

No. 1-11-2041

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. 05 CR 14105
)	
DEVIN EDWARDS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed where defendant's claim is moot due to this court's inability to grant his requested relief.
- ¶ 2 Defendant Devin Edwards appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing

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Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he made a substantial showing that his due process rights were violated where, as previously decided by this court, the trial court's admonishments relating to his mandatory supervised release (MSR) requirements were deficient. Defendant, who is no longer incarcerated but is still subject to his three-year term of MSR, maintains that the law of the case doctrine precludes the relitigation of the propriety of these admonishments, and thus requests that we strike his MSR term in its entirety.

¶ 3 The record shows that defendant was charged with attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, and two counts of aggravated battery that caused great bodily harm in relation to the shooting of Edward Sanders. Following a Supreme Court Rule 402 (eff. July 1, 2012) conference, defendant entered a negotiated plea of guilty to the charge of aggravated battery with a firearm in exchange for a sentence of 10 years' imprisonment and the State's agreement to nol-pros the remaining charges. During defendant's plea hearing, the trial court issued admonishments pursuant to Rule 402, including, in pertinent part:

"THE COURT: Sir, the charge that remains against you is a Class X felony.

A Class X felony is punishable by up to 30 years in the Illinois Department of Corrections. Under certain circumstances, it can be extended to 60 years. You can be fined up to \$25,000 and be given a period of mandatory supervised release or parole for a period of three years. Do you understand that those are possible penalties, sir?

DEFENDANT: Yes."

¶ 4 After the trial court accepted defendant's plea of guilty, it admonished him regarding his appeal rights. Defendant did not move to withdraw his guilty plea or file a direct appeal, but, on

March 26, 2008, he filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). Therein, defendant alleged that his plea agreement for a 10-year sentence had been violated by the addition of a three-year term of MSR, thereby violating his rights to due process. Defendant further alleged that this term of MSR had not been part of his negotiated plea, and that he was not made aware that he was to serve it until he was "confronted by the prison counselor" at Illinois River Correctional Center. The trial court dismissed defendant's 2-1401 petition, finding that such a petition was not the proper vehicle for defendant's claim, which was constitutional in nature.

¶ 5 On May 8, 2008, defendant filed a *pro se* postconviction petition, in which he raised the same claim as contained in his section 2-1401 petition.¹ The trial court dismissed defendant's postconviction petition, finding that the record directly rebutted defendant's claim that he was unaware that the MSR was part of his sentence, and that defendant's claim was thus frivolous and patently without merit.

¶ 6 On January 12, 2010, this court reversed the trial court's summary dismissal of defendant's *pro se* postconviction petition, and remanded the case for second-stage proceedings. *People v. Edwards*, No. 1-08-2238 (2010) (unpublished order under Supreme Court Rule 23). In doing so, this court found that the trial court had not properly apprised defendant of the three-year MSR term which attached to his agreed-upon sentence because, although the court had mentioned the MSR term in admonishing him, it had done so in a manner that suggested MSR as a possibility, rather than linking it to the sentence to be imposed upon him. *Edwards*, No. 1-08-

¹ We note that defendant's 2-1401 and postconviction petitions are identical, aside from their titles and the first line of their introductory paragraphs, which identify the applicable statute pursuant to which relief is sought.

2238, order at 7. This court thus found that defendant had stated the gist of a meritorious due process claim. *Id.*

¶ 7 On remand, postconviction counsel was appointed, and he subsequently filed a Supreme Court Rule 651(c) (eff. Feb 6, 2013) certificate averring, *inter alia*, that he would not be filing a supplemental postconviction petition. The State filed a motion to dismiss defendant's petition, arguing that defendant's due process rights were not violated because the trial court substantially complied with the Rule 402 admonishments pertaining to MSR. Postconviction counsel responded to the State's motion to dismiss and argued that in ruling that defendant had demonstrated the gist of a meritorious due process claim, this court had already ruled that the MSR admonishments in this case were insufficient. Postconviction counsel further argued that this finding should also satisfy the substantial showing requirement necessary to reach the third-stage evidentiary hearing.

¶ 8 A hearing on the State's motion to dismiss was conducted on April 18, 2011. At that hearing, the trial court asked the parties to submit supplemental briefs on whether the recent decision of *People v. Morris*, 236 Ill. 2d 345 (2010), affected defendant's case. In its brief, the State argued that *Morris* was inapplicable because it held that the decision of *People v. Whitfield*, 217 Ill. 2d 177 (2005), upon which defendant's MSR claim was based, could not be applied retroactively, and here there was no retroactive application because defendant's conviction was not final until after the date the decision in *Whitfield* was announced. Defendant agreed that *Morris* was inapplicable to his case for this reason.

¶ 9 The trial court granted the State's motion to dismiss defendant's postconviction petition, finding that there had been substantial compliance with the Rule 402 MSR admonishments in

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this case. The court further found that *Morris*, which was decided after this court issued its order in defendant's appeal from the summary dismissal of his petition, "has changed the manner in which reviewing courts take a look at the sufficiency of mandatory supervised release admonishment."

¶ 10 On appeal, defendant challenges the propriety of that dismissal, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Because we review the judgment and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 11 At the second stage of postconviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 12 Defendant argues that because this court previously found that the trial court's MSR-related admonishments were insufficient, the law of the case doctrine, which bars relitigation of an issue already decided in the same case, precluded that issue from being from being relitigated on remand. He further maintains that he has made a substantial showing of a due process violation due to the insufficient MSR-related admonishments. The record shows that as of November 1, 2013, defendant finished serving his term of imprisonment and is currently serving his term of MSR, with a scheduled discharge date of November 1, 2016. Accordingly, defendant

does not challenge his 10-year sentence, or seek to withdraw or vacate his guilty plea, but rather, solely requests that his three-year MSR term be stricken from his sentence. The State relies on *People v. Porm*, 365 Ill. App. 3d 791 (2006), and argues that defendant's claim is moot because no remedy is available to him given that he has fully served his term of imprisonment. We agree and find that we need not address defendant's law of the case argument because, even assuming that the trial court's MSR-related admonishments were insufficient, defendant's claim is moot where we are unable to grant the relief he has requested.

¶ 13 Pursuant to Supreme Court Rule 402, before accepting a guilty plea, the trial court must admonish defendant, *inter alia*, that a term of MSR will be added to the end of his sentence, and a court's failure to do so is a violation of due process. *Whitfield*, 217 Ill. 2d at 188. However, because MSR terms are statutorily required, a court has no power to withhold an MSR term in imposing sentence (*Whitfield*, 217 Ill. 2d at 200-01), or to strike a term of MSR from an imposed sentence; (*People v. Russell*, 345 Ill. App. 3d 16, 22 (2003)). Accordingly, in *Porm*, this court held that even if a defendant has established a deprivation of his constitutional rights based on improper MSR admonishments, a court is without authority to strike an MSR term from that defendant's sentence. *Porm*, 365 Ill. App. 3d at 794-95.

¶ 14 In *Porm*, the defendant appealed from an order of the trial court granting the State's motion to dismiss his postconviction petition alleging a deprivation of his constitutional rights due to improper MSR-related admonishments at his plea hearing. *Id.* at 791-92. Defendant, who had fully served his term of imprisonment, did not seek to withdraw his guilty plea, but rather, solely requested that we strike his term of MSR from his sentence. *Id.* at 794-95. Although this court found that defendant had established a deprivation of his constitutional rights, we affirmed

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the trial court's dismissal of his petition, finding that his claim was moot under his particular circumstances. *Id.* at 793-95. In doing so, we reasoned that because, pursuant to *Whitfield* and *Russell*, we had no authority strike an MSR term from a defendant's sentence, the only available remedy to a defendant who had fully served his sentence in a situation such as this was to give him the opportunity to withdraw his guilty plea. *Id.* at 794-95. However, because defendant did not wish to withdraw his guilty plea, we found that no posconviction relief was available to him, that remand would be futile, and affirmed the trial court's order dismissing defendant's postconviction petition. *Id.* at 795.

¶ 15 We reach the same conclusion in the case at bar. Here, as in *Porm*, defendant has fully completed his term of imprisonment and the sole remedy he seeks is that we strike his term of MSR. As explained above, we do not have the authority to grant such a remedy, and even assuming that defendant's claim is meritorious, it has been rendered moot. *Id.* at 794-95.

¶ 16 Although defendant acknowledges our decision in *Porm*, he argues that it was wrongly decided and cites *People v. Moore*, 214 Ill. App. 3d 938, 943-44 (1991), for the proposition that we have the authority to strike his term of MSR. In *Russell*, this court expressly declined to follow *Moore*, whose holding we found to be contrary to the plain language of section 5-8-1(d)(2) of the Unified Code of Corrections (730 ILCS 5/ 5-8-1(d)(2) (West 1998)), which governs MSR terms, and we stressed our continued adherence to the principle that courts do not have the authority to strike MSR terms from a defendant's sentence. *Russell*, 345 Ill. App. 3d at 22. We continue to adhere to that principle, as well as to our reasoning and holdings as stated in *Porm* and *Russell*.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

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¶ 18 Affirmed.