

2014 IL App (2d) 130298-U  
No. 2-13-0298  
Order filed October 8, 2014

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Jo Daviess County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-84
	)	
ROY E. HUBBARD,	)	Honorable
	)	William A. Kelly,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly denied defendant's motion for leave to file a successive postconviction petition asserting a violation of Rule 402(a): the court's failure to admonish defendant of the maximum sentence for the offense to which he pleaded guilty was harmless, as absent the plea agreement defendant would have faced trial only on different charges, and defendant was advised of the maximum sentence for those charge.

¶ 2 Defendant, Roy E. Hubbard, appeals from the denial of his motion, brought under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)), for leave to file a successive petition asserting a violation of Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). He asserts that the motion stated cause for not including the claim in his first petition

in that, until he saw our opinion in *People v. Hubbard*, 2012 IL App (2d) 120060, he did not know that the maximum sentence for aggravated criminal sexual assault (bodily harm) (ACSA) (720 ILCS 5/12-14(a)(2) (West 2004)) as the State had charged it was 60 years' imprisonment, and not life. He further asserts that the motion stated prejudice from the trial court's failure to admonish him properly in that he would not have accepted the plea agreement had he known that the maximum term was 60 years. We hold that, given the specific circumstances of this plea agreement, the knowledge of the range of sentences for the offense as charged could not reasonably have affected his plea decision. Thus, he did not suffer prejudice, so his motion did not state a basis for a successive petition. We therefore affirm the denial.

¶ 3

#### I. BACKGROUND

¶ 4 The conviction at issue here was entered under a plea agreement by which defendant received a sentence of 47½ years' imprisonment. Defendant was initially charged with three counts of predatory criminal sexual assault of a child (PCSAC) (720 ILCS 5/12-14.1(a)(1) (West 2004)). Each of these counts alleged that defendant had a prior conviction of PCSAC. In discussion before the court, the parties agreed that this prior conviction made applicable the recidivist sentencing provision of section 12-14(d)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-14(d)(2) (West 2004) (now 720 ILCS 5/11-1.30(d)(2) (West 2012))), such that the only statutorily authorized sentence for the charges was a life sentence.

¶ 5 The State received leave to amend the indictment to include the count of ACSA of which he was convicted. This count did not refer to the prior conviction. The State told the court that it had concluded that a guilty plea to the new count and a 47½-year sentence would be acceptable. The court asked the State, "Now this is a charge \*\*\* that carries with it a statutory disposition here of life imprisonment but in this case the sentence is going to be 47 and a half years, is that

right?” and the State agreed. The State presented a factual basis for the plea that excluded any mention of defendant’s prior conviction, and the court imposed the agreed sentence.

¶ 6 Defendant later filed a postconviction petition that, by application of the rule in *People v. Whitfield*, 217 Ill. 2d 177 (2005), resulted in the court’s reducing his sentence by three years. That is, because defendant was not admonished that his sentence would include 3 years of mandatory supervised release (MSR), the court reduced his sentence such that the total including MSR was the 47½ years of which he was admonished.

¶ 7 Defendant next filed a “Petition for Relief from Void Judgments” in which he asserted that his sentence was void in that it was neither a proper unenhanced Class X sentence—it was too long for that—nor the life sentence mandated by the recidivist sentencing provision. The court dismissed that petition and defendant filed another petition raising essentially the same issue. The court dismissed that petition as well.

¶ 8 In the consolidated appeal of both petitions’ dismissals, we held that “the sentence had statutory authorization as a discretionary extended-term Class X sentence predicated on the aggravating factor that the victim was less than 13 years old at the time of the offense.” *Hubbard*, 2012 IL App (2d) 120060, ¶ 15. Thus, the applicable extended-term range was 30 to 60 years. 730 ILCS 5/5-5-3.2(b)(1), 5-8-2(a)(2) (West 2004)). We affirmed the dismissals. *Hubbard*, 2012 IL App (2d) 120060, ¶ 27.

¶ 9 Defendant then filed the motion for leave to file a proposed successive postconviction petition, the denial of which is at issue here. He asserted that, until we issued our opinion affirming the two petitions’ dismissals, he had understood that the “maximum penalty which could be imposed upon his guilty plea to [ACSA] \*\*\* was [a] ‘MANDATORY NATURAL LIFE SENTENCE.’ ” He asserted that his lack of knowledge on this point had made his plea

involuntary. In the proposed petition, defendant asserted that, in violation of Illinois Supreme Court Rule 402 (eff. July 1, 2012), the court had denied him due process by failing to advise him of the minimum and maximum sentences (including the possibility of an extended term) that he could receive upon a conviction of the ACSA count. He did not know that ACSA could carry an extended-term maximum of 60 years' imprisonment. "[D]efendant would not have plead[ed] guilty to [ACSA] which [was] accompanied [by] an AGGRAVATING FACTOR if he did not believe that 'LIFE IMPRISONMENT' was the maximum sentence that could be imposed upon the conviction of [ACSA]."

¶ 10 The court denied defendant's motion. Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant asserts that, in asserting that he would not have pleaded guilty had he known that the maximum sentence he could receive on the ACSA count was 60 years, he set out prejudice such that the court should have allowed the successive postconviction petition. He further asserts that, by averring that he did not know the sentencing range for ACSA as charged until we issued the opinion in his appeal, he stated cause for the filing of a successive petition. Defendant argues that we should evaluate the existence of cause and prejudice according to the "gist" standard we applied in *People v. LaPointe*, 365 Ill. App. 3d 914, 923-24 (2006), a case in which we held that, because a prisoner filing a *pro se* motion for leave to file a successive petition cannot be expected to have mastery of the law, such a motion need present only the gist of the basis of allowing a successive petition. Defendant further asserts that his statements of cause and prejudice were also sufficient under the stricter standards that other courts have adopted (*e.g.*, *People v. Morrow*, 2013 IL App (1st) 121316, ¶ 55).

¶ 13 We do not agree that defendant has made a showing of prejudice. Moreover, this is so regardless of whether we consider that question under the relaxed “gist” standard of *LaPointe* or the stricter standard other courts have adopted.

¶ 14 Section 122-1(f) of the Act governs when a defendant may file more than one postconviction petition:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.” 725 ILCS 5/122-1(f) (West 2012).

Where the issues raised by the denial of a motion for leave to file a successive postconviction petition are solely ones of law, review is *de novo*. *People v. Wrice*, 2012 IL 111860, ¶ 50; *cf. People v. Guerrero*, 2012 IL 112020, ¶ 13 (holding that *de novo* review was improper where the court had held an evidentiary hearing).

¶ 15 Under the United States Supreme Court holding in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), a court violates a defendant’s right to due process when it accepts a guilty plea and there is no record of an affirmative showing that the defendant entered the plea voluntarily and with understanding. Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997 ) exists to ensure that

guilty pleas comply with *Boykin*'s mandate. See *People v. Davis*, 145 Ill. 2d 240, 249 (1991).

Rule 402(a)(2) provides:

“(a) \*\*\* The court shall not accept a plea of guilty \*\*\* without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

\*\*\*

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences[.]” Ill. S. Ct. R. 402(a)(2). (eff. July 1, 1997).

However, “[t]he failure to properly admonish a defendant, alone, does not automatically establish grounds for reversing the judgment or vacating the plea.” *Davis*, 145 Ill. 2d at 250. “Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment.” *Davis*, 145 Ill. 2d at 250.

¶ 16 Here, the record shows that—excepting the now-mitigated failure to inform defendant that his sentence would include a term of MSR—the information that defendant received at the plea hearing was the information that he needed to make an intelligent decision about accepting the plea agreement. The in-court statements informed him that accepting the agreement would result in a sentence of 47½ years’ imprisonment, but that, if he went to trial and were convicted, he would face a mandatory life sentence. Because the ACSA charge—and specifically its omission of reference to his prior conviction—was simply a vehicle for the agreed sentence, no real possibility existed that defendant would be tried on that charge. If he rejected the plea agreement, he surely would have been tried only for PCSAC, and he would indeed have faced a

nondiscretionary life sentence. Therefore, the maximum and minimum possible sentences for the ACSA charge were not relevant to an intelligent decision on the plea agreement, and defendant could not have been prejudiced by omission of admonitions on that point.

¶ 17

### III. CONCLUSION

¶ 18 For the reasons stated, we affirm the denial of defendant's motion to file a successive postconviction petition.

¶ 19 Affirmed.