

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) 140654-U

NO. 4-14-0654

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 20, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Mason County
STANLEY C. SISK, JR.,)	No. 07CF59
Defendant-Appellant.)	
)	Honorable
)	Diane M. Lagoski,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's first-stage dismissal of defendant's postconviction petition is reversed where defendant presented the gist of a constitutional claim his due-process rights were violated as a result of the trial court's inaccurate MSR admonishment during defendant's fully negotiated plea hearing.

¶ 2 In September 2007, pursuant to a fully negotiated guilty plea, defendant, Stanley C. Sisk, Jr., was sentenced to seven years in prison for criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)), to run consecutively to concurrent four-year prison terms for indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). Prior to pleading guilty, the trial court admonished defendant that his sentences would be followed by a two-year term of mandatory supervised release (MSR) for each count.

¶ 3 In September 2012, defendant filed a *pro se* postconviction petition. On November 8, 2012, the trial court dismissed defendant's postconviction petition at the first stage. On November 19, 2012, defendant filed a *pro se* "Motion For Reconsideration of the 1st Stage Denial of Post-Conviction Petition." On December 10, 2012, defendant filed a notice of appeal, identifying the nature of the judgment appealed from as the "denial of post conviction petition and pending motion of reconsideration of post conviction denial." On May 9, 2014, this court dismissed defendant's appeal for lack of jurisdiction because defendant's motion for reconsideration of the first-stage dismissal of his postconviction petition was still pending in the trial court. See *People v. Sisk*, 2014 IL App (4th) 121121-U. On June 27, 2014, the trial court denied defendant's motion for reconsideration.

¶ 4 On appeal, defendant asserts that the trial court erred in summarily dismissing his postconviction petition where he stated the gist of a constitutional claim. Specifically, he contends that he was denied his constitutional right to due process of law when the trial court admonished him that his sentence for criminal sexual assault would be followed by a two-year term of MSR, rather than the statutorily required MSR term of three years to natural life. We reverse and remand for second-stage proceedings.

¶ 5 I. BACKGROUND

¶ 6 In September 2007, pursuant to a fully negotiated plea agreement, defendant pleaded guilty to (1) indecent solicitation of a child (count I) (720 ILCS 5/11-6(a) (West 2006)); (2) criminal sexual assault (count II) (720 ILCS 5/12-13(a)(1) (West 2006)); and (3) aggravated criminal sexual abuse (count III) (720 ILCS 5/12-16(d) (West 2006)). In exchange for his guilty plea, the State dismissed one count of criminal sexual assault (count IV) (720 ILCS 5/12-13(a)(4) (West 2006)) and a misdemeanor offense of sexual exploitation of a child (count V)

(720 ILCS 5/11-9.1 (West 2006)). Pursuant to the agreement, defendant was sentenced to seven years' imprisonment for count II, to run consecutively to concurrent 4-year prison terms for counts I and III, for a total sentence of 11 years' imprisonment.

¶ 7 On September 25, 2007, prior to accepting defendant's guilty plea, the trial court admonished him that a two-year MSR term attached to each count to which he was pleading guilty. Specifically, as to the charge of criminal sexual assault, the trial court admonished defendant as to the minimum and maximum penalties as follows: "That is a Class 1 felony. You could spend from four to fifteen years in the Department of Corrections [DOC], *plus two years* [MSR]." (Emphasis added.) The prosecutor then recited the terms of the fully negotiated plea agreement but omitted any mention of MSR. The trial court confirmed with defendant his agreement with the recited terms of the plea bargain.

¶ 8 After accepting defendant's guilty plea, there was a discussion regarding whether the MSR terms would run concurrently or consecutively. The following colloquy occurred:

"THE COURT: *** [Defendant,] the [DOC] may run this different because you are running your sentence[s] consecutive. It looks to me like four years, could be two, but I am going to tell you four, better I tell you more than less. It is what they do after you get out.

[DEFENDANT]: That is two for each count.

THE COURT: The two counts run concurrent, that will run concurrent, that is two years[,] and the other count, that is running consecutive, that is two years, that is why I am telling you

four years mandatory supervised release. *** You don't know
either I take it?

[DEFENSE COUNSEL]: I am not a thousand percent sure.

THE COURT: Rather tell him more and have him find out
it is less."

The sentencing judgment reflects a two-year MSR term was imposed for each
count. Defendant did not directly appeal.

¶ 9 In September 2012, defendant filed a *pro se* petition under the Post-Conviction
Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), asserting the trial court erred by
admonishing him he would serve a two-year MSR term for the offense of criminal sexual assault
when section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West
2006)) mandates an MSR term of three years to natural life. According to defendant, this error
violated his constitutional right to due process and altered the bargain he made with the State.
To remedy the alleged error, defendant sought a reduction of his prison sentence. On November
8, 2012, the trial court dismissed defendant's postconviction petition. While acknowledging it
had incorrectly admonished defendant regarding the MSR term for criminal sexual assault, the
trial court determined it had substantially complied with its admonishment requirements during
the guilty-plea hearing since it had at least admonished defendant that a term of MSR attached to
his sentences, and thus, it did not "think it rises to the level that would require that we move on
to the next stage."

¶ 10 On November 19, 2012, defendant filed a motion for reconsideration of the first-
stage dismissal of his postconviction petition. In his motion for reconsideration, defendant
asserted in part that (1) the plea agreement was void as it was not authorized by statute; (2) trial

counsel was ineffective for failing to explain the possible MSR term; and (3) the trial judge erred by leaving the MSR term to be decided by the DOC. Defendant sought either a vacature of the trial court's first-stage dismissal of his postconviction petition so that he could proceed to the second stage of postconviction proceedings or "a new sentencing order modifying the sentence to 6 years to allow for the correction of the 3[-]year MSR."

¶ 11 On December 10, 2012, defendant filed a notice of appeal, identifying the nature of the order appealed from as the "Denial of Post Conviction Petition and Pending Motion of Reconsideration of Post Conviction Denial." On May 9, 2014, this court dismissed defendant's appeal for lack of jurisdiction because defendant's motion for reconsideration of the first-stage dismissal of his postconviction petition was still pending in the trial court. See *Sisk*, 2014 IL App (4th) 121121-U. On June 27, 2014, the trial court denied defendant's motion for reconsideration.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant asserts that the trial court erred in summarily dismissing his postconviction petition where he stated the gist of a constitutional claim. Specifically, he contends that he was denied his constitutional right to due process of law when the trial court admonished him that his sentence for criminal sexual assault would be followed by a two-year term of MSR, rather than the statutorily required MSR term of three years to natural life.

¶ 15 Initially, we note the State cites *People v. Smith*, 2013 IL App (4th) 110220, ¶ 23, 986 N.E.2d 1274, in support of its contention that defendant's motion to reconsider the denial of his postconviction petition should be considered a successive postconviction petition—the dismissal of which it concludes should be affirmed by this court since defendant did not obtain

leave to file a successive postconviction petition—because it presented a different argument than defendant raised in his initial postconviction petition. In *Smith*, the defendant's initial postconviction petition was summarily dismissed at the first stage and the defendant did not appeal from that dismissal. *Id.* ¶ 12, 986 N.E.2d 1274. Instead, three months later, in November 2010, the defendant filed a " 'Successive Post-Conviction Petition' " raising new claims not included in his initial postconviction petition, and an " 'Amended Petition for Successive Post-Conviction Relief,' " which was "mostly a duplicate" of the defendant's initial postconviction petition. *Id.* ¶¶ 13-14, 986 N.E.2d 1274. The trial court dismissed both petitions, finding that they were successive petitions filed without leave of court. *Id.* ¶ 14, 986 N.E.2d 1274. On appeal, the defendant asserted that the trial court erred in treating the November 2010 motions as successive postconviction petitions rather than a motion to amend and reconsider the initial postconviction petition. *Id.* ¶ 17, 986 N.E.2d 1274. This court disagreed with the defendant, noting that petitions cannot be amended after final judgment, and thus, the defendant's November 2010 motions—filed after the trial court's summary dismissal of the postconviction petition became final—must be considered successive petitions. *Id.* ¶ 23, 986 N.E.2d 1274 (citing 725 ILCS 5/122-5 (West 2010) for the proposition that amendments may be allowed on just and reasonable terms *before final judgment*).

¶ 16 Unlike the order dismissing the initial postconviction petition in *Smith*, at the time the November 2012 motion for reconsideration was filed in this case, the trial court's first-stage dismissal order was not yet a final judgment. Thus, unlike in *Smith*, defendant's subsequent motion for reconsideration does not bear the hallmarks of a successive postconviction petition. We find defendant's motion to reconsider was not a successive postconviction petition requiring leave of court to be filed, and we will address the merits of defendant's claim.

¶ 17 The Act provides a means by which a defendant may collaterally attack his conviction or sentence for federal or state constitutional violations. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases such as this, postconviction proceedings are divided into three separate stages. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208 (2009). "At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit.'" *Id.*, 912 N.E.2d at 1208-09 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). At this stage, the court is limited to examining "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 2012). To avoid dismissal at this stage of the postconviction proceedings, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). "This standard presents a 'low threshold' [citation], requiring only that the petition plead sufficient facts to assert an arguably constitutional claim [citation]." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). In other words, a postconviction petition may be dismissed at the first stage only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12, 912 N.E.2d at 1209. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16, 912 N.E.2d at 12. We review the summary dismissal of a postconviction petition at the first stage *de novo*. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 18 Here, we note that defendant asks this court to take judicial notice of certain information provided on the DOC website, information which, according to defendant, indicates he is subject to an MSR term of three years to life. See *People v. Peterson*, 372 Ill. App. 3d

1010, 1019, 868 N.E.2d 329, 336 (2007) (appellate court may take judicial notice of DOC records). According to the DOC website, which this court initially accessed on April 24, 2015, defendant's projected discharge date (which we understand is the date calculated by DOC for completion of MSR) was listed as April 25, 2017—two years after his projected parole date of April 25, 2015, for criminal sexual assault. We note that on May 7, 2015, when this court again accessed the DOC website, it indicated a projected discharge date of January 7, 2017, the same date listed as defendant's projected parole date for the four-year sentences he is now serving. Regardless of the information provided on DOC's website, however, section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West 2006)) requires a defendant who commits the offense of criminal sexual assault on or after December 13, 2005, to serve an MSR term of three years to natural life. Thus, despite what appears to be incorrect information provided on the DOC website—and the trial court's inaccurate MSR admonishment at the guilty-plea hearing—defendant is statutorily required to serve an MSR term of three years to natural life for the offense of criminal sexual assault.

¶ 19 Prior to accepting a defendant's guilty plea, the trial court must admonish the defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997), which states, in relevant part, as follows:

"In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by

addressing the defendant personally in open court,
informing him of and determining that he
understands the following:

(2) the minimum and
maximum sentence prescribed by
law, including, when applicable, the
penalty to which the defendant may
be subjected because of prior
convictions or consecutive
sentences[.]"

¶ 20 Defendant cites *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 665 (2005), in support of his contention that his due-process rights were violated when the trial court improperly admonished him regarding the applicable MSR term. In *Whitfield*, the defendant pleaded guilty to first degree murder and armed robbery pursuant to a negotiated plea agreement. *Id.* at 179, 840 N.E.2d at 661. During the plea hearing, defendant was not informed that a 3-year term of MSR would follow his 25-year sentence for murder. *Id.* at 180, 840 N.E.2d at 661. In a postconviction petition, the defendant alleged that his due-process rights were violated because the sentence imposed upon him was more onerous than the sentence he agreed to. *Id.* The supreme court agreed, finding as follows:

"[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 [an MSR] 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." *Id.* at 195, 840 N.E.2d at 669.

¶ 21 The facts in this case differ from *Whitfield* in that defendant was admonished that an MSR term would attach to his sentences. Specifically, defendant pleaded guilty after the trial court admonished him that a two-year MSR term attached to each offense to which he was pleading guilty, when pursuant to statute, the required MSR term for the offense of criminal sexual assault is three years to natural life.

¶ 22 While the State does not dispute that the trial court incorrectly admonished defendant regarding the term of MSR associated with the offense of criminal sexual assault, it cites *People v. Andrews*, 403 Ill. App. 3d 654, 936 N.E.2d 648 (2010), and *People v. Dorsey*, 404 Ill. App. 3d 829, 942 N.E.2d 535 (2010), in support of its contention that the admonishment at issue here substantially complied with Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). We find *Andrews* and *Dorsey* are distinguishable. In those cases, the trial courts, in admonishing the defendants regarding the maximum penalties pursuant to Rule 402(a), *accurately* admonished

the defendants of the term of MSR which would follow a prison sentence prior to accepting their guilty pleas. At the guilty-plea hearing in *Andrews*, the trial court correctly informed the defendant that a one-year term of MSR would follow any prison sentence. *Andrews*, 403 Ill. App. 3d at 656, 936 N.E.2d at 651. Likewise, at the guilty-plea hearing in *Dorsey*, the trial court correctly informed the defendant that a three-year term of MSR would follow any prison sentence. *Dorsey*, 404 Ill. App. 3d at 831, 942 N.E.2d at 537. In this case, however, the trial court misstated the term of MSR that attached to defendant's conviction and prison sentence for criminal sexual assault. Specifically, the court informed defendant that a two-year MSR term would follow his prison sentence, a considerable departure from the statutorily mandated MSR term of three years to natural life (730 ILCS 5/5-8-1(d)(4)(West 2006)). Our supreme court has noted, "[t]he 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." *People v. Morris*, 236 Ill. 2d 345, 367, 925 N.E.2d 1069, 1082 (2010). We find the trial court's MSR admonishment for the offense of criminal sexual assault did not substantially comply with Rule 402(a).

¶ 23 Accordingly, we conclude that defendant pleaded facts sufficient to establish the gist of a constitutional claim that his due-process rights were violated due to the trial court's inaccurate MSR admonishment. We reverse the trial court's summary dismissal at the first stage of postconviction proceedings and remand for second-stage postconviction proceedings.

¶ 24 III. CONCLUSION

¶ 25 The trial court's summary dismissal of defendant's postconviction petition is reversed. Defendant's case is remanded for second-stage postconviction proceedings.

¶ 26 Reversed and remanded.