FOURTH DIVISION
JUNE 30, 2011

2011 IL App (1st) 092706-U
No. 1-09-2706

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.
	)	
v.	)	06 C 660783
	)	
KELLY SKAMRA,	)	The Honorable
	)	Robert Jeffrey Clifford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

HELD: Where the trial court informed defendant that the felony to which he was pleading guilty carried a term of mandatory supervised release, it substantially complied with Illinois Supreme Court Rule 402 and defendant's right to due process was not violated.

¶ 1 Defendant Kelly Skamra appeals from the second stage dismissal of his *pro se* postconviction petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2006). On appeal, defendant contends that in his guilty plea proceeding the trial court insufficiently admonished him about serving a mandatory supervised release (MSR) term,

thereby violating his right to due process. We affirm.

¶ 2 Defendant was charged with committing residential burglary on July 20, 2006. He requested a plea conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). On October 30, 2006, after the plea conference, the court explained to defendant that his charge of residential burglary would be:

> "[A] Class X felony, punishable from 6 to 30 years in the penitentiary, fine up to $25,000 and a period of mandatory supervised release."[1]

¶ 3 Defendant said he understood the charges and the possible penalties. Defendant pled guilty to residential burglary and the parties stipulated to a factual basis for the plea. The court found defendant pleaded guilty knowingly and voluntarily, and accepted his guilty plea. Defendant signed a presentence investigation (PSI) waiver and orally waived the PSI in open court. The State also waived the PSI. The trial court then asked the State whether it had "anything else in aggravation or mitigation", to which the State replied "[j]ust what was elicited in the conference." Defendant was sentenced to 12 years in prison "based on [his] extensive background." The court informed defendant that he had a right to appeal but to do so, he had to file a motion to withdraw his plea within 30 days. The trial court did not mention MSR at sentencing and the MSR term was not included in the written sentencing order.

¶ 4 In October 2007, defendant filed a *pro se* postconviction petition alleging a violation of due process and a denial of the benefit of his bargain. Specifically, defendant alleged

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[1]Although residential burglary is a Class 1 felony (720 ILCS 5/19-3 (West 2006)), the parties do not dispute and the record establishes, particularly at the July 2, 2009, postconviction proceeding, that he was subject to a Class X sentence based on his criminal background.

that he "pleed (*sic*) guilty pursuant to a negotiated plea agreement with the State, which specifically requires petitioner to serve only a 12 year term" but that, during his imprisonment, he learned "that he is required to serve an additional 3 year term of mandatory supervised release (MSR) after release from the Illinois Department of Corrections." Defendant also attached his own affidavit, in which he attested he entered into a negotiated plea agreement on October 30, 2006. Defendant's petition was advanced to the second stage of postconviction proceedings and he was assigned counsel.

¶ 5 The State moved to dismiss defendant's petition. In response, defense counsel filed a supplemental postconviction petition arguing defendant entered a negotiated guilty plea in which he agreed to a 12-year sentence, and because the trial court only informed defendant that a possible penalty was serving an unspecified MSR term, he was denied the benefit of his bargain pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005).

¶ 6 At the motion hearing on September 25, 2009, the trial court specifically found that defendant's plea was negotiated and not open. The trial court further found that the admonitions were sufficient and dismissed the postconviction petition.

¶ 7 On appeal, defendant asserts that his petition should not have been dismissed as the trial court's Rule 402 admonishments were insufficient because he was not told he would be required to serve a MSR term of 3 years in addition to his 12-year prison term. Defendant contends that, as a result, he did not receive the benefit of his bargain with the State and his right to due process was violated.

¶ 8 The Act provides for a three stage proceeding. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). At the second stage, the trial court may dismiss a petition unless the defendant

makes a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Additionally, we must accept as true all well pleaded facts not positively rebutted by the trial record. *Id*. The dismissal of a postconviction petition that has not had an evidentiary hearing is reviewed *de novo*. *People v. Harris*, 224 Ill. 2d 115, 123 (2007).

¶ 9 Rule 402(a)(2) (eff. July 1, 1997) requires the trial court to admonish a defendant of the minimum and maximum sentence prescribed by law before it accepts a guilty plea. Defendant here relies on *Whitfield,* which held that a defendant's right to due process is violated when he enters into a negotiated plea and the trial court completely fails to mention the MSR term. *Whitfield*, 217 Ill. 2d at 201-02. The State contends *Whitfield* does not apply because defendant entered into an open plea, while defendant asserts that the plea was negotiated. Accordingly, the first question we must answer is whether the plea was open or negotiated.

¶ 10 We find defendant entered a negotiated plea for a specific sentence. Notably, at the hearing on the motion to dismiss defendant's petition, the trial court also found defendant entered a negotiated plea. Defendant pleaded in his postconviction petition that he entered a negotiated guilty plea for a sentence of 12 years in prison. This allegation is not positively rebutted by the record and therefore must be accepted as true. *Pendleton*, 223 Ill. 2d at 473. Moreover, the record supports defendant's allegation that the plea was negotiated. First, the Unified Code of Corrections requires the completion and consideration of a PSI report before a defendant is sentenced for a felony, except "where both parties agree to the imposition of a specific sentence." 730 ILCS 5/5-3-1 (West 2006). Here, defendant and the State waived the PSI in open court, showing the parties had agreed to a specific sentence. Furthermore, two instances on the record suggest that the basis for defendant's sentence was discussed at the

conference. When asked whether there was anything further in aggravation or mitigation, the State replied "[j]ust what was elicited at the conference." Then, the court stated it was sentencing defendant to 12 years in prison "based on [his] extensive background." Clearly, the parties and the court discussed the basis for defendant's sentence at the conference, which further suggests that the plea was negotiated. Finally, the trial court here only instructed defendant that he must move to withdraw his plea of guilty in order to appeal, which is the admonishment for a negotiated plea. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001). Therefore, we agree with defendant that he entered a negotiated guilty plea.

¶ 11 Next we consider whether the trial court's admonishments substantially complied with Rule 402. Defendant asserts that, in *Morris*, the Illinois Supreme Court held a trial court's failure to explicitly state that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea violates due process. Specifically, defendant argues that the admonishments were insufficient here because the trial court only mentioned MSR in the context of possible sentences, never directly linked a term of MSR to his negotiated plea agreement, and failed to specify the length of the potential MSR term. Defendant contends he is entitled to relief because the trial court did not specify that defendant would be serving a MSR term. We disagree.

¶ 12 In *Morris*, the supreme court held that the rule announced in *Whitfield* would only be applied prospectively to cases where the conviction was not finalized before December 20, 2005, the date *Whitfield* was announced. *Morris*, 236 Ill. 2d at 366. Defendant's attempt to expand this narrow holding is unavailing. The court in *Morris* did clarify *Whitfield* and encourage trial court judges to explicitly tell defendants during preplea admonishments and at

sentencing that a term of MSR would be a part of the sentence. *Morris*, 236 Ill. 2d at 366-68. Contrary to defendant's position, this discussion in *Morris* did not impose any new mandates or requirements.

¶ 13 In particular, after acknowledging *Morris* and its narrow holding, the First District has held that "until the supreme court tells us differently, we believe *Marshall* [*People v. Marshall*, 381 Ill. App. 3d 724 (2008)] settles the issue of whether the *Whitfield* rule extends to the 'sole mention' of the MSR term in the circuit court's preplea admonishments in the First District." *People v. Davis*, 403 Ill. App. 3d 461, 467 (2010). In *Marshall*, this court held where the trial court mentions the term of MSR as a possible penalty, and the defendant says he understands, the admonishment is sufficient even though the trial court did not mention MSR at sentencing or in the written sentencing order. *Marshall*, 381 Ill. App. 3d at 735-36. Accordingly, Rule 402 admonishments are sufficient as long as the trial court informs defendant that the sentence carries with it a period of MSR. *Marshall*, 381 Ill. App. 3d at 736; see also *Davis*, 403 Ill. App. 3d at 467; *People v. Andrews*, 403 Ill. App. 3d 654, 665 (2010); *contra*, *People v. Burns*, 405 Ill. App. 3d 40 (2010). As the trial court here stated a term of MSR was a possible penalty, and defendant indicated he understood the possible penalties, under *Marshall* and *Davis* the admonishment substantially complied with Rule 402.

¶ 14 We also reject defendant's argument that the failure to specify the length of the MSR term renders the admonishments insufficient. See *People v. Johnson*, 392 Ill. App. 3d 897, 899 (2009). In *Johnson*, the court advised the defendant before he pled guilty about the charged offense of aggravated kidnaping as follows:

> "That is a Class X felony. That is punishable from 6 to 30 years in

> the penitentiary, a fine up to $25,000, and a period of mandatory, supervised release." *Id*.

The trial court further advised the defendant about the charged offense of possession of a controlled substance:

> "As charged, a Class 1 felony, you'd be sentenced in that case form 4 to 15 years in the penitentiary, a fine up to $25,000, and a period of mandatory, supervised release." *Id*.

Notably, the *Johnson* defendant also had at least three prior felony convictions for which he had been sentenced to prison. *Id* at 901. We found in *Johnson* that the trial court's admonishments substantially complied with Rule 402 because prior to accepting the defendant's guilty plea, the trial court had admonished him for both charged offenses that he would be subject to a prison term, a fine and "a period of mandatory, supervised release." *Id* at 913.

¶ 15 As in *Johnson*, the trial court here admonished defendant, who had an extensive criminal history, about the charged offense of residential burglary as

> "[A] Class X felony, punishable from 6 to 30 years in the penitentiary, a fine up to $25,000 and a period of mandatory supervised release."

This admonishment is indistinguishable from the preplea admonishments in *Johnson* which did not specify a particular numerical term of MSR but did advise the defendant that a term of MSR would apply. As the admonishments in *Johnson* were distinguishable from *Whitfield*, where MSR was never mentioned, and were deemed sufficient under Rule 402 (*Johnson*, 392 Ill. App. 3d at 913), we also find the admonishments here complied with Rule 402 even absent a specified

term of MSR.

¶ 16 Defendant argues that *Johnson* was overruled by *Morris* and may not be considered. However, *Johnson* was overruled only to the extent that it held *Whitfield* did not create a new rule of law. *Morris*, 236 Ill. 2d at 365 n.2, 366; *Johnson*, 392 Ill. App. 3d at 907. The *Morris* decision did not effect any other portion of *Johnson*.

¶ 17 For all the foregoing reasons, we find the trial court's admonishments substantially complied with Rule 402, defendant's due process rights were not violated, and therefore the trial court properly dismissed defendant's petition. We affirm the judgment of the trial court.

¶ 18 Affirmed.