

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).

2016 IL App (4th) 140410-U
NO. 4-14-0410
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
February 25, 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
IVRAN D. GALMORE,)	No. 06CF876
Defendant-Appellant.)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The circuit court erred by *sua sponte* denying defendant's petition for relief from judgment solely on timeliness grounds but, because the petition lacked merit, the error was harmless.

(2) Cause is remanded for vacation of fines imposed by the circuit clerk and for imposition of fines, with directions, by the circuit court.

¶ 2 In February 2014, defendant, Ivran D. Galmore, filed a *pro se* petition for relief from judgment, claiming he was denied the benefit of his bargain from his plea agreement when the circuit court failed to inform him, at the time of imposing his sentence, he would be required to serve a term of mandatory supervised release (MSR) after he served his agreed upon term of imprisonment. The court, *sua sponte*, denied defendant's petition as untimely. Defendant appeals, arguing the court erred by denying his petition, *sua sponte*, on timeliness grounds because the two-year limitation period is an affirmative defense that can only be asserted, or

waived, by the State. We agree, yet affirm, finding the error to be harmless as defendant's petition lacked a meritorious claim.

¶ 3 Defendant also challenges the imposition of various fines at his sentencing hearing, claiming the same were improperly imposed by the circuit clerk. We vacate those fines improperly assessed and remand with directions for the circuit court to impose the appropriate fines as directed.

¶ 4 I. BACKGROUND

¶ 5 In November 2007, defendant entered into a fully negotiated plea agreement, pleading guilty to one count of unlawful possession of a controlled substance with intent to deliver between 15 and 100 grams of cocaine, a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2006)). The trial court sentenced defendant to seven years and six months in prison in accordance with the plea agreement. His sentence was to run consecutively to the 19-year sentence imposed in his prior, unrelated drug case in Champaign County case No. 04-CF-1516. Defendant did not file a direct appeal.

¶ 6 In August 2012, defendant filed a postconviction petition, alleging his attorney rendered ineffective assistance. Defendant did not raise a claim relating to the imposition of an MSR term. The circuit court dismissed defendant's petition at the second stage of the postconviction proceedings upon the State's motion, claiming defendant's petition was untimely. Defendant filed a motion to reconsider, claiming his petition was not untimely because he was alleging his guilty plea was void for violating the double-jeopardy clause in that the trial court had used his current charge to enhance a prior sentence, thus punishing him twice for the same offense. The circuit court denied defendant's motion. Defendant appealed, but this court affirmed the dismissal. *People v. Galmore*, 2013 IL App (4th) 130228-U, ¶ 13.

¶ 7 In February 2014, defendant 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 2012)). Defendant alleged he was not advised he would be required to serve a three-year MSR term after completing his term in prison. He claims the trial court failed to inform him of this requirement before accepting his guilty plea and sentencing him pursuant to the agreement. Thus, he contends, because he was not aware of this term before pleading guilty, he did not receive the benefit of his bargain.

¶ 8 In May 2014, the circuit court, *sua sponte*, denied defendant's section 2-1401 petition, finding it untimely. In a written order, the court found defendant's petition was filed more than six years after entry of the judgment of conviction, beyond the two-year statutory requirement.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 A. Circuit Court's *Sua Sponte* Dismissal

¶ 12 Defendant first argues the circuit court erred in dismissing his section 2-1401 petition solely on timeliness grounds. He cites authority to support his claim that timeliness is an affirmative defense that can only be asserted, or waived, by the State. See *People v. Harvey*, 196 Ill. 2d 444, 447 (2001); *People v. Malloy*, 374 Ill. App. 3d 820, 823 (2007); *People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2007); *People v. Smith*, 386 Ill. App. 3d 473, 476 (2008).

¶ 13 The State concedes the circuit court erred by dismissing, *sua sponte*, defendant's petition on the sole basis of timeliness. See *Malloy*, 374 Ill. App. 3d at 824 ("If the trial court dismisses a petition for relief from judgment, on its own motion, on the basis of timeliness, that dismissal is erroneous."). We accept the State's concession of error. However, contrary to

defendant's position, the State argues the error is not cause for reversal. Instead, the State insists the error is harmless because defendant's claim is without merit. The State argues that, because the trial court advised defendant that any prison term would be followed by an MSR term, defendant's claim that he did not receive the benefit of his bargain fails. We agree.

¶ 14 At the plea hearing in November 2007, the trial court advised defendant, prior to considering any plea agreement, as follows: "Any sentence of imprisonment would be followed by three years of mandatory supervised release." Defendant indicated he understood. The court accepted defendant's plea and sentenced him accordingly, without another mention of MSR.

¶ 15 In *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005), our supreme court held, "although substantial compliance with [Illinois Supreme Court] Rule 402 [(eff. July 1, 1997)] is sufficient to establish due process [citations], *** 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 *Whitfield*, the defendant received absolutely no MSR admonishments and, as a result, the supreme court found a substantial violation of his constitutional rights. *Whitfield*, 217 Ill. 2d at 201.

¶ 16 Here, unlike in *Whitfield*, MSR was discussed during defendant's plea hearing. As stated, prior to accepting defendant's guilty plea, the circuit court admonished defendant regarding the applicable three-year MSR term when informing him of minimum and maximum penalties. Although defendant argues such admonishments are insufficient to comply with Rule 402 or supreme court precedents, in *People v. Lee*, 2012 IL App (4th) 110403, ¶ 23, this court recently addressed a substantially similar situation and determined the defendant was properly admonished.

¶ 17 The defendant in *Lee*, like defendant here, entered into a fully negotiated plea agreement. *Lee*, 2012 IL App (4th) 110403, ¶ 5. During the plea hearing, while admonishing the defendant regarding the maximum and minimum potential sentence, the circuit court advised that "[a]ny term in prison would be followed by a period of [MSR] of at least three years." *Lee*, 2012 IL App (4th) 110403, ¶ 4. However, the court's oral pronouncement of sentence did not reference MSR. *Lee*, 2012 IL App (4th) 110403, ¶ 7.

¶ 18 In our holding, we noted, "[t]his court has been unwilling to expand *Whitfield* to cases where MSR was mentioned in the admonishments prior to the guilty plea." *Lee*, 2012 IL App (4th) 110403, ¶ 26 (citing *People v. Andrews*, 403 Ill. App. 3d 654, 666 (2010)). Further, we stated, "[w]hile the best practice may be for the trial court or counsel to expressly link the MSR term to the agreed-upon sentence," the circuit court's "failure to make that link does not violate Rule 402 or the parties' plea agreement." *Lee*, 2012 IL App (4th) 110403, ¶ 26 (citing *People v. Dorsey*, 404 Ill. App. 3d 829, 836-38 (2010), and *Andrews*, 403 Ill. App. 3d at 665). As such, this court's precedent is clear and we continue to follow that precedent here. Because defendant's petition for relief from judgment was without merit, we conclude the circuit court's erroneous dismissal of the petition on timeliness grounds was harmless error.

¶ 19 **B. Imposition of Fines**

¶ 20 When sentencing defendant, the trial court imposed the following fines: a street-value fine in the amount of \$4,500 and a drug-assessment fine in the amount of \$3,000. Thereafter, the circuit clerk imposed the following fines: a court-finance charge in the amount of \$50, an arrestee's-medical fine in the amount of \$10, a victim's-fund assessment in the amount of \$700, a traffic/criminal surcharge in the amount of \$1,750, a trauma-fund assessment in the amount of \$100, and a spinal-cord-research assessment in the amount of \$5. Because the court

did not order those fines imposed by the circuit clerk, defendant argues, they must be vacated. On the authority of *Warren*, the State agrees with defendant's claim. See *People v. Warren*, 2014 IL App (4th) 120721, ¶ 82 ("Any *fine* imposed by the clerk must be vacated and the cause remanded for the trial judge to impose the fines." (Emphasis in original.)).

¶ 21 We note our supreme court recently directed this court to vacate our judgment in *Warren* in light of *People v. Castleberry*, 2015 IL 116916. See *People v. Warren*, No. 118322, (Jan. 20, 2016). In *Castleberry*, our supreme court discussed the limitations on the State's ability to appeal a defendant's sentencing order. The court noted that Illinois Supreme Court Rule 604(a) (eff. Feb. 6, 2013), which sets forth the instances in which the State may appeal a criminal case, does not permit the State to appeal a sentencing order. *Castleberry*, 2015 IL 116916 ¶ 21. The supreme court in *Castleberry* abolished the "void sentence rule," concluding it was constitutionally unsound. *Castleberry*, 2015 IL 116916, ¶ 19. The court also held, absent the filing of a writ of *mandamus*, the State may not seek to increase a defendant's sentence. *Castleberry*, 2015 IL 116916, ¶¶ 26-27.

¶ 22 In *Warren*, in response to one of the defendant's claims, the State argued this court should increase the street-value fine because it was calculated incorrectly. *Warren*, 2014 IL App (4th) 120721, ¶ 82. The defendant responded to the State's claim, arguing it was an unauthorized cross-appeal since the defendant had not challenged the value of the street-value fine. *Warren*, 2014 IL App (4th) 120721, ¶ 150. This court held the State's claim was not a "free-standing claim of error" because the defendant had "put his entire sentence at issue." *Warren*, 2014 IL App (4th) 120721, ¶ 150. We agreed with the State, finding it may always seek to correct a void or partially void judgment on appeal. *Warren*, 2014 IL App (4th) 120721, ¶ 152.

¶ 23 In this case, the parties cite *Warren* solely for the proposition that the circuit clerk has no authority to impose fines. See *Warren*, 2014 IL App (4th) 120721, ¶ 82. This proposition stems from a long line of cases from this court—cases unaffected by the supreme court's decision in *Castleberry*. See, e.g., *People v. Chester*, 2014 IL App (4th) 120564, ¶ 35 (the court held the task of imposing fines may not be delegated to the clerk); *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 52 ("The circuit clerk has no authority to impose fines."); *People v. Montag*, 2014 IL App (4th) 120993, ¶ 37 (vacating the circuit clerk's imposition of mandatory fines because the circuit clerk has no authority to levy fines against a criminal defendant); *People v. Isaacson*, 409 Ill. App. 3d 1079, 1085-86 (2011). Because this case does not consider the "void judgment rule" or the State's authority to request an increase in any ordered assessment, we address the merits of defendant's claim, finding *Castleberry* inapplicable.

¶ 24 To that end, we accept the State's concession that the subject fines were improperly imposed by the circuit clerk. We therefore vacate those improperly assessed fines (the court-finance fee, the arrestee-medical fine, the victim's-fund fine, the traffic/criminal surcharge, the trauma-fund assessment, and the spinal-cord-research fine) and remand with directions for the circuit court to impose the mandatory fines.

¶ 25 On remand, we direct the circuit court to reduce the amount of the traffic/criminal-surcharge fine from \$1750 to \$1430 and the victim's-fund fine from \$700 to \$676, as the correctly calculated amounts conceded by the State. Further, because defendant did not have a probable-cause hearing, we direct the court to vacate the \$10 preliminary-hearing fee. See *People v. Smith*, 236 Ill. 2d 162, 174 (2010).

¶ 26

III. CONCLUSION

¶ 27 For the reasons stated, we vacate the circuit clerk's fine assessments and remand to the circuit court with directions; we otherwise affirm. We grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 28 Affirmed in part and vacated in part; cause remanded.