



## BACKGROUND

¶ 3 After a bench trial, Malek was convicted in 2004 of first degree murder and sentenced to 25 years' imprisonment. But, on direct appeal we ultimately remanded the case for entry of a guilty plea and dismissed the appeal on an agreed motion. *People v. Malek*, No. 1-04-2171 (2009).

¶ 4 On November 6, 2009, Malek pled guilty to aggravated battery of a child in exchange for a prison sentence of 15 years and 7 months. The court asked Malek if he was "prepared to plead guilty to" aggravated battery of a child punishable by 6 to 30 years' imprisonment "followed by a three-year period of parole." Malek agreed that he so intended. No further reference to MSR was made during the hearing or in the mittimus.

¶ 5 In September 2010, Malek filed a *pro se* post-conviction petition seeking reduction of his prison sentence by three years because the trial court had not admonished him regarding MSR. Seeking relief under *People v. Whitfield*, 217 Ill. 2d 177 (2005), he alleged that he had only just learned that he was subject to MSR and would not have pled guilty had he been aware of MSR. Counsel was appointed for defendant, and filed a certification under Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that she consulted with Malek, reviewed the record, and concluded that his petition adequately presented his claims.

¶ 6 The State moved to dismiss the petition, arguing that MSR was mentioned at the guilty plea hearing so that defendant's MSR claim was contradicted by the record. On October 19, 2011, the circuit court granted the motion to dismiss, finding that Malek was admonished regarding MSR before he pled guilty. This appeal followed.

ANALYSIS

¶ 7 On appeal, Malek contends that the trial court's admonishments were insufficient to inform him that his actual negotiated sentence included three years' MSR and, thus, he is entitled to the *Whitfield* remedy of reducing his sentence of imprisonment by the same three years.

¶ 8 In *People v. Morris*, 236 Ill. 2d 345 (2010), our supreme court addressed "what information must be conveyed to ensure that the admonishments given during a plea hearing comply with the requirements of [Supreme Court] Rule 402 and due process post-*Whitfield*." *Morris*, 236 Ill. 2d at 366, citing Ill. S. Ct. R. 402 (eff. July 1, 2012). The *Morris* court held that the purpose of admonishments is to "advise the defendant of the actual terms of the bargain he has made with the State." *Morris*, 236 Ill. 2d at 366. Further:

"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. We recognize that there is no precise formula in admonishing a defendant of his MSR obligation, and we are mindful that '[a]n admonition of the court must be read in a practical and realistic sense. The admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning.' [Citation.] The trial court's MSR admonishments need not be perfect, but they must substantially comply with the requirements of Rule 402 and the precedent of this court. [Citation.] *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 366-67, quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983).

¶ 9 The supreme court also stated:

"Ideally, a trial court's admonishment would explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment. \*\*\* We strongly encourage trial court judges to follow this practice, and to discuss MSR when reviewing the terms of a defendant's plea agreement, to include the MSR term when imposing sentence, and to add the MSR term to the written order of conviction and sentence. This practice, which is not unduly burdensome, would ensure that defendants understand the consequences of their plea agreement and would avoid prolonged litigation on the issue." *Morris*, 236 Ill. 2d at 367-68.

¶ 10 The contrast between the mandatory language of the first paragraph and the precatory or aspirational language of the second is palpable. The *Morris* court reinforced the non-binding nature of the second paragraph by supporting it with several quotes from appellate cases that used advisory language similar to its own. *Morris*, 236 Ill. 2d at 367-68, quoting *People v.*

*Daniels*, 388 Ill. App. 3d 952, 956 (2009); *People v. Berrios*, 387 Ill. App. 3d 1061, 1064 (2009); *People v. Mendez*, 387 Ill. App. 3d 311, 321 (2008); *People v. Marshall*, 381 Ill. App. 3d 724, 736 (2008); *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007). Moreover, while *Whitfield* relief was granted in some of those cases (*Daniels* and *Mendez*), some of the hortatory quotes in *Morris* come from cases where this court found that the MSR admonishments did not violate *Whitfield* (*Berrios*, *Marshall*, and *Jarrett*), thus emphasizing that it is not reversible error when a trial court fails to expressly refer to MSR in the pronouncement of sentence or the mittimus.

¶ 11 We conclude the supreme court in *Morris* instructed the lower courts that it is preferable to expressly include MSR in the pronouncement of sentence and the mittimus but mandatory to give admonishments that convey to defendants that the sentence, which they would be accepting with the negotiated guilty plea, includes a term of MSR following prison. *People v. Hunter*, 2011 IL App (1st) 093023, ¶¶ 14-19; *People v. Davis*, 403 Ill. App. 3d 461, 467 (2010); *People v. Andrews*, 403 Ill. App. 3d 654, 664-66 (2010) (*Morris* does not require express reference to MSR in imposing sentence); see also *People v. Lee*, 2012 IL App (4th) 110403, ¶¶ 4, 22-23 (sufficient to inform defendant of MSR before accepting plea).

¶ 12 Here, the admonishment satisfied that test. The court mentioned MSR while asking Malek if he intended to plead guilty to aggravated battery of a child punishable by 6 to 30 years' imprisonment "followed by a three-year period of parole." When the court then asked Malek if this was his intention, he replied that it was. We find that the trial court informed Malek of his MSR term in language that made it reasonably plain before he entered his plea that his prison sentence would be followed by parole or MSR, rather than merely including MSR as a potential penalty. Cf. *People v. Company*, 376 Ill. App. 3d 846, 850 (2007), where this court found that

the trial court improperly admonished a defendant regarding MSR by describing the prison terms defendant could have received "if you were convicted at trial" and then stating that, "at the conclusion of *that* sentence you \*\*\* would do two years of mandatory supervised release, and on each one I could fine you \$25,000." (Emphasis added.)

¶ 13 Moreover, as the parties agree and the records of the Department of Corrections show, Malek completed his prison sentence. See *People v. McCurry*, 2011 IL App (1st) 093411, ¶ 7 n. 1 (court may take judicial notice of Department's online records). Thus, the *Whitfield* remedy is no longer available and Malek could not be granted effectual relief even if his *Whitfield* claim was meritorious. *People v. McNulty*, 383 Ill. App. 3d 553, 558 (2008), citing *People v. Porm*, 365 Ill. App. 3d 791, 794-95 (2006). In light of clear holdings that "[t]erms of MSR are mandated by statute and courts have no authority to withhold the MSR term when imposing a sentence" (*McCurry*, ¶ 16, citing *Whitfield*, 217 Ill. 2d at 200-01), absent a decision by this court or our supreme court to the contrary, we find unpersuasive Malek's argument that we should consider his MSR term served at the end of his imprisonment as that would effectively withhold his MSR term.

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

¶ 15 Affirmed.