

NOTICE

Decision filed 02/10/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140084-U

NO. 5-14-0084

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 08-CF-283
)	
THOMAS HAUN,)	Honorable
)	James Hackett,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* Although the defendant was improperly admonished regarding the proper mandatory-supervised-release (MSR) term, the defendant's MSR term cannot be modified because it is mandated by statute and he has fully served his prison sentence.

¶ 2 The defendant, Thomas Haun, appeals the denial of his section 2-1401 petition for relief of judgment (735 ILCS 5/2-1401 (West 2014)). The court appointed the Office of the State Appellate Defender (OSAD) to represent him. Subsequently, OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections,

or any other document supporting his appeal. The defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Madison County.

¶ 3 BACKGROUND

¶ 4 On February 28, 2008, a grand jury returned a four-count indictment against the defendant. Count I alleged a criminal sexual assault. Counts II-IV alleged possession of child pornography. On December 1, 2008, the defendant entered an *Alford* plea (*North Carolina v. Alford*, 400 U.S. 25 (1970)) to the criminal sexual assault charge in exchange for a six-year sentence and the dismissal of counts II-IV. Prior to accepting the plea, the circuit court advised the defendant, *inter alia*, that any sentence of imprisonment would be followed by a two-year term of MSR.

¶ 5 During the defendant's incarceration, the Illinois Department of Corrections (IDOC) informed the circuit court that the circuit court mistakenly sentenced the defendant to a two-year term of MSR, but that the MSR term required by statute was three years to life. The circuit court modified the defendant's mittimus to reflect an MSR term of three years to life. After becoming aware of the change in his MSR term, the defendant filed a petition for postconviction relief that he subsequently abandoned.

¶ 6 On December 5, 2013, the defendant filed a section 2-1401 petition seeking specific performance of his plea agreement, specifically a two-year term of MSR. In his petition, the defendant stated that he did not want to withdraw his guilty plea; he wanted specific

performance. According to the IDOC website,¹ the defendant's parole date was January 6, 2014. On February 19, 2014, the circuit court denied the defendant's section 2-1401 petition, finding that it could not grant the relief sought by the defendant as a matter of law because the controlling statute mandated the three-year-to-life MSR term.

¶ 7 The defendant filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 Section 2-1401 provides a mechanism to collaterally attack a "final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007) (citing 735 ILCS 5/2-1401(a) (West 2002)). Section 2-1401 replaced the common law writ system. *Id.* A petition filed under section 2-1401 is to be filed in the "same proceeding in which the order or judgment was entered, but it is not a continuation of the original action." *Id.* (citing 735 ILCS 5/2-1401(b) (West 2002)). The petition is to be supported by "affidavit or other appropriate showing as to matters not of record." *Id.* (citing 735 ILCS 5/2-1401(b) (West 2002)). Relief is obtained "upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986)). While section 2-1401 is a civil remedy, it applies to criminal cases as well as to civil cases. *Id.* at 8 (citing *People v. Sanchez*, 131 Ill. 2d 417, 420 (1989)). The issue

¹(<https://www.illinois.gov/IDOC/OFFENDER/Pages/InmateSearch.aspx> (last visited Sept. 3, 2015)), of which we may take judicial notice (*Cordrey v. Prisoner Review Board*, 2014 IL 117155, ¶ 12).

decided by the circuit court, the existence of a meritorious defense, is subject to *de novo* review. *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10.

¶ 10 When a defendant pleads guilty in return for a sentence that violates the law, there are three possible remedies: allow the defendant to withdraw the guilty plea; direct the government to provide specific performance; or, if either of the first two options is unavailable because they would be impossible or meaningless, order a specific sentence that approximates the promised sentence. See *People v. Whitfield*, 217 Ill. 2d 177, 204 (2005) (citing *United States v. Bowler*, 585 F.2d 851, 856 (7th Cir. 1978)). " '[A] court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.' " *Id.* at 205 (quoting *Santobello v. New York*, 404 U.S. 257, 267 (1971) (Douglas, J., concurring)). On more than one occasion, our supreme court modified a void sentence to bring it into accord, or as nearly as possible, with the sentence promised to a defendant in exchange for a guilty plea. *Id.*; *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552, 557-58 (2002).

¶ 11 In this case, the defendant pleaded guilty to criminal sexual assault under section 12-13 of the Criminal Code of 1961. 720 ILCS 5/12-13 (West 2006). At that time, criminal sexual assault was a Class 1 felony (720 ILCS 5/12-13(b)(1) (West 2006)) and required a mandatory MSR term of three years to natural life (730 ILCS 5/5-8-1(d)(4) (West 2006)). The court is not to assign a definite term between three years and natural life; the length of MSR is to be determined by the Prisoner Review Board. *People v. Rinehart*, 2012 IL 111719, ¶¶ 28-30. An agreement between the State and the defendant does not allow the

circuit court to impose a sentence not authorized by law. *People v. White*, 2011 IL 109616, ¶ 23.

¶ 12 As an MSR term of two years was not authorized by statute, the circuit court did not have the authority to sentence the defendant to such a term. Given the crime to which the defendant pleaded guilty, the circuit court had no option but to modify the mittimus to include an MSR term of three years to life. The circuit court was not authorized to grant the relief sought by the defendant in his section 2-1401 petition: a two-year term of MSR for a conviction of criminal sexual assault. Because the defendant had already completed his prison sentence and because the defendant did not want to vacate his plea, the circuit court had no choice but to deny the petition.

¶ 13 CONCLUSION

¶ 14 The circuit court properly denied the defendant's petition seeking an MSR term different than that mandated by statute. Therefore, OSAD's motion to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Madison County is affirmed.

¶ 15 Motion granted; judgment affirmed.