

No. 1-13-1031

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 9928
)	
DARVELL DELOACH,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* We reverse the circuit court's dismissal of defendant's section 2-1401 petition, and remand the cause to give him the opportunity to withdraw his plea and proceed to trial if he so chooses where his term of mandatory supervised release, which was part of his agreed on sentence, was not authorized by statute.

¶ 2 Defendant Darvell Deloach appeals from an order of the circuit court dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, Deloach contends that we should remand this case to the circuit court with instructions to allow him to withdraw his guilty plea because the

three-years-to-life mandatory supervised release (MSR) term imposed by the Illinois Department of Corrections violates his negotiated plea agreement of a period of three years mandatory supervised release. Alternatively, Deloach contends that his concurrent 28-year sentences for aggravated criminal sexual assault and home invasion are void where the sentences must be imposed consecutively, and thus requests that this case be remanded for an imposition of consecutive sentences totaling 28 years.

¶ 3 We reverse. Deloach did not receive the benefit of his bargain and either the promise must be fulfilled or he should be given the opportunity to withdraw his plea. We cannot change the MSR term to three-years-to-life, although this change would conform the sentence to section 5-8-1(d)(4) of the Unified Code because it would fundamentally alter the parties' agreement. Thus, Deloach must be given the opportunity to withdraw his plea. Regarding his alternative argument, the State correctly concedes that his sentence was void because he was subject to a mandatory consecutive sentences, but received concurrent sentences.

¶ 4 **Background**

¶ 5 In 2007, Deloach entered into a negotiated guilty plea to aggravated criminal sexual assault and home invasion in exchange for two concurrent terms of 28 years' imprisonment. The factual basis for the plea showed Deloach entered an Oak Park residence after noon on April 6, 2007, and found 13-year-old S.S. home alone. Deloach pulled out what S.S. believed to be a gun, stole electronic equipment and money from her, and then sexually assaulted her. When S.S.'s brother and girlfriend returned home, they found Deloach in S.S.'s bedroom in the process of tying up S.S. Deloach showed what appeared to be a gun and fled the house. The police were called and soon arrested Deloach with a toy handgun. Deloach provided police a handwritten statement, admitting that he entered the house with the intent to commit a burglary, and took

electronic equipment and money. He further explained that he tied up S.S. and put a pillow case over her head, but claimed the intercourse was consensual. In sentencing Deloach, the trial court stated:

"I will sentence you then as indicated to 28 years Illinois Department of Corrections, 85 percent served-85 percent of the sentence must be served. You will be credited with 109 days credit, time served. At the time of your release you will be placed on a period of three years mandatory supervised release, which is a form of parole. At the time of your release you will be required to register as a sex offender."

The Illinois Department of Correction's (IDOC) website, however, states Deloach's term of MSR as "3 years to life – to be determined." Deloach subsequently filed a motion to withdraw his guilty plea, which the trial court denied. He did not file a direct appeal.

¶ 6 In 2010, Deloach filed a *pro se* post-conviction petition, which the circuit court dismissed as frivolous and patently without merit. On appeal, Deloach maintained that this court should modify his mittimus to reflect the three-year term of MSR the trial court entered, rather than the MSR term stated on IDOC's website. But, Deloach later conceded that, by statute, the MSR term for aggravated criminal sexual assault "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2006). The supreme court has interpreted that statute as requiring the MSR period to be set at the indeterminate term of three-years-to-life and, therefore, a court could not impose a determinate MSR term. *People v. Rinehart*, 2012 IL 111719, ¶ 30. We accepted Deloach's acknowledgment that *Rinehart* foreclosed his argument, ordered the clerk of the circuit court to correct the mittimus to reflect 140 days of presentence custody credit, and affirmed the judgment of the circuit court in all other respects. *People v. Deloach*, 2012 IL App (1st) 101987-U (unpublished summary order under

Supreme Court Rule 23(c)).

¶ 7 In January 2013, Deloach filed, *pro se*, a section 2-1401 petition, alleging he was denied the benefit of his bargain where he was admonished that he would serve a three-year period of MSR instead of an indeterminate term of three-years-to-life. The circuit court denied the petition.

¶ 8 Analysis

¶ 9 On appeal, Deloach contends that his cause should be remanded to the circuit court with instructions to allow him the opportunity to withdraw his guilty plea because the three-years-to-life MSR term imposed by IDOC violates his plea agreement, and the sentence to which he agreed is void.

¶ 10 We review a dismissal under section 2-1401 *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 11 Deloach committed the offense of aggravated criminal sexual assault in April 2007. At that time, section 5-8-1(d)(4) of the Unified Code of Corrections (Unified Code) stated that the MSR term for aggravated criminal sexual assault ranged "from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2006).

¶ 12 For Deloach, his sentence provided for a three-year MSR term. The trial court specifically stated at sentencing that "I will sentence you then as indicated to 28 years ***. At the time of your release you will be placed on a period of three years mandatory supervised release, which is a form of parole." But, as Deloach correctly states in his brief, a three-year term of MSR was not an available option because when section 5-8-1(d)(4) of the Unified Code mandated that he be sentenced to an indeterminate term of three-years-to-life. *Rinehart*, 2012 IL 111719, ¶ 30.

¶ 13 Courts do not have authority to impose a sentence that does not conform to statutory guidelines (*People v. Whitfield*, 228 Ill. 2d 502, 511 (2007)), and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates (*People v. White*, 2011 IL 109616, ¶ 20). Even where the State and the Deloach agree to reduce the statutorily required MSR term, the circuit court lacks the authority to act in accordance with their agreement. *People v. Andrews*, 403 Ill. App. 3d 654, 664 (2010). "A sentence, or portion thereof, that is not authorized by statute is void." *People v. Donelson*, 2013 IL 113603, ¶ 15.

¶ 14 The MSR portion of Deloach's sentence, being less than mandated by section 5-8-1(d)(4) of the Unified Code was unauthorized and void. Because the three-year term of MSR agreed on at sentencing cannot be enforced where the relevant statute dictates that Deloach must serve an MSR term of three-years-to-life, he was denied the benefit of his bargain. The supreme court has explained that where a defendant does not receive the benefit of his or her bargain, two remedies are available, *i.e.*, either the promise must be fulfilled, or the defendant should be given the opportunity to withdraw the plea. *People v. Whitfield*, 217 Ill. 2d 195, 202 (2005). Here, a court cannot fix the problem by changing the MSR term to three-years-to-life. Although this change would conform the sentence to section 5-8-1(d)(4) of the Unified Code, it would fundamentally alter the parties' agreement. Therefore, the remedy appropriate in this situation is to give Deloach the opportunity to withdraw his plea.

¶ 15 The Third District came to a similar conclusion in *People v. Strom*, 2012 IL App (3rd) 100198. In *Strom*, the defendant entered into a negotiated, but void, plea agreement that included a two-year MSR term for the offense of criminal sexual assault, which was contrary to the indeterminate term of three-years-to-life required by section 5-8-1(d)(4) of the Unified Code. *Id.*, ¶¶ 3, 5. Thereafter, IDOC required the defendant to serve at least three years of MSR and up to

natural life. *Id.*, ¶ 5. The defendant appealed, arguing that his case must be remanded to the trial court for imposition of an MSR term of three years. The State responded that the appellate court should order the trial court to impose an indeterminate MSR term of three-years-to-life, and thereby allow IDOC to administer the defendant's MSR. *Id.*, ¶ 7. The Third District refused to modify the agreed, but unauthorized, sentence to give the defendant the benefit of his bargain. *Id.*, ¶ 10. Instead, the reviewing court remanded the matter to the trial court to give the defendant an opportunity to withdraw his plea. *Id.*, ¶ 11.

¶ 16 The State attempts to distinguish *Strom* by arguing that, in *Strom* the two-year MSR term imposed was contrary to what the law authorized while here the three-year MSR term fell within the range permitted by statute, and thus, the sentence is not void. But, a determinate three-year MSR term was authorized by law. As *Rinehart* specifically held, the legislature changed the MSR term for aggravated criminal sexual assault from a determinate three-year term to an indeterminate term of three-years-to-life. *Rinehart*, 2012 IL 111719, ¶¶ 29-30. In doing so, the legislature "created a comprehensive scheme regarding MSR for certain sex offenses, which marked a philosophical and procedural change in how parole operates for defendants convicted of such offenses." *Id.*, ¶ 29. The State does not cite any authority to support its contention that due process is satisfied if a defendant enters a negotiated guilty plea in exchange for a particular sentence and is advised that he or she would be subject to specific term of MSR, but then receives an open-ended term of MSR that could potentially last for defendant's entire life. We thus follow our supreme court in *Rinehart* and conclude Deloach's determinate three-year MSR term was improperly imposed.

¶ 17 The State also attempts to distinguish *Strom* by arguing that Deloach cannot demonstrate that the three years of MSR imposed by the trial court was a specific part of his agreed-on

sentence where the sentencing colloquy explains that the agreement between the parties was only as to the 28 years' imprisonment Deloach would serve. In support, the State stresses that the court "reiterated the agreed or 'indicated' sentences merely as '28 years in the Illinois Department of Corrections,' and not '28 years in the Illinois Department of Corrections followed by three years of mandatory supervised release,' or something similar which would indicate that the court's belief that three years MSR was an agreed-upon component of the sentence." But, as Deloach points out in his reply brief, no authority supports the State's contention that the three-year MSR term had to be negotiated for his due process rights to be violated.

¶ 18 In fact, the defendant in *Whitfield* entered into a negotiated plea whereby he plead guilty to the charged offense in exchange for a sentence of 25 years' imprisonment, and neither the prosecutor nor the court advised him that he would be subject to three years of MSR following the completion of his sentence. *Whitfield*, 217 Ill. 2d 180. On later learning that he would be subject to the MSR term, the defendant argued that his due process rights were violated because the MSR term, of which he had not been advised, was added to his negotiated sentence, resulting in a more onerous sentence than the one to which he pleaded guilty. *Id.* The supreme court agreed that adding the statutorily required three-year MSR term to the defendant's negotiated sentence amounted to a unilateral modification and breach of the plea agreement with the State, inconsistent with constitutional concerns of fundamental fairness. *Id.* 190, 195. *Whitfield* is, thus, like this case—Deloach was advised that he would serve a three-year term of MSR when he pleaded guilty, but an additional term of "to life," of which defendant knew nothing, was added to his negotiated sentence, resulting in a more onerous sentence than the one to which he agreed when he plead guilty. Similar to *Whitfield*, the addition of the statutorily required "to life" MSR term to defendant's negotiated sentence amounted to a unilateral modification and breach of the

plea agreement with the State, and regardless of whether defendant explicitly negotiated a three-year term of MSR as part of his agreement in exchange for pleading guilty, nevertheless he will not receive the full benefit of his plea bargain.

¶ 19 After arguing that Deloach cannot demonstrate that the three years of MSR imposed by the trial court was a specific part of his agreed-on sentence, the State makes the circular argument that defendant's claim "must fail because reviewing courts in this State have firmly declared that specific terms of MSR cannot be 'negotiated.'" In support, the State cites to *Andrews*, 403 Ill. App. 3d 664, where the Fourth District of this court emphasized that even if the parties agreed to reduce or waive the statutorily required MSR term, the trial court lacks the authority to act in accordance with the agreement. As stated, however, this case does not turn on whether the three-year MSR term was specifically negotiated by the parties, but, instead on the fact that an additional term of "to life," about which defendant was not advised, was added to his negotiated sentence, resulting in a more onerous sentence than the one to which he agreed when he plead guilty. Furthermore, *Andrews* is factually distinguishable. There, the Fourth District rejected the defendant's argument that the sentence he bargained for was one in which the MSR term was included within the agreed-on sentence of six years, instead finding that the circuit court had accurately admonished him of the one-year term of MSR when informing him of the potential penalties he faced. *Id.* at 663, 666.

¶ 20 As in *Strom*, we find the only proper remedy to be remand, and the defendant be given the opportunity to withdraw his guilty plea and proceed to trial if he chooses to do so. *Strom*, 2012 IL App (3d) 100198, ¶ 11, citing *White*, 2011 IL 109616.

¶ 21 In an alternative argument raised for the first time on appeal, Deloach contends, and the State correctly concedes, that his sentence was void because he was subject to a mandatory

consecutive sentence, but received concurrent sentences.

¶ 22 Section 5-8-4(a)(ii) of the Unified Code directs consecutive sentences when multiple sentences of imprisonment are imposed at the same time, and Deloach was convicted of a specified triggering offense, including aggravated criminal sexual assault. 730 ILCS 5/5-8-4(a)(ii) (West 2006). When the sentencing statutes require consecutive sentences, but the trial court imposes concurrent sentences, the sentences are void. *People v. Bishop*, 218 Ill. 2d 232, 254 (2006). If the plea agreement can be fashioned to give the parties the benefit of the bargain agreed to, the entire plea agreement is not void, and the remedy is to remand the matter so that the sentences can be revised to meet the terms and conditions of the bargain made. *Donelson*, 2013 IL 113603, ¶¶ 1, 28-29.

¶ 23 The sentencing range for aggravated criminal sexual assault and home invasion is 6 to 30 years (720 ILCS 5/12-11(c), 14(d)(1) (West 2006)), and the specific sentences can be adjusted so that Deloach can be sentenced to an aggregate term of 28 years in prison, the negotiated agreement. If Deloach declines to withdraw his guilty plea on remand, he must be resentenced to consecutive terms consistent with the agreement reached during his plea.

¶ 24 Reversed and remanded.