2011 IL App (1st) 093101-U
No. 1-09-3101

FIRST DIVISION
FILED: August 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 4973
	)	
CLAUDE GILES,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Defendant's claim that he was not advised of a two-year MSR term when he entered his negotiated guilty plea was moot because defendant already served his term of imprisonment, and defendant did not seek to withdraw his guilty plea. This court was unable to grant the relief requested. The summary dismissal of defendant's postconviction petition was affirmed.

¶ 1 Defendant Claude Giles appeals from the summary dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Defendant contends the trial court failed to admonish him that he was subject to a two-year term of mandatory supervised release (MSR) following the seven-year concurrent sentences imposed on his negotiated guilty plea to drug possession and unlawful use of a weapon by a felon (UUWF). He contends that his constitutional right to due process was violated. We affirm.

¶ 2 At the January 8, 2008, plea hearing, the trial court admonished defendant in accordance with Supreme Court Rule 402 (eff. July 1, 1997) of the minimum and maximum term of imprisonment for the drug charge. The court stated that the drug charge was "an enhanced Class 1 felony" carrying a term of 6 to 30 years, together with 2 years' MSR. Defendant stated that he understood. The court did not admonish defendant regarding the possible penalties for the UUWF charge.

¶ 3 The court accepted the stipulated facts underlying the two offenses, as set forth in the Rule 402 conference, then found defendant had pled guilty freely and voluntarily. The court sentenced defendant to the negotiated term of seven years on each count, to be served concurrently.

¶ 4 Defendant did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 5 On July 14, 2009, defendant, through counsel, filed this postconviction petition with an accompanying affidavit. He alleged that the trial court failed to substantially comply with Rule 402, thereby violating his constitutional right to due process, because the court did not admonish him that a two-year MSR term would attach to his sentence. Defendant alleged that he did not know MSR would attach to his sentence when he entered the plea. As a remedy, defendant requested that he be granted postconviction relief and that his sentence for the drug charge be modified to reflect the minimum sentence of six years, plus two years' MSR. He did not request to withdraw his guilty plea.

¶ 6 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed.

¶ 7 In December 2010, however, defendant completed his sentence and was released from prison. He is currently serving his two-year MSR term, with a projected completion date of December 28, 2012.

¶ 8 The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A *pro se* postconviction petition may be

summarily dismissed as frivolous and patently without merit if it has no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-12, 16-17. Our review of the summary dismissal of a postconviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 9 Defendant contends that he stated a claim of arguable constitutional merit that he was not admonished, in accordance with *People v. Whitfield*, 217 Ill. 2d 177 (2005), prior to his guilty plea conviction that his sentence included a two-year MSR term.

¶ 10 In *Whitfield*, the supreme court held that a defendant convicted on a negotiated guilty plea who was not admonished by the court regarding MSR was prejudiced and thus entitled to either withdraw his guilty plea or receive a three-year reduction of his prison sentence to account for three years' MSR.

¶ 11 The State argues that, in this case, we need not determine whether the court's admonishment was sufficient to apprise defendant of the two-year MSR term because defendant's claim is moot. In support of this argument, the State points out that defendant already completed his prison sentence and now lacks a remedy for any claimed due process violation.

¶ 12 Defendant responds by asserting that a remedy is available and that his claim is not moot. Although he makes no request to withdraw his guilty plea, he asks this court reduce his drug sentence to the minimum of six years and strike one year of MSR.

¶ 13 We cannot grant the relief requested by defendant. Generally, where a defendant already has served his prison sentence, and does not seek to withdraw his guilty plea, any claim that he was not advised of MSR is moot. See *People v. Porm*, 365 Ill. App. 3d 791, 795 (2006). A court cannot reduce the prison sentence to approximate the bargain struck by the parties when the defendant already has served that sentence. See 730 ILCS 5/5-8-1(d)(1) (West 2008); *Porm*, 365 Ill. App. 3d at 795. Likewise, a court is unable to strike the statutorily-mandated MSR term. See *Whitfield*, 217 Ill. 2d at 200-01 (the court has no authority to withhold an MSR term in a sentence); *Porm*, 365 Ill. App. 3d at 794-95; *People v. Russell*, 345 Ill. App. 3d 16, 22 (2003). Here, because defendant does not seek the only available remedy of withdrawing his guilty plea, his claim as argued is moot. See *Porm*, 365 Ill. App. 3d at 795.

¶ 14 Defendant acknowledges the holdings in *Porm* and *Russell*, but contends they were wrongly decided. Defendant relies on *People v. Moore*, 214 Ill. App. 3d 938, 944 (1991), and like cases, wherein this court held that MSR may be stricken.

This court in *Russell* rejected *Moore* for two reasons. First, *Russell* noted that *Moore* was a direct appeal and not a postconviction case, as in *Russell*, where the only available remedy was to remand the cause for further proceedings under the Act. Second, *Russell* noted, the plain language of the MSR statute mandates that such a term shall be served in addition to a term of imprisonment. Given the language of the statute, *Russell* held that courts simply do not have the authority to strike MSR. *Russell* thereby disavowed the holding in *Moore*, finding the appropriate remedy was to allow defendant to withdraw his guilty plea, not to strike the MSR term. We find *Russell* more soundly reasoned and analogous to the present case, which is also a postconviction proceeding. We therefore follow *Russell* and *Porm*.

¶ 15 To the extent defendant argues that *Russell* and *Porm* ignore supremacy clause principles, we are unpersuaded. Defendant contends that due process requires granting him the remedy he seeks and "his constitutional right to due process necessarily trumps" the MSR statute under the supremacy clause. See U.S. Const., art. VI, cl. 2; *People v. Mata*, 217 Ill. 2d 535, 546 (2005) (recognizing that "a state law is without effect if it conflicts with a federal law"). A sentence reduction is a remedy unique to Illinois law and not mandated by federal jurisprudence. *People v. Morris*, 236 Ill. 2d 345, 361 (2010). Although

defendant now may withdraw his guilty plea, he has chosen not to exercise that remedy. Therefore, defendant has not established that due process requires the grant of a sentence reduction, and the supremacy clause does not come into play.

¶ 16 Defendant alternatively requests that we reduce his drug possession conviction to a lesser drug offense, carrying a lesser sentence, or modify the sentence on his UUWF conviction. These claims are also moot because defendant has already served the sentence on his drug conviction, the greater class offense. See *People v. Wills*, 61 Ill. 2d 105, 109-10 (1975); *People v. Alexander*, 207 Ill. App. 3d 577, 582 (1990); see also *People v. Giampaolo*, 385 Ill. App. 3d 999, 1005 (2008) (a defendant can only serve one term of MSR); see also 730 ILCS 5/5-8-4(e)(2) (West 2008).

¶ 17 Finally, failing all else, defendant requests that we remand this case for further proceedings under the Act. We decline to do so. Defendant's claim has no legal merit because there is no relief that can be granted to him, and remanding the case would serve no purpose. See *Porm*, 365 Ill. App. 3d at 795.

¶ 18 Defendant next contends the mittimus incorrectly states that his UUWF offense was a Class 2 felony, when in fact it was a Class 3 felony. Defendant urges this court to consider the Department of Corrections (DOC) website; none of the offenses

listed, he notes, would support enhancing his offense to a Class 2 felony.

¶ 19 Although defendant casts this issue as a mittimus correction, it is something more, and the record is insufficient to grant him the relief he seeks. See *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010) (appellant must present complete record on appeal). We can, and have, granted the correction of a defendant's mittimus where it is clear from the record that the mittimus is incorrect. Here, that is simply not the case. We decline defendant's invitation to substitute our own independent finding of fact for the trial court's, especially when the document (DOC website) from which defendant asks us to make such a finding was never before the trial court and, on its face, includes a disclaimer suggesting that it may be incomplete. Therefore, we will not disturb the trial court's finding that defendant was eligible for sentencing as a Class 2 offender.

¶ 20 Based on the foregoing, we affirm the decision of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 21 Affirmed.