2012 IL App (1st) 110802-U

SIXTH DIVISION
SEPTEMBER 28, 2012

No. 1-11-0802

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. 97 CR 16972
	)	
EDWARD LOPEZ,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Hall and Garcia concurred in the judgment.

O R D E R

¶ 1 *Held*: An MSR term is set by statute without regard to whether the period is expressly attached by the sentencing court to the term of imprisonment.

¶ 2 In 1999, defendant Edward Lopez was convicted of first degree murder and aggravated battery with a firearm by a jury, then sentenced to consecutive, respective terms of 35 and 7 years in the Illinois Department of Corrections, followed by 3 years of mandatory supervised release. He now appeals, *pro se,* from an order of the circuit court of Cook County dismissing, *sua sponte*, his *pro se* petition for *mandamus* relief (735 ILCS 5/14-101 *et seq.* (West 2008)). The

only issue raised on this appeal is a challenge to the imposition of his three-year term of mandatory supervised release (MSR).

¶ 3 BACKGROUND

¶ 4 Defendant appeals the denial of his *pro se* petition for *mandamus* relief from the trial court. The only issue raised on this appeal is a challenge to the imposition of his three-year MSR term. Defendant is serving a total of 42 years in the Illinois Department of Corrections, followed by three years of mandatory supervised release. On August 20, 1996, four teenage boys and girls were sitting in a parked vehicle when defendant and another offender fired several shots into the vehicle. One boy died from multiple gunshot wounds, and another was shot in the knee. Three of the teenagers in the vehicle identified defendant as one of the two shooters. A jury found defendant guilty of committing first degree murder and aggravated battery with a firearm. (720 ILCS 5/9-1(A)(1), 12-4.2(A)(1) (West 2012)). The trial court sentenced defendant to 35 years for first degree murder to be served consecutively with a 7-year sentence for aggravated battery. Defendant's sentence automatically included an additional three years' MSR term. (730 ILCS 5/5-8-1(d)(1) (West 2006)).

¶ 5 Since the only issue on this appeal is the imposition of a MSR term and there are no facts at issue with respect to defendant's underlying conviction, we will not set forth the evidence at trial. Instead we will provide a short summary of the procedural history of defendant's case. On the direct appeal from his conviction, defendant argued that he was denied his right to a fair trial claiming that his: (1) Sixth Amendment right to confrontation was violated when the trial court limited his cross-examination of a police officer; (2) that the State misstated the evidence during both its rebuttal and closing arguments; and (3) that the court admitted morgue photographs of the crime scene into evidence that prejudiced the jury. Defendant also argued that his sentence was improper because: (1) the trial court sentenced him on the wrong charge; (2) the trial court erred in sentencing him to consecutive sentences; and (3) that the imposition of consecutive

sentences is unconstitutional. On March 29, 2009, we affirmed defendant's 1999 convictions for first degree murder and aggravated battery with a firearm, but remanded the case to the trial court for clarification of the sentence imposed. *People v. Lopez*, No. 1-99-2029 (2002) (unpublished order under Supreme Court Rule 23). On remand, the trial court again resentenced defendant to consecutive terms of 35 and 7 years' imprisonment, and defendant's subsequent appeal from that judgment was dismissed on defendant's motion. *People v. Lopez*, No. 1-03-2853 (2004) (dispositional order).

¶ 6 Defendant then filed a number of unsuccessful collateral challenges to the judgment entered on his convictions. The chronology of these *pro se* postconviction petitions and petitions for relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), are set forth in *People v. Lopez*, No. 1-08-0470 (2009) (unpublished order under Supreme Court Rule 23).

¶ 7 On June 22, 2009, defendant moved for leave to file his fifth *pro se* postconviction petition in which he alleged ineffective assistance of trial and appellate counsel and challenged the constitutionality of consecutive sentencing. The trial court reviewed his petition and dismissed. The trial court found that the postconviction claims were barred by *res judicata* because they had already been raised, and that they failed to satisfy the cause and prejudice test required to file a successive petition. Defendant appealed this dismissal, but his appointed counsel filed a motion for leave to withdraw based on a legal opinion that an appeal would be without arguable merit, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Defendant then filed a *pro se* response, opposing counsel’s motion to withdraw. This court found no issue of arguable merit could be raised on appeal. As a result, we granted counsel’s motion for leave to withdraw and affirmed the order of the trial court.

¶ 8 ANALYSIS

¶ 9 In this court, defendant contends that the circuit court erred in dismissing his *mandamus* petition, where he sought to compel the circuit court to incorporate the applicable three-year term of mandatory supervised release into his 42-year prison sentence as a 3-year reduction. Defendant frames this issue as involving an "as applied" challenge to the constitutionality of the MSR statute (730 ILCS 5-8-1(d) (West 2006)), arguing that the statute is ambiguous and void for vagueness, deprives prisoners of credit for time spent/served in MSR custody, thereby "increasing" the judicially imposed sentence in violation of the prohibition against cruel and unusual punishment, and illegally delegates authority to the Department of Corrections (DOC), an agency of the executive branch, in violation of the separation-of-powers doctrine.

¶ 10 Notwithstanding defendant's characterization of his challenge to the pertinent statute (see *People v. One 1998 GMC,* 2011 IL 110236, ¶ 98 (Karmeier, J., specially concurring) ("we are not automatically bound by the parties' conception of the nature of a statute's constitutional infirmity"), we find his substantive assertions without merit. It is evident from the plain language of section 5-8-1(d) that the MSR term is a mandatory component of defendant's sentence. *People v. Hunter,* 2011 IL App (1st) 093023, ¶ 23. Except where a term of life imprisonment is imposed, "every sentence shall include as though written therein a term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d) (West 2006). Thus, even a defendant, as here, who was convicted of first degree murder and aggravated battery with a firearm must serve 100% of the prison sentence imposed by the trial court with no good conduct credit, and must serve a three-year MSR term after serving his "entire sentence." 730 ILCS 5/3-6-3(a)(2)(i) (West 1998); *Hunter,* 2011 IL App (1st) 093023, at ¶ 23.

¶ 11 The fact that the trial court did not "verbally order" him to serve a three-year MSR term or enter a written order to that effect does not necessitate the conclusion that the MSR term was added to his sentence by DOC, as opposed to the trial court. *Cf. People v. Munoz,* 2011 IL App

(3d) 100193, ¶ 2 (the trial court's written sentencing judgment reflected a two-year MSR term, but DOC inmate records listed defendant's MSR terms as otherwise). MSR relates to a term of imprisonment by statutory requirement "without regard to whether the period is expressly attached by the sentencing court to the term of imprisonment." *People v. Brown,* 296 Ill. App. 3d 1041, 1043 (1998). Because the MSR term attaches by operation of law (*People v. Morgan,* 128 Ill. App. 3d 298, 300 (1984)), defendant's sentence included a three-year MSR term to be served upon his release from prison. *Hunter,* 2011 IL App (1st) 093023, at ¶ 23. As such, this term was not added to his sentence by DOC, and his assertion that his sentence was increased by DOC in violation of the separation of powers clause of the Illinois Constitution (Ill. Const., art. II, § 1) is without merit. *Hunter,* 2011 IL App (1st) 093023, ¶ 23.

¶ 12 When construing a statute, our "primary objective *** is to ascertain and give effect to the intent of the legislature." *People v. Robinson*, 172 Ill. 2d 452, 457 (1996) (citing *People v. Zaremba,* 158 Ill. 2d 36, 40 (1994)). The most reliable indicator of legislative intent is the language of the statute itself. "[T]he best evidence" of the legislature's true intent is "the language used in the statute itself." *People ex rel. Devine v. Sharkey*, 221 Ill. 2d 613, 617 (2006). The statutory language must be given its plain and ordinary meaning, (*People v. Robinson*, 172 Ill. 2d at 457 (citing *People v. Bole,* 155 Ill. 2d 188, 197 (1993))), and where that language is clear and unambiguous, we must apply the statute without further aids of statutory construction (*Bole,* 155 Ill. 2d at 198). Any ambiguities in a criminal statute must be resolved in favor of the defendant. *People v. Foster,* 99 Ill. 2d 48, 55.

¶ 13 *Mandamus* is an extraordinary remedy traditionally used to compel a public official to perform a ministerial duty. *People ex rel. Madigan v. Snyder*, 208 Ill. 2d 457, 464-65 (2004). "Generally, a writ of *mandamus* will be awarded only if a plaintiff establishes a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to

comply with the writ." *People ex rel. Madigan v. Snyder*, 208 Ill. 2d at 464-65 (citing *People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 398 (2001).

¶ 14 CONCLUSION

¶ 15 In light of defendant's failure to demonstrate a clear right to anything close to the relief he requested under *mandamus* (*Owens v. Snyder,* 349 Ill. App. 3d 35, 44-45 (2004)), we affirm the order of the circuit court of Cook County dismissing his petition.

¶ 16 Affirmed.