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.*) (West 2006) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) (citing *People v. Whitfield*, 217 Ill. 2d at 183). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a)(1) (West 2006); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill.2d at 183).

¶ 15 The Act provides for three stages in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72.

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At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2006); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2006); *Pendleton*, 223 Ill. 2d at 472.

¶ 16 The Illinois Supreme Court has held that, at this first stage, the trial court evaluates only the merits of the petition's substantive claim, and not its compliance with procedural rules. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The issue at this first stage is whether the petition presents "the gist of a constitutional claim." *Perkins*, 229 Ill. 2d at 42 (quoting *People v. Boclair*, 202 Ill.2d 89, 99-100 (2002), quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). As a result, "[t]he petition may not be dismissed as untimely at the first stage of the proceedings." *Perkins*, 229 Ill. 2d at 42.

¶ 17 In the case at bar, defendant's petition proceeded to the second stage. The Act provides that, at the second stage, counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2006); *Pendleton*, 223 Ill. 2d at 472. After an appointment, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments "that are necessary" to the petition previously filed by the *pro se* defendant. *Perkins*, 229 Ill. 2d at 42. Our supreme court has interpreted Rule 651(c) also to require appointed counsel "to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence."

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Perkins, 229 Ill. 2d at 49. Defense counsel is not required to make amendments if he does not deem this to be necessary. *Perkins*, 229 Ill.2d at 49. Here, defense counsel did not deem it to be necessary.

¶ 18 After defense counsel has made any necessary amendments, the State may move to dismiss the petition. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2006)). See also *Perkins*, 229 Ill. 2d at 49. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81, (1998). A trial court is foreclosed “from engaging in any fact finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.” *Coleman*, 183 Ill. 2d at 380-81.

¶ 19 **II. Standard of Review**

¶ 20 The appeal in the case at bar arises from the dismissal of defendant’s second-stage postconviction petition. The standard by which second-stage dismissals of post-conviction petitions are reviewed is *de novo*. *People v. Munson*, 206 Ill. 2d 104, 115 (2002). “A *de novo* review entails performing the same analysis a trial court would perform”; in other words, we accept all well-pleaded facts in the complaint as true while disregarding legal or factual conclusions unsupported by allegations of fact. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 21 **III. Law of the Case**

¶ 22 The law of the case doctrine provides that “where an issue has been litigated and decided, a court’s unreversed decision on that question of law or fact settles that question for all

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subsequent stages of the suit.” *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 911 (2011), quoting *Pekin Insurance Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64, 69 (2003).

“The purpose of the doctrine is to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effectuate proper administration of justice, and bring litigations to an end. [Citation.] An additional concern addressed by the law of the case doctrine is the maintenance of the prestige of the courts, for the reason that if an appellate court issues contrary opinions on the same issue in the same case, its prestige is undercut.” *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 352 Ill. App. 3d 399, 417 (2004).

There are two exceptions to this doctrine. The first applies when a higher reviewing court, subsequent to the lower reviewing court’s decision, issues a contrary ruling on the same issue. *Alwin*, 371 Ill. App. 3d at 911; *Martin v. Federal Life Insurance Co.(Mutual)*, 268 Ill. App. 3d 698, 701 (1994). The second exception allows the reviewing court to depart from the doctrine of law of the case if the court finds that its prior decision was palpably erroneous, but only when the court remanded the case for a new trial on all issues. *Alwin*, 371 Ill. App. 3d at 911; *Martin*, 268 Ill. App. 3d at 701 (1994).

¶ 23 In *Foster*, we previously found that:

“[a]pplying the words of *Whitfield* holding to the facts of our case shows that reversal is required. As it is undisputed that defendant pled guilty to first-degree murder in exchange for a specific sentence, namely a 44-year prison sentence, and

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the trial court failed to advise the defendant, prior to accepting his plea, that a mandatory supervised release term would be added to the 44-year sentence, it is clear that the allegations contained in defendant's petition were sufficient to make a substantial showing of a constitutional violation." *Foster*, No. 07-3168 at 7.

Therefore it is clear we decided the defendant made a substantial showing of a constitutional violation based on the retroactive application of *Whitfield*.

¶ 24 However, as noted, the first exception to the law of the case doctrine applies "where in the interim the supreme court decides the precise question contrary to the rule announced in the appellate court." *W.C. Richards Co., Inc. v. Hartford Accident & Indemnity Co.*, 311 Ill. App. 3d 218, 222 (1999); *Proesel v. Myers Publishing Co.*, 48 Ill. App. 2d 402, 404 (1964) ("the law of the case must be considered modified by pertinent decisions of higher courts handed down thereafter"). The first exception is most appropriate here because the supreme court specifically addressed the question considered in our previous appellate decision and decided the exact legal question contrary to the holding in our previous decision.

¶ 25 In *Morris* the supreme court found that *Whitfield* does not apply retroactively to cases that became final before it was issued, on December 20, 2005. *Morris*, 236 Ill. 2d at 365. Since defendant's sentence was finalized in 2002, the *Morris* decision is squarely on issue and contrary to our finding in *Foster*. Given the supreme court in *Morris* pronounced a finding directly contrary to our ruling in *Foster*, we find the trial court did not act contrary to the law of the case doctrine in its dismissal of the defendant's postconviction petition.

¶ 26 IV. Waiver of Non-Retroactivity of *People v. Whitfield*

¶ 27 Defense counsel also argues that the State waived the defense of non-retroactivity of *People v. Whitfield* in the instant case, because the State never asserted this argument at the second stage hearings. However, we have previously said that waiver is a limitation on the parties and not the court. *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010) (citing *People v. Carter*, 208 Ill. 2d 309, 318-19 (2003)). Furthermore, the State's position does not limit the court's authority on review, and a supreme court opinion cannot be waived by a party but must be applied as a matter of law. *Demitro*, 406 Ill. App. 3d at 957 (citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009)). As noted, the holding in *Morris* is clearly applicable to this case, notwithstanding defense counsel's argument, and this court lacks the authority to overrule it. *Artis*, 232 Ill. 2d at 164.

¶ 28 V. Substantial Showing of Constitutional Violation Independent of *Whitfield*

¶ 29 Finally, defense counsel argues that independent of *Whitfield*, a substantial showing of a constitutional violation was made under *Santobello v. New York*, 404 U.S. at 262, which held that a defendant's right to due process may be violated where the state fails to honor its promises as part of a plea agreement. In *Morris*, the supreme court explained that its decision in *Whitfield* expressly relied on *Santobello*. *Morris*, 236 Ill. 2d at 361. The court explained that the opinion in *Whitfield* was in conformity with precedent recognizing that the defendant was entitled to the bargained-for benefit in his negotiated plea. *Morris*, 236 Ill. 2d at 361. Where *Whitfield* was the first time the supreme court relied on *Santobello* in the context of MSR, defendant cannot maintain a claim for that remedy without relying on the holding in *Whitfield*. By citing

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Santobello, defendant cannot avoid the effect of its progeny *Whitfield* and its limitation to prospective application under *Morris*.

¶ 30 Having so found, we need not address whether defendant established a lack of culpable negligence. *McNeil v. Carter*, 318 Ill. App. 3d 939, 944 (2001) (where this court affirms a dismissal, it need not address the viability of the alternative grounds on which the trial court may have relied).

¶ 31 We affirm the dismissal of the circuit court of Cook County.

¶ 32 Affirmed.