

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).

2015 IL App (4th) 140164-U

NO. 4-14-0164

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 25, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
COREY U. KELLY,)	No. 07CF1945
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by summarily dismissing defendant's postconviction petition where defendant's claim he was denied due process due to an improper mandatory supervised release admonishment stated the gist of a constitutional claim.

¶ 2 In November 2007, a grand jury indicted defendant, Corey U. Kelly, with criminal sexual assault and robbery. In February 2008, defendant pleaded guilty to the criminal-sexual-assault charge, his robbery charge was dismissed, and he received the agreed-upon seven year sentence for criminal sexual assault. Defendant did not appeal. In January 2014, defendant filed a *pro se* postconviction petition, which the Champaign County circuit court summarily dismissed as frivolous and patently without merit. Defendant appeals the dismissal of his postconviction petition, arguing his claims related to his term of mandatory supervised release (MSR) stated the gist of a constitutional claim. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4 The grand jury's November 2007 indictment asserted defendant committed criminal sexual assault, a Class 1 felony (720 ILCS 5/12-13(a)(1), (b)(1) (West 2006)), and robbery, a Class 2 felony (720 ILCS 5/18-1 (West 2006)), on November 6, 2007. On February 25, 2008, the trial court held defendant's plea hearing. Defendant and the State had entered into a plea agreement, under which defendant would plead guilty to the criminal-sexual-assault charge and the State would recommend a sentence of seven years for criminal sexual assault and request the dismissal of the robbery charge. In explaining defendant's criminal-sexual-assault charge, the court stated the following:

"Now this is a Class 1 felony, non-probationable. Calls for a mandatory minimum sentence of four years, with a maximum sentence of fifteen years in prison. That's followed by a period of mandatory supervised release of two years. The maximum fine could be up to \$25,000.00. You understand those are the maximum penalties?"

Defendant replied in the affirmative. After all of the admonishments and the State's factual basis for the guilty plea, the court accepted defendant's guilty plea to the criminal-sexual-assault charge, sentenced defendant to seven years' imprisonment, and dismissed the robbery charge. On the day of the plea hearing, the court also filed both a written judgment and sentencing order on the guilty plea and a written judgment of sentence to the Department of Corrections. Neither document stated an MSR term.

¶ 5 In March 2008, defendant filed a *pro se* motion to withdrawal his guilty plea, asserting his counsel forced him to plead guilty. Defendant later withdrew his motion. He did not file a direct appeal.

¶ 6 On January 23, 2014, defendant filed his *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2014)). He asserted he completed his agreed-upon prison term on October 19, 2013, and was then informed his MSR term was three years to life. See 730 ILCS 5/5-8-1(d)(4) (West 2006). Noting our supreme court's decision in *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005), defendant claimed his due process rights were violated and he did not receive the benefit of the bargain because he received a sentence more onerous than the one to which he agreed. During most of the petition, defendant contended he was never informed about MSR during his plea hearing. However, in his conclusion, he seeks the enforcement of his plea agreement "7 years at 50%, and no more than the 2 year, [MSR] maximum, as explained in defense (Exhibit A, page 4)." The postconviction petition in the appellate record does not have any exhibits attached to it.

¶ 7 On February 3, 2014, the trial court dismissed defendant's petition, finding it frivolous and patently without merit. As to defendant's MSR claim, the court noted our supreme court had addressed the identical issue in *People v. McChriston*, 2014 IL 115310, ¶¶ 1, 4, 4 N.E.3d 29, which found no constitutional violations resulted from the imposition of MSR when the trial court failed to mention MSR during sentencing and in the written sentencing judgment after a jury had found the defendant guilty of unlawful delivery of a controlled substance. On February 28, 2014, defendant filed a notice of appeal, which failed to note he was appealing the dismissal of his postconviction petition. On March 14, 2014, defendant timely sought leave to file an amended notice of appeal, which listed the dismissal of the postconviction petition as the appealed order, in compliance with Illinois Supreme Court Rules 606 (eff. Feb. 6, 2013), 303(b)(5) (eff. May 30, 2008), and 303(d) (eff. May 30, 2008). This court granted defendant

leave to file the amended notice of appeal. Accordingly, this court has jurisdiction of defendant's postconviction petition under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 8

II. ANALYSIS

¶ 9

On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition, claiming he has stated the gist of a constitutional claim related to the trial court's incorrect MSR admonishment. Specifically, defendant notes a due process violation and ineffective assistance of counsel. The State asserts defendant's claims on appeal were not raised in his postconviction petition, noting defendant claimed he pleaded guilty with the understanding he would not have to serve any MSR term after the completion of his prison term and defendant only makes one brief reference to an ineffective attorney. At the first stage of the postconviction process, courts are to give liberal construction to *pro se* petitions, reviewing them " 'with a lenient eye, allowing borderline cases to proceed.' " *People v. Hodges*, 234 Ill. 2d 1, 21, 912 N.E.2d 1204, 1214 (2009) (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)). While defendant at the beginning of his *pro se* petition asserts a due process violation because he had no knowledge of an MSR term, he concludes the petition by asserting his sentence should be modified to conform to the plea agreement, which included a maximum MSR term of two years. Considering the court only mentioned MSR in describing the offense of criminal sexual assault and then it stated two years, which is incorrect under 5-1-8(d)(4) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(d)(4) (West 2006)), defendant's argument is understandable. Accordingly, we find that, under a liberal construction of defendant's *pro se* postconviction petition, he does raise a due-process claim based on the trial court's incorrect MSR admonishment. As a result of our resolution of the due-process issue, we do not address whether the petition sufficiently stated an ineffective-assistance-of-counsel claim.

¶ 10 The Postconviction Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1074-75 (2010). A proceeding under the Postconviction Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 11 The Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Our supreme court has held "a *pro se* petition seeking postconviction relief under the [Postconviction] Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209. A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*,

234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 12 "In considering a petition pursuant to [section 122-2.1 of the Postconviction Act], the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2014). Our review of a first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 13 Here, defendant's due process claim has an arguable factual basis as defendant was subject to an MSR term of three years to life for criminal sexual assault under section 5-8-1(d)(4) of the Unified Code (730 ILCS 5/5-8-1(d)(4) (West 2006)) and the record shows the trial court admonished him the MSR term was two years. As to its legal basis, we note Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) provides that, prior to accepting a defendant's guilty plea, the trial court must admonish the defendant in accordance with its provisions. In *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669, the supreme court addressed Rule 402 and MSR admonishments and held the following:

"[A]lthough substantial compliance with Rule 402 is sufficient to establish due process [citations] and an imperfect admonishment is not reversible error unless real justice has been denied or the defendant has been prejudiced by the inadequate admonishment [citation], there is no substantial compliance with Rule 402 and 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. In these circumstances, addition of the MSR term to the agreed-upon sentence violates due process because the sentence imposed is more onerous than the one defendant agreed to at the time of the plea hearing. Under these circumstances, the addition of the MSR constitutes an unfair breach of the plea agreement."

There, the defendant and the State had entered into a plea agreement, under which the defendant was to plead guilty to felony murder with a prison term of 25 years and armed robbery with a concurrent prison term of 6 years. *Whitfield*, 217 Ill. 2d at 179, 840 N.E.2d at 661. During the plea hearing, neither the prosecutor nor the court advised the defendant he would be subject to a 3 year MSR term after the completion of his 25 year murder sentence. *Whitfield*, 217 Ill. 2d at 180, 840 N.E.2d at 661. As a result of that failure, the *Whitfield* court concluded the defendant's guilty plea was induced by the promise of a specific sentence, which he did not receive, and thus his constitutional right to due process and fundamental fairness was violated. *Whitfield*, 217 Ill. 2d at 201-02, 840 N.E.2d at 673.

¶ 14 In *Morris*, 236 Ill. 2d at 366, 925 N.E.2d at 1082, the supreme court clarified its decision in *Whitfield*. It noted courts give admonishments before accepting a guilty plea to both (1) ensure the defendant's guilty plea is entered intelligently and with full knowledge of its consequences and (2) advise the defendant of the actual terms of the bargain he has made with the State. *Morris*, 236 Ill. 2d at 366, 925 N.E.2d at 1082. "The trial court's MSR admonishments need not be perfect, but they must substantially comply with the requirements of

Rule 402 and the precedent of this court." *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082. The *Morris* court noted the *Whitfield* decision requires courts to advise defendants an MSR term will be added to the actual sentence agreed upon in exchange for a guilty plea to the charged offense. *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082. Our supreme court further explained, "Ideally, a trial court's admonishment 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, 925 N.E.2d at 1082.

¶ 15 While the facts of this case differ from *Whitfield* because the trial court did mention an MSR term, defendant still was not advised of the actual terms of the bargain he had made with the State because the MSR admonishment he received was incorrect. The erroneous information was never corrected as the court did not mention an MSR term when discussing the plea agreement or in any sentencing judgment. Moreover, we note a two-year MSR term is substantially different than the statutorily mandated MSR term of three years to life (730 ILCS 5/5-8-1(d)(4) (West 2006)). Thus, an arguable legal basis exists a due process violation occurred because the trial court's MSR admonishment for the offense of criminal sexual assault did not substantially comply with Rule 402 and supreme court precedent.

¶ 16 Accordingly, we find defendant's petition does meet the low threshold of stating a gist of a constitutional claim of a due process violation. In light of our finding, the entire postconviction petition must be remanded for further proceedings because "summary partial dismissals are not permitted at the first stage of a postconviction proceeding." *Hodges*, 234 Ill. 2d at 22 n.8, 912 N.E.2d at 1215 n.8. However, our finding is in no way an opinion on the actual merits of the issue or on whether defendant will ultimately prevail on his due process claim. See

Hodges, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

¶ 17

III. CONCLUSION

¶ 18 For the reasons stated, we reverse the Champaign County circuit court's judgment and remand the cause for further proceedings.

¶ 19 Reversed and remanded.