

No. 1-10-2534

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. 03 CR 8163
 PHILLIP DANIEL,)
)
)
 Defendant-Appellant.) Honorable
) Kevin M. Sheehan
) Judge Presiding.
)

JUSTICE SIMON delivered the judgment of the court.
Harris, P.J., and Connors, J., concurred in the judgment.

ORDER

¶ 1 HELD: The circuit court did not err by dismissing defendant's claims that he was denied his rights to counsel and to due process because defendant merely rephrased the same issues he had raised and this court had addressed on direct appeal, and the claims are, therefore, barred by *res judicata*. The circuit court did not err by dismissing defendant's claim that the trial court failed to advise him that he would be required to serve a term of MSR in addition to his 39-year sentence because the record supports the conclusion that the trial court adequately admonished defendant under Rule 402(a)(2) that his sentence would be subject to a period of MSR.

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¶ 2 Defendant Phillip Daniel appeals the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), contending that the circuit court erred in dismissing his petition because his claims were not barred by the doctrine of *res judicata* and were not otherwise frivolous or patently without merit. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with having committed multiple criminal acts in connection with the robbery of a record store on March 26, 2003, and entered a negotiated plea of guilty to the charges of attempted first degree murder and robbery. At the pretrial plea agreement conference conducted pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), the State asserted that if it proceeded to trial, the evidence would show that defendant robbed a record store on March 26, 2003. The State also asserted that the evidence would show that defendant strangled the record store clerk with a scarf until he passed out, dragged the clerk to a back room of the store, lit the clerk on fire while defendant attempted to burn his way out of the store, and beat the clerk. After the clerk had regained consciousness, he called 911. Following acceptance of defendant's guilty plea on August 8, 2005, the trial court imposed consecutive sentences of 30 years imprisonment for attempted first degree murder and 9 years imprisonment for robbery.

¶ 5 Defendant did not file any postplea motions with the trial court but, instead, filed a *pro se* motion seeking leave to file a late notice of appeal on November 23, 2005, which was granted by this court. On direct appeal, defendant contended that the trial court had failed to adequately admonish him pursuant to Illinois Supreme Court Rule 605(c)(5) (eff. Oct. 1, 2001) regarding his

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right to the assistance of appointed counsel in preparing postplea motions and that his case should, therefore, be remanded to the trial court for proper admonishments. *People v. Daniel*, No. 1-05-3572 (2007) (unpublished under Supreme Court Rule 23). This court dismissed defendant's appeal, noting that defendant's failure to file a proper postplea motion within 30 days of sentencing as required by Illinois Supreme Court Rule 604(d) (eff. Feb. 1, 2005) would only be excused if he had not been properly admonished of his rights pursuant to Rule 605 and concluding that the trial court had substantially complied with Rule 605(c)(5) because the court had admonished defendant that he was entitled to counsel in a postplea proceeding. *Id.* at 4.

¶ 6 On March 23, 2010, defendant filed a *pro se* petition for postconviction relief in which he asserted: 1) that his sixth amendment right to counsel was violated where the trial court failed to adequately admonish him pursuant to Rule 605(c)(5) of his right to the assistance of appointed counsel in preparing his postplea motions; 2) that he was denied his rights to due process and appointed counsel where the court's failure to specifically admonish him of his right to appointed counsel under Rule 605(c)(5) left him with the misapprehension that he was only entitled to appointed counsel on appeal; and 3) that his right to due process was violated where the court did not advise him prior to entering his guilty plea that a term of mandatory supervised release (MSR) would be added to his sentence.

¶ 7 On May 13, 2010, the circuit court entered a written order dismissing defendant's petition at the first stage of postconviction proceedings as frivolous and patently without merit. In doing so, the court found that defendant's claims regarding the adequacy of the trial court's admonitions under Rule 605(c)(5) were barred by the doctrine of *res judicata* because defendant had raised

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the exact same claim on direct appeal. The court also found that defendant's claim regarding MSR was contradicted by the record, which showed that the trial court advised defendant that his convictions were subject to MSR and that defendant stated that he understood the court's advisement. Defendant now appeals from this order.

¶ 8

ANALYSIS

¶ 9 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). To be entitled to postconviction relief, a defendant must demonstrate that he has suffered a substantial deprivation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Proceedings are commenced by filing a petition, verified by affidavit, in the court in which the conviction occurred. 725 ILCS 5/122-1(b) (West 2010). Proceedings may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). Summary dismissal of a petition is appropriate at the first stage of proceedings if the circuit court determines the petition is either frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 233 Ill. 2d 366, 388-89 (1998).

¶ 10

I. Right to Counsel

¶ 11 In this appeal, defendant first contends that the circuit court erred by dismissing his claim that he was denied his right to counsel on the basis of *res judicata*. A postconviction petition may be dismissed at the first stage of proceedings as frivolous and patently without merit when

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the claims raised therein are barred by *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

"The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal." *Id.* at 443. A defendant may not avoid the application of *res judicata* simply by rephrasing an issue previously addressed on direct appeal as a constitutional claim. *People v. Simms*, 192 Ill. 2d 348, 360 (2000).

¶ 12 Defendant initially asserts that his postconviction claim is different from the claim he raised on direct appeal because "the claim here is that the failure to *appoint* counsel to represent [defendant] post-plea was a denial of his *federal* right to counsel." (Emphasis in original.) We now consider whether defendant has waived the claim he now asserts in this appeal by failing to include that claim in his postconviction petition.

¶ 13 A postconviction claim not raised in the original or an amended petition is waived. 725 ILCS 5/122-3 (West 2010). "The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). As such, this court may only review issues and claims presented in the petition, and "a defendant may not raise an issue for the first time while the matter is on review." *People v. Jones*, 211 Ill. 2d 140, 148 (2004).

¶ 14 In defendant's first postconviction claim, he alleged that the trial court "failed to provide clear specific admonishment of [his] right to appointment of counsel to advise him and to prepare post-plea motions" where the court had failed "to admonish the petitioner specificall[y] pursuant to Illinois Supreme Court Rule 605(c)(5)." In his second claim, defendant alleged that he "was

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denied the right to counsel, appointed to assist him with the preparation of motions pursuant to Illinois Supreme Court Rule 605(c)(5)," where the court's admonishment regarding appointed counsel was given in the context of an appeal, and not the preparation of postplea motions.

Defendant also asserted in his second claim that, as a result of the trial court "not specifically admonishing the petitioner under Illinois Supreme Court Rule 605(c)(5) regarding the right to request appointed counsel in preparation of motions [defendant] had no way of knowing he had a right to request court-appointed counsel to prepare a motion to withdraw [his] guilty plea" or a motion to reduce his sentence.

¶ 15 Based upon defendant's repeated references to the trial court's allegedly inadequate Rule 605(c)(5) admonishments, we determine that defendant's allegations of constitutional violations in both postconviction claims were based upon his claims that the trial court's Rule 605(c)(5) admonishments were inadequate. As the claim now raised by defendant in this appeal does not concern the trial court's Rule 605(c)(5) admonishments, we determine that defendant's appellate claim is different from the claims he raised in his postconviction petition and conclude that the newly raised appellate claim has been waived. 725 ILCS 5/122-3 (West 2010). Accordingly, we will limit our consideration to the claims set forth in defendant's postconviction petition.

¶ 16 Defendant maintains, however, that such a conclusion runs afoul of our supreme court's holding in *People v. Hodges*, 234 Ill. 2d 1 (2009). In *Hodges*, the court held that the defendant's allegation that defense counsel was ineffective for failing to produce evidence to support his self-defense claim should have been construed to include an arguably meritorious claim of ineffective assistance for failing to produce evidence to support a theory of "unreasonable belief" second

degree murder even though the defendant did not expressly include such a claim in his petition because a *pro se* petition should be liberally construed in the defendant's favor. *Id.* at 21-22. In this case, defendant alleged in his petition that the trial court erred by failing to adequately admonish him pursuant to Rule 605(c)(5) and that this error resulted in the denial of his right to counsel, but on appeal is asserting that the trial court erred by failing to appoint counsel to represent him following the entry of his guilty plea. Unlike in *Hodges*, where the defendant's petition could be construed to have included an additional legal claim stemming from the alleged error, here defendant is not asking us to construe his petition to include an additional legal claim arising from the alleged error but, rather, to consider an entirely new claim of error. While a first-stage *pro se* petition must be liberally construed in favor of the defendant, *Hodges* does not provide that a defendant may raise a new claim of error on appeal and, as such, does not impact our conclusion that defendant has waived his newly raised appellate claim by failing to include it in his postconviction petition.

¶ 17 Thus, we now consider whether the claims set forth in defendant's postconviction petition are barred by the doctrine of *res judicata*. In this case, defendant challenged the adequacy of the trial court's Rule 605(c)(5) admonishments on direct appeal, and we resolved that issue in favor of the State. As such, defendant cannot now challenge those admonishments again in the context of a postconviction claim that he was denied his right to counsel, and we conclude that the circuit court did not err by dismissing that claim on the basis of *res judicata*.

¶ 18

II. Due Process

¶ 19 Defendant next contends that the circuit court erred in determining that his claim that he

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was denied his right to due process was frivolous and patently without merit because the claim was not barred by the doctrine of *res judicata*. Defendant asserted in his second postconviction claim that he was denied his right to due process because the trial court failed to specifically admonish him of his right to appointed counsel pursuant to Rule 605(c)(5). However, as stated earlier, this court has already concluded on direct appeal that the trial court adequately admonished defendant of his right to counsel in preparing a postplea motion pursuant to Rule 605(c)(5). As such, defendant's claim is barred by the doctrine of *res judicata*, and we conclude that the circuit court did not err by dismissing defendant's claim on that basis.

¶ 20 III. Mandatory Supervised Release

¶ 21 Defendant further contends that the circuit court erred in determining that his claim that the trial court had failed to advise him pursuant to Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997) that he would be required to serve a term of MSR in addition to the combined 39-year sentence for attempted first degree murder and robbery was frivolous and patently without merit. The State responds that the court properly dismissed defendant's claim because it was contradicted by the record, which shows that the trial court substantially complied with Rule 402(a)(2) by advising defendant that his sentence for attempted first degree murder would be subject to a three-year MSR term.

¶ 22 As stated earlier, a postconviction petition may only be dismissed at the first stage of proceedings as frivolous or patently without merit if it "has no arguable basis either in law or in fact," which is the case when the petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Due process requires that a defendant's

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guilty plea be given knowingly and voluntarily. *People v. Williams*, 188 Ill. 2d 365, 370 (1999). In *Whitfield*, 217 Ill. 2d at 190, our supreme court held that when a defendant pleads guilty to a crime pursuant to a negotiated plea agreement and will be subject to a term of MSR, the trial court must admonish the defendant prior to accepting his guilty plea pursuant to Rule 402(a)(2) that a MSR term will be added to his sentence. In doing so, the court held that a trial court's substantial compliance with Rule 402(a)(2) was sufficient to ensure that the defendant's right to due process has been protected. *Id.* at 195. In *People v. Morris*, 236 Ill. 2d 345, 367 (2010), the court clarified that "*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."

¶ 23 Initially, the State asserts that defendant's claim has no arguable basis in law because the claim is based upon the new constitutional rule of criminal procedure set forth in *Whitfield*, which should only be applied prospectively to convictions finalized after December 20, 2005, and defendant's conviction was finalized on August 29, 2005. Our supreme court has held that the new rule set forth 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." *Id.* at 366. In this context, a conviction becomes final when the availability of a direct appeal has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. *People v. Simmons*, 388 Ill. App. 3d 599, 609 (2009). In this case, although defendant did not file a timely notice of appeal following his conviction and sentence, this court granted defendant's motion seeking leave to file a late notice of appeal on November 23, 2005. Thus, defendant's case was pending on direct appeal on December 20,

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2005, and the new rule of criminal procedure set forth in *Whitfield* applies in this case.

¶ 24 The record shows that prior to accepting defendant's guilty plea, the trial court advised defendant as follows:

"[THE COURT]: Attempt murder is a class X felony. It's subject to a possible penalty of incarceration in the penitentiary for a determinate period of time between six and 30 years, a fine of up to 25 thousand dollars, or both. It's also subject to what's called mandatory supervised release for a period of three years after you're released from the penitentiary.

Do you understand?

[DEFENDANT]: Yes.

[THE COURT]: Robbery is a class two felony. It is subject to a possible penalty of incarceration in the penitentiary for a determinate period of time between three and seven years, a fine of up to 25 thousand dollars, or both. And a mandatory supervised release for a period of two years after you're released from the penitentiary.

Because of the nature of these charges, you have to be sentenced consecutively. That is, the sentence you receive on the murder – attempt murder charge has to be served consecutive to the sentence that you receive on the robbery charge.

Do you understand that?

[DEFENDANT]: Yes.

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[THE COURT]: Is it your understanding that upon the plea of guilty that you will receive 30 years on the attempt murder, and nine years on the robbery charge, is that correct, for a total of 39? Is that correct?

[DEFENDANT]: Yes."

Shortly thereafter, defendant entered his guilty plea, which was accepted by the court.

¶ 25 Defendant asserts that the trial court did not comply with Rule 402(a)(2) where it referred to MSR in setting forth the minimum and maximum penalties for the crime, but did not link the MSR term to the actual sentence he would receive under his plea agreement, citing to the Second District's decision in *People v. Burns*, 405 Ill. App. 3d 40 (2010), for support. In that case, the trial court referred to MSR in advising the defendant of the sentencing range for the crime to which he was pleading guilty, and the appellate court held that the trial court's admonishments did not comply with *Whitfield* and *Morris* because they "did not link the term of MSR to the actual sentences that the defendant would receive under his plea agreement and did not convey unconditionally that the MSR would be added to the agreed-upon sentences." *Id.* at 43-44.

¶ 26 The State responds that the trial court substantially complied with Rule 402(a)(2) in this case because it advised defendant that the determinant sentence for attempted first degree murder was subject to a MSR term of three years. In *People v. Marshall*, 381 Ill. App. 3d 724, 735-36 (2008), this court held that the trial court had substantially complied with Rule 402 where the defendant entered a negotiated plea of guilty, the court advised the defendant prior to accepting his plea that he would have to serve a three-year term of MSR, and the defendant indicated that he understood the admonishments provided by the court. In doing so, we distinguished that case

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from *Whitfield* on the basis that the trial court in *Whitfield* never mentioned the MSR term to the defendant, while the trial court in *Marshall* mentioned the MSR term and the defendant indicated that he understood the court's admonishments. *Id.* at 735. This court has subsequently reaffirmed its holding in *Marshall*, stating that "[u]ntil the supreme court tells us differently, we believe *Marshall* settles the issue of whether the *Whitfield* rule extends to the 'sole mention' of the MSR term in the circuit court's preplea admonishments in the First District." *People v. Davis*, 403 Ill. App. 3d 461, 467 (2010); *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 19. Moreover, unlike *Burns*, which has not been followed by any other appellate court, the reasoning in *Marshall* and other similar cases has been followed and adopted by courts in the First District (*Davis*, 403 Ill. App. 3d at 467; *Hunter*, 2011 IL App (1st) 093023, ¶ 19), the Third District (*People v. Berrios*, 387 Ill. App. 3d 1061, 1064 (2009)), the Fourth District (*People v. Andrews*, 403 Ill. App. 3d 654, 666 (2010)), and the Fifth District (*People v. Thomas*, 402 Ill. App. 3d 1129, 1133-35 (2010)).

¶ 27 In this case, the record shows that prior to accepting defendant's guilty plea, the trial court advised defendant that his convictions for attempted murder and robbery were subject to periods of MSR, that defendant acknowledged that he understood the court's admonishments, and that defendant entered his plea of guilty shortly thereafter. The record also shows that the MSR admonishment was given by the court after defendant and the State had reached an agreement regarding a 39-year sentence, which reinforces the conclusion that defendant had full knowledge of the consequences of his guilty plea. *Davis*, 403 Ill. App. 3d at 465. As such, we determine that the trial court adequately advised defendant under Rule 402(a)(2) that his sentence would be

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subject to a period of MSR and conclude that the circuit court did not err in finding that defendant's claim challenging the trial court's admonishments was frivolous and patently without merit and dismissing that claim at the first stage of proceedings on that basis.

¶ 28

CONCLUSION

¶ 29 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.