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No. 3-07-0856

Order filed December 17, 2010
Modified upon denial of rehearing February 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	No. 91-CF-2786
)	
ROLANDO GUERRERO,)	Honorable
)	Amy Bertani-Tomczak,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Holdridge dissented.

ORDER

Held: Following the issuance of our order in *People v. Guerrero*, No. 3-07-0856 (2008) (unpublished order under Supreme Court Rule 23), our supreme court ordered this court to vacate its earlier judgment and reconsider its decision in light of *People v. Morris*, 236 Ill. 2d 345 (2010), to determine if a different result is warranted. After considering *Morris*, we find the trial court erred in denying defendant's motion for leave to file a successive postconviction petition because defendant's petition established prejudice and cause, and defendant is entitled to relief because his plea was not knowingly and voluntarily made. We reverse the trial court's order and reduce defendant's sentence to 47 years imprisonment followed by 3 years mandatory supervised release.

Defendant plead guilty to first degree murder on December 2, 1991. The court sentenced defendant to a 50-year term of imprisonment. Defendant filed his first postconviction petition in 1994. The circuit court dismissed defendant's first postconviction petition, and the dismissal was affirmed on appeal. On December 21, 2006, defendant filed a *pro se* successive postconviction petition claiming that he was denied due process because the trial court failed to admonish defendant regarding the applicability of three years mandatory supervised release at the time of his plea. Appointed counsel requested leave to file a successive postconviction petition on May 16, 2007. The trial court denied defendant's motion for leave to file a successive postconviction petition and defendant's motion to reconsider. Defendant filed a timely notice of appeal on November 20, 2007.

Initially, we reversed the trial court's order and reduced defendant's sentence in *People v. Guerrero*, No. 3-07-0856 (2008) (unpublished order under Supreme Court Rule 23). Our supreme court ordered this court to vacate its earlier judgment and reconsider its decision in light of *People v. Morris*, 236 Ill. 2d 345 (2010), to determine if a different result is warranted. After considering *Morris*, we reverse the trial court's order and reduce defendant's sentence to 47 years imprisonment followed by 3 years mandatory supervised release.

FACTS

Defendant was charged by criminal complaint with first degree murder which occurred on or about September 22, 1991. The grand jury of Will County issued a bill of indictment on October 16, 1991. On December 2, 1991, the parties appeared before the trial court. The State indicated to the trial court that defendant would be pleading guilty to first degree murder in exchange for a recommendation of 50 years in the Department of Corrections. Defense counsel

concurrent with that representation to the court. Trial court confirmed with the State that this was the extent of the negotiations.

The State presented an agreed factual basis to the court, but the common law record does not contain a written, signed guilty plea. The trial court advised defendant that the offense carried a minimum sentence of 20 years and a maximum sentence of 60 years in the Department of Corrections and a \$10,000 fine. On the record, defendant verbally indicated he understood these penalties and indicated his intent to plead guilty.

Before proceeding to sentencing, the trial judge raised the necessity for a presentence investigation report during a discussion with counsel. The attorneys for the State and defense agreed to waive the preparation of a presentence investigative report. Defendant did not participate in this discussion with the court.

Neither attorney presented evidence in aggravation or mitigation for the court to consider. However, there was a brief discussion regarding defendant's age of 16 years, and the need for him to begin incarceration in a juvenile facility. Shortly thereafter, the trial court stated:

“Okay. I see no reasons that I won't accept these plea negotiations, fifty years in the Department of Corrections, since the law only provides up to sixty years.

And, Mr. Guerrero, unfortunately, on the day you took Mr. Horton's life, I think you took your own life on that day. So there is two lives and many other people who are victims because of your acts, the family and parents and friends of Mr. Horton, as well as your parents and family and friends. And there are many, many

lives that were taken on that night.

I am going to approve the plea negotiations. The defendant will be sentenced to fifty years in the Department of Corrections.

And there will be a judgment for costs. The defendant will be given credit for sixty-four days served in the Will County Jail.

There will be no day-for-day.”

The parties agree that the trial court did not advise defendant regarding the statutorily required three years of mandatory supervised release that would follow the period of incarceration. On December 4, 1991, the trial court signed a written judgment which provided that the trial court sentenced defendant “to imprisonment in a penitentiary and fixes the term of imprisonment at fifty (50) years with credit for 64 days already served; no day for day credit.” The judgment did not order or reference any term of mandatory supervised release which defendant would have to serve.

Defendant filed a *pro se* motion for postconviction relief in October 1994. The trial court denied that motion, and the dismissal was affirmed on appeal. On December 21, 2006, defendant filed a *pro se* successive postconviction petition claiming that the trial court failed to properly admonish defendant that his sentence included a term of three years mandatory supervised release at the time of his plea. Appointed counsel filed an amended postconviction petition and a motion for leave to file the successive postconviction petition on May 16, 2007.

After a hearing, the trial judge denied defendant’s motion for leave to file the successive petition on two grounds. First, the trial court found defendant did not establish that his failure to raise this issue earlier was without cause. Second, the trial court found defendant’s petition

failed to establish prejudice because the plea was not a fully negotiated agreement. Following the denial of a motion to reconsider, defendant filed a timely notice of appeal.

ANALYSIS

In this appeal, defendant argues that the court was in error because his postconviction petition demonstrated cause and prejudice, and defendant was ultimately entitled to relief based upon the contents of his petition. Specifically, defendant asserts that his constitutional rights were violated because the trial court failed to admonish him regarding the applicability of three years mandatory supervised release at the time of his plea, relying upon *People v. Whitfield*, 217 Ill. 2d 177 (2005). Defendant claims that he was without fault in failing to raise this issue in his first postconviction petition because he did not learn of the mandatory supervised release requirement until he met Whitfield, himself, while incarcerated and because the case of *People v. Whitfield*, 217 Ill. 2d 177, was not decided until after he filed his first postconviction petition. Defendant requests a remand for further postconviction proceedings or alternatively requests this court to reduce his sentence to 47 years to be followed by 3 years mandatory supervised release.

The State responds that the trial court properly denied leave to file a successive postconviction petition in this case. The State argues that defendant's plea was not fully negotiated, but only partially negotiated, because the agreed recommendation for a 50-year sentence was not binding on the court, and defendant was so advised. Therefore, according to the State, *Whitfield* does not apply, and defendant is not entitled to the requested relief.

Recently, in *People v. Morris*, 236 Ill. 2d 345, our supreme court addressed the application of *Whitfield*. In *Morris*, our supreme court explained that the rule pronounced by the *Whitfield* court established that a "faulty MSR admonishment deprived a defendant of his right to

due process by denying him the benefit of his bargain with the State.” *People v. Morris*, 236 Ill. 2d at 361. However, the *Morris* court held that *Whitfield* established a new rule of law (*People v. Morris*, 236 Ill. 2d at 360), and that the rule shall only apply *prospectively* to cases where a defendant’s conviction was finalized after December 20, 2005, the date on which *Whitfield* was announced. *People v. Morris*, 236 Ill. 2d at 365-66.

In this case, the trial court entered a conviction against defendant, pursuant to his plea on December 2, 1991, prior to the date *Whitfield* was announced. Therefore, in light of our supreme court’s ruling in *Morris*, we conclude the *Whitfield* decision does not apply to this case. Based on the holding in *Morris*, we now understand that this defendant’s claim of a due process violation must be decided by this court based on the case law, as it existed, prior to the *Whitfield* decision. Our supreme court provides guidance in this regard by observing:

“Prior to *Whitfield*, Illinois courts routinely held that a defendant's right to due process was protected even in the face of a faulty MSR admonishment, as long as the defendant's plea was entered knowingly and voluntarily.” *People v. Morris*, 236 Ill. 2d at 360.

Our supreme court also explained that:

“Although courts considered the defendant's bargain with the State in determining the propriety of certain MSR admonishments, particularly in cases where there was a fully negotiated plea [citations omitted], the focus of reviewing courts' analysis remained on the requirements of Rule 402 and the voluntary and knowing nature of the plea.” *People v. Morris*, 236 Ill. 2d at 360.

In this case, the trial court denied defendant's request for leave to file a successive postconviction petition. We review an order denying a request for leave to file a successive postconviction petition *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), affirmed, 227 Ill. 2d 39 (2007).

It is well settled that in order for a defendant to succeed with a successive postconviction petition, a defendant must demonstrate two points. First, defendant must show prejudice resulted from the court's omission of the admonishment regarding mandatory supervised release. Second, defendant must show he was without fault for failing to raise the issue at an earlier stage in the proceedings. *People v. Jones*, 191 Ill. 2d 194, 198-99 (2000); 725 ILCS 5/122-1 *et seq.* (2006).

In considering whether defendant was prejudiced, we must first identify whether the plea agreement was fully negotiated by considering the circumstances surrounding the sentencing proceedings. At the time of defendant's plea, the State advised the trial court that:

“defendant would be pleading guilty to the indictment charging first degree murder, in exchange for a recommendation of fifty years in the Department of Corrections by the People.”

We conclude the phrase “in exchange” implies that bargaining occurred between the parties.

Importantly, the record demonstrates that the parties did not request or contemplate that a presentence investigation report would be prepared and presented to the trial court prior to the imposition of sentence. In fact, both attorneys waived a presentence investigation report without any admonishments on the record that defendant was entitled to a presentence investigation report that could assist the court in the task of designing a fair disposition. Further, neither attorney offered evidence in aggravation or mitigation, and defendant was not asked if he wished

to make a statement on his own behalf to the court prior to the imposition of sentence.

The Unified Code of Corrections provides as follows:

“A defendant *shall not be sentenced* for a felony before a written presentence report of investigation is presented to and considered by the court.

However, *** the court need not order a presentence report of investigation, where both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to defendant’s history of delinquency or criminality.” (Emphasis added.) 730 ILCS 5/5-3-1 (1990).

The case law provides a presentence investigation report cannot be waived, absent agreement between the parties as to the sentence to be imposed. See *People v. Walton*, 357 Ill. App. 3d 819 (2005); *People v. Evans*, 273 Ill. App. 3d 252 (1995). Since the statute requiring a presentence investigation is mandatory in nature, strict compliance with the statutory provision is required. *People v. Harris*, 105 Ill. 2d 290, 302-03 (1985). Thus, a defendant cannot simply choose to waive compliance with this statutory requirement. *People v. Harris*, 105 Ill. 2d at 301-02; *People v. Walton*, 357 Ill. App. 3d at 821-22.

To accept the State’s argument that this was not a fully negotiated plea agreement, it would require this court to conclude that the trial court ignored the statutory requirements of section 5-3-1 of the Uniform Code of Corrections. 730 ILCS 5/5-3-1 (West 1990). Accordingly, this court would be required to remand to the trial court for a new sentencing hearing following the preparation of a presentence investigation report. See *People v. Harris*, 105 Ill. 2d 290;

People v. Walton, 357 Ill. App. 3d 819. However, we do not perceive that the trial court deliberately ignored the statute. In fact, the court elected to bring the issue of a presentence investigation report to the attention of both attorneys before proceeding to accept the negotiated agreement. Thus, we agree with defendant's position and conclude that defendant entered into a fully negotiated agreement that allowed the trial judge to sentence the offender in the absence of a presentence investigation.

At the time of defendant's plea, the trial court was required to comply with the mandates of Supreme Court Rule 402, and defendant's claim must be viewed in light of whether defendant's plea was knowing and voluntary. Pursuant to Supreme Court Rule 402, the trial court was required to advise defendant of the minimum and maximum sentence prescribed by law. 177 Ill. 2d R. 402(a).

It is undisputed that although the trial court advised defendant that the offense of murder carried a sentence of 20 to 60 years imprisonment, the court never admonished defendant that his negotiated sentence would also include a term of mandatory supervised release of three years which would follow his term of incarceration. Therefore, because defendant's plea was fully negotiated for a term of 50 years imprisonment without any reference to mandatory supervised release, defendant's plea was not knowingly and voluntarily made. See *People v. Didley*, 213 Ill. App. 3d 910 (1991); *People v. O'Toole*, 174 Ill. App. 3d 800 (1988). Accordingly, defendant's successive postconviction petition does establish prejudice in light of the fact that the mandatory supervised release would add 3 years to the 50-year term of incarceration, negotiated by defendant with the State and approved by the trial judge

Next, we address whether defendant was without fault in failing to raise the issue in his

first postconviction petition. At the time of defendant's plea, defendant was 16 years of age. It is undisputed from the record that neither the trial court nor the court's written sentencing order advised defendant of the three year mandatory supervised release requirement. Defendant asserts he learned of the MSR requirement from Whitfield himself, who was an inmate at the same correctional facility where defendant was housed. Defendant further claims that he had cause for not raising this issue sooner because *Whitfield* was not decided until 2005, after defendant's plea and after the filing of his original postconviction petition. It was this new rule of law which defendant relied upon in making his claim in his successive postconviction petition.

Based upon these facts as alleged by defendant, which we must take as true, and the fact, evident from the record, that he was not admonished about the existence of the MSR at the time his plea was taken, we find defendant was without fault in failing to raise the issue in his original postconviction petition. Accordingly, we conclude that the trial court erred in denying defendant's motion for leave to file the amended successive postconviction petition because defendant's petition established prejudice and cause.

We do not find here that *Whitfield* entitles defendant to the relief he requests. We have already stated that *Whitfield* is not applicable to this case. Rather we find that defendant has adequately demonstrated that his plea was fully negotiated, that he was not admonished by the trial judge or by the sentencing order that a three-year period would be added to his sentence in the form of mandatory supervised release, that his plea to this extent was not knowingly and voluntarily made, that he only learned of his right to admonishments when he met Whitfield in prison and was told of the new rule of law that was established in Whitfield's case. We find that defendant is entitled to relief because his plea was not knowingly and voluntarily made.

Defendant does not ask to set aside his guilty plea, but only requests that this court either remand the cause to the trial court for further proceedings or amend his sentencing order. As requested by defendant and consistent with the ruling in *People v. Moore*, 214 Ill. App. 3d 938 (1991), we modify the trial court's sentencing order to reduce defendant's sentence to 47 years imprisonment to be followed by a term of 3 years mandatory supervised release, with all other conditions of the court's sentencing order to remain in full force and effect.

CONCLUSION

Accordingly, the judgment of the circuit court of Will County denying leave to file the successive postconviction petition is reversed. The trial court's sentencing order is modified consistent with the contents of the order of this court. We direct the Department of Corrections to recalculate defendant's release date consistent with this order.

Sentencing order modified.

JUSTICE HOLDRIDGE, dissenting:

I disagree with the majority's conclusion that the defendant showed the requisite good cause for filing a successive postconviction petition. The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) contemplates the filing of only one postconviction petition. Moreover, section 122-3 of the Act provides that "[a]ny claim of substantial denial of a constitutional right not raised in the original or amended petition is waived." 725 ILCS 5/122-3 (West 2006). In addition, "a ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198 (2000) citing *People v. Flores*, 153 Ill. 2d 264, 274 (1992).

"As a consequence, a defendant faces a daunting procedural hurdle when bringing a successive postconviction petition." *Jones*, 191 Ill. 2d at 198.

As I pointed out in my dissent prior to our supreme court's supervisory order in this matter, the defendant has failed to overcome that procedural hurdle. The question here is whether the claim that he was improperly admonished regarding mandatory supervised release (MSR) could have been raised in the initial petition. If the claim could have been raised in the initial petition, the doctrine of *res judicata* bars it from being raised in a successive petition. When a claim that could have been raised in the initial petition was not raised therein, the defendant must "establish good cause for failing to raise his claims in [the] prior proceedings." *Jones*, 191 Ill.2d at 199. Moreover, "[f]or purposes of this test, 'cause' is further defined as some objective factor external to the defense that impeded counsel's effort to raise the claim in an earlier proceeding." *Jones*, 191 Ill. 2d at 199.

Here, the defendant maintains that he could not have raised the claim in his initial petition because he was not aware of the claim until sometime after December 20, 2005, the date our supreme court decided *People v. Whitfield*, 217 Ill. 2d 177 (2005). As I noted in my previous dissent in this matter, his claim is unavailing for a number of reasons. First, "the lack of precedent for a position differs from 'cause' for failing to raise an issue, and a defendant must raise the issue, even when the law is against him, to preserve it for review." *People v. Leason*, 352 Ill. App. 3d 450, 454-55 (2004); see also *People v. Purnell*, 356 Ill. App. 3d 524 (2005). Second, the defendant's claim about not being admonished regarding MSR was not new or novel. *People v. McCoy*, 74 Ill. 2d 398 (1979), a case involving failure to admonish a defendant about mandatory parole at the time of a guilty plea, was decided nearly 30 years ago. Moreover,

several appellate court decisions regarding the failure of the trial court to admonish regarding MSR prior to accepting a guilty plea had already been decided prior to the filing of this defendant's initial postconviction petition in 1994. See *People v. Didley*, 213 Ill. App. 3d 910 (1991); *People v. Moore*, 214 Ill. App. 3d 938 (1991); *People v. O'Toole*, 174 Ill. App. 3d 800 (1988); and *People v. Kull*, 171 Ill. App. 3d 496 (1988). Thus, it is clear that the claim of improper admonishment regarding MSR existed and could have been raised in the defendant's initial postconviction petition.

The defendant's claim that prior to the *Whitfield* decision he could not have known about his right to be properly admonished regarding MSR is not persuasive. First, as the case law cited above shows, the right to be properly admonished regarding MSR existed before *Whitfield*. Second, while *Whitfield* did establish new law regarding the right to be properly admonished regarding MSR, that new law only applied to convictions effective after *Whitfield* was decided. *People v. Morris*, 236 Ill. 2d 345, 365-66 (2010). Since the defendant's conviction was finalized in 1991, and his first postconviction petition was adjudicated in 1994, in accordance with our supreme court's holding in *Morris*, I would find that *Whitfield* clearly had no impact upon the propriety of the defendant's guilty plea.

Moreover, the defendant's position that he could not have known about his right to proper MSR admonishment prior to his finding out about the *Whitfield* decision is also unpersuasive. The record clearly established that the defendant was aware of concept of MSR, although he referred to that concept as "parole." The defendant acknowledged in his testimony that he "knew [he] had to serve parole" after being released from prison, that he "had to serve parole once [he was] done with the service of [his] time actually in DOC," that he "knew DOC was going to

implement something on [his] sentence," and that he would have to "serve a term of what [he] considered to be parole."

In light of these observations, I do not believe that the defendant showed the requisite good cause for failing to raise his claim of lack of proper admonishment regarding MSR in his initial postconviction petition. The claim clearly existed at the time of the filing of the initial petition, and the defendant's claim that he was without fault in failing to raise the issue in th initial petition because he was not aware he could raise the claim until he heard about *Whitfield*, is not sufficient to overcome the fact that it could have been raised in the initial petition. Moreover, since the defendant has not shown he was without fault in failing to raise the issue in the initial postconviction petition, I consequently see no reason to address the prejudice prong of the applicable test. I respectfully dissent on this basis.