NOTICE
Decision filed 12/05/14. 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.

2014 IL App (5th) 120495-U

NO. 5-12-0495

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,	)	St. Clair County.
	)	
v.	)	No. 99-CF-40
	)	
THEODORE ROGERS, JR.,	)	Honorable John Baricevic and
	)	Honorable Stephen P. McGlynn,
Defendant-Appellant.	)	Judges, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: A three-year mandatory supervised release term was part of the defendant's sentence notwithstanding the sentencing court's failure to mention it when pronouncing sentence or to include it in the written judgment order.

¶ 2 The defendant, Theodore Rogers, Jr., appeals the circuit court's denial of his motion to correct the mittimus *nunc pro tunc*. He argues that the circuit court improperly increased his sentence when it belatedly added a term of mandatory supervised release (MSR) which was not imposed by the original sentencing judge. We affirm.

¶ 3 On January 21, 2000, a jury found Rogers guilty of two counts of armed robbery and the court sentenced him to two concurrent 35-year terms of imprisonment. The court

made no mention of MSR when imposing sentence, nor did the written judgment order include an MSR term. Rogers's convictions and sentences were affirmed (*People v. Rodgers*, No. 5-00-0280 (Apr. 30, 2002) (unpublished order under Supreme Court Rule 23)), as was the second-stage dismissal of his postconviction petition (*People v. Rogers*, No. 5-03-0446 (Dec. 30, 2004) (unpublished order under Supreme Court Rule 23)).

¶ 4 On September 12, 2011, and again on January 30, 2012, Rogers mailed letters to the circuit court requesting that his name be corrected from "Rodgers" to "Rogers" on the mittimus because the misspelling was making it difficult for him to obtain employment at the penal institution where he was incarcerated. The circuit court amended the mittimus to correct the spelling of Rogers's name and, *sua sponte*, amended the mittimus to reflect a three-year MSR term.

¶ 5 Rogers's appeal of the denial of his motion for leave to file a successive postconviction petition was remanded to the circuit court for a determination of whether he was entitled to additional presentence incarceration credit against his sentence. *People v. Rodgers*, 2012 IL App (5th) 100609-U. On remand, the circuit court amended the mittimus to reflect one additional day of presentence incarceration credit, and again included the three-year MSR term.

¶ 6 Rogers filed a petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) challenging, for the first time, the addition of the MSR term to the judgment. The State filed a motion to dismiss, arguing that Rogers had failed to show due diligence in bringing the claim, that the belated inclusion of the MSR term to the judgment was a ministerial act properly

carried out by the circuit court, and that the claim had been waived. The circuit court granted the State's motion and dismissed Rogers's petition. Rogers did not appeal.

¶ 7 On September 26, 2012, Rogers filed a motion to correct the mittimus *nunc pro tunc*, wherein he argued that by adding the MSR term long after the sentences had been imposed, the circuit court improperly increased his sentence beyond that imposed by the sentencing court. Rogers requested that his prison terms be reduced to 32 years so that his sentence would conform to the sentence that was originally imposed. The circuit court denied Rogers's motion.

¶ 8 On appeal, Rogers argues that the circuit court's *sua sponte* addition of the 3-year MSR term 12 years after imposition of the original sentence improperly increased his sentence beyond that originally imposed by the court. We find our supreme court's decision in *People v. McChriston*, 2014 IL 115310, to be dispositive.

¶ 9 In *McChriston*, the defendant was convicted of unlawful delivery of a controlled substance and sentenced to 25 years' imprisonment. The circuit court's sentencing order did not indicate that the defendant would be required to serve a term of MSR, nor did the trial judge make any reference to MSR at the sentencing hearing. The defendant subsequently filed a petition for postjudgment relief pursuant to section 2-1401 of the Code, arguing that the Illinois Department of Corrections (IDOC) had impermissibly added a three-year MSR term to his sentence. The circuit court dismissed the defendant's petition and the appellate court affirmed. *People v. McChriston*, 2012 IL App (4th) 110319-U.

¶ 10 On appeal to our supreme court, the defendant argued that the IDOC was not empowered to impose a term of MSR, and that the IDOC's addition of an MSR term to his sentence violated his constitutional right to due process as well as the separation of powers clause in the Illinois Constitution. Our supreme court rejected the defendant's separation of powers argument, holding that the version of section 5-8-1(d) of the Unified Code of Corrections in effect at the time the defendant was sentenced unambiguously provided that the MSR term was automatically included as part of a defendant's sentence notwithstanding the fact that it was not mentioned by the circuit court, and that the IDOC did not add the MSR term to the defendant's sentence by its enforcement of the MSR term.[1] *McChriston*, 2014 IL 115310, ¶ 23.

¶ 11 Our supreme court also rejected the defendant's due process argument. The defendant cited *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), and *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), for the proposition that increasing his sentence beyond that imposed by the trial court's order violated his federal due process rights, and that his sentence was limited to the 25-year term of imprisonment. In *Wampler*, the Supreme Court held that a provision in a sentencing order which was added by the clerk of the court was void. In *Earley*, the court relied on *Wampler* to hold that the addition of five years of postrelease supervision to the defendant's sentence by the New York

[1]The court noted that section 5-8-1(d) was amended in 2011 to require circuit courts to include the MSR term in the sentencing order. *McChriston*, 2014 IL 115310, ¶ 19.

Department of Corrections was of no effect because it was not imposed by the court. The *McChriston* court noted that it had previously declined to follow *Earley*, and that unlike *Wampler*, the enforcement of the statutorily mandated MSR term was not an increase in the sentence because the MSR term attached automatically as though written into the defendant's sentence. *McChriston*, 2014 IL 115310, ¶ 31.

¶ 12 In the present case, the version of section 5-8-1(d) in effect at the time Rogers was sentenced is the same one at issue in *McChriston*, and it provides in relevant part:

> "Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment *** identified as a mandatory supervised release term." 730 ILCS 5/5-8-1(d) (West 2000).

¶ 13 In *McChriston*, our supreme court held that the plain meaning of this provision was that "the sentencing order issued by the trial court included a term of MSR even if the court did not mention the MSR term at the sentencing hearing or in the sentencing order." *McChriston*, 2014 IL 115310, ¶ 17. As in *McChriston*, the three-year MSR term was included in Rogers's sentence notwithstanding the sentencing court's failure to mention the MSR term when pronouncing sentence or to include it in the sentencing order. The circuit court's subsequent addition of the MSR term to the mittimus did not increase Rogers's sentence; it merely corrected the mittimus to reflect the MSR term which, by operation of section 5-8-1(d), was part of the sentence originally imposed by the sentencing court.

¶ 14 Rogers also relies on *Wampler* and *Earley* for the proposition that the imposition of an MSR term violated his right to due process. This argument is meritless for the reasons set forth in *McChriston*. The MSR term was part of Rogers's original sentence notwithstanding the sentencing court's failure to mention it at the sentencing hearing or include it in the sentencing order, and the court's subsequent correction of the mittimus to reflect the MSR term did not violate Rogers's due process rights.

¶ 15 For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

¶ 16 Affirmed.