

NOTICE
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2014 IL App (5th) 130218-U

NO. 5-13-0218

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).

FRED A. LURZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Christian County.
)	
v.)	No. 13-MR-55
)	
GEORGE GOOD, Warden, ¹)	Honorable Ronald D. Spears, and
)	Honorable Allen F. Bennett,
Defendant-Appellee.)	Judges, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed the plaintiff's complaint for *habeas corpus* relief where the MSR portion of his sentence was imposed by the circuit court rather than the Illinois Department of Corrections, where he failed to state a cognizable claim for *habeas corpus* relief, and where *Whitfield*-type relief was unavailable to him.

¹George Good has replaced Lynn Dexheimer as warden of Taylorville Correctional Center, where the plaintiff is incarcerated. Pursuant to section 10-107 of the Code of Civil Procedure (735 ILCS 5/10-107 (West 2012)), George Good should be substituted as the defendant in this action. See *Hennings v. Chandler*, 229 Ill. 2d 18, 23-24 n.2 (2008) (The proper defendant in a *habeas corpus* case is the plaintiff's current custodian.).

¶ 2 The plaintiff, Fred A. Lurz, appeals *pro se* the circuit court's *sua sponte* dismissal of his complaint for *habeas corpus*. He argues that his judicially imposed sentence did not include a term of mandatory supervised release (MSR), and that the addition of an MSR term by the Illinois Department of Corrections (IDOC) violated his constitutional right to due process and the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1). He also contends that he was not advised that he would be required to serve a period of MSR. For the following reasons, we affirm.

¶ 3 On December 27, 2004, the plaintiff entered a negotiated plea of guilty to home invasion and attempted first-degree murder, and was sentenced to consecutive terms of seven years' imprisonment on each conviction. At the plea hearing, the court advised the plaintiff as follows:

"Each of these is a Class X felony for which you could be sentenced to the Department of Corrections for a period between six and 30 years or if qualified for extended term sentencing under circumstances not presently known to me, 30 to 60 years, any of which would be followed by three years mandatory supervised release. You could also be fined up to \$25,000 on each offense."

The plaintiff indicated that he understood this possible range of sentencing. In pronouncing sentence, the court did not mention an MSR term, nor was it contained in the court's written order. The plaintiff did not take a direct appeal.

¶ 4 The plaintiff filed a petition for postconviction relief on March 2, 2007. This petition was summarily dismissed. The plaintiff appealed the dismissal, but later withdrew his appeal. On April 3, 2013, the plaintiff filed *pro se* a complaint for *habeas*

corpus. The plaintiff alleged that his constitutional rights were violated when the IDOC added a three-year term of MSR to his judicially imposed sentence, and that the IDOC's imposition of an MSR term violated the separation of powers clause in the Illinois Constitution. He also argued that he was not admonished that he would be required to serve a term of MSR in addition to his prison sentence. The plaintiff sought to have his sentence of imprisonment reduced from 14 to 11 years. The circuit court dismissed *sua sponte* the plaintiff's complaint for *habeas corpus*, finding that the court had sufficiently admonished him of the three-year MSR term, and also finding that, even if the admonishment was inadequate, the plaintiff would not be entitled to relief because the Illinois Supreme Court had decided that the rule announced in *People v. Whitfield*, 217 Ill. 2d 177 (2005), "that a faulty MSR admonishment deprived a defendant of his right to due process by denying him the benefit of his bargain with the State," did not "require[] retroactive application to cases on collateral review." *People v. Morris*, 236 Ill. 2d 345, 361, 364 (2010). The court noted that the rule from *Whitfield* "should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005" (*id.* at 366), and that the plaintiff's conviction was final 30 days after his plea was entered on December 27, 2004. The plaintiff appeals.

¶ 5

ANALYSIS

¶ 6 On appeal, the plaintiff argues first that his judicially imposed sentence did not include an MSR term, and that the IDOC's unauthorized addition of an MSR term to his sentence violated his constitutional right to due process and the separation of powers clause

of the Illinois Constitution.

¶ 7 Arguments essentially identical to those raised by the plaintiff were recently rejected by our supreme court in *People v. McChriston*, 2014 IL 115310. 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 of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), arguing that the 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.

¶ 8 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 Code of Corrections (730 ILCS 5/5-8-1(d) (West 2004)) 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.² *McChriston*, 2014 IL 115310, ¶ 23.

¶ 9 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 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.

¶ 10 As did the defendant in *McChriston*, the plaintiff in the present case argues that his judicially imposed sentence contained no MSR term, and that the IDOC's subsequent addition of an MSR term violated his constitutional right to due process as well as the separation of powers clause in the Illinois Constitution. The version of section 5-8-1(d) in

²The 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.

effect at the time the plaintiff 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 2004).

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 MSR term was not added to the plaintiff's sentence by the IDOC, but was included in the judicially imposed sentence notwithstanding the court's failure to mention the MSR term at the sentencing hearing or to include it in the sentencing order.

¶ 11 The plaintiff in the present case also relies on *Wampler* and *Earley* for the proposition that the imposition of an MSR term by the IDOC violated his right to due process. This argument is meritless for the reasons set forth in *McChriston*. The MSR term was part of the plaintiff's judicially imposed sentence notwithstanding the circuit court's failure to mention it at the sentencing hearing or include it in the sentencing order, and the IDOC's enforcement of the MSR term did not violate the plaintiff's due process rights.

¶ 12 *McChriston* aside, the circuit court's dismissal of the plaintiff's complaint for *habeas corpus* must be affirmed because he failed to state a cognizable claim for *habeas*

corpus relief. Although this was not the basis for the circuit court's dismissal of the complaint, this court can affirm the circuit court's judgment on any ground supported by the record. *People v. Boswell*, 148 Ill. App. 3d 915, 918 (1986).

¶ 13 "*Habeas corpus* provides relief only on the grounds specified in section 10-124 of the Code of Civil Procedure." *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008) (citing 735 ILCS 5/10-124 (West 1996); *People v. Gosier*, 205 Ill. 2d 198, 205 (2001); *Barney v. Prisoner Review Board*, 184 Ill. 2d 428, 430 (1998)). "It is well established that an order of *habeas corpus* is available only to obtain the release of a prisoner who has been incarcerated under a judgment of a court that lacked jurisdiction of the subject matter or the person of the [plaintiff], or where there has been some occurrence subsequent to the prisoner's conviction that entitles him to release." *Id.* The sole remedy under *habeas corpus* is immediate discharge from custody. *Adcock v. Snyder*, 345 Ill. App. 3d 1095, 1098 (2004). A court may *sua sponte* dismiss a complaint for *habeas corpus* if it is insufficient on its face to warrant relief. *Beacham*, 231 Ill. 2d at 59 (citing *Hennings v. Chandler*, 229 Ill. 2d 18, 30 (2008)). We apply *de novo* review to the *sua sponte* dismissal of an application for *habeas corpus*. *Hennings v. Chandler*, 229 Ill. 2d 18, 31-32 (2008).

¶ 14 Here, the plaintiff did not allege in his complaint, nor does he argue on appeal, that the circuit court which convicted and sentenced him lacked jurisdiction. Moreover, any such argument would be meritless. Criminal charges brought pursuant to the Criminal Code of 1961 allege the existence of a justiciable matter over which circuit courts have authority to preside (see *People v. Baum*, 2012 IL App (4th) 120285, ¶ 13) and the circuit

court acquired personal jurisdiction over the plaintiff when he appeared before the court (*People v. Speed*, 318 Ill. App. 3d 910, 932 (2001)).

¶ 15 The plaintiff did not allege, nor does he argue on appeal, that some occurrence subsequent to his conviction entitles him to release. A prisoner is not entitled to discharge until the maximum term of imprisonment that could legally, under the prisoner's reasoning, be imposed, including MSR, has been served. *Taylor v. Cowan*, 339 Ill. App. 3d 406, 410-11 (2003). In his brief, the plaintiff states that if his prison sentence were reduced to 11 years, he would have begun serving his 3-year MSR term in 2012. Thus, even if the plaintiff were entitled to have his prison sentence reduced to 11 years, he would not have been entitled to immediate release.

¶ 16 The plaintiff also argues that he was not properly admonished that he would be required to serve a period of MSR upon his release from prison. He contends that if MSR is mandated by statute, then his prison sentence must be reduced to 11 years. The plaintiff is essentially arguing that he is being denied due process because he is being deprived of the benefit of his plea bargain with the State.

¶ 17 In *Whitfield*, our supreme court held that when a defendant pleads guilty in exchange for a specific sentence, Supreme Court Rule 402(a)(2) (eff. July 1, 1997) requires the trial court to admonish the defendant, prior to accepting his plea, that a period of MSR will be added to that sentence. *Whitfield*, 217 Ill. 2d at 188. Failure to do so, the court held, resulted in defendant having to serve a more onerous sentence than that to which he had agreed, violating his constitutional right to due process and denying him the benefit of

his bargain with the State. *Id.* at 195. The court noted that *Santobello v. New York*, 404 U.S. 257 (1971), provided two possible remedies when a defendant does not receive the "benefit of his bargain": either the promise must be fulfilled or defendant must be given the opportunity to withdraw his plea. *Id.* at 202. The remedy defendant in *Whitfield* chose was enforcement of the plea agreement as he understood it. Recognizing that it could not vacate the MSR term, the supreme court reduced defendant's prison sentence by the amount of the MSR term so that he would receive the sentence for which he had bargained. *Id.* at 205.

¶ 18 The failure to properly admonish a defendant that his sentence includes a period of MSR does not deprive the court of jurisdiction. See *People v. Santana*, 401 Ill. App. 3d 663, 666 (2010). Thus, even if the circuit court failed to properly admonish the plaintiff that he would be required to serve a period of MSR in addition to his prison sentence, this claim would not be cognizable in a *habeas corpus* proceeding. Moreover, *Whitfield*-type relief is not available in a *habeas corpus* proceeding because, as noted above, the sole remedy under *habeas corpus* is immediate discharge from custody. Finally, even if *Whitfield*-type relief were available in a *habeas corpus* proceeding, it would not be available to the plaintiff because, as the circuit court noted, the plaintiff's conviction was finalized before the decision in *Whitfield* was announced and *Whitfield* does not apply retroactively. *Morris*, 236 Ill. 2d at 363-64.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Christian County is

affirmed.

¶ 21 Affirmed.