

NOTICE

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FILED

July 1, 2014
Carla Bender
4th District Appellate
Court, IL

2014 IL App (4th) 130105-U

NO. 4-13-0105

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
STEVEN D. EASTON,)	No. 09CF531
Defendant-Appellant.)	
)	Honorable
)	Mitchell K. Shick,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Defendant was admonished his sentence would include a three-year term of mandatory supervised release.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because any request for review would be frivolous and without merit. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2009, the State charged defendant, Steven D. Easton, with unlawful criminal drug conspiracy (720 ILCS 570/405.1 (West 2008)) and unlawful possession of a controlled substance with intent to deliver (720 ILCS 401(a)(2)(B) (West 2008)).

¶ 5 In September 2010, the trial court held a plea hearing. The State informed the court it agreed to dismiss other charges, not file additional charges, and cap its sentencing recommendation to 20 years' imprisonment for each count. The court admonished defendant, in relevant part, as follows:

"THE COURT: Both of these counts *** are Class X felonies.

If you plead guilty or are found guilty of these counts, you could be sentenced from 9 to 40 years in the Department of Corrections [(Department)].

These are nonprobationable counts, meaning you cannot be sentenced to probation or conditional discharge. There must be a sentence within that range to the [Department].

You could be fined up to \$500,000 for these offenses.

There is a mandatory supervised release period of three years for each count. That is what we used to call parole. There is a mandatory supervised release period for three years if you plead guilty or are found guilty of these counts. Do you understand?

DEFENDANT EASTON: Yes, Your Honor.

* * *

THE COURT: Now, do you understand that the State is not agreeing to a term. Neither are you. ***

At the sentencing hearing, arguments could be made,

evidence can be offered, and it will be up to me, the sentencing judge, to determine the appropriate sentence within the range I have told you. Do you understand?

DEFENDANT EASTON: Yes, Your Honor.

THE COURT: And you understand there is no agreement as to what the sentence will be?

DEFENDANT EASTON: Yes.

* * *

THE COURT: Have any promises of any kind been made to you that have not been revealed to me?

DEFENDANT EASTON: No."

Defendant pleaded guilty to the two counts stated above.

¶ 6 In December 2010, the trial court held a sentencing hearing. The State and defense counsel made a "joint recommendation" defendant receive 12 years' imprisonment on each count, with the sentences to run concurrently. Defendant represented he agreed to this recommendation. The court sentenced defendant consistent with the recommendation. The court did not mention mandatory supervised release (MSR) in its oral pronouncement of sentence. The written sentencing judgment states defendant is sentenced to 12 years' imprisonment and three years' MSR on each count, with the sentences to run concurrently.

¶ 7 In December 2012, defendant filed a *pro se* postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2012)). Defendant alleged, "at no time during [his] sentencing hearing did the Honorable Judge advi[s]e

[him] or stipulate on record, nor in open court that [he] had to do any (MSR) [sic] upon his release from the [Department]." He argued (1) the enactment of the MSR statute violated separation of powers; and (2) his MSR term (a) was an extension of his sentence and deprived him of his liberty, (b) violated due process because it was not "a judicially imposed component of [his] sentence," and (c) was imposed by the Department. He requested his prison sentence be reduced by three years. In December 2012, the trial court, in a written order, summarily dismissed defendant's postconviction petition. Defendant did not appeal.

¶ 8 In January 2013, defendant filed a "Motion for Leave to File a Successive Post-Conviction Petition and Motion for Appointment of Counsel." Defendant asserted the December 2012 postconviction petition was a "draft." However, he did not repeat his previous arguments. He alleged, "[a]t no time during the plea bargain hearing or sentence [hearing] was the [d]efendant advised that he would be subject to an (MSR) [sic] term of (3) years following his (12) year sentence." He argued *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005), applied and the appropriate remedy was "to modify the sentence to (6) six years to serve in the [Department]. Followed by the (3), three year mandatory supervised release (MSR) [sic] term." In January 2013, the trial court summarily dismissed defendant's motion for leave to file a successive postconviction petition. The court found defendant's contention he was not admonished about MSR was contradicted by the record.

¶ 9 This appeal followed.

¶ 10 On February 24, 2014, OSAD moved to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court

granted defendant leave to file additional points and authorities by March 28, 2014. Defendant did not. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11

II. ANALYSIS

¶ 12

A. Standard of Review

¶ 13 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) provides a method for criminal defendants to assert their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). In reviewing a first postconviction petition, the trial court considers whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A criminal defendant must obtain leave to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2012). To obtain leave to file a successive postconviction petition, the petitioner must establish cause and prejudice to excuse his failure to raise the claim earlier or show actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23, 969 N.E.2d 829. Dismissal of a successive postconviction petition is reviewed *de novo*. *People v. Smith*, 2013 IL App (4th) 110220, ¶ 21, 986 N.E.2d 1274.

¶ 14

B. Merits of Defendant's Claims

¶ 15 Defendant's motion to file a successive postconviction petition failed to allege cause and prejudice or actual innocence. See 725 ILCS 5/122-1(f) (West 2012) (stating the requirements for cause and prejudice). Rather, he asserted his previous petition was a "draft" and proceeded to argue a *Whitfield* claim. There is no basis to characterize defendant's motion to file

a successive postconviction petition as a motion to amend his "draft" petition filed in December 2012. The order dismissing the December 2012 petition was a final judgment and defendant had no right to amend. See *Smith*, 2013 IL App (4th) 110220, ¶ 23, 986 N.E.2d 1274. Defendant's January 2013 petition must be considered as a successive petition.

¶ 16 In *Whitfield*, the defendant pleaded guilty pursuant to a negotiated plea agreement. In accordance with the plea agreement, the trial court sentenced the defendant to 25 years' imprisonment. At no time during the plea hearing did the court advise the defendant he would be subject to a three-year period of MSR following his 25-year prison sentence. *Whitfield*, 217 Ill. 2d at 179-80, 840 N.E.2d at 661. Before the supreme court, the defendant argued the State breached the plea agreement by adding the MSR and he received a more onerous sentence than the one which induced him to plead guilty. *Id.* at 186, 840 N.E.2d at 665. The supreme court found the trial court failed to admonish defendant, as required by Illinois Supreme Court Rule 402 (eff. July 1, 1997), an MSR term would be added to the agreed sentence. The supreme court found the defendant was never advised his agreed sentence would include the MSR term. *Id.* at 201, 840 N.E.2d at 673. The supreme court found the appropriate remedy, to approximate the promise which induced the defendant to plead guilty, was to modify his sentence to a term of 22 years' imprisonment, followed by a mandatory 3-year term of MSR. *Id.* at 205, 840 N.E.2d at 675.

¶ 17 The record shows the trial court admonished defendant in accordance with Rule 402 and informed him, before he pleaded guilty, any prison sentence would be followed by a mandatory three-year MSR term. Defendant's *Whitfield* claim must be rejected. See *People v. Lee*, 2012 IL App (4th) 110403, ¶ 23, 979 N.E.2d 992; *People v. Holt*, 372 Ill. App. 3d 650, 653,

867 N.E.2d 1192, 1195 (2007). Further, the record shows the State only agreed to dismiss other charges, not file additional charges, and "cap" its sentencing recommendation at 20 years' imprisonment on each count. It did not promise defendant a certain sentence and he cannot show he is entitled to the extraordinary remedy afforded to the defendant in *Whitfield*. See *Lee*, 2012 IL App (4th) 110403, ¶¶ 26-27, 979 N.E.2d 992; *Holt*, 372 Ill. App. 3d at 653-54, 867 N.E.2d at 1195 ("where the State only promises to recommend a certain sentence, the defendant does receive the benefit of the bargain he made with the State").

¶ 18 OSAD argues no colorable claim can be made defendant is not required to serve a term of MSR because the trial court did not make an oral pronouncement about MSR at the sentencing hearing. It acknowledges the supreme court recently rejected similar arguments in *People v. McChriston*, 2014 IL 115310, 4 N.E.3d 29, and reaffirmed MSR automatically attaches to any prison sentence (*id.* ¶ 23, 4 N.E.3d 29). See also *Lee*, 2012 IL App (4th) 110403, ¶ 32, 979 N.E.2d 992 (rejecting similar arguments). Further, it points out the written sentencing judgment stated defendant's sentence included a three-year MSR term. OSAD's argument is persuasive. However, this appeal concerns the dismissal of defendant's successive postconviction petition, which did not repeat the MSR-related arguments defendant presented in his initial postconviction petition. We decline to consider the merits of arguments not presented in the January 2013 petition.

¶ 19 III. CONCLUSION

¶ 20 We grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 21 Affirmed.