FIFTH DIVISION
June 16, 2017

No. 1-15-3138

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

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Respondent-Appelee,	)	
	)	
v.	)	No. 08 CR 3590
	)	
SHAUN JACKSON,	)	
	)	Honorable
Petitioner-Appellant.	)	Diane Cannon,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the circuit court's dismissal of defendant's postconviction petition where he was adequately admonished during his guilty plea that a mandatory supervised released term would be added to his sentence.

¶ 2 The matter comes before this court for a second time after the circuit court again dismissed defendant Shaun Jackson's petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Before the trial court, defendant was charged

with 29 various counts of sexual assault, but pled guilty to one count of criminal sexual assault with the use of force and was sentenced to 15 years' imprisonment in the Illinois Department of Corrections. The trial court further admonished defendant that he would thereafter serve a two-year term of mandatory supervised release (MSR). Defendant did not appeal his sentence, but later filed a postconviction petition alleging he was denied the benefit of the bargain where the trial court admonished him of the incorrect term of MSR. The circuit court dismissed defendant's postconviction petition and, on appeal before this court, we remanded the matter for second-stage proceedings finding defendant stated the gist of a constitutional claim so as to survive a first-stage dismissal. *People v. Jackson*, 2013 IL App (1st) 110883-U, ¶ 11 (unpublished pursuant to Illinois Supreme Court Rule 23).

¶ 3 On remand, defendant filed a supplemental postconviction petition raising the same allegations and the State moved to dismiss the petition. At the dismissal hearing, the circuit court determined the remedy would be vacating defendant's guilty plea and proceeding to trial. Consequently, defendant voluntarily dismissed his petition and the circuit court entered an order on September 30, 2015, correcting his mittimus *nunc pro tunc* to reflect the correct statutory MSR term of 3 years to natural life. See 730 ILCS 5/5-8-1(d)(4) (West 2008).

¶ 4 Defendant now appeals the circuit court's September 30, 2015, order, arguing that he made a substantial showing that his due process rights were violated when he did not receive the benefit of his plea bargain. Defendant requests that this court fashion a sentence and MSR term to approximate the sentence he bargained for when he pled guilty. For the reasons that follow, we correct the mittimus and affirm the judgment of the circuit court.

¶ 5 BACKGROUND

¶ 6 Defendant was charged with two counts of predatory criminal sexual assault, eight counts

of criminal sexual assault, ten counts of aggravated criminal sexual abuse, and nine counts of criminal sexual abuse premised on the sexual assault of his then girlfriend's 14-year old daughter. Following negotiations with the State, defendant pled guilty on April 16, 2009, to a single count of criminal sexual assault with the use of force. Prior to entering defendant's plea, the prosecutor informed the trial court that the State had offered defendant a 15-year sentence with the "statutory mandatory supervised release term."

¶ 7 With regard to sentencing, the following admonishments occurred:

> "THE COURT: The agreement your attorney has made with the state's attorney, which I will go along with, is to nolle or drop all the Class Xs to the Class 1. You'll receive 15 years. You'll be on parole or mandatory supervised release for 2 years. You must register as a sex offender. You must submit DNA samples to the Illinois State Police for analysis and storage in their databank. Has anyone promised you anything else in order to get you to plead guilty?
>
> THE DEFENDANT: No, ma'am."

Following the stipulation to the factual basis for the guilty plea, the trial court accepted defendant's guilty plea and sentenced defendant, stating:

> "THE COURT: I will go along with the agreement. Your sentence is 15 years in the Illinois Department of Corrections on Count 6. You'll be on parole or mandatory supervised release for 2 years upon your release from the penitentiary. Credit for 624 days."

¶ 8 Defendant did not move to withdraw his plea or directly appeal his conviction and sentence. On January 20, 2011, however, defendant filed a *pro se* petition for postconviction relief alleging in pertinent part that he received a more onerous sentence than the one he

bargained for in his plea agreement. He argued that he agreed to, and the trial court admonished him of, a two-year MSR term, but that the Illinois Department of Corrections listed his projected MSR term as three years to natural life. Defendant contended in his petition that this violated his right to due process and Illinois Supreme Court Rule 402 (eff. July 1, 1997). Defendant further argued that he did not receive the benefit of his bargain citing *People v. Whitfield*, 217 Ill. 2d 177 (2005) and *People v. Morris*, 236 Ill. 2d 345 (2010). The circuit court summarily dismissed the petition as frivolous and patently without merit on February 22, 2011.

¶ 9 Defendant then appealed to this court asserting the same contentions of error. *Jackson*, 2013 IL App (1st) 110883-U, ¶ 2. We concluded that defendant's petition presented an arguable basis in law that his due process right to receive the benefit of the plea bargain was violated. *Id.* ¶ 11. Accordingly, we reversed the circuit court's first-stage dismissal of defendant's petition and remanded the matter for second-stage proceedings. *Id.* ¶ 14.

¶ 10 On remand, defendant, with the assistance of counsel, filed a supplemental postconviction petition requesting relief in the form of the immediate reduction or modification of his sentence to a term consistent with what he bargained for, his immediate release from custody, or any additional relief to which he was entitled. The State moved to dismiss defendant's petition. Although the circuit court did not expressly rule that defendant made a substantial showing of a constitutional violation or that his constitutional rights were violated, it ultimately determined the remedy in this case would be vacating defendant's guilty plea and proceeding to trial. The circuit court noted for the record,

> "[The State's] offer to you was the number of years. There was no MSR as an offer to you. The MSR is set by statute. The fact that I gave you two instead of the three that's required, I will now allow you to vacate your plea of guilty and we can set the case down

for trial. I am not going to give you less than what the State and you bargained for. So my one year off the MSR is not going to change what you bargained for. I will allow you to vacate your plea of guilty. ***

But the three years MSR is required by statue. 15 years I believe is what you bargained for and not a term of MSR. So I'm not going to give you an incorrect number of years or not give the victims and, you know, say it's not 15 years any more, it's 14 because the Judge said 2 instead of 3 okay?

So it's totally up to you if you want to talk to your lawyer and decide what you want to do. If you want to set the case, vacate your plea, I'll allow you to do that."

¶ 11 Defendant indicated he did not want to vacate his plea and proceed to trial, but instead requested the court fashion a sentence to conform with his plea bargain. The circuit court restated the benefit of his bargain was a 15-year sentence with the statutory MSR term and that the only remedy was to vacate his guilty plea. Defendant insisted he did not want to withdraw his guilty plea, but ultimately voluntarily withdrew his petition at the circuit court's direction. The circuit court then entered an order correcting defendant's mittimus *nunc pro tunc* to reflect defendant was sentenced to 15 years' imprisonment with an MSR term of 3 years to natural life. This appeal followed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues that the circuit court erred when it required him to withdraw his postconviction petition. According to defendant, the record discloses that the withdrawal of his postconviction petition was not voluntary. Defendant maintains that, for the purposes of judicial economy, we should review his petition on the merits rather than reinstating his petition for further proceedings. Defendant further asserts that he demonstrated he suffered a substantial

constitutional violation when he was denied the benefit of his bargain with the State and requests this court fashion an appropriate sentence in accordance with his bargain.

¶ 14 While the State first and foremost argues that we need not consider defendant's appeal because defendant voluntarily withdrew his postconviction petition, the State agrees with defendant that the matter should not be remanded to the trial court for further proceedings and urges us to decide the case on its merits.

¶ 15 Before we address the merits of the case, we must first address the issue of our jurisdiction. Our supreme court has said that we have an independent duty to consider jurisdiction regardless of whether the parties raise the issue. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008). We are duty bound to dismiss an appeal over which we lack jurisdiction. *People v. Thompson*, 2015 IL 118151, ¶ 26. Notably, in this case, defendant maintains that we have jurisdiction pursuant to Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013). Pursuant to Rule 651(a), "An appeal from a final judgment of the circuit court in any post-conviction proceeding shall lie to the Appellate Court in the district in which the circuit court is located." Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013). Rule 651 further provides that the procedure for an appeal in a postconviction proceeding "shall be in accordance with the rules governing criminal appeals, as near as may be." Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013). To perfect an appeal "the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014). A final judgment in a criminal case is the sentence (*People v. Lilly*, 56 Ill. 2d 493, 496 (1974)), but in regards to a postconviction petition, an order dismissing such a petition under the Act constitutes a final judgment in a civil proceeding (*People v. Dominguez*, 366 Ill. App. 3d

468, 472 (2006)). See *In re D.D.*, 212 Ill. 2d 410, 418 (2000) (a final judgment is one that fixes the rights of the parties, determines the litigation *on the merits*, and if affirmed, leaves only the execution of the judgment).

¶ 16 Initially, it appears as though no final judgment was entered in this matter due to defendant's voluntary withdrawal of his postconviction petition. See *People v. Baptist*, 284 Ill. App. 3d 382, 388 (1996) ("Subject to certain exceptions, appellate courts are without jurisdiction to review judgments, orders, or decrees which are not final."). A review of the record reveals, however, that the circuit court entered an order on September 30, 2015, from which defendant appeals, that corrected his mittimus *nunc pro tunc*. The correction, in relevant part, reads as follows, "It is further ordered that 3 years to life MSR, nunc pro tunc 4/16/09." "A *nunc pro tunc* order may itself properly be treated as an appealable order, because it would be manifestly unfair to allow a party no avenue in which to seek appellate review of the propriety of such an order." *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 51 (1999). Thus, a *nunc pro tunc* order is a final order and it follows that we have jurisdiction to consider defendant's appeal regardless of whether or not defendant voluntarily withdrew his petition. See *People v. Jones*, 104 Ill. 2d 268, 278 (1984). Moreover, the circuit court, after being presented with the State's motion to dismiss and hearing arguments, essentially ruled that defendant had made a substantial showing of a constitutional violation when it declared the only remedy would be to vacate defendant's guilty plea. This ruling was memorialized in the *nunc pro tunc* order and occurred prior to defendant's voluntary withdrawal of the petition. Therefore, we conclude we have jurisdiction to review the final order of September 30, 2015, and the trial court's rulings as they appear in the record of proceedings. See *People v. Holland*, 56 Ill. 2d 318, 319-20 (1974) (finding the transcript contained oral rulings the propriety of which were considered on appeal); *People v.*

Niemiro, 256 Ill. App. 3d 904, 908 (1993) (considering the trial court's oral pronouncements as reflected in the transcripts of the proceedings). Accordingly, we now turn to review the merits of defendant's claim.

¶ 17 On appeal, defendant maintains that his postconviction petition demonstrated a substantial showing of a constitutional violation, but disagrees with the circuit court's remedy of vacating his guilty plea. Citing *Whitfield*, defendant requests that this court find his due process rights were violated and, rather than remand the proceedings to circuit court, fashion a sentence and MSR term to approximate the sentence he bargained for when he pled guilty.

¶ 18 We begin by noting the familiar principles regarding postconviction proceedings. The Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides criminal defendants a remedy to redress substantial violations of their federal or state constitutional rights in their original trial or sentencing hearing. *People v. Allen*, 2015 IL 113135, ¶ 20. A postconviction action is not a substitute for or an addendum to a direct appeal, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, *res judicata* bars consideration of issues that were presented and decided on direct appeal, and issues that could have been raised on direct appeal but were not presented are considered forfeited. *People v. Simpson*, 204 Ill. 2d 536, 551, 560 (2001).

¶ 19 The Act creates a three-stage procedure of postconviction relief in noncapital cases. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, the defendant need only present the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Since most petitions at this stage are drafted by *pro se* defendants, the threshold for survival is low. *Id.* If the circuit court

independently determines that the petition is either "frivolous or is patently without merit" it dismisses the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 11. If a petition is not summarily dismissed by the circuit court, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10.

¶ 20 At the second stage of postconviction proceedings, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)) and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2010)). *Id.* at 10-11. At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights to warrant a third-stage evidentiary hearing. *People v. English*, 403 Ill. App. 3d 121, 129 (2010). The petitioner, however, is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Rather, in order to mandate an evidentiary hearing, allegations in the petition must be supported by the record or by its accompanying affidavits. *Id*. Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id*. Further, at this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the circuit court determines the petitioner made a substantial showing of a constitutional violation at the second stage, a third-stage evidentiary hearing must follow. 725 ILCS 5/122-6 (West 2010); see also *English*, 403 Ill. App. 3d at 129.

¶ 21 Defendant first argues that he has made a substantial showing of a constitutional violation where the facts are undisputed and this court "already settled the issue of law in this case" in *Jackson*. We disagree. Whether defendant's postconviction petition was properly dismissed at the second-stage was not determined by this court in its prior decision. See *Jackson*, 2013 IL

App (1st) 110883-U, ¶ 11. As previously discussed, the standard a postconviction petition must meet in order to withstand dismissal differs depending on the stage of the postconviction proceedings. In first-stage proceedings, a defendant need only present the "gist" of a constitutional claim (*Hodges*, 234 Ill. 2d at 9), whereas in second-stage proceedings a defendant must make a "substantial showing of a constitutional violation" (*English*, 403 Ill. App. 3d at 129). As we concluded in defendant's initial postconviction appeal, the facts of the case at that time presented "an arguable basis in law" and thus defendant's petition was sufficient to survive a first-stage dismissal. *Jackson*, 2013 IL App (1st) 110883-U, ¶ 11. Contrary to defendant's assertion in this appeal, we did not consider whether defendant made a "substantial showing" of a constitutional violation, a completely different legal standard. See *id.* Accordingly, this court must now consider defendant's supplement petition under the latter standard and, consequently, may review all of the relevant case law to that effect.

¶ 22 Turning to the merits of defendant's appeal, we observe that "[t]o be entitled to postconviction relief, a defendant must demonstrate that he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *Whitfield*, 217 Ill. 2d at 183. The principles of due process require that a defendant entering into a plea agreement understands and voluntarily agrees to the terms before the court accepts that agreement. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). This due process right to be fully admonished in open court is embodied in Illinois Supreme Court Rule 402 (eff. July 1, 1997). *Whitfield*, 217 Ill. 2d at 188. Rule 402(a) requires that the trial court give a defendant certain admonishments before accepting a guilty plea, including admonishing defendant of the "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[.]" Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). Further, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). We also observe, however, that the Rule 402(a)(2) requirement that defendant be advised of an 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 than 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).

¶ 23 Our supreme court has held that a defendant's right to due process is violated when he pleads guilty in exchange for a specific sentence and the trial court fails to admonish him, prior to accepting the plea, that a term of MSR will be added to his sentence. *Whitfield*, 217 Ill. 2d at 195. In *Whitfield*, the trial court completely failed to advise the defendant at any time during the plea hearing that he would be required to serve a term of MSR, when in fact the statutorily mandated MSR term was three years. *Id.* at 180; see *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007) (declining to expand *Whitfield* finding it "only applies where the judge failed to entirely mention MSR before taking the plea and failed to include it in the judgment of sentence."). Consequently, the supreme court reduced the defendant's term of imprisonment by three years to account for the due process violation. *Id.* at 205.

¶ 24 Our supreme court subsequently clarified in *Morris* 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.' " (Emphasis added.) *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 15 (quoting *Morris*, 236 Ill. 2d at 367). 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 *Morris* court explained that, in addition to ensuring a defendant enters a plea " 'intelligently and with full knowledge of the consequences,' " admonishments must also inform the defendant of the actual terms of the bargain made with the State. *Id.* at 366 (quoting *Whitfield*, 217 Ill. 2d at 184). "An admonishment 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." *Id.* *Morris* also held that while an admonishment need not be perfect nor follow a precise formula, it must "substantially comply" with precedent and Rule 402. *Id.* at 366-67. The supreme court, however, did not expressly require the trial court to explicitly link the MSR term to its negotiated sentence, but "strongly encourage[d]" such a practice. *Morris*, 236 Ill. 2d at 367-68.

¶ 25 Additionally, a trial court's reference to MSR while explaining the possible sentencing ranges to a defendant, rather than while imposing sentence upon him or her, has been held to satisfy due process. See *People v. Dorse*y, 404 Ill. App. 3d 829, 834-38 (2010); *People v. Davis*, 403 Ill. App. 3d 461, 467 (2010); *Andrews*, 403 Ill. App. 3d at 665-66. These cases all note that in *Whitfield*, the trial court never mentioned the three-year term of MSR at any point during the plea hearing. See *Dorsey*, 404 Ill. App. 3d at 834; *Davis*, 403 Ill. App. 3d at 465-66; *Andrews*, 403 Ill. App. 3d at 663; *People v. Marshall*, 381 Ill. App. 3d 724, 735 (2008). On that basis, this court has held that under *Whitfield*, the defendant's due process rights are violated only where the trial court fails to make *any* mention to him, before he pleads guilty, that he must serve a term of MSR in addition to his negotiated sentence. See *Davis*, 403 Ill. App. 3d at 466.

¶ 26 Based on our supreme court's holding in *Morris* and the relevant case law, we conclude

that defendant has failed to make a substantial showing of a constitutional violation to withstand the dismissal of his postconviction petition. See *Morris*, 236 Ill. 2d at 367. Here, we are not faced with a situation where the trial court neglected to inform defendant he was subject to a period of MSR; rather, the trial court understated the MSR period defendant faced. Unlike the facts of *Whitfield*, the case defendant primarily relies upon, when the trial court here admonished defendant, it advised him of a two-year term of MSR. While the term stated by the trial court was ultimately incorrect, the trial court did admonish defendant of "a term of MSR." See *id.*; *Andrews*, 403 Ill. App. 3d at 665. The record thus demonstrates 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 his due process rights were violated.

¶ 27 We further observe that a defendant who negotiates to receive a specific sentence upon his plea of guilty before the guilty plea hearing is conducted receives the full bargain made with the prosecution upon receiving that sentence, as the prosecution can only bargain on the sentence to be imposed. *Andrews*, 403 Ill. App. 3d at 664. The prosecution has no say on whether a defendant must serve the corresponding MSR term as the term is automatically imposed by law in accordance with the classification of the felony to which the defendant has pled guilty. *Id.* "Accordingly, 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." *Id.* at 665.

¶ 28 In conclusion, we emphasize that the trial court's admonishment could have been improved by correctly stating the MSR term that applied to defendant. See *Marshall*, 381 Ill. App. 3d at 736. As stated by our supreme court in *Morris*, "The better practice would incorporate the mandatory supervised release admonition when the specific sentencing is

announced. The written sentencing judgment should also include the term of mandatory supervised release." (Internal quotation marks omitted.) *Morris*, 236 Ill. 2d at 367 (quoting *Marshall*, 381 Ill. App. 3d at 736).

¶ 29 Pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we order that the mittimus be corrected to reflect defendant's sentence of 15 years' imprisonment with an MSR term of three years to natural life (730 ILCS 5/5-8-1(d)(4) (West 2008)) and strike the *nunc pro tunc* language from the mittimus.

¶ 30 CONCLUSION

¶ 31 For the reasons stated, we affirm the second-stage dismissal of defendant's postconviction petition.

¶ 32 Affirmed; mittimus corrected.