2011 IL App (5th) 070370-U

NO. 5-07-0370

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 04-CF-424
	)	
SCOTT A. JONES,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: Where the trial court adequately informed defendant of the mandatory three-year period of mandatory supervised release that would be attached to any sentence imposed, the admonishment was proper, and dismissal of defendant's postconviction petition which alleged improper admonishment was proper.

¶ 2 FACTS

¶ 3 Defendant pled guilty to attempted murder on June 23, 2004. He had originally been charged earlier that year on March 3 with attempted murder and armed robbery. As a part of a negotiated plea, the armed robbery charge was dismissed. The case stems from an attack by defendant Scott A. Jones on an elderly woman named Billie. Billie survived the attack and named Scott A. Jones as her attacker, as she knew him and had voluntarily allowed his entrance to her home on the evening of the attack. Defendant had performed yard work for her in the past, and defendant's sister used to live across the street from Billie.

¶ 4 Defendant gave two statements within a short period of time on the evening and

morning of February 17 and 18, 2004. His version of the events began at about 4 p.m. when defendant visited with a friend. Upon the friend's departure, defendant left and began driving around. In the earlier version of the story, defendant claims that he noticed a friend's vehicle broken down on the side of the road and that he offered to help by contacting a tow truck company. Defendant's second statement, provided 2.5 hours later, explained that there was no friend broken down on the side of the road–and that he parked his car and put on its flashers in an attempt to make his own car appear to be broken down. He then walked to Billie's home in Granite City, which was apparently not very far from where he had parked his vehicle. His purpose in going to Billie's home was to borrow money. Defendant had borrowed money from Billie on an earlier occasion. Upon defendant's arrival at her home, Billie allowed defendant's request to use her bathroom. Billie then asked defendant when she could expect repayment of the money she had loaned him. Defendant stated that when Billie asked him about the past loan, he knew it was not a good time to ask Billie for additional funds. In the first statement, defendant claimed that he blacked out at this time and regained consciousness outside of her home holding a pair of scissors that had blood on them, which he claimed he threw down into the street. In his second statement, defendant stated that instead of asking Billie for additional money, he removed a pair of scissors he was carrying in his coat pocket, and without any provocation, he began to repeatedly stab her. At first he stabbed her in the back, but after she fell to the kitchen floor and onto her back, defendant continued to stab Billie in her chest as she lay on the floor. When Billie stopped moving, defendant left her where she was in the kitchen and went to a chest in her bedroom where he knew that she stored money. He took $30 and left the home. With his $30, he purchased $5 worth of gasoline, a bag of chips and a soda, and a $20 rock of crack cocaine. Defendant then drove home, where he and "William" smoked the crack. He claimed to have tossed the scissors under William's bed.

¶ 5 From the victim-impact statement, Billie, a 73-year-old woman, stated that she also sustained a broken right hand in the attack and that defendant carved a letter "S" above one of her eyes and a letter "A" above the other eye. She had undergone considerable therapy in an effort to regain the use of her right arm and shoulder.

¶ 6 Defendant was arrested and charged. As a result of plea negotiations, he reached a plea agreement. On June 23, 2004, the case was called in court pursuant to the negotiations. The court asked defendant:

> "Is that your understanding of your negotiations, enter a plea of guilty in Count I, sentence will be from six to 22 years. Whatever sentence you do receive, you do have to serve 85 percent of that sentence. And Count II will be dismissed."

After reading through the charge against defendant, including the relative statutory language, the court stated as follows:

> "Before I will accept your plea of guilty, I want to advise you of the rights you have, the possible penalties that exist for this offense. You have previously entered pleas of not guilty to both of these charges. You have a right to persist in those pleas of not guilty and have a trial. That trial, Mr. Jones, would be a trial of your choice.
>
> ***
>
> This is a Class X felony. Upon conviction for a Class X felony, you could be sentenced to prison for a fixed term anywhere from six to thirty years. If you have a prior Class X or greater felony conviction within the last ten years or if this case was found to be brutal or heinous, you could get an extended sentence anywhere from 30 to 60 years.
>
> Upon release there is a three-year mandatory supervised release period. Also, could be assessed a fine not to exceed $25,000. The minimum sentence on this charge is six years in prison.

Do you understand those possible penalties?"

Defendant answered that question in the affirmative. The court continued:

"Mr. Jones, I will advise you at this time that I will bind myself to your negotiations. What that means Count II will be dismissed. Count I, the Attempt First Degree Murder, have a sentencing hearing. At that hearing the sentencing range will be anywhere from six years to twenty-two years in the Illinois Department of Corrections.

Whatever sentence is imposed by this Court you will serve 85 percent of that time. Now, knowing all of that, do you still wish to plead guilty to the charge of Attempt First Degree Murder?"

Defendant stated that he wanted to plead guilty to the charge. Nothing more was said at the plea hearing regarding the mandatory three-year supervised release that would attach to any sentence rendered in this case.

¶ 7 On February 2, 2005, the sentencing hearing was held. After all of the testimony was heard, the trial court stated:

"Taking into consideration all those factors, Mr. Jones, it is the sentence of the Court and you are hereby sentenced to the Illinois Department of Corrections for a term of 20 years. You will receive credit for time spent in custody which is 351 days as of today's date. Mittimus will be ordered to issue. You will be remanded to the custody of the Sheriff of Madison County for transportation to the Illinois Department of Corrections."

No mention was made of mandatory supervised release.

¶ 8 The written sentence order filed that same date contains no mention of mandatory supervised release.

¶ 9 On May 7, 2007, defendant filed a *pro se* postconviction petition in which he raised

the issue of the addition of the three-year period of mandatory supervised release to his prison sentence. In his sworn affidavit attached to the petition, defendant claims that he was never admonished of this possibility, that his understanding was that the sentence he would receive would be for a minimum of 6 years and a maximum of 22 years, and that he only entered his guilty plea because he believed that he could only receive a maximum of 22 years.

¶ 10 On June 8, 2007, the trial court summarily dismissed defendant's postconviction petition as being frivolous and patently without merit. The court reviewed the plea hearing transcript and found that it included the mandatory three-year period of supervised release in its recitation of possible and expected penalties and that in response to a direct question from the court, defendant indicated his understanding of these possibilities and expected penalties. From this order, defendant appeals.

¶ 11 LAW AND ANALYSIS

¶ 12 In the first stage of a petition filed pursuant to a Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)), the court reviews the petition to determine if it is frivolous or patently without merit and should be summarily dismissed. 725 ILCS 5/122-2.1(a) (West 2006). In the first stage, a defendant need only raise the "gist" of a meritorious claim in order to survive summary dismissal. 725 ILCS 5/122-2.1(a)(2) (West 2006). In the first stage, the court may review the defendant's petition as well as the trial record, and it can dismiss the petition if the record is in contradiction to the claims made in the petition. 725 ILCS 5/122-2.1(c) (West 2006). Appellate review of a summary dismissal of a postconviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998).

¶ 13 Supreme Court Rule 402(a) (eff. July 1, 1997) requires that in any hearing where a defendant enters a plea of guilty, the court must substantially comply with certain

admonitions to the defendant. Substantial compliance does not mean literal compliance. *People v. Dismore*, 33 Ill. App. 3d 495, 501-02, 342 N.E.2d 151, 156-57 (1975). The admonition at issue requires the court to advise the defendant as well as confirm the defendant's understanding of "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). Substantial compliance is determined by the admonishments provided to the defendant at the hearing when the plea of guilt is received. *People v. Blankley*, 319 Ill. App. 3d 996, 1007, 747 N.E.2d 16, 25 (2001).

¶ 14 If the court does not substantially comply with the provision of admonitions, that failure denies the defendant his due process rights. *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). The Illinois Supreme Court held in *People v. Whitfield* that substantial compliance with the admonition requirements did not occur when the trial court failed to explain prior to acceptance of the plea that a term of mandatory supervised release (MSR) would be tacked onto the sentence he would receive. The court explained that the failure to inform of the MSR period constituted "an unfair breach of the plea agreement." *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669.

¶ 15 A recent Illinois Supreme Court case determined that the rule as set forth in *Whitfield* is applicable only to cases in which the sentencing occurred after the date of the *Whitfield* case–December 20, 2005. *People v. Morris*, 236 Ill. 2d 345, 363-64, 925 N.E.2d 1069, 1080 (2010). The court first determined that the holding in *Whitfield* established a new rule, as prior to *Whitfield*, even with a faulty MSR admonishment, a defendant's due process rights remained intact so long as the plea of guilt was deemed intelligent and voluntary. *Morris*, 236 Ill. 2d at 360, 925 N.E.2d at 1078. In determining whether or not this new rule required retroactive application to cases on collateral review, the court concluded that *Whitfield*'s new

rule did not present a " 'watershed rule' of criminal procedure implicit in the concept of ordered liberty and central to the accuracy of a conviction." *Morris*, 236 Ill. 2d at 361, 925 N.E.2d at 1079 (citing *Teague v. Lane*, 489 U.S. 288, 311-13 (1989)). The court also found that the new rule did not "legalize primary, private individual conduct and does not reinterpret a statute." *Id*. Because the new rule could not be characterized as a "watershed rule," the rule must not be applied retroactively. *Morris*, 236 Ill. 2d at 363-64, 925 N.E.2d at 1080.

¶ 16 As the sentencing in this case took place on February 2, 2005, a date before *Whitfield* was filed on December 20, 2005, the *Whitfield* rule does not apply. Because defendant did not directly appeal from his sentence, his conviction was deemed final after February 2, 2005.

¶ 17 Removing the *Whitfield* rule and all cases decided that have interpreted *Whitfield* from consideration, the defendant must establish that he was not admonished in substantial compliance with Supreme Court Rule 402(a)(2)–that his plea of guilt was not voluntary and intelligently made. *People v. Wills*, 61 Ill. 2d 105, 110, 330 N.E.2d 505, 508 (1975) (referring to mandatory period of parole (which is now referred to as mandatory supervised release)); *Blankley*, 319 Ill. App. 3d at 1007, 747 N.E.2d at 25.

¶ 18 Supreme Court Rule 402(a)(2) mandates that a court cannot accept a plea of guilt until the court admonishes the defendant of the "minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997). The purpose of requiring the admonishments is to ensure that the defendant has an understanding of the agreement, the rights he is waiving by entering the plea, and the results of his actions. *People v. Louderback*, 137 Ill. App. 3d 432, 435, 484 N.E.2d 503, 505 (1985).

¶ 19 In *People v. Wills*, the supreme court held that with all guilty pleas after May 19,

1975, defendants must be admonished of the MSR period before the court can accept a plea of guilt. *People v. Wills*, 61 Ill. 2d 105, 109, 330 N.E.2d 505, 508 (1975).

¶ 20 Several cases have held that where there was absolutely no mention of a period of MSR in the admonishments before the plea of guilt was entered, the defendant's due process rights were violated. See *People v. Kull*, 171 Ill. App. 3d 496, 498, 525 N.E.2d 1223, 1224 (1988) (with a negotiated plea of 22 years, and no mention of MSR at any time, upon sentencing to the 22 years plus MSR, due process was violated and defendant should be allowed to withdraw his guilty plea); *People v. O'Toole*, 174 Ill. App. 3d 800, 801-04, 529 N.E.2d 54, 55-57 (1988) (no admonishments of MSR, or of the minimum and maximum penalties associated with the crime charged, and with an agreement that his sentence would be a flat 10 years, defendant's petition for postconviction relief was found to have merit on appeal); *People v. Moore*, 214 Ill. App. 3d 938, 943-44, 574 N.E.2d 37, 41 (1991) (where defendant entered a negotiated plea of guilt on three charges with the agreement that he would receive 18 years on the first two charges served concurrently, and 10 years on the third charge to be served consecutively, and there was no mention of MSR, being sentenced to the negotiated sentences plus the MSR violated due process, and the court concluded that the period of MSR should be stricken from his sentence); *People v. Didley*, 213 Ill. App. 3d 910, 915, 572 N.E.2d 423, 426 (1991) (defendant's guilty plea was not voluntary when he was not informed that in addition to the 10-year negotiated sentence, he would have to serve a period of MSR); *People v. Smith*, 285 Ill. App. 3d 666, 670-71, 676 N.E.2d 224, 227-28 (1996) (defendant's negotiated guilty plea of 11 years was vacated when he was not advised of the mandatory MSR period attached to a sentence for that crime); *People v. Brown*, 296 Ill. App. 3d 1041, 1043, 695 N.E.2d 1374, 1375-76 (1998) (appellate court remanded for resentencing when the trial court neglected to mention MSR in the admonishments of the maximum possible punishment for the crimes charged, and when defendant received the maximum

sentences, plus the MSR); *People v. Fish*, 316 Ill. App. 3d 795, 800, 737 N.E.2d 694, 698 (2000) (no MSR admonishments and no admonishments of possible monetary fines included in sentencing defendant following a stipulated bench trial resulted in prejudice to the defendant and noncompliance with Rule 402).

¶ 21 Illinois case law on the issue of proper Rule 402(a)(2) admonishments has generally been consistent in sentencing situations when the defendant is not told about any MSR period being attached to his sentence. The mere absence of MSR admonishments, without more, can be insufficient to establish a due process violation. "Due process requires only that the defendant not be prejudiced by the court's failure to fully and correctly explain his potential sentence, and, in some cases, when the record indicates that no unfairness has resulted, the court's omission does not require reversal." *Smith*, 285 Ill. App. 3d at 669, 676 N.E.2d at 227; see also *Fish*, 316 Ill. App. 3d at 800, 737 N.E.2d at 698; *Blankley*, 319 Ill. App. 3d at 1007, 747 N.E.2d at 25.

¶ 22 In *People v. McCoy*, the supreme court concluded that the failure to admonish a defendant of parole (now labeled as MSR) at any time during the guilty plea and sentencing aspects of the case did not amount to a due process violation. *People v. McCoy*, 74 Ill. 2d 398, 402, 385 N.E.2d 696, 699 (1979). The defendant was not apprised of the applicable MSR period, but the term of imprisonment received (1 to 3 years) plus the applicable 3-year period of parole was still less than the maximum 20 years possible of which the defendant was admonished. *McCoy*, 74 Ill. 2d at 402, 385 N.E.2d at 699. In *People v. Louderback*, however, the court concluded that when the defendant was advised that the maximum sentence he could receive was four years, and the court made no mention of the two-year MSR period, the defendant's guilty plea was not intelligently and voluntarily given when he was sentenced to the maximum sentence of four years plus the added two-year MSR. *Louderback*, 137 Ill. App. 3d at 436-37, 484 N.E.2d at 505-06.

¶ 23 In this case, defendant's plea of guilt was accepted on June 23, 2004. During the Supreme Court Rule 402 admonishments and prior to acceptance of defendant's plea at that same hearing, the court admonished defendant that the possible sentence applicable for the crime at issue included the period of MSR. The admonishment delivered to defendant by the court included the applicable range of penalties for the crime charged. During the admonishments, the trial court specifically stated, "*Upon release there is a three-year mandatory supervised release period.*" (Emphasis added.) Therefore, this is not a case in which the court made no mention of MSR prior to accepting defendant's plea. The court unambiguously informed defendant that the MSR period applied automatically to any sentence that he would receive as a result of his plea negotiation.

¶ 24 The purpose of mandating the admonishment as to the minimum and maximum applicable penalties is to ensure that the defendant understands precisely to what he is agreeing. *Louderback*, 137 Ill. App. 3d at 435, 484 N.E.2d at 505. However, failure to properly admonish the defendant alone has been held insufficient to create a due process violation. See *Smith*, 285 Ill. App. 3d at 669, 676 N.E.2d at 227. In this case, we conclude that the trial court properly admonished defendant of the MSR period and did not violate his due process rights.

¶ 25 CONCLUSION

¶ 26 We conclude that defendant has failed to establish a gist of a meritorious claim relative to the claimed violation of his constitutional right to due process. The record supports the State's contention that defendant was adequately admonished that a three-year MSR period would be attached to any sentence imposed pursuant to his plea negotiation. Accordingly, we hereby affirm the judgment of the circuit court of Madison County.

¶ 27 Affirmed.