

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).

2019 IL App (4th) 170462-U

NO. 4-17-0462

FILED
July 9, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
SETH A. WEAVER,)	No. 06CF1481
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by denying defendant’s petition for leave to file a successive postconviction petition.

¶ 2 In May 2017, defendant, Seth A. Weaver, filed a motion for leave to file a successive postconviction petition. In his motion, defendant asserted he was denied due process and effective assistance of counsel throughout the proceedings in this case because he was never informed he would have to serve a mandatory supervised release (MSR) term of three years to natural life. In June 2017, the Champaign County circuit court entered an order denying defendant’s motion for leave to file a successive postconviction petition. Defendant appeals, contending the circuit court erred by denying him leave to file a successive postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2006, the State charged defendant with one count of aggravated criminal sexual assault (count I) (720 ILCS 5/12-14(a)(2) (West 2006)) and one count of domestic battery with a prior domestic battery conviction (count II) (720 ILCS 5/12-3.2(a)(1) (West 2006)) for his actions on September 14, 2006. At a December 2006 hearing, defendant pleaded guilty to aggravated criminal sexual assault pursuant to a plea agreement, under which the State was to dismiss count II and recommend a sentence of no greater than 20 years in prison. In admonishing defendant, the circuit court stated, “[a]ny time in prison would be followed by three years of mandatory supervised release.” The court later sentenced defendant to 20 years’ imprisonment and did not mention MSR. The written sentencing judgment did not state an MSR term. Thereafter, defendant filed a motion to withdraw his guilty plea, alleging his plea was not knowing and voluntary because he was pressured and coerced into pleading guilty and believed he would receive less than 20 years’ imprisonment by pleading guilty. During the postplea proceedings, defendant chose to proceed *pro se* on his motion to withdraw his guilty plea. In April 2008, the court denied defendant’s motion to withdraw his guilty plea.

¶ 5 Defendant appealed and argued the circuit court erred by (1) not providing him with a transcript of his guilty-plea hearing prior to the hearing on his postplea motion and (2) denying his motion to withdraw his guilty plea because he did not knowingly and intelligently waive his right to counsel. This court affirmed the circuit court’s judgment. *People v. Weaver*, 385 Ill. App. 3d 1149, 970 N.E.2d 137 (2008) (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 In September 2009, defendant filed a *pro se* postconviction petition, asserting he was denied the effective assistance of both trial and appellate counsel because neither counsel raised a claim regarding his three-year MSR term. Relying on *People v. Whitfield*, 217 Ill. 2d

177, 840 N.E.2d 658 (2005), defendant argued he did not receive the benefit of the bargain in his guilty plea because the 20-year sentence with the 3-year MSR term was a greater sentence than the one to which he agreed. On September 4, 2009, the circuit court entered a written order dismissing defendant's postconviction petition as frivolous and patently without merit. The court found defendant had been informed a Class X felony has a sentencing range of 6 to 30 years in prison followed by a 3-year MSR term, and thus defendant's *Whitfield* claim was meritless.

¶ 7 Defendant appealed the circuit court's dismissal of his postconviction petition, and this court affirmed the circuit court's dismissal. *People v. Weaver*, 405 Ill. App. 3d 1219, 997 N.E.2d 1018 (2011) (table) (unpublished order under Illinois Supreme Court Rule 23). We found defendant's allegation the circuit court failed to inform him of the three-year MSR term was completely contradicted by the record.

¶ 8 In May 2017, defendant filed his motion for leave to file a successive postconviction petition, which is at issue in this appeal. In his motion, defendant argued his due process rights were violated because he was not informed his MSR term was three years to natural life. Defendant further contended he was denied effective assistance of counsel by all of his prior attorneys because none of them informed him of the correct MSR term. Defendant claimed his plea agreement was illegal and involuntary and his sentence was void. Additionally, defendant noted he was not made aware of the three years to natural life MSR term until prison staff told him in December 2016. Defendant stated he would have filed his petition sooner if one of his attorneys had notified him of the correct MSR term.

¶ 9 The circuit court entered a written order on June 1, 2017, denying defendant leave to file his successive postconviction petition. The court noted defendant could have raised his

claim in his initial postconviction petition and this court decided the same issue in our 2011 Rule 23 order.

¶ 10 On June 16, 2017, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the procedure for appeals in postconviction proceedings is in accordance with the rules governing criminal appeals). Thus, we have jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 11 II. ANALYSIS

¶ 12 Defendant argues he did establish cause and prejudice for allowing him to file his successive postconviction petition. The State disagrees. When the circuit court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 13 Section 122-1(f) of the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1(f) (West 2016)) provides the following:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows

prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.”

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 14 With a motion for leave to file a successive postconviction petition, the court is just conducting “a preliminary screening to determine whether defendant’s *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice.” *People v. Bailey*, 2017 IL 121450, ¶ 24, 102 N.E.3d 114. The court is only to ascertain “whether defendant has made a *prima facie* showing of cause and prejudice.” *Bailey*, 2017 IL 121450, ¶ 24. If the defendant did so, the court grants the defendant leave to file the successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 24.

¶ 15 Regarding cause, defendant contends he established cause because he was untrained in the law and did not know he was subject to an MSR term of up to natural life until he was advised by prison staff in December 2016 and received written confirmation of such in March 2017. In his motion for leave to file his successive postconviction petition, defendant alleges he would have brought his claim earlier if one of his attorneys would have told him the correct MSR term. Both of defendant’s allegations are essentially claims of ignorance of law. However, as the State points out, our supreme court has held ignorance of law at the time of the initial postconviction petition can never establish cause for filing a successive postconviction petition. *People v. Evans*, 2013 IL 113471, ¶¶ 12-13, 989 N.E.2d 1096. We disagree with defendant’s contention the supreme court’s decision in *Evans* does not apply to this case simply

because he pleaded guilty and the defendant in *Evans* was found guilty after a trial.

¶ 16 In *Evans*, 2013 IL 113471, ¶ 5, the circuit court sentenced the defendant to 12 years' imprisonment and made no mention of any period of MSR. The defendant appealed his conviction and sentence and did not raise any issue regarding his MSR term. *Evans*, 2013 IL 113471, ¶¶ 3, 5. The defendant later filed his first postconviction petition and again did not raise any issue with respect to his MSR term. *Evans*, 2013 IL 113471, ¶¶ 4-5. In the defendant's motion for leave to file a successive postconviction petition, he alleged, for the first time, the circuit court did not mention or impose an additional term of MSR with the defendant's 12-year prison sentence. *Evans*, 2013 IL 113471, ¶ 5. The defendant argued the application of a 3-year MSR term was improper because it would result in a sentence longer than the 12-year sentence imposed by the circuit court. *Evans*, 2013 IL 113471, ¶ 5. As to "cause" for failing to raise the issue in his first postconviction petition, the defendant alleged the following: "The information about the M.S.R. was not yet discovered to me yet. And when I did learn about it more research need to be done. Also it was still being decided in appeals court, so no case were able to be used as evidence. Basically I Petitioner just discovered this." *Evans*, 2013 IL 113471, ¶ 5.

¶ 17 Our supreme court found the defendant's aforementioned allegation was insufficient to establish cause for the filing of a successive postconviction petition under the Postconviction Act. *Evans*, 2013 IL 113471, ¶¶ 12-13. The supreme court explained the defendant's allegation of cause was merely an allegation of his ignorance of the law which, as a matter of law, could never be cause for the filing of a successive postconviction petition. *Evans*, 2013 IL 113471, ¶¶ 12-13. It noted the defendant claimed "he only 'just discovered' that he would be subject to a three-year term of MSR," but at the time he was sentenced, as well as the time of his direct appeal and his initial postconviction petition, the Unified Code of Corrections

(Unified Code) expressly provided that, by operation of law, every Class X sentence must include a three-year term of MSR. *Evans*, 2013 IL 113471, ¶ 13. The supreme court concluded, “Defendant is presumptively charged with knowledge of this provision, and, as a matter of law, his subjective ignorance of it is not ‘an objective factor that impeded’ his ability to raise the MSR claim sooner.” *Evans*, 2013 IL 113471, ¶ 13.

¶ 18 Here, defendant pleaded guilty to aggravated criminal sexual assault. At the time he did so and when he filed his initial postconviction petition, section 5-8-1(d)(4) of the Unified Code (730 ILCS 5/5-8-1(d)(4) (West 2006)) expressly required a sentence for aggravated criminal sexual assault include an indeterminate period of MSR from three years to natural life. In his initial postconviction petition, defendant contended he did not receive the benefit of the bargain with his negotiated plea agreement because of the additional three-year MSR term and argued ineffective assistance of trial and appellate counsel for not raising said issue. Defendant also noted an MSR term was not mentioned at all during his sentencing hearing and attached his written sentencing judgment, which did not include an MSR term. Additionally, we note defendant did not mention the circuit court’s admonishments at his guilty plea hearing in his initial postconviction petition.

¶ 19 First, it is clear from his initial postconviction petition defendant was aware an MSR term applied to his sentence at the time he filed his initial postconviction petition. The *Evans* decision establishes that, when the defendant filed his first postconviction petition, he was presumptively charged with knowledge of the requirements of section 5-8-1(d) of the Procedure Code. *Evans*, 2013 IL 113471, ¶ 13. This case presents an even stronger reason for having the presumption since defendant raised an MSR issue in his initial postconviction petition.

¶ 20 Second, the fact the circuit court incorrectly admonished defendant about the

applicable MSR term does not render *Evans* inapplicable, as it did not impede his ability to raise a lifetime MSR argument. The record contains no suggestion defendant relied on the improper admonishment in making his MSR claim in his initial postconviction petition. Defendant did not reference the MSR admonishment in his initial postconviction petition. Moreover, the entire basis for his initial MSR argument was his lack of knowledge a three-year MSR term was part of his sentence under the plea agreement, and thus he was entitled to the benefit of his plea bargain.

¶ 21 Additionally, we note the circuit court’s order and this court’s order addressing defendant’s initial postconviction petition do not affect what defendant knew or should have known when he filed his initial postconviction petition. However, in retrospect, we recognize this court should have noted defendant was arguing the incorrect MSR provision in addressing defendant’s contention he was unaware of a “three-year MSR term” when he pleaded guilty.

¶ 22 The cases defendant cites in support of his argument he has alleged cause, *People v. Welch*, 376 Ill. App. 3d 705, 877 N.E.2d 134 (2007), and *People v. Gutierrez*, 2011 IL App (1st) 093499, 954 N.E.2d 365, were both appellate court cases decided before our supreme court’s decision in *Evans*. Moreover, the *Welch* case is distinguishable from this one because the defendant in that case did not know an MSR term applied to his sentence when he filed his initial postconviction petition. *Welch*, 376 Ill. App. 3d at 709, 877 N.E.2d at 138. Likewise, in *Gutierrez*, 2011 IL App (1st) 093499, ¶ 14, the defendant was unaware he could possibly face deportation when he filed his first postconviction petition. In this case, the record is undisputable defendant was aware an MSR term applied to his sentence when he filed his initial postconviction petition.

¶ 23 Accordingly, we find that, as a matter of law, defendant’s subjective ignorance of section 5-8-1(d)(4) was not an “objective factor that impeded” his ability to bring his ineffective

assistance of counsel claim when he filed his first postconviction petition. *Evans*, 2013 IL 113471, ¶ 13. Since defendant cannot establish the cause prong of the cause and prejudice test, the circuit court properly denied his motion for leave to file a successive postconviction petition.

¶ 24

III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Champaign County circuit court's judgment.

As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.