

NOTICE
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2013 IL App (4th) 120060-U

NO. 4-12-0060

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 19, 2013
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Coles County |
| ROY L. LAWHORN, JR., |) | No. 04CF108 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | James R. Glenn, |
| |) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's amended postconviction petition, which sought to withdraw his guilty plea on charges of child pornography.

¶ 2 In May 2004, defendant, Roy L. Lawhorn, Jr., pleaded guilty to five counts of child pornography (case No. 04-CF-108)) and two counts of criminal sexual assault (case No. 04-CF-94)). In July 2004, the trial court sentenced defendant to 2 concurrent 14-year prison sentences for criminal sexual assault and 5 concurrent 14-year prison sentences for child pornography. The court ordered the criminal-sexual-assault sentences to run consecutive to the sentences for child pornography. In July 2007, defendant filed a *pro se* postconviction petition, and defense counsel filed an amended postconviction petition in June 2010. The State filed a motion to dismiss, which the court denied. In August 2011, the court granted, in part, defendant's motion for summary judgment. In January 2012, the court denied the remaining allega-

tions in the amended postconviction petition.

¶ 3 On appeal, defendant argues the trial court erred in denying his amended postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2004, the State charged defendant by information with five counts of child pornography (720 ILCS 5/11-20.1(a)(1) (West 2004)) in case No. 04-CF-108. In May 2004, defendant agreed to plead guilty to the five counts in case No. 04-CF-108 and two counts of criminal sexual assault in case No. 04-CF-94. The trial court admonished defendant that each count of child pornography was subject to discretionary consecutive sentences of 4 to 15 years in prison. On the sexual-assault charges, the court admonished defendant that the sentences were mandatorily consecutive to the sentences in case No. 04-CF-108, and it was within the court's discretion whether the two counts of sexual assault would be concurrent or consecutive to each other. The court accepted defendant's guilty plea on all of the charges in the two cases.

¶ 6 In July 2004, the trial court conducted the sentencing hearing. The court sentenced defendant to 2 concurrent sentences of 14 years in prison for criminal sexual assault in case No. 04-CF-94. In case No. 04-CF-108, the court sentenced defendant to 5 concurrent sentences of 14 years in prison on each count of child pornography. The court also ordered the sentences in case No. 04-CF-108 to be consecutive to the sentences in case No. 04-CF-94.

¶ 7 In July 2007, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)). Defendant argued his concurrent sentences for criminal sexual assault (No. 04-CF-94) were void because he was subject to mandatory consecutive sentencing. Defendant asked that he be allowed to withdraw

his entire plea agreement due to the improper admonitions given when he agreed to plead guilty in both cases.

¶ 8 In June 2010, appointed counsel filed an amended petition, incorporating the allegation made in defendant's original petition. In July 2010, the State filed a motion to dismiss. In February 2011, the trial court conducted a hearing on the State's motion to dismiss.

¶ 9 The State argued, *inter alia*, the concurrent sentences received by defendant for the two counts of criminal sexual assault were proper because they were made consecutive to the sentences in the child-pornography cases. Defense counsel argued the two criminal-sexual-assault charges were mandatorily consecutive to one another in addition to being mandatorily consecutive to the sentences in the child-pornography cases. Also, counsel noted criminal sexual assault is a triggering offense requiring mandatory consecutive sentences. Thus, counsel argued the admonitions given to defendant, that the sentences for criminal sexual assault could be concurrent with one another, voided the guilty pleas in both cases.

¶ 10 The trial court found defendant had been improperly admonished regarding the applicable sentencing on the criminal-sexual-assault cases. However, the court found defendant had been properly admonished that his child-pornography sentences would be consecutive to the two criminal-sexual-assault charges. The court denied the State's motion to dismiss.

¶ 11 In April 2011, defense counsel filed a motion for summary judgment on the issue of whether defendant was entitled to withdraw his guilty pleas in both case Nos. 04-CF-94 and 04-CF-108 due to the improper admonitions in case No. 04-CF-94. In August 2011, the trial court granted the motion with respect to case No. 04-CF-94, finding defendant had not been properly admonished that the sentences for the two offenses of criminal sexual assault had to be

served consecutively. The court allowed defendant to withdraw his guilty plea. The court, however, denied the motion for summary judgment with respect to case No. 04-CF-108, finding the admonishments in that case were correct. In January 2012, the court conducted a hearing on the remaining issues in the amended postconviction petition and ultimately denied the petition. This appeal followed.

¶ 12

II. ANALYSIS

¶ 13 Defendant argues the trial court erred in denying his amended postconviction petition seeking to withdraw his guilty plea in case No. 04-CF-108 when he received improper admonitions in case No. 04-CF-94. We disagree.

¶ 14 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 bears the initial burden of establishing a substantial deprivation of his federal or state constitutional rights. *People v. Williams*, 209 Ill. 2d 227, 242, 807 N.E.2d 448, 458 (2004).

¶ 15 The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. English*, 2013 IL 112890, ¶ 23, __ N.E.2d __. Here, the trial court dismissed defendant's amended petition following a third-stage evidentiary hearing. "After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous." *English*, 2013 IL 112890, ¶ 23, __ N.E.2d __. However, where only questions of law are involved, our review is *de novo*. *English*, 2013 IL

112890, ¶ 23, __ N.E.2d __.

¶ 16 Supreme Court Rule 402 provides that "every defendant who enters a plea of guilty has a due process right to be properly and fully admonished." *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 665 (2005). Rule 402(a) requires substantial compliance by the trial court in admonishing the defendant on (1) the nature of the charge, (2) the minimum and maximum sentences, (3) the right to plead not guilty, and (4) the waiver of the right to trial. Ill. S. Ct. R. 402(a) (eff. July 1, 1997). "Informing a defendant of the possibility of consecutive sentences when consecutive sentences are mandatory is an inadequate admonishment under Rule 402. Under such circumstances, the defendant should be allowed to withdraw his guilty plea and plead anew." *People v. Dorethy*, 331 Ill. App. 3d 504, 507, 771 N.E.2d 609, 611 (2002).

¶ 17 In the case *sub judice*, the trial court conducted a single plea hearing involving case No. 04-CF-94 (criminal sexual assault) and case No. 04-CF-108 (child pornography). The court admonished defendant that the five child-pornography counts carried a mandatory prison term of between 4 and 15 years in prison, but the court explained it had the discretion to impose consecutive prison terms on each of the five counts.

¶ 18 The trial court then admonished defendant that the criminal-sexual-assault counts carried possible prison terms of not less than 4 years and not more than 15 years in prison. The court erroneously stated it had discretion to impose consecutive terms on the criminal-sexual-assault counts, although the court correctly noted those counts would be consecutive to the counts in case No. 04-CF-108. The court also told defendant he could be sentenced to four years' probation on the criminal-sexual-assault counts.

¶ 19 At the combined sentencing hearing, the trial court sentenced defendant to

concurrent 14-year terms on the two counts of criminal-sexual assault (No. 04-CF-94), five concurrent 14-year terms for child pornography (No. 04-CF-108), and ordered the sentences in case No. 04-CF-108 be served consecutively to the sentences in case No. 04-CF-94.

¶ 20 During the postconviction proceedings, the trial court allowed defendant to withdraw his guilty plea in case No. 04-CF-94 because he was not informed the two counts of criminal sexual assault were mandatorily consecutive. However, the court concluded defendant had been properly admonished concerning the child-pornography charges in No. 04-CF-108, as he was informed they were mandatorily consecutive to any sentences received in No. 04-CF-94.

¶ 21 Defendant points out, and the State concedes, the trial court erroneously admonished him that it was possible his sentences for the two counts of criminal sexual assault could be served concurrently. Thus, the court correctly allowed defendant to withdraw his guilty plea on those charges. Defendant contends the same result should be reached as to the child-pornography charges. For the following reasons, however, we find the court was correct in refusing to allow defendant to withdraw his guilty plea on those counts.

¶ 22 Defendant cites no authority that the incorrect admonitions on the criminal-sexual-assault counts can serve as grounds to allow him to withdraw his plea in the child-pornography counts, where defendant concedes he was properly admonished. Moreover, defendant's arguments the State violated the plea agreement and that he did not receive the benefit of his bargain are not persuasive. The record does not reflect the State had any agreement with defendant. Instead, defendant entered into an open plea without promises or concessions by the State.

¶ 23 Defendant is also incorrect in asserting his minimum possible sentence was 12

years and the trial court incorrectly admonished him the minimum possible sentence was 8 years. Actually, the court admonished defendant he was eligible for probation on the criminal-sexual-assault counts. Thus, in effect, the court's admonishments correctly informed defendant his minimum prison sentence could be as little as four years. As defendant failed to show he was entitled to withdraw his guilty plea, the court did not err in denying his amended postconviction petition.

¶ 24

III. CONCLUSION

¶ 25 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.

¶ 26 Affirmed.