

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).

2013 IL App (4th) 120323-U

NO. 4-12-0323

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 30, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DAMIAN L. GUDE,)	No. 10CF1216
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's judgment, agreeing with counsel's conclusion no meritorious issues could be raised on appeal as to whether the trial court erred in dismissing defendant's section 2-1401 petitions for relief from judgment (735 ILCS 5/2-1401 (West 2010)).

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. We grant OSAD's motion and affirm the trial court.

¶ 3 I. BACKGROUND

¶ 4 On August 12, 2010, the State charged defendant, Damian L. Gude, with robbery, a Class 1 felony (720 ILCS 5/18-1(a), (b) (West 2010)). On March 16, 2011, defendant pleaded guilty in exchange for the dismissal of charges in another case and the State's agreement to

recommend a sentence cap of 15 years' imprisonment. Due to a prior conviction, defendant was extended-term eligible. The trial court admonished defendant as follows before accepting his guilty plea:

"For this offense, in your situation, the minimum term in the Illinois Department of Corrections is 4 years up to a maximum prison sentence which is 15 years. Because of that same prior conviction you qualify for a possible extended term prison sentence. That could double the prison term from 15 years up to 30 years. There would also be a 2 year parole or mandatory supervised release term. Do you understand all the possible sentences?"

Defendant responded in the affirmative. Again, before imposing sentence, the court asked defendant if he had "any questions today regarding what you are charged with, your rights, possible sentences or anything else?" Defendant replied, "No."

¶ 5 On April 27, 2011, the trial court sentenced defendant to 12 years' imprisonment, with 2 years of mandatory supervised release (MSR). The court's sentencing order, entered the same day, reflects a 12-year prison term accompanied by 2 years of MSR.

¶ 6 On November 23, 2011, in case No. 10-CF-1216, defendant filed two petitions for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), making similar arguments and requesting similar relief in the petitions. Defendant alleged (1) he did not receive the benefit of the bargain because his negotiated plea did not make any reference to his two-year MSR term; (2) the trial court failed to admonish him as to MSR; (3)

the imposition of MSR *after* he served his sentence was (a) unconstitutional and violated the fourth, fifth, sixth, eighth, and fourteenth amendments (U.S. Const., amends. IV, V, VI, VIII, XIV) and (b) unconstitutionally unsound because it results in an unlawful constraint upon his liberty; (4) the imposition of MSR violates the day-for-day good-conduct-credit statute; and (5) MSR is unconstitutional based on double jeopardy grounds.

¶ 7 On January 9, 2012, the trial court dismissed defendant's petitions, finding the allegations in the petitions did not provide a legal basis for relief under section 2-1401.

¶ 8 On February 16, 2012, defendant filed a notice of appeal in the trial court. In April 2012, OSAD was appointed to represent defendant. In May 2012, this court granted defendant's motion for leave to file late notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 Counsel filed a motion to withdraw accompanied by a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Defendant was provided notice of the motion. We gave defendant leave to file additional points and authorities on his behalf by January 17, 2013. Defendant failed to do so. After examining the record in accordance with our duties under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's judgment.

¶ 11 OSAD alleges no colorable argument can be made the trial court erred by dismissing defendant's section 2-1401 petitions. Specifically, OSAD contends no colorable argument can be made (1) defendant did not receive the benefit of his bargain, (2) defendant was not properly admonished about MSR, (3) the imposition of MSR violates constitutional provisions, (4) the imposition of MSR conflicts with the day-for-day good-conduct-credit statute,

or (5) MSR is unconstitutional based on double jeopardy grounds. We agree with OSAD.

¶ 12 "Section 2-1401 is intended to correct errors of fact, unknown to the petitioner and the court at the time of the judgment, which would have prevented the rendition of the judgment had they been known." *People v. Muniz*, 386 Ill. App. 3d 890, 893, 899 N.E.2d 428, 431 (2008). To obtain relief under this section, defendant must affirmatively set forth factual allegations to satisfy the following three requirements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting this claim or defense in the trial court; and (3) due diligence in presenting a claim for relief under section 2-1401. *People v. Pinkonsly*, 207 Ill. 2d 555, 565, 802 N.E.2d 236, 243 (2003). "When examining a trial court's ruling on a section 2-1401 petition, the appropriate standard of review is whether the trial court abused its discretion." *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182-83 (2000).

¶ 13 Defendant can make no colorable argument he did not receive the benefit of his bargain with the State because his negotiated plea did not make any reference to a two-year MSR term. This court has held "the benefit of the bargain argument fails on its face" because "the State could not have agreed to waive MSR" and was not free to negotiate concerning MSR. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 27, 979 N.E.2d 992.

¶ 14 Defendant can make no meritorious argument the trial court failed to admonish him he would be subject to a two-year MSR term. The record shows, prior to accepting defendant's guilty plea, the court specifically told defendant "there would also be a [two] year parole or mandatory supervised release term." See *Lee*, 2012 IL App (4th) 110403, ¶ 21, 979 N.E.2d 992 (notice and due process are satisfied when the trial court informs a defendant a MSR term will follow imprisonment before a defendant pleads guilty).

¶ 15 Defendant can also make no meritorious argument the imposition of MSR violates constitutional provisions. In his section 2-1401 petitions, defendant argued the imposition of MSR *after* he served his sentence was (1) unconstitutional and violated the fourth, fifth, sixth, eighth, and fourteenth amendments and (2) unconstitutionally unsound because it results in an unlawful constraint upon his liberty. Defendant's arguments presuppose MSR is an additional sentence, separate and independent of his prison sentence. Such is not the case in Illinois. This court has previously clarified, "MSR is a mandatory part of a criminal sentence" and a defendant's MSR and prison term "are part of the same sentence, not two different sentences." *Lee*, 2012 IL App (4th) 110403, ¶ 32, 979 N.E.2d 992.

¶ 16 Defendant can make no colorable argument MSR violates the day-for-day good-conduct-credit statute. This court has held such argument has no merit because it "confuses the parts (prison term and MSR term) for the whole (sentence)." *Lee*, 2012 IL App (4th) 110403, ¶ 33, 979 N.E.2d 992. The day-for-day good-conduct-credit statute only serves to reduce the "period of imprisonment." *Lee*, 2012 IL App (4th) 110403, ¶ 33, 979 N.E.2d 992.

¶ 17 Finally, defendant can make no colorable argument the MSR statute is unconstitutional because it subjects defendant to double jeopardy. MSR is not a separate sentence but is a part of the whole. See *Lee*, 2012 IL App (4th) 110403, ¶ 32, 979 N.E.2d 992. MSR is not a form of incarceration. *Holly v. Montes*, 231 Ill. 2d 153, 166, 896 N.E.2d 267, 276 (2008). Defendant cannot argue he was sentenced or imprisoned twice for the same crime.

¶ 18 III. CONCLUSION

¶ 19 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no colorable argument can be made in this appeal, and we grant OSAD's

motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 20 Affirmed.