FIRST DIVISION
February 18, 2014

No. 1-12-0152

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. 98 CR 18530
	)	
JOHNNY PLASS,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's second-stage dismissal of defendant's postconviction petition is affirmed where defendant's challenge to his term of mandatory supervised release did not present a substantial showing of a constitutional violation, and the record shows that postconviction counsel provided reasonable assistance pursuant to Supreme Court Rule 651(c).

¶ 2 Defendant Johnny Plass appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition. On appeal, defendant contends the court erred in dismissing his petition because he made a substantial showing that his due process rights were violated when the trial court imposed a three-year term of mandatory supervised release (MSR),

which he was never informed of, thereby denying him the benefit of his plea bargain and rendering his plea unknowing and involuntary. Defendant also contends his postconviction counsel failed to provide reasonable assistance because he did not include an evidentiary affidavit from defendant with his supplemental petition. We affirm.

¶ 3 Following a March 2000 fully-negotiated guilty plea, defendant was convicted of first degree murder, attempted first degree murder and attempted residential burglary. Pursuant to the agreement, the trial court sentenced defendant to consecutive prison terms of 50 years, 20 years, and 5 years, respectively, for an aggregate sentence of 75 years' imprisonment. The trial court did not advise defendant that he would be required to serve a three-year term of MSR following his prison sentence.

¶ 4 Defendant, through counsel, filed a timely motion to vacate his guilty plea arguing that he pled guilty out of fear of receiving a potential death sentence, he was denied counsel of his choice, he had a viable affirmative defense of self-defense, and his sentence was excessive. The trial court denied defendant's motion. On appeal, the State confessed error, and this court remanded the case to the trial court for compliance with Supreme Court Rule 604(d) (eff. Aug. 1, 1992). *People v. Plass*, No. 1-00-2786 (2001) (dispositional order). On remand, the trial court again denied defendant's motion to vacate his guilty plea. Defendant did not appeal from that judgment.

¶ 5 On May 8, 2008, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Defendant solely alleged that pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2006), he was entitled to have his sentence reduced by three years because the trial court's failure to admonish him about the three-

year term of MSR denied him due process and the benefit of the bargain he made with the State. Defendant also submitted a *pro se* memorandum of law in support of his petition. Therein, in addition to *Whitfield*, defendant relied on the United States Supreme Court's holdings in *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Santobello v. New York*, 404 U.S. 257 (1971). Defendant argued that under *Boykin*, a guilty plea is invalid unless the defendant has an understanding of the consequences of the plea, and the record adequately establishes his understanding. *Boykin*, 395 U.S. at 243-44. Defendant further argued that under *Santobello*, when a guilty plea rests on a promise or agreement by the prosecutor such that the promise was part of the inducement or consideration for the plea, that promise must be fulfilled. *Santobello*, 404 U.S. at 262. Defendant attached to his *pro se* petition a verification affidavit pursuant to section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2008)). In support of his claims, defendant also attached the State's confession of error related to the motion to vacate his guilty plea, this court's order granting the State's request for remandment on that motion, and defendant's mittimus.

¶ 6 The circuit court appointed counsel to represent defendant and advanced his petition to second-stage postconviction proceedings. In March 2011, postconviction counsel informed the court that defendant was in the infirmary and unable to have an affidavit notarized. Counsel requested a continuance for return of the affidavit, and stated he would then be filing a supplemental petition.

¶ 7 In May 2011, counsel filed his certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that he consulted with defendant by letter and telephone to ascertain his contentions of deprivation of his constitutional rights, he examined the report of proceedings and common law record, and he examined defendant's *pro se* postconviction petition and "filed a

Memorandum of Law in Support of Petitioner's Petition; together they adequately presents [*sic*] his issues for review." In his memorandum, counsel expressly stated that he filed the "Memorandum of Law in Support of Post Conviction Petition as part of his Post Conviction Petition filed May 8, 2008." Therein, counsel acknowledged that the *Whitfield* decision was based on *Santobello* and provided a method of implementing *Santobello*. Counsel further acknowledged that in *People v. Morris*, 236 Ill. 2d 345 (2010), our supreme court held that the remedy in *Whitfield* did not apply retroactively to convictions that were finalized prior to December 20, 2005, the date *Whitfield* was announced. Counsel argued, however, that notwithstanding the holding in *Morris*, defendant was entitled to relief pursuant to *Santobello*. Counsel maintained that defendant's sentence should be reduced by three years to accommodate for the MSR term, which was not part of his plea agreement.

¶ 8 The State moved to dismiss defendant's postconviction petition arguing that, pursuant to *Morris*, defendant was not entitled to relief under *Whitfield* because defendant's conviction was finalized in March 2000, five years before *Whitfield* was decided. The State further argued that defendant was not entitled to relief under *Santobello* where the *Whitfield* ruling relied squarely on *Santobello*, which was recognized by our supreme court in *Morris*. Relying on the holding in *Morris*, the circuit court granted the State's motion and dismissed defendant's postconviction petition.

¶ 9 On appeal, defendant first contends the circuit court erred in dismissing his petition because he made a substantial showing that his due process rights were violated when the trial court imposed a three-year term of MSR, which he was never informed of, thereby denying him the benefit of his plea bargain and rendering his plea unknowing and involuntary. Defendant

acknowledges that in *Morris*, our supreme court held that the remedy in *Whitfield* does not apply retroactively. Defendant argues, however, that the holding in *Whitfield* is irrelevant to his case because his claim is independent of *Whitfield*. Defendant argues that he raised his claim as a federal due process violation solely under the holdings of *Santobello*, which was decided 30 years before his plea, and *Boykin*. Defendant further acknowledges that this argument was previously rejected by this court in *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010), but claims that case was wrongly decided because its reasoning is illogical and it runs afoul of the Supremacy Clause of the United States Constitution.

¶ 10 Reviewing the circuit court's second-stage dismissal of defendant's postconviction petition *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)), we find that defendant is not entitled to sentencing relief. In *Morris*, our supreme court held that the remedy announced in *Whitfield*, which allows a court to reduce a defendant's sentence by the number of years in the MSR term, was a "new rule" that "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. Here, defendant concedes that his conviction was finalized several years before *Whitfield* was decided. It is well established that supreme court holdings are binding on all lower courts, and this court lacks authority to disregard or overrule those decisions. *People v. Artis*, 232 Ill. 2d 156, 164 (2009).

¶ 11 Moreover, we find no merit in defendant's claim that, independent of *Whitfield*, he is entitled to relief under *Santobello*. In *Morris*, our supreme court explained that its decision in *Whitfield* relied "squarely on the Supreme Court's decision in *Santobello*." *Morris*, 236 Ill. 2d at 361. Thus, the *Whitfield* holding was expressly dependent upon *Santobello*. The *Morris* court

further explained that the *Whitfield* opinion conformed with the precedent that recognized that a defendant is entitled to the benefit of the bargain in his negotiated plea. *Morris*, 236 Ill. 2d at 361.

¶ 12 In *Demitro*, this court expressly stated:

> "[w]here *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 to prospective application under *Morris*." *Demitro*, 406 Ill. App. 3d at 957.

We decline to depart from our prior holding and similarly reject defendant's argument here.

¶ 13 We note that in his reply brief, defendant relies on a recent opinion from the Seventh Circuit Court of Appeals, *Villanueva v. Anglin*, 719 F.3d 769 (2013), wherein the defendants sought *habeas corpus* relief claiming their MSR terms deprived them of the benefit of their plea bargains. The Seventh Circuit stated that the defendants' *Whitfield* and *Santobello* claims should have been analyzed separately by the state courts. *Villanueva*, 719 F.3d at 777. It is well established that the federal appellate court has no jurisdiction over the state appellate court, and their federal decisions are not binding authority in this court. See *People v. Kidd*, 129 Ill. 2d 432, 457 (1989). As stated above, in this case, we find no merit in defendant's claim that *Santobello*, independent of *Whitfield*, provides him relief.

¶ 14 Defendant next contends his postconviction counsel failed to provide reasonable assistance because he did not include an evidentiary affidavit from defendant with his supplemental petition. Defendant claims that an evidentiary affidavit was needed to show that he

was not informed of the MSR term and that he did not know it was part of his plea agreement. Defendant notes that counsel requested a continuance because he was unable to get defendant's affidavit notarized while defendant was in the infirmary, but then never submitted an affidavit. Defendant argues that without his affidavit, his petition lacked any evidentiary support.

¶ 15 We review the interpretation of a supreme court rule, including whether counsel fulfilled his duties under Rule 651(c), *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). At second-stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel. 725 ILCS 5/122-4 (West 2008); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Lander*, 215 Ill. 2d at 583. Pursuant to Rule 651(c), postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Compliance with these duties may be shown by a certificate filed by postconviction counsel. Rule 651(c); *Lander*, 215 Ill. 2d at 584. Counsel's substantial compliance with Rule 651(c) is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 16 Here, counsel filed a Rule 651(c) certificate; therefore, the presumption exists that counsel provided defendant with the reasonable level of assistance required by the rule. The burden is on defendant to rebut this presumption by demonstrating that postconviction counsel

failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307 at ¶ 19. In this case, defendant has failed to meet that burden.

¶ 17 As stated in his Rule 651(c) certificate, and as reflected in the record, counsel did not file a supplemental or amended petition replacing defendant's *pro se* petition, but instead, filed a "Memorandum of Law in Support of Post Conviction Petition." Counsel stated in his certificate that he examined defendant's *pro se* petition and found that the petition, together with the memorandum, adequately presented defendant's issues for review. In his memorandum, counsel expressly stated that he filed the "Memorandum of Law in Support of Post Conviction Petition as part of his Post Conviction Petition filed May 8, 2008." Rather than an evidentiary affidavit, defendant attached to his petition a *pro se* memorandum of law in which he stated that he was never admonished about the MSR term, and that the MSR term was not reflected on his mittimus. Defendant's *pro se* memorandum is signed and notarized together with his verification affidavit. Defendant also attached to his petition as evidentiary support the State's confession of error related to the motion to vacate his guilty plea, this court's order granting the State's request for remandment on that motion, and a copy of his mittimus. We find that this documentation was sufficient evidentiary support for the claims in defendant's petition, and there was no need for an additional affidavit from defendant. We note that at the time postconviction counsel informed the court that he needed to have defendant's affidavit notarized, counsel also stated that he planned to file a supplemental petition. As stated above, rather than filing a supplemental petition, counsel filed the memorandum. It appears that counsel had determined that a supplemental petition and an additional affidavit were not necessary, and that his memorandum, together with defendant's *pro se* petition and documentation, were sufficient.

¶ 18 Based on our review of the record, we conclude that postconviction counsel substantially complied with the duties required in Rule 651(c) and provided defendant with the reasonable assistance contemplated by the Act. Accordingly, the circuit court's dismissal of defendant's postconviction petition during the second stage of proceedings was proper.

¶ 19 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.