

NOTICE

Decision filed 03/04/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0569

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Saline County.
v.	)	No. 08-CF-274
	)	Honorable
CARL DAVID RUSS,	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE CHAPMAN delivered the judgment of the court. Justices Stewart and Wexstten concurred in the judgment.

**RULE 23 ORDER**

*Held:* Where the defendant was sentenced to a term of mandatory supervised release that was less than that required by statute, the defendant's sentence and plea of guilty are vacated and the cause is remanded for further proceedings.

The defendant, Carl David Russ, appeals from the circuit court's October 6, 2009, denial of his motion to withdraw his plea of guilty. For the following reasons, we vacate the defendant's plea and sentence and remand to the circuit court for further proceedings.

BACKGROUND

On September 17, 2008, the defendant was charged by information with one count of criminal sexual assault, a Class 1 felony (720 ILCS 5/12-13(a)(3) (West 2008)), and one count of aggravated criminal sexual abuse, a Class 2 felony (720 ILCS 5/12-16(b) (West 2008)). On December 19, 2008, the State filed an amended information, which charged the defendant with 2 additional counts of criminal sexual assault and 22 additional counts of aggravated criminal sexual abuse. The charges alleged that the defendant sexually abused his stepson between June 25, 2008, and September 9, 2008.

In exchange for the State's agreement to dismiss the remaining charges and to recommend that he be sentenced to 12 years in the Department of Corrections, the defendant agreed to plead guilty to one count of criminal sexual assault. The defendant signed a waiver of appeal, pursuant to which he agreed that if the court accepted his guilty plea, he would not appeal the judgment of conviction or the sentence imposed by the court.

Prior to accepting the guilty plea, the circuit court admonished the defendant that if the plea agreement was accepted and he was sentenced to prison, "there will be a two-year period of mandatory supervised release." The court stressed that it was not bound by the terms of the agreement the parties had reached and that it could impose a sentence up to the statutory maximum of 15 years in prison. The court also admonished the defendant that due to his waiver of appeal, "[t]he Appellate Court will not look at this, will not determine whether or not this proceeding has any errors in it," and that "[t]here won't be any appeal."

The circuit court found that the defendant had made a knowing and intelligent waiver of his right to a jury trial and his right to appeal. The court accepted the defendant's plea, sentenced him to 12 years in prison, and told him that upon completing his prison term, he "shall serve a two-year period of mandatory supervised release." The court's December 23 written sentencing order likewise indicates that the defendant was sentenced to 12 years in prison, to be followed by two years of mandatory supervised release.

On January 16, 2009, the defendant filed *pro se* in the circuit court a motion to withdraw his guilty plea, alleging that he had received ineffective assistance of counsel. The circuit court appointed the defendant an attorney, who on August 21 filed a supplement to the defendant's motion, in which he argued that the plea was involuntary because counsel failed to fully inform the defendant of his rights prior to his guilty plea. Following a hearing, the circuit court denied the defendant's motion to withdraw his plea. The defendant then filed a timely notice of appeal.

## CONTENTIONS ON APPEAL

The defendant argues on appeal that the circuit court failed to properly admonish him concerning the term of mandatory supervised release that would be imposed upon his release from prison and that his guilty plea was thus not entered into knowingly and voluntarily. The State has confessed error. The parties agree that the circuit court's denial of the defendant's motion to withdraw his guilty plea should be reversed and the cause remanded to the circuit court. We do not agree with the rationale of the parties, but for the following reasons we vacate the defendant's plea of guilty and remand for further proceedings.

## DISCUSSION

The defendant contends—and the State agrees—that because the court improperly admonished the defendant regarding the term of mandatory supervised release that he would be required to serve upon his release from prison, the defendant's plea of guilty was not knowing and voluntary and thereby violated his due process rights. They maintain that the court's denial of his motion to withdraw his plea was thus in error. The State's confession of error does not relieve this court of its duty to perform its judicial function, though, and we are obligated to independently examine the errors confessed in order to protect the public interest. *In re Larry B.*, 394 Ill. App. 3d 470, 471, 914 N.E.2d 1243, 1244-45 (2009).

The sentencing statute in effect at the time the defendant's crime was alleged to have been committed mandated that upon a conviction for criminal sexual assault the term of mandatory supervised release imposed on the defendant "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2008). Supreme Court Rule 402(a)(2) (eff. July 1, 1997) requires that, prior to a court accepting a negotiated plea of guilty, the defendant be admonished on the period of mandatory supervised release that will be imposed upon his release from prison. *People v. Wills*, 61 Ill. 2d 105, 109, 330 N.E.2d 505, 508 (1975). If the sentence imposed—including

any term of mandatory supervised release—is more onerous than the one to which the defendant agreed, the court's failure to admonish him regarding mandatory supervised release may result in a violation of the defendant's due process rights. *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005).

The defendant relies on *Whitfield* for the proposition that the court's failure to properly admonish him regarding the term of mandatory supervised release he will be required to serve upon his release from prison violated his due process rights. In *Whitfield*, the defendant pled guilty pursuant to a negotiated plea agreement, under the terms of which the court agreed to impose a 25-year sentence for convictions of first-degree murder and armed robbery. *Whitfield*, 217 Ill. 2d at 190, 840 N.E.2d at 667. The defendant was not admonished that he would be subject to a term of mandatory supervised release following his sentence. *Whitfield*, 217 Ill. 2d at 190, 840 N.E.2d at 667. The supreme court held that the defendant's due process rights were violated "because he pled guilty in exchange for a specific sentence, but received a different, more onerous sentence than the one he agreed to." *Whitfield*, 217 Ill. 2d at 189, 840 N.E.2d at 666. Because the defendant had not been properly admonished, adding the term of mandatory supervised release to the sentence was a "unilateral modification and breach" of the plea agreement and violated the defendant's due process rights. *Whitfield*, 217 Ill. 2d at 190, 840 N.E.2d at 667.

Supreme Court Rule 402(d)(3) (eff. July 1, 1997) requires that if the court has not bound itself to a sentencing recommendation, it "shall inform the defendant in open court at the time the agreement is stated \*\*\* that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement." The circuit court here did so, repeatedly admonishing the defendant that the State's sentencing recommendation was not binding and that he could receive any sentence up to the statutory maximum of 15 years in prison.

Where the State only promises to recommend a sentence to the court, and the total sentence imposed, including subsequent periods of mandatory supervised release, is less than the maximum sentence authorized by law, and the court advises the defendant that it is not bound by the recommendation of the State, the court's failure to admonish the defendant of the subsequent period of mandatory supervised release does not offend due process. *Whitfield*, 217 Ill. 2d at 193, 840 N.E.2d at 668. Where the State only promises to recommend a sentence, the defendant has received the benefit of the bargain he made with the State when the State does in fact make the agreed-upon recommendation, regardless of the sentence ultimately imposed by the court. *Whitfield*, 217 Ill. 2d at 191, 840 N.E.2d at 667.

A factual situation more analogous to the one at bar was confronted by the court in *People v. Holt*, 372 Ill. App. 3d 650, 867 N.E.2d 1192 (2007). In *Holt*, as here, the State merely agreed to recommend a sentence, and the court advised the defendant that it was not bound by the recommendation. Also as is the case here, the sentencing court in *Holt* advised the defendant that he would be required to serve a term of mandatory supervised release, but it failed to advise him of the correct duration of the term of mandatory supervised release that would in fact be imposed. *Holt*, 372 Ill. App. 3d at 654, 867 N.E.2d at 1196. The *Holt* court held that because the defendant was admonished that he could receive a sentence in excess of the one that was actually imposed, the court's failure to specifically advise the defendant of the length of the term of mandatory supervised release that would be imposed did not violate his due process rights. *Holt*, 372 Ill. App. 3d at 654, 867 N.E.2d at 1196.

Furthermore, under the defendant's theory, it is probable that his waiver of appeal would act to bar this court from considering his appeal. As a general rule, an appeal waiver is valid so long as it is entered into knowingly and voluntarily: "[U]nless the defendant can show that the agreement not to appeal was made involuntarily or unintelligently or suffers

from some similar infirmity, it may be enforced." *People v. Fearing*, 110 Ill. App. 3d 643, 645, 442 N.E.2d 939, 940-41 (1982). It is unnecessary to discuss the validity of the defendant's waiver of appeal, though, for the reasons that follow.

A judgment is void where the court lacks the inherent power to enter the order involved. *People v. Wade*, 116 Ill. 2d 1, 5, 506 N.E.2d 954, 955 (1987). A court lacks the inherent power to order a sentence that does not conform to a statutory requirement, and such a sentence is void. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995). A sentence is void not only where the court imposes a sentence more onerous than that permitted by statute but also where the court orders a lesser sentence than that mandated by statute. *Wade*, 116 Ill. 2d at 6, 506 N.E.2d at 956.

A void judgment may be attacked at any time, in any court, either directly or collaterally. *Eckel v. MacNeal*, 256 Ill. App. 3d 292, 296, 628 N.E.2d 741, 744 (1993). Courts have the duty to vacate a void judgment, based on the inherent power of a court to expunge any void acts of which it has knowledge. *People v. Childs*, 278 Ill. App. 3d 65, 78, 662 N.E.2d 161, 169 (1996). A void judgment will be reversed on appeal whenever it is brought before a reviewing court by any means possible. *Moffat Coal Co. v. Industrial Comm'n*, 397 Ill. 196, 201, 73 N.E.2d 423, 426 (1947).

Principles of waiver do not apply to void judgments, and judgments found to be void may be corrected notwithstanding waiver. *People v. Simmons*, 256 Ill. App. 3d 651, 652, 628 N.E.2d 759, 761-62 (1993). If a sentence entered upon a negotiated plea of guilty is void, then the plea itself is likewise void. *People v. Summers*, 291 Ill. App. 3d 656, 657, 684 N.E.2d 1004, 1005 (1997).

Here, the circuit court lacked the inherent authority to order that the defendant serve a two-year term of mandatory supervised release upon his release from prison, because the statutory minimum term of mandatory supervised release for the crime to which he pled

guilty was three years. See *People v. Brown*, 296 Ill. App. 3d 1041, 1043, 695 N.E.2d 1374 (1998) (mandatory-supervised-release requirements may not be bargained away by the State during plea negotiations). The defendant's sentence and plea of guilty are thus void and hereby vacated.

#### CONCLUSION

Because the circuit court imposed a sentence that was not authorized by statute, the defendant's plea of guilty and the sentence are void. The plea and the sentence are vacated, and the cause is remanded to the circuit court so that further proceedings may be conducted.

Vacated; cause remanded.