

2013 IL App (2d) 110928-U  
No. 2-11-0928  
Order filed March 19, 2013

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-2903
	)	
JESSE M. LOPEZ,	)	Honorable
	)	M. Karen Simpson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly summarily dismissed defendant's postconviction petition, which alleged that appellate counsel had been ineffective for failing to argue that his MSR term was imposed by the Department of Corrections in violation of due process and the separation of powers: because by statute the MSR term was part of the sentence imposed by the trial court, the argument would not have succeeded.

¶ 2 Defendant, Jesse M. Lopez, appeals from an order of the circuit court of Kane County summarily dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In the petition, defendant sought relief from convictions of armed violence (720 ILCS 5/33A-2(b) (West 2004)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1))

(West 2004)), which we affirmed on direct appeal (*People v. Lopez*, No. 2-08-0653 (2010) (unpublished order under Supreme Court Rule 23)), and for which defendant received a sentence of 22 years' imprisonment. When pronouncing sentence, the trial court failed to add that, after completing the prison term, defendant would be required to serve a three-year term of mandatory supervised release (MSR). See 730 ILCS 5/5-8-1(d) (West 2004). The trial court's written sentencing order also failed to set forth the MSR requirement expressly. However, records of the Department of Corrections indicate that an MSR term is part of defendant's sentence. According to defendant, the discrepancy represents a due process violation and a violation of the separation of powers that his appellate counsel should have, but did not, raise in his direct appeal. Defendant contends that that failure gives rise to an arguably meritorious claim of ineffective assistance of counsel on direct appeal. We disagree and therefore affirm the summary dismissal of the postconviction petition.

¶ 3 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). Within 90 days after a petition for relief under the Act is filed and docketed, the trial court must examine the petition and either summarily dismiss it or docket it for further proceedings. 725 ILCS 5/122-2.1 (West 2010). If the trial court finds that the petition is "frivolous or is patently without merit" the petition will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). Summary dismissal is proper if the petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Summary dismissal is reviewed *de novo*. *Id.* at 9.

¶ 4 A defendant claiming ineffective assistance of counsel must show that his counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "As applied to claims involving the failure of appellate counsel to raise a particular issue, the defendant must show that 'the failure to raise that issue was objectively unreasonable, as well as a reasonable probability that, but for this failure, his sentence or conviction would have been reversed.'" *People v. Mack*, 167 Ill. 2d 525, 532 (1995) (quoting *People v. Caballero*, 126 Ill. 2d 248, 270 (1989)).

¶ 5 The substantive premise of defendant's claim of ineffective assistance of counsel on appeal is that it was the Department, not the trial court, that imposed the MSR term, and that by doing so, the Department violated both his right to due process of law and the constitutional separation-of-powers doctrine. Defendant maintains that appellate counsel should have advanced an argument to this effect based on the decision of the United States Court of Appeals for the Second Circuit in *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). In *Earley*, a New York court sentenced the defendant to a prison term, but did not expressly impose a term of post-release supervision (PRS). Although a PRS term was statutorily required and the applicable statute provided that a prison sentence "includes [a PRS term], as part thereof" (N.Y. Penal Law § 70.45 (McKinney \_\_\_\_)), the *Earley* court held that it was not part of the defendant's sentence. The *Earley* court relied on *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936). In that case, the clerk of the United States District Court for the District of Maryland unilaterally augmented a warrant of commitment by adding a provision requiring payment of fines as a condition of release from imprisonment. In holding the condition

ineffective, the *Wampler* Court commented that “[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court.” *Id.* at 464. Citing *Bozza v. United States*, 330 U.S. 160 (1947), the State of New York argued that, because PRS was mandatory, it became part of the sentence by operation of law. The *Earley* court rejected the argument, observing that *Bozza* merely held that the double jeopardy clause did not prohibit *a court* from increasing a sentence by adding a previously omitted mandatory fine. *Earley*, 451 F.3d at 76.

¶ 6 Decisions of the lower federal courts are not binding on Illinois courts, although they may be considered persuasive authority. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30. *Earley* is unpersuasive, however, because the United States Supreme Court decisions that *Earley* discusses are readily distinguishable from that case. In neither *Wampler* nor *Bozza* did the Court have any occasion to consider whether a statutorily mandated component of a sentence can become part of the trial court’s judgment by operation of law. The question simply did not arise in either case. *Wampler* involved the validity of a condition of release that was not required by statute. In *Bozza*, the trial court corrected its statutory error, so it was unnecessary to decide whether the mandatory fine would have otherwise been enforceable by operation of law.

¶ 7 During the relevant time frame, the MSR requirement was carefully structured to take effect whether or not expressly mentioned by the trial court when pronouncing sentence or in its written sentencing order. To that end, section 5-8-1(d) of the Unified Code of Corrections, as in effect at the time of defendant’s offense, provided, “Except where a term of natural life is imposed, every sentence shall include *as though written therein* a term in addition to the term of imprisonment. \*\*\* For those sentenced on or after February 1, 1978, such term shall be identified as a mandatory

supervised release term.”<sup>1</sup> (Emphasis added.) 730 ILCS 5/5-8-1(d) (West 2004). Thus, by legislative fiat, MSR became a term of a defendant’s sentence and a part of the court record when a sentence of imprisonment was imposed. A sentence of imprisonment therefore *inherently* consisted of a prison term *and* an MSR term. Nothing in either *Wampler* or *Bozza* suggests any constitutional impediment to carrying out this legislative directive.

¶ 8 We recognize that, in denying the State of New York’s petition for rehearing, the *Earley* court rejected a similar argument (*Earley v. Murray*, 462 F.3d 147 (2d Cir. 2006)). Suffice it to say that, in our view, the *Earley* court’s reasoning on this point is more an exercise in question-begging than a cogent analysis.<sup>2</sup> We further note that, consistent with the language of section 5-8-1(d), in *Nance v. Lane*, 663 F. Supp. 33 (N.D. Ill. 1987), the United States District Court for the Northern District of Illinois held that a term of MSR attached to a prison term by operation of law even though the sentencing order did not provide for MSR. Nevertheless, although it is not mandatory, the better practice is to incorporate an admonition regarding mandatory supervised release when the specific sentence is allowed, and to include the term of mandatory supervised release into the written sentencing order. See *People v. Marshall*, 381 Ill. App. 3d 724, 736 (2008).

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<sup>1</sup>Section 5-8-1(d) was later amended to provide that the MSR term “shall be written as part of the sentencing order.” See Pub. Act 97-531, § 5 (eff. Jan. 1, 2012).

<sup>2</sup>To illustrate, when the *Earley* court asserts that “[t]he sentence imposed remains the sentence to be served unless and until it is lawfully modified” (*id.* at 149), it merely begs the question of whether PRS was part of the “sentence imposed” by virtue of statutory language that a prison term “includes [a PRS term], as part thereof” (N.Y. Penal Law § 70.45 (McKinney \_\_\_\_)).

¶9 Under the foregoing analysis, defendant would not have prevailed by arguing on direct appeal that the MSR term violated defendant's due process rights. A separation-of-powers argument would have fared no better. The premise of the argument is that, by imposing the MSR term, the Department usurped a judicial power. Because the MSR was an inherent part of the sentence of imprisonment imposed by the trial court, that premise is false. See *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194 (1977). More importantly, perhaps, even if either of these theories were arguably meritorious, a victory on appeal would have been wholly symbolic. The trial court had no power to impose a prison sentence that did not include an MSR term. *People v. Whitfield*, 217 Ill. 2d 177, 200-01 (2005). Had the issue been raised on direct appeal, we undoubtedly would have concluded that, absent an MSR term, the sentence was void. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995) ("A sentence which does not conform to a statutory requirement is void."). A void sentence may be corrected so as to conform to the applicable statutory requirements even where doing so results in a more onerous sentence. Accord *id.* For that reason, we disagree with defendant's contention that there is an arguable basis that his sentence "should be reduced to the minimum sentence of 20 years' imprisonment to best accommodate the applicable 3-year MSR term."

¶10 Clearly, it was not unreasonable for appellate counsel to refrain from raising an issue that could not have resulted in any meaningful relief for defendant. Therefore, there is no arguable basis for a claim of ineffective assistance of appellate counsel.

¶11 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶12 Affirmed.