

THIRD DIVISION
October 9, 2013

No. 1-11-2671

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. 06 CR 13072
)	
JERRY LOTT,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition affirmed where MSR claim had no arguable basis in fact or law; defendant's indeterminate MSR term was a mandatory part of his sentence.

¶ 2 Defendant Jerry Lott appeals from the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court erred in summarily dismissing his petition where he presented an arguable claim that he was denied due process by the trial court's failure to inform him that he would be required to serve

an indeterminate period of mandatory supervised release (MSR) of three years to natural life. He also contends that his MSR term is void pursuant to *Earley v. Murray*, 451 F. 3d 71 (2d Cir. 2006).

¶ 3 The record shows that defendant was charged by indictment with two counts of criminal sexual assault and four counts of aggravated criminal sexual abuse, all stemming from an incident on April 30, 2006. Following a plea conference on January 12, 2007, defendant pleaded guilty to one count of criminal sexual assault and the State nol-prossed the remaining counts.

¶ 4 Before accepting his guilty plea, the trial court admonished defendant that he was charged with criminal sexual assault, a Class 1 felony punishable by a term of imprisonment between 4 and 15 years, or if eligible, by an extended term of imprisonment between 15 and 30 years, and "any penitentiary sentence is followed by a period of two years mandatory supervised release." Defendant indicated that he understood the possible sentencing range, the consequences of pleading guilty to criminal sexual assault and persisted in his guilty plea. After defendant stipulated to the factual basis for the charge, the trial court accepted his guilty plea and sentenced him to four years' imprisonment, although the State sought a sentence of 10 years' imprisonment.

¶ 5 The trial court then admonished defendant of his appeal rights, including his right to file a written motion to vacate his plea "and/or" to reconsider his sentence, and noted defendant's "signed acknowledgement [*sic*] of those rights under Supreme Court Rule 605(b)," which included the referenced provision. The trial court further admonished defendant that "any motion to reconsider your sentence must be preceded by, meaning your motion to vacate your plea must come before."

¶ 6 Defendant did not file a postplea motion or otherwise attempt to appeal the judgment entered on his plea conviction. Rather, on October 16, 2009, defendant, *pro se*, filed a form motion to "vacate/amend final orders." The trial court found that it no longer had jurisdiction over the case and directed the public defender to consult with defendant.

¶ 7 On May 16, 2011, defendant, through private counsel, filed the subject postconviction petition, alleging that pursuant to an agreement with the State, he pleaded guilty to one count of criminal sexual assault in exchange for a four-year prison sentence, which, he was admonished, included a two-year MSR term. He since learned that he was subject to a lifetime of MSR, and claimed that "for [him] to serve a lifetime term of MSR after agreeing to a sentence with a term of 2 years of MSR is in violation of [his] due process rights." He argued that the trial court's failure to admonish him about the possibility of being required to serve an indefinite term of MSR deprived him of the full knowledge of the consequences of pleading guilty, and, as a result, he will be forced to serve a more onerous sentence than that for which he bargained in exchange for his guilty plea. The circuit court summarily dismissed the petition and denied defendant's motion to reconsider.

¶ 8 According to the Illinois Department of Corrections (IDOC) website, of which we may take judicial notice (*People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010)), defendant has completed his penitentiary sentence and is currently serving an indeterminate MSR term of three years to life.

¶ 9 In this court, defendant first contends that he presented an arguable claim relating to his MSR term. He acknowledges that an indeterminate MSR term of three years to life is statutorily mandated (730 ILCS 5/5-8-1(d)(4) (West 2006)), but claims that the unilateral modification of his "negotiated MSR term" violated his due process rights because he did not receive the benefit of his plea bargain with the State as in *People v. Whitfield*, 217 Ill. 2d 177 (2005). Having served his term of imprisonment, defendant asserts that his indeterminate MSR term must be reduced to the 2-year MSR term "to which he was sentenced."

¶ 10 The Act provides a procedural mechanism for defendants to challenge their convictions or sentences based on a substantial violation of their constitutional rights. *People v. Evans*, 2013 IL 113471, ¶ 10. At the first stage of proceedings under the Act, the circuit court must independently determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2)

(West 2010); *People v. Smith*, 2013 IL App (3d) 110738, ¶ 7. A petition may be summarily dismissed as frivolous and patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks an arguable basis either in law or in fact when it is based on an indisputably meritless legal theory, *e.g.*, one which is completely contradicted by the record, or a fanciful factual allegation, *e.g.*, one which is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. We review *de novo* the summary dismissal of a postconviction petition. *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 11 The State initially responds that the record directly rebuts defendant's claim that he entered into a negotiated guilty plea where the trial court sentenced him to a prison term less than that sought by the State, and that MSR is automatically imposed and not a part of plea bargaining. The State thus argues that this court should affirm the circuit court's dismissal of defendant's petition because we do not have the authority to grant the relief requested, namely a reduction of the indeterminate MSR term.

¶ 12 Defendant replies that the MSR statute is no obstacle to his claim for relief because due process requires that a guilty plea be entered both knowingly and voluntarily, with full understanding of the consequences. He asserts that the withdrawal of his guilty plea, when he has already served his time in prison, is "in no way acceptable" and an inadequate remedy for the due process violation.

¶ 13 Our review of the record shows that defendant entered into a partially negotiated plea of guilty to one count of criminal sexual assault in exchange for the State nol-prossing the remaining five counts. This "negotiated as to charge" agreement entails no sentencing inducement from the State (*People v. Lumzy*, 191 Ill. 2d 182, 187 (2000); see *People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (1999) (partially negotiated pleas include "negotiated as to charge" agreements)), and was accomplished here by the dismissal of all the other counts charged in the indictment. *People v. Snyder*, 2011 IL 111382, ¶ 30. The "benefit of the bargain" analysis in *Whitfield* is therefore

inapplicable to defendant's plea where he received the full "benefit" of his bargain with the State. *Snyder*, 2011 IL 111382, ¶ 30.

¶ 14 Having reached that conclusion, we necessarily reject defendant's suggestion that the cause be remanded to clarify whether the sentence he received was part of the plea agreement with the State. The record shows that defendant was sentenced to four years' imprisonment, despite the State's request for a 10-year sentence, and that no prison term was set forth as part of a plea agreement. Thus, we find no ambiguity in the record requiring clarification of the terms of the plea.

¶ 15 We also observe that the Rule 402(a)(2) (eff. July 1, 2012) requirement that defendant be advised of *any* MSR term "has nothing whatsoever to do with plea bargaining or plea agreements," and "as long as the trial court informs a defendant at the time of his guilty plea that an MSR term must follow any prison sentence that is imposed upon him, he has received all the notice and all the due process to which he is entitled regarding MSR." *People v. Andrews*, 403 Ill. App. 3d 654, 665 (2010). Because MSR terms are statutorily mandated and courts have no authority to withhold such terms when imposing a sentence (*People v. Porm*, 365 Ill. App. 3d 791, 794 (2006)), defendant and the State, here, had " 'nothing to negotiate regarding an MSR term because even if they agreed to reduce or waive the statutorily required MSR term, the trial court would lack the authority to act in accordance with their agreement.' " *People v. Lee*, 2012 IL App (4th) 110403, ¶ 21 (*quoting Andrews*, 403 Ill. App. 3d at 664).

¶ 16 That said, we recognize that the trial court misadvised defendant that any prison sentence would be followed by two years of MSR. Although that term correctly applies to a Class 1 felony offense, as here, the trial court neglected to account for the nature of defendant's offense, which carries a MSR term of three years to life (730 ILCS 5/5-8-1(d)(4) (West 2006)). Nevertheless, the record clearly shows that the trial court informed defendant that an MSR term must follow any prison sentence that is imposed, and we reject defendant's assertion that due process requires a

remedy beyond the MSR statute. More importantly, defendant's MSR claim has no legal merit because there is no effectual relief that can be granted to him and remanding the matter for further postconviction proceedings would serve no purpose. *People v. McNulty*, 383 Ill. App. 3d 553, 558 (2008); *Porm*, 365 Ill. App. 3d at 795.

¶ 17 As for defendant's contention that his indeterminate MSR term is void pursuant to *Earley v. Murray*, 451 F. 3d 71 (2d Cir. 2006), we acknowledge the State's observation that this issue was not raised in defendant's postconviction petition (725 ILCS 5/122-3 (West 2010)), but note that an argument that an order or judgment is void "may be raised for the first time on appeal from the dismissal of a postconviction petition." *People v. Spears*, 371 Ill. App. 3d 1000, 1007 (2007). However, we find that defendant's claim that his MSR term is void "because it is an invalid administrative addition to a judicially-imposed sentence" has no legal merit. *Lee*, 2012 IL App (4th) 110403, ¶ 38. The MSR term is neither a negotiated release, nor a privilege; rather, it is a mandatory part of defendant's sentence, and contrary to defendant's position, the MSR term was not added to his sentence by the Department of Corrections. *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 23.

¶ 18 Moreover, we find defendant's reliance on *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), misplaced. First, the lower federal court decision in *Earley* is not binding on this court (*Wilson v. County of Cook*, 2012 IL 112026, ¶ 30). Thus, even if *Earley* was correctly decided, that decision "has absolutely no consequence in Illinois unless and until a court of this state endorses its analysis and then applies that analysis" to the MSR statute. *People v. Evans*, 2013 IL 113471, ¶ 15.

¶ 19 Second, we observe that *Earley* relied on *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 461-62 (1936), where the clerk of the court unilaterally modified a warrant of commitment by adding a provision requiring payment of imposed fines as a condition of release from imprisonment. The *Hill* Court held that the clerk did not have the authority to alter the sentence imposed by the court

and, thus, the additional provision was void. *Hill*, 298 U.S. at 465-67. Here, unlike *Hill*, the indeterminate MSR term was automatically imposed pursuant to a statute.

¶ 20 In *Earley*, a New York court sentenced defendant to a prison term, but did not expressly impose a term of post-release supervision (PRS). *Earley*, 451 F.3d at 73. Although a PRS term was statutorily required and the applicable statute provided that a prison sentence "includes a PRS term, as part thereof," the *Earley* court held that the PRS term was not part of defendant's sentence because the "additional provision for post-release supervision added by [the Department of Corrections] is a nullity." *Earley*, 451 F.3d at 76. In Illinois, MSR is automatically imposed by operation of law. *Evans*, 2013 IL 113471, ¶ 13.

¶ 21 Accordingly, we find that the IDOC correctly listed defendant's MSR term as "3 yrs to life—to be determined," and pursuant to our authority under Rule 615(b) (eff. Aug. 27, 1999), we order that the mittimus be corrected to reflect an indeterminate MSR term of three years to natural life. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 52.

¶ 22 For the reasons stated, we affirm the summary dismissal of defendant's postconviction petition.

¶ 23 Affirmed; mittimus corrected.