THIRD DIVISION
May 16, 2012

No. 1-10-0745

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. 07 C2 20245
	)	
DEWITT BROWN,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Second stage denial of defendant's post-conviction petition affirmed where he failed to present a substantial showing of a constitutional violation based on *People v. Whitfield*, 217 Ill. 2d 177 (2005); Class X MSR term properly imposed on defendant, who was sentenced as a Class X offender.

¶ 2 Dewitt Brown, the defendant, appeals from an order of the circuit court of Cook County denying his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). He contends that he made a substantial showing that his constitutional rights to due process and fundamental fairness were violated when the circuit court admonished him that he would

receive a two-year period of mandatory supervised release (MSR), but a three-year period of MSR was added to his 2008 agreed-upon Class X sentence. He maintains, in the alternative, that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 1 felony offense.

¶ 3 The record shows that in May 2008, defendant entered a negotiated plea of guilty to aggravated battery and was sentenced as a Class X offender to eight years' imprisonment. At the guilty plea proceeding, the court admonished defendant as follows:

> "[A]ggravated battery is normally a Class 1 Felony carrying 4 to 15 years in the State Penitentiary. But because of your extensive criminal history, it is a Class X Felony. As such it carries no less than 6 nor more than 30 years in the Illinois Department of Corrections plus a potential fine up to $50,000 and two years of mandatory supervised release."

Defendant indicated that he understood and still wished to plead guilty. The court then accepted the plea and sentenced defendant to the agreed term of eight years' imprisonment. Defendant made no attempt to vacate his plea, or otherwise perfect an appeal from the judgment entered thereon.

¶ 4 In November 2008, however, defendant filed a *pro se* post-conviction petition alleging that his due process rights were violated when a three-year term of MSR was added to his negotiated sentence, resulting in a more onerous sentence than the two-year term for which he bargained. Defendant was subsequently appointed counsel, who, in August 2009, filed an amended post-conviction petition alleging that contrary to the negotiated plea agreement and the court's admonishment that he would receive a two-year MSR term, defendant was ordered to serve a three-year term. Defendant maintained that the additional year of MSR violated his due process rights, and that his sentence should be reduced by one year, followed by a three-year term of MSR pursuant

to *People v. Whitfield*, 217 Ill. 2d 177 (2005).

¶ 5 The State filed a motion to dismiss alleging that the court substantially complied with Supreme Court Rule 402(a) (eff. July 1, 1997) when it admonished defendant that he would have to serve a term of MSR. The State further alleged that defendant's request for relief was nothing more than an attempt to unilaterally renegotiate his sentence.

¶ 6 The circuit court initially denied the State's motion, and indicated that there would be a hearing. After further argument, however, the court denied defendant's petition, and defendant appealed.

¶ 7 Where, as here, no evidentiary hearing was held, we review the denial of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 8 We initially observe that the parties do not dispute that a term of MSR is a mandatory part of defendant's sentence (730 ILCS 5/5-8-1(d) (West 2008); *People v. Hunter*, 2011 IL App (1st) 093023, ¶23) and that defendant must be apprised of that fact before the court accepts his guilty plea. *Whitfield*, 217 Ill. 2d at 190. They also do not dispute that defendant was advised that he would have to serve a period of MSR, and that the trial court advised him that he would have to serve two years, but that a three year term was added to his sentence. They disagree as to the consequences of the court's misstatement. Defendant, relying on *Whitfield*, claims that he was denied the benefit of his plea bargain, and that his sentence should be reduced by one year followed by a three-year term of MSR. The State responds that the circuit court substantially complied with Supreme Court Rule 402 (eff. July 1, 1997) when it advised defendant that he had to serve a term of MSR, and that the imperfect admonishment did not run afoul of that rule or due process.

¶ 9 *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. *People v. Morris*, 236 Ill. 2d 345, 367 (2010). Where the trial court fails to advise the defendant that an MSR term will be

added to the sentence, but an MSR term is added, there is a due process violation because the sentence imposed is more onerous than the sentence the defendant agreed to at the time of the plea hearing. *Whitfield*, 217 Ill. 2d at 195. In *Morris*, 236 Ill. 2d at 367, the supreme court explained that the trial court's MSR admonishment need not be perfect but must substantially comply with the requirement of Supreme Court Rule 402 and other precedents of the supreme court.

¶ 10 In *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010), this court explained that under *Whitfield*, a constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty. Accord *Hunter*,¶18. Here, the circuit court duly advised defendant prior to accepting his plea that a term of MSR would be added to his sentence; and although the admonition was not perfect, it appears that it was sufficient under *Whitfield*, and its progeny to place defendant on notice that his debt to society for the crime he was admitting to having committed extended beyond fulfilling his sentence in the penitentiary. *Davis*, 403 Ill. App. 3d at 466.

¶ 11 Moreover, the record shows that defendant negotiated a specific term of eight years in the penitentiary in exchange for his plea of guilty and received the full bargain made with the prosecutor when he was sentenced to the agreed term. *Davis*, 403 Ill. App. 3d at 466. The prosecution can only bargain on the sentence to be imposed and has no say on the MSR term which is applied in accordance with the classification of felony to which defendant has pled guilty. *Davis*, 403 Ill. App. 3d at 466. Thus, where defendant was sentenced in accordance with the plea agreement and was advised that he would be required to serve a term of MSR, we find that he failed to present a substantial showing of a due process violation requiring an evidentiary hearing (*People v. Rissley*, 206 Ill. 2d 403, 412 (2003)), and we affirm the denial of his post-conviction petition (*Hunter*, ¶23).

¶ 12 Defendant contends, in the alternative, that the three-year term of MSR that attached to his

Class X sentence is void and should be reduced to two years because he was convicted of a Class 1 felony offense. Although a void sentence can be challenged at any time, we review the sentence to assess whether it is in fact void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008). For the reasons that follow, we find that it is not.

¶ 13 Section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2008)) provides that the MSR term for a Class X felony is three years and two years for a Class 1 felony. Since defendant was convicted of a Class 1 felony, he maintains that he is only subject to a two-year term of MSR, relying on *People v. Pullen*, 192 Ill. 2d 36 (2000). *Pullen*, however, has been fully addressed by this court and found not to change the conclusion that a defendant sentenced as a Class X offender shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies. *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); accord *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011). We agree with these decisions, and likewise conclude that the three-year MSR term is part of the sentence. *Lee*, 397 Ill. App. 3d at 1073. We also find, contrary to defendant's contention, that the rule of lenity does not apply here where there is no ambiguity and sections 5-8-1 and 5-5-3(c)(8) of the Code (730 ILCS 5/5-8-1, 5-5-3(c)(8) (West 2008)) can be read together in a consistent and harmonious manner. *Lee*, 397 Ill. App. 3d at 1069-70.

¶ 14 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.