2014 IL App (1st) 122251-U

FOURTH DIVISION
March 13, 2014

No. 1-12-2251

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. 94CR8934
	)	
KENYATTA TURNER,	)	The Honorable
	)	Frank Zelezinski,
Petitioner-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Dismissal of petitioner's section 2-1401 petition affirmed where: (1) petition was untimely, issue was forfeited and, even considering the issue on the merits, petitioner's claim that the trial court's error of misadmonishing him at his guilty plea hearing regarding mandatory supervised release requires this court to modify his sentence is meritless; and (2) petitioner's constitutional challenge to the automatic transfer statute is rejected.

¶ 2 Petitioner appeals the circuit court's summary dismissal of his *pro se* petition for relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)).

On appeal, petitioner contends that the circuit court erred in dismissing his petition and that: (1)

this court should reduce his sentence because the trial court mis-admonished him when he pled guilty regarding the amount of Mandatory Supervised Release (MSR) he would be required to serve; and (2) this court should find the automatic transfer provision of the Juvenile Court Act of 1987 (JCA) (705 ILCS 405/5-130 (West 2010)), pursuant to which petitioner's case was automatically transferred, unconstitutional, vacate petitioner's adult convictions, and remand this cause to juvenile court. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1994, petitioner Kenyatta Turner was charged with attempt first degree murder, armed robbery, seven counts of armed violence, criminal sexual assault, burglary, five counts of aggravated battery, two counts of aggravated unlawful restraint, and nine counts of aggravated criminal sexual assault for raping a mother in her vehicle whose young child was also in the vehicle and, after raping the mother, stabbing the mother with a knife approximately 40 times. Petitioner was 16 years old at the time. Pursuant to a negotiated plea agreement, petitioner, 17 years old by that time, pled guilty to one count of attempt murder, one count of armed robbery, and one count of aggravated criminal sexual assault. The remaining counts were nolle prossed by the State. The trial court sentenced petitioner as an adult to 30 years' imprisonment for attempt first degree murder; 30 years' imprisonment for armed robbery, to be served concurrent to the attempt murder sentence; 28 years' imprisonment for aggravated criminal sexual assault, to be served consecutively to the attempt murder and armed robbery sentence, for a total of 58 years' imprisonment.

¶ 5 In April 1995, the court held a plea hearing. At the hearing, the court recited the charges

faced by petitioner:

> "THE COURT: The charges against you are that on March 1st, 1994, at and within the County of Cook, you committed the offense of attempt first degree murder in that you without lawful justification and with the intent to commit the offense of murder, you intentionally and knowingly, attempted to kill [the victim], by stabbing her, in violation of Chapter 38, Section 8-4 (38-9-1) of the Illinois Revised Statute 1989, as amended. The other count reads that on or about March 1st, 1994, within the County of Cook, you committed the offense of armed robbery. In that you while armed with a dangerous weapon to-wit: a knife, took a cash station card, and United States currency from the person of [the victim] by the use of force, or by threatening the imminent use of force in violation of Chapter 38, Section 18-2A of the Illinois Revised Statues 1989, as amended. And the third charge reads that on or about March 1st of 1994, at and within the County of Cook, you committed the offense of aggravated criminal sexual assault in that you committed the offense of sexual penetration upon [the victim's] vagina and displayed, threatened to use or used a dangerous weapon,, to-wit: a knife, in violation of Chapter 38, Section 12-14-A(1) of the Illinois Revised Statutes 1989 as

amended. Do you understand the charges against you?"

Petitioner replied affirmatively. The court then described the penalties for these offenses:

"THE COURT: Now, the law provides certain penalties for these offenses when convicted either after trial, or upon a plea of guilty. These are all Class X felonies which means you can be sentenced anywhere from the minimum of six years in the Illinois Department of Corrections to the maximum of thirty years in the Illinois Department of Corrections or any number of years and months between six years to thirty years, so long as it is for a definite number of years. But if the crime is of a heinous nature and the behavior is wanton cruelty, you would be liable for an extended term, a sentence of from thirty years in the Illinois Department of Corrections to a maximum of sixty years in the Illinois Department of Corrections or any number of years or months between thirty years or sixty years, so long as it is for a definite period of time.

Finally, you would be required to serve one year of supervised release which is supervised by the Illinois Department of Corrections. If you did not follow all of their rules and regulations, they would return you to the penitentiary."

¶ 6 The court then explained consecutive and concurrent sentences, and told petitioner:

"[THE COURT: Now, it is important in this case because in your

particular case what is gong to happen is I am going to sentence you to a thirty year term, on the charges of murder and the armed robbery charge. Those will run concurrent with each other. But they will be consecutive to the aggravated criminal sexual assault charge for which you are receiving twenty-eight years on. So, your total sentence will be fifty-eight years in the Illinois Department of Corrections. And that is how the Illinois Department of Corrections will interpret that order.

Now, in so far as probation, conditional discharge, and periodic imprisonment that is not possible for these offenses. Do you understand that?"

Petitioner responded affirmatively, and agreed that he wished to plead guilty.

¶ 7 Then petitioner, who was represented by counsel, agreed to the following factual basis underlying his guilty plea:

"THE COURT: Can I have a factual basis?

[ASSISTANT STATE'S ATTORNEY LYNN:] Yes, the evidence would show that on March 1st of 1994, shortly after 5:00, at the Jewel Food Store, at 130 South Orchard Boulevard, Park Forest, Cook County, Illinois. [The victim] took her twenty-two-month-old child, to the supermarket. Unbeknownst to her, the Defendant had slipped into her van and laid in wait for her. The Defendant

would be identified in open court.

The Defendant saw her exit the van with her child to go into that store. The Defendant slipped into her van and laid in wait for her. [The victim] returned with her son and some groceries. She then placed her child inside. Then she turned around to place the groceries inside, when she was confronted by the Defendant. The Defendant ordered the victim into the van or else he would hurt the baby, Brandon.

Once inside, the Defendant demanded [the victim's] purse. Then at knifepoint, the Defendant forced the victim to submit to vaginal intercourse. After raping [the victim], the Defendant then took what money the victim had on her, $2.00 United States Currency. The Defendant demanded more money, but the victim did not have any more. The Defendant then began stabbing [the victim] repeatedly. He stabbed her in the neck, stabbed her in the face, stabbed her in the left chest, stabbed her in the left abdomen, the lower back. The victim was stabbed approximately forty times. The Defendant used such force that he bend the blade of the knife, attempting to kill [the victim].

In his confession, the Defendant after being advised of his rights, indicated that after he had completed the rape of the victim

> in this case, he states, 'When I was done, I covered my face, so she couldn't identify me. I thought to myself, should I kill her or not? I figured she could identify me, so I had to kill her. I pushed her down by the neck. I figured this would kill her real quick. It didn't. She started to struggle and wrestle with me over the knife. The baby was crying, and would not stop. I stabbed her in the ribs. And she also kept fighting. I stabbed her in the leg. I was trying to kill her, but she kept fighting. That is when the police came. I got up to the front seat. I dropped the knife.' That would be the conclusion of the statement."

¶ 8 The trial court then asked petitioner if he had any questions about "anything" that had happened in court that day, and petitioner said he did not. The court then asked petitioner if he wished to plead guilty, and petitioner replied affirmatively. The court accepted his guilty plea.

¶ 9 The trial court then sentenced petitioner as an adult to 30 years' imprisonment for attempt first degree murder; 30 years' imprisonment for armed robbery, to be served concurrent to the attempt murder sentence; 28 years' imprisonment for aggravated criminal sexual assault, to be served consecutively to the attempt murder and armed robbery sentence, for a total of 58 years' imprisonment. It specifically credited petitioner to 407 days of presentence incarceration. The trial court did not mention the imposition of MSR at this time. Petitioner's mittimus does not reflect a specific order for MSR. The court specifically noted that petitioner was a juvenile sentenced as an adult.

¶ 10 Petitioner was imprisoned. Petitioner did not file a post-plea motion or an appeal.

¶ 11 In February 2012, petitioner filed the instant *pro se* petition for relief under section 2-1401 of the Code. In it, petitioner alleged that, prior to entering into his fully negotiated guilty plea, the court admonished him that he would be required to serve only one year of MSR and that later, while incarcerated, he learned that he would actually have to serve a three-year term of MSR. Petitioner alleged he did not receive the benefit of his bargain and his plea was not knowingly and voluntarily entered because the Illinois Department of Corrections was imposing a longer mandatory supervised release term than the one-year term mentioned at his plea hearing. He requested that the court reduce his prison sentence by two years to account for the additional two years of MSR to which he did not agree and about which he was not informed.

¶ 12 The State filed a motion to dismiss, arguing that the petition was untimely and that *People v. Whitfield*, 217 Ill. 2d 177 (2006), did not apply to petitioner's case because petitioner's case became final before *Whitfield* was decided, and *Whitfield* does not apply retroactively.

¶ 13 Following a hearing on the motion, the trial court granted the State's motion to dismiss. In so doing, it found petitioner's section 2-1401 petition was untimely, and that there was no basis for excusing the untimeliness. The court also found that *Whitfield* could not be applied retroactively to petitioner's case. Additionally, the court found petitioner was advised of a mandatory supervised release period, which is precisely what *Whitfield* requires.

¶ 14 Petitioner appeals.

¶ 15 II. ANALYSIS

¶ 16 i. Mandatory Supervised Release

¶ 17 Petitioner first contends that the trial court erred in dismissing his section 2-1401 petition because he was denied due process of law where he did not receive the benefit of his bargained-for agreement. Specifically, petitioner argues the trial court mis-admonished him before he entered into his negotiated plea agreement that he would serve only 1 year of MSR after the completion of his agreed-upon sentence, rather than the actual required 3 years. Petitioner asks this court to subtract his MSR term from his sentence to conform the sentence to his understanding of his bargain, as the court did in *Whitfield*. He argues that a 2-year reduction in his sentence, giving him a 56-year prison sentence plus a 3-year MSR term, for a total of 59 years would give him the benefit of his bargained-for plea agreement. In lieu of that remedy, petitioner asks that we remand this cause to the trial court with directions to recharacterize his *pro se* motion as a postconviction petition.

¶ 18 Section 2-1401 of the Code provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. *People v. Vincent*, 226 Ill. 2d 1,7 (2007); see also *People v. Haynes*, 192 Ill. 2d 437, 460 (2000). "Section 2-1401 is intended to correct errors of fact, unknown to the petitioner and the court at the time of the judgment, which would have prevented the rendition of the judgment had they been known." *People v. Muniz*, 386 Ill. App. 3d 890, 893 (2008). Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases. *Vincent*, 226 Ill. 2d at 7.

¶ 19 In considering a section 2-1401 petition, the court must determine whether facts exist that were unknown to the court at the time of trial and would have prevented judgment against the

petitioner. *People .v. Welch*, 392 Ill. App. 3d 948, 952 (2009). To be entitled to relief under section 2-1401, petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003); see also *Vincent*, 226 Ill. 2d at 7-8 ("Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition."). The petition must be supported by affidavit or other appropriate showing as to matters not of record. *Vincent*, 226 Ill. 2d at 6; 735 ILCS 5/2-1401(b) (West 2010).

¶ 20 Additionally, a section 2-1401 petition must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (2010); see also *Vincent*, 226 Ill. 2d at 7; *Pinkonsly*, 207 Ill. 2d at 566. A section 2-1401 petition filed beyond the two year limitation will normally not be considered. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). An exception to the two-year period has been recognized, however, where a clear showing has been made that the person seeking relief is: (1) under legal disability or duress or (2) the grounds for relief are fraudulently concealed. *Pinkonsly*, 207 Ill. 2d at 566. Additionally, the two-year limitations period does not apply to petitions brought on voidness grounds. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Where, as here, a section 2-1401 is dismissed with prejudice on the pleadings, the standard of review is *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 21 Initially, the State argues that the trial court properly dismissed petitioner's section 2-1401 petition because it was untimely, as it was filed more than two years after the entry of the order or judgment, as required in section 2-1401(c). 735 ILCS 5/2-1401(c) (West 2010). On appeal, petitioner acknowledges that the petition was filed beyond the statutory two-year timeframe, but cites section 2-1401(c) ("the time during which the ground for relief is fraudulently concealed from defendant shall not count against the two-year time period") to argue that his petition "establishes grounds sufficient to excuse his failure to file the petition within the statutorily required two years," because his cause fits the "fraudulently concealed" exception to the two-year rule. See *Pinkonsly*, 207 Ill. 2d at 566 (An exception to the two-year period has been recognized, however, where a clear showing has been made that the person seeking relief is: (1) under legal disability or duress or (2) the grounds for relief are fraudulently concealed.). Specifically, petitioner argues that the allegations in his petition that "he did not learn of the issue regarding his MSR until some time after he was incarcerated," such that he "could not be expected to raise a claim regarding the court's erroneous admonishments until he first became aware that the admonishments were indeed erroneous" are sufficient to toll the two-year statutory limitation period. We disagree.

¶ 22 To make a successful showing of fraudulent concealment, the petitioner must specifically allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief, as well as offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period. See *People v. Coleman*, 206 Ill. 2d 261, 290 (2002). Petitioner pled guilty and was

sentenced in April 1995. He filed his section 2-1401 petition in February 2012, far outside of the two-year statutory period. Although he claims he "recently" discovered his claim, he fails to point to any affirmative act or representation that prevented him from discovering the claim sooner. Our review of the record reveals that the trial court mentioned mandatory supervised release during petitioner's plea hearing. Petitioner admits the trial court informed him he would have to serve an MSR term at the end of his sentence. Petitioner has failed to allege any grounds that we could consider to be fraudulent concealment in the context of tolling the statutory limitation period. In sum, petitioner's representation that he "recently" discovered, while researching in the prison law library, that he might have a claim regarding his MSR and sentence, is insufficient to show the affirmative acts designed to prevent discovery of the cause of action or ground for relief such that the two-year statute of limitations would be tolled. See *Coleman*, 206 Ill. 2d at 290. As such, the trial court did not err in finding his petition untimely.

¶ 23 Additionally, petitioner has forfeited this claim by failing to raise it in a post-plea motion or on direct appeal. See *People v. Newman*, 365 Ill. App. 3d 285, 290 (2006). Petitioner was informed by the trial court (albeit misinformed of the exact amount of MSR to attach) that an MSR term would attach to his sentence. Petitioner admits in his 2-1401 petition that he was so informed ("[T]he trial Court, admonished the petitioner of the possible penalties and informed him albeit incorrectly that, 'Finally, you would be required to serve one year of supervised release.' ") There was sufficient information available to petitioner that he could have raised the MSR issue in a post-plea motion or on direct appeal. Petitioner failed to do either, arguing in the instant petition that he only just discovered the claim while "doing legal research in the prison

library." Petitioner does not explain what prevented him from doing said research 17 years ago, when he could potentially have included this claim in a post-plea motion or a direct appeal. Petitioner has forfeited this issue.

¶ 24 Forfeiture and timeliness notwithstanding, even if petitioner had filed his petition in a timely manner and had properly preserved this issue, we would still find no error in the trial court's dismissal of the petition, where the arguments contained within the petition are without legal merit.

¶ 25 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) 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).

¶ 26 Rule 402 provides, in pertinent part:

"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[.] " Supreme Court Rule 402(a)(2), (b).

¶ 27 Petitioner maintains that the court erred in dismissing the petition, arguing that he is entitled to relief because the trial court mis-admonished him regarding his three-year MSR term when he pled guilty. The court dismissed the complaint finding, in pertinent part, that *Whitfield* did not apply, both because: (1) *Whitfield* does not apply retroactively; and (2) *Whitfield* is distinguishable where the *Whitfield* defendant was not advised of any MSR term, but here, petitioner was advised, albeit mis-advised. 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 the one to which he agreed. *Whitfield*, 217 Ill. 2d at 181. Our supreme court found:

> "[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.

¶ 28 Later, in *Morris*, 236 Ill. 2d 345, 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."

¶ 29 Important to the case at bar, our supreme court conducted a retroactivity analysis and concluded that "the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced." *Morris*, 236 Ill. 2d at 365.

¶ 30 Here, petitioner pled guilty and was sentenced on April 11, 1995. Petitioner did not file post-plea motions nor attempt to perfect an appeal from the judgment entered on his conviction. Therefore, petitioner's conviction was finalized prior to the *Whitfield* decision was announced in 2005. The circuit court did not err in determining that retroactive relief under *Whitfield* is not available to petitioner. See *Morris*, 236 Ill. 2d at 361; see also *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010) (where defendant pled guilty in 2000 and did not file postplea motions or attempt to perfect an appeal from the judgment entered on his conviction, defendant's conviction was finalized before the *Whitfield* decision was announced and retroactive relief under *Whitfield* was unavailable to him). The *Whitfield* remedy is not available to petitioner.

¶ 31 Prior to *Whitfield*, courts held that a defendant's due process rights were not violated by faulty MSR admonishments when the defendant entered his guilty plea knowingly and voluntarily. See *People v. Wills*, 61 Ill. 2d 105, 110 (1975); *Morris*, 236 Ill. 2d at 360 ("Prior to *Whitfield*, Illinois courts routinely held that a defendant's right to due process was protected even in the face of a faulty MSR admonishment, as long as the defendant's plea was entered knowingly and voluntarily"). Additionally, courts determined prior to *Morris* that informing a defendant of the MSR term at some point prior to accepting the plea was sufficient, although incorporation of the admonishment at sentencing was the best practice. See, *e.g.*, *People v. Borst*, 372 Ill. App. 3d 331, 334 (2007); *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007). Petitioner here does not argue his plea was not knowingly and voluntarily made, but instead argues only that he was denied the benefit of the bargain struck when entering into his guilty plea. Regardless, we note the record indicates that, prior to accepting the plea, the trial court admonished petitioner of the minimum and maximum sentence prescribed by law, confirmed the terms of the plea agreement, and admonished petitioner that he would be required to serve a term of MSR. Additionally, petitioner affirmatively stated he understood the charges against him, understood the sentence to be imposed upon him, and agreed that he wished to plead guilty. Where the *Whitfield* remedy is unavailable to petitioner, and petitioner's plea was entered knowingly and voluntarily, the trial court's dismissal of his 2-1401 petition was proper. See, *e.g.*, *Morris*, 236 Ill. 2d at 360

¶ 32 In addition, petitioner 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 fact, the argument made by petitioner here has already been considered and rejected by this court in *Demitro*, 406 Ill. App. 3d at 957; see also *People v. Hildenstein*, 2012 IL App (5th) 100056, ¶ 19. Petitioner acknowledges this, but argues that *Demitro* was wrongly decided. We disagree.

¶ 33 In *Demitro*, the First District, Sixth Division expressly rejected this precise argument, holding that *Whitfield* was dependent upon, not independent of, *Santobello*. The *Demitro* court explained:

> "In *Morris*, 236 Ill. 2d at 361, the supreme court explained that its decision in *Whitfield* expressly relied on *Santobello*. The court also explained that the opinion in *Whitfield* was in conformity with precedent recognizing that the defendant was entitled to the bargained-for benefit in his negotiated plea. *Morris*, 236 Ill. 2d at 361. Where *Whitfield* was the first time the supreme court relied on *Santobello*, defendant cannot avoid the effect of its progeny *Whitfield* and its limitation to prospective application under *Morris*." *Demitro*, 406 Ill. App. 3d at 957.

Similarly, petitioner here cannot rely on *Santobello* to circumvent the non-retroactivity holding of *Morris*. We find no error in the circuit court's dismissal of petitioner's section 2-1401 petition.

¶ 34 In reaching this conclusion, we also reject petitioner's request to remand this cause to the

trial court with directions to recharacterize it as a postconviction petition. Petitioner argues in his brief that the circuit court abused its discretion by failing to recharacterize his *pro se* section 2-1401 petition as a postconviction petition. Our supreme court has held that a trial court may treat a defendant's *pro se* pleading as a postconviction petition if the pleading alleges a deprivation of rights cognizable in a postconviction proceeding. *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005). However, the court is not required to do so. *Shellstrom*, 216 Ill. 2d at 53 n. 1. Petitioner's argument is without merit because a trial court has no obligation to recharacterize a *pro se* pleading (see *Shellstrom*, 216 Ill. 2d at 53 n.1), and a court's decision not to recharacterize a defendant's *pro se* pleading cannot be reviewed for error (see *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010)). Because the trial court here did not treat petitioner's section 2-1401 as a postconviction petition, petitioner can make no colorable argument that this court should review such decision.

¶ 35 ii. The Automatic Transfer Provision of the Juvenile Court Act

¶ 36 Next, petitioner contends that the automatic transfer provision of the JCA (705 ILCS 405/5-130 (West 2010)) is unconstitutional. Specifically, petitioner argues that the automatic transfer provision violates the due process clauses of the United States and Illinois Constitutions, the prohibition against cruel and unusual punishment found in the eighth amendment to the United States Constitution, and the proportionate penalties clause of our state constitution, because it automatically mandates that juveniles like himself be subject to the same sentencing scheme as adults. We disagree.

¶ 37 Initially, we note that, although petitioner did not raise the constitutionality of the

automatic transfer provision in the trial court, the constitutionality of a statute may be raised at any time. *People v. Farmer*, 2011 IL App (1st) 083185, ¶ 16.

¶ 38 The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *People v. McChriston*, 2014 IL 115310, ¶ 15; *People v. Ramirez*, 214 Ill. 2d 176, 179 (2005). A statute is presumed to be constitutional and, thus, the party challenging it bears the burden of clearly demonstrating its invalidity. See *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 290 (2003); accord *People v. Bailey*, 167 Ill. 2d 210, 225 (1995); *People v. Zapata*, 347 Ill. App. 3d 956, 966 (2004). We are duty-bound to construe a statute in a manner that upholds its validity and constitutionality, if this can reasonably be done. See *Cryns*, 203 Ill. 2d at 290-91; accord *In re C.E.*, 161 Ill. 2d 200, 227 (1994); *People v. Cosby*, 305 Ill. App. 3d 211, 224 (1999) (we must affirm statute's constitutionality and validity whenever possible). In examining a statute's constitutionality, we employ a *de novo* standard of review. See *Zapata*, 347 Ill. App. 3d at 967.

¶ 39 While the purpose of the Juvenile Court Act is the rehabilitation of the minor (705 ILCS 405/5-101(c) (West 2010)), the purpose and policy section of the Juvenile Court Act has been amended to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system that will protect the community, impose accountablity for violations of law, and equip juvenile offenders with competencies to live responsibly and productively (705 ILCS 405/5-101 (West 2010)). Enumerated purposes of the Juvenile Court Act now include to "protect citizens from juvenile crime," and to "hold each juvenile offender directly accountable for his or her acts." 705 ILCS 405/5-101(a), (b) (West 2010). Our supreme court has recognized

that these amendments "represent a *** shift from the singular goal of rehabilitation to include the overriding concerns of protecting the public and of holding juveniles accountable for violations of the law." *In re J.W.*, 204 Ill. 2d 50, 69 (2003).

¶ 40 The automatic transfer provision of the JCA excludes juveniles over 15 years of age who are charged with particular enumerated crimes from juvenile court jurisdiction. 705 ILCS 405/5-130 (West 2010). Our supreme court has upheld the automatic transfer provision as constitutional. See *People v. J.S.*, 103 Ill. 2d 395, 405 (1984); *People v. M.A.*, 124 Ill. 2d 135, 147 (1988). Petitioner acknowledges that our supreme court "previously rejected challenges to the mandatory transfer scheme twenty and thirty years ago," but argues that those cases are "no longer valid in light of the United States Supreme Court's recent watershed decisions."

¶ 41 Petitioner claims a number of deformities with the automatic transfer statute, arguing that the automatic transfer provision violates both substantive and procedural due process. Specifically, petitioner claims the statute is unconstitutional because "Illinois' statutory scheme entirely prohibits any consideration of the offender's youth and attendant characteristics before requiring imposition of a mandatory adult penalty." He asks that this court vacate his adult convictions and remand the cause to the juvenile court for a transfer hearing. Petitioner cites to United States Supreme Court cases *Roper v. Simmons*, 543 U.S. 551, 567 (2005), *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012), to argue that juveniles are constitutionally different from adults and should therefore not be automatically transferred to the adult system. We note here that each of these cases, *Roper, Graham*, and *Miller*, have been distinguished by this court on the basis that they, unlike the case

at bar, involved direct challenges to the sentencing statutes themselves, rather than to the procedure that exposed the defendant to an adult sentencing scheme. *Jackson*, 2012 IL App (1st) 100398, ¶¶ 19, 24; *People v. Salas*, 2011 IL App (1st) 091880, ¶¶ 66, 67.

¶ 42 Petitioner also contends that the transfer statute violates the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution, arguing that Illinois' "statutory scheme is cruel and unusual because it mandates adult sentencing for all juveniles who are subject to automatic transfer. It is true that some juveniles may deserve to receive an adult sentence. But, the transfer statute presupposes that every child subject to it shares none of the inherent characteristics of youth that the Supreme Court has repeatedly said render juveniles categorically less culpable than adults." Petitioner argues that the transfer statute also violates the proportionate penalties clause "because it precludes a judge's consideration of mitigating factors such as youth, even though minors differ from adults."

¶ 43 Each of the issues raised by petitioner here have consistently been rejected by our courts. See, *e.g.*, *People v. Pacheco*, 2013 IL App (4th) 110409 (appeal allowed, 996 N.E. 2d 20, 374 Ill. Dec. 573 (Ill. Sep. 25, 2013) (Table No. 116402)); *People v. Jackson*, 2012 IL App (1st) 100398; *People v. Salas*, 2011 IL App (1st) 091880. We briefly review some of the relevant cases here.

¶ 44 *Due Process Argument*

¶ 45 In *Jackson*, 2012 IL App (1st) 100398, the First District, Second Division held that the automatic transfer provision did not violate the defendant's substantive and procedural due process rights. *Jackson*, 2012 IL App (1st) 100398, ¶ 17. In *Pacheco*, the Fourth District of this court also found that the automatic transfer statute does not violate a juvenile offender's due

process rights, noting:

> "Illinois courts have found the automatic transfer statute does not violate a juvenile offender's substantive and procedural due process rights. See *People v. J.S.*, 103 Ill. 2d 395, 402-05, 83 Ill. Dec. 156, 469 N.E. 2d 1090, 1094-95 (1984); *People v. Patterson*, 2012 IL App (1st) 101573, ¶ 27, 363 Ill. Dec. 818, 975 N.E. 2d 1127; *People v. Croom*, 2012 IL App (4th) 100932, ¶¶ 13-18, 363 Ill. Dec. 798, 975 N.E. 2d 1107; *Jackson*, 2012 IL App (1st) 100398, ¶¶ 13-17, 358 Ill. Dec. 552, 965 N.E. 2d 623; *Salas*, 2011 IL App (1st) 091880, ¶¶ 75-79, 356 Ill. Dec. 442, 961 N.E. 2d 831; *People v. Reed*, 125 Ill. App. 3d 319, 322-25, 80 Ill. Dec. 694, 465 N.E. 2d 1040, 1042-44 (1984). In *Croom*, 2012 IL App (4th) 100932, ¶ 16, 363 Ill. Dec. 798, 975 N.E. 2d 1107, this court noted *Roper* and *Graham* did not consider due process arguments and found those cases distinguishable because each 'applied (1) a different analysis (2) under a different test for (3) an alleged violation of a different constitutional provision regarding severe sentencing sanctions–not the automatic transfer to adult court at issue here.' *Miller* does not require a different result because it only dealt with eighth-amendment arguments and not substantive and procedural due process." *Pacheco*, 2013 IL App (4th) 110409 (appeal allowed,

996 N.E. 2d 20, 374 Ill. Dec. 573 (Ill. Sep. 25, 2013) (Table No. 116402)).

¶ 46 *Cruel and Unusual Punishment; Proportionate Penalties Argument*

¶ 47 In *Salas*, 2011 IL App (1st) 091880, the First District, First Division decided, in pertinent part, that the automatic transfer statute did not violate the Eighth Amendment's prohibition against cruel and unusual punishment because "it does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant's case is to be tried, *i.e.*. it provides for the forum in which his guilt may be adjudicated." *Salas*, 2011 IL App (1st) 091880, ¶ 66; accord *Jackson*, 2012 IL App (1st) 100398, ¶ 23. Additionally, it found:

> "As discussed above, the Supreme Court determined from recent sociological and scientific studies that juveniles have lessened culpability than adults and are less deserving of the most severe punishments, such as the death penalty in a homicide case or natural life in prison in a nonhomicide case. *Roper*, 543 U.S. at __, 130 S.Ct. at 2016. Accordingly, the Supreme Court held that such punishments violate the eighth amendment. *Roper*, 543 U.S. at __, 130 S.Ct. at 2034. However, the automatic transfer statute does not itself impose any punishment on defendant, but merely provides the forum where his guilt will be adjudicated. In the absence of any punishment imposed by the automatic transfer

> statute, the eighth amendment has no application here regardless of defendant's lessened culpability." *Salas*, 2011 IL App. (1st) 091880, ¶ 68.

In addition, the *Salas* court found, using the same analysis, that the automatic transfer provision does not violate the Illinois proportionate penalties clause:

> "Our analysis of defendant's eighth amendment challenge also applies to his proportionate penalties challenge. The Illinois Supreme Court has held: the 'proportionate penalties clause is coextensive with the cruel and unusual punishment clause. [Citation.] Both clauses apply only to the criminal process–that is, to direct actions by the government *to inflict punishment.*' (Emphasis added.) *In re Rodney H.*, 223 Ill. 2d 510, 518, 308 Ill. Dec. 292, 861 N.E. 2d623 (2006). The automatic transfer statute imposes no penalty or punishment and so neither the proportionate penalty clause nor the *Roper* and *Graham* analysis applies here." *Salas*, 2011 IL App (1st) 091880, ¶ 70.

¶ 48 Similarly, in *Jackson*, 2012 IL App (1st) 100398, the First District, Second Division agreed with *Salas* and found that the automatic transfer provision does not violate the proportionate penalties clause. *Jackson*, 2012 IL App (1st) 100398, ¶ 22; accord *Pacheco*, 2013 IL App (4th) 110409. Additionally, the *Jackson* court determined that the automatic transfer provision does not violate the prohibition against cruel and unusual punishment, noting:

> "The automatic transfer provision is not a penalty provision in even the broadest sense. It merely dictates for a small class of older juvenile defendants who are charged with the commission of certain heinous crimes where their cases are to be tried. Guilt has not been determined at this stage, let alone what punishment, if any, should be imposed. The automatic transfer provision does not dictate any form of punishment as that term is used throughout criminal statutes. Because the automatic transfer provision does not mandate or even suggest a punishment, any analysis as to whether or not it violated the eighth amendment's proscription against cruel and unusual punishment is futile. The automatic transfer provision does not impose any punishment. Therefore, it is not subject to the eighth amendment." *Jackson*, 2012 IL App (1st) 100398, ¶ 24.

¶ 49 In this case, petitioner offers no new argument which would cause us to depart from the well-reasoned decisions in the above cases. Thus, petitioner's constitutional challenge to the automatic transfer provision fails.

¶ 50 III. CONCLUSION

¶ 51 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 52 Affirmed.