

NOTICE
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2020 IL App (5th) 180479-U

NO. 5-18-0479

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 15-CF-1558
)	
ANNAN M. GROSS,)	Honorable
)	Neil T. Schroeder,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Presiding Justice Welch and Justice Wharton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in dismissing the defendant’s section 2-1401 petition for postjudgment relief, and any argument to the contrary would lack merit, and therefore the defendant’s appointed attorney is granted leave to withdraw as counsel in this appeal, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Annan M. Gross, pleaded guilty to residential burglary, and the circuit court sentenced him to eight years of imprisonment and two years of mandatory supervised release (MSR), all in accordance with a fully-negotiated plea agreement between the defendant and the State. The defendant is currently serving his MSR term. While still imprisoned, the defendant filed the pleading that is the subject of this appeal—a petition for postjudgment relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2018)). In the petition, the defendant claimed that requiring him to serve the MSR term, commencing after he had finished

his prison term, was unlawful for various reasons. The circuit court dismissed the defendant's section 2-1401 petition. The defendant appeals from the dismissal.

¶ 3 The defendant's court-appointed attorney in this appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit, and on that basis it has filed with this court a motion to withdraw as counsel, along with a memorandum of law in support thereof. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). OSAD provided the defendant with a copy of its *Finley* motion and memorandum. This court gave the defendant ample opportunity to file a written response to OSAD's motion, or a memorandum, brief, etc., explaining why his appeal has merit, but the defendant has not taken advantage of that opportunity. This court has examined OSAD's *Finley* motion and memorandum, as well as the entire record on appeal, and has determined that this appeal does indeed lack merit. Accordingly, OSAD's *Finley* motion must be granted, and the order dismissing the defendant's section 2-1401 petition must be affirmed.

¶ 4 **BACKGROUND**

¶ 5 In July 2015, the defendant was charged with residential burglary and stalking. The circuit court appointed counsel for the defendant. Several continuances followed. In late January 2017, a Rule 402 conference (see Ill. S. Ct. R. 402(d) (eff. July 1, 2012)) was held. A few days after the conference, on February 3, 2017, the defendant, his counsel, and an assistant state's attorney appeared before the circuit court, and the attorneys informed the court that the parties had reached a plea agreement. Under the terms of the plea agreement, the defendant would plead guilty to residential burglary and would be sentenced to imprisonment for eight years and MSR for two years, and the stalking charge would be dismissed. Upon hearing the plea agreement's terms, the court addressed the defendant, as follows:

“You currently have two counts. Count 1 is residential burglary. Count 2 is stalking. Your attorney tells me you’re going to plead guilty to Count 1, residential burglary. In exchange for your plea of guilty, you would be sentenced to 8 years in the Illinois Department of Corrections. Upon your release from the Department of Corrections, you would be subject to a 2 year mandatory supervised release period. You’d be given credit for all time served in custody from July 8th of 2015 through the present. Pursuant to the plea and sentence on that count, the other count, which is stalking, would be dismissed.”

The court asked the defendant whether this summary reflected the defendant’s “understanding” of the plea agreement, and the defendant answered in the affirmative.

¶ 6 In response to further questions from the court, the defendant stated that he was 33 years old and had earned an associate’s degree, and he indicated that he could read, write, and understand the English language, that he was not under the influence of any drug or alcohol, and that he did not have any physical or mental disability that could prevent his understanding of the proceedings. The court admonished the defendant as to the nature of the residential-burglary charge against him, and the defendant indicated his understanding. The court asked the defendant how he pleaded to that charge, and the defendant answered, “I plead guilty, your Honor.” The court told the defendant that it could not accept his guilty plea without first making sure that he understood his rights and the possible penalties associated with residential burglary. The court admonished the defendant on the presumption of innocence and the burden of proof, and the defendant indicated his understanding of those matters. The court admonished the defendant as to his right to an attorney, including an appointed attorney, his right to plead guilty or not guilty, his right to a trial, whether by a jury or by a judge alone, his right to confront and to cross-examine the witnesses against him, his right to subpoena witnesses to testify on his behalf, and his right to testify or not to testify at

the trial, and the defendant indicated his understanding of all those rights. The court informed the defendant that he, by pleading guilty, would waive most of those rights and no trial would be held, and the defendant indicated his understanding. The court also admonished the defendant that residential burglary was a Class 1 felony punishable by imprisonment for a term of 4 to 15 years, and that “[u]pon [his] release” from prison, he would be “subject to a 2 year mandatory supervised release period.” The defendant indicated his understanding of the possible penalties.

¶ 7 The State provided a factual basis for the defendant’s guilty plea; defense counsel concurred in the State’s presentation. In response to further queries from the court, the defendant indicated that no one had forced him or threatened him into pleading guilty, that no one had promised him anything outside the terms of the plea agreement, that he had discussed the plea with his attorney, and that he was pleading guilty freely and voluntarily. Finding that the plea was knowing and voluntary and that a factual basis existed, the court accepted the defendant’s guilty plea. The parties waived preparation of a presentence investigation report and stipulated to a written criminal history for the defendant. The court stated that “[p]ursuant to the negotiations,” it sentenced the defendant to an eight-year term of imprisonment and a two-year term of MSR that would begin “upon [his] release” from prison. The court awarded credit for presentencing incarceration, and it dismissed the stalking charge. The court asked the defendant whether the sentence imposed was the sentence he had expected, and whether he understood the sentence, and the defendant answered both questions in the affirmative. At the close of the guilty-plea hearing, the court admonished the defendant as to appeal rights and procedures, and the defendant indicated his understanding thereof.

¶ 8 The defendant did not seek to withdraw his guilty plea. He did not attempt to appeal from the judgment of conviction.

¶ 9 On May 14, 2018, approximately one year and three months after the judgment of conviction was entered, the defendant filed a *pro se* petition seeking relief from a final judgment, under section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2018)). At the time of filing, the defendant was still serving his eight-year term of imprisonment. The defendant alleged that subjecting him to a two-year MSR term commencing after his release from prison would require him to serve a sentence longer than Illinois law permits. The defendant also alleged that subjecting him to a post-prison MSR term would deprive him of the benefit of his plea bargain with the State and would violate the prohibition against double jeopardy. For relief, the defendant suggested that his MSR term should be made concurrent with his prison term. Accompanying the section 2-1401 petition was a motion for the appointment of counsel.

¶ 10 On June 30, 2018, the circuit court entered a written order denying the defendant's request for the appointment of counsel. The court granted the State time to file a response to the defendant's section 2-1401 petition.

¶ 11 On July 9, 2018, the defendant filed a *pro se* "second amended petition on recently filed post-judgment relief of M.S.R. (2-1401)." This document was merely a request that the circuit court reconsider its refusal to appoint counsel for the defendant.

¶ 12 On August 2, 2018, the State filed a "response to defendant's petition and motion for mandatory supervised release relief from judgment pursuant to 735 ILCS 5/1-109 and petition for commuted sentence." The State's response stated that the defendant's sentence, consisting of an eight-year prison term plus a two-year MSR term, was lawful.

¶ 13 On August 27, 2018, the defendant filed a *pro se* document asking the court to dismiss the State's response of August 2, 2018. On that same date, the defendant filed a *pro se* motion asking the circuit court to reconsider its denial of appointed counsel. The defendant stated that he could

not afford to hire an attorney, that he had been relying on other prison inmates for legal help, that he had “high functioning autism,” and that he lacked the background necessary to serve as his own attorney. On August 28, 2018, the defendant filed another motion seeking the court’s reconsideration of its denial of the motion to appoint counsel; this motion for reconsideration was substantively the same as the one filed the previous day.

¶ 14 On September 10, 2018, the court entered a written order that (1) denied the motion to reconsider the refusal to appoint counsel and (2) “denied” the section 2-1401 petition, after finding that the petition was “without merit.” (The court’s disposition of the section 2-1401 petition may properly be characterized as a dismissal on the pleadings for failure to state a claim upon which relief could have been granted.) The defendant filed a timely *pro se* notice of appeal from the order, thus perfecting the instant appeal. The court appointed OSAD to represent the defendant in this appeal.

¶ 15 ANALYSIS

¶ 16 This appeal is from the circuit court’s dismissal of the defendant’s section 2-1401 petition for postjudgment relief. As previously mentioned, OSAD has concluded that this appeal lacks merit, and on that basis, it has filed a *Finley* motion to withdraw as counsel and a memorandum of law in support of the motion. In its memorandum, OSAD discusses two potential issues in this appeal, *viz.*: (1) whether requiring the defendant to serve an MSR term after his release from prison is “unconstitutional” and (2) whether the circuit court abused its discretion when it denied the defendant’s motion for the appointment of counsel. For the following reasons, this court agrees with OSAD that each of these potential issues is meritless.

¶ 17 Section 2-1401 of the Civil Code provides a comprehensive statutory procedure for obtaining relief from final orders or judgments more than 30 days after their entry. *People v.*

Haynes, 192 Ill. 2d 437, 460 (2000). “Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases.” *Id.* at 460-61. Section 2-1401 authorizes a circuit court “to vacate or modify a final order or judgment in civil and criminal proceedings.” *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. Where a section 2-1401 petition raises a purely legal challenge to a final order or judgment, and does not involve any factual dispute, the circuit court’s dismissal of the petition is subject to *de novo* appellate review. *Id.* ¶ 47. *De novo* review is appropriate here, for the defendant’s section 2-1401 petition raised a purely legal challenge to the judgment of conviction; his challenge was not fact-dependent. (OSAD suggests that this court should apply an abuse-of-discretion standard, but this suggestion is clearly incorrect. The abuse-of-discretion standard applies where the section 2-1401 petition presented a fact-dependent challenge to a final order or judgment, not a purely legal challenge, such as the one here. See *id.* ¶ 51.)

¶ 18 As mentioned *supra*, OSAD’s first potential issue in this appeal is whether it is “unconstitutional” to require the defendant to serve an MSR term after he has been released from prison. In his section 2-1401 petition, the defendant claimed that subjecting him to a two-year MSR term commencing after his release from prison (1) would require him to serve a sentence longer than Illinois law permits, (2) would deprive him of the benefit of his plea bargain with the State, and (3) would violate the prohibition against double jeopardy. These three claims were without merit, as the circuit court evidently realized.

¶ 19 The defendant pleaded guilty to residential burglary, a violation of section 19-3(a) of the Criminal Code of 2012 (720 ILCS 5/19-3(a) (West 2014)). The offense was a Class 1 felony. *Id.* § 19-3(b). Therefore, it was punishable by imprisonment for a term of 4 to 15 years. 730 ILCS 5/5-4.5-30(a) (West 2014). The defendant’s eight-year prison term was within this statutory range.

After serving his prison sentence, the defendant was required to serve a two-year term of MSR. See *id.* §§ 5-4.5-15(c), 5-4.5-30(l). The defendant was sentenced to MSR for two years. In short, the defendant's sentence for residential burglary, consisting of an eight-year prison term followed by a two-year MSR term, was perfectly valid under the applicable Illinois statutes.

¶ 20 In regard to the defendant's claim that he would be deprived of the benefit of his plea bargain with the State (see, e.g., *People v. Whitfield*, 217 Ill. 2d 177, 183-85 (2005) (due process, fundamental fairness, and benefit-of-the-bargain claims)) if he were required to serve a two-year MSR term after being released from prison, the record makes clear that the MSR term, commencing after the defendant's release from prison, was in fact an explicit part of the plea agreement. At the guilty-plea hearing, the court was scrupulous in admonishing and questioning the defendant in accordance with Supreme Court Rule 402 (eff. July 1, 2012), as detailed *supra*. The record establishes that the defendant pleaded guilty knowingly and voluntarily, and that he understood that he was pleading guilty to residential burglary in exchange for a sentence consisting of imprisonment for eight years and MSR for two years, with the MSR to commence after his release from prison, plus the dismissal of a stalking charge. Nothing has deprived the defendant of the benefit of his plea bargain; he is serving exactly the sentence for which he bargained.

¶ 21 As for the defendant's claim that requiring him to serve an MSR term after finishing his prison term amounts to double jeopardy (see U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10), this claim too was fatally flawed; relief could not have been granted upon it. The defendant's prison term and his MSR term are not two separate punishments, or two separate sentences, for a single offense of residential burglary. They are two parts of a single sentence. See, e.g., *People v. Lee*, 2012 IL App (4th) 110403, ¶ 32.

¶ 22 The second of OSAD's two potential issues in this appeal is whether the circuit court abused its discretion when it denied the defendant's motion for the appointment of counsel to represent him on his section 2-1401 petition. Section 2-1401 is silent on the issue of appointing counsel; it neither confers a right to counsel nor prohibits the appointment of counsel. Accordingly, the circuit court has discretion over whether to appoint counsel to represent a litigant in a section 2-1401 proceeding. *People v. Kane*, 2013 IL App (2d) 110594, ¶ 21. Here, the circuit court did not provide a reason for refusing to appoint counsel for the defendant, and nothing in the record suggests any improper reason for the court's refusal. Therefore, this court has no specific reason to suspect an abuse of discretion in refusing to appoint counsel.

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, this court concludes that this appeal does not present any issue of arguable merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court dismissing the defendant's section 2-1401 petition is affirmed.

¶ 25 Motion granted; judgment affirmed.