2021 IL App (5th) 190080-U

NO. 5-19-0080

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Richland County.
	)	
v.	)	No. 09-CF-77
	)	
BURT D. WENZEL,	)	Honorable
	)	Michael J. Valentine,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WHARTON delivered the judgment of the court.
Presiding Justice Boie and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court lacked jurisdiction to amend the term of mandatory supervised release included in the defendant's sentence where more than 30 days had passed since entry of the order, the revestment doctrine was inapplicable, and the court amended the order without granting postconviction relief in pending postconviction proceedings.

¶ 2 The defendant, Burt D. Wenzel, pled guilty to one count of predatory criminal sexual assault of a child. The court sentenced him to nine years in prison to be followed by a three-year period of mandatory supervised release (MSR). He later filed a postconviction petition. While that petition was pending, the court entered an order amending the defendant's MSR to comply with a statutory requirement mandating an indeterminate MSR of three years to life. See 730 ILCS 5/5-8-1(d)(4) (West 2016). Pursuant to the advice of postconviction counsel, the defendant agreed to this amendment at a status hearing on his postconviction petition. The defendant

appeals, arguing that (1) the court lacked jurisdiction to enter the order amending his MSR; (2) he received ineffective assistance of counsel at resentencing, a critical stage of trial proceedings; and (3) he received unreasonable assistance of postconviction counsel. We agree with the first of these arguments. We therefore vacate the court's order amending the MSR.

¶ 3 I. BACKGROUND

¶ 4 In 2009, the defendant was charged with one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and one count of aggravated criminal sexual abuse (*id*. § 12-16(c)(1)(i)). The charges stemmed from an incident in which the defendant impregnated 12-year-old K.S. In July 2009, he pled guilty to the charge of predatory criminal sexual assault of a child in exchange for an agreement to cap his sentence at 30 years. The court sentenced him to 16 years in prison followed by a 3-year period of MSR. The defendant was eventually allowed to withdraw his plea on the basis that he received incorrect admonishments regarding the sentencing range for the offense.

¶ 5 After the defendant withdrew his plea, the case remained pending before the trial court for over a year. During this time, the defendant filed a motion to suppress evidence of a buccal swab, which the court denied. He was subsequently found unfit to stand trial. The defendant was treated at Alton Mental Health Center, after which he was found to have been restored to fitness.

¶ 6 In December 2015, the defendant pled guilty but mentally ill to one count of predatory criminal sexual assault of a child. Pursuant to a plea agreement, the charge of aggravated criminal sexual abuse was dismissed, and the defendant was sentenced to nine years in prison with a three-year period of MSR. At the plea hearing, the prosecutor described the terms of the agreement. The court then asked the defendant, "Mr. Wenzel, is that your understanding of the plea agreement?" The defendant replied, "Yes, sir." In response to further questioning, the

defendant confirmed that he had an adequate opportunity to consult with his attorney concerning these terms. The court next admonished the defendant about the rights he would have if he went to trial, the nature of the charge, and the sentencing range. The defendant indicated that he understood these admonishments. The court explained that the defendant would serve a three-year period of MSR, and the defendant confirmed that he understood.

¶ 7 After hearing the factual basis and accepting the defendant's plea, the court pronounced the agreed-upon sentence—nine years in the Illinois Department of Corrections (IDOC), to be served at 85%, followed by three years of MSR. The court noted that the defendant would receive credit against this sentence for time spent in custody from May 1, 2009. The defendant's projected release date was thus December 23, 2016.

¶ 8 In June 2016, the defendant filed a *pro se* postconviction petition. He alleged that he waived his *Miranda* rights and gave a statement to police only because the interrogating officer told him that an attorney representing him in an unrelated matter had consented to questioning on his behalf. He further alleged that because he gave this statement, he felt he had no choice but to plead guilty. The defendant argued that (1) he received ineffective assistance of counsel, (2) his plea was not knowing and voluntary, and (3) his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the fifth amendment (U.S. Const., amend. V) were violated. The petition did not challenge any aspect of the defendant's sentence.

¶ 9 The court advanced the defendant's petition to the second stage of postconviction proceedings and appointed counsel. However, two attorneys appointed to represent the defendant withdrew as counsel due to conflicts of interest. In September 2016, attorney Stephen Hough was appointed.

¶ 10 On December 13, 2016, 10 days before the defendant's projected release date, he filed with the court a *pro se* pleading entitled "*Pro Se* Motion for Emergency Postconviction Relief." He stated that he was filing the motion *pro se* rather than through his attorney because he had "no time to consult with" counsel and "must get this [motion] to [the court] now." He alleged that he had been informed that he would not be released on his projected release date of December 23, 2016. He acknowledged that he was aware that his sentence included a three-year MSR period. However, he asserted that he was never admonished that the 9-year prison term would be transformed into a 12-year sentence.

¶ 11 The following day, the court received a letter from the record office supervisor and litigation coordinator at IDOC. The letter stated that pursuant to section 5-8-1(d)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(4) (West 2014)) and *People v. Rinehart*, 2012 IL 111719, the MSR following a prison term for the offense of predatory criminal sexual assault "shall range from a minimum of 3 years to a maximum of the natural life" and "should be indeterminate." The letter further stated that the MSR period in the court's order does not comply with *Rinehart* or the applicable statute. Finally, the letter stated, "If you feel that an amended order is necessary[,] please forward the amended order[ ] to my attention at Big Muddy River Correctional Center."

¶ 12 On January 24, 2017, the case came for a status hearing. At the outset, the defendant's appointed attorney, Hough, informed the court that although the defendant was scheduled to be released on December 23, 2016, he had not yet been released because he had not been able to find housing approved by IDOC and the probation department. Hough further stated:

> "I've spoken with Mr. Wenzel earlier today just 25 minutes ago. He has agreed now to accept the amended order of the order that was entered [after the] hearing on December 8,

2015, a nine-year sentence, and MSR would be changed to indeterminate pursuant to statute and pursuant to *People v. Rinehart*."

The court asked the defendant, "Mr. Wenzel, did you hear what your attorney, Mr. Hough, stated?" The defendant replied, "Yes, sir." The court did not ask whether the defendant understood what his attorney had said.

¶ 13 The court then asked the defendant whether he was withdrawing all pending "petitions and motions for postconviction relief." The defendant responded, "Dealing with the MSR issue. Yes." The following exchange then occurred:

"THE COURT: Is there another issue you believe is still pending?

THE DEFENDANT, BURT D. WENZEL: Well, I—as far as I know, I filed for a post-conviction due to a *Miranda* violation. I don't—that's—

THE COURT: Are you asking that—that that stay pending?

THE DEFENDANT, BURT D. WENZEL: Yes. But the MSR issue where I'm asking—basically, I asked the Court to withdraw my incomplete because of the MSR I would, I guess, take that back and agree to an intermediate pursuant to the—

MR. HOUGH: Indeterminate.

THE DEFENDANT, BURT D. WENZEL: —statute—indeterminate pursuant to the statute.

THE COURT: All right. So the Court will amend the sentencing order which was entered on December 8, 2015. The order will now read that the sentence is nine years in the Illinois Department of Corrections, plus an indeterminate term of mandatory supervised release."

¶ 14 The court next asked if it was necessary to set additional hearings. At this point, the prosecutor indicated that he would file a motion to dismiss the defendant's petition. The court granted the State 14 days leave to file its motion and set the matter for further proceedings.

¶ 15 In March 2017, the State filed a motion to dismiss the defendant's postconviction petition, arguing that the claims raised in the petition could have been raised in a timely motion to withdraw the defendant's plea or on direct appeal. Later the same month, the defendant filed a *pro se* pleading entitled "Motion for Rehearing and Void Judgment."

¶ 16 At an April 4, 2017, motion hearing, the court asked Hough if he intended to amend the defendant's *pro se* petition. In response, Hough stated that he was unable to do so because he could not file claims he believed to be frivolous. At this point, the defendant stated, "I would like to have my attorney withdrawn." The court denied the defendant's request to dismiss Hough, struck the defendant's *pro se* motions filed while he was represented by counsel, and granted the State's motion to dismiss. The court dismissed the petition without prejudice, explaining that the defendant could refile a postconviction petition with any appropriate amendments, and that "at that point, the State can move forward with some sort of dismissal with prejudice."

¶ 17 Later in April, the defendant filed a *pro se* motion alleging that Hough provided ineffective assistance and failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The defendant asked the court to allow him to represent himself.

¶ 18 On May 2, 2017, the court held a hearing to address the allegations in the defendant's *pro se* motion. The court first allowed the defendant to explain the basis of his claims. The defendant began by asserting that he believed Hough was biased against him. He alleged that during their first telephone conversation, Hough told the defendant that he "had no rights" and that he deserved severe punishment. The defendant told the court that he and Hough disagreed

about the validity of the claims raised in the defendant's *pro se* petition. He acknowledged that he understood Hough could not present any claims he believed to be frivolous, but he stated that he did not agree with Hough that his claims were frivolous.

¶ 19 The defendant next addressed the issue of his MSR. He told the court that prior to the January 24 status hearing, he had believed that the purpose of that hearing was to address the claims raised in his original postconviction petition. He stated that when he arrived at court, however, Hough explained to him that the court would give him an opportunity to withdraw his plea. The defendant asserted that Hough advised him that if he withdrew his plea, "the State would hit [him] with 30 years." He stated, "I got scared, didn't think about it, didn't understand the consequences of accepting the three-to-life term."

¶ 20 The court asked Hough to respond, but Hough indicated that anything he might say would violate the attorney-client privilege. The court took the matter under advisement.

¶ 21 At the next status hearing, the court denied the defendant's request to represent himself, explaining that the case involved complex legal questions. The court also denied the defendant's claim of ineffective assistance of counsel. However, the court, *sua sponte*, vacated an earlier order striking the defendant's *pro se* motions. The court directed Hough to review the defendant's *pro se* petition and decide whether to file an amended petition. In addition, the court noted that further proceedings were needed to address "several issues," including "an MSR issue [which] seems to have been in some way raised."

¶ 22 Hough was subsequently allowed to withdraw as counsel, and attorney Matthew Vaughn was appointed to represent the defendant. In July 2018, Vaughn filed on behalf of the defendant a pleading entitled "Supplement to the Defendant's *Pro Se* Postconviction Petition." In it, he argued that the defendant received ineffective assistance of counsel during the plea proceedings

due to counsel's failure to preserve three issues for review—the admissibility of the defendant's 2008 statements to police, the admissibility of the buccal swab, and the question of whether the defendant's *Miranda* waiver was knowing and voluntary. He further argued that Hough provided the defendant with ineffective assistance when he failed to object to the entry of an amended judgment increasing the defendant's MSR from three years to an indeterminate term.

¶ 23 The third-stage postconviction hearing took place on January 8, 2019. Neither party presented evidence, but the defendant's attorney, Vaughn, asked the court to take judicial notice of pertinent portions of the record, including the transcript of the January 24, 2017, status hearing at which the defendant acquiesced to an increase in his MSR.

¶ 24 In addressing the defendant's claim concerning the increase to his MSR, Vaughn distinguished the circumstances of this case from those involved *Rinehart*. He explained that in *Rinehart*, the trial court did not include any MSR in the sentencing order, leaving that decision to IDOC, whereas here, the trial court imposed a determinate three-year MSR. He further argued that there was no pending motion to reconsider the defendant's underlying sentence when the court increased the MSR and that there was no benefit to the defendant in agreeing to the increase. Finally, Vaughn argued that advising the defendant to accept the increase constituted ineffective assistance of counsel. We note that Vaughn did not present any argument concerning the level of assistance required—the effective assistance of counsel constitutionally mandated during trial, including sentencing, or the reasonable assistance mandated by the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, however, the defendant argues that the higher standard applied because the court was considering his original sentence, and sentencing is a critical stage of trial proceedings.

¶ 25 The court took the matter under advisement. On February 11, 2019, the court issued a written order denying each of the defendant's postconviction claims, including his claim of ineffective assistance of counsel at the January 2017 hearing. The court explained that the defendant was offered an opportunity to withdraw his plea but declined to do so in order to avoid a potentially longer sentence after being tried. The court stated, "The defendant presents no argument or evidence that had his attorney objected to the judgment's MSR amendment, he would have prevailed at trial or, if not, would have obtained a lesser sentence." The court therefore found that the defendant could not establish that he was prejudiced by Hough's advice.

¶ 26 The defendant subsequently filed this timely appeal. He challenges only the court's ruling on his claims related to the amendment of his MSR.

¶ 27 II. ANALYSIS

¶ 28 The defendant first argues that the court lacked jurisdiction to amend his sentence on January 24, 2017. We agree. Because our resolution of this question is dispositive, we need not consider his alternative arguments concerning ineffective assistance of counsel or unreasonable assistance of postconviction counsel.

¶ 29 Ordinarily, a court loses jurisdiction over a case 30 days after entering the final judgment unless timely postjudgment motions are filed. *People v. Bailey*, 2014 IL 115459, ¶ 14; *People v. Lake*, 2020 IL App (1st) 170309, ¶ 14. There are limited exceptions (see *Bailey*, 2014 IL 115459, ¶ 12), including two at issue in this appeal—jurisdiction conferred under the Post-Conviction Hearing Act and the revestment doctrine.

¶ 30 Under the Post-Conviction Hearing Act, as the State points out, the circuit court has jurisdiction to "enter an appropriate order with respect to the judgment or sentence" in the criminal proceedings. 725 ILCS 5/122-6 (West 2016). Significantly, however, the express terms

of the Post-Conviction Hearing Act grant this authority only if the court finds in favor of the defendant and grants postconviction relief. See *id*.; see also *People v. Hill*, 2020 IL App (1st) 171739, ¶ 23.

¶ 31 We find the First District's recent decision in *Hill* instructive. There, the defendant was given two concurrent mandatory natural life sentences for murders he committed when he was 15 years old. *Hill*, 2020 IL App (1st) 171739, ¶¶ 1, 9. Years later, he filed a postconviction petition. *Id.* ¶ 10. While the petition was pending, the United States Supreme Court issued its decision in *Miller v. Alabama*, 567 U.S. 460 (2012). The parties agreed that, under *Miller*, the defendant's natural life sentences were unconstitutional. *Hill*, 2020 IL App (1st) 171739, ¶ 10. The circuit court therefore held a new sentencing hearing and sentenced the defendant to concurrent prison terms of 54 years. *Id.* ¶¶ 1, 11. The defendant filed a motion to reconsider that sentence, which the court denied. *Id.* ¶ 20. At this point, the defendant's other postconviction claims were still pending. *Id.*

¶ 32 The defendant appealed the court's resentencing order. He argued that the 54-year sentences constituted *de facto* life sentences, which were not permissible where the court did not find the defendant to be permanently incorrigible and "instead *** acknowledged his rehabilitative potential." *Id.* ¶¶ 2-3.

¶ 33 Before addressing the merits of the defendant's contentions, however, the First District considered whether the circuit court had jurisdiction to enter a new sentencing order. *Id.* ¶ 22. The court noted that, absent jurisdiction, the circuit court's order was void, and the appellate court lacked jurisdiction to do anything other than vacate it. *Id.* (citing *Bailey*, 2014 IL 115459, ¶ 29). Although the court ultimately found that the circuit court had jurisdiction to resentence the

defendant under the revestment doctrine (*id.* ¶¶ 26-28), the court first considered whether the Post-Conviction Hearing Act conferred jurisdiction (*id.* ¶¶ 23-25).

¶ 34 In deciding this question, the appellate court explained that once the circuit court loses jurisdiction over a criminal case 30 days after entering a final judgment in that case, the only way to reacquire jurisdiction through the Post-Conviction Hearing Act is "by granting postconviction relief and entering an appropriate order." *Id.* ¶ 23 (citing 725 ILCS 5/122-6 (West 2018)). Although both parties asserted that the circuit court ordered a new sentencing hearing after granting a *Miller* claim raised by the defendant in his petition, the First District found that no such order had been entered. *Id.* ¶ 24. The court thus concluded that, "under the terms of the Post-Conviction Hearing Act, the circuit court lacked jurisdiction to resentence" the defendant. *Id.* ¶ 25.

¶ 35 Here, likewise, the court entered an order amending the defendant's MSR without first granting postconviction relief. Pursuant to *Hill* and the express language of the Post-Conviction Hearing Act, we find that it did not have jurisdiction to do so.

¶ 36 The State, however, urges us to construe the court's January 2017 order as an interlocutory postconviction order that became final only after the court eventually ruled on the merits of the defendant's postconviction petition. We are not persuaded for two reasons.

¶ 37 First, the State's argument overlooks the collateral nature of postconviction proceedings and the limits that places on the court's jurisdiction to amend or vacate a judgment that became final in the criminal proceedings more than 30 days earlier. Even assuming the defendant placed the issue of the MSR term before the court, as we have just discussed, the court could not modify the judgment of conviction unless and until it granted postconviction relief.

¶ 38 Second, we disagree with the State's assertion that the defendant filed a postconviction pleading asking the court to address the question of his MSR. The *pro se* "emergency motion" filed by the defendant before the court entered the January 2017 order amending the MSR did not address the term of the MSR; rather, it addressed the manner in which the MSR was to be served. As we discussed earlier, the sole concern raised by the defendant in that motion was the requirement that he remain in prison until he found suitable housing. He argued that this requirement transformed his 9-year prison term into a 12-year prison term, an argument that strongly suggests he was not aware at that time that he was facing an indeterminate MSR. It is true that the MSR term was addressed in subsequent pleadings, including *pro se* motions filed by the defendant and the amended petition filed by attorney Vaughn. However, those pleadings addressed the amended order entered in January 2017, not the original MSR included in the judgment of conviction in December 2015. A court cannot simply enter an "interlocutory" order and then acquire jurisdiction retroactively by affirming that order in response to subsequent pleadings challenging the order. To accept the State's argument would be boot-strapping. We therefore find that the Post-Conviction Hearing Act did not confer jurisdiction on the court to amend the defendant's MSR at the January 2017 status hearing.

¶ 39 The second exception that allows a court to exercise jurisdiction more than 30 days after entering a final judgment is the revestment doctrine. Pursuant to that doctrine, a court is revested with jurisdiction to consider a final order more than 30 days after its entry if (1) both parties actively participate in the proceedings, (2) neither party objects to the late filing of pertinent pleadings, and (3) both parties take positions that are inconsistent with the merits of the prior judgment and support setting aside at least part of that judgment. *Bailey*, 2014 IL 115459, ¶ 25.

The revestment doctrine is to be applied narrowly. *Id.* ¶ 26. It is not applicable unless all three requirements are satisfied. *Id.* ¶ 25.

¶ 40 Here, the court ruled that the defendant's MSR would be amended during a status hearing. The State did not take any position on the matter during that hearing, and the prosecutor remained silent until after the court made its ruling. Thus, the requirement that both parties take positions inconsistent with the merits of the prior order was not satisfied. See *Lake*, 2020 IL App (1st) 170309, ¶ 19. The requirement that both parties actively participate in the proceedings is likewise not satisfied. Because two of the requirements of the revestment doctrine are not satisfied, the doctrine does not apply.

¶ 41 Finally, we note that, as both parties point out, our supreme court has held that when a court fails to include an MSR in a sentencing order, the MSR is part of the sentence by operation of law. *Round v. Lamb*, 2017 IL 122271, ¶ 16. As both parties likewise assert, the applicable statute mandates an indeterminate MSR of three years to natural life for those convicted of certain sex offenses, including the defendant in this case. 730 ILCS 5/5-8-1(d)(4) (West 2014); *Rinehart*, 2012 IL 111719, ¶ 29. The defendant argues that although an MSR will be read into the defendant's sentence where *no* MSR is explicitly included in the sentencing order, the same principle does not apply in cases where an incorrect MSR is included in the sentencing order. However, this question is not before us. Because the trial court lacked jurisdiction to enter the order amending the MSR, our jurisdiction is limited to vacating that order. See *Hill*, 2020 IL App (1st) 171739, ¶ 22. We therefore express no opinion as to the effect of our ruling. See *Lake*, 2020 IL App (1st) 170309, ¶ 21 (declining to comment on the practical effect of its decision to vacate a circuit court order increasing the defendant's MSR from two years to four years).

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we vacate the order of January 24, 2017, amending the defendant's MSR.

¶ 44 Order vacated.