

No. 1-09-0116

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

| | | |
|--------------------------------------|---|----------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County, Illinois |
| |) | |
| v. |) | |
| |) | No. 02 CR 9644, 06 CR 6024 |
| |) | |
| STACEY KEMP, |) | |
| |) | |
| |) | Honorable |
| Respondent-Appellant. |) | Stanley J. Sacks, |
| |) | Judge Presiding. |

JUSTICE SALONE delivered the judgment of the court. Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

HELD: The trial court erred in finding defendant in direct criminal contempt of court, where the record lacked evidence to support the finding that defendant knowingly and intentionally filed a false post-conviction petition; and, defendant's *pro se* post-conviction petition was properly dismissed at the first stage where his claim that he was improperly admonished regarding mandatory supervised release was without an arguable basis in law or fact.

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Defendant Stacey Kemp appeals from the first stage dismissal of his *pro se* post-conviction petition and the order finding him in direct criminal contempt of court. On appeal, he contends that the trial court failed to properly admonish him under Illinois Supreme Court Rule 402 (eff. Jul. 1, 1997), as required by the rule announced in our supreme court in *People v. Whitfield*, 217 Ill. 2d 177 (2005) regarding mandatory supervised release (MSR). Defendant also contends that the trial court erred in finding him in direct criminal contempt of court for filing a false pleading. For the following reasons, we reverse the criminal contempt order and affirm the dismissal of his post-conviction petition.

BACKGROUND

On September 15, 2006, defendant appeared before the trial court on multiple charges stemming from two separate incidents of residential burglary. On that day, the trial court, prosecutor, and public defender held a conference pursuant to Supreme Court Rule 402. After that conference and prior to defendant being sentenced, the following colloquy occurred:

“THE COURT: The charge in case number 06, 6024 reads that Stacey Kemp on or about February 24, 2006 committed the offense of residential burglary in that he knowingly without authority entered the dwelling place of Carlos Campos, located at 2703 West Washington, with the intent to commit the offense of theft therein. Do you understand that charge, Mr. Kemp?

DEFENDANT: Yes, sir.

THE COURT: Residential burglary is a class 1 felony.

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That means it ordinarily carries a sentence of 4 up to 15 years in the Department of Corrections, a fine of up to 25 thousand dollars or both, 2 years mandatory supervised release formerly known as parole, if you were sentenced to the penitentiary once you got out. Ordinarily it's a 4 to 15 year range. In your case, since you have at least 2 prior convictions for other burglaries that took place at different times under different circumstances since 1977, even though the charge stays as a class 1 felony, the sentence range moves up from class one felony to class x sentence range, not less than 6 or more than 30 years, a fine of 25 thousand dollars or both, and 3 years mandatory supervised release instead of 2. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: In case number 06, 9644, it reads that on or about April 12, 2006 you committed the offense of residential burglary in that he knowingly without authority entered the dwelling place of Byron McClain, —c-C-l-a-I-n, located at 2926 West Fulton, with the intent to commit a theft therein. Do you understand the charge in that case also, Mr. Kemp? Do you understand the charge on that case?

DEFENDANT: Yes, sir.

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THE COURT: The charge in that case also is a class 1 felony. It carries the same possible range as well as the other, 4 up to 15 years in the Department of Corrections, 2 years mandatory supervised release and a fine of up to 25 thousand dollars or both. Since you have at least 2 prior convictions for class 2 felonies or higher since 1977, at different times, even those it's a class 1 felony, the range goes up to a class x range of not less than 6 or more than 30 years, a fine of 25 thousand dollars or both, and 3 years mandatory supervised release instead of 2, do you understand that?

DEFENDANT: Yes.”

No mention of MSR was made following this exchange. The trial court then admonished defendant regarding the constitutional rights he would be waiving. After concluding that defendant knowingly and voluntarily waived his rights, the trial court found that a sufficient factual basis existed to sustain the guilty pleas and accepted defendant's guilty pleas on both residential burglary charges. In exchange, the State nol-prossed the remaining charges. Defendant waived his right to a pre-sentencing investigation and the trial court sentenced defendant to consecutive terms of seven and one-half and six years' imprisonment, respectively. Defendant was further admonished of his right to appeal and credited for 174 days of pre-trial incarceration. Defendant did not file any post-judgment motions, nor did he file a direct appeal.

On November 5, 2008, defendant filed a *pro se* petition for post-conviction relief,

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alleging that “[a]t no time during the plea hearing on September 15, 2006, did the Cook County Circuit Judge advise me that I would be subject to a [t]wo-year (MSR) period following the agreed to 13 ½-year term of imprisonment for the Class One Felony Offenses of Residential Burglary.” Defendant alleged that as a result of the trial court’s failure, he was deprived of due process because he did not receive the benefit of his negotiated plea agreement.

On December 2, 2008, defendant appeared before the trial court for a hearing on his post-conviction petition. At that hearing, defendant was asked if wished to proceed and, upon affirming that he did, was sworn in and testified to the truth of his petition and accompanying affidavit. Thereafter, the court reviewed the transcript and the following colloquy occurred:

“[THE COURT]: You then filed a motion for post conviction relief claiming under oath that you were not given your mandatory release admonishments, in an effort to get your sentence reduced by two years.

Obviously you were admonished about mandatory release admonishments. The record clearly reflects that, and therefore –

DEFENDANT KEMP: Excuse me your Honor, can I say something?

THE COURT: Yes, sir.

DEFENDANT KEMP: In the Whitfield case it said –

THE COURT: I don’t want to hear anything else, Mr. Kemp. You filed a motion in Court, under oath, claiming you were not told about your mandatory release period.

Obviously you were lying about that in your petition and therefore, as I told you before you wanted to proceed, you chose to proceed and the Court finds you in direct criminal contempt of Court for filing a false pleading saying that you were not given your mandatory release period, when you obviously were.

So we are going to add on six months to your sentence. Once you finish that sentence of six months, they will bring you back from the county to serve your six month sentence once you have gotten to the penitentiary.

I would suggest in the future, Mr. Kemp, before you file any false pleadings, you be sure that they are not false. Instead of getting your sentence reduced we are adding six months on to it for direct criminal contempt for lying in your post conviction petition for relief.

DEFENDANT KEMP: Yes, sir, your Honor. You Honor, can I say something?

THE COURT: You can say anything you want to now.

DEFENDANT KEMP: The ruling was that during the sentencing portion of the transcript that's when the contract to agree or the agreement for the plea bargain was made. That admonishment according to the Whitfield statement said that it doesn't matter if it was mentioned during negotiations or beforehand.

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THE COURT: Mr. Kemp, don't tell me the law.

DEFENDANT KEMP: I am not trying to, sir.

THE COURT: I know it better than you do. You filed a false pleading saying you were not told [of] your mandatory release period, you clearly were, and it was done with the intent to get me to reduce your sentence, the sentence you agreed upon you want two years less, because you lied under oath in your petition for post conviction relief.

You should be more cautious about what you do in the future because it's a lot of trouble for me to get a transcript, I know I did something anyway, to be sure it was there. And you were told the sentence carried three years mandatory release, once released from custody.

You want to try to lie to get out of that three year mandatory release. You certainly did that this time. That lie is going to cost you six months once you get out.

DEFENDANT KEMP: Sir, I am not trying to be difficult.

THE COURT: Take him on back.

DEFENDANT KEMP: Yes, sir."

Thereafter, defendant's petition was summarily dismissed as frivolous and without merit and he was found in direct criminal contempt of court. From these orders, defendant timely appeals.

ANALYSIS

On appeal, defendant raises two issues. First, defendant challenges the trial court's judgment finding him in direct criminal contempt for filing a false pleading. Second, defendant contends that the trial court failed to properly admonish him regarding mandatory supervised release, and that he is therefore entitled to a reduction in his sentence, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005). We will address each of these issues in turn.

As a threshold matter, the State contends that this court lacks jurisdiction to review defendant's challenge to the direct criminal contempt order. In summary, the State contends that defendant's failure to list the criminal contempt judgment in his notice of appeal deprives this court of jurisdiction to review that judgment.

We begin by acknowledging that this court has "an independent duty to consider jurisdiction even if a jurisdiction issue is not raised by the parties." *People v. Lewis*, 234 Ill. 2d 32, 36-37 (2009), citing *Secura Insurance Co. V. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). Our supreme court has also held that filing a notice of appeal is the only jurisdictional step required to initiate appellate review, such that, where there is no properly filed notice, a reviewing court is obliged to dismiss the appeal for lack of jurisdiction. *People v. Smith*, 228 Ill. 2d 95, 104 (2008).

In *Lewis*, our supreme court explained that the purpose of the notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision. *Lewis*, 234 Ill. 2d at 37. Consistent with that purpose, Supreme Court Rule 606(d) (eff. September 1, 2006) requires that a notice of appeal identify the nature of the order appealed from if the appeal

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is not from a conviction. A notice of appeal confers jurisdiction on an appellate court where, considered as a whole and construed liberally, it fairly and adequately identifies the complained-of judgment. *Lewis*, 234 Ill. 2d at 37. Even more recently, this court held that a defendant's failure to list a specific judgment in his notice of appeal did not deprive the court of jurisdiction where the State fully briefed the issue, thereby establishing notice and an absence of prejudice. *People v. Decaluwe*, 405 Ill. App. 3d 256, 264 (2010) (petition for leave to appeal denied).

In this case, we find defendant's notice of appeal was sufficient to confer jurisdiction on this court to review the contempt judgment. As in *Decaluwe*, the State and defendant in this case, each briefed the substantive issue regarding the contempt judgment even though defendant failed to include that order in his notice of appeal. *Decaluwe*, 405 Ill. App. 3d at 264. Moreover, it is our view, having liberally evaluated defendant's *pro se* appeal as a whole, that defendant necessarily intended to include the circuit court's contempt finding. The record establishes that defendant challenged the dismissal of his post-conviction petition and the circuit court's contempt judgment was based solely on its view that defendant knowingly and intentionally filed a false petition. Accordingly, by claiming on appeal that his petition has an arguable basis in fact, defendant necessarily challenges the contrary contempt judgment.

Having resolved the issue of jurisdiction, we now turn to the substance of defendant's appeal from the contempt finding. As noted above, defendant was found in direct criminal contempt for "lying" in his post-conviction petition about the trial court's admonishments regarding MSR. Defendant contends that the trial court erred in holding him in direct criminal contempt where his post-conviction petition had a legitimate arguable basis in law and fact. The

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State argues that the circuit court should be affirmed because it had sufficient evidence to support its finding.

It is well-settled that criminal contempt is conduct which is calculated to “embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute.” *People v. Javaras*, 51 Ill. 2d 296, 299 (1972). Direct criminal contempt is “strictly restricted to acts and facts seen and known by the court, and no matter resting upon opinions, conclusions, presumptions or inferences should be considered.” Whereas criminal contempt of court is punitive in nature, and can be found without any hearing, the exercise of such power is ““a delicate one, and care is needed to avoid arbitrary or oppressive conclusions.”” *People v. Simac*, 161 Ill. 2d 297, 305-06 (1994), quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925). On appeal, we review direct criminal contempt to determine whether there is sufficient evidence to support the finding of contempt and whether the trial court considered facts outside of its personal knowledge. *Simac*, 161 Ill. 2d at 306.

We begin by noting the legal landscape at the time when defendant filed his post-conviction petition. In late 2008, following our supreme court’s decision in *Whitfield* there was considerable disagreement within this court, regarding the question of when it was appropriate to lessen a defendant’s sentence because he was not admonished at his actual sentencing hearing regarding MSR.¹ There were well-reasoned opinions from this district on both sides of this issue which defendant raised in his appeal. In 2010, nearly two years after defendant filed his petition,

¹ For an in depth delineation of the differences in opinion compare *People v. Marshall*, 381 Ill. App. 3d 724 (2008) with *People v. Smith*, 386 Ill. App. 3d 473 (2008).

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our supreme court, in *People v. Morris*, 236 Ill. 2d 345, 366 (2010), found that an admonishment prior to sentencing that includes MSR was legally sufficient. However, at the time that defendant filed his *pro se* post-conviction petition, the question of whether strict compliance was required under *Whitfield* remained unresolved.

Context notwithstanding, the trial court found that defendant knowingly and intentionally filed his *pro se* post-conviction petition with false factual allegations, and thereby found defendant in direct criminal contempt. We disagree, and in doing so note that the trial court is to accept all well-pled facts as true and defendant need only assert an *arguable basis* in law or fact in his post-conviction petition to advance beyond the summary dismissal stage. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009) (emphasis added). Indeed, our supreme court instructed us that a defendant need only provide more than “fanciful factual allegation[s],” which it defined as “fantastic or delusional” to survive first-stage dismissal. *Hodges*, 234 Ill. 2d at 16-7.

Here, the trial court concluded that defendant committed contemptuous conduct by knowingly and intentionally falsifying the factual allegations in his petition. However, our review of the record, including defendant’s petition and the sentencing transcript shows that, the trial court did not reference the MSR term, when it imposed its sentence on defendant, though it had done so earlier. Thus, the record does not establish that defendant’s filing was calculated to embarrass, hinder or obstruct the circuit court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute. As such, we find that the trial court lacked sufficient evidence to support its finding that defendant knowingly and intentionally falsified his post-conviction petition. Accordingly, we reverse the trial court’s

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contempt finding and vacate the attendant six-month sentence.

In doing so, we necessarily reject the State's contention that this case is analogous to *People v. Brown*, 30 Ill. App. 3d 828 (1975), wherein this court upheld a contempt finding for filing a false post-conviction petition. In *Brown*, the defendant admitted that he knowingly filed a false statement with the court in his post-conviction petition, but stated that he did so without the intention to defraud the court, but instead to "get his lawyer off his back[.]" *Brown*, 30 Ill. App. 3d at 830. By contrast, the defendant in *Brown* was given an opportunity to explain why he filed his post-conviction petition. The defendant in this case was told that he could not explain his view of the facts and applicable law. Even in *Brown*, this court, on review, vacated defendant's six-month sentence in the interest of justice. *Brown*, 30 Ill. App. 3d at 831. Unlike *Brown*, defendant in this case, did not express that he knowingly and intentionally filed a false pleading, and given our review of the transcript, we do not find that the circuit court had sufficient evidence to conclude that defendant knowingly and intentionally falsified his petition.

Defendant next contends that the trial court erred in summarily dismissing his *pro se* post-conviction petition. Defendant contends that the admonishments he received were unclear and that as a result, he pleaded guilty without a full understanding of the terms of his sentence. The State contends that the trial court substantially complied with Supreme Court Rule 402 and *Whitfield*, such that defendant's claim was properly dismissed.

As noted above, a trial court must substantially comply with Rule 402 before accepting a guilty plea. *Morris*, 236 Ill. 2d at 366. A trial court deprives a defendant of his due process rights when it fails to substantially comply, by failing to advise him "prior to accepting his plea,

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that a mandatory supervised release term will be added to [his] sentence.” *Whitfield*, 217 Ill. 2d at 195. This court has recently addressed this issue, in finding that substantial compliance occurs where the trial court addresses the MSR term prior to sentencing defendant, but fails to do so, when defendant is actually sentenced. *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010). In *Davis*, as in this case, defendant claimed that the trial court’s admonishment prior to sentencing was insufficient because it was not done immediately prior to sentencing. *Davis*, 403 Ill. App. 3d at 466. The court, relying on *People v. Marshall*, 381 Ill. App. 3d 724 (2008), held that substantial compliance was achieved where the MSR term was stated before defendant’s plea was accepted and when his plea was accepted he stated that he understood and accepted the terms. *Davis*, 403 Ill. App. 3d at 466.

We agree with the court in *Davis* that substantial compliance is achieved where the clear inference from the record is that defendant was aware of the MSR term before he accepted his sentence and that defendant acknowledged his understanding of his sentence prior to pleading guilty. Turning to our facts, the record establishes that the court described defendant’s potential sentence range in detail, and then explained that because of his prior convictions his sentencing range would be increased. The court then went on to independently explain that if defendant were sentenced to the penitentiary, he would be required to serve MSR upon his release. The court further explained that because of defendant’s criminal background, that his MSR term was increased from two to three years. Thereafter, defendant acknowledged that he understood the charges, and pled guilty to both residential burglary charges. Thus, the trial court clearly and thoroughly explained MSR to the defendant prior to accepting his guilty plea, as required. *Davis*,

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403 Ill. App. 3d at 466.

Accordingly, we affirm the dismissal defendant's post-conviction petition, reverse the contempt order and vacate the accompanying contempt sentence.

Affirmed in part; reversed and vacated in part.