

NOTICE
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2014 IL App (4th) 140183-U
NO. 4-14-0183

FILED
December 19, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DONALD J. WHALEN,)	No. 91CF344
Defendant-Appellant.)	
)	Honorable
)	Elizabeth A. Robb,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in finding defendant was not entitled to relief from judgment on account of sentencing judge not mentioning three-year term of mandatory supervised release.

¶ 2 In November 1991, a jury found defendant, Donald J. Whalen, guilty of first degree murder (Ill. Rev. Stat. 1991, ch. 38, ¶ 9-1). In December 1991, the trial court sentenced defendant to 60 years in prison.

¶ 3 In September 2013, defendant filed a *pro se* petition for relief from judgment. He contended the trial court did not sentence him to any period of mandatory supervised release and to expect him to serve this extra time would deprive him of his constitutional rights. The trial court denied defendant's petition.

¶ 4 This appeal followed.

¶ 5

I. BACKGROUND

¶ 6 On April 6, 1991, William Whalen was murdered. On May 31, 1991, defendant was charged with his murder. On November 19, 1991, after a jury trial, defendant was found guilty of first degree murder. On December 27, 1991, the trial court sentenced defendant to 60 years in prison. No mention was made of parole or mandatory supervised release.

¶ 7 On September 3, 2013, defendant filed a *pro se* petition for relief from judgment. Defendant complained that after he serves the 60-year sentence ordered by the judge, he will be required to serve a three-year term of mandatory supervised release. Defendant alleged because the sentencing judge never ordered him to serve mandatory supervised release, it was not part of his sentence. He requested his sentence be vacated or modified to 54 years.

¶ 8 On January 15, 2014, the State filed a motion to dismiss defendant's petition. In the petition, the State alleged at the time defendant was sentenced, he was entitled to day-for-day good-time credit and the sentencing judge noted he would serve a "minimum" of 30 years in the Department of Corrections. In addition, at the time of defendant's sentencing, the law in Illinois required a mandatory supervised release period of three years (Ill. Rev. Stat. 1991, ch.38, ¶ 1005-8-1(d)(1)). The Department would add this period to his sentence as required by law at the time of defendant's sentencing.

¶ 9 On January 27, 2014, at the hearing on the State's motion to dismiss, defendant argued the Legislature recognized the problem with section 5-8-1(d) of the Unified Code of Corrections (Ill. Rev. Stat. 1991, ch.38, ¶ 1005-8-1(d)) and rewrote the law to require a term of mandatory supervised release be written as part of the sentencing order. He argued he should be entitled to an adjustment to his sentence, reducing it by three years as received by other

defendants due to this error by the trial court. The other defendants cited by defendant all received their sentences via a plea agreement which did not recite a term of mandatory supervised release was included. Defendant's sentence was imposed after a jury trial and guilty verdict.

¶ 10 The trial court found defendant's sentence was legal, not void as he alleged, when imposed in December 1991. The court then denied defendant's petition for relief from judgment. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Because the trial court entered judgment on the pleadings in a section 2-1401 proceeding, review of the court's decision is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 13 Defendant contends the mandatory supervised release statute was invalid back in 1991 pursuant to *Hill v. Wampler*, 298 U.S. 460, 80 L.Ed.2d 1283, 56 S. Ct. 760 (1936), and *Earley v. Murry*, 451 F.3d 71 (2d Cir. 2006), because those cases held a sentence was whatever was imposed by a judge, no more, no less. These cases have never been adopted by any court in Illinois.

¶ 14 When defendant was sentenced, the law provided "Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment." Ill. Rev. Stat. 1991, ch. 38, ¶ 1005-8-1(d). "For those sentenced on or after February 1, 1978, such term shall be identified as a mandatory supervised release term." Ill. Rev. Stat. 1991, ch. 38, ¶ 1005-8-1(d). Subject to earlier termination, the term shall be three years for first degree murder. Ill. Rev. Stat. 1991, ch. 38, ¶ 1005-8-1(d)(1).

¶ 15 The Supreme Court of Illinois has rejected the premise a term of mandatory supervised release was not included as part of an offender's original sentence in *People v. McChriston*, 2014 IL 115310, ¶23, 4 N.E.3d 29. The court found the plain meaning of the phrase in section 1005-8-1(d) and its successor 730 ILCS 5/5-8-1(d) (West 2004), "every sentence shall include as though written therein," resulted in the sentencing order issued by the trial court to include a term of mandatory supervised release even if the court did not mention the term at the sentencing hearing or in the sentencing order. *McChriston*, 2014 IL 115310 , ¶17, 4 N.E. 3d 29. This phrase was not removed until an amendment to the mandatory supervised release statute in 2011. *McChriston*, 2014 IL 115310, ¶¶18-21, 4 N.E.2d 29.

¶ 16 The *McChriston* court specifically distinguished *Wampler* and *Earley* because the trial court had no discretionary power over the mandatory supervised release term as it attached automatically as though written into a defendant's sentence.

¶ 17 Defendant claimed he will be forced to serve more time in "custody" than the maximum "per the sentencing guidelines" since the trial court specifically sentenced him to the "maximum" and adding three years of mandatory supervised release will result in him serving 63 years. However, defendant overlooks the fact an added three years of mandatory supervised release was part of the sentencing guidelines for his offense.

¶ 18 Further, even if defendant were correct the sentencing judge needed to impose a term of mandatory supervised release, it would not result in modifying his sentence. The cases where such modification occurred were those like *People v. Whitfield*, 217 Ill. 2d 177, 202-205, 840 N.E.2d 658, 673-75 (2005), where a fully negotiated plea did not include a term of mandatory supervised release in the bargain. In *Whitfield*, the defendant's sentence was modified

to the total number of years for which he bargained.

¶ 19 In this case, defendant maintained a plea of not guilty and went through a jury trial. There was no bargain as to his total sentence. Further, defendant's conviction became final in 1994. *People v. Whalen*, 158 Ill. 2d 415, 431, 634 N.E.2d 725, 733 (1994). The new rule announced in *Whitfield* applies only prospectively to cases where the conviction was not finalized prior to December 20, 2005. *People v. Morris*, 236 Ill. 2d 345, 366, 925 N.E.2d 1069, 1081 (2010).

¶ 20 The trial court was correct in its judgment to dismiss defendant's petition.

¶ 21 III. CONCLUSION

¶ 22 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. 55 ILCS 5/4-2002 (West 2012).

¶ 23 Affirmed.