2015 IL App (1st) 130356-U

THIRD DIVISION
March 4, 2015

No. 1-13-0356



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 02 CR 22461 |
| | ) | |
| MICHAEL JOHNSON, | ) | Honorable |
| | ) | Neera Lall Walsh, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Defendant failed to make a substantial showing of a constitutional violation where the trial court admonished him of a mandatory supervised release term without explicitly linking it to the term of incarceration agreed upon in plea negotiations.

¶ 2 Defendant Michael Johnson appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends that the trial court's admonishments were insufficient, where they did not explicitly link his mandatory

supervised release (MSR) term to his agreed upon sentence. He also contends that the trial court improperly made findings of fact at the second stage of his postconviction petition. We affirm.

¶ 3 According to the factual basis stipulated to at defendant's guilty plea hearing, on August 3, 2002, defendant argued with Daryl Newell about a debt. Newell threatened him, and he fired multiple shots at Newell, hitting him in the arm. Two off-duty Chicago police officers observed the incident. They followed defendant and pointed their guns at him. When he raised his gun towards one of the officers, the other officer shot him multiple times.

¶ 4 Petitioner was charged by indictment with one count of attempted first-degree murder of a peace officer, two counts of attempted first-degree murder, one count of aggravated battery with a firearm, four counts of aggravated unlawful use of a weapon, two counts of unlawful use of a weapon by a felon, and one count of aggravated assault. Pursuant to a plea deal, defendant agreed to plead guilty to one count of aggravated unlawful use of a weapon.

¶ 5 At the plea hearing on June 19, 2009, the State informed the trial court of the terms of the agreement, stating:

> "The State has made an offer in this matter. The offer is that the defendant would plead on Count Five of this matter, which is an aggravated unlawful use of weapon count under 24 1.6(A). The offer is for 11 years Illinois Department of Corrections, and the defendant is extendible under section 730 ILCS 5/5-5-3.2(B)(9)."

Defendant pleaded guilty to one count of aggravated unlawful use of a weapon. The trial court then informed defendant:

> "[S]ir, you heard what the assistant state's attorney told you, that it's Class Two, and I am telling you, that it is a Class Two felony which ordinarily would be punishable from 3 to

> 7 years in the Illinois Department of Corrections. But as you heard the state's attorney has indicated, they are seeking an extended term. An extended range from 7 to 14 years with a fine of up to twenty-five thousand dollars, mandatory supervised release, which is commonly referred to as parole, for two years, which you would be doing in addition to the time that you serve in the penitentiary. Do you understand that, sir?"

Defendant replied, "Yes." The court then admonished him of the rights he was waiving by pleading guilty. Defendant stated that he understood, and that he was pleading guilty of his own free will. The State read a factual basis to which defendant stipulated. The trial court accepted defendant's plea as knowing and voluntary. The court granted defendant's request for "a little bit of time" to witness the birth of his child, and postponed sentencing defendant for about two months.

¶ 7 At defendant's sentencing hearing, he asked the trial court to further postpone his sentencing and allow him time to financially prepare his family for his incarceration. The court explained that it could not grant him any more time. The State offered nothing in aggravation. In mitigation, defense counsel informed the court that defendant had six children. The following exchange then happened between the trial court and defendant:

> "THE COURT: Okay. Mr. Johnson, I did give you an opportunity to speak before —
>
> THE DEFENDANT: Can I have a week or two weeks? I took the car.
>
> THE COURT: I understand, but I cannot give you any more time at this point, sir. And I am going to sentence as to Count Five to 11 years in the Illinois Department of Corrections. This is an extended Class Two.

THE DEFENDANT: But I have been good.

THE COURT: You are going to be serving two years mandatory supervised release, which I told you about before which is commonly referred to as parole.

THE DEFENDANT: Can I withdraw my plea?

THE COURT: It's going to be 50 percent time.

THE DEFENDANT: Excuse me, your Honor.

THE COURT: You'll get credit for 15 days time considered served. Just a moment sir.

[DEFENSE COUNSEL]: Stop what you're doing."

The trial court then admonished defendant of his rights to appeal, including the necessity of filing a written motion to withdraw his plea within 30 days.

¶ 8 Following the court's explanation of his appeal rights, defendant stated, "Can I say something?" After further discussion by the trial court, it directed him to take a moment to talk with his attorney off the record. Defense counsel then asked the court for a two-week stay. As the court began to grant a one-week stay, defendant stated, "I don't want that. I don't want that. I don't want that," and "I'm not going nowhere. I'm not going." The following exchange then occurred:

"THE DEFENDANT: I'll go.

THE COURT: All right. Mit to issue then. You'll go right now with the sheriffs who are here.

THE DEFENDANT: Can I talk to you before I leave?

THE COURT: We can't really talk any further than what we have. All right?

THE DEFENDANT: 30 days.

[DEFENSE COUNSEL]: I have done the best I could. This is the best disposition I could possibly have gotten for you. I have tried. This is it. This is the end of the line."

¶ 9 In October 2010, defendant filed a postconviction petition under the Act alleging ineffective assistance of counsel and that the trial court failed to sufficiently admonish him that he would be sentenced to a two-year term of MSR in addition to his 11-year imprisonment, and therefore, he did not receive the plea deal he bargained for. Defendant asserted that he had informed counsel, off the record, that he wanted to withdraw his plea, and trial counsel told him that she would withdraw it. He also stated that he believed that the plea deal was for nine years of incarceration and two years of MSR. The trial court appointed counsel for defendant, and postconviction counsel filed a supplemental petition incorporating defendant's original petition.

¶ 10 The State moved to dismiss the petition and the trial court granted the motion. In a written order, the court explained that the record clearly showed that defendant had been properly admonished. In addressing defendant's ineffective assistance of counsel claim, the court found that the record also showed that his statements asking to withdraw his plea were efforts to delay his transfer to prison. Defendant appeals.

¶ 11 Defendant first contends that the trial court erred in dismissing his petition, because it contained a substantial showing that he was denied the benefit of his bargain when the court insufficiently admonished him. He notes that at the plea hearing the trial court included an admonishment of MSR alongside its discussion of potential penalties and that upon hearing the full sentence, he immediately tried to withdraw his plea. He also asserts that he believed the terms of the plea deal to be nine years of incarceration and two years of MSR.

¶ 12 The State responds that the trial court substantially complied with the requirements of Supreme Court Rule 402 (eff. May 20, 1997) for admonishments when a defendant pleads guilty. The State notes that it informed the court and defendant that the terms of the offer included 11 years in the Illinois Department of Corrections, the trial court then referred to the State's comments, and defendant stated he understood the admonishments.

¶ 13 The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2010). A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the second stage of the proceeding, as in this case, the State may either file an answer to the defendant's petition or a motion to dismiss it. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. Before a postconviction petition moves to the third stage, an evidentiary hearing, the trial court must determine if the petition and any attached documents "make a substantial showing of a constitutional violation." *Edwards*, 197 Ill. 2d at 246. In making this determination the court takes all well-pleaded facts in the petition and attached documents as true, unless contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). When a petition is dismissed at the second stage, review is *de novo*. *Id.* at 389.

¶ 14 When a defendant pleads guilty as part of a plea agreement, due process requires that the plea be entered "intelligently and with full knowledge of its consequences." *People v. Whitfield*, 217 Ill. 2d 177, 184 (2005). Illinois Supreme Court Rule 402 (eff. May 20, 1997) governs admonishments required when a defendant pleads guilty. Before accepting a guilty plea, the circuit court must admonish a defendant and determine whether he or she understands the

minimum and maximum sentence prescribed by law. Ill. S. Ct. R. 402 (eff. May 20, 1997). In order to satisfy Rule 402, the court must inform the defendant of any MSR term added to the end of his or her sentence. *Whitfield*, 217 Ill. 2d at 188. A trial court's admonishment need not be perfect, it need only substantially comply with the requirements of Rule 402 and Illinois Supreme Court precedent. *People v. Morris*, 236 Ill. 2d 345, 367 (2010). An admonishment substantially complies with the rule when an ordinary person in the defendant's circumstances would understand it to convey the necessary warning. *Id.* at 366. A court's failure to fully admonish a defendant who pleads guilty under a plea agreement requires either (1) fulfillment of the agreement through modifying his or her sentence, or (2) the withdrawal of his or her plea. *Whitfield*, 217 Ill. 2d at 202.

¶ 15 In *Whitfield*, the defendant pleaded guilty in exchange for a specific sentence, but the State never discussed MSR during negotiations and the trial court never advised the defendant regarding MSR. *Id.* at 180. The supreme court found that "the court's failure to advise the defendant, on the record, concerning the MSR term [is] reversible error and a violation of due process." *Id.* The court reasoned that when a defendant pleads guilty in exchange for a specific sentence, a trial court's failure to admonish that an MSR term will be added to that sentence violates due process. *Id.* at 195.

¶ 16 In *Morris*, the supreme court further explained that the use of the term "MSR" without 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." *Morris*, 236 Ill. 2d at 366. The supreme court advised lower courts that "[i]deally, 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." *Id.* at 367.

¶ 17 Defendant argues that *Whitfield* and *Morris* required the trial court to specifically link the MSR term to his negotiated sentence. This court has addressed similar arguments multiple times, including in *People v. Davis*, 403 Ill. App. 3d 461 (2010). See also *People v. Hunter*, 2011 IL App (1st) 093023. In *Davis*, the defendant agreed to plead guilty to a single count of aggravated battery with a firearm in exchange for a prison term of 16 years. *Davis*, 403 Ill. App. 3d at 462. At the defendant's plea hearing, the trial court admonished him:

> "THE COURT: Sir as to this offense of aggravated battery with a firearm, a Class X felony, as to Count Three, do you understand if you plead guilty to this, I have to sentence you to the penitentiary between 6 and 30 years. You could be fined up to $25,000. You would have to serve at least three years mandatory supervised release, which is like parole. *** Do you understand that?
>
> THE DEFENDANT: Yes, sir." *Id.* at 462-63.

In a postconviction petition, the *Davis* defendant argued that the admonishment failed to specifically link the MSR to his agreed upon term, as required by *Whitfield* and *Morris*. This court held that "under *Whitfield*, a constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty." *Id.* at 466. If, prior to the admonishments, a defendant knows he will be sentenced to incarceration in exchange for his plea, and he is told at a plea hearing that he must serve an MSR term upon being sentenced to incarceration, then "the defendant is placed on notice that his debt to society

for the crime he admits to having committed extends beyond fulfilling his sentence to the penitentiary." *Id.*; see also *Hunter*, 2011 IL App (1st) 093023, ¶ 18.

¶ 18 We find the essential elements of the trial court's admonishment in the present case to be indistinguishable from the admonishment this court found sufficient in *Davis*. Both admonishments state the potential sentencing range, a potential fine and then state a term of MSR which defendant would have to serve in addition to incarceration. The court asked if defendant understood the admonishment and he replied, "yes." Prior to the admonishment, the State announced the terms of agreement on the record, including the 11 years of incarceration. The trial court began its admonishment by referencing the terms reported by the State. Defendant was informed he was to be incarcerated in exchange for his plea and was told at the plea hearing that he would have to serve MSR in addition to the term of incarceration. Therefore, as in *Davis*, we find that the trial court's admonishment substantially complied with Rule 402 and did not violate defendant's right to due process. Consequently, defendant has failed to make a substantial showing of a constitutional violation.

¶ 19 Defendant's reliance on *Morris* is misplaced. Contrary to defendant's contention, *Morris* does not mandate an explicit link between a term of MSR and the agreed upon sentence in a court's admonishment. The supreme court referenced this as an ideal admonishment; however, it also explicitly stated that a court's admonishment need only substantially comply with Rule 402. *Morris*, 236 Ill. 2d at 367. While we acknowledge that the trial court's admonishment was not perfect, it substantially complied with Rule 402.

¶ 20 Defendant asks this court to follow the Second District's opinion in *People v. Burns*, 405 Ill. App. 3d 40 (2d Dist. 2010). We acknowledge that there is currently disagreement among the

districts of the appellate court on the issue of whether a circuit court must explicitly link a MSR term to the defendant's agreed upon prison term under Rule 402 and *Whitfield*. Compare *Davis*, 403 Ill. App. 3d at 466-67; *People v. Hunter*, 2011 IL App (1st) 093023; and *People v. Andrews*, 403 Ill. App. 3d 654 (4th Dist. 2010) with *Burns*, 405 Ill. App. 3d 40 (2d Dist. 2010) and *People v. Smith*, 386 Ill. App. 3d 473 (5th Dist. 2008). This court has previously addressed the disagreement among the districts, and continues to adhere to the reasoning of *Davis*. *Davis*, 403 Ill. App. 3d at 466-67; *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 16.

¶ 21 We briefly note that defendant requests that we modify his sentence, following *Whitfield*. See *Whitfield*, 217 Ill. 2d at 202. Since defendant initiated his appeal, he has been released from incarceration and has begun to serve his MSR term. Because MSR terms are statutorily mandated, this court has no power to strike or modify a prisoner's MSR term. See *Whitfield*, 217 Ill. 2d at 200-01; *People v. Porm*, 365 Ill. App. 3d 791, 794 (2006). Thus, even if this court were to find for defendant, we could not modify his MSR term. *Porm*, 365 Ill. App. 3d at 795.

¶ 22 Defendant next contends that the circuit court improperly dismissed his petition based upon improper findings of fact. He notes that the trial court determined that the record indicated that he wished to withdraw his plea based upon the desire to see his family, rather than his unhappiness with his sentence. The State responds that defendant improperly raises the issue for the first time on appeal and, alternatively, that the circuit court properly considered the petition in light of the record. Our review of the circuit court's consideration of defendant's petition remains *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 23 In viewing the record, the trial court referenced defendant's desire to withdraw his plea only in regards to defendant's ineffective assistance of counsel argument. On appeal, defendant

has abandoned his ineffective assistance of counsel claim, making no argument on the issue. While discussing defendant's admonishment claim, the trial court focused solely on the fact that the record showed it had admonished defendant. Moreover, any factual findings of the defendant's state of mind are irrelevant to his claim of insufficient admonishment. The question of whether an admonishment was sufficient under Rule 402 and due process is an objective one. See *Morris*, 236 Ill. 2d at 366 (" [An] admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning.") Finally, we review the judgment, not the reasoning of the trial court; we may affirm the trial court's judgment "for any appropriate reason regardless of whether the trial court relied on those grounds." *People v. Johnson*, 231 Ill. App. 3d 412, 419 (1992). Even taking all of defendant's assertions to be true, the court's admonishment as to MSR substantially complied with Rule 402.

¶ 24 For the foregoing reasons, we find that defendant has failed to make a substantial showing that a constitutional violation occurred. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.