

**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).

NO. 4-09-0797

Order Filed 3/30/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JASON HODGES,	)	No. 08CF247
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Justices Appleton and McCullough concurred in the  
judgment.

**ORDER**

*Held:* Defendant forfeited his arguments regarding MSR and the trial court's consideration of an improper sentencing factor by not raising these issues in his postsentencing motions. However, because the trial court failed to admonish defendant he would forfeit for appeal any issue not raised in his postsentencing motions, cause was remanded so the trial court could provide defendant with proper admonishments pursuant to Supreme Court Rules 604(d) and 605(c) and defendant could file postsentencing motions.

In March 2009, defendant, Jason Hodges, was sentenced to 10 years' imprisonment after he entered a partially negotiated guilty plea. In September 2009, the trial court denied defendant's motions to withdraw his guilty plea and to reconsider his sentence. Defendant appeals, arguing his sentence should be reduced by two years because the trial court did not admonish him he was subject to a two-year period of mandatory supervised

release (MSR) and the trial court improperly considered as an aggravating factor in sentencing defendant's refusal to reveal his marijuana supplier. In the alternative, if we find defendant's sentencing claims are forfeited on appeal, defendant asks this court to reverse and remand this case for compliance with Illinois Supreme Court Rules 605(c) (eff. Oct. 1, 2001) and 604(d) (eff. July 1, 2006). We remand with directions.

#### I. BACKGROUND

In January 2009, defendant agreed to enter a guilty plea to a charge of unlawful delivery of cannabis (more than 2,000 but less than 5,000 grams) (720 ILCS 550/5(f) (West 2006)), a Class 1 felony, in exchange for the State dismissing a charge of unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2006)), a Class 3 felony, and agreeing to a sentencing cap of 10 years. The trial court admonished defendant regarding the charge, the possible sentencing range he faced on the original charge, the terms of the negotiated plea agreement, and the rights he was waiving by pleading guilty. After the State provided a factual basis for the charge, defense counsel stipulated the State would be able to provide such evidence. The trial court did not advise defendant he would be subject to a two-year period of MSR.

At defendant's March 2009 sentencing hearing, the State pointed out defendant's criminal history, including convictions

for prior drug-delivery offenses for which defendant served time in prison. The State argued defendant was a significant cannabis dealer in the area who refused to identify his gang-connected drug supplier.

According to the State, defendant deserved a significant prison sentence. However, the State argued it agreed to a 10-year sentencing cap because some of his prior convictions were older. The State noted defendant was eligible for a 30-year extended-term sentence.

Defense counsel argued defendant was fortunate the State agreed to a 10-year sentencing cap as the applicable sentencing range was 4 to 30 years. While conceding defendant did not have a clean record, defense counsel pointed out defendant had performed community-service work since February 2008 and had cooperated in DCFS programs and visited with his children even though he knew he would be imprisoned if convicted.

According to defense counsel, defendant showed he could be a productive member of society. Defense counsel stated defendant had been gainfully employed over the preceding year and owned his own business. As a result, defense counsel asked for a sentence in the lower end of the sentencing range.

In delivering defendant's sentence, the trial court stated it was apparent defendant's conduct did not cause serious physical harm, but it was less apparent whether his conduct

threatened serious physical harm to others because of the serious physical risks illegal drugs pose to users. The court stated it was unclear how aware defendant was of the dangerousness of his criminal enterprise. The court also noted defendant had the ability to contribute to the welfare of his family and his community and his family would suffer a hardship because of his imprisonment. According to the court, with regard to defendant, "the good does outweigh the bad." The court noted defendant would be released from prison while still a young man.

With regard to aggravating factors, apart from the danger of dealing drugs and the harm it threatens, the court noted defendant had a substantial history of prior criminal activity. The court further stated the offense clearly presented the necessity to deter others from committing the same crime. In addition, the court stated "the offense is related to the activities of individuals involved in gang activity. At least that's the indication from the Defendant." The court found defendant made a

"willful choice to not assist the community in protecting itself from the predators that caused this enterprise, in the Defendant's view, to go on in this community. And he did so, perhaps, for understandable reasons. He chose his welfare over the welfare of the

community. I don't think there's any other way to draw this picture other than that being profoundly aggravating."

The trial court also stated it was troubled by the manner in which defendant described his conduct as a "mistake." According to the court:

"There appears to be a sense that this was just a 'Whoops, this was just a mistake.' I'm not convinced that the Defendant really gets it yet. The past is--if anything, it's prologued [*sic*]. We're looking at a long criminal history of variable misconduct; and under that circumstance, this drug transaction of a significant amount is characterized as making a mistake. Perhaps, what, first, has to emerge is the appreciation of how huge this mistake is, how huge the offense is that is, under the law, perpetrated upon the quality of life in the community when this level of enterprise is permitted to go on, when the lesson, after this lengthy criminal history has, demonstrably, not been learned."

The trial court found the State's sentencing

concessions in the plea agreement compensated for most, if not all, of the mitigation presented to the court. The trial judge stated if the entire sentencing range under the law was available to him he would not sentence defendant within the sentencing cap agreed to by the State. As a result, the court stated it found the appropriate punishment to be 10 years' imprisonment, the maximum allowed under the plea agreement, with credit for 9 days in custody.

The trial court advised defendant he needed to file a motion to withdraw his guilty plea, a motion to reconsider sentence, or both within 30 days if he wished to appeal. The court noted those motions would need to be in writing and set forth all of the mistakes he believed occurred during the course of his plea or sentencing hearing along with any other reasons he should be allowed to withdraw his guilty plea or his sentence should be reconsidered.

On March 26, 2009, defendant filed a *pro se* motion to reconsider sentence, arguing his sentence was excessive. At the July 2009 hearing on defendant's motion to reconsider sentence, the trial court acknowledged it incorrectly admonished defendant as if he had entered an open plea instead of a partially negotiated plea. The court admonished defendant at this hearing he must file a motion to withdraw his guilty plea to perfect his appeal rights as his plea was partially negotiated. The trial

court granted defendant 14 days to file an amended posttrial motion. On August 14, 2009, defendant filed a motion to withdraw his guilty plea, arguing only his plea was unknowing and involuntary.

In December 2009, the trial court held a hearing on defendant's motions to withdraw his guilty plea and reconsider his sentence. Defense counsel argued the court did not give enough weight to defendant's conduct between the time of the offense and his sentencing hearing. As for defendant refusing to provide the names of his suppliers, defense counsel argued defendant was neither trying to circumvent further prosecutions nor protect himself, but was looking out for the well-being of his fiancée and the three children he was caring for because he feared repercussions from the suppliers.

The trial court denied both defendant's motion to withdraw his guilty plea and motion to reconsider sentence. The trial court found no basis to justify withdrawal of the guilty plea. As for the motion to reconsider sentence, the court recognized defendant's conduct in the year after his arrest could be interpreted in two ways; either he had turned the corner from his past criminal behavior or he was simply aware his conduct could affect the sentence he would receive on the charge he faced. While the court admitted defendant's concerns were valid regarding his family, the court was unpersuaded by this

justification for refusing to identify his suppliers.

This appeal followed.

## II. ANALYSIS

On appeal, defendant argues his sentence should be reduced by two years because the trial court failed to admonish him prior to accepting his plea he was subject to a two-year term of MSR. In addition, defendant argues he should receive a new sentencing hearing because the trial court improperly considered defendant's refusal to identify his marijuana supplier in aggravation. The State argues both of these issues are forfeited because defendant did not raise these arguments in his post-sentencing motions. Defendant argues this case should be remanded to the trial court for admonitions in compliance with Supreme Court Rules 604(d) and 605(c) should this court find his first two arguments are forfeited.

### A. Forfeiture

We first look at whether defendant forfeited his MSR argument and then whether defendant forfeited his argument the trial court considered an improper factor.

#### 1. MSR

In *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005), the supreme court found the defendant in that case did not forfeit his claim regarding the trial court's failure to admonish him regarding MSR because defendant had no knowledge of

the imposition of the MSR term until after he was in prison and no longer had a right to a direct appeal. The supreme court stated:

"It is undisputed that the circuit court failed to admonish defendant in accord with the rule. Under the circumstances, it would be incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him. To so hold would place the onus on defendant to ensure his own admonishment in accord with due process. Moreover, defendant alleges that it was not until he was in prison that he learned that his sentence had been increased by a three-year period of MSR. Therefore, he could not have raised the error in a motion to withdraw his plea or a direct appeal." *Whitfield*, 217 Ill. 2d at 188, 840 N.E.2d at 666.

However, according to the State, in the instant case, defendant forfeited his MSR argument for two reasons. First, defendant forfeited any argument his due-process rights were violated as a result of improper Supreme Court Rule 402(a)

admonishments (Ill. S. Ct. R. 402(a) (eff. July 1, 1997)) because he only argued the trial court's imposition of a term of MSR constituted a unilateral modification and breach of defendant's agreement with the State. Citing this court's decision in *People v. Andrews*, 403 Ill. App. 3d 654, 936 N.E.2d 648 (2010), the State argues the supreme court's holding in *Whitfield* had nothing to do with plea bargaining or the plea agreement the defendant reached with the State because the parties have no authority to make deals regarding MSR. While not cited, it appears the State is relying on Illinois Supreme Court Rule 341(h) (7) (eff. September 1, 2006) for this portion of its forfeiture argument.

However, contrary to the State's argument, one section of defendant's brief on this issue is titled: "The trial court violated Supreme Court Rule 402, due process, and the holdings in *People v. Whitfield* when it made no mention of MSR prior to accepting the defendant's negotiated guilty plea." In addition, defendant extensively discusses *Whitfield*, which is the seminal decision on this issue. As a result, it is easy to discern defendant's argument, and we decline to find defendant forfeited this issue on this basis.

However, the State also argues defendant forfeited this issue by not raising it in his postsentencing motions. See Ill. S. Ct. Rs. 605(b) (6), (c) (6) (eff. Oct. 1, 2001). In *People v. Newman*, 365 Ill. App. 3d 285, 290, 848 N.E.2d 262, 267 (2006),

this court held MSR challenges can be forfeited. This court distinguished *Whitfield*, stating:

"[I]n *Whitfield*, the supreme court determined there was no procedural default under the facts of that case; it did not hold that all improper MSR-admonishment claims were immune from forfeiture. Further, unlike defendant in this case, the defendant in *Whitfield* did not file a motion to withdraw his guilty plea or a direct appeal. Instead, the court was faced with the defendant's failure to make a contemporaneous objection to the trial court's admonishment.

Additionally, in *Whitfield*, the supreme court noted that the defendant alleged he did not become aware of his improper admonishment until after he was already in prison and when he could not have raised the error in a motion to withdraw his plea or on direct appeal." *Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267.

This court noted the defendant in *Newman* made no similar allegation. In fact, the record showed the defendant was aware of the MSR argument while his direct appeal was pending.

*Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267.

In this case, the record reflected defendant was made aware two years of MSR were part of his sentence. The sentencing order clearly reflects defendant would serve two years of MSR. The sentencing order provided for a copy of the order to be provided to defendant and defendant's attorney. In addition, on August 14, 2009, defendant's attorney filed a certificate of compliance pursuant to Supreme Court Rule 604(d), stating he had "examined the court file [and] report of proceedings of plea of guilty [and] report of proceedings of sentencing hearing." Based on defense counsel's statement he examined the court file and the fact the sentence defendant received from the trial court was defendant's main point of contention in the postplea motions, we presume defense counsel examined the sentencing order which clearly stated defendant would serve a two-year period of MSR.

As this court stated in *Newman*, not all MSR claims are immune from forfeiture. *Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267. Like the defendant in *Newman*, defendant in this case could have raised this issue in a postplea motion. *Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267. We agree and find this argument forfeited. Unlike the defendant in *Whitfield*, the trial court's sentencing order placed defendant on notice he would serve two years of MSR.

## 2. *Consideration of Defendant's Failure To Identify Supplier*

On appeal, defendant argues the trial court improperly considered his failure to identify his drug supplier as an aggravating factor. According to defendant's brief, this violated his constitutional rights under both the fifth and fourteenth amendments. The State argues this issue is forfeited because defendant did not present this argument in his postplea motions. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). We agree.

In his written motion, defendant only asserted his sentence was excessive. In addition, at the hearing on the motion, defendant only argued the trial court gave this factor too much weight and did not take into consideration defendant's fear of retribution against his family should he identify his supplier. Defendant in fact conceded his failure to identify his source was a measurable item for the trial court to take into consideration. He cannot now argue otherwise on appeal.

B. Improper Admonishments Under Supreme Court Rule 605(c)

Having found defendant forfeited the arguments previously discussed, defendant then asks this court (1) to remand this case to the trial court for proper admonishments pursuant to Supreme Court Rules 604(d) and 605(c) and (2) for the opportunity to replead his postsentencing motions because the trial court failed to admonish him that any issue not contained in his postsentencing motions would be forfeited on appeal.

Defendant relies on our supreme court's decision in *People v. Henderson*, 217 Ill. 2d 449, 841 N.E.2d 872 (2005). In *Henderson*, our supreme court cited its decision in *People v. Davis*, 145 Ill. 2d 240, 582 N.E.2d 714 (1991), for the principle a trial court's improper admonitions do not automatically require reversal in every case. *Henderson*, 217 Ill. 2d at 458, 841 N.E.2d at 876. In *Davis*, the supreme court stated: "Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *Davis*, 145 Ill. 2d at 250, 582 N.E.2d at 719.

In this case, the State concedes the trial court failed to advise defendant any claim not raised in his postsentencing motions would be forfeited on appeal. The State cites *People v. Tlatenchi*, 391 Ill. App. 3d 705, 909 N.E.2d 198 (2009), for the proposition the trial court's admonishments were sufficient because they substantially complied with the supreme court rules. However, *Tlatenchi* fails to discuss or even cite our supreme court's decision in *Henderson*.

Based on our reading of *Henderson*, defendant was prejudiced by the trial court's inadequate admonishments because he forfeited the potentially meritorious claims he raised in his appellate brief by failing to raise these issues in a post-sentencing motion. We remand this case to the trial court in order for the trial court to properly admonish defendant pursuant

to Supreme Court Rules 604(d) and 605(c) and for defendant to be given the opportunity to argue and properly preserve any ground on which he believes his sentence should be reduced or his guilty plea withdrawn.

### III. CONCLUSION

For the reasons stated, we remand this cause to the trial court with directions.

Remanded with directions.