

FOURTH DIVISION
August 1, 2013

No. 1-11-0504

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).

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. 93 CR 22103
)	
GORDON THORNTON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Because three-year period of mandatory supervised release (MSR) is a statutorily imposed component of a sentence, defendant has not raised constitutional claim in post-conviction petition regarding lack of admonishment as to MSR period; the dismissal of the petition without an evidentiary hearing was affirmed.

¶ 2 Defendant Gordon Thornton appeals the dismissal of his post-conviction petition at the second stage of review. In his petition, defendant asserted he was denied the benefit of his plea bargain because he was not told he would have to serve three years of mandatory supervised

release (MSR) following his sentence. On appeal, defendant contends his petition stated a due process claim under *Santobello v. New York*, 404 U.S. 257 (1981), which offers relief when the State fails to honor the terms of a plea agreement. In the alternative, defendant argues his three-year MSR term is void because it exceeded the sentence imposed by the trial court. We affirm.

¶ 3 Defendant was charged with first degree murder and various other offenses in connection with a 1993 shooting. After defendant's jury trial ended in a mistrial and he unsuccessfully moved to dismiss the indictment, defendant pled guilty to one count of murder. On October 30, 1998, the trial court accepted defendant's plea and admonished defendant that he would receive a 60-year sentence for his prison term, to be served concurrently with a 20-year federal prison sentence he was serving. Defendant did not file any post-plea motion or an appeal.

¶ 4 On May 30, 2002, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)), which was summarily dismissed. On appeal, this court remanded for second-stage post-conviction proceedings. *People v. Thornton*, No. 1-02-2671 (2004) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant's post-conviction counsel filed a supplemental post-conviction petition in 2006. In the supplemental petition, counsel relied on *People v. Whitfield*, 217 Ill. 2d 177 (2005), to assert that defendant's sentence should be reduced by three years, *i.e.*, from 60 years to 57 years to be followed by the MSR period, because the trial court did not properly admonish him about the 3-year MSR term. The supreme court held in *Whitfield* that a defendant's due process is violated when he pleads guilty to a specific sentence but is not admonished about a corresponding MSR term. *Whitfield*, 217 Ill. 2d at 205. The circuit court rejected that argument and dismissed the petition. On appeal, this court agreed with defendant's argument pursuant to *Whitfield* and remanded the case to the trial court for the imposition of a

57-year sentence, to be followed by three years of MSR. *People v. Thornton*, No. 1-07-1475 (2009) (unpublished order under Supreme Court Rule 23).

¶ 6 After defendant's petition was remanded to the circuit court, the State moved to dismiss the petition in light of the Illinois Supreme Court's ruling in *People v. Morris*, 236 Ill. 2d 345 (2010), in which the court held that the rule set out in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the day the *Whitfield* decision was announced. In January 2011, the circuit court heard arguments on the issue and held that under *Morris*, defendant was not entitled to relief pursuant to the theory in *Whitfield*. The circuit court granted the State's motion to dismiss defendant's post-conviction petition. Defendant now appeals that ruling.

¶ 7 The Act provides a three-step process for defendants who claim a deprivation of their constitutional rights to collaterally attack the court's judgment. 725 ILCS 5/122-1 (West 2002). A defendant begins proceedings under the Act by filing a petition in the trial court that sets forth a violation of his constitutional rights, and if the petition is not dismissed at the first stage of review, counsel is appointed to represent him and the State may move to dismiss the petition. 725 ILCS 5/122-1(b), 122-5 (West 2002). Here, defendant's petition was dismissed at the second stage of proceedings under the Act, at which the circuit court determines whether the defendant has made a substantial showing of a constitutional violation. Our review of the dismissal of a post-conviction petition at this stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

¶ 8 In dismissing the petition, the circuit court in this case noted the applicability of *Whitfield* and *Morris* to these proceedings. Defendant's guilty plea was entered on October 30, 1998, and no appeal was taken. Because defendant's conviction was finalized prior to December 20, 2005, the holding of *Whitfield* cannot be applied to this case. See *Morris*, 236 Ill. 2d at 366.

¶ 9 Defendant nevertheless contends on appeal that *Morris* does not preclude him from raising a due process claim based on *Santobello*, in which the United States Supreme Court held a defendant is entitled to a remedy where the State does not adhere to the terms of a plea agreement. In *Santobello*, a defendant received a maximum sentence, as recommended by a prosecutor, after being told earlier that he could plead guilty to a lesser charge in exchange for the prosecutor making no sentencing recommendation. *Santobello*, 404 U.S. at 258. The United States Supreme Court held that when a defendant does not receive the benefit of a negotiated plea bargain due to a breach of the agreement with the government, the defendant may either receive specific performance of the agreement or may withdraw his guilty plea. *Santobello*, 404 U.S. at 263.

¶ 10 In Illinois, this court has addressed the identical argument that defendant now raises and has held that a defendant may not make an independent *Santobello* claim given the controlling Illinois Supreme Court precedent of *Whitfield* and *Morris*. *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010) (holding the rule in *Whitfield* is dependent upon, and not independent of, *Santobello*). Although defendant claims in this appeal that *Demitro* was incorrectly decided and this court should not follow its holding, this court has in fact adhered to *Demitro's* analysis. See, e.g., *People v. Hildenstein*, 2012 IL App (5th) 100056, ¶ 19. We follow that precedent and hold that defendant cannot obtain relief under *Santobello*.

¶ 11 Alternatively, defendant argues his MSR term is void because that portion of his punishment was not mentioned by the sentencing judge or included in the sentencing order. Although defendant did not include this argument in his post-conviction petition, he contends the failure to specify the MSR term rendered his sentence void and can thus be challenged at any time.

¶ 12 Defendant cites *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), and *Earley v. Murray*, 451 F.2d 71 (2d Cir. 2006), to support his argument that he cannot be held to a sentence longer than the time period that was stated by the court. In *Hill*, a federal trial judge sentenced a defendant to 18 months in prison and imposed a fine; however, the clerk of the court added a condition that the defendant remain in custody until his fine was paid, following a local "practice" known to the court. *Hill*, 298 U.S. at 461-62, 465. The United States Supreme Court held that the clerk lacked the power to alter the sentence imposed by the court, thus making the additional condition void. *Hill*, 298 U.S. at 465-67. Here, however, unlike in *Hill*, the three-year MSR term was applied automatically pursuant to statute, not as a result of an overreaching of authority.

¶ 13 Furthermore, the Illinois Supreme Court has addressed the applicability of *Earley* to an Illinois case in an MSR setting and has rejected the argument that a defendant's lack of knowledge about an MSR term provides cause for failing to bring that claim in an initial post-conviction petition. In *People v. Evans*, 2013 IL 113471, ¶ 15, the supreme court noted *Earley* was a decision of the Second Circuit Court of Appeals interpreting New York law and thus "has absolutely no consequence in Illinois unless and until a court of this state endorses its analysis[.]" The supreme court further noted that the defendant in *Evans* was sentenced prior to the 2006 decision in *Earley* and therefore could not rely on that decision to support his ignorance of the law at the time he was sentenced. *Evans*, 2013 IL 113471, ¶ 16.

¶ 14 The rationale set out in *Evans* applies in the instant case. Defendant was sentenced long before *Earley* was decided, and no Illinois court has applied *Earley's* reasoning. Rather, this court has held that an MSR term is a mandatory part of a defendant's sentence, not a negotiated term or privilege. *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 23. Because the three-year

MSR term was included in defendant's sentence pursuant to statute, we reject defendant's argument that the MSR portion of his sentence is void.

¶ 15 In summary, defendant cannot challenge his three-year MSR term by relying on *Santobello*. See *Demitro*, 406 Ill. App. 3d at 957 (2010). Moreover, defendant's MSR term is not void but instead is a statutorily mandated portion of his sentence.

¶ 16 Accordingly, the circuit court's dismissal of defendant's post-conviction petition is affirmed.

¶ 17 Affirmed.