2014 IL App (3d) 120291-U

Order filed March 14, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0291
v.	)	Circuit No. 99-CF-81
	)	
DERRICK M. McGEE,	)	Honorable Richard C. Schoenstedt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order dismissing defendant's section 2-1401petition as untimely is affirmed. The MSR term being challenged was not void because the mandatory MSR term was to be applied even if not specifically written into the trial court's sentencing order.

¶ 2 A jury found defendant, Derrick M. McGee, guilty of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 1998)), aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 1998)), and aggravated battery (720 ILCS 5/12-4(a) (West 1998)). He was sentenced to 24, 8, and 5-year terms of imprisonment, respectively. On direct appeal, this court reversed defendant's conviction and vacated his sentence for aggravated vehicular hijacking. *People v.*

McGee, 326 Ill. App. 3d 165 (2001). Defendant is serving the remaining consecutive sentences of 24 years of imprisonment for aggravated criminal sexual assault and 5 years of imprisonment for aggravated battery.

¶ 3 Defendant filed a petition for relief for judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) that was dismissed. Defendant later filed an untimely second petition for relief from judgment. In the second petition, defendant argued for the first time that the three-year term of mandatory supervised release (MSR) following his prison sentence is void as having been improperly imposed by the Illinois Department of Corrections (DOC). The circuit court granted the State's motion to dismiss the petition as untimely, reasoning that the MSR term was proper and not void. We affirm.

¶ 4 FACTS

¶ 5 On May 4, 2000, following a jury trial, defendant was found guilty of aggravated criminal sexual assault, aggravated vehicular hijacking, and aggravated battery. On August 8, 2000, defendant was sentenced to 24 years of imprisonment for the Class X felony of aggravated criminal sexual assault to run consecutively to concurrent terms of 8 years of imprisonment for the Class X felony of aggravated vehicular hijacking and 5 years of imprisonment for the Class 3 felony of aggravated battery. In sentencing defendant, the trial court did not verbally order or indicate in its written order that a three-year term of MSR would follow defendant's prison terms. After defendant was sentenced, he moved for reconsideration of his sentence because he received "considerably more time" than any of his three codefendants. The circuit court denied defendant's motion to reconsider.

¶ 6 On direct appeal, this court reversed defendant's conviction for aggravated vehicular hijacking and affirmed the remaining convictions and sentences. *McGee,* 326 Ill. App. 3d 165. On June 4, 2002, a new sentencing order was filed in the circuit court reiterating defendant's

consecutive sentences of 24 years of imprisonment for aggravated criminal sexual assault and 5 years of imprisonment for aggravated battery. There was no mention of MSR.

¶ 7 On April 14, 2004, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2004)), regarding issues unrelated to MSR. The circuit court dismissed the petition as frivolous, and this court affirmed. *People v. McGee,* No. 3-04-0436 (2006) (unpublished order under Supreme Court Rule 23).

¶ 8 On December 22, 2008, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)), regarding issues unrelated to the MSR term. The circuit court dismissed the petition. On appeal, we allowed the State Appellate Defender to withdraw from representing defendant on appeal pursuant to *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *People v. McGee,* No. 3-09-0375 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On January 20, 2012, defendant filed a second petition for relief from judgment. In the petition, defendant argued that the three-year MSR term was void because the trial court failed to order the MSR at the sentencing hearing or in its written order. Defendant contended that the MSR term was imposed by the DOC subsequent to the circuit court's sentencing order and the DOC was without authority to do so. The State filed a motion to dismiss the petition. The circuit court granted the State's motion to dismiss the petition, reasoning that the MSR term was not void and, therefore, the petition was untimely.

¶ 10 Defendant appealed.

¶ 11 ANALYSIS

¶ 12 Defendant appeals the trial court's dismissal of his second petition for relief from judgment as untimely. Defendant contends the MSR term was void because the DOC

improperly increased his sentence by imposing a three-year MSR term without having the authority to do so.

¶ 13 The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court that, if known at the time of judgment, would have precluded its entry. *People v. Haynes,* 192 Ill. 2d 437 (2000). Generally, a section 2-1401 petition must be filed not later than two years after the entry of the order of judgment. 735 ILCS 5/2-1401(c) (2012). However, a void judgment may be challenged at any time with a section 2-1401 petition. *People v. Harvey,* 196 Ill. 2d 444 (2001). The dismissal of a petition for relief from judgment on the pleadings or dismissal for failure to state a cause of action is reviewed *de novo. People v. McChriston,* 2014 IL 115310; *People v. Vincent,* 226 Ill. 2d 1 (2007).

¶ 14 In this case, in order to determine whether the petition was properly dismissed as untimely, we must determine whether the petition was void. Defendant argues that "because the trial court did not impose [his] MSR term, the DOC's imposition of the MSR term violates the Separation of Powers Clause of the Illinois Constitution, as well as [his] federal constitutional right to due process."

¶ 15 I. Separation of Power

¶ 16 Defendant contends that it was a violation of separation of powers for the DOC to impose the MSR term where only the trial court had the authority to sentence defendant. The Illinois Constitution provides, "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. "[T]he power to impose sentence is exclusively a function of the judiciary." *McChriston,* 2014 IL 115310, ¶ 8 (quoting *People v. Phillips,* 66 Ill. 2d 412, 415 (1977)).

¶ 17 When defendant was sentenced in 2000, the Unified Code of Corrections (Code) provided, "[e]xcept where a term of natural life 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 2000). The Code in 2000 also indicated that the MSR term for a Class X felony was three years. 730 ILCS 5/5-8-1(d)(1) (West 2000). In addressing a separation of powers argument similar to the one in this case, our supreme court recently construed the meaning of the " 'as though written therein' " provision. *McChriston,* 2014 IL 115310, ¶ 17 (quoting 730 ILCS 5/5-8-1(d) (West 2004)).[1] The court held that the language meant that "the sentence shall include a period of MSR as if it were written within the sentence" even if the court did not mention the MSR term at the sentencing hearing or in the sentencing order. *McChriston,* 2014 IL 115310, ¶ 17.

¶ 18 In *McChriston,* our supreme court looked to the legislative history of a 2011 amendment of section 5-8-1(d)(1), noting that an amendment to a statute may be an appropriate source to determine legislative intent of a statute as it previously existed. *McChriston,* 2014 IL 115310, ¶ 18. The 2011 amendment "remove[d] the phrase 'as though written therein' to require that the MSR term 'shall be written as part of the sentencing order.' " *McChriston,* 2014 IL 115310, ¶ 19 (quoting 730 ILCS 5/5-8-1(d) (West 2004) and 730 ILCS 5/5-8-1(d) (West 2012)). According to the supreme court, the plain and ordinary meaning of "as though written therein" suggests that the mandatory MSR term is to be applied even if not specifically written in the sentencing order, while the amended language "requires that the court explicitly write the applicable MSR term into the order." *McChriston,* 2014 IL 115310, ¶ 19.

¶ 19 Our supreme court noted that the legislative discussion surrounding the 2011 amendment provides additional support for interpreting the "as though written therein" language as meaning

[1] Although *McChriston* addressed the 2004 version of section 5-8-1(d), the language therein is identical to the 2000 version applicable in this case.

that the mandatory MSR term is to be applied even if not specifically written in the sentencing order. *McChriston,* 2014 IL 115310. During the House of Representatives floor debate regarding the 2011 amendment, Representative Cunningham noted that the amending Bill was an initiative of the DOC to change the Code to require judges to enter the specific length of MSR that each inmate needs to serve after their sentence is complete because " '[t]hey're not required to do that right now, creates confusion sometimes at intake for the [DOC], and they have to contact a sentencing judge as frequently to make sure they enter the right parole information into their record system.' " *McChriston*, 2014 IL 115310, ¶ 20 (quoting 97th Ill. Gen. Assem., House Proceedings, May 17, 2011, at 48 (statement of Representative Cunningham)).

¶ 20 Additionally, our supreme court noted that reading the language "as though written therein" as suggested by defendant to mean that the MSR term was not included as part of the sentence if it was not ordered by the circuit court would make the phrase superfluous. *McChriston,* 2014 IL 115310. Under defendant's position, the phrase "as though written therein" would serve no purpose in the statute if the judge was required to write the MSR term in the sentencing order. *Id.*

¶ 21 "The plain language of section 5-8-1(d) at the time of defendant's sentencing was unambiguous and provided that the MSR term be automatically included as part of defendant's sentence and the DOC did not add onto defendant's sentence when it enforced the [statutorily mandated] MSR term." *Id.* ¶ 23. As did our supreme court in *McChriston,* we hold that defendant's separation of powers argument fails.

¶ 22 II. Due Process

¶ 23 Defendant also claims that the DOC administratively increased his sentence beyond the trial court's order in violation of his federal due process rights. See U.S. Const., amend. XIV. Defendant's argument is that while the legislature may determine the appropriate sentences,

including supervised release, only a court can enter a judgment of confinement because an administrative agency lacks the authority to do so. See *People v. Munoz*, 2011 IL App (3d) 100193 (vacating the term of MSR imposed by the DOC and remanding to the trial court with directions to impose MSR as provided under section 5-8-1(d) of the Code).

¶ 24 In this case, a statute mandated that defendant serve a three-year term of MSR. Therefore, the trial court had no discretionary power as to whether the MSR would be imposed. *McChriston*, 2014 IL 115310. The enforcement of the mandatory MSR term was not an increase in sentencing because the MSR term attached automatically "as though written into defendant's sentence. " *Id.* ¶ 31. Therefore, defendant's due process argument also fails.

¶ 25 Consequently, defendant's three-year MSR term was not void, and we affirm the trial court's dismissal of defendant's second petition for relief from judgment as untimely.

¶ 26 CONCLUSION

¶ 27 For the forgoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.