2013 IL App (2d) 120749-U
No. 2-12-0749
Order filed November 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROOSEVELT McCRAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kendall County. Nos. 11-CF-73 11-CM-222 Honorable John A. Barsanti, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Because defendant entered a nonnegotiated guilty plea, he was not entitled to a benefit-of-the-bargain remedy under *Whitfield* for the trial court's failure to admonish him of an applicable MSR term.

¶ 2 Defendant, Roosevelt McCray, entered a nonnegotiated plea of guilty to a single count each of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(G) (West 2010)), driving while his license was revoked (DWLR) (625 ILCS 5/6-303(d) (West 2010)), and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)), and was sentenced to concurrent extended

term sentences of four years' imprisonment. Defendant also pleaded guilty to certain misdemeanors and was sentenced to time served. Other misdemeanor charges were nol-prossed. Defendant argues on appeal that his prison term for domestic battery must be reduced to three years. We affirm.

¶ 3 Prior to accepting defendant's plea, the trial court advised him that, if he was eligible for extended-term sentencing, he could be imprisoned for a period of up to six years and that upon completing his prison terms he would be required to serve a one-year term of mandatory supervised release (MSR). In actuality, because defendant was convicted of *felony* domestic battery, he was required to serve a four-year MSR term for that offense. 730 ILCS 5/5-8-1(d)(6) (West 2010). When the trial court imposed sentence, it correctly stated the applicable MSR term for the domestic battery conviction, and the correct term is set forth in the sentencing order.

¶ 4 Defendant contends that, because he entered his guilty plea after receiving admonishments indicating that the maximum combined duration of the prison term and MSR term he faced was seven years, his right to due process of law was violated when the trial court later sentenced him to prison and MSR terms totaling eight years. He argues that, pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005), the appropriate remedy is to reduce the length of his prison term for domestic battery by one year. Significantly, this is the only remedy defendant seeks.

¶ 5 Before proceeding, we note that defendant has completed his prison term. The State argues that defendant's release from prison renders the issue raised on appeal moot. In *People v. Porm*, 365 Ill. App. 3d 791, 794 (2006), it was held that reduction of the defendant's prison term pursuant to *Whitfield* was no longer available as a remedy after the defendant had been released from prison. The *Porm* court observed that "[a]t this date, there is no sentence remaining to modify as it has been discharged; only the MSR period remains." *Id.* at 795. The *Porm* court therefore concluded that the

defendant's claim for relief pursuant to *Whitfield* was moot. *Id.* In contrast, however, in *People v. Lieberman*, 332 Ill. App. 3d 193 (2002), it was held that a challenge to the length of a prison term is not moot before the defendant completes his or her MSR term. See also *People v. Elizalde*, 344 Ill. App. 3d 678, 681 (2003), *overruled in part on other grounds*, *People v. Graves*, 235 Ill. 2d 244 (2009)).

¶ 6 At present, it is unnecessary to resolve the conflict between *Porm*, on the one hand, and *Lieberman* and *Elizalde* on the other: even if the latter cases are correct, defendant is not legally entitled to the relief he seeks. As noted, defendant relies on our supreme court's decision in *Whitfield* as authority that his prison term must be reduced. In *Whitfield*, our supreme court recognized that a defendant's right to due process is violated when he or she pleads guilty in exchange for a specific sentence, but receives "a different, more onerous sentence than the one he agreed to." *Whitfield*, 217 Ill. 2d at 189. In *Whitfield*, the defendant pleaded guilty in exchange for a 25-year prison term. At no time during the hearing at which the defendant entered his plea was he informed that he would also be required to serve a three-year MSR term. The defendant's argument, as stated by the *Whitfield* court, was that "because no [MSR] admonishment was given, his plea agreement, *as evinced by the record*, was that he would receive a maximum sentence of 25 years' imprisonment." (Emphasis added.) *Id.* at 186. The *Whitfield* court agreed:

> "[D]efendant pled guilty pursuant to a negotiated plea agreement. The terms of the plea agreement, as set forth by the prosecutor at the plea hearing, included a specific sentence of 25 years. The trial court ratified this agreement and failed to admonish defendant, as required by Supreme Court Rule 402, that a mandatory supervised release term would be added to the sentence defendant had agreed to. Under these circumstances, we conclude that

> adding the statutorily required three-year MSR term to defendant's negotiated 25-year sentence amounts to a unilateral modification and breach of the plea agreement by the State, inconsistent with constitutional concerns of fundamental fairness." *Id.* at 190.

The *Whitfield* court held that, because the term of MSR may not be stricken from the defendant's sentence, the remedy that most closely approximates the defendant's bargain with the State is to reduce the defendant's prison term by a period equal in length to the MSR term. *Id.* at 203. Thus, in *Whitfield*, where the defendant pleaded guilty in exchange for a 25-year prison term and was not told that he would also have to serve a 3-year term of MSR, the court reduced the prison term by 3 years so that the sum of the prison term and the MSR term equaled 25 years.

¶ 7 Defendant acknowledges that he did not raise a due-process argument based on *Whitfield* in his motion to reconsider his sentence and that he therefore forfeited the argument. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006) ("Upon appeal [from a judgment entered upon a plea of guilty] any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived."). However, because "a lower court's failure to give a defendant the admonishments required by Rule 402 has been held to be plain error" (*People v. Blankley*, 319 Ill. App. 3d 996, 1007 (2001)), we may take consider the argument, notwithstanding defendant's forfeiture (see Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 8 Quoting *Whitfield*, 217 Ill. 2d at 195, defendant argues that his "due process rights were violated as he received a 'more onerous' sentence than the one he had 'agreed to at the time of the plea hearing.' " The obvious problem with the argument is that defendant had not entered into any agreement concerning the sentence he would receive. Before the trial court accepted defendant's guilty plea, the court and defendant engaged in the following exchange:

"THE COURT: I'm being told that you're gonna plead cold or blind as we call it. What that means is that you are pleading guilty with no agreement as to what your punishment or your sentence is going to be. Is that what your understanding is also?

THE DEFENDANT: Yes.

THE COURT: So as you stand here today, you're gonna plead guilty but you do not know what your sentence is; is that right?

THE DEFENDANT: That's correct.

THE COURT: And that your sentence will be determined by the Court at a sentencing hearing. Do you understand that?

THE DEFENDANT: Yes."

There can be no benefit of the bargain without a bargain. Thus, in *People v. Snyder*, 2011 IL 111382, our supreme court made clear that *Whitfield*'s benefit-of-the-bargain theory does not extend to cases in which there is no agreement as to the defendant's sentence. In *Snyder*, the defendant relied on *Whitfield* in support of her argument that, because the trial court had not admonished her that her guilty plea would result in entry of an order of restitution, that order should be vacated. Because the defendant's agreement with the State was that certain charges would be dismissed, and they were, the defendant "received the full 'benefit' of her bargain." *Id.* ¶ 30. The same is true here.

¶ 9 In his reply brief, defendant attempts to distinguish this case from *Snyder* on the basis that in *Snyder* trial court neglected to mention a feature of the defendant's sentence (restitution), whereas here the trial court made a misstatement about a feature of defendant's sentence (the length of the MSR term). Defendant insists that the State should have corrected the trial court's misstatement, and that by failing to do so it "essentially acquiesced" to a cap on defendant's sentence. This

reasoning represents a considerable expansion of *Whitfield*, which proceeded from the defendant's argument that MSR was not part of the plea agreement "as evinced by the record." *Whitfield*, 217 Ill. 2d at 186. In this respect, *Whitfield* was concerned with the *interpretation* of a contract (the plea agreement), not with the *formation* of that contract. There was no question in *Whitfield* that the defendant and the State had reached an agreement about the defendant's sentence. Here, in contrast, although defendant was misled about the consequences of his plea, the record quite clearly evinces his understanding that he had no agreement with the State concerning his sentence and that the full range of penalties provided for by law was applicable. Plea agreements are generally governed by contract law. See *People v. Absher*, 242 Ill. 2d 77, 87-88 (2011). A meeting of the minds is the essence of a contract. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 51. "[I]t is the objective manifestation of intent that controls whether a contract has been formed." *Id.* In this case, there is no objective manifestation of an intent to form a contract. The prosecutor's failure to correct the trial court's admonishment does not reflect any intent to enter into an agreement with defendant about sentencing, and, as seen, defendant was quite clear that he did not believe that the parties had entered into any such agreement. In the absence of a plea agreement, defendant has no right to insist upon a particular sentence. If he would not have pleaded guilty but for the incorrect admonishment, defendant should have moved to withdraw his plea. *Snyder*, 2011 IL 111382, ¶ 32. Because he did not do so, there is no basis for relief from sentence.

¶ 10 For the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 11 Affirmed.