2011 IL App (1st) 070886-U

FOURTH DIVISION
September 22, 2011

No. 1-07-0886

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. 05 CR 8205
	)	
RAFAEL PACHECO,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ *1* *Held*: Where defendant was properly admonished of his two-year period of mandatory supervised release that attached to his sentence, the trial court's judgment was affirmed; where defendant's post-conviction petition was dismissed without the State's involvement, the State's Attorney fee was vacated.

¶ 2 Defendant Rafael Pacheco appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2006). On appeal, he contends that when he entered his negotiated plea in 2006, the trial court did not properly admonish him of the two-year period of mandatory supervised release (MSR) that

attached to his sentence. Defendant seeks relief under *People v. Whitfield*, 217 Ill. 2d 177 (2005), which afforded the guilty plea defendant sentencing relief where the trial court made no mention of MSR at his plea hearing. Defendant also challenges certain pecuniary penalties imposed by the court.

¶ 3 In a Rule 23 Order entered on August 29, 2008, we affirmed the trial court's dismissal. Subsequently, the Illinois Supreme Court entered a supervisory order directing us to vacate that decision and reconsider the decision in light of *People v. Morris*, 236 Ill. 2d 345, 366 (2010). We again affirm the trial court's dismissal.

¶ 4 On April 5, 2006, defendant entered a negotiated plea of guilty to a charge of second degree murder. During the plea proceedings, the trial court admonished defendant as to the range of sentences for that offense. Before accepting defendant's plea, the trial court stated,

> "I want you to understand that this is a Class 1 felony. You could be sentenced anywhere from four years to 20 years in the Illinois Department of Corrections, you could be fined up to $25,000, and when you're released from the Department of Corrections, you would be on parole for a period of two years. Do you understand that?"

Defendant responded affirmatively.

¶ 5 After completing the admonishments pursuant to Supreme Court Rule 402 (eff. July 1, 1997), the court ascertained defendant's understanding of the rights he was relinquishing by pleading guilty, then accepted his guilty plea and sentenced him in accordance with the plea agreement to 20 years' imprisonment. The court also admonished defendant that he had a right to appeal and, in order to perfect that right, he had to file a written motion to vacate his plea. On August 14, 2006, defendant filed a motion to withdraw his guilty plea, which was denied as

untimely.

¶ 6 In December 2006, defendant sought relief under the Act. As pertinent to this appeal, defendant alleged that his constitutional rights were violated when the court "sentenced him to a term of imprisonment that, when combined with the statutorily required MSR term, *** is greater than the sentence he expected to actually serve as part of his plea agreement." He further stated that it was his understanding that the two-year MSR term would be subtracted from his prison term, and it was not until he arrived in prison that he realized the MSR term would be added to his sentence. As relief, defendant requested the court to reduce his sentence by two years. Defendant attached his own sworn affidavit to the petition, in which he stated that everything contained in his petition was true.

¶ 7 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit, and assessed costs of $309 pursuant to section 27.2(a) of the Clerks of Court Act (705 ILCS 105/27.2(a) (West 2006)), and $50 in State's Attorney's fees pursuant to section 4-2002.1 of the Counties Code (55 ILCS 5/4-2002.1 (West 2006)). In doing so, the circuit court found that defendant's MSR claim was meritless since the legislature intended the MSR term to be separate and distinct from the term of imprisonment, and thus defendant's 20-year term of imprisonment followed by a 2-year MSR term did not exceed the maximum sentence allowed.

¶ 8 Defendant now challenges the propriety of the court's decision, and contends that, pursuant to *Whitfield*, 217 Ill. 2d at 177, his cause should be remanded to the circuit court with directions that it reduce his prison sentence by two years. The issue here is controlled by *Morris*, which expressly held that (1) "*Whitfield* announced a new rule" (*Morris*, 236 Ill. 2d at 361) and (2) "the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced" (*Morris*, 236 Ill. 2d at 366). Because defendant pled guilty and was admonished in 2006,

Whitfield applies here.

¶ 9 The *Morris* court also addressed the type of information that must be communicated to ensure that the admonishments provided during a plea hearing comply with the requirement of Supreme Court Rule 402 (eff. July 1, 1997)), and due process post-*Whitfield*. *Morris*, 236 Ill. 2d at 366. According to *Morris*, 236 Ill. 2d at 366, the purpose of admonishments is to "advise the defendant of the actual terms of the bargain he has made with the State." The admonition is sufficient if it substantially complies with Rule 402 and an ordinary person would understand it to convey the required warning. *Morris*, 236 Ill. 2d at 366-67. Following the above language describing what is required of a trial court admonishing a defendant of MSR, the supreme court then discussed what a trial court ideally should do when giving its MSR admonishments. The supreme court encouraged judges to explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, give the admonition at the time the trial court reviews the provisions of the plea agreement, and reiterate the admonition both at sentencing and in the written judgment. *Morris*, 236 Ill. 2d at 367-68.

¶ 10 The contrast between what the trial court must do and what it should do in giving MSR admonishments is significant. The *Morris* court reinforced the non-binding nature of what the "ideal" admonishment is by supporting it with several quotes from appellate cases that used advisory language similar to its own. *Morris*, 236 Ill. 2d at 367-68, quoting *People v. Daniels*, 388 Ill. App. 3d 952, 956 (2009); *People v. Berrios*, 387 Ill. App. 3d 1061, 1064 (2009); *People v. Mendez*, 387 Ill. App. 3d 311, 321 (2008) (vacated in light of *Morris*); *People v. Marshall*, 381 Ill. App. 3d 724, 736 (2008); and *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007). Moreover, while *Whitfield* relief was granted in some of those cases (*Daniels* and *Mendez*), it was denied in others (*Berrios*, *Marshall*, and *Jarrett*), thus emphasizing that it is not reversible error when a trial court fails to make express references to MSR in the pronouncement of sentence or the

mittimus.

¶ 11 We conclude, therefore, that the supreme court in *Morris* was instructing the lower courts that it is *preferable* to expressly include MSR in the pronouncement of sentence and the mittimus but *mandatory* to give admonishments that convey to a defendant that his actual sentence, which he would be accepting with his negotiated plea, includes a term of MSR following his imprisonment.

¶ 12 Here, the admonishment satisfied that test. The court stated that, "[y]ou could be sentenced anywhere from four years to 20 years in the Illinois Department of Corrections, *** and when you're released from the Department of Corrections, you would be on parole for a period of two years." The court then asked defendant if he "understood that," and he replied that he did. We find that the trial court informed defendant of his MSR term in language that made it sufficiently clear that his prison sentence would be followed by MSR, rather than merely including MSR as a potential penalty. See *People v. Davis*, 403 Ill. App. 3d 461, 466 (1st Dist. 2010).

¶ 13 In reaching this conclusion, we find *People v. Burns*, 405 Ill. App. 3d 40 (2nd Dist. 2010), relied on by defendant, distinguishable from the case at bar. In *Burns*, the trial court recited the maximum and minimum prison terms for a Class X felony and then stated, "[t]here's a potential fine of up to $25,000, with a period of three years mandatory supervised release." *Burns*, 405 Ill. App. 3d at 42. The second district held that the admonition could have "fostered a reasonable belief that MSR attached only to a particular contingency that might or might not happen," and thus remanded the cause to afford the defendant the option of withdrawing his guilty plea. *Burns*, 405 Ill. App. 3d at 44-45. Unlike *Burns*, however, the trial court in this case advised defendant that "when [he's] released from the Illinois Department of Corrections, [he] would be on parole for a period of two years." The admonishment at bar was stated without

contingency, and did not create a reasonable belief that the MSR term might or might not attach to defendant's sentence.

¶ 14 Defendant also argues, and the State concedes, that his $50 State's Attorney fee should be vacated. Section 4-2002.1 of the Counties Code (55 ILCS 5/4-2002.1 (West 2006)), allows State's Attorneys to collect fees in several instances. However, under the Act, a court must make an independent determination as to the merits of a post-conviction petition at the first stage of proceedings, and the court is barred from receiving input from the State. *People v. Ponyi*, 315 Ill. App. 3d 568, 572-73 (2000). Because the record indicates that the State had no input in the proceedings, defendant's $50 State's Attorney fee should be vacated.

¶ 15 Defendant next contends that, in light of *Morris*, the circuit court erred in imposing costs and fees against him for filing a frivolous post-conviction petition because his petition, at the very least, has arguable merit in fact and law. *See People v. Hodges*, 234 Ill. 2d 1, 16 (2009). For the reasons stated above, however, defendant's petition was properly dismissed by the circuit court as frivolous and patently without merit. Therefore, defendant failed to state the gist of a constitutional claim and the fees imposed on him were proper.

¶ 16 Alternatively, defendant contended in his opening brief that the trial court's assessment of costs and fees pursuant to section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2006)) violates his State and Federal constitutional rights to due process and equal protection by unfairly subjecting indigent petitioners to pecuniary punishment for attempting to exercise a state-granted post-conviction remedy, and by targeting prisoners to the exclusion of other similarly-situated indigent petitioners without any rational basis for doing so. The same arguments now advanced by defendant were rejected by our supreme court in *People v. Alcozer*, 241 Ill. 2d 248, 261, 265 (2011). Bound by the supreme court in *Alcozer*, we find section 22-105 to be constitutional.

¶ 17 For the foregoing reasons, we order the Costs and Fees order modified to reflect a total of $309, and affirm the judgment of the circuit court in all other respects.

¶ 18 Affirmed as modified.