

No. 1-10-3348

**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. 93 CR 15952-53
	)	
DAVID WILKERSON,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-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:* Since our supreme court has already held that *People v. Whitfield* cannot be applied retroactively, we must affirm the dismissal of defendant’s postconviction petition at the first stage.

¶ 2 On June 13, 1994, defendant David Wilkerson pled guilty, pursuant to a plea agreement, to attempted aggravated criminal sexual assault. After a hearing on aggravation and mitigation, the trial court sentenced defendant on June 13, 1994 to 30 years in the Illinois Department of Corrections. During the sentencing hearing, the trial court failed to admonish defendant of the 3-year mandatory supervised release (MSR) term following the 30-year sentence. Defendant did

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not file any motions to withdraw his guilty plea and did not file a direct appeal. In 2006, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of counsel during the plea proceedings. The trial court summarily dismissed defendant's petition, and we upheld the dismissal on appeal. *People v. Wilkerson*, No. 1-06-1328 (2008) (unpublished order pursuant to Supreme Court Rule 23). Defendant subsequently filed a second *pro se* petition for postconviction relief on July 19, 2010, in which defendant requested modification of his sentence claiming that the trial court failed to admonish him of the three-year MSR that would be added to his sentence. The trial court summarily dismissed defendant's second *pro se* postconviction petition. Defendant now appeals, claiming that the trial court erred in its summary dismissal of his *pro se* postconviction petition because adding the MSR term to defendant's 30-year imprisonment term denied defendant the benefit of his 30-year bargain. For the reasons set forth below, we affirm.

¶ 3

### BACKGROUND

¶ 4 The underlying facts relevant to this postconviction appeal are undisputed by the parties. In 1993, defendant was charged with attempted aggravated criminal sexual assault. On June 13, 1994, defendant initiated a plea proceeding. The assistant State's Attorney informed the trial court, that in exchange for a plea of guilty, "the State will recommend the maximum of 30 years in the Department of Correction to run concurrent with" defendant's previous conviction of aggravated criminal sexual assault and aggravated kidnapping. The trial court informed defendant:

"This offense is a Class One felony. The possible penalties include the following:

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from 4 to 15 years in the Illinois State Penitentiary with a 3 year period of mandatory supervised release, unless you've been convicted of a Class Two or greater offense in the last 10 years at which time I could extend the term of imprisonment from 15 to 30 years in the Illinois State Penitentiary with a 2-year period of mandatory supervised release. Mandatory supervised release is like the old parole. Do you understand that?"

Defendant did not verbally respond, and the trial court instructed defendant, "You have to answer yes or no." Defendant then answered yes. The trial court found that defendant's plea was knowing and voluntary. The trial court then sentenced defendant to 30 years to the Illinois Department of Corrections.

¶ 5 As noted, defendant did not file any motions to withdraw his guilty plea and did not file a direct appeal. However, on February 8, 2006, defendant filed a *pro se* postconviction petition alleging ineffective assistance of counsel during his plea proceedings. The trial court summarily dismissed defendant's petition. Defendant appealed the trial court's first-stage dismissal of his postconviction petition. On appeal, we affirmed the dismissal holding that defendant's petition contained insufficient facts to state the gist of a constitutional claim.

¶ 6 Defendant subsequently filed a second *pro se* postconviction petition on July 19, 2010. Defendant claims that his 30-year prison term unilaterally modified and breached his plea deal. Specifically, defendant claims that the trial court did not admonish him that a three-year MSR term would be added to his sentence. Therefore, defendant requested that his sentence be modified to a term of 27 years of imprisonment, to be followed by a 3-year MSR term.

¶ 7 In a written order, the trial court summarily dismissed defendant’s second *pro se* post-conviction petition. The trial court held that defendant “fail[ed] to show the existence of a meritorious claim in filing this post-conviction petition.” The trial court also noted that defendant was not entitled to relief based on *People v. Whitfield*, 217 Ill. 2d 177 (2005), because defendant pled guilty on June 13, 1994, more than 10 years before *Whitfield* was decided. The trial court further noted that the conviction and sentence in defendant’s other case “would have required petitioner to serve a term of MSR regardless of his subsequent guilty plea.” Defendant then appealed the first-stage dismissal of his second postconviction petition, and this appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant claims that the trial court erred in its summary dismissal of defendant’s second *pro se* postconviction petition. Defendant claims that he stated at least an arguable claim that the sentencing court denied him due process under *Santobello v. New York*, 404 U.S. 257 (1971). For the following reasons we affirm the dismissal.

¶ 10 I. Stages of a Postconviction Petition

¶ 11 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)) 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 *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 2010); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

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¶ 12 The Act provides for three stages in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. 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 5/122-1(a)(2) (West 2010); *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 5/122-1(b) (West 2010); *Pendleton*, 223 Ill. 2d at 472.

¶ 13 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. Bocclair*, 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.

¶ 14 If the petition states the gist of a constitutional claim, it advances to the second stage where counsel may be appointed for a defendant who cannot afford counsel, and counsel has the opportunity to amend the petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The State then has the opportunity to file a motion to dismiss or to answer the petition. *Hodges*, 234 Ill. 2d at 10. If the motion to dismiss is denied, or if no motion to dismiss is filed, the State must answer the petition, and, excluding the allowance of any further pleadings by the court, the proceeding will advance to the third stage. *Pendleton*, 223 Ill. 2d at 472-73. The third stage provides an evidentiary hearing where the defendant may present evidence in support of his

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petition. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 II. Standard of Review

¶ 16 The appeal in the case at bar arises from the first-stage dismissal of defendant's second postconviction petition. The standard by which first-stage dismissals of postconviction petitions are reviewed is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). 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, 569 (2011).

¶ 17 III. Defendant's Argument: *Santobello* and *Whitfield*

¶ 18 Defendant claims on appeal that the trial court erred in its summary dismissal of defendant's petition because, according to *Santobello*, his due process rights were violated when he was not admonished during sentencing about the 3-year MSR period to follow his 30-year prison term. *Santobello*, 404 U.S. at 262. Defendant further claims that, when a plea rests in any significant degree on a promise by the prosecutor, such promise must be fulfilled. Therefore, defendant requests that his 30-year prison term be reduced to 27 years so that, with the 3-year MSR term, defendant would receive his 30-year bargain.

¶ 19 In 2005, our Illinois Supreme Court held in *Whitfield* that a trial court's failure to admonish a defendant about the MSR period resulted in a violation of his constitutional right to due process and that the appropriate remedy was to modify the defendant's sentence by incorporating the MSR in the number of years to which he was sentenced. *Whitfield*, 217 Ill. 2d at 205. Five years later, in 2010, our Illinois Supreme Court clarified its *Whitfield* decision in

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*People v. Morris*, 236 Ill. 2d 345, 366 (2010), finding that the new rule announced in *Whitfield* had no retroactive application.

¶ 20 Defendant argues that, independent of *Whitfield*, a substantial showing of a constitutional violation was made under *Santobello*. In *Santobello*, a defendant was induced to withdraw his plea of not guilty in exchange for a guilty plea to a lesser charge with an agreement from the prosecutor to make no recommendation as to the sentence. *Santobello*, 404 U.S. at 258. At sentencing, a new prosecutor appeared and recommended the maximum sentence, which the judge imposed. *Santobello*, 404 U.S. at 258. The defendant appealed and the United States Supreme Court held that, when a defendant does not receive the benefit of his negotiated plea bargain due to a breach of the agreement with the government, the defendant's relief is either specific performance of the agreement or withdrawal of his guilty plea. *Santobello*, 404 U.S. at 263. In the case at bar, defendant argues that because he will not receive the benefit of his negotiated plea bargain he has asserted a substantial constitutional violation, pursuant to *Santobello*.

¶ 21 We recently decided this identical issue in *People v. Demitro*, 406 Ill. App. 3d 954 (2010). In *Demitro*, the trial court also failed to admonish the defendant of his MSR obligation before accepting his guilty plea. *Demitro*, 406 Ill. App. 3d at 955. The defendant in that case filed a postconviction petition alleging that, according to *Santobello*, the trial court's failure to inform him of the MSR term violated his due process rights because he did not receive the benefit of his plea bargain. *Demitro*, 406 Ill. App. 3d at 956. In *Demitro*, we found that a defendant may not make an independent *Santobello* claim because the law of this state is controlled by the Illinois

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Supreme Court's decisions in *Whitfield* and *Morris. Demitro*, 406 Ill. App. 3d at 957.

¶ 22 We explained:

"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 *Santobello*, defendant cannot avoid the effect of its progeny *Whitfield* and its limitation on prospective application under *Morris*." *Demitro*, 406 Ill. App. 3d at 957.

¶ 23 Just as we held in *Demitro*, we hold in the case at bar that the trial court properly dismissed the defendant's *pro se* postconviction petition. Defendant seeks the relief ordered by our supreme court in *Whitfield*, which was limited in *Morris*. The supreme court in *Morris* held that *Whitfield* announced a new rule that may *not* be applied retroactively to cases on collateral review. *Morris*, 236 Ill. 2d at 366. Specifically, *Morris* held that *Whitfield* may only be applied prospectively because it was the first time the Illinois Supreme Court held that a flawed MSR admonishment deprived a defendant of due process and created an unprecedented and original remedy. *Demitro*, 406 Ill. App. 3d at 956-57 (citing *Morris*, 236 Ill. 2d at 361).

¶ 24 We stand by our decision in *Demitro*, which is dispositive in this case. The Illinois Supreme Court clearly stated in *Morris* that "the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced." *Morris*, 236 Ill. 2d at 366. In the case at bar, defendant plead guilty on June 13, 1994, more than 11 years prior to the decision in *Whitfield* and, as such,

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retroactive relief under *Whitfield* is not available to defendant. *Morris*, 236 Ill. 2d at

366. Accordingly, defendant failed to allege the gist of a constitutional deprivation. Therefore we affirm the trial court's dismissal of defendant's post-conviction petition.

¶ 25

#### CONCLUSION

¶ 26 For the foregoing reasons, we affirm the trial court's dismissal of defendant's postconviction petition.

¶ 27 Affirmed.