

2011 IL App (1st) 102283-U

FOURTH DIVISION
NOVEMBER 10, 2011

No. 1-10-2283

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).

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 16726
)	
RALPH FLOWERS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition affirmed where the record rebuts his claim that the trial court's admonishment regarding the requisite MSR term before accepting his plea of guilty fell short of constitutional requirements.

¶ 2 Defendant Ralph Flowers appeals from the second-stage dismissal of his 2008 petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the circuit court erred in dismissing his petition because the trial court's admonition regarding the term of mandatory supervised release (MSR) that attached to his

negotiated sentence fell short of the due process requirements announced in *People v. Whitfield*, 217 Ill. 2d 177 (2005), and clarified in *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 3 The record shows that on April 17, 2006, defendant entered into a fully negotiated plea of guilty to one count of aggravated battery with a firearm in exchange for the State's dismissal of two other charges and the recommendation of a sentence of six years' imprisonment. After acknowledging the plea agreement between the parties, the trial court advised defendant that this was a Class X felony, punishable by a prison term up to 30 years, and up to 60 years if he was eligible for an extended term. The trial court asked defendant if he understood that he "can be fined up to \$25,000 and be given a period of mandatory supervised release or parole for a period of three years," and defendant responded, "yes." Defendant also indicated that he understood the consequences of pleading guilty, and after he stipulated to the factual basis for the plea, the trial court accepted defendant's plea of guilty to aggravated battery with a firearm, entered a judgment of conviction upon it, and sentenced him in accordance with the negotiated plea. Although he was advised of his right to appeal and how to perfect it, defendant did not attempt to do so.

¶ 4 Defendant subsequently retained private counsel who, on December 18, 2008, filed the subject petition pursuant to the Act, "to vacate [defendant's] plea." As relevant to this appeal, defendant alleged that the trial court's failure to admonish him, as required by Supreme Court Rule 402 (eff. July 1, 1997), that a three-year MSR term would be added to the sentence he had agreed to, was a unilateral modification and breach of the plea agreement by the State, inconsistent with constitutional concerns of fundamental fairness.

¶ 5 Because the circuit court did not address the petition within the required 90-day period for summary dismissal, it was advanced to the second stage of proceedings, where post-conviction counsel filed an amended petition, alleging, in pertinent part, that defendant was not admonished that the three-year MSR term would be in addition to his negotiated sentence, "but

rather that it *could* be." (Emphasis added.) The State filed a motion to dismiss, which the circuit court granted on June 14, 2010, finding, pursuant to *Morris*, that the trial court's plea admonitions substantially complied with the requirements of Supreme Court Rule 402. Defendant now appeals that dismissal, and our review is *de novo*. *People v. Dent*, 408 Ill. App. 3d 650, 652 (2011).

¶ 6 In this court, defendant asserts that the trial court's mere mention of the three-year MSR term in the context of the potential penalties was insufficient to inform him that it would apply to his actual sentence. He argues that under *Whitfield* and *Morris*, the trial court's failure to "connect" the MSR term to his actual sentence deprived him of the benefit of his bargain with the State and violated due process. He thus requests that the MSR term be stricken.

¶ 7 As an initial matter, we note, and reject, the State's contention that defendant has forfeited the MSR issue because he was informed about the MSR term that would follow his prison term and failed to present it at his first opportunity. This court has found that the doctrines of waiver and *res judicata* apply to appeals from the denial of post-conviction petitions only in cases where a petitioner has previously taken a direct appeal from a judgment of conviction. *People v. Miranda*, 329 Ill. App. 3d 837, 842 (2002), and cases cited therein. Because defendant did not take a direct appeal from the judgment entered on his conviction, the doctrine of waiver is inapplicable, and we turn to the merits of defendant's appeal. *Miranda*, 329 Ill. App. 3d at 842-43; accord *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007).

¶ 8 In *Whitfield*, 217 Ill. 2d at 195, the supreme court held that there is no substantial compliance with Supreme Court Rule 402 (eff. July 1, 1997) and that due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise him, prior to accepting his guilty plea, that a MSR term will be added to that sentence. The constitutional challenges, which stem from a trial court's failure to admonish on MSR, focus

on matters that occur prior to the trial court's acceptance of a defendant's guilty plea. *People v. Davis*, 403 Ill. App. 3d 461, 465 (2010).

¶ 9 Subsequently, in *Morris*, 236 Ill. 2d 367, the supreme court clarified that "*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." The supreme court observed that an admonition that mentions the term "MSR" without placing it in some relevant context cannot serve to advise defendant of the consequences of his guilty plea and cannot assist him in making an informed decision. *Morris*, 236 Ill. 2d at 366. However, the supreme court noted that "there is no precise formula in admonishing a defendant of his MSR obligation," and that an admonition must be read "in a practical and real sense." *Morris*, 236 Ill. 2d at 366.

¶ 10 Here, after the plea agreement of six years in the penitentiary had been reached between defendant and the State, and before accepting his guilty plea, the trial court admonished defendant of the three-year MSR term, which reinforces, "in a practical and realistic sense," that defendant was placed on notice "that his debt to society for the crime he admits to having committed extends beyond fulfilling his sentence to the penitentiary." *People v. Davis*, 403 Ill. App. 3d 461, 465 (2010). Under *Whitfield*, a constitutional violation arises only if the trial court makes no mention to defendant before he pleads guilty that he must serve an MSR term in addition to the sentence agreed upon in exchange for his guilty plea. *Davis*, 403 Ill. App. 3d at 466.

¶ 11 We acknowledge the split of authority, cited by defendant, on the issue of whether the mere mention of MSR at the guilty plea hearing satisfies the requirements of *Whitfield*. However, in *Davis*, 403 Ill. App. 3d at 467, this court considered the issue settled by its decision in *People v. Marshall*, 381 Ill. App. 3d 724 (2008), which was cited with approval by the supreme court in *Morris*, 236 Ill. 2d at 367. In *Marshall*, this court found that the requirements

of Supreme Court Rule 402 (eff. July 1, 1997) and due process were met where the judge did not mention MSR at sentencing or in the written sentencing judgment, but did advise defendant of the requirement before accepting his guilty plea. *Marshall*, 381 Ill. App. 3d at 736.

¶ 12 Consistent with *Marshall*, a defendant, as here, who negotiates a specific sentence in exchange for his plea of guilty before the plea hearing is conducted, receives the full bargain made with the State upon receiving that sentence. *Davis*, 403 Ill. App. 3d at 466. Although we recognize that the "better practice would incorporate the mandatory supervised release admonition when the specific sentencing is announced" (internal quotation marks omitted) (*Morris*, 236 Ill. 2d at 367), we find that the admonition in the instant case comports with those in *Marshall* and *Davis*, and that defendant's claim to the contrary is rebutted by the record. *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 19. Because defendant received the full bargain made with the State and the MSR admonition at his guilty plea hearing satisfied the requirements of *Whitfield*, we find no due process violation and reject defendant's request to strike the MSR term of his sentence (*People v. Benford*, 345 Ill. App. 3d 751, 752-53 (2004)).

¶ 13 Accordingly, we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 14 Affirmed.