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2013 IL App (4th) 120161

NO. 4-12-0161

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 20, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
ANTHONY J. REALE,)	No. 08CF168
Defendant-Appellant.)	
)	Honorable
)	James R. Glenn,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's postconviction petition.

¶ 2 In March 2009, defendant entered fully negotiated guilty pleas to criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and conspiracy to commit first degree murder (720 ILCS 5/8-2(a), 9-1(a)(1) (West 2008)). Pursuant to the terms of the plea agreement, the trial court sentenced defendant to consecutive prison terms of 9 years for criminal sexual assault and 14 years for conspiracy to commit first degree murder. Pursuant to section 5-8-1(d)(4) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(d)(4) (West 2008)), defendant's conviction for criminal sexual assault carried a mandatory supervised release (MSR) term of three years to life. In January 2012, defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) in which he argued for the first time that his

due process rights were violated because the trial court, prior to accepting his guilty plea, improperly admonished him that he would be subject to a shorter period of MSR than that which was actually imposed as required by statute. The trial court summarily dismissed the petition as frivolous or patently without merit. Defendant filed a motion to reconsider, which the court denied. Defendant appealed. For the reasons that follow, we reverse the court's summary dismissal and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 In March 2009, defendant entered fully negotiated guilty pleas to criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and conspiracy to commit first degree murder (720 ILCS 5/8-2(a), 9-1(a)(1) (West 2008)). Prior to accepting defendant's guilty pleas, the trial court admonished defendant he would be subject to a two-year MSR term. In reality, defendant's conviction for criminal sexual assault carried an MSR term of three years to life pursuant to section 5-8-1(d)(4) of the Unified Code (730 ILCS 5/5-8-1(d)(4) (West 2008)).

¶ 5 After accepting defendant's guilty pleas, the trial court sentenced him to 9 years' imprisonment for criminal sexual assault and 14 years' imprisonment for conspiracy to commit first degree murder. In its written sentencing order, the court left the space for the MSR term blank. Upon request of the Department of Corrections (DOC), the court entered an amended sentencing order to include specific statutory citations. In the amended sentencing order, entered in April 2009, the court again left the space for the MSR term blank.

¶ 6

A. Defendant's Postsentencing Motions

¶ 7 In April 2009, defendant, *pro se*, filed a motion for reduction of his sentence, arguing his sentence was excessive. He did not allege the trial court improperly admonished him

as to the MSR term. Defendant also filed a motion for appointment of counsel, which the trial court granted in May 2009.

¶ 8 In September 2009, defendant, through counsel, filed a motion to withdraw his guilty plea in which he argued his plea to criminal sexual assault was the subject of coercion and inducement. The motion did not allege an improper admonishment as to the MSR term.

¶ 9 In October 2009, the State filed a motion to dismiss defendant's motion to withdraw his guilty plea, alleging (1) defendant's motion was untimely and (2) defendant failed to support his motion by citing facts in the record or providing a supporting affidavit.

¶ 10 In November 2009, following a hearing, the trial court granted the State's motion to dismiss defendant's motion to withdraw his guilty plea and, on defense counsel's request, ordered defendant's *pro se* motion to reduce his sentence stricken as an inappropriate remedy for a fully negotiated sentence.

¶ 11 B. Defendant's Direct Appeal

¶ 12 Defendant filed a notice of appeal from the trial court's order dismissing his motion to withdraw his guilty plea. The trial court appointed the office of the State Appellate Defender (OSAD) to represent defendant on appeal. In January 2011, OSAD moved to withdraw as appellate counsel, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). *People v. Reale*, No. 4-09-0940 (Apr. 18, 2011) (unpublished order under Supreme Court Rule 23). OSAD asserted no colorable argument could be made the trial court erred in granting the State's motion to dismiss defendant's motion to withdraw his guilty plea. Specifically, OSAD argued (1) the trial court was without jurisdiction to hear defendant's motion to withdraw his plea because defendant failed to file it within 30 days

of the imposition of his sentence, as required by Rule 604(d), and (2) defendant's failure to timely file was not excused because (a) defendant's *pro se* motion to reconsider his sentence was ineffective to extend the time to file a motion to withdraw his guilty plea, (b) the trial court's order granting defendant an extension of time to file a motion to withdraw his guilty plea was ineffective, and (c) defendant was properly admonished as required by Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). *People v. Reale*, No. 4-09-0940 (Apr. 18, 2011) (unpublished order under Supreme Court Rule 23).

¶ 13 On its own motion, this court granted defendant leave to file additional points and authorities, which he failed to do. *Id.* at 5. In April 2011, this court entered an order granting OSAD's motion to withdraw and affirmed the trial court's order dismissing defendant's motion to withdraw his guilty plea. *Id.* at 5-6. This court agreed with OSAD the trial court was divested of jurisdiction to consider it because defendant's motion to withdraw his plea was untimely filed without justification. However, instead of dismissing the appeal outright, this court noted defendant was entitled to a credit up to \$1,695 applicable against his deoxyribonucleic acid (DNA) analysis assessment imposed pursuant to section 5-4-3(j) of the Unified Code (730 ILCS 5/5-4-3(j) (West 2008)) and any other applicable fines and fees. Neither OSAD's brief nor this court's order addressed the issue of defendant's MSR term or the court's admonishments as to MSR.

¶ 14 C. Defendant's Postconviction Petition

¶ 15 In January 2012, defendant, *pro se*, filed a postconviction petition pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2010)). In his petition, defendant claims (1) he was denied his right to counsel at a critical stage of the proceeding, specifically in "filing a post-plea

motion and in perfecting his appeal" and (2) the trial court failed to admonish him he was subject to lifetime MSR. In an affidavit attached to the petition, defendant alleged, in pertinent part, (1) he intended to file a motion to withdraw his guilty plea when he filed the motion to reconsider his sentence and (2) he told his attorney he wanted to withdraw his guilty plea.

¶ 16 On January 18, 2012, the trial court entered an order summarily dismissing defendant's postconviction petition as frivolous or patently without merit. In its order, the court noted (1) the allegations of defendant's petition are not supported by affidavits, records, or other evidence attached thereto; (2) the allegations regarding the right to counsel after defendant's guilty plea fail to set forth a substantial denial of defendant's rights under the constitutions of the United States or State of Illinois; and (3) the issues of defendant's petition could have been raised on direct appeal but were not. The court's order did not specifically address defendant's argument as to the MSR term.

¶ 17 D. Defendant's Motion To Reconsider

¶ 18 In February 2012, defendant, *pro se*, filed a "motion to reconsider postconviction petition." The motion read in its entirety as follows:

"Now comes the Defendant, Anthony J. Reale and brings to the attention of this Court that it failed to acknowledge issues of Defendant being improperly admonished to (MSR) but 730 ILCS 5/5-8-1(d)(4) says defendant has to do 3 years to life. In people vs Witfield [*sic*], we find that when a defendant receives a different and more onerous sentence than was negotiated it is a violation of the due process [law] and rights and the only way to correct this

error is to take the extra time off the sentence or give the defendant the option to withdraw his plea.

The Defendant is now asking to be allowed to withdraw his plea."

Defendant attached to his motion to reconsider (1) a photocopy of two pages of his original postconviction petition in which he sets forth his claims of error and pertinent facts, (2) one page of the transcript from his guilty plea hearing in which the trial court admonished him he would be subject to an MSR term of two years, and (3) five pages of argument in support of his claim his due process rights were violated by the trial court's failure to properly admonish him as to the applicable MSR term.

¶ 19 On February 9, 2012, the trial court made a docket entry which reads as follows:
"Court lacks statutory authority to reconsider its Order of Dismissal of Petition as Frivolous and Patently Without Merit and finds no basis for such reconsideration in Deft's Motion to Reconsider Post-Conviction Petition. Therefore, said motion is denied."

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant appeals from the trial court's January 2012 summary dismissal of his *pro se* postconviction petition as frivolous and patently without merit. Before we address the merits of this appeal, we address the court's finding it lacked statutory authority to reconsider the summary dismissal of defendant's postconviction petition. As the State concedes, the court did

have authority to hear defendant's motion to reconsider.

¶ 23 A summary dismissal of a postconviction petition is a final judgment in a civil proceeding. 725 ILCS 5/122-2.1(a)(2) (West 2010). "A party may move to reconsider a final judgment in a civil proceeding within 30 days of the entry of that judgment." *People v. Dominguez*, 366 Ill. App. 3d 468, 472, 851 N.E.2d 894, 899 (2006). In reviewing the court's denial of defendant's motion to reconsider the summary dismissal of his postconviction petition, we ultimately consider the merits of the postconviction petition itself. *Id.* at 473, 851 N.E.2d at 899.

¶ 24 Moving to the substance of this appeal, defendant's postconviction petition alleged (1) he was denied his right to counsel in assisting him in preparing the appropriate postsentencing motions and in perfecting his appeal and (2) the trial court failed to admonish him he was subject to lifetime MSR. In relating the specific facts of his case, defendant stated, in part, he intended to file a motion to withdraw his guilty plea but his public defender was not available to assist him in preparing the motion. According to the petition, due to his lack of knowledge and the pressure of filing the motion on time, defendant filed the wrong motion. In an attached affidavit, defendant stated he intended to file a motion to withdraw his guilty plea, he told his lawyer he wanted to withdraw his guilty plea, and he filed the motion to reduce sentence by mistake because he did not "understand fully what to check [and] my lawyer was not there."

¶ 25 The trial court summarily dismissed defendant's petition as frivolous or patently without merit. The court found defendant's petition was not supported by affidavits, records, or other evidence attached to the petition; defendant's allegations regarding his right to counsel after his guilty plea fail to set forth a substantial denial of his constitutional rights; and the issues

raised in the petition could have been raised on direct appeal but were not. We find the court erred in summarily dismissing defendant's petition.

¶ 26 The Act sets forth a procedural mechanism through which a defendant can assert “in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]” 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734, 740 (2002). At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is “frivolous” or “patently without merit,” the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss his petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the defendant's petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446.

¶ 27 The trial court summarily dismissed this case during the first stage of postconviction proceedings. We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). Our supreme court has stated a trial court is to independently examine a postconviction petition during the first stage of postconviction proceedings. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

To survive the first stage of postconviction proceedings, a petitioner is only required to present a limited amount of detail. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754. He is not required to include citation to legal authority or legal argument. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754. However, he is "is not excused *** from providing any factual detail whatsoever on the alleged constitutional deprivation." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

"The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. [Citation.] This standard presents a 'low threshold' [citation], requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim [citation].

In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court. *** We recently explained that a *pro se* postconviction petition is frivolous or patently without merit only if it 'has no arguable basis either in law or in fact.' [Citation.] A petition lacking an arguable basis in law or fact is one 'based on an indisputably meritless legal theory or a fanciful factual allegation.' " *Brown*, 236 Ill. 2d at 184-85, 923 N.E.2d at 754.

¶ 28 On appeal, defendant argues the "trial court erred by summarily dismissing the postconviction petition because the pleadings set forth, at the very least, an arguable constitutional claim." Relying on *People v. Whitfield*, 217 Ill. 2d 177, 188, 840 N.E.2d 658, 665

(2005), defendant argues: "When a defendant has negotiated a plea for a specific sentence, the failure to properly admonish him of the applicable MSR term violates due process." Here, the trial court erroneously admonished defendant regarding the applicable MSR term, stating he would be subject to a mandatory supervised release term of two years. As noted in defendant's brief, the official website for the Department of Corrections (DOC) states defendant is subject to an MSR term of three years to life. We agree with defendant his postconviction petition stated the gist of a constitutional claim.

¶ 29 In *Whitfield*, the supreme court held the trial court's failure to properly admonish defendant regarding the applicable MSR term amounted "to a unilateral modification and breach of the plea agreement by the State, inconsistent with constitutional concerns of fundamental fairness." *Whitfield*, 217 Ill. 2d at 190, 840 N.E.2d at 667. Further, a finding due process was violated is not contingent upon the defendant's ability to demonstrate he would not have pled guilty had he known about the actual MSR. *Id.* at 196-97, 840 N.E.2d at 670. The court explained its ruling as follows:

"It is 'uncontested' that the circuit court failed to admonish defendant, as required by Supreme Court Rule 402 and due process, that a three-year MSR term would be added, by operation of law, to the negotiated 25-year sentence defendant agreed to when he pled guilty. As a result of the circuit court's error, defendant was never advised that the sentence he was told he would receive in exchange for his plea of guilty was not the sentence which he would ultimately receive. Defendant was

prejudiced by the omitted admonition because he received a more onerous sentence than the one he was told he would receive. Under these circumstances, it is not necessary for defendant to demonstrate a reasonable probability that, but for the error, he would not have pleaded guilty. Based on the record, defendant's guilty plea was induced by the promise of a specific sentence, which he did not receive. Thus, defendant has established that this constitutional right to due process and fundamental fairness was violated." *Id.* at 201-02, 840 N.E.2d at 673.

But for the length of the negotiated sentence at issue in *Whitfield*, the court's aforementioned language is directly applicable to the allegations in defendant's *pro se* postconviction petition. Taking the allegations in defendant's petition as true, his petition stated the gist of a constitutional claim.

¶ 30 The State argued defendant forfeited his claims because they could have been raised on direct appeal but were not. *Whitfield*, 217 Ill. 2d at 187-88, 840 N.E.2d at 665. We disagree.

¶ 31 Defendant could not have raised this issue on direct appeal pursuant to our supreme court's decision in *People v. Foster*, 171 Ill. 2d 469, 471, 665 N.E.2d 823, 824 (1996). In *Foster*, our supreme court stated, pursuant to Rule 604(d), appellate courts may not consider allegations of error regarding either a guilty plea or a corresponding sentence unless the defendant first filed a written motion to withdraw his guilty plea or a motion to reconsider sentence in the trial court. If the defendant does not file a written motion, the appellate court

must dismiss the appeal. *Foster*, 171 Ill. 2d at 471, 665 N.E.2d at 824. Likewise, our supreme court has stated: "Where no written motion has been filed with the trial court, the appellate court must dismiss the appeal, leaving the Post-Conviction Hearing Act as a defendant's only recourse." *Foster*, 171 Ill. 2d at 471, 665 N.E.2d at 824.

¶ 32 Pursuant to *Foster*, because defendant failed to file a timely motion to withdraw his negotiated guilty plea, neither he nor OSAD could raise the MSR issue on direct appeal. Defendant's only recourse was to raise the claim in a postconviction petition, which he did.

¶ 33 The State also argues we should consider these arguments forfeited because defendant could have raised them in a motion to withdraw his guilty plea. The State does not cite any specific authority for the proposition failure to file a motion to withdraw one's guilty plea results in forfeiture for postconviction purposes of any claim defendant could have included in a motion to withdraw his guilty plea. Even if the State could establish this legal proposition, defendant's postconviction petition contained an allegation he received the ineffective assistance of his posttrial counsel.

¶ 34 According to defendant's petition: "Defendant was denied his right to counsel at a critical stage of proceedings where he was entitled to the assistance of counsel in filing a Post-Plea Motion and in Perfecting his appeal; he did not waive the previous appointment of counsel; and the trial court failed to ensure he was represented." Much like the failure to raise an issue on direct appeal can be excused based on an allegation of ineffective assistance of appellate counsel, if the failure to raise an issue in a motion to withdraw a guilty plea results in forfeiture, the forfeiture could be excused by the ineffective assistance of a defendant's posttrial counsel.

¶ 35 According to defendant's affidavit attached to his petition, he intended to file a

motion to withdraw his guilty plea. He told his attorney he wanted to file a motion to withdraw his guilty plea. Defendant further stated in the affidavit his lawyer was not present when he mistakenly filed the motion to reconsider because he did not fully understand which box to check. As we stated earlier, because defendant did not file a motion to withdraw his guilty plea in a timely manner, neither his appellate counsel nor he could raise any issue on direct appeal.

¶ 36 The State's reliance on this court's decision in *People v. Newman*, 365 Ill. App. 3d 285, 848 N.E.2d 262 (2006), is misplaced in this case. In *Newman*, this court noted "*Whitfield* does not stand for the proposition that allegations of improper MSR admonishments are immune from forfeiture in postconviction proceedings." *Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267. While true, the case *sub judice* is factually and procedurally distinguishable from *Newman*.

¶ 37 In *Newman*, this court noted the defendant filed both a motion to withdraw his guilty plea and a direct appeal and could have raised his improper admonishment claim in each but did not. *Newman*, 365 Ill. App. 3d at 289, 848 N.E.2d at 267. As a result, this court found defendant forfeited his claim. Further, the record in *Newman* showed that while his direct appeal was pending, the defendant filed a postconviction petition, alleging he was not advised of his MSR obligation. *Newman*, 365 Ill. App. 3d at 290, 848 N.E.2d at 267.

"Thus, defendant was aware of that particular claim of error prior to (1) the date OSAD moved to withdraw as appellate counsel, on March 4, 2004; (2) when this court granted him leave to file additional points and authorities, of which defendant filed none; and (3) the resolution of his direct appeal." *Newman*, 365 Ill. App.

3d at 290, 848 N.E.2d at 267.

Unlike defendant in this case, the defendant in *Newman* could have raised the issue in his direct appeal.

¶ 38 In this case, defendant did not file a timely motion to withdraw his guilty plea. As previously stated, this resulted in neither OSAD nor defendant having the ability to raise any issue on direct appeal. Further, the record in this case does not reflect defendant knew he had been improperly admonished at the time of his direct appeal, let alone prior to the deadline for a timely motion to withdraw his guilty plea. The record contains no mention of the actual MSR term of "three years to life" and nothing in the record contradicts the trial court's incorrect admonishments at the guilty-plea hearing. Both the original and the amended sentencing orders contain blank spaces where the applicable MSR term was to be filled in. In fact, the *only* mention of MSR in the entire record available to defendant is the court's erroneous admonishment contained in the transcript of his guilty-plea hearing.

¶ 39 Based on the allegations in defendant's petition and the record in this case, this case more closely resembles *Whitfield* than *Newman*. First, as was the case in *Whitfield*, the sentencing order in this case makes no reference to the applicable MSR term. *Whitfield*, 217 Ill. 2d at 180 n.1, 840 N.E.2d at 661 n.1. Granted, the sentencing order contains a statutory citation to the offense of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)), which carried the three-year to life MSR term applicable to defendant. However, to ascertain the applicable MSR term (or whether any MSR term applied at all, for that matter), defendant would have been required to cross-reference the statutory provision in the Criminal Code of 1961 with the relevant provision of the Unified Code setting forth the applicable MSR term (730 ILCS 5/5-8-1(d)(4)

(West 2008)). Were we to hold defendant's mere knowledge of the offense of conviction should have put him on notice of the applicable MSR term, we would essentially nullify the purpose of the Rule 402(a)(2) admonishment requirements as well as the supreme court's holding in *Whitfield*. See *People v. Gerow*, 388 Ill. App. 3d 524, 528, 903 N.E.2d 770, 775 (2009) ("We will not presume a defendant has knowledge of the MSR term before he has been admonished about it."). Moreover, as previously noted, the record available to defendant when he was required to file a postsentencing motion or direct appeal contained nothing to put him on notice the trial court had improperly admonished him as to the applicable MSR term.

¶ 40 Because defendant's postconviction petition stated the gist of a constitutional claim he was deprived of due process of law, the trial court erred by summarily dismissing the petition and denying defendant's motion to reconsider. The trial court should have proceeded to the second stage of postconviction proceedings and appointed counsel for defendant.

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, we reverse the trial court's order dismissing defendant's postconviction petition as frivolous and patently without merit and remand for further proceedings, including the appointment of counsel to represent defendant.

¶ 43 Reversed and remanded.