FOURTH DIVISION
June 28, 2012

Nos. 1-10-2488 & 1-10-2935 (cons.)



---

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. 07CR12297, |
| | ) | 07CR12298, |
| JIMMY MILLER | ) | 07CR12299, |
| | ) | 07CR19177, |
| Defendant-Appellant. | ) | 08CR13000 |
| | ) | |
| | ) | The Honorable |
| | ) | Kevin M. Sheehan, |
| | ) | Judge Presiding. |

---

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

*Held:* Summary dismissal of *pro se* postconviction petition affirmed where defendant failed to state the gist of a meritorious claim where trial court properly admonished defendant during plea hearing; summary dismissal also affirmed where defendant failed to state the gist of a constitutional claim that trial counsel was ineffective during guilty plea negotiations where counsel failed to inform court that defendant had previously attempted suicide; trial court did not abuse its discretion where it denied defendant's motion to amend *pro se* postconviction petition; fines, fees, and costs order is modified; and DNA analysis fee is vacated.

¶ 1 **ORDER**

¶ 2 Defendant Jimmy Miller appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq*. (West 2010)). On appeal, defendant asserts that this court should remand his postconviction petition for second-stage proceedings where: (1) the trial court improperly admonished him at the time he was sentenced on his negotiated guilty plea that he would serve a three-year term of mandatory supervised release (MSR) following the 13-year sentence he accepted; (2) he was denied the effective assistance of trial counsel where counsel failed to tell the trial court that he had attempted suicide; and (3) the trial court abused its discretion when it denied defendant's motion to amend his *pro se* postconviction petition. Alternatively, defendant asks this court to reduce his sentence by three years because the trial court improperly admonished him regarding his MSR term. Defendant also challenges the imposition of various fines and fees. Defendant also contends, and the State properly concedes, that he is entitled to pre-sentence incarceration credit toward certain fines. Defendant also contends and the State properly agrees that the $200 DNA analysis fee must be vacated. For the following reasons, we affirm the summary dismissal of defendant's post-conviction petition. We vacate that portion of the trial court's order requiring defendant to pay the $200 DNA analysis fee, and order the clerk of the circuit court to enter a modified fines, fees, and costs order to reflect $20 presentence custody credit toward defendant's fines.

¶ 3 BACKGROUND

¶ 4 The trial court held a guilty plea hearing on defendant's five pending cases, 07CR14497, 07CR14498, 07CR14499, 07CR19177, and 08CR13000. The factual bases for the guilty pleas are as follows.

¶ 5 In case 07CR14497, if called, Clyde Gavin would testify that, on the night of June 25, 2007, he was working as a security guard at 800 N. Clark Street in Chicago. At that time, he observed defendant standing inside one of the offices holding a pair of Mr. Gavin's pants. Defendant fled the building. Defendant did not have authority or permission to be inside the building. Mr. Gavin subsequently identified defendant as the person he saw in the office suite in a line-up at the police station.

¶ 6 In case 07CR14498, if called, Mr. Gavin would testify that, on the night of July 30, 2007, he saw defendant break out a glass door and exit a building across the street at 100 West Chicago Avenue. Police later learned that an office had been broken into and several bottles of cologne were taken. The police recovered a bloodied towel, which was sent to the Illinois Police crime lab for DNA testing. Mr. Gavin subsequently identified defendant as the person he saw in the office suite in a line-up at the police station.

¶ 7 In case 07CR14499, Mr. Fred Lev would testify that, on July 2007, he owned an office complex at 200 West Ohio Street. At approximately 2:00 a.m., a burglar alarm sounded at that location, and Mr. Lev called the police. Officers responded and found defendant, who fled through a broken window. Defendant was apprehended after climbing down a fire escape.

¶ 8 In case 07CR19177, the facts presented showed that, at approximately 4:15 a.m. on June 28, the burglar alarm at 800 North Clark Street sounded. Police responded. A beer can that was

not previously there was sitting on a desk. There was an unlocked safe beneath the desk from which was missing approximately $1000. An evidence technician retrieved print impressions from the area which were later matched to defendant.

¶ 9 In case 08CR13000, Mr. Lev would again testify that, on May 7, 2007, the burglar alarm at 800 North Clark Street sounded. Police responded. Mr. Lev would testify that an air conditioning unit had been knocked out of a window and that numerous items in an office had been broken and strewn about. An evidence technician collected fingerprints from the area. Those prints plus urine found in a garbage can in the same office were later matched to defendant.

¶ 10 On December 9, 2008, defendant pled guilty to five counts of burglary. He was sentenced as a Class X offender to 13 years' imprisonment, with all sentences to be served concurrently. The State's offer was based on the fact that defendant's sentence was mandatory Class X due to his prior criminal history.

¶ 11 The court admonished defendant:

> "THE COURT: How doe you plead to each of those cases, guilty or not guilty?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Do you understand by pleading guilty to those Class 2 offenses in each of those five cases, normally you would had [*sic*] been able to be sentenced, except in your background, anywhere from three to seven years in the penitentiary. These are

> Class 2 offenses. But because you are a Class X offender, based on your background, you could have faced a concurrent sentence on each charge anywhere from six to 30 years in the penitentiary, non-probationable, the fine not to exceed $25,000, and upon being released from the penitentiary, sir, you will serve an additional three years of being monitored, it used to be called parole, of three years called mandatory supervised release by the Illinois Department of Corrections authorities. Do you understand that, sir?
>
> THE DEFENDANT: Yes, sir."

¶ 12 The court asked defendant:

> "THE COURT: Mr. Miller, do you want to say anything on your own behalf before I give you the sentence you expect to receive? You are under no obligation to speak, sir."

¶ 13 Defendant elected to address the court, saying:

> "THE DEFENDANT: In regards to the alleged crimes that I have committed, it is true, and I was reckless. I was going through a lot of things, stopped taking my medication, and I was - - I didn't care. I didn't care whether I got caught. I didn't care if I got killed. And these people have done me no wrong. I continue to do what I did because I felt it was an easy way for me to get in,

> and I took advantage of that. I took advantage of their sense of security. I was on drugs. And I'm not saying this on the grounds for you to be lenient, you know. I accept my - - I accept full responsibility for my actions, and I apologize."

¶ 14 The court thanked defendant for his statement, commenting that it was "one of the finest elocutions from an individual I have ever heard." The court then sentenced defendant:

> "THE COURT: On those aforementioned cases, judgment will be entered. There will be a concurrent sentence of 13 years."

¶ 15 On April 23, 2010, defendant filed a *pro se* postconviction petition alleging that the trial court failed to inform him of the three-year term of mandatory supervised release (MSR) he must serve upon his release from prison and seeking a three-year reduction in his sentence pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005). In his petition, defendant alleged that his plea was not made knowingly because he was not admonished that he would have to serve a period of mandatory supervised release at the end of his prison term, because he did not realize he was pleading guilty in exchange for a 13-year sentence, because his trial counsel was aware that he tried to commit suicide yet did not request a fitness hearing, and because his trial counsel advised him not to tell the trial court that he had not previously been convicted of armed robbery.

¶ 16 On July 7, the trial court dismissed defendant's petition as frivolous and patently without merit. The court's memorandum order held that the trial record clearly established that defendant was admonished as to MSR and that "[t]here [was] no indication in the record that [defendant] did not know he would be receiving a 13 year term of imprisonment in exchange for his guilty

plea." The court also noted that "[n]o single factor raises a *bona fide* doubt as to defendant's fitness to stand trial and sentencing." The trial court deemed defendant's behavior in court as "interested, rational, and appropriate." The court also held that defendant was not prejudiced by his counsel's advise that he not tell the court about his armed robbery conviction, as he was required to be sentenced as a Class X offender due to his criminal history, regardless of whether his conviction was for armed robbery or for aggravated battery.

¶ 17 On June 24, 2010, defendant filed a motion to amend his *pro se* postconviction petition. In his motion, defendant alleged that the MSR statute is unconstitutional and, in the alternative, if the statute was constitutional, the trial court erroneously imposed a 13-year sentence. On August 13, 2010, the trial court denied defendant's motion to amend, determining that it had already ruled on the issues contained therein and that defendant's *pro se* petition had already been dismissed. The trial court order reads:

> "Petitioner, Jimmy Dale Miller, seeks to amend his petition for post-conviction relief which was filed in the court on April 29, 2010. On July 7, 2010, after due consideration, this court dismissed that petition as frivolous and patently without merit. Pursuant to section 2.1(a)(2) of the Post-Conviction Hearing Act, once the court determines that a petition is 'frivolous and patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law . . . [and] such order . . . is a final judgment . . .' 725 ILCS 5/122-2.1 (West

> 2002). Thus, the order dismissing petitioner's post-conviction petition, entered in this court on July 7, 2010, is a final order. If petitioner seeks further review of that order, he should do so pursuant to the rules of the Supreme Court, as is mandated by section 122-7 of the Act. Accordingly, petitioner's motion to amended [*sic*] petition for post-conviction relief, reply to the court's order [*sic*] as frivolous and patently without merit is hereby dismissed."

¶ 18 Defendant now appeals.[1]

¶ 19 ANALYSIS

¶ 20 I. Mandatory Supervised Release

¶ 21 Defendant first contends that the trial court failed to inform him of the three-year term of mandatory supervised release (MSR) he must serve upon his release from prison and, thus, breached the terms of his plea agreement. He seeks a three-year reduction in his sentence pursuant to *Whitfield*, 217 Ill. 2d 177. He argues that a three-year reduction in his sentence giving him a 10-year prison sentence plus a 3-year MSR term, for a total of 13 years would give

[1]Defendant filed notices of appeal regarding both the summary dismissal of his postconviction petition and the denial of his motion to amend his postconviction petition. Subsequently, defendant's appellate counsel filed a motion to consolidate the two appeals. We granted the motion and consider herein the two consolidated appeals.

him the benefit of his bargained-for plea agreement. In the alternative, defendant requests that we remand his cause of second-stage postconviction proceedings because his constitutional rights were violated when he did not receive his bargained-for sentence. For the following reasons, we disagree.

¶ 22 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶ 23 The summary dismissal of a postconviction petition is appropriate at the first stage of postconviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is low threshold. *Hodges*, 234 Ill. 2d at 9-10. This standard requires only that a defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The summary dismissal of a postconviction petition is a legal question which we review *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). "Although the trial court's reasons for

dismissing [the] petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 24 Due process requires that defendants understand the terms of their plea agreements before their agreements are accepted by the court. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *People v. St. Pierre*, 146 Ill. 2d 494, 506 (1992). Illinois Supreme Court Rule 402 was adopted to implement this constitutional safeguard. *St. Pierre*, 146 Ill. 2d at 506. Rule 402(a)(2) requires that, prior to accepting a guilty plea, a trial court must admonish the defendant as to the minimum and maximum sentence prescribed by law. Illinois Supreme Court Rule 402(a)(2). Rule 402(b) additionally requires the court to determine whether the plea is voluntary, including "confirm[ing] the terms of the plea agreement." Illinois Supreme Court Rule 402(a), (b). Our supreme court has held that "compliance with Rule 402(a)(2) requires that a defendant must be admonished that the mandatory period of parole [now referred to as mandatory supervised release] pertaining to the offense is a part of the sentence that will be imposed." *People v. Wills*, 61 Ill. 2d 105, 109 (1975); *People v. Morris*, 236 Ill. 2d 345, 358 (2010).

¶ 25 Rule 402 provides, in pertinent part, as follows:

> "In hearings on pleas of guilty, or in any case in which the defense offers to stipulate that the evidence is sufficient to convict, there must be substantial compliance with the following:
>
> (a) Admonitions to Defendant. The court shall not accept a plea of guilty or a stipulation that the evidence is sufficient to convict without first, by addressing the defendant personally in open court,

> informing of and determining that he understands the following:
>
> * * *
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences[.]
>
> * * *
>
> (b) Determining Whether the Plea is Voluntary. The court shall not accept a * * * plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats, or any promises, apart from a plea agreement, were used to obtain the plea." Supreme Court Rule 402(a)(2), (b).

¶ 26 Defendant maintains that the court erred in dismissing his petition and, relying on *Whitfield*, 217 Ill. 2d 177, argues that his is entitled to relief because the trial court failed to admonish him of his three-year MSR term when he pled guilty. In *Whitfield*, the defendant pled guilty to felony murder and armed robbery in exchange for concurrent terms of imprisonment of 25 years and 6 years respectively. *Whitfield*, 217 Ill. 2d at 179. However, "at no time during the

plea hearing" did the trial court admonish the defendant he would be subject to a 3-year MSR term following the agreed-upon 25-year prison sentence. *Whitfield*, 217 Ill. 2d at 180. The defendant did not file a motion to withdraw his plea, and never directly appealed his conviction or sentence. *Whitfield*, 217 Ill. 2d at 180. The defendant then filed a *pro se* motion which alleged that he learned about the MSR period while in prison, and that by the addition of such term, he was subjected to a more onerous sentence than that one to which he agreed. *Whitfield*, 217 Ill. 2d at 181. Our supreme court found that:

> "[D]ue 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 a mandatory supervised release term will be added to that sentence. In these circumstances, addition of the MSR term to the agreed-upon sentence violates due process because the sentence imposed is more onerous than the one defendant agreed to at the time of the plea hearing. Under these circumstances, the addition of the MSR constitutes an unfair breach of the plea agreement." *Whitfield*, 217 Ill. 2d at 195.

¶ 27 Later, in *People v. Morris*, 236 Ill. 2d 345 (2010), our supreme court clarified that *Whitfield* requires trial courts to "advise defendants of when an MSR term will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged." *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 15, quoting *Morris*, 236 Ill. 2d at 366. Pursuant to

Whitfield, a defendant must be advised that a period of MSR will be added to the actual, agreed upon sentence, in exchange for the guilty plea. *Morris*, 236 Ill. 2d at 367. The Court explained that, in addition to ensuring a defendant enters a plea " 'intelligently and with full knowledge of its consequences,' " admonishments must also inform the defendant of the actual terms of the bargain made with the State. *Morris*, 236 Ill. 2d at 366, quoting *Whitfield*, 217 Ill. 2d at 184, citing *Boykin*, 395 U.S. at 243. "An admonition that uses the term 'MSR' without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case." *Morris*, 236 Ill. 2d at 366. *Morris* also held that, while admonishments need not be perfect, they must "substantially comply with the requirements of Supreme Court Rule 402 and the precedents of this court."

¶ 28 While we recognize that a split has developed among the various districts of this court as to what constitutes a *Whitfield* violation following *Morris*[2], our district has held that a constitutional violation under *Whitfield* occurs only where there is no mention of MSR. See *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010). Moreover, another division of this court recently found very similar admonishments to those at issue in the case at bar to be sufficient. *Hunter*, 2011 IL App (1st) 093023. In that case, like here, the defendant urged this court to follow the holding in *People v. Burns*, 405 Ill. App 3d 40 (2010), a second district opinion which declined to find admonishments sufficient where the court did not link the MSR term to the actual sentence the defendant would receive under his plea agreement and did not convey

[2] See *People v. Dorsey*, 404 Ill. App. 3d 829, 834-36 (2010), for a discussion of the relevant split authorities.

unconditionally that the MSR term would be added to the agreed upon sentences. *Burns*, 405 Ill. App 3d at 43-45.[3]

¶ 29 In *Hunter*, the 1st District considered the defendant's argument after his *pro se* petition for postconviction relief was summarily dismissed. At the plea hearing in that case, the trial court advised the defendant that he was charged with a Class 1 felony and asked him if he understood that he "could be sentenced for a fixed period of time between four years minimum to 15 years maximum." The defendant responded in the affirmative. The court then asked defendant if he

---

[3]In *Burns*, prior to accepting the defendant's plea, the trial court admonished the defendant as follows:

> " 'THE COURT: Mr. Burns, on both cases, the armed robbery, a Class X felony, and the home invasion is also a Class X felony, you should be advised that a conviction on these offenses could result in you being sentenced to the Illinois Department of Corrections for a period of time from 6 to 30 years; the extended term is 30 to 60 years. There's a potential fine of up to $25,000, with a period of three years [MSR].' "

The *Burns* court concluded that the admonishment was not consistent with the holdings in *Whitfield* or *Morris* because "an ordinary person in the defendant's place might have reasonably believed that he would not have to serve any MSR as a result of his plea agreement." *Burns*, 405 Ill. App 3d at 44.

understood that "Any period of incarceration would be followed by a period of mandatory supervised release of two years following your discharge from the Department of Corrections." The defendant again responded in the affirmative. The court also informed the defendant that, "if a person was to receive probation, the maximum period of probation could be four years." Defendant agreed that he understood, and pled guilty. *Hunter*, 2011 Ill App (1st) 093023, ¶ 4. The court then accepted defendant's plea of guilty and entered judgment on defendant's plea without further mention of the MSR term after imposing sentence. Defendant brought a *pro se* petition for postconviction relief arguing, like defendant here, that the "trial court failed to properly admonish him that his prison sentence would be followed by a two-year term of MSR." *Hunter*, 2011 Ill App (1st) 093023, ¶ 6. The trial court dismissed the petition as frivolous and patently without merit. On appeal, the defendant, like defendant in the instant appeal, contended that he was entitled to a reduction in his sentence because the trial court failed to adequately advise him that he must serve an MSR term when he was sentenced to prison. *Hunter*, 2011 Ill App (1st) 093023, ¶ 9. The third division of this court affirmed the summary dismissal, rejecting the defendants argument that, pursuant to *Morris*, even where a trial court advises a defendant of his MSR term during the sentencing hearing, the admonishments fail to comply with Rule 402 and the requirements of due process if the court fails to reiterate the MSR term at the time the specific sentence is announced." *Hunter*, 2011 Ill App (1st) 093023, ¶ 14. The *Hunter* court stated:

> "While we acknowledge that the *Morris* court said that the 'better practice' would be to incorporate the MSR admonition with the

> announcement of the sentence, we do not agree with defendant's assertion that such a practice is mandatory in order to satisfy the requirements of due process." *Hunter*, 2011 Ill App (1st) 093023, ¶ 14.

¶ 30 The *Hunter* court considered *Burns*, but found *Davis* to be "more persuasive." *Hunter*, 2011 Ill App (1st) 093023, ¶18. In *Davis*, this court held that under *Whitfield*, a constitutional violation only occurs when there is "absolutely no mention" to a defendant that he must serve an MSR term in addition to the agreed-upon sentence before he enters his guilty plea. *Davis*, 403 Ill. App. 3d at 466, citing *People v. Marshall*, 381 Ill. App. 3d 724 (2008) (1st district) (holding that an admonishment to a defendant before he pled guilty that he " 'could get a penitentiary sentence and have to serve a period of three years['] mandatory supervised release, which is like parole, when you get out of the penitentiary' " satisfied the constitutional standard that defendant have full knowledge of the consequences before entering his guilty plea.)[4]

¶ 31 We see no need to deviate from the well-reasoned precedent set by this district. Unlike

---

[4] The *Davis* court also stated: "In line with *Marshall*, we note that a defendant who negotiates to receive a specific sentence upon his plea of guilty before the guilty plea hearing is conducted, receives the full bargain made with the prosecution upon receiving that sentence, as the prosecution can only bargain on the sentence to be imposed. The prosecution has no say on whether a defendant must serve the corresponding MSR term as the term is automatically imposed by law in accordance with the classification of the felony to which the defendant has pled guilty." *Davis*, 403 Ill. App. 3d at 466.

the trial court in *Whitfield*, the trial court here was not silent about the requirements of MSR. Rather, the trial court substantially complied with Rule 402 and the precedents of the court where, prior to accepting his guilty plea, it expressly admonished defendant that "upon being released from the penitentiary, sir, you will serve an additional three years of being monitored, it used to be called parole, of three years called mandatory supervised release by the Illinois Department of Corrections authorities." Just as in *Hunter*, it was clear from these admonishments that defendant would receive a penitentiary sentence to be followed by two years of mandatory supervised release.

¶ 32 Defendant also argues that he should be entitled to relief independent of *Whitfield* under *Santobello v. New York*, 404 U.S. 257 (1971), which held that a defendant's right to due process may be violated where the government fails to honor its promises in a plea agreement. We disagree, because *Whitfield* was expressly dependent upon, not independent of, *Santobello*. See *Whitfield*, 217 Ill. 2d at 184-85 (the defendant's " 'benefit of the bargain' " claim finds its roots in *Santobello").* In *Whitfield*, our supreme court specifically considered *Santobello* in its decision, noting that, in deciding the issue, the court employed the "principles first espoused in *Santobello* in finding that due process is implicated when an agreed-upon sentence is unilaterally modified by the addition of an MSR term, and in creating a remedy when a defendant does not receive the benefit of the bargain. *Whitfield*, 217 Ill. 2d at 190, 202. In addition, our supreme court again acknowledged in *Morris* that *Whitfield* "rel[ied] squarely on the Supreme Court's decision in *Santobello*." *Morris*, 236 Ill. 2d at 361. Defendant here entered into his bargain with full knowledge that he would be required to serve a 3-year term of MSR. Contrary to his argument

here, there was no breach of that agreement.

¶ 33 Defendant also contends that he could not have understood that his prison term included a mandatory three-year term of MSR because he was mentally ill and on "heavy psychotropic medication." He claims that the court's admonishment "would not have conveyed the required warning to any ordinary person, let alone one in the circumstances that [defendant] was in–those of someone taking three different psychotropic medications. A heavily medicated person who smiles, nods, and says 'yes, sir,' when asked if he understands something explained to him is not necessarily demonstrating true understanding of the explained concept." Defendant's claim fails, however, because the record contradicts this contention.

¶ 34 First, in her report dated April 18, 2008, forensic psychiatrist Dr. Roni Seltzberg stated that she evaluated defendant on April 18, 2008 and found him fit to stand trial with medication. She stated:

> "Based upon my review of the available records and my clinical examination it is my opinion, within a reasonable degree of medical/psychiatric certainty, that Mr. Miller is fit to stand trial with medication. He is currently prescribed a mood-stabilizing agent as well as two antidepressant agents. There was no indication of any clinically significant adverse effect from the medications on his cognitive functioning, behavior or fitness for the trial. He was able to demonstrate understanding of the nature of the charges against him, the purpose of the proceedings against

him, and he has the ability to assist counsel in his defense."

Also included in the record is a report from licensed clinical psychologist Dr. Christofer Cooper dated April 16, 2008, in which he, also, opined that defendant was fit to stand trial, legally sane, and able to understand his *Miranda* warnings. Dr. Cooper opined that defendant was "cognizant of the charges pending against him, demonstrates an adequate understanding of the nature and purpose of legal proceedings, and is familiar with the roles of various courtroom personnel."

¶ 35 Moreover, although defendant claims he was a "heavily medicated person who smiles, nods and says 'yes, sir,' when asked if he understands something," the record reveals that defendant took an active part in his plea and spoke articulately. Specifically, defendant was invited to speak before he was sentenced. When he did so, he acknowledged that he "took advantage of [the victims'] sense of security" and that he took full responsibility for his actions. He gave what the court called "one of the finest elocutions from an individual that I have ever heard." The court thanked defendant for his "honesty and candor." In addition, at no point during the proceedings did defendant express any confusion about what was occurring. Accordingly, we find that the trial court properly dismissed defendant's postconviction claim that he was not properly admonished about a period of MSR to follow his prison sentence where that claim was frivolous and patently without merit.

¶ 36 Although we affirm the dismissal of defendant's postconviction petition, we reiterate here the words of Presiding Justice Cahill in *Marshall*, which our supreme court quoted in *Morris*:

" 'The better practice would incorporate the mandatory supervised release admonition when the specific sentencing is announced. The written sentencing judgment should also include the term

of mandatory supervised release.' " *Morris*, 236 Ill. 2d at 367, quoting *Marshall*, 381 Ill. App. 3d at 736.

¶ 37 II. Ineffective Assistance of Counsel Claim

¶ 38 Next, defendant contends that the circuit court erred when it summarily dismissed his postconviction petition because his allegations, taken as true, stated the gist of a meritorious claim that his trial attorney rendered him ineffective assistance. The defendant specifically asserts that his trial counsel was ineffective because he failed to bring to the court's attention that he had attempted suicide before pleading guilty. He alleges that the fact he was taking psychotropic medication and had attempted suicide in while the jail approximately two months prior to his sentencing hearing raised a *bona fide* doubt as to his fitness. We disagree.

¶ 39 The prosecution of a defendant who is not fit to stand trial violates due process. *People v. Haynes*, 174 Ill. 2d 204, 226 (1996). In Illinois, a defendant is presumed to be fit to stand trial, and will be considered unfit only if, because of the defendant's mental or physical condition, the defendant is unable to understand the nature and purpose of the proceedings against him or her, or to assist in his own defense. 725 ILCS 5/104-10 (West 2001); see also *People v. Easley*, 192 Ill. 2d 307, 318 (2000).

¶ 40 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). Failure to make the requisite

showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *Easley*, 192 Ill. 2d at 317. Specifically, the defendant must show that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Easley*, 192 Ill. 2d at 317-18. A court reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 41 Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *Easley*, 192 Ill. 2d at 344. Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *McGee*, 373 Ill. App. 3d 824, 835 (2007).

¶ 42 Defendant's argument here fails because, even if we were to find counsel's representation ineffective, defendant would still be unable to show resulting prejudice. See *Palmer*, 162 Ill. 2d at 475-76 (failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim). The relevant inquiry here is not whether a fitness hearing would have been conducted had defense counsel requested one, but whether the outcome of the hearing

would have been favorable to the defendant, that is, whether defendant would have been found unfit to stand trial. See *People v. Mitchell*, 189 Ill. 2d 312, 334 (2000) ("If a defendant would have been found fit to stand trial, he suffered no prejudice by not having a hearing. The correct test for evaluating prejudice in these situations is whether a reasonable probability exists that, if defendant would have received the section 104-21(a) fitness hearing to which he was entitled, the result of the proceeding would have been that he was found unfit to stand trial.).

¶ 43 A trial court must only order a fitness hearing if a *bona fide* doubt is raised of the defendant's fitness. 725 ILCS 5/104-11(a) (West 2010). Section 104-11 provides, in relevant part, that "when a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further." 725 ILCS 5/104-11(a) (West 2010). A defendant's diminished mental capacity does not, in itself, render the defendant unfit to stand trial. *People v. Johnson*, 183 Ill. 2d 176, 194 (1988). Nor does a history of suicide attempts, by itself, demonstrate that a defendant is unfit. *People v. Sanchez*, 169 Ill. 2d 472, 484 (1996). A defendant does not have a due process right to such a hearing, and trial courts have no obligation to order *sua sponte* a fitness hearing if a defendant does not request one. *Mitchell*, 189 Ill. 2d at 337. No single factor raises a *bona fide* doubt as to a defendant's fitness to stand trial and sentencing; even the fact that a defendant suffers a mental disturbance or requires psychiatric treatment does not necessarily raise a *bona fide* doubt. *People v. Walker*, 262 Ill. App. 3d 796, 803 (1994).

¶ 44 Our supreme court considered whether a suicide attempt prior to sentencing necessitated a fitness hearing in *Sanchez*, 169 Ill. 2d 472. In that case, the defendant attempted suicide before

his sentencing hearing and requested that his attorney ask for a fitness hearing. *Sanchez*, 169 Ill. 2d at 484. The attorney did so. *Id.* The trial court denied the request, ruling that there was no *bona fide* doubt of the defendant's fitness for sentencing. *Id*. at 484. On review, our supreme court agreed, holding that the full text of the admonishments demonstrated that the defendant's waiver was knowing and intelligent in that his statements were coherent and nothing on the record suggested that he failed to understand the admonitions or the nature of the proceeding. *Id*. at 485. The Court further held that the defendant's counsel was not ineffective by failing to investigate the suicide attempt because the defendant failed to show that the examination of the circumstances of the suicide attempt would have led the trial judge to conduct a fitness hearing. *Id.* at 488.

¶ 45 Here, there is nothing in the record or in defendant's postconviction petition to indicate that defendant was unfit to plead guilty. Defendant was evaluated for fitness before he pled guilty and was found fit. As discussed previously, defendant clearly understood the admonitions when he pled guilty. Nothing in the record suggests a *bona fide* doubt as to defendant's fitness, and there is nothing in the record to suggest that defendant had ceased taking his medication or that he was unable to understand the proceedings. Defendant did not allege in his postconviction petition or on appeal that he was not taking his medication or that he was unable to understand the proceedings.[5] [6]

---

[5]Defendant's argument on this issue in his postconviction petition is as follows:

> "On October 18, 2008 I made an attempt to committ [*sic*] suicide by ingesting 52 pill [*sic*]. I told my attorney and this matter was

¶ 46 Like the *Sanchez* defendant, defendant here argues that his counsel was ineffective for failing to ask for a fitness hearing and investigate his alleged suicide attempt. However, defendant fails to show that the disclosure to the court would have led to a fitness hearing and that he would have been found unfit where his plea was knowing and intelligent, and nothing in the record indicated that defendant was unable to understand the nature of the admonitions. Defendant was evaluated by two psychiatrists, both of whom found him fit to stand trial. Dr. Salzburg stated in her report that defendant was able to "demonstrate understanding of the nature of the charges against him, the purpose of the proceedings against him, and he has the ability to assist counsel in his defense." Dr. Cooper also noted that defendant was cognizant of the charges pending against him, that he demonstrated an adequate understanding of the nature and purpose of legal proceedings, and was familiar with the roles of the various courtroom personnel. He opined that defendant was capable of assisting counsel in his own defense. Defendant is unable

---

> never presented to the court of my mental state at the time I was also on psych medication and really did not understand what was happening to me all I know is that I was in jail, in trouble, and I will be going to prison."

The only affidavit defendant attached to his postconviction petition is from himself, averring that "everything herein is true and accurate to the best of my knowledge and belief."

[6]In his reply brief on appeal, defendants states: "[Defendant's] allegation that he took 52 pills raises the inference that he had stopped taking his medication in order to save enough up to take a massive suicidal dose at once, and thus was not taking his medication as prescribed."

to show a reasonable probability that, had counsel requested a fitness hearing, he would have been found unfit. See *Mitchell*, 189 Ill. 2d at 334. Accordingly, defendant's argument fails where he is unable to show that the facts alleged, taken as true, stated the gist of a meritorious claim that his trial attorney rendered him ineffective assistance.

¶ 47 Defendant's reliance on *Brown*, 236 Ill. 2d 175, does not persuade us differently. In *Brown*, the defendant was shot by a police officer after lunging at the officer with a butcher knife. *Id*. at 179. He was convicted of attempted first degree murder of a peace officer. *Id.* Defendant then asserted that he had been depressed, that he had previously tried to kill himself, and that he lunged at the police officers because he wanted them to kill him. *Id*. at 180. He filed a postconviction petition to which he attached medical records documenting his bipolar disorder and the medications he took to treat it, and affidavits from his mother and aunt attesting that the defendant's mother had informed defendant's counsel that he was taking medication to treat his disorder and that he was previously suicidal. *Id*. The trial court dismissed the petition as frivolous and patently without merit, and the appellate court affirmed. *Id*. at 182. On review, our supreme court reversed and held that the defendant was entitled to a second-stage postconviction hearing where the defendant's allegations and supporting affidavits were not refuted by the record and, thus, arguably raised a *bona fide* doubt as to the defendant's ability to understand the proceedings and assist in his own defense. *Id*.

¶ 48 Unlike the defendant here, the *Brown* defendant had never received a psychiatric evaluation prior to trial. Here, in contrast, defendant was evaluated by two psychiatrists who both found defendant fit to stand trial. Unlike the defendant in *Brown*, defendant here failed to

attach affidavits to support his claim. Moreover, defendant failed to bring his suicidal ideation to the attention of the trial court, although he had opportunity to do so.

¶ 49 III. Failure to Allow Defendant to Amend His *Pro Se* Postconviction Petition

¶ 50 Next, defendant contends that the trial court abused its discretion where it denied defendant's motion to amend his *pro se* postconviction petition. Specifically, defendant argues that the trial court misconstrued the motion to amend as a motion to reconsider, and also failed to consider the merits of the motion before denying it. He argues that, "[b]ecause the trial court did not actually consider and properly rule on Miller's motion to amend before the 90-day statutory clock had expired, Miller's petition must be remanded for second-stage review." We disagree.

¶ 51 The Act mandates that the circuit court review a postconviction petition within 90 days of its filing to determine whether it is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). The Act directs the court to specify its findings of fact and conclusions of law if it summarily dismisses the petition on the pleadings. 725 ILCS 5/122-2.1 (a) (2) (West 2010). The Act provides that a court has discretion to allow amendments of petitions "as shall be appropriate, just and reasonable and is generally provided in civil cases." 725 ILCS 5/122-5 (West 2010).

¶ 52 Defendant filed a petition for postconviction relief on April 29, 2010. Subsequently, he filed a motion to amend his petition, which was marked filed on June 24, 2010. In his motion to amend, defendant alleged that the statute authorizing MSR was unconstitutional, contained ambiguous definitions, or in the alternative, his "place of confinement is incorrectly applying the

MSR term." Defendant alleged that the MSR statute violated both the separation of powers and the due process clauses of the Illinois Constitution as the statute improperly delegates authority to the prisoner review board and restricts his liberty following release from prison. Defendant further alleged, as he did in his original *pro se* petition, that he only agreed to a 13-year sentence rather than a 13-year sentence plus 3 years of MSR. Like in his original petition, defendant requested the court to eliminate the MSR term or reduce his prison term by the length of the MSR term. Defendant asserted in his motion that the new argument was not included in his original postconviction petition because it was "filed in haste" and that, at the time of the filing, he did not have a copy of his sentencing transcript. Defendant alleged:

> "Question: Defendant was sentence [sic] to 13 years at 50% which mean I understand that I have to serve 6 ½ years to satisfy my judicial sentence. If 6 ½ years have been revoked for disciplinary reason I would have to serve my maximum 13 year sentence. 13 years in which I copped out to will I still have to do 3 years on MSR in which will total my sentence to 16 years!!? 16 years that I did not copp [*sic*] out to!"

Defendant included with this motion a series of hand-drawn graphs designed to illustrate that he did not bargain for a period of MSR when he bargained for his prison sentence, as well as a copy of the transcript from his guilty plea hearing.

¶ 53 On July 7, 2010, the court dismissed defendant's postconviction petition as frivolous and patently without merit. Then, on August 13, 2010, the court denied defendant's motion to amend

his postconviction petition. The trial court's order of August 13, 2010, states:

> "Petitioner, Jimmy Dale Miller, seeks to amend his petition for post-conviction relief which was filed in this court on April 29, 2010. On July 7, 2010, after due consideration, this court dismissed that petition as frivolous and patently without merit. Pursuant to section 2.1(a)(2) of the Post-Conviction Hearing Act, once the court determines that a petition is 'frivolous or patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law . . . [and] such order . . . is a final judgment . . .' 725 ILCS 5/122-2.1 (West 2002). Thus, the order dismissing petitioner's post-conviction petition, entered in this court on July 7, 2010, is a final order. If petitioner seeks further review of that order, he should do so pursuant to the rules of the Supreme Court, as is mandated by section 122-7 of the Act. Accordingly, petitioner's motion to amended [*sic*] petition for post-conviction relief, reply to the court's order as frivolous and patently without merit is hereby dismissed."

¶ 54 Initially, we note that the trial court's ruling on the motion to dismiss was timely. The Act requires that "within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section." 725 ILCS 5/122-2.1

(West 2010). When a defendant who has filed an original postconviction petition subsequently files an amended petition, however, the 90-day period in which the court must examine the defendant's petition and enter an order thereon is to be calculated from the filing of the amended petition. *People v. Watson*, 187 Ill. 2d 448, 451 (1999). When defendant here filed his motion to amend the *pro se* postconviction petition, a new 90-day period began in which the trial court was required to examine defendant's amended petition and enter an order. The motion to amend was docketed on June 24, 2010, and the court ruled on the motion on August 24, 2010. Therefore, the court's ruling was within the 90-days required by the Act.

¶ 55 Defendant argues, however, that because the trial court "misconstrued" his motion to amend as a motion to reconsider, the court never actually made a proper ruling on his motion to amend and, therefore, violated the 90-day requirement. We disagree. To support this argument, defendant points to the court's written order which stated, "Accordingly, petitioner's motion to amended [*sic*] petition for post-conviction relief, reply to the court's order as frivolous and patently without merit is hereby dismissed." However, a written order is not mandatory and a trial court is not required to state all of the reasons for summary dismissal. *People v. Porter*, 122 Ill. 2d 64, 82 (1988).

¶ 56 The record on appeal includes the transcript of the hearing in which the trial court ruled on defendant's motion to amend. The court stated:

> "THE COURT: The order reads as follows on Mr. Jimmy Miller.
>
> Mr. Miller is seeking to amend the petition for post conviction relief which was filed on April 29th, 2010. On July 7, 2010, after

> due consideration, this Court dismissed that petition as frivolous and patently without merit. Once the Court determined the petition is frivolous and patently without merit, it shall dismiss the case in a written order which I did, specifying findings of fact and conclusions which I did. Subsequently there was an order dismissing the petition for post conviction entered by the Court on July 7, 2010 is a final order. [*sic*] If petitioner seeks further review of that order, he should do so pursuant to Supreme Court rule 122 dash 7 of the Post Conviction Act. Accordingly Petitioner's motion to amend the petition for post conviction relief is hereby dismissed."

¶ 57 We find no abuse of discretion here in the trial court's dismissal of defendant's motion to amend the *pro se* petition for postconviction relief where the record refutes defendant's claim that the trial court did not consider and properly rule on defendant's motion to amend. It is clear from the transcript as well as from the written order that the trial court was cognizant of the motion on which it was ruling. It specifically stated that defendant was "seeking to amend the petition for post conviction relief which was filed on April 29th, 2010." It considered the merits of the postconviction petition as well as the merits of the motion to amend the petition. The trial court did not "misconstrue" the motion to amend as a motion to reconsider, and it did, in fact, exercise its discretion in determining that it would not allow defendant to amend his petition.

¶ 58 IV. Fines and Fees

¶ 59 Next, defendant contends that his fines and fees order must be amended because several of the fines and fees assessed against him were improperly imposed and, thus, void. Specifically, he claims that the following fines and fees assessed against him were improper: the $5 court system fee (55 ILCS 5/5-1101(a) (West 2010)); the $25 court supervision fee (625 ILCS 5/16-104c (West 2010)); the $20 serious traffic violation fine (625 ILCS 5/16-104d (West 2010)); and the $30 children's advocacy center fine (55 ILCS 5/5-1101(f-5) (West 2010)). Defendant also contends that he is entitled to a $5-per-day presentence custody credit against the fines imposed by the trial court.

¶ 60 The State properly concedes that these fines and fees were improperly assessed, but argues that: (1) this challenge to the trial court's imposition of fines and fees is not cognizable under the Act because the imposition does not constitute a substantial violation of defendant's rights; and (2) defendant has forfeited review of these complaints by failing to raise this claim until the appeal from the dismissal of his postconviction petition. However, a void order is not subject to forfeiture and may be corrected at any time. *Marshall*, 242 Ill. 2d at 302 ("A challenge to an alleged void order is not subject to forfeiture"); see also *People v. Roberson*, 212 Ill. 2d 430, 440 (where the defendant's sentence was in conflict with a statutory guideline, it was void and could be challenged in the reply brief); *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 63 (holding that an unauthorized fee is void, and rejecting the State's claim that postconviction petitioner could not challenge, for the first time on appeal of dismissal of a successive postconviction petition, an unauthorized fee assessed in conjunction with an earlier

postconviction petition).

¶ 61 First, defendant claims, the State concedes, and we agree that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)), the $25 court supervision fee (625 ILCS 5/16-104(c) (West 2010)), and the $20 serious traffic violation fine (625 ILCS 5/16-104d (West 2010)) must be vacated because his burglary convictions are not related to the Illinois Vehicle Code or a similar municipal ordinance. See 625 ILCS 5/16-104(c) (West 2010); 55 ILCS 5/5-1101(a) (West 2010); (625 ILCS 5/16-104d (West 2010); *People v. Price*, 375 Ill. App. 3d 684, 698 (2007).

¶ 62 Next, defendant claims, the State concedes, and we agree that the $30 children's advocacy center fee (55 ILCS 5/5-1101(f-5) (West 2010) should be vacated because it is punitive in nature and the statute authorizing its imposition was not in effect at the time defendant's offense was committed. This court has found that the children's advocacy center fine is punitive in nature and is a fine. See *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009); *People v. Williams*, 2011 IL App (1st) 091667, ¶ 19. The $30 children's advocacy center fee was added to the Code as section (f-5), effective January 1, 2008. 55 ILCS 5/5-1101(f-5) (West 2010). The offenses underlying defendant's convictions all occurred during May through July of 2007, before the children's advocacy center fine took effect. Because this assessment is a fine, which is punitive in nature, and the underlying offenses took place prior to the statute authorizing its imposition took effect, this fine must be vacated.

¶ 63 Next, defendant contends, and the State properly concedes, that his fines charge should be offset by the $5-per-day credit for days spent in presentencing custody under section 110-14 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14 (West 2010)). We agree.

¶ 64 Section 110-14 of the Code allows for a $5-per-day credit for days spent in presentencing custody, but this credit offsets only fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006).

¶ 65 The $10 mental health court fee and the youth diversion/peer court fees are "fines" because they are punitive in nature and do not seek to recoup the cost incurred in prosecuting the defendant. See *People v. Graves*, 235 Ill. 2d 244, 251 (2009); *Price*, 375 Ill. App. 3d at 701. The same is true for the $5 drug court charge. See *People v. Sulton*, 395 Ill. App. 3d 186 (2009). Because the mental health court fee, the youth diversion/peer court fee, and the drug court fee are fines, defendant is entitled to a pre-sentence incarceration credit toward them. 725 ILCS 5/110-14(a) (West 2010). Defendant was incarcerated on a bailable offense for 584 days before sentencing. Accordingly, defendant was entitled to a credit of $20 for these fines.

¶ 66 V. DNA Assessment Fee

¶ 67 Finally, defendant contends, the State concedes, and we agree that the five $200 DNA assessment fees should be stricken as void under the Illinois Supreme Court's recent decision in *Marshall*, 242 Ill. 2d at 303.

¶ 68 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2010)) authorizes a trial court to order the taking, analysis, and indexing of a qualifying offender's DNA, and corresponding payment of the analysis fee, only once where the defendant is not currently registered in the DNA database. *Marshall*, 242 Ill. 2d at 303. An order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Marshall*, 242 Ill. 2d at 302; *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 23.

¶ 69 In the instant case, the records, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), reflect that defendant was convicted of and sentenced on a prior felony in August 2003. Therefore, we can presume that defendant is already registered in the DNA database. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (holding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). Accordingly, we agree with defendant that the five $200 DNA analysis fees he was assessed are duplicative and must be vacated.

¶ 70 CONCLUSION

¶ 71 For the reasons explained above, we affirm the summary dismissal of defendant's post-conviction petition. We vacate that portion of the trial court's order requiring defendant to pay the $200 DNA analysis fee, and order the clerk of the circuit court to enter a modified fines, fees, and costs order to reflect $20 presentence custody credit toward defendant's fines.

¶ 72 Affirmed in part; vacated in part; order modified.