

NOTICE
Decision filed 10/09/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110376-U
NO. 5-11-0376
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 10-CF-710
)	
TYRONE L. SHANNON,)	Honorable
)	W. Charles Grace,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the circuit court did not properly admonish the defendant about a one-year mandatory-supervised-release term and did not properly calculate the defendant's presentence custody credit for time served, the defendant's sentence is affirmed as modified.
- ¶ 2 The defendant, Tyrone L. Shannon, entered a partially negotiated plea of guilty to unlawful possession of a controlled substance pursuant to section 402 of the Illinois Controlled Substances Act (the Act) (720 ILCS 570/402(c) (West 2010)) and was sentenced to the maximum extended-term sentence of six years' imprisonment, to be followed by one year of mandatory supervised release (MSR). The defendant asks this court to either reduce his sentence to five years' imprisonment plus one year of MSR or vacate his conviction. The State agrees. The defendant has filed a motion for summary relief alleging that the circuit court incorrectly calculated his amount of presentence credit. This court ordered the motion for summary relief to be taken with this case. For the following reasons, we modify the

defendant's sentence to five years' imprisonment and one year of MSR, and we direct that the mittimus be corrected to reflect 241 days of presentence credit.

¶ 3

BACKGROUND

¶ 4 The defendant was initially charged with unlawful possession of a controlled substance with intent to deliver under section 401 of the Act (720 ILCS 570/401(c)(2) (West 2010)), unlawful possession of a controlled substance under section 402 of the Act (720 ILCS 570/402(c) (West 2010)), and unlawful possession of a firearm by a felon under section 24-1.1 of the Criminal Code of 1961 (720 ILCS 5/24-1.1(a) (West 2010)). At the time of the offense, the defendant was on MSR for a previous infraction. On May 20, 2011, he entered a partially negotiated plea of guilty to unlawful possession of a controlled substance in exchange for the State recommending dismissal of the other charges. At the plea hearing, the circuit court admonished the defendant that he was eligible for an extended-term sentence of between one and six years' imprisonment. However, the court indicated that the defendant would serve six years plus one year of MSR. The sentencing hearing took place on July 28, 2011, where the circuit court stated the following:

"This is a day-for-day sentence which means that for every year out of those six that you serve, you get a year off. And plus you have credit for the 232—or 231 days—. I'm also sentencing you to a term of one year of mandatory supervised release to kick in at the conclusion of your sentence to the penitentiary."

Thus, the court sentenced the defendant to six years' imprisonment plus one year of MSR. The court also gave the defendant 231 days' credit for time served.

¶ 5 On August 12, 2011, the defendant filed a *pro se* motion to withdraw his guilty plea as well as a *pro se* motion to reduce his sentence. On August 15, 2011, the court denied both motions. The defendant acknowledges that in his motion to withdraw his guilty plea, he did not allege that he was incorrectly admonished by the court, but he contends that the

incorrect admonishment constitutes plain error. On August 30, 2012, the defendant filed, in this court, a motion for summary relief, asserting that his mittimus was incorrectly calculated. We address these arguments in turn.

¶ 6

ANALYSIS

¶ 7 Initially, we must address the fact that the defendant failed to address the improper admonishment in his *pro se* motion to withdraw his guilty plea. The State and the defendant correctly note that we invoke the plain error rule when addressing a circuit court's failure to properly admonish a defendant of the maximum and minimum penalties possible. *People v. Blankley*, 319 Ill. App. 3d 996, 1007 (2001). As such, failure to properly admonish a defendant under Illinois Supreme Court Rule 402 (eff. July 1, 1997) regarding possible penalties may serve as an exception to the waiver rule. *People v. Davis*, 145 Ill. 2d 240, 250 (1991). We find that the plain error rule applies to this situation because the defendant was not properly admonished about the possible penalties, and we therefore address the defendant's improper admonishments.

¶ 8 The defendant argues that the proper channel through which his sentence should be modified is found in *People v. Whitfield*, 217 Ill. 2d 177 (2005). However, *Whitfield* only applies to cases where the defendant entered a fully negotiated plea. *Whitfield*, 217 Ill. 2d at 193. In this case, the defendant entered a partially negotiated plea, not a fully negotiated plea. Therefore, *Whitfield* does not apply.

¶ 9 Where there is no factual dispute, we review the issue of admonishments *de novo*. *People v. Smith*, 191 Ill. 2d 408, 411 (2000). Rule 402(a)(2) requires that a circuit court explicitly admonish a defendant about the minimum and maximum penalties prescribed by law, as well as any penalty to which the defendant may be subjected due to prior convictions. The circuit court must substantially comply with the Rule 402 admonishments. Ill. S. Ct. R. 402 (eff. July 1, 1997). An MSR term is included in a prison sentence, and the circuit

court must admonish a defendant that he will have to serve an MSR term after being released from the correctional facility. *People v. Smith*, 386 Ill. App. 3d 473, 482-84 (2008). A defendant who is not admonished about an MSR term has not been advised of the maximum penalty for the offense and a circuit court thereby violates Rule 402. *People v. Fish*, 316 Ill. App. 3d 795, 799-800 (2000).

¶ 10 Typically, there is no reversible error when the defendant's prison sentence plus an MSR term are below the maximum penalty possible. *People v. Johnson*, 392 Ill. App. 3d 897, 910 (2009). However, in this case, the defendant's MSR term, when added to his prison term, created a penalty that exceeded the maximum penalty about which the defendant was admonished, in contravention of Rule 402. The defendant was convicted of a Class 4 felony, which has an MSR term of one year. 730 ILCS 5/5-8-1(d)(3) (West 2010). The maximum possible extended-term sentence for the Class 4 felony conviction is six years, which includes a one-year term of MSR. Here, the defendant was essentially sentenced to a total of seven years: six years' imprisonment and one year of MSR, which exceeded the maximum possible penalty by one year. As noted above, such a result is plain error.

¶ 11 This court may modify a sentence per Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999). We choose to do so in this case. The defendant's sentence is hereby modified to five years' imprisonment plus one year of MSR.

¶ 12 The defendant has also filed a motion for summary relief, requesting that this court correct his mittimus from 231 days of credit for time served to 241 days of credit for time served. The State has not filed an objection. A defendant is entitled to credit for time spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-4.5-100(b) (West 2010). A defendant held in custody for any part of a day is given credit against his sentence for that day. *People v. Johnson*, 396 Ill. App. 3d 1028, 1033 (2009).

We have the authority to correct a defendant's mittimus per Rule 615(b)(1). The record shows that the defendant was incarcerated from his arrest on November 30, 2010, until July 28, 2011, prior to his sentencing hearing. Therefore, the amount of time the defendant spent in presentence custody was 241 days. We grant the defendant's motion and order the defendant's mittimus be modified to reflect 241 days of credit for time served in presentence custody.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the judgment of the circuit court of Jackson County is affirmed as modified.

¶ 15 Affirmed as modified; motion granted.