2011 IL App (1st) 092687-U

THIRD DIVISION
September 14, 2011

Nos. 1-09-2687 and 1-10-2557
(Consolidated)

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.	)	No. 04 CR 4224
	)	
STEVEN KONZ,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Quinn and Neville concurred in the judgment.

O R D E R

Held: The trial court properly dismissed defendant's *pro se* postconviction petition alleging that the trial court failed to adequately inform him that he would be required to serve a three-year term of mandatory supervised release upon the completion of the agreed upon prison term when the record positively rebutted the claim.

¶ 1 Defendant Steven Konz appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He contends the trial court erred in dismissing his petition because it established that the trial court

failed to adequately inform him of the three-year term of mandatory supervised release (MSR) he must serve upon his release from prison. Defendant also contends that he is entitled to one additional day of presentence custody credit. We affirm and correct defendant's mittimus.

¶ 2 In 2007, defendant agreed to enter a plea of guilty to first degree murder in exchange for a sentence of 28 years in prison. The court then informed defendant, *inter alia*, that murder was a charge punishable with between 20 and 60 years in prison, he would have to serve 100% of his sentence, and there was "a mandatory supervised release period of three years." Defendant indicated that he understood and was pleading guilty freely. The court then heard a recitation of the factual basis for the plea, accepted defendant's plea, and admonished defendant regarding his appeal rights.

¶ 3 Defendant subsequently filed a *pro se* motion seeking a declaratory judgment. The motion alleged that his due process rights had been violated when, although his plea agreement indicated he would serve 28 years in prison, he later learned that he was also required to serve a three-year term of MSR upon the completion of his sentence. After the trial court denied this motion, defendant filed a notice of appeal.

¶ 4 Defendant then filed a *pro se* postconviction petition alleging that the trial court failed to adequately inform him, at the time of his plea, that he would be required to serve a three-year term of MSR upon the completion of his agreed upon prison sentence.[1] The petition requested that his sentence be reduced by three years in order to approximate the bargain defendant believed he had entered into with the State. The trial court summarily dismissed the petition, and defendant filed a notice of appeal.

---

[1] Although the postconviction petition is *pro se*, it is signed on defendant's behalf by the assistant Appellate Defender assigned to represent defendant in the appeal from the trial court's denial of the motion for a declaratory judgment.

¶ 5 This court subsequently granted defendant's motion to consolidate his appeals.

¶ 6 Before addressing the merits of defendant's contentions on appeal, this court must first address the State's argument that defendant waived these claims because he failed to raise them on direct appeal. However, defendant did not pursue a direct appeal, and, consequently, he may raise claims of constitutional deprivations in his postconviction petition. See *People v. Brooks*, 371 Ill. App. 3d 482, 485-86 (2007) (finding the rule that a defendant cannot raise an issue in a postconviction petition that he could have raised on direct appeal inapplicable to those situations where the defendant did not take a direct appeal). Accordingly, this court will consider the merits of defendant's claims.

¶ 7 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). "Unless positively rebutted by the record, all well-pled facts [in the petition] are taken as true" at the first stage. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001).

¶ 8 A petition is summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 9 Here, defendant relies on our supreme court's decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005), to argue that he was denied the benefit of his bargain with the State when the trial court failed to explicitly link the term of MSR he will be required to serve upon release from prison to his agreed upon 28-year sentence. In *Whitfield*, our supreme court held that a defendant who enters into a negotiated plea, but is not informed of the required MSR term, suffers a violation of his constitutional rights and is entitled to the benefit of the bargain by having his prison sentence reduced by the length of the MSR term to approximate the agreement. *Whitfield*, 217 Ill. 2d at 201-03. While defendant acknowledges that the court mentioned MSR when discussing the range of penalties he could receive, he asserts that he was never actually told he had to serve a term of MSR, and, consequently seeks to reduce his term of imprisonment by three years to approximate the bargain he believed he had agreed to.

¶ 10 This court rejected a similar argument in *People v. Davis*, 403 Ill. App. 3d 461 (2010). There, we determined that under *Whitfield* a constitutional violation occurs only when there is "absolutely no mention" to a defendant, prior to the entry of his guilty plea, that he must serve a term of MSR in addition to the agreed upon sentence that he will receive in exchange for his plea. *Davis*, 403 Ill. App. 3d at 466. Accordingly, when a defendant knows, before the guilty plea admonishments, that he will be sentenced to prison in exchange for his plea and is subsequently told during the hearing that he must serve a term of MSR upon being sentenced, then that defendant is placed "on notice" that punishment for the crime he has admitted to committing extends beyond the completion of his prison term. *Davis*, 403 Ill. App. 3d at 466; see also *People v. Marshall*, 381 Ill. App. 3d 724, 727, 736 (2008) (determining that a defendant was sufficiently admonished when he was told that he "could get a penitentiary sentence and have to serve a period of three years['] mandatory supervised release, which is like parole, when you get out;" although MSR was not later mentioned at sentencing). Thus, this court found that

because the *Davis* defendant was advised of the MSR term prior to the entry of his guilty plea his claim was rebutted by the record, and his *pro se* postconviction petition was properly dismissed. *Davis*, 403 Ill. App. 3d at 467.

¶ 11 Although defendant acknowledges *Davis*, he argues that it was wrongly decided. He also contends that the facts of this case are different because the *Davis* defendant was told that MSR was a "certain consequence" of his decision to plead guilty and in the case at bar there was only a "general statement" about MSR. He further argues that the mere mention of MSR as it related to possible sentences is not sufficient under *People v. Morris*, 236 Ill. 2d 345 (2010). While this court acknowledges that the *Morris* court said that the "better practice" would be to incorporate the MSR admonishment into the announcement of the sentence, we do not agree with defendant's argument that such a practice is required in order to satisfy the requirements of due process.

¶ 12 Defendant overstates our supreme court's clarification to the trial courts regarding MSR admonishments. *Morris*, 236 Ill. 2d at 366-68. In *Morris*, our supreme court determined that "MSR admonishments need not be perfect" but strongly encouraged the trial courts to "explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea." *Morris*, 236 Ill. 2d at 367. In other words, the admonishments must " 'in a practical and realistic sense' " inform a defendant of the full consequences of his plea, *i.e.*, if he pleads guilty and is sentenced to term of imprisonment, he will have to serve a term of MSR upon his release from prison. *Morris*, 236 Ill. 2d at 366 (quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983)).

¶ 13 This is not a case where there was no mention of MSR before the defendant actually plead guilty. See *Davis*, 403 Ill. App. 3d at 466. Here, defendant was admonished, prior to the entry of his plea, that a guilty plea would result in prison, fines and MSR. See *Marshall*, 381 Ill. App. 3d at 736 (although the court did not mention MSR at sentencing, the defendant was advised of the requirement before the court accepted his plea). Thus, defendant was put "on

notice" that the punishment for the crime he had admitted to committing encompassed more than completing a sentence in the penitentiary. *Davis*, 403 Ill. App. 3d at 466. While this court agrees with the *Morris* court's determination that a trial court's ideal admonishments would explicitly link MSR to the sentence to which a defendant agreed and be given while the trial court reviewed the plea agreement with the defendant and reiterated both at sentencing and in the written judgment (*Morris*, 236 Ill. 2d at 367), in the case at bar, the trial court satisfied the requirements of due process by advising defendant prior to imposing sentence that he would have to serve a term of MSR upon his release from prison.

¶ 14 As defendant's claim that he was not adequately informed of the MSR term he must serve upon his release from prison is contradicted by the record, the trial court properly dismissed the *pro se* postconviction petition. *Hodges*, 234 Ill. 2d at 16-17.

¶ 15 Defendant next contends, and the State concedes, that he is entitled to one additional day of presentence custody credit, for a total of 1,210 days. Accordingly, pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the mittimus to reflect that defendant was in custody for 1,210 days. See *People v. Flores*, 378 Ill. App. 3d 493, 496-97 (2008).

¶ 16 For these reasons, the judgment of the circuit court of Cook county is affirmed, and the mittimus is modified.

¶ 17 Affirmed; mittimus modified.