

NOTICE
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2013 IL App (4th) 111108-U

NO. 4-11-1108

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 4, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
STEVEN BRADFORD,)	No. 09CF752
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgement.

ORDER

¶ 1 *Held:* (1) Where the trial court properly admonished defendant as to the term of mandatory supervised release (MSR) he would be required to serve, the court did not err in granting the State's motion to dismiss his postconviction petition; and (2) where defendant waived his right to appointed counsel in the postconviction proceedings, he cannot claim ineffective assistance of counsel.

¶ 2 In December 2009, defendant, Steven Bradford, pleaded guilty to one count of unlawful delivery of a controlled substance, and the trial court sentenced him to 12 years in prison. In August 2011, defendant filed a *pro se* petition for postconviction relief. In September 2011, the State filed a motion to dismiss. In November 2011, the court granted the motion to dismiss.

¶ 3 On appeal, defendant argues (1) the trial court failed to admonish him that he would be required to serve a term of MSR in addition to his negotiated sentence and (2) in the

alternative, he was denied the reasonable assistance of postconviction counsel. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In August 2009, a grand jury indicted defendant on one count of unlawful delivery of a controlled substance (count I) (720 ILCS 570/401(c)(2) (West 2008)), alleging he knowingly and unlawfully delivered to a confidential source of the police more than 1 gram but less than 15 grams of a substance containing cocaine.

¶ 6 In December 2009, defendant agreed to plead guilty to count I in case No. 09-CF-752 and the State agreed to nol-pros defendant's charge in No. 09-CF-765. The trial court admonished defendant as to the possible penalties for the Class 1 felony followed by a two-year period of MSR. Pursuant to the terms of the written plea agreement, defendant would serve 12 years in prison and pay various fines, fees, and court costs. He would also pay restitution to the victim in case No. 09-CF-765. Defendant agreed this was the entire agreement with the State. The court accepted defendant's plea and sentenced him in accord with the agreement.

¶ 7 In August 2011, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). He alleged he was denied his rights to due process when the trial court failed to properly admonish him at the sentencing hearing with regard to the two-year term of MSR. Defendant asked that his 12-year sentence be reduced to 10 years in prison plus 2 years of MSR.

¶ 8 In September 2011, the trial court appointed counsel and requested the State file a responsive pleading. The State responded with a motion to dismiss, denying defendant was improperly admonished on the MSR term.

¶ 9 In November 2011, the trial court held a second-stage hearing on the State's

motion to dismiss. The State indicated it had nothing to add to its written motion. The following exchange then took place:

"THE COURT: Any argument in response, Mr. Davis.

MR. DAVIS [defense counsel]: Transcript says what it says, your Honor.

THE DEFENDANT: I would like to say something.

THE COURT: You can instruct your attorney as to what you want—

THE DEFENDANT: This is the first time I spoke to him. Just right now.

THE COURT: If you'd like to take some time, Mr. Davis. Let's take some time. Let's make certain that the defendant understands what is going on today.

THE DEFENDANT: Thank you."

Following a brief recess, the following exchange took place:

"THE COURT: At this point I have received all of the arguments that I am going to receive. I had best review the transcript which is the—

THE DEFENDANT: Your Honor, can—

THE COURT: Excuse me a second. You speak through counsel. That's the way it works. You requested the appointment of counsel. You have an attorney. He speaks for you. He said to

the judge, read the transcript because it says what it says.

THE DEFENDANT: He won't speak for me.

THE COURT: I'm sorry, he has spoken for you and you are going to have to live with it. You don't get to represent yourself and have an attorney.

THE DEFENDANT: Well, can I withdraw the motion for appointment of counsel and represent myself?

THE COURT: Sorry. Done deal. Done deal.

THE DEFENDANT: And that's on the record that I made that statement that I would like to represent myself?

THE COURT: Would you be quiet please while I read the evidence which you submitted in your *pro se* petition?

THE DEFENDANT: Yes, sir.

THE COURT: I have read the post-conviction petition and it does seem to be entirely focused on the one issue which has been raised. I'm assuming at this point that I have received all of the evidence that would be possible to be received. I have to assume at this point that the matters as alleged as facts in the petition are to be taken as true. In that regard, is there anything further that you would like to say on the defendant's behalf, Mr. Davis?

MR. DAVIS: No, sir. Mr. Bradford contends that because the admonishments on page three only refer to possible penalties, it

does not attach to the actual sentence imposed. I disagree with that but it is what Mr. Bradford contends.

THE DEFENDANT: It says it.

THE COURT: Mr. Bradford, I am going to make an exception and let you represent yourself if you're asking for Mr. Davis to be relieved. I am going to relieve him at this time, but you're not going to be able to get an attorney for future proceedings, on this petition in any event. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Say what you got to say.

THE DEFENDANT: It's my contention that it was an improper admonishment. They admonished me as to possible penalties of what the charge actually carried. But it was apart from what the plea agreement says. If you notice on the actual plea agreement it says 12 years IDOC. Nothing on the plea agreement mentions two years MSR, probation, or anything to that matter. And in the actual sentence the judge even states that I will sentence you in accordance with the plea agreement which was nothing mentioned no where else other than this part where it says, apart from possible penalties you could face, then you would get two years MSR.

THE COURT: Anything further?

THE DEFENDANT: No, sir."

The court found defendant was sentenced in accordance with his plea agreement and properly admonished regarding the MSR term. The court granted the State's motion to dismiss. This appeal followed.

¶ 10

II. ANALYSIS

¶ 11

A. Second-Stage Dismissal

¶ 12

Defendant argues the trial court failed to admonish him that he would be required to serve a two-year term of MSR in addition to his negotiated sentence. We disagree.

¶ 13

The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 14

The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 15

At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill.

2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion.

¶ 16 At the second stage of postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 17 "A defendant's due-process rights may be violated where the defendant did not receive the 'benefit of the bargain' of his plea agreement with the State." *People v. Holt*, 372 Ill. App. 3d 650, 652, 867 N.E.2d 1192, 1194 (2007) (quoting *People v. Whitfield*, 217 Ill. 2d 177, 186, 840 N.E.2d 658, 664 (2005)). Prior to accepting a guilty plea, the trial court must admonish

the defendant, *inter alia*, as to the nature of the charge and the minimum and maximum sentence prescribed by law. Ill. S. Ct. R. 402(a) (eff. July 1, 1997). Although substantial compliance is sufficient to establish due process, the supreme court has stated as follows:

"there is no substantial compliance with Rule 402 and due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to that sentence. In these circumstances, addition of the MSR term to the agreed-upon sentence violates due process because the sentence imposed is more onerous than the one defendant agreed to at the time of the plea hearing." *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669.

¶ 18 Our supreme court clarified its *Whitfield* decision in *People v. Morris*, 236 Ill. 2d 345, 925 N.E.2d 1069 (2010). The court stated "*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." *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082. "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, 925 N.E.2d at 1082. While the MSR admonitions need not be perfect, "they must substantially comply with the requirements of [Supreme Court] Rule 402 and the precedent of this court." *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082.

¶ 19 In *People v. Andrews*, 403 Ill. App. 3d 654, 657, 936 N.E.2d 648, 651 (2010), the defendant argued his due-process rights were violated because his plea agreement did not mention he would be subject to MSR at the completion of his agreed-upon sentence. This court disagreed, holding "as long as the trial court informs a defendant at the time of his guilty plea that an MSR term must follow any prison sentence that is imposed upon him, he has received all the notice and all the due process to which he is entitled regarding MSR." *Andrews*, 403 Ill. App. 3d at 665, 936 N.E.2d at 657.

¶ 20 In the case *sub judice*, the trial court admonished defendant, in part, as follows:

"With respect to penalty, this is a non-probationable offense due to the weight being over five grams, and it's a Class 1 Felony, which, basically, means, then, that the possible penalties under the law in this case—apart from what's in your plea agreement for a moment, but this is what the law provides—a minimum of four years imprisonment, or any number of years up to a maximum of 15 years' imprisonment followed by a two-year period of mandatory supervised release. The court costs and fines are also possible up to a maximum of \$25,000.00. Do you have any questions concerning the possible penalties?"

Defendant indicated he did not. Thereafter, the court reviewed the actual plea agreement with defendant. Among other things, the written agreement indicated defendant agreed to a sentence of 12 years in prison and would be ordered to pay a \$2,000 drug-treatment assessment, a \$100 drug trauma fund fine, and a \$200 deoxyribonucleic-acid (DNA) assessment. After reviewing the agreement, defendant indicated it was the entire agreement he reached with the State.

¶ 21 Defendant argues he was not sufficiently admonished that a term of MSR would be added to his negotiated sentence. However, the record shows that prior to accepting defendant's guilty plea, the trial court advised defendant that his Class 1 felony offense was subject to a prison term between 4 and 15 years in prison followed by a 2-year MSR term. Defendant indicated he had no questions concerning the possible penalties. We find the court adequately advised defendant under Rule 402 that his sentence would be subject to a period of MSR. See *Andrews*, 403 Ill. App. 3d at 665, 936 N.E.2d at 657; *People v. Marshall*, 381 Ill. App. 3d 724, 736, 886 N.E.2d 1106, 1116 (2008).

¶ 22 Defendant takes issue with the trial court's statement about the possible penalties "apart from what's in [his] plea agreement." Defendant argues this "clearly conveyed that MSR was not part of [his] fully negotiated sentence." We disagree. The statement conveys the possible penalties and notes the appropriate MSR term that the law requires over and above, or "apart from," the sentence imposed. An ordinary person would understand the MSR term would have to be served once the actual sentence had been served. See *Morris*, 236 Ill. 2d at 366, 925 N.E.2d at 1082.

¶ 23 Defendant also argues the trial court failed to comply with Eleventh Judicial Circuit Rule 207 (11th Judicial Cir. Ct. R. 207 (Aug. 1, 2006)), which states, in part, counsel shall submit the plea agreement including the "maximum jail or Illinois Department of Corrections sentence agreed to." Defendant contends the rule required the written plea agreement to note he would serve a total of 14 years in prison.

¶ 24 We find no merit in defendant's argument. First, defendant fails to persuade that Rule 207 requires MSR to be included in the "maximum *** sentence agreed to." Second,

defendant cites no authority that a violation of a local rule may provide the basis for postconviction relief. See *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509 (the Act provides a means of challenging a conviction or sentence that was "based on a substantial violation of constitutional rights").

¶ 25 B. Reasonable Assistance of Postconviction Counsel

¶ 26 Defendant argues, in the alternative, that he was denied the reasonable assistance of postconviction counsel because his attorney (1) failed to speak to him before the hearing on the State's motion to dismiss, (2) failed to amend his *pro se* petition to allege the ineffectiveness of his previous attorney, and (3) did not advocate for him during the hearing.

¶ 27 Defendant filed his *pro se* postconviction petition in August 2011. In September 2011, the trial court appointed counsel at the second stage of the proceedings. The State then filed a motion to dismiss. At the November 2011 hearing on the motion to dismiss, defendant appeared with his appointed counsel. In response to the State's argument, defense counsel stated the "[t]ranscript says what it says." After defendant stated the hearing was the first time he spoke with counsel, the court took a brief recess to make sure defendant understood the proceedings. Defendant later complained counsel would not speak for him and asked to represent himself. The court then reviewed the petition, and counsel indicated his disagreement with defendant's claim that the admonishments were deficient. The court decided to allow defendant to represent himself and relieved counsel. Defendant then argued the admonishments were improper. The court disagreed and granted the State's motion to dismiss.

¶ 28 The right to postconviction counsel is statutory (725 ILCS 5/122-4 (West 2010)), and defendants are only entitled to a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d

37, 42, 862 N.E.2d 977, 979 (2007). A defendant may waive his right to appoint counsel in a postconviction proceeding. *People v. French*, 210 Ill. App. 3d 681, 690, 569 N.E.2d 934, 940 (1991).

¶ 29 Here, defendant waived his right to appointed counsel at the hearing on the motion to dismiss. Accordingly, defendant cannot successfully claim ineffective assistance of counsel. *French*, 210 Ill. App. 3d at 690, 569 N.E.2d at 940.

¶ 30 We note defendant argues on appeal that counsel did not speak for him, amend his petition, or advocate for him. However, no amount of consultation would change what took place at the guilty plea hearing. Further, defendant's postconviction petition was well-drafted; included citations to *Whitfield*, *Morris*, and other related cases; and had the transcript of the plea hearing and the written plea agreement attached as exhibits. Everything the trial court needed to rule on the issue was provided. Defendant argues counsel did not provide citations to decisions of our sister courts. However, this court has set forth multiple cases on this issue that the trial court was obligated to follow. Defendant's petition and his argument to the court fully presented his claim of error. Thus, we find the court did not err in granting the State's motion to dismiss.

¶ 31 On a final issue, appellate counsel argues defendant's plea counsel failed to determine whether a DNA assessment was required in case No. 09-CF-752. Defendant claims he supplied a DNA sample in 2005, and, as a result, he was improperly assessed this fee as a consequence of the plea agreement in this case. We note defendant did not raise the issue of plea counsel's ineffectiveness in his postconviction petition. The State points out the DNA fee was a term of defendant's plea agreement and thus he should be estopped from complaining about it now. See *People v. Evans*, 391 Ill. App. 3d 470, 474, 907 N.E.2d 935, 939 (2009). Appellate

counsel acknowledges the State's point of law but contends postconviction counsel was ineffective for not raising the issue of plea counsel's ineffectiveness in allowing defendant to agree to the DNA assessment. In the end, however, defendant does not argue the assessment must be vacated or ask this court to do so. As such, we need not address the matter.

¶ 32

III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.