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2015 IL App (3d) 130370-U

Order filed April 13, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0370
	)	Circuit No. 94-CF-62
ROBERT BROWN,	)	Honorable
Defendant-Appellant.	)	Stephen A. Kouri, Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The mandatory supervised release term was imposed by the trial court by operation of law and did not violate the separation of powers clause of the Illinois Constitution or defendant's right to due process.

¶ 2 Defendant, Robert Brown, appeals from the dismissal of his petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant argues that the three-year mandatory supervised release (MSR) period added to his sentence by the Illinois Department of Corrections (DOC) is void because it was not imposed by the trial court. We affirm.

¶ 3

## FACTS

¶ 4

Following a jury trial, defendant was convicted of armed robbery (720 ILCS 5/18-2(a) (West 1994)). On June 9, 1994, the trial court sentenced defendant to 25 years' imprisonment. In pronouncing the sentence, the trial court did not mention an MSR term. The sentencing order made no reference to a period of MSR. On direct appeal, we affirmed defendant's conviction and sentence. *People v. Brown*, No. 3-94-0419 (1996) (unpublished order under Supreme Court Rule 23).

¶ 5

On August 21, 2012, defendant filed a petition for relief from judgment. In the petition, defendant argued that his sentence was unconstitutional and void because the DOC imposed a three-year MSR term without an order of the court. The trial court denied defendant's petition. Defendant appeals.

¶ 6

## ANALYSIS

¶ 7

### I. Timeliness

¶ 8

Defendant argues that the trial court erred when it dismissed his section 2-1401 petition. The State notes that defendant's petition was untimely, but acknowledges that defendant may challenge a void order in a late petition. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009).

¶ 9

Section 2-1401 establishes a statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2012). A petition for relief from judgment, filed pursuant to section 2-1401 of the Code of Civil Procedure, must be filed not later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2012). A person may seek relief beyond the limitations period where the judgment being challenged is void. *People v. Gosier*, 205 Ill. 2d 198, 206 (2001).

¶ 10 Here, defendant filed his petition more than two years after the entry of the judgment. However, defendant's petition alleged that his sentence was void. Therefore, defendant's petition is not subject to dismissal on timeliness grounds.

¶ 11 II. Separation of Powers

¶ 12 Defendant argues that the MSR term was imposed by the DOC or legislature, and therefore, violated the separation of powers clause of the Illinois Constitution. Ill. Const. 1970, art. II, § 1; see also *People v. Phillips*, 66 Ill. 2d 412, 415 (1977). The State argues that the trial court correctly dismissed defendant's petition.

¶ 13 At the time defendant was sentenced, section 5-8-1(d) of the Unified Code of Corrections stated "[e]xcept 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." 730 ILCS 5/5-8-1(d) (West 1994). Section 5-8-1(d) identified the additional term as MSR. *Id.*

¶ 14 Here, defendant was convicted of armed robbery, a Class X felony, and was subject to a three-year MSR term. 720 ILCS 5/18-2(b) (West 1994); 730 ILCS 5/5-8-1(d)(1) (West 1994). However, the trial court did not include the MSR term in its sentence pronouncement or sentencing order. Defendant alleged that the DOC unlawfully imposed the MSR term without an order of the court.

¶ 15 In *People v. McChriston*, 2014 IL 115310, *cert. denied*, *McChriston v. Illinois*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 59 (2014), our supreme court held that section 5-8-1(d) imposed a term of MSR even if the trial court did not mention the MSR term during the sentencing hearing or in the sentencing order. *Id.* ¶ 17. The supreme court found that the plain language of section 5-8-1(d) automatically imposed the MSR term as part of a defendant's sentence, and therefore, the MSR term was not imposed by the DOC. *Id.* ¶ 23. Accordingly, we conclude that the instant

defendant's MSR term was not imposed by the DOC, but was ordered by the trial court as though it was written in the sentencing order.

¶ 16 Defendant also argues that the imposition of the MSR term by operation of law violates the separation of powers clause of the Illinois Constitution. Ill. Const. 1970, art. II, § 1.

¶ 17 The legislature has the power to define criminal conduct and determine the nature and extent of criminal sentences. *People v. Lee*, 167 Ill. 2d 140, 144-45 (1995). The legislature also has the power to enact mandatory sentences. See *People v. Taylor*, 102 Ill. 2d 201, 208 (1984) (statute requiring mandatory life sentence did not violate the separation of powers clause); *People v. Dunigan*, 165 Ill. 2d 235, 250 (1995) (prosecutor's ability to invoke the Habitual Criminal Act and subject defendant to mandatory life sentencing did not violate the separation of powers clause). The United States Supreme Court has recognized that the legislature has the power to define criminal punishments without giving the courts any sentencing discretion. *Chapman v. United States*, 500 U.S. 453, 467 (1991).

¶ 18 In the instant case, the legislature did not impose defendant's MSR term, but limited the trial court's sentencing discretion. Section 5-8-1(d) divested the trial court of discretion on whether to impose an MSR term and mandated that all sentences include such a term. Although the trial court did not expressly order defendant's MSR term, it was imposed by the court by operation of law.

¶ 19 III. Due Process

¶ 20 Defendant argues that the administrative imposition of the MSR term violates his right to due process. See *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936); *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), *cert. denied*, *Burhlre v. Earley*, 551 U.S. 1159 (2007).

¶ 21 In *Wampler*, the defendant was convicted of attempting to evade payment of income tax

and was sentenced to pay a fine and serve 18 months' imprisonment. *Wampler*, 298 U.S. at 461-62. When issuing the commitment, the clerk of the court added a provision that defendant would remain incarcerated until his fines were paid. On review, the United States Supreme Court noted that it is within the judge's discretion to direct that a defendant be imprisoned until the fine is paid, but that imprisonment does not automatically follow a default of payment. *Id.* at 463-464. The Court held that the "choice of pains and penalties" is part of the judicial function, and the commitment for nonpayment of fines inserted by the clerk was void. *Id.* at 464.

¶ 22 In *Earley*, the Second Circuit Court of Appeals applied *Wampler* to reverse the defendant's five-year postrelease supervision that was added by the New York Department of Correctional Services during defendant's incarceration. *Earley*, 451 F.3d 71. The court stated that *Wampler* articulated a broad holding that "[t]he judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment." *Id.* at 75. The court concluded that under *Wampler*, "[a]ny alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect." *Id.*

¶ 23 In *McChriston*, our supreme court reviewed the *Wampler* and *Earley* decisions in the context of an MSR term imposed without a specific order of the trial court. *McChriston*, 2014 IL 115310, ¶ 31. The supreme court noted that, in contrast to *Wampler*, the trial court did not have discretion to impose an MSR term, and the enforcement of the MSR term was not a later increase in defendant's sentence because it attached automatically at the time the sentencing order was entered. *Id.* ¶ 31. In light of *McChriston*, we conclude that defendant's MSR term did not violate his right to due process as the term was imposed by the trial court as part of defendant's sentence. Therefore, the trial court did not err in dismissing defendant's petition for relief from judgment.

¶ 24

CONCLUSION

¶ 25

The judgment of the circuit court of Peoria County is affirmed.

¶ 26

Affirmed.