No. 1-09-2412

THIRD DIVISION
May 11, 2011

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. 04 CR 25652
	)	
ROBERT HUBBARD,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

O R D E R

HELD: The trial court’s denial of defendant’s motion for leave to file a successive postconviction petition was affirmed because the defendant's conviction was finalized before the decision in Whitfield was announced and, under Morris, retroactive relief was not available to him.

Robert Hubbard, the defendant, appeals from an order of the circuit court of Cook County denying him leave to file a

successive pro se petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2008)). He contends that the circuit court erred in finding that he did not establish the requisite cause and prejudice to proceed where he failed to challenge the trial court's admonishments regarding mandatory supervised release (MSR) in his first postconviction petition.

The record shows that on February 9, 2005, a conference was held pursuant to Supreme Court Rule 402 (eff. July 1, 1997), after which defense counsel informed the trial court that defendant wished to enter a plea of guilty to multiple charges of reckless homicide and aggravated driving under the influence of alcohol (DUI). Before accepting defendant's plea, the trial court stated that "if your client wishes to plead guilty, I will sentence him to 12 years Illinois Department of Corrections." The trial court admonished defendant of the charges against him, the consequences of pleading guilty, and the sentencing range and term of MSR for each offense. Defendant indicated that he understood and that he was not promised anything in exchange for his plea other than what had been stated in open court. Defendant then stipulated to the factual basis for the charges, and the trial court accepted defendant's pleas of guilty to reckless homicide and aggravated DUI.

The cause proceeded to sentencing, whereupon the trial court concluded that, "based on the matters in aggravation and mitigation, I sentence you to 12 years in the Illinois Department of Corrections. The lesser matters will merge with [ ] the aggravated DUI." The trial court also advised defendant of his appeal rights and the requirements for doing so.

Thereafter, defendant did not seek to withdraw his guilty plea or to otherwise perfect a direct appeal from the judgment entered. Instead, on May 12, 2006, defendant filed a pro se motion for reduction of sentence. The record contains no indication as to the disposition of that motion.

In October 2007, defendant filed a pro se postconviction petition alleging, inter alia, that he was not admonished of the application of truth-in-sentencing to his plea of guilty. The circuit court summarily dismissed the petition as frivolous and patently without merit, and we affirmed that order after granting the State Appellate Defender's motion for leave to withdraw as counsel pursuant to Pennsylvania v. Finley, 481 U.S. 551 (1987). People v. Hubbard, No. 1-08-0307 (2009) (unpublished order under Supreme Court Rule 23).

While that appeal was pending, defendant filed the subject pro se motion for leave to file a successive postconviction petition. In his motion, defendant alleged that he was denied due process of

law because he was not informed of the MSR requirement when he pled guilty, and that he had cause for not raising this claim earlier since he first learned that he was subject to MSR from his correctional counselor in March 2009 after he had filed his first postconviction petition. Relying on People v. Whitfield, 217 Ill. 2d 177, 205 (2005), where the supreme court held that a defendant who enters a negotiated guilty plea, but is not informed of the MSR term, is entitled to the benefit of his plea bargain, defendant claimed that he was also deprived due to the trial court's failure to admonish him and explain the MSR term. The circuit court denied the motion, finding that defendant failed to satisfy the cause-and-prejudice test required for the filing of successive petitions "particularly since he was aware of the M.S.R. requirement during his plea admonishment."

In this court, defendant challenges the propriety of the circuit court's denial of his motion for leave to file a successive postconviction petition. He asserts that the court erred in denying his motion because the factual basis for his MSR claim was not available to him at the time of his plea in 2005 or when he filed his initial postconviction petition in 2007; and, as a result, it is inconsequential that Whitfield was announced before his initial petition.

The Post-Conviction Hearing Act (Act) contemplates the filing of only one postconviction petition without leave of court (725 ILCS 5/122-1(f) (West 2008)), and any claim not raised in that petition is waived (725 ILCS 5/122-3 (West 2008)). Here, it is undisputed that defendant did not raise his MSR claim in his initial postconviction petition, and therefore it may be deemed waived. People v. Johnson, 392 Ill. App. 3d 897, 902-03 (2009).

The statutory bar to successive petitions will be relaxed, however, where fundamental fairness demands. People v. Pitsonbarger, 205 Ill. 2d 444, 458 (2002). The fundamental fairness exception and the granting of leave to file a successive postconviction petition are defined in terms of the cause-and-prejudice test, which must be applied to each claim in a successive petition. People v. Jarrett, 399 Ill. App. 3d 715, 720 (2010), citing Pitsonbarger, 205 Ill. 2d at 458-59. Defendant has the burden of establishing both elements of the test in order to prevail (Johnson, 392 Ill. App. 3d at 903), and our review of the denial of a section 122-1(f) motion is de novo. People v. LaPointe, 365 Ill. App. 3d 914, 923 (2006), aff'd on other grounds, 227 Ill. 2d 39 (2007).

Contrary to the position set forth by defendant, we find that this case is governed by People v. Morris, 236 Ill. 2d 345 (2010). In Morris, 236 Ill. 2d at 366, the supreme court

held that "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." Defendant concedes, and we agree, that his conviction was finalized before the Whitfield decision. Thus, defendant is not entitled to retroactive relief under Whitfield. Morris, 236 Ill. 2d at 366.

To avoid this result, defendant argues in his reply brief that Morris wrongly decided that Whitfield announced a new constitutional rule of criminal procedure as it merely endorsed the long and established line of cases, holding that the failure to properly admonish a defendant of the MSR term connected to his sentence violated due process. We note, however, that the propriety of Morris is not before us, that we are bound by the decisions of the supreme court and may not overrule them. People v. Artis, 232 Ill. 2d 156, 164 (2009).

Defendant, nonetheless, maintains that "retroactivity is an affirmative defense," which cannot be asserted by the State until the second stage of postconviction proceedings. We find this contention unavailing since the two postconviction petitions at issue in Morris were summarily dismissed, and the supreme court affirmed those dismissals without advancing them to the second stage of proceedings for input from the State.

Morris, 236 Ill. 2d at 368. Moreover, even assuming, arguendo, that non-retroactivity is an affirmative defense, the supreme court has recognized that not all affirmative defenses are precluded from first stage review of a postconviction petition. People v. Blair, 215 Ill. 2d 427, 445 (2005). Finally, a supreme court opinion cannot be waived by a party, but must be applied as a matter of law. Artis, 232 Ill. 2d at 164.

Defendant further contends that his reliance on Whitfield does not preclude an independent argument based on Santobello v. New York, 404 U.S. 257 (1971), where it was held that the State's failure to honor its promises as part of a plea agreement may implicate a defendant's right to due process. This contention is unpersuasive because Whitfield expressly relied on Santobello. Morris, 236 Ill. 2d at 361; see also People v. Demitro, No. 1-09-2104, slip op. at 4 (Dec. 17, 2010). By citing Santobello, defendant cannot avoid the effect of its progeny, Whitfield, and its limitation on prospective application under Morris. Demitro, No. 1-09-2104, slip op. at 4.

For the reasons stated, we affirm the order of the circuit court of Cook County denying defendant leave to file a successive postconviction petition.

Affirmed.