NO. 4-09-0700 Filed 1/18/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SHELDON D. PITTMAN, Defendant-Appellant.	)))))))	Appeal from Circuit Court of Vermilion County No. 06CF522 Honorable Craig H. DeArmond, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

Held: Where defendant was properly admonished at his guilty-plea hearing as to the requirement that he serve a term of mandatory supervised release (MSR) after the completion of his prison sentence, the trial court did not err in granting the State's motion to dismiss his postconviction petition.

In March 2007, defendant, Sheldon D. Pittman, pleaded guilty to one count of unlawful possession of a controlled substance with intent to deliver, and the trial court sentenced him to 10 years in prison. In May 2009, defendant filed an amended postconviction petition. In September 2009, the court granted the State's motion to dismiss.

On appeal, defendant argues he was denied due process when he was not advised that an MSR term would be added to his fully negotiated sentence. We affirm.

I. BACKGROUND

In September 2006, the State charged defendant by information with one count of possession of a controlled substance (720 ILCS 570/402(a)(2)(A) (West 2006)), alleging he knowingly possessed more than 15 grams but less than 100 grams of a substance containing cocaine. The State also charged him with one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2006)), alleging he knowingly possessed with intent to deliver 15 grams but less than 100 grams of a substance containing cocaine.

In March 2007, defendant pleaded guilty pursuant to a negotiated plea agreement. During the hearing, the following exchange occurred:

> "THE COURT: All right. Gentlemen, are we dealing with the original [i]nformation which is a two-count possession of a controlled substance and possession with intent as a Class X?
>
> MR. MERLIE [defense counsel]: I believe it's possession with intent, Your Honor.
>
> MR. MILLS [Assistant State's Attorney]: Yes, Your Honor.
>
> * * *
>
> THE COURT: Tell me what your plea is?
>
> MR. MERLIE: He's going to plead guilty

to the charge, Your Honor, be for a maximum of 10 years.

MR. MILLS: Flat.

MR. MERLIE: Flat 10 years.

MR. MILLS: Flat 10 or max of 20.

THE COURT: What's he want?

MR MERLIE: Flat 10.

THE COURT: Probably safer.

MR. MERLIE: I would imagine.

THE COURT: Then the Class 1 charge is going to be dismissed?

MR. MERLIE: Yes, Your Honor.

MR. MILLS: It would merge in any case.

THE COURT: Thank you. Let me ask you a little bit to educate me again, if you would. The Class X, of course, would be non-probationable; and he could be looking there at 6 to 30 years without extended term possibility.

MR. MILLS: Yes, Your Honor.

MR. MERLIE: That's correct, Your Honor.

THE COURT: Extended terms would take it up to the possibility of 60 years. Mandatory supervised release on a Class X is three

years, sir, and the fine up to $25,000. So that's all the options the court has with that Class X.

The Class 1 that is being dismissed, I would just tell you that could be 4 to 15 years in the Department of Corrections; and if extended terms applied on that, it could go up to 30. You're non-probationable in any event, is that correct?

MR. MILLS: Yes, Your Honor.

MR. MERLIE: Yes, Your Honor.

MR. MILLS: On either count.

MR. MERLIE: That's correct, Your Honor.

THE COURT: On either count. So you have no options for any probation. You're certainly looking at a longer stint in the Department of Corrections if left to the discretion of the court.

Your lawyer tells me that you're interested in pleading guilty to the charge of possession with intent for a flat 10 years in the Department of Corrections. Is that right?

THE DEFENDANT: Yes, ma'am."

The court admonished defendant as to his various trial rights and heard the State's factual basis. After asking defendant if he still wanted to go ahead with the plea, he responded in the affirmative. The court then stated, in part, as follows:

> "Okay. In a way, I'm kinda relieved, too, sir. I'm going to go ahead and accept your plea because there is a factual basis, and I'm going to find that it's knowingly and voluntarily made. Finding and judgment will enter. And you are going to prison today or as soon as they are able to transport you, and that's for a flat 10 years in the Department of Corrections."

The MSR term was not listed in the written judgment and sentence order.

In March 2008, defendant filed a *pro se* motion for relief from judgment, alleging ineffective assistance of counsel and the failure to admonish him on the MSR term. Defendant requested "reentry into the community program." In April 2008, the trial court denied the motion, finding the relief requested was not properly granted in a *habeas-corpus* proceeding. Defendant appealed, and this court dismissed the appeal and remanded for further proceedings. *People v. Pittman*, No. 4-08-0274 (August 6, 2008) (dismissed on appellant's motion).

In May 2009, defendant filed an amended petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)). Defendant alleged he was never informed he would have to serve three years of MSR and thus he received a sentence greater than he agreed on. In support of his petition, defendant cited *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005).

In June 2009, the State filed a motion to dismiss, arguing *Whitfield* did not apply to defendant's case. Further, the State argued defendant was properly admonished as to the appropriate MSR term.

In September 2009, the trial court conducted a hearing on the motion to dismiss. The court reviewed the transcript and found defendant had been sufficiently admonished as to the MSR term. The court granted the motion and dismissed the postconviction petition. This appeal followed.

II. ANALYSIS

Defendant argues he was denied due process when he was not admonished that a 3-year MSR term would be part of the 10-year sentence he negotiated with the State. We disagree.

A. Postconviction Petition

The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill.

2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2008).

At the second stage, the trial court may appoint counsel, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2008). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People*

v. Harris, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). We review the trial court's second-stage dismissal *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

B. MSR Term

"A defendant's due-process rights may be violated where the defendant did not receive the 'benefit of the bargain' of his plea agreement with the State." *People v. Holt*, 372 Ill. App. 3d 650, 652, 867 N.E.2d 1192, 1194 (2007), quoting *Whitfield*, 217 Ill. 2d at 186, 840 N.E.2d at 664. Prior to accepting a guilty plea, the trial court must admonish the defendant, *inter alia*, as to the nature of the charge and the minimum and maximum sentence prescribed by law. Ill. S. Ct. R. 402(a) (eff. July 1, 1997). Although substantial compliance is sufficient to establish due process, the supreme court has stated as follows:

> "there is no substantial compliance with Rule 402 and due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to that sentence. In these circumstances, addition of the MSR term to the agreed-upon sentence violates due process because the sentence imposed is more onerous

than the one defendant agreed to at the time of the plea hearing." *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669.

Our supreme court clarified its *Whitfield* decision in *People v. Morris*, 236 Ill. 2d 345, 925 N.E.2d 1069 (2010). The court stated "*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." *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082. "An admonition that uses the term 'MSR' without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case." *Morris*, 236 Ill. 2d at 366, 925 N.E.2d at 1082. While the MSR admonitions need not be perfect, "they must substantially comply with the requirements of [Supreme Court] Rule 402 and the precedent of this court." *Morris*, 236 Ill. 2d at 367, 925 N.E.2d at 1082.

In *People v. Andrews*, 403 Ill. App. 3d 654, 657, 936 N.E.2d 648, 651 (2010), the defendant argued his due-process rights were violated because his plea agreement did not mention he would be subject to MSR at the completion of his agreed-upon sentence. This court disagreed, holding "as long as the trial court informs a defendant at the time of his guilty plea that an MSR term must follow any prison sentence that is imposed upon

him, he has received all the notice and all the due process to which he is entitled regarding MSR." *Andrews*, 403 Ill. App. 3d at 665, 936 N.E.2d at 657.

In the case *sub judice*, the trial court admonished defendant he was facing a prison term of 6 to 30 years in prison as a Class X felon. Per the agreement, the State would dismiss the possession charge and agree to a 10-year sentence. The court informed defendant that the term of "mandatory supervised release" on a Class X felony is three years. When the court asked defendant whether he wanted to plead guilty in exchange "for a flat 10 years" in prison, defendant responded in the affirmative.

Here, the trial court's admonitions informed defendant that his 3-year MSR term would follow his 10-year sentence. While the court did mention it had certain "options" available to it after referring to extended-term sentencing, MSR, and a fine, the "mandatory" nature of MSR showed it was in addition to the 10-year sentence. Further, no argument could be advanced that defendant was under the misconception that the sentence he agreed to was seven years with three years of MSR tacked on. Instead, defendant received the full bargain he made with the State. See *People v. Davis*, 403 Ill. App. 3d 461, 466, 934 N.E.2d 550, 555-56 (2010) ("a defendant who negotiates to receive a specific sentence upon his plea of guilty before the guilty-plea hearing is conducted receives the full bargain made with the prosecution

upon receiving that sentence, as the prosecution can only bargain on the sentence to be imposed"). As a review of the record indicates defendant received all the notice and due process to which he was entitled regarding MSR, we find the court did not err in granting the State's motion to dismiss.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

Affirmed.