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2018 IL App (3d) 160380-U

Order filed April 17, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0380 Circuit No. 08-CF-131
GEORGE F. ZELENAK,	)	Honorable Howard C. Ryan, Jr., Judge, Presiding.
Defendant-Appellant.	)	

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JUSTICE LYTTON delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice McDade dissented.

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**ORDER**

- ¶ 1 *Held:* While the circuit court erred when it did not admonish defendant of the applicable indeterminate mandatory supervised release term and potential for an order of restitution, reversal is not warranted because defendant did not allege or argue that he suffered prejudice.
- ¶ 2 Defendant, George F. Zelenak, appeals from the circuit court's denial of his motion to vacate his guilty plea. Defendant argues remand is required for new Illinois Supreme Court Rule 402(a) (eff. July 1, 2012) admonishments and to allow him to confirm or withdraw his guilty

plea because the court affirmatively misinformed him of the applicable mandatory supervised release (MSR) term and possibility of restitution. We affirm.

¶ 3

### FACTS

¶ 4

Defendant was charged by indictment with aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2008)), aggravated criminal sexual assault (*id.* § 12-14(a)(2)), and criminal sexual assault (*id.* § 12-13(a)(1)). During a pretrial hearing, the State said that the parties had reached a plea agreement. In exchange for defendant’s guilty plea to the aggravated kidnapping and aggravated criminal sexual assault charges, the State would dismiss the criminal sexual assault charge. The State also agreed to cap its sentence request at 40 years’ imprisonment. Before accepting the plea, the court admonished defendant that he could be “sentenced to the Department of Corrections for a minimum of 6, a maximum of 30 years” on either of the charges, and the sentences imposed on each charge must be served consecutively. “Upon release from prison, [defendant would] undergo a three-year [MSR].” The court also admonished defendant that he could be fined up to \$25,000. Defendant said that he understood the consequences of his plea. The court then explained:

“[Defendant], you must also understand the State has made an indication that they’re going to ask for no more than what? A cumulative of 40 years?

[STATE’S ATTORNEY]: 40 years, yes.

THE COURT: They’re going to ask for no more than accumulation [*sic*] of 40 years in the Illinois Department of Corrections. You must serve a minimum of 85 percent of that if that sentence was granted.

However, they're bound by that 40 years and I'm not. I can impose a sentence anywhere within the range of the possible punishments we've previously spoke of \*\*\*.

Do you understand that, sir?

THE DEFENDANT: Yes.”

The court accepted defendant's plea, and imposed two consecutive terms of 18 years' imprisonment. The court ordered defendant to pay \$6,149.50 in restitution to the victim. The written judgment imposed a three-year MSR term. Thereafter, defendant filed a motion to withdraw his guilty plea. The court denied the motion, and defendant appeals.

¶ 5

#### ANALYSIS

¶ 6

Defendant argues the cause must be remanded “for new [plea] admonishments pursuant to Illinois Supreme Court Rule 402(a) and to allow [defendant] to either confirm or withdraw his guilty plea because the trial court affirmatively misinformed him of the applicable term of [MSR] \*\*\*, resulting in a substantially more onerous sentence than he was admonished was possible.” While we agree that the circuit court's MSR admonishment was incorrect, defendant failed to plead or argue that he suffered prejudice—that he would not have pled guilty if he were admonished correctly.

¶ 7

To determine whether reversal is required, we must determine whether: (1) the circuit court's admonishments substantially complied with Illinois Supreme Court Rule 402 (eff. July 1, 2012), and (2) if not, whether defendant suffered prejudice as a result.

¶ 8

Rule 402(a) requires the circuit court to admonish defendant of “the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences.” Ill. S. Ct. R.

402(a)(2) (eff. July 1, 2012). This admonishment includes the MSR term that will follow defendant's sentence. *People v. Wills*, 61 Ill. 2d 105, 111 (1975).

¶ 9 Prior to accepting defendant's guilty plea, and pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 2012), the circuit court admonished defendant that any sentence it imposed would be followed by a three-year term of MSR. The court's MSR admonishment was erroneous because defendant's aggravated criminal sexual assault charge carried an indeterminate MSR of three years to life. 730 ILCS 5/5-8-1(d)(4) (West 2008).

¶ 10 Not every admonishment error requires reversal because "substantial compliance with [Rule 402] is sufficient to satisfy due process." *People v. Burt*, 168 Ill. 2d 49, 64 (1995). "Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment." *People v. Davis*, 145 Ill. 2d 240, 250 (1991). We interpret this phrase to mean that a defendant cannot establish a denial of real justice unless he makes a showing of prejudice.

¶ 11 The supreme court has not defined prejudice in the context of a non-negotiated plea and incorrect MSR admonishment. However, in *People v. Snyder*, 2011 IL 111382, ¶ 31, the supreme court held the appropriate remedy for the omission of a restitution admonishment is to "allow [defendant] the opportunity to withdraw her plea." *Snyder* indicates that to prevail on an erroneous admonishment claim, a defendant must allege prejudice. That is, defendant would withdraw his plea now that he is aware of the applicable sentencing consequences.

¶ 12 In *Davis*, 145 Ill. 2d at 250, the supreme court similarly indicated that a defendant must establish prejudice to prevail on an inaccurate admonishment claim. The defendant entered an open guilty plea in reliance on representations from a probation officer and the circuit court that he was eligible for Treatment Alternatives to Street Crimes (TASC) probation. *Id.* at 250. The

defendant learned before sentencing that he was ineligible for TASC, and the court sentenced him to 10 years' imprisonment. *Id.* at 243. The appellate court reversed the defendant's sentence and remanded the case to the trial court. *Id.* The supreme court affirmed the appellate court's reversal and remand of defendant's sentence, finding that as a result of the court's misstatement the defendant "did not attempt to negotiate a lesser term of incarceration, and forwent the opportunity to go to trial, where he may have been acquitted." *Id.* at 250.

¶ 13 The Illinois appellate courts have also described prejudice as the requirement that defendant allege that he would not have pled guilty if he had been properly admonished. See *People v. Anthony Williams*, 2012 IL App (2d) 110559, ¶ 18 (to show prejudice, defendant must allege that he would not have pled guilty if he had been properly admonished); see also *People v. Adrian Williams*, 2014 IL App (3d) 120824, ¶ 26 (defendant alleged prejudiced in that he relied on improper admonishments in entering his guilty plea and gave up the opportunity to negotiate a lesser term of incarceration); *People v. Seyferlich*, 398 Ill. App. 3d 989, 992 (2010) (defendant's contention that the circuit court failed to admonish her of restitution failed, in part, because defendant did not argue that she would not have pleaded guilty but for the incomplete admonishment). Therefore, to warrant reversal, defendant must allege prejudice in that the erroneous admonishment influenced his decision to plead guilty and not go to trial where he might be acquitted.

¶ 14 Defendant did not allege in his motion to withdraw the plea that he suffered prejudice or would not have pled guilty if he knew the correct MSR term. Defendant also does not argue on appeal that he suffered prejudice, that is, he would not have pled guilty if he were admonished of the correct MSR term. Instead, on appeal, defense counsel argues for a remand with directions for the circuit court to admonish defendant of the correct MSR term and then "allow [defendant]

to either confirm or withdraw his guilty plea.” Defense counsel’s argument is incompatible with the requirement that he show prejudice because counsel expressly takes no position on whether defendant would withdraw his plea if he knew the correct MSR term. Therefore, defendant has failed to establish that he suffered a due process violation as a result of the erroneous admonishment. Defendant’s additional argument, that the court failed to admonish him of the possibility for restitution, similarly fails because defendant did not allege that the omission of this admonishment affected his decision to enter the guilty plea.

¶ 15 CONCLUSION

¶ 16 The judgment of the circuit court of La Salle County is affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE McDADE, dissenting:

¶ 19 I respectfully dissent from the majority’s order. I would reverse the circuit court’s order denying defendant’s motion to withdraw his guilty plea and remand for further proceedings because the circuit court’s erroneous MSR admonishment resulted in the denial of “real justice.” See *Davis*, 145 Ill. 2d at 250.

¶ 20 In *Davis*, the supreme court held that reversal, following an improper plea admonishment, depends on “whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment.” *Id.* Thus, *Davis* provides two paths for reversal: the denial of real justice *or* prejudice. *Id.*; see also *People v. Guzman*, 2015 IL 118749, ¶ 34 (noting defendants who did not receive proper immigration consequence admonishments before entering their guilty plea “may also be entitled to withdraw their pleas if they have been denied ‘real justice’ or have suffered prejudice”); *People v. Delvillar*, 235 Ill. 2d 507, 522 (2009) (defendant bears the burden to show prejudice or the denial of “real justice” if he wishes to

withdraw his plea in the absence of a proper immigration admonishment); *People v. Torres*, 228 Ill. 2d 382, 399 (2008) (“[w]hether reversal is required for an imperfect [sentence] admonishment depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment”); *People v. Henderson*, 217 Ill. 2d 449, 469 (2005) (court’s failure to provide proper Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001) admonishments “neither prejudiced nor denied real justice”); *People v. Fuller*, 205 Ill. 2d 308, 323 (2002) (“whether reversal is required for an imperfect [sentence] admonishment depends on whether real justice has been denied or whether the defendant has been prejudiced by the inadequate admonishment”).

¶ 21 In *People v. Williams*, 344 Ill. App. 3d 334, 338-39 (2003), this court applied the disjunctive format of the *Davis* test to the issue of an omitted Rule 605(a) admonishment. We first determined that “[d]efendant has not been denied real justice by the lack of the trial court’s admonishment regarding the steps necessary to challenge his sentence on appeal for the simple reason that the defendant did not challenge his sentence in this appeal.” *Id.* at 338. Then, we independently found that “defendant was not prejudiced by the trial court’s failure to properly admonish defendant of the steps necessary to challenge his sentence on appeal.” *Id.* at 339.

¶ 22 The majority focuses its analysis on the prejudice component of *Davis* and concludes that defendant cannot show a denial of real justice without showing prejudice. While I agree with the majority that defendant has failed to adequately plead or argue prejudice, I find that this does not end the inquiry. Instead, I would proceed to independently analyze whether defendant has established that the circuit court’s erroneous MSR admonishment resulted in a denial of real justice. As indicated by the supreme court’s repeated interpretation of *Davis* and our own

application of it in *Williams*, this is a disjunctive test with two distinct routes for reversal. *Supra* ¶¶ 20-21.

¶ 23 In coming to this conclusion, I acknowledge that the supreme court has not expressly defined the denial of “real justice” in the erroneous preplea admonishment context. However, in *Davis*, 145 Ill. 2d at 251, the supreme court implicitly found that the circuit court’s failure to properly admonish a defendant of the applicable minimum sentence plus defendant’s misapprehension as to his eligibility for TASC probation were reversible error. The supreme court did not detail whether this compound error was reversible because defendant had pled prejudice or established a denial of real justice. *Id.*

¶ 24 More recently, in *Guzman*, 2015 IL 118749, ¶ 34, the supreme court stated “[d]efendants who did not receive section 113-8 [immigration consequence] admonishments *may* also be entitled to withdraw their pleas if they have been denied ‘real justice.’ ” (Emphasis added.) However, the supreme court did not take an affirmative position on this issue because *Guzman* failed to raise this argument. *Id.*

¶ 25 In light of *Davis* and *Guzman*, I conclude that the instant defendant has established a denial of real justice that warrants withdrawal of his guilty plea. Specifically, the circuit court’s erroneous MSR admonishment, that defendant’s potential maximum sentence of 60 years’ imprisonment was to be followed by 3 years of MSR, rendered defendant’s plea unknowing and involuntary because defendant received a far greater sentence than the court admonished. Defendant received a sentence of 40 years’ imprisonment to be followed by an MSR term of 3 years *to natural life*. 730 ILCS 5/5-8-1(d)(4) (West 2008). This indeterminate MSR term is a part of defendant’s sentence (*Wills*, 61 Ill. 2d at 109), and effectively subjects defendant to a life sentence—the most severe sentence possible following the abolition of the death penalty.

Although defendant's three years to life MSR term is technically "indeterminate," in practice, it is a life sentence subject to discretionary release after the minimum term has been served. See, e.g., *People ex rel. Michaels v. Bowen*, 367 Ill. 589, 593-95 (1937). To be discharged from this indeterminate MSR term, defendant must file a petition for discharge with the Prisoner Review Board (Board). 730 ILCS 5/3-3-8(b) (West 2016). To have any chance of success, defendant must support his petition with a favorable recommendation from his supervising agent and a positive evaluation from an approved sex offender evaluator obtained at defendant's expense. *Id.* § 3-14-2.5(d). Once defendant has supplied the Board with this information, the Board has the discretion to "enter an order releasing and discharging [defendant] from parole or [MSR] \*\*\*, when it determines that he or she is likely to remain at liberty without committing another offense." *Id.* § 3-3-8(b). Viewing the above facts in totality, I believe defendant's sentence constitutes a *de facto* life sentence, and therefore, the trial court's admonishment error constitutes a denial of "real justice."

¶ 26 Independent of defendant's unadmonished *de facto* life sentence, I also find that defendant suffered a denial of real justice in that he was not properly admonished of a direct consequence of his guilty plea. See *People v. Hughes*, 2012 IL 112817, ¶ 35 ("a direct consequence of a guilty plea is one which has a definite, immediate and largely automatic effect on the range of a defendant's sentence"). Due process requires the circuit court to admonish defendant of all direct consequences of his guilty plea. *Id.* Without these admonishments, defendant cannot enter a knowing and voluntary plea. *Id.* MSR is a part of defendant's sentence, and therefore, a direct consequence of defendant's plea. *Wills*, 61 Ill. 2d at 109. Hence, the circuit court's misstatement as to the applicable MSR term, a direct consequence of his plea, made it impossible for defendant to enter a valid plea. This fact, by itself, warrants reversal

because it provides grounds to withdraw the plea. It, therefore, also constitutes a denial of “real justice” because without a proper admonishment on this direct consequence of the plea, defendant’s plea does not satisfy due process.