NO. 4-10-0846 Filed 5/31/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ANTHONY JONES, Plaintiff-Appellant, v. MICHAEL P. RANDLE and THE DEPARTMENT OF CORRECTIONS, Defendants-Appellees.	)))))))	Appeal from Circuit Court of Sangamon County No. 10MR219 Honorable Peter C. Cavanagh, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

Held: (1) Where plaintiff failed to show his statutory maximum sentence and its term of mandatory supervised release (MSR) was void, the trial court did not err in dismissing his motion for declaratory judgment;

(2) Where murder cannot serve as the predicate felony for armed violence, no proportionate-penalties violation existed; and

(3) Where plaintiff's arguments on his extended-term sentence were without merit or forfeited, he was not entitled to relief.

In February 2010, plaintiff, Anthony Jones, an inmate at the Pinckneyville Correctional Center, filed a *pro se* complaint for declaratory judgment. In June 2010, defendants, Michael P. Randle and the Illinois Department of Corrections, filed a motion to dismiss. In October 2010, the trial court dismissed plaintiff's cause of action.

On appeal, plaintiff argues the trial court erred in granting defendants' motion to dismiss. We affirm.

I. BACKGROUND

Plaintiff was convicted of the 1986 murder of his great-grandmother and the aggravated battery of her caregiver. *People v. Jones*, 334 Ill. App. 3d 61, 63, 777 N.E.2d 449, 451 (2002). In 1987, the trial court sentenced him to an extended term of 80 years in prison for murder and a concurrent 5-year term for the aggravated battery.

In February 2010, plaintiff filed a *pro se* complaint for declaratory judgment, asking the trial court to declare his "83-year sentence" for murder void. Plaintiff complained the 3-year MSR term unlawfully lengthened his sentence to 83-years in prison. Plaintiff argued the sentence was void and asked the court to vacate it.

In June 2010, defendants filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2008)). Defendants argued the MSR term is constitutional and is "in addition" to the sentence imposed by the trial court.

In October 2010, the trial court dismissed plaintiff's complaint, finding the additional time added to his sentence was MSR, which was constitutional. This appeal followed.

II. ANALYSIS

A. MSR

Plaintiff argues the trial court erred in granting defendants' motion to dismiss. Plaintiff contends his "83-year sentence" is void as it exceeded the maximum extended term of 80 years. We disagree.

A motion to dismiss under section 2-615 of the Procedure Code challenges only the legal sufficiency of the complaint. *Pickel v. Springfield Stallions, Inc.*, 398 Ill. App. 3d 1063, 1066, 926 N.E.2d 877, 881 (2010). In ruling on a section 2-615 motion to dismiss, "the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.'" *Green v. Rogers*, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 458-59 (2009) (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004)). The trial court should not grant the motion to dismiss "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009). We review an order granting a section 2-615 motion to dismiss *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57, 896 N.E.2d 327, 331 (2008).

According to section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2008)), "every

sentence shall include as though written therein a term in addition to the term of imprisonment." According to section 3-3-3(c) of the Code (730 ILCS 5/3-3-3(c) (West 2008)), "every person sentenced to imprisonment *** shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the [MSR] provisions of paragraph (d) of [s]ection 5-8-1 of this Code." A person convicted of murder is subject to an MSR term of three years. 730 ILCS 5/5-8-1(d)(1) (West 2008).

Plaintiff's argument that the three-year MSR term caused his sentence to exceed the statutory maximum is without merit. "Terms of mandatory supervised release are imposed by statute 'in addition' to imprisonment and cannot be stricken by the courts." *Owens v. Snyder*, 349 Ill. App. 3d 35, 45, 811 N.E.2d 738, 746 (2004). Plaintiff has not alleged the sentencing court failed to advise him he would serve a three-year MSR term in addition to his term of imprisonment. Thus, the MSR term applicable to plaintiff did not render his sentence void, and the trial court did not err in dismissing his complaint.

B. Proportionate-Penalties Clause

Although not raised in his motion for declaratory judgment, plaintiff argues his 80-year extended sentence for murder violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) and must be

vacated. We note the Attorney General offers no response to plaintiff's argument.

The proportionate-penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. A defendant's sentence can violate the proportionate-penalties clause if, *inter alia*, the sentence "is greater than the sentence for an offense with identical elements." *People v. Hauschild*, 226 Ill. 2d 63, 74, 871 N.E.2d 1, 7-8 (2007). "Where offenses with identical elements carry different sentences, the proportionate-penalties clause is violated." *People v. Coleman*, 399 Ill. App. 3d 1150, 1158, 927 N.E.2d 304, 310 (2010).

Here, we find the proportionate-penalties clause is not implicated.

> "The purpose of the armed[-]violence statute is to enhance the penalty for the underlying felony when a dangerous weapon is used in its commission. (*People v. Rudd* (1980), 90 Ill. App. 3d 22, 25-26, 412 N.E.2d 982, 984.) This purpose cannot be achieved where the underlying felony, whether based on armed conduct or unarmed conduct, carries a greater penalty than armed violence. The stiff pun-

ishment mandated by the armed[-]violence statute is intended to deter the criminal from carrying a weapon while committing a felony. (*People v. Alejos* (1983), 97 Ill. 2d 502, 509, 455 N.E.2d 48, 51.) The possibility of being charged with armed violence cannot possibly act as a deterrent to carrying a weapon while committing a murder because murder carries a stiffer penalty than does armed violence. Thus, the armed[-]violence statute can serve no deterrent purpose when applied to the offense of first-degree murder. Accordingly, just as a charge of armed violence cannot be predicated on the offenses of voluntary manslaughter (second-degree murder) (*Alejos*, 97 Ill. 2d at 513, 455 N.E.2d at 53) and involuntary manslaughter (*People v. Fernetti* (1984), 104 Ill. 2d 19, 24-25, 470 N.E.2d 501, 503) because it would have no deterrent effect, a charge of armed violence cannot be predicated on the offense of first-degree murder." *People v. Hobbs*, 249 Ill. App. 3d 679, 683, 619 N.E.2d 258, 261 (1993).

See also *People v. Alexander*, 354 Ill. App. 3d 832, 844, 822 N.E.2d 496, 507 (2004) (noting first-degree murder cannot serve as the predicate felony for armed violence).

As no offense of armed violence based on murder could be charged, no proportionate-penalties issue exists in plaintiff's case. Thus, he is not entitled to relief.

C. Extended-Term Sentence

In his reply brief, plaintiff makes several arguments about the extended-term nature of his sentence that were not raised in his motion for declaratory judgment or in his initial brief on appeal. A litigant forfeits argument on an issue by failing to raise it in his initial brief. *Berggren v. Hill*, 401 Ill. App. 3d 475, 479, 928 N.E.2d 1225, 1229 (2010). Moreover, "[i]ssues or arguments that a party fails to raise in its initial brief cannot later be raised in a reply brief." *People v. Sparks*, 315 Ill. App. 3d 786, 790, 734 N.E.2d 216, 220 (2000); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief"). Thus, we will not address those issues.

Plaintiff also contends this court should consider the constitutionality of the 1986 extended-term statute even though first raised in his reply brief. However, "issues raised for the first time in a reply brief, even when they deal with the constitutionality of a statute, may not be considered." *People v.*

Brooks, 377 Ill. App. 3d 836, 841, 885 N.E.2d 320, 324 (2007). Thus, we will not address this issue either.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.