

No. 1-10-0652

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 00 CR 13755
	)	
JOSEPH GRECO, III,	)	
	)	Honorable Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

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Justice Simon delivered the judgment of the court.

Presiding Justice Harris and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Dismissal of defendant's amended *pro se* postconviction petition at second stage of proceedings was proper where constitutionality of consecutive sentencing and truth-in-sentencing statutes is well settled as applied to the date of defendant's convictions and sentencing. Dismissal also proper for claim alleged under *People v. Whitfield*, 217 Ill. 2d 177 (2005), concerning the lack of admonishments from the trial court concerning defendant's mandatory supervised release term because conviction was final in 2000 and *Whitfield* does not have retroactive application.

¶ 2 On September 20, 2000, defendant Joseph J. Greco, III, pled guilty to two counts of

predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 1998)) and was sentenced to consecutive terms of 14 years' imprisonment. Defendant did not file a motion to withdraw his plea or pursue a direct appeal. On August 15, 2003, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)) (Act), alleging that the sentences were improperly imposed consecutively. On October 15, 2003, the trial court summarily dismissed the petition as frivolous and patently without merit. Defendant ultimately argued successfully on appeal that he was never notified of the summary dismissal and this court entered an order remanding the matter for further proceedings and appointing defendant counsel. *People v. Greco*, 1-06-3085 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 3 Defendant was granted his request to proceed *pro se* in the trial court and leave to file an amended complaint. Defendant filed the underlying amended *pro se* postconviction petition, alleging that his constitutional rights were deprived by the imposition of consecutive sentences, that the truth-in-sentencing act (730 ILCS 5/3-6-3 (West 1998)) is unconstitutional, and the trial court failed to advise him of his mandatory supervised release (MSR) period in violation of the rule announced in *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The State moved to dismiss the amended petition and the trial court dismissed defendant's amended postconviction petition. Defendant asserts on appeal that the trial court erred in dismissing his claims of constitutional violations. For the following reasons, we affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 On September 20, 2000, defendant pled guilty to two criminal counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1 (West 1998)). The convictions related to

separate incidents in May 1999 involving defendant and his eight-year-old niece. The parties stipulated that the victim would testify that on May 22, 1999, defendant placed his penis in the victim's mouth and on May 25, 1999, defendant placed his penis in the victim's anus. The parties also stipulated that when brought in pursuant to an investigation, defendant admitted to these acts and agreed to give a written statement to that effect.

¶ 6 Defendant was sentenced to 14-year terms of imprisonment for each conviction, to run consecutively. A mandatory 3-year MSR term was also imposed by the trial court pursuant to 730 ILCS 5/5-8-1(d) (West 1998). Defendant's guilty plea came following sentencing on two separate convictions and sentences against defendant that arose in Kane County and DuPage County. Defendant's sentences imposed in Cook County were to run concurrently to these other sentences. Defendant did not withdraw his guilty plea, did not file a direct appeal, and began to serve his sentences.

¶ 7 On August 15, 2003, defendant filed a *pro se* postconviction petition. That petition was summarily dismissed on October 15, 2003. Defendant was not notified of the dismissal and did not file a motion to vacate the dismissal until 2005, which was denied as untimely. Defendant appealed that order and this court entered an order reversing the summary dismissal of defendant's postconviction petition and remanding the matter for further proceedings and appointing defendant counsel. *People v. Greco*, 1-06-3085 (2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 On remand, defendant was appointed counsel for second stage proceedings under the Act. However, defendant was granted his request to proceed *pro se* and counsel was allowed to withdraw. Defendant was granted leave to file an amended complaint and filed his *pro se*

amended postconviction petition on June 5, 2009. Defendant alleged that his constitutional rights were deprived by the imposition of consecutive sentences, that the truth-in-sentencing act was unconstitutional, and the trial court violated his rights under *Whitfield* by failing to advise him of his MSR term when he was sentenced.

¶ 9 The State filed a motion to dismiss the petition. After argument, the trial court granted the State's motion. It found that the case law was clear that consecutive sentencing is constitutional, particularly for sexual assault cases, that the truth-in-sentencing act has been found constitutional pursuant to the amendments made prior to defendant's convictions, and that defendant had no claim under *Whitfield* because it did not apply at the time defendant was sentenced. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 The Act provides a means for a criminal defendant to seek relief where he has suffered a substantial denial of his constitutional rights. *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009). Supporting affidavits, records or other evidence shall be attached to the petition, or the defendant must explain why the evidence is not attached. 725 ILCS 5/122-2 (West 2006). At the first stage of postconviction proceedings, the trial court undertakes a facial review of the petition to determine if it is frivolous or patently without merit. Our supreme court has recognized a low threshold for a *pro se* petitioner at the first stage of postconviction proceedings. To withstand dismissal, a *pro se* defendant must merely allege enough facts, with supporting affidavits, records or other evidence, to support the “gist” of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). If the court determines that the petition is either frivolous or

patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2006).

¶ 12 If the petition survives to proceed to stage two, section 122-4 of the Act (725 ILCS 5/122-4 (West 2006) provides for counsel to be provided for an indigent defendant, who may file an amended petition. *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002). A defendant has a constitutional right to counsel at trial and on direct appeal; however, the right to postconviction counsel is derived from the Act as there is no constitutional right to counsel in postconviction proceedings. *Id.*; 725 ILCS 5/11-4 (West 2012). A defendant may waive his right to counsel at the second stage and choose to represent himself. However, a *pro se* defendant does not have a right to legal assistance or access to a law library or other facilities. *People v. Ellison*, 2013 IL App (1st) 101261, ¶¶ 42-44. A defendant that chooses to waive his right to counsel is responsible for conducting his own case and will not receive favored treatment or leniency "even though the result may be that he is less effective as his own attorney." *People v. Tuczynski*, 62 Ill. App. 3d 644, 650 (1978).

¶ 13 At this second stage, the State must answer or move to dismiss within 30 days. 725 ILCS 5/122-5 (West 2006). The Act is not an avenue for a defendant to simply rephrase an issue previously addressed on direct appeal. *People v. Simpson*, 204 Ill. 2d 536, 559 (2001). To be successful in his petition, a defendant must demonstrate his rights were substantially deprived in the proceedings against him and that his challenge has not been raised and could not have been adjudicated earlier. Issues that could have been raised on direct appeal or in prior proceedings,

but were not, are procedurally defaulted. Previously decided issues are barred by the doctrine of *res judicata*. *Whitfield*, 217 Ill. 2d at 183.

¶ 14 Appellate review of a trial court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 380-89 (1998). We review the trial court's judgment, not the reasons cited, and we may affirm on any basis supported by the record if the judgment is correct. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). At this stage, factual disputes not rebutted by the record must be resolved in a third-stage evidentiary hearing. *People v. Whitfield*, 217 Ill. 2d 177, 200 (2005). The instant matter was dismissed at the second stage when the trial court granted the State's motion to dismiss. We affirm the trial court's judgment that defendant failed to advance claims that his rights were substantially deprived and dismissal was proper.

¶ 15 Defendant concentrates the bulk of his memorandum on allegations of improprieties of the trial court and the State on remand and during second-stage proceedings. He admits that he had difficulty in navigating the "convoluted mess" presented by the judiciary in postconviction jurisprudence, but relies on leniency as a *pro se* litigant for liberal construction of his arguments. As outlined above however, we do not grant leniency to a *pro se* litigant at this stage and are concerned with only the judgment of the trial court in granting a motion to dismiss in undertaking our *de novo* review. Accordingly, we consider whether defendant's three constitutional claims were meritorious to withstand the State's motion to dismiss.

¶ 16 Defendant first claims that the trial court improperly rejected his argument that the imposition of consecutive sentences was unconstitutional. Defendant argued that he was

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attacking the constitutionality of sections 5-8-4(a) and (b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a), (b) (West 1998)) "in a way that no one's ever attacked it before."

Defendant asserts that our supreme court's discussion of the "single course of conduct" language from section 5-8-4(a) in *People v. Bole*, 155 Ill. 2d 188, 192-93 (1993), specifically left unresolved whether the definition of that phrase was provided in the statute and that confusing language leads to the conclusion the statute is unconstitutional. Therefore, defendant argues that the underlying court's determination there was a separate course of conduct to support enhanced or consecutive sentences is not justified. Defendant argues that where there is no substantial change in the nature of the criminal objective, the course of conduct is singular.

¶ 17 We agree with the trial court and the State that the constitutionality of consecutive sentencing has been repeatedly affirmed and that this statute contemplates and properly allows for consecutive sentences in this case. See *People v. Wagener*, 196 Ill. 2d 269 (2001); *People v. Carney*, 196 Ill. 2d 518 (2001); *People v. Sergeant*, 326 Ill. App. 3d 974 (2001). Despite defendant's contention that his argument is novel and that language has not been considered, this court has considered that clause in several cases. See *People v. Whitney*, 188 Ill. 2d 91, 98-100 (1999); *Sergeant*, 326 Ill. App. 3d at 985-89. More importantly, that language is not of import in the instant matter because defendant pled guilty and was convicted of two counts of sexual assault and the single course of conduct language is inconsequential because consecutive sentencing is mandatory under section 5-8-4(a) whether or not there is a single course of conduct in this case. See, *People v. Harris*, 203 Ill. 2d 111, 117 (2003). Defendant's claims in his reply

brief that this well established precedent and decisions explaining the Act are improperly decided and insufficiently written to provide a lay understanding are also unavailing.

¶ 18 Defendant next claims that the truth-in-sentencing act has been held unconstitutional and that its application was a violation of equal protection and due process. The truth-in-sentencing act was found to be unconstitutional as enacted because the legislature violated the single subject clause of the Illinois Constitution in enacting the law. *People v. Reedy*, 186 Ill. 2d 1, 12 (1999). However, the *Reedy* court also addressed the fact that the General Assembly passed curative legislation, effective June 19, 1998, to cure the constitutional infirmity. As such, the act was no longer deemed unconstitutional as applied to offenses committed after June 19, 1998. *Id.* at 17-18. Defendant's offenses were committed in 1999 and he pled guilty and was sentenced in 2000, therefore, the act was no longer unconstitutional based on the holding in *Reedy* and defendant's second claim was properly dismissed.

¶ 19 Finally, we consider defendant's claim concerning the trial court's admonishment of his MSR term. Our supreme court has held that the remedy sought by defendant under *Whitfield* may only be applied prospectively. *People v. Morris*, 236 Ill. 2d 345 (2010). The *Morris* court held that, because *Whitfield* created a new constitutional and remedial law, it could not be applied to convictions finalized prior to its release on December 20, 2005. *Morris*, 236 Ill. 2d at 366.

¶ 20 In this case, defendant did not file a motion to withdraw his guilty plea within 30 days of the imposition of his sentence as required by Supreme Court Rule 604(d). 210 Ill. 2d R. 604 (d); *People v. Flowers*, 208 Ill. 2d 291, 300-301 (2004). Defendant did not file a direct appeal,



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therefore, defendant's conviction was final approximately five years prior to the prospective remedy announced in *Whitfield*. Accordingly, the trial court properly dismissed defendant's claim concerning the MSR admonishment. The judgment of the trial court is affirmed.

¶ 21

### III. CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 23 Affirmed.