

NOTICE
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2011 IL App (4th) 100484-U
NOS. 4-10-0484, 4-10-0485 cons.

Filed 12/7/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JAMES GOUTY,)	Nos. 06CF607
Defendant-Appellant.)	07CF147
)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by granting the State's motion to dismiss the postconviction petitions, because the petitions alleged a substantial violation of due process, namely, the unilateral modification of a plea agreement by adding a longer term of mandatory supervised release (MSR) to the sentence than the court had admonished the defendant he would receive.

¶ 2 Defendant, James Gouty, appeals from the second-stage dismissal of his postconviction petitions in Vermilion County case Nos. 06-CF-607 and 07-CF-147. He contends that these petitions alleged a substantial violation of due process in that the State unilaterally modified a plea agreement in the two cases by adding MSR to the agreed-upon sentences.

¶ 3 We find this contention to be correct, since the trial court never admonished defendant that a three-year term of MSR would be added to his sentence for armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)). Instead, the court admonished him that only a one-year term of

MSR would be added to his sentence for the other offense to which he offered to plead guilty, burglary (720 ILCS 5/19-1(a) (West 2006)). Therefore, we vacate the trial court's judgment in Vermilion County case Nos. 06-CF-607 and 07-CF-147, and we remand this case with directions that it impose a sentence of 13 year's imprisonment (instead of 15 years' imprisonment) for armed robbery and a sentence of 6 years' imprisonment for burglary (the same sentence as before), to be followed by 3 years of MSR. The prison terms will run consecutively, and defendant will receive credit for time served.

¶ 4

I. BACKGROUND

¶ 5 A. Defendant Is Charged With Burglary (Vermilion County Case No. 06-CF-607)

¶ 6 On October 23, 2006, the State charged defendant, by information, with one count of burglary (720 ILCS 5/19-1(a) (West 2006)) in that on October 21, 2006, he entered Kelly D. Arthur's automobile with the intent to commit therein a theft. The information was assigned Vermilion County case No. 06-CF-607.

¶ 7 On December 5, 2006, defendant posted bond in this case and was released.

¶ 8 B. Defendant Is Charged With Armed Robbery (Vermilion County Case No. 07-CF-147)

¶ 9 On February 26, 2007, the State filed an information charging defendant with one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)) in that on February 23, 2007, while armed with a handgun, he took currency from Amber N. Ripple. This information was assigned Vermilion County case No. 07-CF-147.

¶ 10 On February 28, 2007, the State amended the information by changing the alleged date of the armed robbery to February 22, 2007, and by alleging two alternative counts of armed robbery: count I, armed robbery with a dangerous weapon (720 ILCS 5/18-2(a)(1) (West 2006));

and count II, armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2006)).

¶ 11 C. The Plea Agreement

¶ 12 On April 20, 2007, the parties appeared before Judge Claudia Smith Anderson and announced they had reached a proposed plea agreement. By the terms of this agreement as recited in the hearing, defendant would plead guilty to the count of burglary in Vermilion County case No. 06-CF-607, and he also would plead guilty to one of the counts of armed robbery, count I, in Vermilion County case No. 07-CF-147. In return, according to the express terms of the agreement, the State would dismiss the remaining count, count II, in Vermilion County case No. 07-CF-147, as well as dismiss another criminal case pending against defendant, Vermilion County case No. 06-CF-142. In addition, defendant would receive a sentence of 15 years' imprisonment for armed robbery and 6 years' imprisonment for burglary, minus credit for time served, with the two terms running consecutively.

¶ 13 D. The Trial Court's Admonitions to Defendant in the Guilty-Plea Hearing

¶ 14 1. *The Admonition Regarding Burglary*

¶ 15 After hearing the terms of the proposed plea agreement recited in open court, Judge Anderson admonished defendant. The first subject of the admonitions was the range of penalties that statutory law provided for burglary. The court told defendant:

"THE COURT: Okay, let's talk about what you have, Mr. Gouty.

In 06 CF 607 you are pleading guilty to the charge of burglary, that's a Class 2 Felony and it carries with it 3 to 7 years in the Department of Corrections.

Do extended terms apply to the man?

MR. SOHN [(defense counsel)]: Yes, Your Honor.

MR. MILLS [(prosecutor)]: Yes, and he is nonprobationable on this offense.

THE COURT: On the burglary?

MR. MILLS: On the burglary. And extended terms apply.

THE COURT: Okay. Thanks, Larry.

So, in other words, you are not a person that the Court is limiting to sentencing just up to 7 years. The Court could elect on that Class 2 to sentence you up to 14 years and there is no option of probation because of your priors.

THE DEFENDANT: Yes, ma'am.

THE COURT: In addition—and if there's money out there I'll need to know that, ladies—the Court can fine up to \$25,000. *Mandatory supervised release or parole can be up to a year on that charge.*

Your plea of guilt in that case is going to be one that results in 6 years in the Illinois Department of Corrections with credit for any amount of time served.

Do we have credit on that case?

MR. MILLS: 46 days on the burglary case." (Emphasis added.)

Thus, with respect to armed robbery, the court said nothing about MSR, either for purposes of sentencing after trial or for purposes of the plea bargain.

¶ 18 The trial court then admonished defendant regarding his right to a jury trial, his right to be represented by counsel in the trial, the burden of proof, his right not to incriminate himself, his right to refuse to testify, his right to confront the witnesses against him, and his right to present a defense, and the court made sure he understood that under the proposed plea agreement, he would give up his right to a jury trial. The court also confirmed with defendant that no one was forcing him to plead guilty and that no one had made any promises to him other than the promises in the plea agreement. The court confirmed with defendant that the assistant public defender, William Sohn, had answered all his questions and had represented him satisfactorily.

¶ 19 After defendant signed the jury waivers and the prosecutor described the factual bases for the charges, the trial court asked defendant if he still wished to plead guilty to the count of burglary in Vermilion County case No. 06-CF-607 and to count I of the amended information, armed robbery, in Vermilion County case No. 07-CF-147. He answered yes. The court found the guilty pleas to be knowing and voluntary, accepted them, and sentenced defendant as stated. The written sentencing judgment left the line for specifying duration of MSR on each offense blank.

¶ 20 Defendant filed no motion to withdraw his guilty pleas. Nor did he take a direct appeal in either case

¶ 21 E. Defendant Files a Postconviction Petition in the
Armed-Robbery Case (Vermilion County Case No. 07-CF-147)

¶ 22 On May 20, 2008, in the armed-robbery case, Vermilion County case No. 07-CF-147, defendant filed a *pro se* petition for postconviction relief, in which he accused his defense counsel

of rendering ineffective assistance.

¶ 23 On May 20, 2008, Judge Nancy S. Fahey entered an order stating: "The motion, complaint, or request filed on May 20, 2008 in this case is hereby DENIED for the reason that the relief requested is not properly granted in a proceeding under the Habeas Corpus and there is no proper basis or jurisdiction to grant the relief requested."

¶ 24 Defendant appealed, and on August 6, 2008, we entered the following order: "Appellant's motion to remand ALLOWED. APPEAL DISMISSED. The cause is REMANDED to the Circuit Court for further proceedings."

¶ 25 On remand, the trial court granted a motion by the public defender to withdraw from representing defendant, and the court appointed Derek Girton to represent him.

¶ 26 F. Defendant Files Another *Pro Se* Postconviction Petition,
This One in Both the Armed-Robbery Case and the Burglary Case

¶ 27 On November 6, 2009, while his postconviction petition in the armed-robbery case was still pending, defendant filed another *pro se* postconviction petition, and in its caption, this petition bore the case numbers of both the armed-robbery case (Vermilion County case No. 07-CF-147) and the burglary case (Vermilion County case No. 06-CF-607). In this postconviction petition, defendant pleaded: "Petitioner's constitutional right to due process was violated in this case because the Petitioner was not admonished that a mandatory 3-year term of mandatory supervised release would be added to his 15 and 6 years consecutive sentence. Thus petitioner has received a more onerous sentence than that to [*sic*] which he pleaded guilty ***." Citing *People v. Whitfield*, 217 Ill. 2d 177, 203 (2005), defendant requested that, since the 3-year term of MSR was statutorily required and could not be reduced, "his sentence be modified to 18 years plus 3 years MSR instead of 21 years

plus 3 years MSR, to approximate [sic] the bargain that was struck."

¶ 28 G. The Order of February 10, 2010

¶ 29 As we have noted, the most recent postconviction petition was filed in both cases: in the burglary case (Vermilion County case No. 06-CF-607) as well as in the armed-robbery case (Vermilion County case No. 07-CF-147).

¶ 30 In an order filed on February 10, 2010, Judge Craig H. DeArmond construed this postconviction petition as an original petition with respect to the burglary case and as an amended petition with respect to the armed-robbery case. Because more than 90 days had passed since defendant filed this petition on November 6, 2009, the court appointed Girton to represent defendant in the postconviction proceedings in the burglary case (Girton already was appointed to represent defendant in the armed-robbery case). See 725 ILCS 5/122-2.1(a), 122-4 (West 2010); *People v. Dauer*, 293 Ill. App. 3d 329, 334 (1997).

¶ 31 Also, the trial court consolidated the two cases for further hearing.

¶ 32 H. Girton's Certificate Pursuant to Illinois Supreme Court Rule 651(c)

¶ 33 On May 7, 2010, Girton filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating, *inter alia*, that after consulting with defendant, he had determined that an amended postconviction petition need not be filed in either of the two cases.

¶ 34 I. The State's Motion To Dismiss the *Pro Se* Petition
for Postconviction Relief in the Two Cases

¶ 35 On May 12, 2010 (after being granted a 30-day extension), the State filed a motion to dismiss the *pro se* petition for postconviction relief in both the burglary case and the armed-robbery case. The motion offered essentially four reasons for the proposed dismissal of the petitions.

First, the motion argued that because defendant never took a direct appeal in either of the two cases and because he could have raised, in a direct appeal, the allegedly defective admonition regarding MSR, he had forfeited that issue. But see *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007) ("[W]hen a defendant never appeals, the rule that a defendant cannot raise any issue in a postconviction petition that he or she could have made on direct appeal is inapplicable.")

¶ 36 Second, the State argued that *Whitfield* was inapplicable not only because of the asserted procedural forfeiture but also because the trial court mentioned MSR in the guilty-plea hearing in these cases. The State interpreted *People v. Jarrett*, 372 Ill. App. 3d 344 (2007), as holding that "the Defendant would only have a valid constitutional claim where the Trial Court failed to entirely mention mandatory supervised release before taking the plea." But see *People v. Morris*, 236 Ill. 2d 345, 367 (2010) ("*Whitfield* requires that defendants be advised that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged.")

¶ 37 Third, the State argued that the postconviction petition that defendant filed on November 6, 2009, was a "successive petition" for purposes of the armed-robbery case (Vermilion County case No. 07-CF-147) and because he never obtained the trial court's permission to file it, let alone satisfied the cause-and-prejudice test (see 725 ILCS 5/122-1(f) (West 2008)), the court should dismiss the petition in the armed-robbery case. But see *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn.")

¶ 38 Fourth, the State asserted that the petition failed to allege a substantial deprivation of constitutional rights.

¶ 39 J. The Trial Court's Dismissal of the Postconviction Petitions

¶ 40 On June 18, 2010, Judge Michael D. Clary entered an order granting the State's motion to dismiss the postconviction petitions in the two cases (*i.e.*, the petition filed on November 6, 2009, bearing the case numbers of both cases). The order gave this reason for the dismissal: "The improper admonishment appears to fall between the fact situations in *Whitfield* and *Jarrett*. It appears to this Court to be more similar to the improper admonishment in *Jarrett* and would constitute substantial compliance with Rule 402 [(Ill. S. Ct. R. 402 (eff. July 1, 1997))]. The Defendant has failed to make a substantial showing of a violation of a constitutional right."

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 In *Whitfield*, 217 Ill. 2d at 190, the supreme court held that if a defendant pleads guilty in return for a specific sentence and the defendant then receives a sentence more onerous than the one to which the defendant agreed in return for pleading guilty, the "unilateral modification and breach of the plea agreement by the State" violates due process.

¶ 44 In the present case, the trial court admonished defendant that in return for his guilty plea, he would receive a total of 21 years' imprisonment (a 15-year term of imprisonment for armed robbery and a consecutive 6-year term of imprisonment for burglary). The court also told him that burglary carried a term of MSR for "up to a year." The court did not tell him that armed robbery carried any term of MSR.

¶ 45 Actually, the term of MSR for the Class 2 felony of burglary was two years (720 ILCS 5/19-1(b) (West 2006); 730 ILCS 5/5-8-1(d)(2) (West 2006)), and the term of MSR for the Class X felony of armed robbery was three years (720 ILCS 5/18-2(a)(2) (West 2006); 730 ILCS 5/5-8-

1(d)(1) (West 2006)). Thus, defendant received a sentence that had a total duration of 24 years (21 years' imprisonment plus 3 years' MSR), not 22 years (21 years' imprisonment plus MSR for "up to a year").

¶ 46 To correct this unilateral modification of the plea agreement, we will order the reduction of the prison sentence for armed robbery by two years. See *Whitfield*, 217 Ill. 2d at 205.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we vacate the trial court's judgments in Vermilion County case Nos. 06-CF-607 and 07-CF-147, and we remand this case with directions that it impose a sentence of 13 year's imprisonment (instead of 15 years' imprisonment) for armed robbery and a sentence of 6 years' imprisonment for burglary (the same sentence as before), to be followed by 3 years of MSR. The prison terms will run consecutively, and defendant will receive credit for time served.

¶ 49 Vacated and remanded with directions.