2017 IL App (2d) 140948-U
No. 2-14-0948
Order filed March 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GLENN A. BARRETT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 05-CF-530 Honorable Kathryn E. Creswell, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to *People v. Castleberry*, 2015 IL 116916, defendant's two-year MSR term was not void merely because the statute mandated a three-year term. Therefore, the term was not subject to correction at any time, and the trial court was not permitted to *sua sponte* increase the two-year term to a three-year term during postconviction proceedings.

¶ 2 Defendant, Glenn Barrett, appeals from the stage-two dismissal of his postconviction petition. 725 ILCS 5/122-5 (West 2006). He argues only that the trial court erred during stage one of the proceedings when it *sua sponte* increased a statutorily nonconforming term of mandatory supervised release (MSR) from two years to three years. After defendant filed his

appeal, the Illinois supreme court decided *People v. Castleberry*, 2015 IL 116916, ¶¶ 20-24, which abolished the void sentence rule and held that a trial court may not *sua sponte* increase a statutorily non-conforming sentence. Hence, pursuant to *Castleberry*, we agree with defendant.

¶ 3 The State raises three arguments: (1) *Castleberry* is not implicated; (2) alternatively, *Castleberry* is implicated but cannot be applied retroactively; and (3) again alternatively, *Castleberry* is implicated and applies retroactively, but efficiency calls for us to excuse the trial court's error. We reject each of these arguments.

¶ 4 We vacate the trial court's imposition of the three-year MSR term and reinstate the two-year MSR term. Defendant does not ask that the remainder of his postconviction claims, concerning his right to effective assistance of counsel, proceed to a stage-three evidentiary hearing. And, because we resolve the MSR claim without an evidentiary hearing, the postconviction proceedings are concluded. See, *e.g.*, *People v. Lara*, 317 Ill. App. 3d 905, 908 (2000) (permitting partial dismissals of stage-two petitions). Accordingly, we reverse as to the MSR claim, and we affirm as to the remaining postconviction claims.

¶ 5 I. BACKGROUND

¶ 6 This is defendant's third appeal before our court. See *People v. Barrett*, No. 2-07-1284 (2009) (*Barrett I*) (unpublished under Illinois Supreme Court Rule 23) (affirming defendant's 2007 conviction and 22-year sentence for residential burglary); *People v. Barrett II*, 2012 IL App (2d) 100404-U (reversing the stage-one dismissal of defendant's postconviction petition).

¶ 7 A. Defendant's Sentence and Corresponding MSR Requirements

¶ 8 Defendant was convicted of residential burglary, which is a Class 1 felony. However, due to his criminal history, the trial court sentenced defendant to 22 years' imprisonment in the Department of Corrections (DOC) under a Class X sentencing scheme. 730 ILCS 5/5-5-3(c)(8)

(West 2006). Then, the court sentenced defendant to a two-year MSR term, which was consistent with a Class 1 sentencing scheme. 730 ILCS 5/5-8-1(d)(2) (West 2006). The court did not mention the MSR term at the hearing, but, that same day, the court included the two-year MSR term in the written sentencing order. The sentencing order lists the offense as residential burglary, the class as Class 1, the DOC sentence as 22 years, and the MSR term as 2 years. Judge Kathryn Creswell manually signed the sentencing order. Three days later, at a hearing on defendant's motion to reduce sentence, the State "ask[ed] that the sentence stand." The court denied defendant's motion to reduce sentence.

¶ 9 When the court entered the sentence and MSR term in 2007, it was consistent, or at least not inconsistent, with case law in this district. See *People v. Hoekstra*, 371 Ill. App. 3d 720, 728 (2007) (Second District) (accepting the State's concession that, under section 5-8-1(d) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d) (West 2004)), a person who committed a Class 2 felony but who, due to a criminal history, was sentenced as a Class X felon, need complete only two years of supervised release); *cf. People v. Smart*, 311 Ill. App. 3d 415, 417 (2000) (Fourth District); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995) (First District).

¶ 10 Later, in *People v. McKinney*, 399 Ill. App. 3d 77, 81 (2010), we determined that the State's concession in *Hoekstra* had been made in error. We joined with the other Districts to hold that a defendant convicted of a Class 1 or Class 2 felony, who is sentenced as a Class X offender because of his criminal history, should receive a three-year MSR term applicable to Class X felonies, rather than a two-year MSR term applicable to Class 1 or Class 2 felonies. *Id.*; see *also People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009) (Third District); *Smart*, 311 Ill. App. 3d at 417; *Anderson*, 272 Ill. App. 3d at 541-42. We explained:

> "[S]ection 5-5-3(c)(8) of the Code provide[s] that an offender of defendant's age and with defendant's criminal history 'shall be sentenced as a Class X offender.' 730 ILCS 5/5-5-3(c)(8) (West 2006). This can only mean that such a defendant 'shall be sentenced as a Class X offender' and shall receive the sentence—the entire sentence—that one convicted of a Class X felony would receive. See [*Smart*, 311 Ill. App. 3d at 417-18]. As noted, section 5-8-1(a)(3) provides, in pertinent part, that, 'for a Class X felony, the sentence [of imprisonment] shall not be less than 6 years and not more than 30 years.' 730 ILCS 5/5-8-1(a)(3) (West 2006). Section 5-8-1(d) provides that 'every sentence shall include as though written therein [an MSR] term in addition to the term of imprisonment.' [730 ILCS 5/5-8-1(d) (West 2006)]. Section 5-8-1(d)(1) requires a three-year MSR term 'for *** a Class X felony.' [*Id.*] This additional MSR is a part of a defendant's sentence. *People v. Whitfield*, [217 Ill. 2d 177, 188 (2005)]. Therefore, under the applicable statutes, a defendant 'sentenced as a Class X offender' [citation omitted] should serve the same MSR term as a defendant convicted of a Class X felony. Thus, because defendant was sentenced as a Class X offender, he is required to serve three years of MSR." *McKinney*, 399 Ill. App. 3d at 80-81.

¶ 11 B. Stage-One Postconviction Proceedings

¶ 12 On February 5, 2010, defendant filed a *pro se* postconviction petition, raising numerous claims of ineffective assistance by appellate counsel. Defendant did not challenge his two-year MSR term.

¶ 13 On March 29, 2010, the trial court summarily dismissed the stage-one petition. The court also *sua sponte* corrected the two-year MSR term, citing to the recently released *McKinney*. It

wrote: "[A] review of the computer[-]generated sentencing order[1] erroneously indicates a period of [MSR] for a Class 1 residential burglary. In that the defendant/petitioner was sentenced as a Class X offender, the order is corrected to reflect a period of 3 years [MSR]. *People v. McKinney*, *** 2010 WL 1053999 (3/19/10)."

¶ *14* C. *Barrett II*

¶ 15 Defendant appealed the first-stage dismissal. *Barrett II*, 2012 IL App (2d) 100404-U. He argued that, when the trial court changed his MSR term from two years to three years, it engaged in a critical stage of a criminal proceeding, to which he was entitled counsel. *Id*. ¶ 8. An MSR term is part of a defendant's sentence. *Id*. (citing *Whitfield*, 217 Ill. 2d at 188). A defendant is entitled to assistance of counsel at all critical stages of criminal proceedings, of which sentencing is one. *Id*. (citing *Iowa v. Tovar*, 541 U.S. 77, 80 (2004); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). Based on this, defendant requested that this court remand the cause for the appointment of counsel and stage-two proceedings. *Id*.

¶ 16 The State responded that the court did not change or reconsider defendant's sentence. Rather, the court merely corrected a void sentence. *Barrett II*, 2012 IL App (2d) 100404, ¶ 9 (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)). In *Arna*, the supreme court articulated the void sentence rule: "A sentence which does not conform to a statutory requirement is void." *Arna*, 168 Ill. 2d at 113. The *Arna* court stated that a void sentence may be corrected at any time, even if that means an increase in the defendant's sentence. *Id*. As applied to the instant case, the State noted that, in 2010, this court held that sections 5-5-3(c)(8) and 5-8-1(d) of the Code require three-year MSR terms for defendants in defendant's position (*i.e.*, those who

[1] We will discuss the court's reference to a computer-generated sentencing order in our analysis.

commit a Class 1 or Class 2 felony but are sentenced as Class X offenders due their criminal history). *McKinney*, 399 Ill. App. 3d at 82. Thus, the State urged, the two-year MSR term violated a statutory requirement, was void, and was subject to the trial court's correction at any time. *Barrett*, 2012 IL App (2d) 100404, ¶ 9.

¶ 17 We reversed the trial court's summary dismissal, stating:

> "Here, however, the trial court did more than merely correct a void sentence. When defendant was sentenced in December 2007, case law in this district held that a person who committed a Class 1 felony but who, due to a prior criminal history, was sentenced as a Class X offender, would receive a two-year MSR term corresponding with the Class 1 felony, rather than a three-year MSR term corresponding with the hypothetical Class X felony. See *People v. Hoekstra*, 371 Ill. App. 3d 720, 728 (2007) (accepting the State's concession that, under section 5-8-1(d) of the Code, a person who committed a Class 2 felony but who, due to a prior criminal history, was sentenced as a Class X felon, need complete only two years of supervised release). This court affirmed defendant's sentence on direct appeal, though the MSR term was not at issue. In order for the trial court to declare the two-year MSR term void, it had to reconsider the sentence in light of new case law (*i.e.*, *McKinney*). Indeed, the trial court cited *McKinney* in changing the MSR term.
>
> Had counsel been present when the trial court changed defendant's sentence in light of new case law, he could have raised a number of non-frivolous arguments, including but not limited to questioning the trial court's authority to change defendant's sentence at this stage and under these circumstances. See, *e.g.*, Amendola, Francis C., et al., *Time for Relief*, Corpus Juris Secondum Crim. Law § 2139 (updated September 2011)

(stating: (a) in some jurisdictions, a court may correct an illegal sentence at any time [*i.e.*, per *Arna*, 168 Ill. 2d at 113 (though not addressing the nuance present here—where case law existing at the time of sentencing read the statute to permit a certain sentence but where subsequent interpretation of the same statute mandated a different result)]; (b) in some jurisdictions, the power to correct even a statutorily illegal sentence must be subject to some temporal limit; and (c) in some jurisdictions, the trial court may amend its sentence to the extent of making it conform to the then existing law). The question of where Illinois law stands on the trial court's authority to, in the context of a first[-]stage postconviction hearing, *sua sponte* increase a defendant's MSR term when case law existing at the time of sentencing read the statute to permit the original MSR term but where subsequent interpretation of the same statute declared that MSR term statutorily illegal (*i.e.*, void) is worthy of discussion. This makes it all the more apparent that defendant is entitled to an attorney and that these arguments should be briefed in some manner before the trial court rules. Therefore, we remand to the second stage of the postconviction proceeding and, upon a finding of indigency, direct the trial court to appoint counsel.

We realize that, due to the unique procedural history of this case, the sentencing issue technically did not originate from defendant's postconviction petition. However, the trial court has entered the order, and the defendant has no way left to attack it (or to allege a denial of his constitutional right to an attorney when his sentence was increased) except through postconviction proceedings. This claim is not frivolous and should proceed to the second stage. Partial [stage-one] dismissals are not permitted under the

Act. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). Therefore, we do not reach defendant's remaining *pro se* claims." *Barrett*, 2012 IL App (2d) 100404, ¶¶ 10-12.

¶ 18 D. Stage-Two Postconviction Proceedings

¶ 19 On April 30, 2014, postconviction counsel filed an amended postconviction petition. Counsel adopted appellate counsel's argument that, when the trial court changed defendant's MSR term from two years to three years, it engaged in a critical stage of a criminal proceeding, to which defendant was entitled counsel.

¶ 20 The State moved to dismiss the amended petition. It argued: "The appellate court acknowledges *Arna*, but suggests that there may be a nuance present in this case that would affect its applicability. The People disagree. *Arna* is the law in this jurisdiction and it clearly provides for this court's order correcting the defendant's MSR term."

¶ 21 On August 29, 2014, the trial court heard the State's motion to dismiss. The court then ruled:

> "This was a case where the MSR was never an issue. It came back because the court corrected the MSR to comport with the law.
>
> [Addressing and rejecting defendant's allegations of ineffective assistance.]
>
> *** And the MSR is three years for a Class X.
>
> So, the State's motion to dismiss the defendant's amended postconviction petition is granted."

The trial court issued a written order consistent with its oral ruling. Defendant appealed.

¶ 22 II. ANALYSIS

¶ 23 After the trial court granted the State's motion to dismiss based on *Arna* and the void sentence rule, the Illinois supreme court issued its opinion in *People v. Castleberry*, 2015 IL

116916. In *Castleberry*, the court abolished the void sentence rule, abrogating *Arna*. *Castleberry*, 2015 IL 116916, ¶ 17. Thus, on appeal, defendant argues that, per *Castleberry*, even if his two-year MSR term violated the statute at the time it was entered, it was not void, and it was not subject to being increased by the trial court in postconviction proceedings. (Because *Castleberry* abolished the void sentence rule, defendant need not pursue the question raised in *Barrett II* of whether the circumstances of this case would have called for a nuanced application of the void sentence rule.)[2]

¶ 24 The *Castleberry* court explained that the rationale behind the void sentence rule had been that "a circuit court which violates a particular statutory requirement when imposing a sentence acts without 'inherent authority'," and, a court that acts without inherent authority acts without jurisdiction, thereby rendering the sentence void. *Id.* ¶ 13. The court determined, however, that the rationale behind the void sentence rule has been fatally undermined by recent decisions addressing the scope of the circuit court's jurisdiction. *Id.* ¶¶ 14-17. In particular, the court pointed to its recent decisions in *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529-32 (2001), and *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶¶ 30-38, as those cases addressed the scope of the circuit court's jurisdiction. *Id.* The Illinois constitution grants the circuit courts "original jurisdiction of all justiciable matters, and such powers of review of administrative action as may be provided by law." Ill. Const. 1870, art. VI (amended 1964), § 9. Whereas an administrative

[2] That is, whether the trial court did in fact violate the statute and act without "inherent authority" *at the time it entered* the two-year MSR term so as to render the two-year term void. A statute says what the court says it says, and, the argument goes, at the time the trial court entered the two-year MSR term, the Second District did not read the statute to prohibit a two-year MSR term nor mandate a three-year MSR term.

agency is a "statutory creature" powerless to act absent statutory authority, a circuit court is a court of general jurisdiction that need not look to a statute for its jurisdictional authority. *Castleberry*, 2015 IL 116916, ¶ 15 (quoting *LVNV*, 2015 IL 116129, ¶ 31). Thus, a circuit court's failure to comply with a statutory requirement does not negate its jurisdiction. *Id*. ¶ 15. The court retains jurisdiction and "inherent authority" when it enters a sentence that violates the statute, and the sentence that violates the statute is not void. *Id*. ¶ 18.

¶ 25 We agree that, pursuant to *Castleberry*, defendant's two-year MSR term was not void. The trial court had jurisdiction to sentence defendant, and defendant's sentence included the two-year MSR term. Whether the two-year MSR term violated the statute when the court entered the term is irrelevant to the court's jurisdiction, and, thus, the sentence was *not* void. As stated in *People v. Price*, 2016 IL 118613, ¶ 17, "After *Castleberry*, a reviewing court may no longer, *sua sponte*, correct a statutorily nonconforming sentence[.]" Here, the trial court was not permitted to *sua sponte* increase the MSR term from two years to three years during postconviction proceedings.

¶ 26 Defendant does not challenge the dismissal of his remaining postconviction claims, which concerned his right to effective assistance of counsel. Unlike stage-one petitions, stage-two petitions may be subject to partial dismissal. See, *e.g.*, *People v. Coleman*, 183 Ill. 2d 366, 378 (1998) (in a death-penalty case, the supreme court allowed only some of the claims to proceed to an evidentiary hearing and affirmed the dismissal of the remaining claim); *Lara*, 317 Ill. App. 3d at 908 ("[While] partial dismissals at the first stage might dissuade appointed counsel from raising otherwise meritorious issues in an amended petition, *** this concern is not present in partial dismissals at the second-stage, [so,] we find nothing improper with partial dismissals at the second stage."). Because defendant has not challenged the dismissal of his

remaining claims, nor does he ask for any relief other than the reinstatement of the two-year MSR term, we conclude the postconviction proceedings with this ruling. We vacate the trial court's imposition of the three-year MSR term and reinstate the two-year MSR term. We now turn to the State's three arguments, which we reject.

¶ *27* A. This Case Implicates *Castleberry*

¶ 28 The State first attempts to recharacterize the procedural history of this case. The State asserts that the procedural history of this case does not implicate *Castleberry,* because the court did *not* attempt to correct a sentence under the void sentence rule. Rather, according to the State, the court merely corrected the mittimus to accurately reflect the judgment that was in fact entered. See *People v. Latona*, 184 Ill. 2d 260, 278 (1998) (a court may amend the mittimus to reflect the judgment at any time). This argument is disingenuous and, more importantly, without merit.

¶ 29 The State's argument is disingenuous, because it is the exact opposite of the argument that the State presented in *Barrett II* and again in its subsequent motion to dismiss. There, the State urged that the two-year MSR term was void, because it violated the statutory requirement that a three-year MSR term be imposed. The State cited *Arna* for the void sentence rule, and it argued that *Arna* provided the court with the authority to correct the void sentence at any time. Now, the State argues that the void sentence rule was never the issue. It posits that, in 2007, the court initially entered a three-year MSR term, and, in 2010, the court merely corrected the mittimus to accurately reflect the three-year MSR term.

¶ 30 The State's argument that the court initially ordered a three-year MSR is without merit. As we stated in *Barrett II*: "In order for the trial court to declare the two-year MSR term void, it had to reconsider the sentence in light of new case law (*i.e.*, *McKinney*). Indeed, the trial court

cited *McKinney* in changing the MSR term." *Barrett II*, 2012 IL App (2d) 100404, ¶ 10. It is clear to us that the trial court initially entered a two-year MSR term, and, in light of *McKinney*, changed the MSR term to three years.

¶ 31 We reject the implicit argument that the trial court's 2010 reference to "correcting" a "computer[-]generated sentencing order" meant that it merely corrected the mittimus to reflect a three-year MSR term that was in fact entered in 2007. While the 2007 sentencing order may have been generated on a computer, it does not appear to have been *automatically* generated on a computer. Rather, it bears the mark of purposeful input, in that it was typed on a form, with boxes checked, and it was manually signed by Judge Creswell. Just three days after the trial court issued the written order, it heard defendant's motion to reduce sentence. The State "ask[ed] that the sentence stand." If the trial court in fact entered a three-year MSR term, it could have made the correction at the hearing. Given that it did not, and given the state of the case law in this district as of 2007, where *Hoekstra*, which set forth a two-year MSR term, was considered good law, we determine that the trial court initially set forth a two-year MSR term.

¶ 32 The State's citation to *People v. McChriston*, 2014 IL 115310, is inapposite. In *McChriston*, as in the instant case, the defendant was convicted of a Class 1 felony that carried a mandatory Class X sentence. *Id.* ¶ 1. The *McChriston* trial court sentenced the defendant to a 25-year prison term, but, unlike the instant case, *did not specify an MSR term*. *Id.* Later, the DOC imposed a three-year MSR term. *Id.* ¶ 3. The defendant filed a postconviction petition, arguing that the DOC impermissibly "added" a three-year MSR term to his original sentence and, thus, violated the separation of powers. *Id.* ¶ 4. The court rejected the defendant's argument that the DOC added a three-year MSR term. *Id.* ¶ 23. It stated that, at the time of the defendant's sentencing, section 5-8-1(d) of the Code plainly provided that the MSR term for

every Class X sentence was three years and that "every sentence shall include as though written therein a [MSR] term in addition to the term of imprisonment." *Id*. ¶ 9 (quoting 730 ILCS 5/5-8-1(d) (West 2004)). The court determined that the phrase "as though written therein" meant that a sentencing order need not mention an MSR term, because the MSR term attached automatically. *Id*. ¶¶ 22-23. Therefore, the DOC did not "add" a three-year MSR term; the three-year MSR term was automatically included in the initial court-ordered Class X sentence. *Id*.

¶ 33 The State acknowledges that the instant case is distinguishable from *McChriston* in that, here, the trial court *specified an MSR term* in the written order. The State argues, however, that this distinction is not controlling. Without citing any case law, the State posits that "whether an errant MSR term is mentioned or no MSR term is mentioned" a three-year MSR term attaches by operation of law. Thus, in the State's view, a court is *incapable* of issuing an MSR term that does not comply with the statute's three-year requirement. We must disagree. By positing that a trial court is incapable of issuing an MSR term that does not comply with the statute's three-year requirement, the State is really saying that such an MSR term would be void *ab initio*. The State's argument is a backdoor attempt to resurrect the discredited void sentence rule and is, therefore, without merit.

¶ 34 B. *Castleberry* Applies Retroactively to Matters then on Collateral Review

¶ 35 The State next presents an alternative argument, where it concedes that, in 2007, the trial court entered a two-year MSR term and, in 2010, relied upon the void sentence rule to change the MSR term to three years. The State further concedes that, moving forward, a trial court may no longer rely upon the void sentence rule to *sua sponte* correct a statutorily nonconforming sentence. The State urges, however, that *Castleberry*'s abolishment of the void sentence rule cannot be applied retroactively to matters then pending on collateral review.

¶ 36 The Illinois supreme court has rejected the State's argument. *Price*, 2016 IL 118613, ¶ 26. Per *Price*, *Castleberry* applies retroactively to matters then on collateral review. *Id*. Here, defendant's postconviction petition was pending when *Castleberry* was decided. Therefore, *Castleberry* applies and the trial court could not rely upon the void sentence rule to change a statutorily nonconforming sentence.

¶ 37 C. The State Presents no Valid Basis to Bypass Existing Procedure

¶ 38 Lastly, the State presents a second alternative argument, wherein it concedes that *Castleberry* applies retroactively. The State urges, however, that efficiency calls for us to uphold the three-year MSR term. The State opines that it would be a waste of resources to vacate the three-year MSR term, due to its predication on the abolished void sentence rule, when the three-year MSR term can, and, in its view, likely will, be reinstated *via* a writ of *mandamus*.

¶ 39 We are not persuaded. Here, the State has *not* filed a complaint for *mandamus*. *Castleberry* states that, if the court issues a statutorily nonconforming sentence, the State's recourse is to file a complaint for *mandamus*. *Castleberry*, 2015 IL 116916, ¶ 26. "*Mandamus* is an extraordinary remedy used to compel a public officer to perform nondiscretionary official duties." *People v. Gaughan*, 2016 IL 120110, ¶ 10 (quoting *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶ 9). To establish a right to *mandamus*, the petitioner must establish a clear right to the relief requested, a clear duty of the public officer to act, and clear authority of the public officer to comply with the writ. *Id*.

¶ 40 A defendant may object to the State's complaint for *mandamus*. *Laches* may be raised as a defense against *mandamus*. See *Id*. ¶ 34. For example, in *Gaughan*, the defendant argued that: (1) the State's complaint for *mandamus* was barred by *laches*; (2) a conflict in the statute defeated a "clear right to relief;" and (3) the State's Attorney, as opposed to the Attorney

General, did not have standing. *Id*. While these arguments did not prevail under the facts of the case, the defendant had an opportunity to raise them, and the court did not treat them as frivolous.

¶ 41 Reviewing a complaint for *mandamus* requires considerations beyond the dictates of a given statute. We will not bypass the *mandamus* procedure proscribed in *Castleberry*. The State's arguments fail.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we vacate the trial court's imposition of the three-year MSR term and reinstate the two-year MSR term. The remainder of the stage-two dismissal is affirmed. The postconviction proceedings are concluded.

¶ 44 Reversed in part; affirmed in part.