THIRD DIVISION
December 7, 2016

No. 1-14-3729

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. 02 CR 10498
	)	
FUNTELL DRINKER,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: Judgment dismissing defendant's postconviction petition at the second stage for the failure to make a substantial showing of a constitutional violation affirmed where the trial court sufficiently admonished the defendant that his negotiated plea deal included three years of mandatory supervised release and defendant was not deprived of the benefit of his negotiated plea bargain.

¶ 2 Defendant Funtell Drinker, who pled guilty to first-degree murder and was sentenced to 23 years' imprisonment, appeals from the circuit court's order granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/22-1 *et seq.* (West 2014)). On appeal, defendant contends that he made a substantial showing that his due

process rights were violated. Defendant argues that the trial court deprived him of the benefit of his negotiated plea bargain by failing to advise him that the actual terms of the agreement included three years of mandatory supervised release (MSR). As a remedy, defendant maintains that this court should reduce his sentence by three years so as to approximate the sentencing agreement. For the following reasons, we affirm.

¶ 3 Defendant, along with two codefendants, was charged with multiple counts of first-degree murder and attempted armed robbery for the shooting death of Sean Fleming. On March 21, 2007, the parties indicated that they reached an agreement for a negotiated plea for defendant, which the trial court confirmed by stating:

> "Mr. Drinker, we're going to go through this again. Your attorney and the State's Attorney have told me that you wish to enter a plea of guilty to Count Number 1, which is first degree murder. And that based upon that plea, they will recommend to me that you be sentenced to 23 years in the Illinois Department of Corrections. Do you understand that?"

¶ 4 Defendant responded that he understood. The trial court explained the charge and asked defendant whether he understood. Defendant responded in the affirmative and pled guilty to Count 1. After the trial court explained defendant's right to a trial, he waived that right verbally and in writing. Prior to accepting defendant's plea, the following exchange occurred, in relevant part:

> "THE COURT: Sir, this offense of Class 1 [*sic*] first degree murder carries the sentence of a minimum of 20 years to a maximum of 60 years with an extended term of 100 years. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: There's also a potential fine of 25 thousand dollars. There's also — this offense also carries with it a mandatory supervised release period of three years. You understand what the sentences — what the range of sentences is for this offense of first degree murder?

THE DEFENDANT: Yes, sir."

¶ 5 After the parties stipulated to the factual basis, the trial court accepted defendant's guilty plea and the State *nolle-prossed* the remaining counts. Defendant waived his right to a presentence investigation report and the trial court continued the case for sentencing and entry of judgment.

¶ 6 At sentencing, the trial court entered judgment on the guilty finding as to Count 1 and sentenced defendant to the agreed upon 23-year term with 1,788 days of credit for time considered served. The trial court did not mention MSR in imposing sentence or in the sentencing order. Defendant did not file a motion to withdraw his plea or file a direct appeal.

¶ 7 Defendant subsequently filed a *pro se* postconviction petition arguing *inter alia*, "The judge never stipulated to me during my guilty plea. That after doing my sentence. That (3) years of parole had to be done. Violating Amendment # 14 of the U.S. Constitution (Due Process)." The trial court docketed the petition and appointed counsel. Thereafter, counsel certified under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), that the *pro se* petition adequately set forth defendant's claims of deprivation of his constitutional rights. The State filed a motion to dismiss defendant's postconviction petition arguing, in relevant part, that the record contradicted defendant's claim that the trial court did not advise him regarding the period of MSR.

¶ 8 At the hearing on the motion to dismiss the petition, the circuit court found that defendant had been admonished of his MSR obligation, rejected the remaining claims, and dismissed the petition.

¶ 9 On appeal, defendant contends that the trial court did not substantially comply with Illinois Supreme Court Rule 402 (eff. July 1, 2012) and violated his due process rights when, prior to accepting his guilty plea, it did not advise him that the actual terms of his plea bargain included three years of MSR. Defendant argues that the deficient admonition deprived him of the benefit of his negotiated plea bargain and he maintains that we should reduce his sentence by three years so as to approximate the sentencing agreement.

¶ 10 In cases not involving the death penalty, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights, and establishes a three-stage process for adjudicating a postconviction petition. *People v. Pendleton,* 223 Ill. 2d 458, 471-72 (2006); *People v. Lamar*, 2015 IL App (1st) 130542, ¶ 11. Because the instant appeal involves the dismissal of a postconviction petition at the second stage, we must determine whether the allegations in the petition, taken as true and liberally construed in favor of the defendant, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review the dismissal of a postconviction petition at the second stage *de novo. People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 11 The principles of due process require that a defendant entering into a plea agreement understands and voluntarily agrees to the terms before the court accepts that agreement. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). This due process right to be fully admonished in open

court is embodied in Rule 402. *People v. Whitfield*, 217 Ill. 2d 177, 188 (2005). Under Rule 402(a)(2) a court must inform a defendant of "the minimum and maximum sentence prescribed by law." This duty requires the court to admonish the defendant that a period of MSR pertaining to the offense is part of the sentence that will be imposed. *Whitfield*, 217 Ill. 2d at 188. Although a trial court's MSR admonition need not be perfect, it must substantially comply with the requirements of Rule 402. *People v. Morris*, 236 Ill. 2d 345, 367 (2010). "The admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning." *Id.* at 366 (citing *People v. Williams*, 97 Ill. 2d 252, 269 (1983)).

¶ 12 In this case, before accepting defendant's guilty plea, the trial court explained the sentencing ranges, confirmed that defendant understood, and then stated, "There's also a potential fine of 25 thousand dollars. There's also — this offense also carries with it a mandatory supervised release period of three years." We find that this language clearly indicated that the period of supervised release was a mandatory part of any sentence imposed for the offense to which defendant was pleading guilty. See *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 20 (2011) (admonitions were sufficient where the trial judge stated that "any sentence of imprisonment would carry with it a term of mandatory supervised release"); *People v. Marshall*, 381 Ill. App. 3d 724, 727, 734-36 (2008) (constitutional standards satisfied where the trial court admonished the defendant before he pled guilty that he "could get a penitentiary sentence and have to serve a period of three years[’] mandatory supervised release"). Here, the mandatory nature of the period of supervised release was further illustrated by the trial court's reference to the fine as "potential," in contrast with the court's unqualified declaration that the offense "carries with it a mandatory supervised release period." See *People v. Davis*, 403 Ill. App. 3d 461, 465

(2010) (finding substantial compliance with Rule 402 where the trial court stated that defendant "could" be fined but that he "would have to" serve the MSR period).

¶ 13 Therefore, we find that defendant was placed on notice that his sentence would include the period of MSR and the record affirmatively shows that defendant understood the admonitions. See *People v. Dougherty*, 394 Ill. App. 3d 134, 138-139 (2009) (finding substantial compliance with Rule 402(a) where the trial court did not recite to the defendant, and ask defendant if he understood, all the components of Rule 402(a), because the record affirmatively showed that the defendant understood them). The trial court's admonishments satisfied the requirements of due process and his postconviction petition was properly dismissed. See *People v. Fern*, 240 Ill. App. 3d 1031, 1041 (1993) ("Where the trial record refutes [a] defendant's assertions that his plea was not knowingly and voluntarily entered, courts may properly dismiss or deny a defendant's [postconviction] petition.").

¶ 14 Citing *People v. Burns*, 405 Ill. App. 3d 40, 43 (2010), defendant nevertheless maintains that the trial court's admonition did not comply with the constitutional standards articulated in *Whitfield* and *Morris* because the trial court "only mentioned MSR in the context of the potential penalties for first degree murder," and did not inform him that the term would, in fact, be added to his sentence. We disagree.

¶ 15 In *Whitfield*, the trial court accepted the defendant's negotiated guilty plea without mentioning MSR. *Whitfield*, 217 Ill. 2d at 180. The defendant filed a postconviction petition arguing that he was denied the benefit of the negotiated plea bargain in violation of his due process rights, which the circuit court denied. *Id*. at 181. Our supreme court held that the trial court's failure to advise the defendant that his negotiated sentence would include a statutorily

required term of MSR substantially violated his due process rights. *Id.* at 201-02. The court reasoned that the addition of the MSR resulted in a more onerous sentence than the defendant had agreed to serve. *Id.* at 201. *Whitfield* did not address the context of the MSR admonition, which is at issue in this case, because the trial court in *Whitfield* did not even mention MSR.

¶ 16 In *Morris*, the defendants pled guilty to several felonies after negotiating plea deals. *Morris*, 236 Ill. 2d at 348. Prior to accepting the pleas, the trial court admonished the defendants regarding the potential sentences and mentioned MSR in each explanation. *Id.* at 350-53. The defendants filed postconviction petitions contending that a substantial violation of their rights occurred and they were deprived of the benefit of their bargained-for sentences. *Id.* at 350, 353. Relying on *Whitfield*, the defendants argued that they were entitled to postconviction relief because the trial courts accepted their negotiated guilty pleas without admonishing them that their sentences would include a period of MSR. *Id.* at 355. Rather than decide whether the trial courts' mention of MSR was sufficient, the *Morris* court held that the rule announced in *Whitfield* did not apply retroactively and was therefore inapplicable in that case. *Id.* at 363-64. Although *Whitfield* did not control in *Morris*, the court sought to clarify the rule *Whitfield* announced, stating:

> "An admonition that uses the term 'MSR' without putting it in some 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. *** *Whitfield* requires that defendants be advised that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged.

> Ideally, 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 366-67.

¶ 17 Since *Morris*, this court has found that admonitions similar to the one at issue in this case satisfied due process, Rule 402, and *Whitfield*. In *Davis*, before accepting the guilty plea, the trial court stated, "[D]o 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*." (Emphasis in original.) *Davis*, 403 Ill. App. 3d at 465. The trial court did not mention the MSR at sentencing or in the written sentencing judgment. *Id.* at 463. The *Davis* court held that the statutory requirement was met because the trial court did advise the defendant of the MSR requirement before accepting his plea. *Id*. at 465. In *Hunter*, this court followed *Davis*, and held that the statement, "Any period of incarceration would be followed by a period of mandatory supervised release of two years" within the context of potential sentencing outcomes did not run afoul of *Whitfield*, even in light of *Morris*. *Hunter*, 2011 IL App (1st) 093023, ¶¶ 4, 19.

¶ 18 Here, as in *Davis* and *Hunter*, before the trial court accepted defendant's guilty plea, defendant was put on notice that his offense "carries with it a mandatory supervised release period of three years." See *Hunter*, 2011 IL App (1st) 093023, ¶ 18; see also *Davis*, 403 Ill. App. 3d at 466. Following *Hunter*, we find *Davis* to be more persuasive than *Burns*.

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.