

NOTICE

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2016 IL App (4th) 140333-U

NO. 4-14-0333

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 16, 2016

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
CLINTON WEBSTER, JR.,)	No. 10CF1435
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

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

¶ 3 I. BACKGROUND

¶ 4 In November 2010, a jury found defendant, Clinton Webster, Jr., guilty of unlawful possession of a controlled substance with intent to deliver, a Class 1 felony, committed on August 20, 2010. 720 ILCS 570/401(c)(2) (West 2010). In December 2010, the trial court sentenced defendant to 14 years' imprisonment. The trial court did not orally pronounce the mandatory supervised release (MSR) as part of the sentence but included it in the written

sentencing judgment. The court entered a two-year MSR term to attach to defendant's 14-year sentence. The MSR term was required by statute. 730 ILCS 5/5-8-1(d)(2) (West 2010).

¶ 5 On March 15, 2012, on direct appeal, this court entered an order remanding with directions to issue a corrected sentencing judgment, crediting a fine for time served and reducing another fine. *People v. Webster, Jr.*, No. 4-11-0113 (Mar. 15, 2012) (unpublished agreed order).

¶ 6 On March 31, 2012, defendant filed a petition for postconviction relief. Defendant argued (1) his appellate counsel was ineffective because counsel failed to raise the issue regarding the court's failure to orally pronounce the MSR term; and (2) by imposing MSR, the Department of Corrections (DOC) violated his due process rights.

¶ 7 On April 4, 2014, the trial court summarily dismissed defendant's petition, noting the MSR period is a " 'requirement without regard to whether the period of parole is expressly attached by the sentencing [c]ourt to the term of imprisonment.' " (quoting *People v. Miller*, 36 Ill. App. 3d 943, 945, 344 N.E.2d 760, 762 (1976)). The court differentiated this case, stating, "[d]efendant was convicted in a jury trial *** not a plea situation." The court said, "admonishment concerning MSR is irrelevant."

¶ 8 This appeal followed.

¶ 9 OSAD filed a motion for leave to withdraw as defendant's counsel on appeal, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), asserting it had thoroughly reviewed the record and concluded any request for review would be without merit. The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by November 6, 2015, but defendant had not done so. After examining the record, we grant OSAD's motion and affirm the trial court's summary dismissal of defendant's postconviction petition.

¶ 10

II. ANALYSIS

¶ 11 OSAD concludes no colorable argument can be made challenging the trial court's summary dismissal order. OSAD finds "an appeal in this case would be frivolous" and seeks to withdraw. We agree.

¶ 12 The Post-Conviction Hearing Act (Act) provides a three-stage postconviction process to determine whether there was a substantial denial of a defendant's rights under the Illinois or United States Constitutions. 725 ILCS 5/122-1(a)(1) (West 2014). At the first stage, the trial court must determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the trial court dismisses the defendant's petition at this stage, it must specify the findings of fact and conclusions of law it relied on in making its decision. *Id.* If the defendant's arguments have merit, the court proceeds to the second stage. *Id.* During this stage, the State may move to dismiss the petition. 725 ILCS 5/122-5 (West 2014). If the petition is not dismissed, the court moves to the third stage and holds an evidentiary hearing. 725 ILCS 5/122-6 (West 2014).

¶ 13 The trial court summarily dismissed defendant's postconviction petition at the first stage of the proceedings. Summary dismissal is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998) (dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*).

¶ 14 In *Finley*, the United States Supreme Court held prisoners do not have a constitutional right to counsel when collaterally attacking their convictions. The Court noted, however, if a state chooses to offer appointed counsel for this type of relief, "[s]tates have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Finley*, 481 U.S. at 559. In Illinois, our supreme court stated when a

defendant is appointed postconviction counsel who then moves to withdraw citing *Finley*, appointed counsel must provide some explanation as to why the defendant's claim is without merit, and counsel owes this explanation with respect to each of the defendant's claims. *People v. Kuehner*, 2015 IL 117695, ¶ 21, 32 N.E.3d 655. We find OSAD has provided an adequate explanation for its basis to withdraw as to defendant's postconviction claim.

¶ 15 Defendant, in his *pro se* postconviction petition, argued he was denied effective assistance of appellate counsel because his appointed appellate counsel failed to raise the failure to admonish on MSR at sentencing on direct appeal. Defendant contends DOC violated his due process rights by "[retaining] custody of defendant beyond the term [i]mposed by the trial court in order to accommodate a mandatory parole term." According to defendant, this is something only the trial court could have ordered; and because the trial court did not include the MSR term in orally pronouncing sentence, the MSR term could not attach and the judgment is void.

¶ 16 Defendant was tried and found guilty by a jury of one count of unlawful possession of a controlled substance with intent to deliver, a Class 1 felony. 720 ILCS 570/401(c)(2) (West 2010). Under the Illinois statute, a two-year MSR period attached automatically, leaving no discretion to the trial judge. 730 ILCS 5/5-8-1(d)(2) (West 2010) ("mandatory supervised release term *shall* be" two years for a Class 1 felony (emphasis added)). The MSR term, although not orally pronounced, was included in the judge's written sentence. The judge did not have any discretion as to whether to sentence defendant to MSR but was obligated to do so. *Id.*; see also *People v. McChriston*, 2014 IL 115310, ¶ 23, 4 N.E.3d 29 ("[t]he plain language of section 5-8-1(d) at the time of defendant's sentencing was unambiguous and provided that the MSR term be automatically included as part of defendant's sentence and the DOC did not add onto defendant's sentence when it enforced the MSR term"). DOC did not

sentence defendant to MSR, the trial court did, as required by statute. The court properly summarily dismissed defendant's postconviction petition.

¶ 17 In his *pro se* postconviction petition, defendant relied on several cases involving improper terms of MSR, *i.e.*, *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2008), *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), and *United States ex rel. Carroll v. Hathaway*, No. 10 C 3862, 2012 WL 171322 (N.D. Ill. Jan. 19, 2012), as well as *People v. Munoz*, 2011 IL App. (3d) 100193, 962 N.E.2d 632 (2011). Defendant mischaracterized the precedent these cases establish. These cases involve, nearly exclusively, defendants who either accepted plea deals and were not properly admonished of potential MSR terms or scenarios where MSR was discretionary and not mandatory under the statute.

¶ 18 The Supreme Court of Illinois expressly declined to follow the reasoning of *Earley*. *McChriston*, 2014 IL 115310, ¶ 31, 4 N.E.3d 29 ("we are unpersuaded and do not adopt the reasoning from *Earley*"). *Wampler* involved a sentence improperly imposed by a circuit clerk without any statutory or constitutional authority. *Wampler*, 298 U.S. at 463-64. In *Wampler*, the United States Supreme Court explicitly determined "[t]he choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." *Id.* at 464. No choice was involved here; the term of MSR was mandatory. 730 ILCS 5/5-8-1(d) (West 2010) ("*shall*") (emphasis added)). The Illinois Supreme Court reached the same decision in *McCriston*, 2014 IL 115310, ¶ 31, 4 N.E.3d 29 ("unlike the court in *Wampler*, the trial court had no discretionary power in this case"). Similarly, *Munoz* and *Hathaway* are distinguishable. *Munoz* dealt with a plea deal entered into by the defendant and adopted by the trial court without change. *Munoz*, 2011 IL App (3d) 100193 at ¶ 1, 962 N.E.2d 632. DOC later unilaterally altered the terms of MSR included in the plea deal without authority. *Id.* ¶ 2. DOC

did not alter any part of the judge's sentence; nor did defendant enter into a plea deal in this case. In *Hathaway*, the Northern District of Illinois found, "[t]he Second Circuit recognized, as does this [c]ourt, that *Wampler* did not deal with a term of imprisonment *mandated* by state law." (Emphasis in original). *Hathaway*, No. 10 C 3862, 2012 WL 171322 at *10. This MSR term was mandated by statute (730 ILCS 5/5-8-1(d)(2) (West 2010)).

¶ 19 OSAD stated the Illinois Supreme Court has expressly rejected defendant's arguments in *McChriston*. The court determined the plain language of section 5-8-1 does not provide any discretion to the trial court. *McChriston*, 2014 IL 115310, ¶ 23, 4 N.E.3d 29. MSR terms instantly attach to each defendant's respective sentence, in this case a Class 1 felony. *Id.* at ¶¶16-23. Defendant was convicted of a Class 1 felony and, as a result, a two-year MSR term attached instantaneously, regardless of whether the trial court orally pronounced it. The trial court included the MSR term in its written judgment. Even if it was not included in this written judgment, it would still nevertheless attach. *Id.* ¶ 19.

¶ 20 The trial court, in recognition of this established law, did not err by summarily dismissing defendant's postconviction petition as patently without merit. OSAD correctly concludes no colorable argument can be made the court erred in this ruling. The court's ruling does not require correction and as a result an appeal in this case would be frivolous.

¶ 21 III. CONCLUSION

¶ 22 We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 23 Affirmed.