FIRST DIVISION
FEBRUARY 11, 2013

1-11-1702



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>v.<br><br>JAMES POULOS,<br><br>Petitioner-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Cook County.<br><br>Nos. 07 CR 14705<br>07 CR 14706<br><br>Honorable<br>Timothy J. Chambers,<br>Judge Presiding. |

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the trial court did not advise defendant that he would have to serve a term of mandatory supervised release (MSR) in addition to the sentence negotiated as part of his plea agreement, dismissal of defendant's petition for post-conviction relief was improper. The cause is remanded to the circuit court with directions to impose sentences of nine and six years' imprisonment plus two years of MSR. In addition, the $200 DNA analysis fee is vacated.

¶ 2 Defendant James Poulos, who pleaded guilty to aggravated criminal sexual abuse and child abduction and was sentenced to respective concurrent extended terms of 11 and 6 years in prison, appeals from the granting of the State's motion to dismiss his petition for post-conviction relief by the circuit court of Cook County. On appeal, defendant contends that his petition made a substantial

showing that his due process rights were violated when the trial court did not inform him that he would have to serve two years of mandatory supervised release (MSR) in addition to the sentence negotiated as part of his plea agreement. Defendant further contends that this court should vacate the trial court's assessment of a $200 DNA analysis fee.

¶ 3 For the reasons that follow, we reverse the judgment of the circuit court of Cook County and remand with directions.

¶ 4 Defendant was charged with three counts of child abduction, two counts of aggravated criminal sexual abuse, and one count of unlawful restraint. On January 15, 2008, the parties indicated to the trial court that they had negotiated a guilty plea to one count of aggravated criminal sexual abuse and one count of child abduction, in exchange for concurrent extended-term sentences of 11 and 6 years' imprisonment, respectively. The trial court addressed defendant, in relevant part, as follows:

> "[Defendant], on case number 07 CR 14706, you will be sentenced to an extended term of 11 years in the Illinois Department of Corrections. On 07 CR 14705, you will be sentenced to a concurrent term of six years in the Illinois Department of Corrections. There are fines, fees, and costs in the amount of $765 which you will receive credit at the rate of $5 a day. Further understand that upon your parole from the state penitentiary, you will begin the sex offender registration program for life. You have gone over this with your attorney, is that correct, [defendant]?"

Defendant responded affirmatively to the trial court's question.

¶ 5 Defendant did not file a motion to withdraw his guilty plea or a direct appeal. In September 2010, defendant filed an attorney-drafted petition for post-conviction relief (petition), alleging that his due process rights were violated because the trial court did not inform him he would be required

to serve a two-year period of MSR in addition to the sentence he negotiated as part of his guilty plea. As relief, defendant sought a two-year reduction in his sentence.

¶ 6 The State filed a motion to dismiss. Following a hearing on the motion to dismiss, the trial court granted the State's motion. Defendant appeals.

¶ 7 In cases such as this, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). At second-stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 8 On appeal, defendant contends that he was denied due process and the benefit of his bargain by the trial court's failure to admonish him that two years of MSR would be added to his agreed-upon term of imprisonment. He argues that his sentence must be reduced by two years so as to approximate the sentencing agreement as he understood it at the time he pleaded guilty.

¶ 9 In support of his contention, defendant relies primarily upon *People v. Whitfield*, 217 Ill. 2d 177 (2005), and *People v. Morris*, 236 Ill. 2d 345 (2010). In *Whitfield*, the trial court made no mention of MSR to the defendant when he entered into a negotiated plea. See *Whitfield*, 217 Ill. 2d at 179-80. Our supreme court held that because the defendant was not informed of the required MSR term, he was entitled to the benefit of the bargain by having his prison sentence reduced by the length of the MSR term. *Whitfield*, 217 Ill. 2d at 195, 205.

¶ 10 In *Morris*, our supreme court acknowledged that *Whitfield* had "created some confusion" and that questions remained as to what information a trial court was required to convey to a defendant regarding MSR to ensure that the guilty plea admonishments complied with Supreme Court Rule 402

and due process. *Morris*, 236 Ill. 2d at 366. While the *Morris* court did not explicitly reach the issue -- it resolved the case by finding that *Whitfield* did not apply retroactively to the *Morris* defendants -- the *Morris* court provided guidance for trial courts to follow when giving guilty plea admonishments. *Id.*, at 355, 366-68; *People v. Thomas*, 402 Ill. App. 3d 1129, 1130 (2010).

¶ 11 The *Morris* court instructed that a Rule 402 admonishment is sufficient if an ordinary person in the accused's circumstances would understand it to convey the required *Whitfield* warning, that is, "that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged." *Morris*, 236 Ill. 2d at 366-67. In addition, the *Morris* court suggested that ideally, a Rule 402 admonishment expressly linking MSR to the agreed-upon sentence would be: (1) given when the trial court reviewed the plea agreement's provisions; (2) reiterated at sentencing; and (3) included in the written judgment. *Id.* at 367.

¶ 12 We agree with defendant that the admonishment given in the instant case did not substantially comply with *Whitfield* and *Morris*, as it did not link a term of MSR to the actual sentences that defendant was to receive and did not convey unconditionally that a term of MSR would be added to those sentences. Here, the trial court admonished defendant regarding his prison penalties and the amount of fines, fees, and costs that would be assessed. However, the trial court never uttered the words "mandatory supervised release" or "MSR," did not admonish defendant that a term of MSR would be added to his actual sentence, and did not specify how many years of MSR would be added. The trial court's only statement that even touched upon the topic of MSR occurred when the court advised defendant, "Further understand that upon your parole from the state penitentiary, you will begin the sex offender registration program for life." In our view, an ordinary person in defendant's circumstances would not have understood this language to convey that a two-year term of MSR would follow his prison sentence. See *id.* at 366-67.

¶ 13 The State argues that given defendant's criminal history and the paperwork he signed notifying him of his duty to register as a sex offender, the trial court's mention of parole was

sufficient to place him on notice that he would have to serve a term of parole or MSR upon his release from prison. The presentence investigation report indicates that defendant pleaded guilty to criminal sexual abuse and residential burglary in 1997 in exchange for a sentence of 10 years in prison, and then pleaded guilty to bribery of a public official in 1998 in exchange for a sentence of 4 years in prison. According to the State's motion to dismiss the petition and the State's brief in this court, defendant had been discharged from MSR in an unrelated case for only a few months when he committed the first of the crimes at issue in the instant case. The notification form defendant signed regarding sex offender registration includes language stating, "[y]ou must register within 5 days of conviction when sentenced to probation or upon release, parole, or discharge from prison or mental hospital. Reconfinement due to violation of parole or other circumstances which relate to the original conviction or adjudication shall extend the period of registration to 10 years after final parole, discharge or release." Given this background, the State argues that an ordinary person in defendant's circumstances would have had a preexisting knowledge of MSR and therefore, would have understood the trial court's statement to mean that he would have to serve a term of MSR upon his release from prison.

¶ 14 We cannot agree with the State. First, while nothing prohibits us from considering defendant's criminal history as evidence that he had some level of general knowledge about MSR, as noted in *Whitfield*, such background knowledge does not establish what defendant reasonably understood the terms of his current plea agreement to be at the time he pleaded guilty. See *Whitfield*, 217 Ill. 2d at 200. Second, while the word "parole" appears in the sex offender registration notification form, its use there is linked to defendant's duty to register, not to his sentence. Similarly, the trial court's oral use of the word "parole" in this case occurred in the context of informing defendant of his duty to register as a sex offender. These references do not comport with the directives of *Whitfield* and *Morris* that defendants must 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. See *Morris*,

236 Ill. 2d at 367; *Whitfield*, 217 Ill. 2d at 195. As our supreme court explained in *Morris*: "An admonition that uses the term 'MSR' without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case." *Morris*, 236 Ill. 2d at 366. Here, the term "parole" was not used in a relevant context. Therefore, we cannot find that its use advised defendant that he would be serving a two-year term of MSR in addition to his agreed-upon prison sentence.

¶ 15 We are mindful of the statement in *People v. Davis*, referenced by the State, that "under *Whitfield*, a constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty." *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010). However, this pronouncement is not as stark as the State would have us believe. The *Davis* court followed the above statement by explaining further that:

> "If, prior to the guilty plea admonishments, the defendant knows he will be sentenced to the penitentiary in exchange for his plea of guilty, and knowing this, he is told during the guilty plea hearing that he must serve an MSR term upon being sentenced to the penitentiary, then the defendant is placed on notice that his debt to society for the crime he admits to having committed extends beyond fulfilling his sentence to the penitentiary." *Davis*, 403 Ill. App. 3d at 466.

In *Davis*, the trial court admonished the defendant regarding the possible penalties he faced and stated, "You would have to serve at least three years mandatory supervised release, which is like parole." *Davis*, 403 Ill. App. 3d at 462. On appeal, we found that the trial court's admonishment met the requirements of *Whitfield*. *Davis*, 403 Ill. App. 3d at 466-67. Unlike *Davis*, in the instant case, defendant was not told during the guilty plea hearing that he would have to serve a term of MSR. Accordingly, *Davis* is distinguishable and does not dictate the result in this case.

¶ 16 Defendant's post-conviction petition made a substantial showing of a constitutional violation and should not have been dismissed. We reverse the judgment of the circuit court and remand with directions to reduce defendant's prison term by two years, so as to approximate the sentence he negotiated as part of his plea agreement. See *Whitfield*, 217 Ill. 2d at 205 (appropriate remedy is to reduce the defendant's sentence by the applicable number of years of MSR).

¶ 17 Defendant's second contention on appeal is that the trial court's assessment of a $200 DNA analysis fee should be vacated. He argues, and the State agrees, that the fee should not have been imposed in this case because he had previously been convicted of a felony and therefore had already submitted DNA for analysis and been assessed the fee. Section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) authorizes a trial court to order the collection, analysis, and indexing of a qualifying offender's DNA, and corresponding payment of the analysis fee, only once where the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). An order imposing a duplicative DNA analysis fee is void and must be vacated, as it exceeds statutory authority. *Id.* at 302; *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 23.

¶ 18 In the instant case, the records, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), reflect that defendant was convicted of and sentenced on a prior felony in April 1998. Therefore, we can presume that defendant is already registered in the DNA database. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (holding that in order to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). Accordingly, we agree with defendant and the State that the $200 DNA analysis fee is duplicative and must be vacated.

¶ 19 For the reasons explained above, we reverse the dismissal of defendant's post-conviction petition, vacate the sentence imposed, and remand to the circuit court with directions that it impose concurrent sentences of nine and six years' imprisonment, to be followed by a two-year term of MSR.

We further vacate that portion of the trial court's order requiring defendant to pay the $200 DNA analysis fee, and order the clerk of the circuit court to enter a modified fines, fees, and costs order consistent with our decision.

¶ 20 Reversed and remanded with directions.