2015 IL App (5th) 120309-U

NO. 5-12-0309

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 09-CF-127
	)	
CODY COOPER,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The order dismissing the defendant's postconviction petition is reversed, and this cause is remanded with directions that the circuit court vacate the judgment of conviction and allow the defendant to plead anew, where an important part of the defendant's agreed-upon sentence, the term of MSR, was not authorized by statute and is therefore void.

¶ 2 Pursuant to a fully negotiated plea agreement with the State, the defendant, Cody Cooper, pleaded guilty to predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and was sentenced to a seven-year term of imprisonment and a three-year term of mandatory supervised release (MSR). Through a petition for postconviction relief, the defendant sought to "withdraw his plea of guilty" due to the

circuit court's allegedly improper admonishment concerning his MSR term. According to the defendant, he was admonished that he would serve an MSR term of three years, but he actually was subject to an MSR term of three years to natural life. The circuit court granted the State's motion to dismiss the postconviction petition. From this dismissal, the defendant now appeals. For the reasons stated below, this court reverses the order dismissing the postconviction petition and remands this cause with directions that the circuit court vacate the judgment of conviction and allow the defendant to plead anew.

¶ 3 BACKGROUND

¶ 4 On March 19, 2009, the defendant was charged by information with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). On April 27, 2009, the defendant, defense counsel, and an assistant State's Attorney appeared in court. Defense counsel stated that he and the State had "a negotiated disposition to present to the court." Counsel specified that in exchange for the defendant's pleading guilty to the charge, the State would recommend a seven-year term of imprisonment, with credit for 68 days of presentencing incarceration. "It's also agreed," counsel continued, "that he will do three years of parole after finishing this sentence." The parties also agreed that the defendant was to have no contact with the victim, that he was to submit to DNA testing if he had not already done so, that two mandatory fines would be imposed, and that an unrelated felony in another Williamson County case, No. 09-CF-80, would be dismissed as part of the plea agreement.

¶ 5 In response to the court's questions, the defendant stated that he was 21 years old, indicated that he could read and write, acknowledged signing a written plea of guilty,

which was presented to the court, and concurred in the attorneys' recitation of the plea agreement. The defendant indicated that he understood the presumption of innocence, his right to a trial, his rights at trial, and the consequences of pleading guilty. He also indicated that he was freely pleading guilty pursuant to his agreement with the State, without any threats or promises outside the stated terms of the plea agreement. The court admonished the defendant that the offense to which he was pleading guilty was a Class X felony for which probation was not a possible sentence, and the defendant indicated his understanding. In regard to the terms of imprisonment and MSR, the following colloquy occurred:

"COURT: And the penalties include required Department of Corrections commitment from six years as a minimum to thirty years at a maximum, a three-year parole period, now known as mandatory supervised release. Do you understand those various ranges?

DEFENDANT: Yes, sir.

COURT: Okay. Actually, technically the law's been modified, some of these charges, and I think that may be one of them, where the parole period is actually up to life, but the State's recommending seven years with three years parole. Is that correct?

[ASSISTANT STATE'S ATTORNEY]: That's correct, Your Honor.

COURT: Okay. Do you understand those various ranges?

DEFENDANT: Yes, sir.

COURT: Do you still want to plead guilty in exchange for this agreement?

DEFENDANT: Yes, sir."

¶ 6 The court read the charge to the defendant. The defendant indicated his understanding of the charge and pleaded guilty to it. The State provided a factual basis for the guilty plea, stating that in December 2006, the defendant, who was 18 years old at the time, placed his penis into the vagina of K.R., who was 12 years old at the time.

¶ 7 The court accepted the defendant's guilty plea as knowing and voluntary, and adopted or ratified the parties' agreement. "The defendant's hereby sentenced to the Illinois Department of Corrections for a prison term of seven years with a three-year parole period, now known as mandatory supervised release," the court stated. The court also imposed the other portions of the agreed-upon sentence, including submission to DNA testing and payment of the $200 fee therefor, and dismissed the charge in No. 09-CF-80. Subsequently, the court entered a written judgment reflecting the sentence of imprisonment for seven years and MSR for three years.

¶ 8 The defendant did not file a motion to withdraw his guilty plea or otherwise attempt to perfect an appeal from the judgment of conviction.

¶ 9 On February 17, 2011, the defendant filed *pro se* a petition for postconviction relief. He stated that the mittimus in his case reflected an MSR term of three years to life even though the written judgment specified an MSR term of only three years. The court appointed postconviction counsel for the defendant.

¶ 10 On February 28, 2012, the defendant, by appointed counsel, filed an amended postconviction petition. The defendant noted that during the hearing on April 27, 2009, the circuit court advised him that his sentence included an MSR term of three years, and

failed to advise him that the MSR term was actually three years to natural life. On that basis, the defendant sought to withdraw his plea of guilty.

¶ 11 On May 11, 2012, the State filed a motion to dismiss the amended postconviction petition, and a memorandum in support of the motion. On June 20, 2012, the circuit court entered an order granting the State's motion and dismissing the amended postconviction petition. It is from this dismissal order that the defendant now appeals.

¶ 12 ANALYSIS

¶ 13 This appeal is from an order dismissing a petition for postconviction relief at the second stage of postconviction proceedings. Appellate review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a method by which a criminal defendant may assert that he suffered a "substantial denial" of a federal or state constitutional right in the proceedings that resulted in his conviction or sentence. 725 ILCS 5/122-1(a)(1) (West 2012). A defendant initiates the postconviction process by filing in the circuit court a petition setting forth his constitutional claim(s). 725 ILCS 5/122-1(b) (West 2012).

¶ 15 The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage of the process, the circuit court has 90 days to review the petition. If the court finds the petition frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition within the 90-day period, it must docket the petition for further consideration (725 ILCS 5/122-2.1(b) (West

2012)), and the second stage of the postconviction process begins. At the second stage, the court may appoint counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2012). Counsel may amend the defendant's postconviction petition as necessary. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The State has the opportunity to answer the petition or to file a motion to dismiss it. 725 ILCS 5/122-5 (West 2012). If the State moves to dismiss, the circuit court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). At a dismissal hearing, all well-pleaded facts, except those positively rebutted by the trial record, are to be taken as true, and the court cannot engage in fact-finding. *Id.* The defendant has the burden of making a "substantial showing" of a constitutional violation, whether through the record or through accompanying affidavits. *Id.* at 381. The court may dismiss the petition at this second stage "only when the petition's allegations of fact–liberally construed in favor of the petitioner and in light of the original trial record–fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Id.* at 382. If the defendant makes a substantial showing, and the petition is not dismissed, the postconviction process advances to the third and final stage, an evidentiary hearing at which the court engages in fact-finding and credibility determinations. 725 ILCS 5/122-6 (West 2012); *Coleman*, 183 Ill. 2d at 385.

¶ 16 Here, the defendant's petition was dismissed at the second stage of proceedings under the Act. The defendant's primary argument is that the dismissal was erroneous because he had made a substantial showing of a violation of his constitutional right to the due process of law when he received, by operation of law, a sentence that was harsher

than the one the court admonished him he would receive. Specifically, he states that he has received a sentence that includes MSR for the statutorily mandated term of three years to natural life despite being admonished that he would receive MSR for a determinate term of three years. For this alleged due-process violation, the defendant seeks vacation of his sentence and guilty plea, and a remand to the circuit court so that he may plead anew.

¶ 17 Secondarily, the defendant argues that the circuit court erred in ordering him to submit a DNA specimen and to pay a $200 DNA analysis fee (see 730 ILCS 5/5-4-3 (West 2008)) where his DNA profile was already in the Illinois State Police's DNA database. Due to this court's disposition of the first issue, this second issue need not be addressed. This court merely notes that if a defendant's DNA profile is already in the database, a court may not order him to submit a second specimen or to pay a second analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011).

¶ 18 In regard to the defendant's first issue, the State agrees that the defendant was admonished that his MSR term would be three years, but the State insists that the circuit court was correct in its admonishment and that a determinate MSR term of three years was statutorily appropriate for the defendant. The State asks this court to affirm the order dismissing the postconviction petition.

¶ 19 The State is plainly incorrect in stating that a determinate MSR term of three years is applicable to the defendant. The defendant committed the instant offense of predatory criminal sexual assault of a child in December 2006, according to the factual basis for the plea. At the time of commission, predatory criminal sexual assault of a child was in

violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2006) (now codified at 720 ILCS 5/11-1.40(a)(1) (West 2012))). The offense was a Class X felony (720 ILCS 5/12-14.1(b)(1) (West 2006)) punishable by imprisonment for a term of not less than 6 years and not more than 30 years (730 ILCS 5/5-8-1(a)(3) (West 2006)). Also at the time of commission, section 5-8-1(d)(4) of the Unified Code of Corrections stated that the MSR term for predatory criminal sexual assault of a child 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). This version of section 5-8-1(d)(4) was effective from January 1, 2006, to May 31, 2009. In years past, the MSR term for predatory criminal sexual assault of a child (and for all other Class X felonies) was indeed a determinate term of three years. See 730 ILCS 5/5-8-1(d)(1) (West 2004). However, Public Act 94-165 (eff. July 11, 2005) changed the MSR term for predatory criminal sexual assault of a child from a determinate three-year term to an indeterminate term of three years to natural life. See *People v. Rinehart*, 2012 IL 111719. Contrary to the State's assertion, the MSR term applicable to the defendant was an indeterminate term of three years to natural life, not a determinate term of three years. Section 5-8-1(d)(4) mandated the imposition of an indeterminate MSR term of three years to natural life; it did not permit MSR for a determinate term of three years, or any other number of years. *Rinehart*, 2012 IL 111719, ¶ 30.

¶ 20 For the defendant's crime, a sentence of probation was not a possibility. See 730 ILCS 5/5-5-3(c)(2) (West 2006) (the court shall sentence a Class X offender to imprisonment, and shall not sentence him to probation). The parties agreed to

imprisonment for a seven-year term. They were free to negotiate a 7-year prison term because the statutory range of imprisonment for a Class X offense was 6 to 30 years. See 730 ILCS 5/5-8-1(a)(3) (West 2006). Section 5-8-1(d) of the Unified Code of Corrections required that a term of MSR be included in any sentence that included imprisonment for a term of years. 730 ILCS 5/5-8-1(d) (West 2006). Unfortunately, the parties imagined that they were free to negotiate a determinate three-year term of MSR, and the circuit court apparently agreed. The parties and the court were incorrect on this point. As explained above, any term of imprisonment for predatory criminal sexual assault of a child had to be followed by MSR for an indeterminate term of three years to natural life. A determinate MSR term, whether for three years or any other number of years, was not a possibility. See 730 ILCS 5/5-8-1(d)(4) (West 2006); *Rinehart*, 2012 IL 111719, ¶ 30.

¶ 21 It is the legislature that has the power to prescribe penalties for defined offenses, and that power necessarily includes the authority to prescribe mandatory sentences. *People v. Huddleston*, 212 Ill. 2d 107, 129 (2004). A court does not have the authority to impose a sentence that does not conform to statutory guidelines (*People v. Whitfield*, 228 Ill. 2d 502, 511 (2007); *People v. Wade*, 116 Ill. 2d 1, 6 (1987)) and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates (*Wade*, 116 Ill. 2d at 7). Even where the State and the defendant 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). Where the court exceeds its sentencing authority, the defendant's sentence must be deemed illegal

and void. "A sentence, or portion thereof, that is not authorized by statute is void." *People v. Donelson*, 2013 IL 113603, ¶ 15. The MSR portion of the defendant's sentence was clearly unauthorized, illegal, and void.

¶ 22 If the void portion of the defendant's sentence concerned a relatively minor issue or an inessential part of the parties' agreement, and the sentence could be made to conform to statutory requirements through a comparatively small modification thereof, a court could effect that modification and thus preserve the essential parts of the parties' agreement. See, *e.g.*, *People v. Montiel*, 365 Ill. App. 3d 601, 606-07 (2006) (where agreed-upon sentence did not fully comply with statutes, but could be brought into compliance through a relatively small modification, the plea agreement as a whole will not be void, the modification will be made, and the agreement's essential terms will be enforced). Indeed, if a sentence can be modified in such a way as to comply with the statutory requirements and as to effectuate the parties' intent, giving the parties the benefit of their bargain, a court *should* reform the parties' agreement and modify the sentence. *Donelson*, 2013 IL 113603, ¶ 17.

¶ 23 Here, though, the void portion of the sentence–*i.e.*, the determinate three-year term of MSR–does not concern a relatively minor issue or an inessential part of the parties' agreement. The three-year term of MSR was a very significant part of the agreement. The difference between a determinate MSR term of three years and an indeterminate MSR term of three years to natural life is great. Given that the defendant was 21 years old at the time of the guilty plea in April 2009, an MSR term of 3 years to life could potentially mean that the defendant would be on MSR for decades. A court cannot fix

the problem with the defendant's sentence by simply changing the MSR term to three years to life. Such a change would certainly bring the sentence into line with section 5-8-1(d)(4), but it would be a major change, not a minor change, and would fundamentally alter the parties' agreement. The agreement and the sentencing order must be deemed void in their entireties.

¶ 24 Courts have a duty to vacate void orders. Indeed, courts may *sua sponte* declare an order void and vacate it. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Accordingly, the sentence herein, even though agreed to by the parties and adopted by the circuit court, must be vacated, along with the entire judgment of conviction of which it is a part. A sentence that is less than the law demands cannot stand. The order dismissing the defendant's postconviction petition is reversed. There is no need for an evidentiary hearing to ascertain the terms of the parties' plea agreement; those terms are a matter of record. This cause is remanded to the circuit court with directions that the court vacate the judgment of conviction and allow the defendant to plead anew.

¶ 25 Reversed and remanded with directions.