

No. 1-12-0347

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. 96 CR 6771
)	
SCOTT MITCHELL,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's summary dismissal of defendant's post-conviction petition was affirmed where the record contradicted defendant's claim that he was not admonished that a period of mandatory supervised release would follow his negotiated sentence.

¶ 2 Defendant Scott Mitchell appeals from the summary dismissal of his petition seeking relief

under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On

appeal, defendant contends that when the trial court accepted his negotiated guilty plea in 1998, the court did not advise him that a three-year period of mandatory supervised release (MSR) would follow his 45-year prison sentence. Defendant argues he was denied the benefit of his plea bargain and that this court should reduce his prison term by three years pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005), or, in the alternative, remand for further proceedings under the Act because he has raised an arguably meritorious post-conviction claim. We affirm.

¶ 3 On June 22, 1998, defendant entered a guilty plea to one count of first degree murder and one count of attempted first degree murder in exchange for respective consecutive sentences of 30 and 15 years in prison. After ascertaining defendant's agreement to forego a bench or jury trial and obtaining a signed jury waiver, the trial judge read to defendant the factual basis for the first degree murder charge against him and admonished defendant that the sentencing range for that crime was between 20 and 60 years in prison. The judge then read the basis for the attempt first degree murder charge. Defendant indicated he understood the charges against him.

¶ 4 In admonishing defendant as to the range for the latter offense, the court stated:

"That charge has a minimum of six and a maximum of 30 years in the penitentiary. It carries with it a possible \$10,000 fine and a three year period of parole [now known as MSR] as does first degree murder. It's a three year period of parole and a maximum of a \$10,000 fine."

¶ 5 The court told defendant the sentences for each offense would run consecutively and informed defendant that the minimum possible sentence would be 26 years and the maximum possible sentence would be 90 years. The court stated that if defendant pled guilty, he would receive 30 years for first degree murder, followed by a consecutive 15-year sentence for attempt first degree murder. Defendant indicated he understood those admonitions.

¶ 6 After further admonishing defendant as to his guilty plea and allowing defendant to address the court, the trial court stated:

"All right. Based on the facts in the case, aggravation and mitigation, criminal history, potential for rehabilitation, I sentence you on the murder which is count three to 30 years IDOC, 884 days credit [for time served], consecutive to count eight which is attempt first degree murder [for] which your sentence is 15 years IDOC."

¶ 7 The court admonished defendant as to his right to withdraw his plea or have the court reconsider his sentence.

¶ 8 The record contains three letters handwritten by defendant and sent to the office of the Cook County Public Defender and the circuit court. The letters were file-stamped on July 21, 1998, which was within 30 days of defendant's plea. In the letters, defendant stated he was told he would only have to serve 85 percent of his sentence and that he was entitled to day-for-day credit towards his sentence. On August 4, 1998, defendant filed a *pro se* motion to reconsider

his sentence.

¶ 9 Counsel was appointed to represent defendant. In January 2001, counsel filed an amended motion to withdraw defendant's plea. In May 2002, a hearing was held, and the circuit court denied defendant's motion to withdraw the plea. On appeal, this court reversed the judgment of the circuit court and remanded the case, finding that defense counsel failed to file a certificate as required by Supreme Court Rule 604(d) (eff. Aug. 1, 1992) indicating that counsel had consulted with defendant, examined the trial court file and transcript of proceedings, and made any necessary amendments to defendant's motion. *People v. Mitchell*, No. 1-02-1876 (2003) (unpublished order under Supreme Court Rule 23).

¶ 10 On remand, new counsel was appointed for defendant. On July 30, 2007, counsel filed a Rule 604(d) certificate. Also on that date, defendant's counsel filed a motion seeking to withdraw the prior request by defendant to withdraw his plea. In the motion, counsel stated that based on his correspondence and consultation with defendant, defendant wished to waive his right to challenge the validity of his guilty plea and would "be forever barred from appealing his plea, conviction and sentence." The trial court granted defendant's request to withdraw his motion to withdraw the plea.

¶ 11 On March 5, 2008, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)), alleging his sentence was void and in violation of his constitutional rights because the required MSR term that follows his sentence extends his effective punishment. Defendant argued the time of his

imprisonment should be reduced by the amount of the MSR period. In a written order on April 4, 2008, the circuit court dismissed that petition and a second petition under section 2-1401 that defendant filed in a separate proceeding. The court held defendant's petitions were untimely because they were filed six years after the denial of defendant's motion to withdraw his plea. The court further held that MSR periods were required by statute and were not unconstitutional and that defendant's claim was not ripe for review because he was still serving his prison term and his MSR period had not yet begun.

¶ 12 On October 13, 2011, defendant filed the *pro se* post-conviction petition that is the basis of this appeal. Defendant asserted his three-year MSR term effectively extends his imprisonment beyond the 45-year sentence to which he agreed when he pled guilty and that he was not admonished as to that possibility. He further argued his due process rights were violated because he did not receive the benefit of his plea agreement. Defendant asked that the MSR period be removed from his sentence or that his 45-year sentence be reduced to allow the MSR term to be served within the 45-year term.

¶ 13 On December 9, 2011, the circuit court summarily dismissed defendant's post-conviction petition. The court held that defendant's claims were barred by *res judicata* because the contentions set out in his post-conviction filing already were raised and rejected in his petition brought under section 2-1401.

¶ 14 On appeal, defendant contends he was denied the benefit of his plea bargain where he pleaded guilty in exchange for a 45-year sentence but later learned of the three-year

MSR period to be served after his sentence. He argues that, pursuant to *Whitfield*, this court should reduce his prison sentence by the length of the MSR term, or, in the alternative, this court should remand for further post-conviction proceedings under the Act.

¶ 15 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a post-conviction proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). In *Hodges*, the supreme court noted that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. An indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* at 16-17. This court reviews the summary dismissal of a post-conviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89. Although defendant abandoned his request to withdraw his plea in the trial court, that does not deprive this court of the ability to consider his post-conviction claim, as the Act provides a separate remedy, the availability of which is not contingent upon the exhaustion of any other remedy. *People v. Wren*, 223 Ill. App. 3d 722, 727 (1992).

¶ 16 The State raises several procedural bars to our consideration of defendant's petition. First, the State contends defendant's conviction became final in July 1998 when he failed to file a

timely motion to withdraw his plea within 30 days of his sentence, thus barring any consideration of defendant's contentions on appeal. The record indicates that defendant wrote several letters that were file-stamped on July 21, 1998, within 30 days of defendant's plea. We agree with defendant's position that, to this stage in these lengthy proceedings, the State has never challenged the timeliness of defendant's initial request to withdraw his plea. The record establishes that both the trial court and this court in the initial appeal in this case, which resulted in remand for the filing of a Rule 604(d) certificate, treated defendant's letters as constituting a timely motion to withdraw his guilty plea. Therefore, the State's argument that defendant did not make a timely initial challenge to his plea is rejected.

¶ 17 The State next asserts that defendant cannot obtain *Whitfield* relief because the proceedings on his guilty plea were complete in 1998 when counsel failed to file a timely Rule 604(d) certificate. Under *Whitfield*, where a defendant pleads guilty in exchange for a specific sentence under a negotiated plea agreement and the trial court fails to admonish the defendant before accepting the plea that an MSR term would be added to the sentence, the sentence that is imposed is greater than the one agreed to by the defendant, therefore violating the plea agreement and denying the defendant due process. *Whitfield*, 217 Ill. 2d at 195. Subsequent to *Whitfield*, the supreme court clarified in *People v. Morris*, 236 Ill. 2d 345, 366 (2010), that its holding in *Whitfield* only applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date that the *Whitfield* decision was announced.

¶ 18 Defendant argues that, pursuant to *Morris*, this court can review his *Whitfield*-based

claim because the proceedings on his guilty plea were not finalized until 2007, when, after remand from this court, defendant's appointed counsel filed a Rule 604(d) certificate and counsel chose not to proceed on defendant's request to withdraw his plea. In this context, a conviction and sentence become final when the availability of direct appeal to the state courts 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. Kizer*, 318 Ill. App. 3d 238, 246 (2000), citing *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); see also *People v. Simmons*, 388 Ill. App. 3d 599, 609 (2009). The filing of a Rule 604(d) motion is a condition precedent to an appeal from a judgment on a plea of guilty. *People v. Flowers*, 208 Ill. 2d 291, 300-01 (2003). Therefore, defendant could not pursue a direct appeal of the merits of his plea proceeding until after his counsel filed a Rule 604(d) certificate, which was in July 2007. Accordingly, the rule in *Whitfield* applies to defendant's case. See *Morris*, 236 Ill. 2d at 366.

¶ 19 The State's next procedural contention is that defendant forfeited his *Whitfield*-related claim by failing to include it in his section 2-1401 petition filed in 2008. Even though defendant did not mention the *Whitfield* decision by name, he contended in his section 2-1401 petition that his sentence should be reduced by the period of his MSR term. Thus, defendant did not forfeit his claim.

¶ 20 However, even allowing defendant to pass each of those procedural hurdles to a substantive review of his claim, his post-conviction petition lacks an arguable basis in law and fact. Illinois Supreme Court Rule 402 (eff. July 1, 1997) requires that the trial court provide a

defendant with certain admonishments before accepting a guilty plea, including the minimum and maximum sentences under the law. Defendant asserted in his petition that his three-year MSR term increased the length of his sentence and the failure to ascertain his understanding of that term violated the terms of his plea agreement pursuant to *Whitfield*.

¶ 21 The defendant in *Whitfield* did not receive any MSR admonishments. See *Whitfield*, 217 Ill. 2d at 201. The supreme court held that "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 (noting the addition of an MSR term to the agreed sentence violates due process and constitutes a breach of the plea agreement "because the sentence imposed is more onerous than the one defendant agreed to at the time of the plea hearing"). In *Morris*, the supreme court clarified its holding in *Whitfield* by stating that while no exact formula existed for admonishing a defendant regarding MSR, the admonition ideally 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 367-68.

¶ 22 This court has upheld the summary dismissal of post-conviction claims involving *Whitfield* where the trial court has mentioned MSR in its admonitions while accepting the defendant's guilty plea. For example, this court has affirmed a summary dismissal where the judge informed the defendant he would have to serve a term of MSR upon his release from

prison, thus placing the defendant "on notice" that the punishment for his crime will extend beyond the length of his prison sentence. *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010) (noting that while the State can bargain as to the sentence to be served, the term of MSR is statutorily mandated and not subject to negotiation). The *Davis* court held that a constitutional violation occurs under *Whitfield* only where there is "absolutely no mention" prior to the defendant's guilty plea, that the defendant must serve a term of MSR in addition to the agreed upon sentence. *Davis*, 403 Ill. App. 3d at 466.

¶ 23 In the instant case, defendant indicated he wished to plead guilty to first degree murder and attempted first degree murder. The trial court admonished defendant of the sentencing range for each offense and then stated that the latter charge carried a "possible \$10,000 fine and a three-year period of parole [MSR] as does first degree murder. It's a three year period of parole and a maximum of a \$10,000 fine."

¶ 24 Defendant cites to two decisions in which this court has found the trial judge's admonitions insufficient where the judge does not refer to the MSR term in connection with the actual sentence the defendant must serve and convey clearly that an MSR term would follow the sentence. See *People v. Burns*, 405 Ill. App. 3d 40, 43-44 (2010); *People v. Smith*, 386 Ill. App. 3d 473, 482-83 (2008). In each of those cases, the trial judge referred to MSR in the context of the defendant's possible penalties, stating that the defendant could be sentenced within the statutory range, could receive a fine and could or potentially would serve an MSR term. *Id.* On appeal, this court held in *Smith* held that "an ordinary person in the defendant's circumstances

would not understand the trial court's admonishment to mean that a term of mandatory supervised release would be added to any prison sentence, but would understand the admonishment as a warning about the possible penalties. *Smith*, 386 Ill. App. 3d at 483.

¶ 25 In the case at bar, although the court did not mention MSR in imposing the sentence or include it in the written judgment, the three-year period of MSR was mentioned in connection with defendant's sentence. The admonition to defendant satisfied the requirements of Rule 402 and met the principles of due process. See, e.g., *People v. Lee*, 2012 IL App (4th) 110403, & 23; *People v. Hunter*, 2011 IL App 093023, & 19 (rejecting the defendant's request to follow *Burns*, and instead citing *Davis* in holding that no *Whitfield* violation occurred when the court told the defendant before taking the plea that any period of incarceration could be followed by MSR). Defendant contends the existence of a split of authority on this issue establishes his claim as one of arguable merit under *Hodges* that must proceed to second-stage post-conviction review. However, where a defendant's post-conviction claim relies on his assertion that he was not admonished regarding the pertinent MSR period, and the record contradicts that assertion by showing that the MSR admonitions were given, the defendant's claim is legally without merit under the meaning of *Hodges*. See *Hodges*, 234 Ill. 2d at 16; *Lee*, 2012 IL App (4th) 110403, & 23.

¶ 26 Accordingly, the summary dismissal of defendant's post-conviction petition is affirmed.

¶ 27 Affirmed.