

1-11-1906

**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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 11391
	)	
KENNETH SMITH,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea because the court adequately admonished the defendant that he would be subject to a period of mandatory supervised release upon his release from prison.

¶ 2 In 2004, defendant Kenneth Smith entered a negotiated plea of guilty to first-degree murder and was sentenced to 25 years in prison. On appeal, the defendant contends that the trial court erred when it denied his motion to vacate his guilty plea because the court did not adequately inform him that he would have to serve three years of mandatory supervised release (MSR) upon his release from prison. We affirm.

¶ 3 On January 12, 2004, the defendant entered a plea of guilty to first-degree murder and was sentenced to 25 years in prison. At the plea hearing, the court admonished the defendant that he was charged with first-degree murder which was punishable with between 20 and 60 years in prison and

included "three years of mandatory supervised released [sic]." The court then asked the defendant whether, knowing the nature of the charge and the possible penalties, he wished to enter a guilty plea. The defendant indicated that he wished to plead guilty. After hearing the factual basis for the plea, the court accepted the plea and sentenced the defendant to 25 years in prison. The defendant's mittimus indicated he was subject to three years of MSR.

¶ 4 The defendant then filed a *pro se* motion to withdraw his plea, which the trial court denied. The defendant appealed contending, in pertinent part, that his right to counsel was violated when the trial court permitted him to proceed *pro se* on the motion to vacate the guilty plea without first determining whether he desired counsel and securing a waiver of that right. This court determined that Illinois Supreme Court Rule 604(d) (eff. Jan. 1, 2013), had been violated when, although the trial court asked the defendant whether he wished to proceed on the *pro se* motion or make an additional argument, the court did not appoint counsel, inquire whether he wanted counsel, or obtain a knowing waiver of his right to counsel to help with a postplea motion. See *People v. Smith*, 365 Ill. App. 3d 356, 360-61 (2006). The cause was then remanded for compliance with Rule 604(d). *Smith*, 365 Ill. App. 3d at 361.

¶ 5 In February 2007, the defendant filed, through counsel, a motion to withdraw the guilty plea and vacate the judgment alleging that prior to accepting his plea, the trial court failed to properly admonish him that he would be required to serve a three-year term of MSR upon his release from prison. During the pendency of the motion to withdraw, three attorneys were appointed to represent the defendant. However, each attorney was permitted to withdraw, and the defendant was eventually permitted to proceed *pro se*. Ultimately, the trial court denied the defendant leave to withdraw his guilty plea.

¶ 6 The decision whether to grant or deny a motion to withdraw a guilty plea is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Delvillar*, 235 Ill. 2d 507, 519 (2009).

¶ 7 In *People v. Whitfield*, 217 Ill. 2d 177 (2005), our supreme court held that when a defendant pleads guilty in exchange for a specific sentence pursuant to a negotiated plea agreement and the trial court fails to admonish him, before accepting the plea, that a MSR term would be added to the sentence, the sentence imposed is more onerous than the one agreed to by the defendant which breaches the plea agreement and violates due process. *Whitfield*, 217 Ill. 2d at 195. The court then determined that in such cases either the promise must be fulfilled or the defendant must be permitted to withdraw his guilty plea. *Whitfield*, 217 Ill. 2d at 202. Subsequently, in *People v. Morris*, 236 Ill. 2d 345 (2010), our supreme court clarified that "MSR admonishments need not be perfect," but strongly encouraged trial courts to "explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea." *Morris*, 236 Ill. 2d at 367. Admonishments must " 'in a practical and realistic sense' " inform a defendant of the actual consequences of his plea, *i.e.*, if he pleads guilty and is sentenced to a term of imprisonment, a term of MSR will be added to the actual sentence agreed upon. *Morris*, 236 Ill. 2d at 366-67 (quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983)).

¶ 8 Initially, the State asserts that the defendant's claim must fail because it is based upon the new rule set forth in *Whitfield*, which should only be applied prospectively to convictions finalized after December 20, 2005. The State points out that the defendant's conviction was finalized on January 12, 2004.

¶ 9 Our supreme court has held that *Whitfield* may only be applied prospectively to cases where the defendant's conviction was not finalized prior to December 20, 2005, the date that *Whitfield* was announced. *Morris*, 236 Ill. 2d at 366. In this context, a conviction becomes final when the availability of a direct appeal has been exhausted and the time for filing a petition for a writ of *certiorari* has elapsed or a timely filed petition has been finally denied. *People v. Simmons*, 388 Ill. App. 3d 599, 609 (2009). In this case, although the defendant entered a plea of guilty in January 2004, he then filed a *pro se* motion to withdraw his plea, and an appeal from the subsequent denial

of that motion. Thus, as the defendant's case was pending on direct appeal on December 20, 2005, and was in fact remanded in March 2006, the new rule set forth in *Whitfield* applies to this case.

¶ 10 Here, the defendant contends that the trial court violated Supreme Court Rule 402 (eff. July 1, 2012), when it failed to adequately admonish him that his sentence would include a three-year term of MSR. He further argues that because the court only mentioned MSR "in passing" when discussing the range of possible prison sentences, it was not reasonable for him to believe that "such a term" would be added to his prison sentence. We disagree.

¶ 11 *People v. Davis*, 403 Ill. App. 3d 461 (2010), is instructive. There, we determined that under *Whitfield* a constitutional violation occurs only when there is "absolutely no mention" to a defendant, prior to the entry of his guilty plea, that he must serve a term of MSR in addition to the agreed upon sentence that he will receive in exchange for his plea. *Davis*, 403 Ill. App. 3d at 466. But see *People v. Burns*, 405 Ill. App. 3d 40, 43-44 (2010) (admonishments were insufficient when the MSR term was not linked to the actual sentences the defendant would receive pursuant to the plea agreement and did not convey unconditionally that MSR would be added to those sentences).

¶ 12 The case at bar is not an instance where there was no mention of MSR before the defendant actually entered a guilty plea. See *Davis*, 403 Ill. App. 3d at 466. Here, the defendant was informed, prior to the entry of his plea, that he was charged with first-degree murder which was punishable with between 20 and 60 years in prison and included three years of MSR. Thus, the defendant was put "on notice" that the punishment for the crime that he had admitted committing encompassed more than completing a sentence in the penitentiary. *Davis*, 403 Ill. App. 3d at 466. The trial court satisfied the requirements of due process by advising the defendant prior to imposing his sentence that he would have to serve a term of MSR upon his release from prison.

¶ 13 Although the defendant acknowledges *Davis*, he urges this court to follow the reasoning of *Burns* instead. However, this court's decision in *People v. Hunter*, 2011 IL App (1st) 093023, ¶¶ 17-18, considered, and rejected a similar argument. Thus, we continue to adhere to the court's

1-11-1906

decision in *Davis*. Therefore, the trial court did not abuse its discretion when it denied the defendant's motion to withdraw the guilty plea.

¶ 14 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 15 Affirmed.