

No. 1-10-2614

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. |) | Nos. 06 CR 14555 |
| |) | 06 CR 19097 |
| |) | |
| JEFFREY PRICE, |) | Honorable |
| |) | James B. Linn, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court informed defendant before accepting his guilty plea that a three-year MSR term was mandatory and would apply to any sentence, and defendant acknowledged that he understood, his petition requesting section 2-1401 and postconviction relief claiming the MSR admonishment was insufficient was properly dismissed.
- ¶ 2 Defendant Jeffrey Price appeals from the summary dismissal of his *pro se* petition seeking relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) and section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401

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(West 2010)). On appeal, defendant contends that for the purposes of the Act, his petition adequately stated a constitutional claim of denial of his negotiated guilty plea bargain when the trial court failed to apprise him of the period of mandatory supervised release (MSR) that attached to his sentence. Defendant also contends that the trial court either failed to rule or prematurely ruled on his request for section 2-1401 relief. We affirm.

¶ 3 Defendant was charged by indictment with five counts of aggravated vehicular hijacking and one count of armed robbery. On November 15, 2007, the State advised the court that it was reducing the charges to one count each of vehicular hijacking and aggravated robbery, and defendant entered a negotiated guilty plea to the two reduced counts in exchange for two concurrent 28-year prison sentences. The change-of-plea hearing on that date included the following exchange between the court and defendant:

"THE COURT: All right, Mr. Price, as to both of these cases, you now stand accused of, on one case, aggravated robbery; the other, vehicular hijacking. These are Class I felonies.

You understand that if you plead guilty, because of your criminal history, I would have to sentence you as a Class X felon on each case, which means a minimum of six, a maximum of thirty years in the penitentiary. You could be fined up to 25,000. You cannot receive probation, and you would have to serve at least three years of mandatory supervised release, which is like parole.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Your lawyer says you want to plead guilty; is that correct?

THE DEFENDANT: Yes.

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THE COURT: You understand that if you do plead guilty, I will sentence you on these cases to 28 years in the penitentiary, concurrent on both cases. Do you understand that?

* * *

THE DEFENDANT: Yes."

¶ 4 The court confirmed that defendant was aware of the rights he would be abandoning by pleading guilty and that his plea was voluntary. The defense stipulated to the State's presentation of a factual basis for each of the two offenses. The court entered judgment on defendant's guilty plea to both charges and then pronounced sentence: "I will sentence you as I agreed originally. I'm not going to make it any lighter or different than what it is. *** The sentence on each case will be 28 years in the penitentiary. The sentences will run concurrently. Statutory DNA and costs will be ordered as well." The court also awarded defendant 520 days of credit on each offense for presentence time served. The court made no further mention of the MSR term. Defendant did not file a motion to withdraw his guilty plea or appeal his conviction.

¶ 5 On July 14, 2010, defendant's "Pro Se Petition for Post Conviction and 2-1401 Relief" was filed in the trial court. Under each form of relief, defendant requested specific performance of the negotiated plea agreement under which he believed he was to be sentenced only to two concurrent prison terms of 28 years without an MSR period. Defendant contended it was not until he was in prison that he learned his sentence had been increased by a 3-year period of MSR and that if he had been aware of that at the time of his plea, he would have insisted on prison sentences of only 25 years. The petition also specified that defendant sought only to have his sentences reduced to 25 years and that he did not seek to withdraw his guilty plea.

¶ 6 On July 21, 2010, the trial court dismissed defendant's *pro se* petition *sua sponte*, stating:

"[Defendant] is complaining about his sentence because he had Mandatory Supervised Release tacked onto it, which is

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statutory. He pled guilty in 2006 [*sic*], and this is untimely under cases handed down recently by the Illinois Supreme Court.

Accordingly, his pro se petition for post-conviction to adjust his sentence is denied."

¶ 7 On appeal, defendant contends the trial court erred in summarily dismissing his *pro se* petition on the basis that his petition was filed untimely.

¶ 8 We disagree with defendant's interpretation of the trial court's order on appeal. A postconviction petition cannot be dismissed at the first stage on the basis that it was untimely filed. *People v. Boclair*, 202 Ill. 2d 89, 100 (2002). We read the order of dismissal here to mean that the trial court was referencing the MSR claim itself, not the petition, in terms of untimeliness because the order stated that defendant "pled guilty in 2006 [*sic*], and this is untimely under cases handed down recently by the Illinois Supreme Court." Defendant's petition claimed he was denied due process where he "did not receive the benefit of his plea negotiated bargain as announced in *People v. Whitfield*," 217 Ill. 2d 177, 195 (2005). Here, the trial court entered its order on July 21, 2010, just months after our supreme court ruled in *People v. Morris*, 236 Ill. 2d 345, 366 (2010), that *Whitfield* would not apply retroactively to convictions finalized before December 20, 2005. The trial court seems simply to have applied the incorrect year for purposes of retroactivity, apparently believing that defendant's 2007 guilty plea was not subject to a *Whitfield* MSR claim. As the trial court's ruling related to an untimely MSR claim, not an untimely-filed petition, the dismissal order constituted a ruling on the merits of defendant's MSR claim. Accordingly, we review the petition *de novo* to determine whether it has an arguable basis in law and in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)) and conclude the petition was properly dismissed because the admonishment he received at the time of his guilty plea was sufficient.

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¶ 9 Defendant contends that the trial court assured him he would receive only the sentences of 28 years he had bargained for, nothing more and nothing less. Defendant concedes that the trial court's admonishment mentioned MSR, but he asserts that the reference to MSR was insufficient where it was made only in the context of possible sentences he could have received and not while announcing his specific sentences. We rejected this claim in *People v. Davis*, 403 Ill. App. 3d 461 (2010), where, pursuant to a negotiated guilty plea, the defendant pleaded guilty to aggravated battery with a firearm, a Class X felony, in return for a 16-year sentence. The trial court admonished the defendant, "do you understand if you plead guilty to this, I have to sentence you to the penitentiary between 6 and 30 years. You could be fined up to \$25,000. You would have to serve at least three years mandatory supervised release, which is like parole." The defendant responded that he understood. The MSR term was not mentioned again when the sentence was pronounced. We held that no constitutional violation occurred and the defendant was placed on notice of the full consequences of his plea when he knew he would be sentenced to prison in exchange for his guilty plea and, knowing this, he was told that he must serve an MSR term upon being sentenced to prison. *Id.* at 466. The wording of the court's MSR admonishment in the instant case was nearly identical to the admonishment in *Davis*. Here, as in *Davis*, the MSR admonishment was sufficient.

¶ 10 We also rejected the same claim of error in *People v. Hunter*, 2011 IL App (1st) 093023. There, the trial court asked the defendant whether he understood that "[a]ny period of incarceration would be followed by a period of supervisory release of two years following your discharge from the Department of Corrections," and the defendant responded that he understood. The MSR term was not mentioned again when the sentence of 6½ years in prison was pronounced. We held that the trial court's mentioning of the MSR term only when informing a defendant of the minimum and maximum penalties, and without linking the MSR term with the sentence specified in the plea agreement, was sufficient to satisfy the constitutional standard that

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the defendant have full knowledge of the consequences before entering his guilty plea. *Id.* at ¶¶ 18-19.

¶ 11 Defendant asserts, and we recognize, that other decisions of this court have reached a contrary result. He draws our attention specifically to two pre-*Morris* cases, *People v. Company*, 376 Ill. App. 3d 846 (2007), and *People v. Daniels*, 388 Ill. App. 3d 952 (2009), and to two cases decided since *Morris*, *People v. Dorsey*, 404 Ill. App. 3d 829 (2010) and *People v. Burns*, 405 Ill. App. 3d 40 (2010). The reasoning in *Dorsey* and the holdings in the other three cases maintain that a trial court's MSR admonishments are not sufficient unless they are specifically linked to the actual sentence imposed. Defendant observes that under *Hodges*, 234 Ill. 2d at 16, a petition lacks an arguable basis in law only if it is based on an indisputably meritless legal theory, and he contends that the legal theory he advances cannot be indisputably meritless where it has been embraced by decisions of this court.

¶ 12 In *Morris*, the supreme court sought to clarify what information a trial court is required to convey "to ensure that the admonishments given during a plea hearing comply with the requirements of Rule 402 and due process post-*Whitfield*." *Morris*, 236 Ill. 2d at 366. The court went on to state: "Ideally, a trial court's admonishment would explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment." *Morris*, 236 Ill. 2d at 367.

¶ 13 *Morris* went on to cite favorably language from *Daniels*, 388 Ill. App. 3d at 956, one of the cases on which defendant in the instant case strongly relies. There, the appellate court ruled: "Ideally, the trial court should specifically advise a defendant that a term of MSR is part of the sentence to which the defendant agreed." The court also stated: "It will often be sufficient for the trial court to mention MSR as part of a general admonition regarding the penalties authorized by law, even though the defendant is not specifically told that MSR will be part of his or her

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sentence." *Id.* The court then cited as examples several cases in which MSR was not specifically linked to the sentence to which defendant agreed but where defendant's *Whitfield* claim was rejected. Some of those cases are relied upon by the State in the case *sub judice*: *People v. Jarrett*, 372 Ill. App. 3d 344 (2007); *People v. Marshall*, 381 Ill. App. 3d 724 (2008); *People v. Borst*, 372 Ill. App. 3d 331 (2007).

¶ 14 We acknowledge the suggestion of our supreme court in *Morris*, 236 Ill. 2d at 367, that the better practice would be to incorporate the MSR admonition when the specific sentence was announced. However, we deem the suggestion as what the supreme court viewed as the ideal or better practice, not the required practice. As we have noted previously (see *Hunter* at ¶ 14), we reject defendant's assertion that such a practice is mandatory to satisfy due process requirements. If defendant's claim does lack an arguable basis in law, it is because it ignores that portion of the supreme court's opinion in *Morris* that immediately preceded its suggested ideal admonishment:

"We recognize that there is no precise formula in admonishing a defendant of his MSR obligation, and we are mindful that '[a]n admonition of the court must be read in a practical and realistic sense. The admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning.' [Citation.] The trial court's MSR admonishments need not be perfect, but they must substantially comply with the requirements of Rule 402 and the precedent of this court. [Citation.] *Whitfield* requires that defendants be advised that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged." *Morris*, 236 Ill. 2d at 366-67.

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¶ 15 In the case at bar, defendant was admonished by the court: "You understand that if you plead guilty, because of your criminal history, I would have to sentence you as a Class X felon on each case, which means a minimum of six, a maximum of thirty years in the penitentiary *** and you would have to serve at least three years of mandatory supervised release, which is like parole." The court asked defendant whether he understood that, and defendant replied, "Yes." We deem this MSR admonishment sufficient because an ordinary person in the place of defendant would understand it to convey that the sentence to be imposed, in addition to the number of years of prison time, would necessarily include three years of MSR. We agree with *Morris* that admonishments need not be perfect and that MSR admonishments need to be read in a practical and realistic sense. Consequently, we reject an insistence on a rigid rule that an MSR admonishment automatically fails to satisfy due process requirements in any case, regardless of the facts, where it is not incorporated when the specific sentence is announced. Here, the court assured defendant that it would impose the agreed-on sentences of 28 years: "I will sentence you as I agreed originally. I'm not going to make it any lighter or different than what it is." But the court also specifically advised defendant that the three-year MSR term *would*, not merely could, be added to any term of imprisonment that could be imposed. Thus, defendant was adequately admonished that a term of MSR would be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged.

¶ 16 Since the trial court's admonishment in the case *sub judice* was sufficient, we conclude defendant's petition failed to state an arguable basis in law and in fact to survive summary dismissal.

¶ 17 Defendant also contends that, by referencing its dismissal of what it termed a "petition for post-conviction" relief, the trial court erred in either failing to rule on his request for section 2-1401 relief or dismissing his section 2-1401 claim prematurely (*People v. Laugharn*, 233 Ill. 2d 318 (2009)). As defendant recognizes, the trial court's order indicates the court treated his

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petition solely as a postconviction petition. Defendant filed only one petition raising only one claim, the *Whitfield* MSR claim which we have addressed. Consequently, we need not and will not view defendant's petition as two separate petitions. See *People v. Burns*, 405 Ill. App. 3d 40 (2010) (trial and appellate courts treated the defendant's dual petition solely as a postconviction petition).

¶ 18 In a supplemental brief, defendant has requested that the mittimus for his aggravated robbery conviction be corrected to reflect 520 days of presentence credit. Defendant asserts, and the record shows, that when defendant's sentences were imposed on November 15, 2007, the parties agreed that defendant was entitled to, and the trial court awarded, presentence credit of 520 days on both offenses, vehicular hijacking (case number 06 CR 19097) and aggravated robbery (case number 06 CR 14555). However, the aggravated robbery mittimus did not reflect the 520-day credit. A corrected mittimus for the aggravated robbery offense was issued on November 19, 2007, but the 520-day credit was not reflected in the corrected mittimus. In May 2010, defendant forwarded to the circuit court clerk a *pro se* "Motion for Order Nunc Pro Tunc" requesting that the aggravated robbery mittimus be corrected to reflect the 520-day credit, and that on June 9, 2010, the judge who had originally sentenced defendant granted his motion, allowing credit for 520 days on both offenses "Nunc Pro Tunc to 11/15/07." However, the record on appeal does not contain a mittimus, corrected or otherwise, entered after June 10, 2010. This court has the authority to directly order the clerk of the circuit court to make the necessary corrections to the mittimus pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999); see *People v. Williams*, 368 Ill. App. 3d 616, 626 (2006). Accordingly, this court directs the circuit court clerk to amend the mittimus for the aggravated robbery offense in case number 06 CR 14555 to reflect that defendant was convicted on Count 1 of aggravated robbery, he was sentenced to 28 years in the Illinois Department of Corrections, the court found that defendant

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was entitled to receive credit for time actually served in custody for a total of 520 days, and the sentence was ordered to be concurrent with the sentence imposed in case number 06 CR 19097.

¶ 19 As the admonishments defendant received concerning MSR were sufficient, the trial court's dismissal of his petition on the merits was appropriate. Accordingly, we affirm the judgment of the trial court and order correction of the mittimus.

¶ 20 Affirmed; mittimus corrected.