2013 IL App (1st) 110168-U

FIFTH DIVISION
JULY 19, 2013

No. 1-11-0168

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 856
	)	
JOSE MONTANEZ,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not err in dismissing defendant's post-conviction petition claiming that he was not admonished regarding mandatory supervised release during guilty-plea proceedings. His 2006 sentencing was not a new negotiated guilty plea but a resentencing on his 1993 open guilty plea, which he did not withdraw.

¶ 2 Pursuant to a 1993 open guilty plea on 1987 offenses, defendant Jose Montanez was convicted of first degree murder, aggravated criminal sexual assault (ACSA), and concealment of a homicidal death (concealment) and sentenced to prison terms of 48, 22, and 2 years, with murder and ACSA to be served consecutively and concealment to be served concurrently for a

total of 70 years' imprisonment. His 2000 post-conviction petition was summarily dismissed, but on appeal we remanded for further post-conviction proceedings. *People v. Montanez*, No. 1-01-0807 (2003)(unpublished order under Supreme Court Rule 23). On remand, he was resentenced in 2006 to concurrent prison terms of 40, 22, and 2 years respectively, and his petition as supplemented was withdrawn. Defendant now appeals from the 2010 dismissal, upon State motion, of his 2009 post-conviction petition. He contends that his petition made a substantial showing that he entered a new, negotiated, guilty plea in 2006 but was not admonished that his sentence included three years of mandatory supervised release (MSR). See *People v. Whitfield*, 217 Ill. 2d 177 (2005).

¶ 3 Defendant was charged with first degree murder, ACSA, and concealment, allegedly committed between November 25 and 30, 1987, in that he allegedly sexually assaulted and strangled to death Helen Savage and then buried her body in a hole that he covered with concrete.

¶ 4 A bench trial commenced on July 20, 1993, after defendant waived orally and in writing his right to a jury for trial and death-penalty sentencing. Two acquaintances of defendant testified that he admitted to choking a woman to death; one also testified to smelling something dead or decaying in defendant's home and to defendant later pointing out where he buried her body in his basement. A woman testified that defendant, then the maintenance man in her California apartment building, lured her to another apartment where he blocked her from leaving, bound her with duct tape, choked her, and struck her on the head with a hammer. When she freed her legs, she fled to her apartment; defendant was there, and when the woman told her roommate what defendant had done, he locked the door with her roommate still inside. The woman fled outside and the police were summoned. The roommate testified, corroborating the woman's account. A psychiatrist testified for defendant (out of sequence; the State had not rested) that he was prescribed anti-psychotic medication and that latent psychosis could be

triggered by drug or alcohol abuse, to which defendant had admitted, but also testified that she could not give a firm diagnosis of psychosis due to his inadequate history.

¶ 5 On the second day of trial, July 21, defense counsel informed the court that defendant would enter a "blind" plea of guilty to all remaining charges. The court read these charges to defendant. The court informed defendant that first degree murder is punishable by imprisonment for 20 to 60 years and extendable to up to 100 years, that he would serve three years of MSR after prison, and that the State was seeking the death penalty. The court also described the sentencing ranges for ACSA and concealment including MSR. However, the court did not mention consecutive sentencing. The court admonished, and defendant acknowledged, that he was waiving his right to a bench trial and to call and confront witnesses, that there was no agreement as to sentencing, and that the State was seeking the death penalty. He denied that anyone forced or threatened him to plead guilty, nor made any promises or offered anything of value to obtain his plea. As to factual basis, the parties noted the trial testimony and stipulated to (1) the autopsy report showing that the victim was bound in tape covered in cement, and that her throat was fractured, so that the medical examiner opined that she died of strangulation, (2) the content of defendant's statement admitting to having sex with, choking, and days later burying the victim, and (3) rebuttal testimony of a psychiatrist opining that defendant has anti-social personality disorder and is a sexual sadist but is not psychotic and was malingering. The court ascertained that defendant agreed with the factual basis and maintained his guilty plea, found that his plea was made knowingly and voluntarily and that there was a factual basis for the plea, and found him guilty.

¶ 6 On August 19, 1993, following evidence and arguments in aggravation and mitigation, the court found defendant eligible for the death penalty but sentenced him to prison terms of 48

years for murder, 22 years for ACSA, and 2 years for concealment, with the ACSA and murder sentences to be served consecutively for a total prison sentence of 70 years.

¶ 7 In 1995, defendant filed a *pro se* post-conviction petition. However, through appointed counsel, he successfully sought leave to withdraw his petition in October 1996. Defendant filed a *pro se* motion to reinstate his petition in 1997, which the court denied in January 1998.

¶ 8 In 2000, defendant filed a *pro se* document seeking leave to file a supplemental post-conviction petition, in which he challenged his consecutive sentencing pursuant to *Apprendi* and the trial court's failure to admonish him before his plea that he faced consecutive sentencing. The circuit court dismissed the petition in January 2001, deeming it his first post-conviction petition but concluding that *Apprendi* does not apply to consecutive sentencing nor on collateral review.

¶ 9 On appeal, we remanded for further post-conviction proceedings. We agreed with the circuit court that defendant's 2000 document was his first post-conviction petition. We noted that Supreme Court Rule 402(a)(2) (eff. July 1, 2012) requires that the trial court admonish a defendant who is pleading guilty of the sentencing ranges he faces "including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." As defendant's admonishments did not mention consecutive sentencing, though it is mandatory for ACSA, we found that his petition stated the gist of a meritorious claim.

¶ 10 In 2002, as said appeal was pending, defendant filed a *pro se* post-conviction petition, which was summarily dismissed in January 2003. We dismissed defendant's appeal therefrom as moot in light of our remand of the 2000 petition. *People v. Montanez*, No. 1-03-0675 (2003).

¶ 11 On remand of the 2000 petition, counsel was appointed and filed a supplemental petition, arguing in relevant part that defendant should be allowed to withdraw his plea because he was not admonished regarding consecutive sentencing and thus the trial court did not substantially comply with Rule 402. Counsel also argued that in 1987, when defendant allegedly committed

his offenses, (1) the maximum unextended prison sentence for first degree murder was 40 years, rendering his 48-year sentence void, and (2) consecutive sentencing for ACSA was not mandatory, so that his consecutive sentencing resulted from a mistake of law rather than a sound exercise of sentencing discretion.

¶ 12 On September 12, 2006, the parties told the court that they had reached an agreement whereby "relief would be granted in the form of a sentence reduction on the murder count to 40 years" and the 22-year sentence for ACSA would be served concurrently, with defendant withdrawing all other claims in the petition as supplemented. The court confirmed from post-conviction counsel that "you're withdrawing the first three points in the post-conviction petition," and confirmed from the State that it was conceding the sentencing issues: in 1987, consecutive sentencing for ACSA was not mandatory and the maximum unextended sentence for murder was 40 years. The court confirmed from defendant that he pled guilty in 1993 to murder, ACSA, and concealment and was now, in light of the "agreement as to the post-conviction petition" was "proceeding forth with your pleas of guilty." The court asked defendant if he "still stand[s] on your pleas of guilty *** on July 21, 1993" and "still stand on the same factual basis" set forth then, to which he responded affirmatively. The court found that defendant "is standing on his plea of guilty," found him guilty, and proceeded to sentencing. The court confirmed from defendant his understanding that he would receive 40 years for murder and a concurrent 22 years for ACSA, that his plea was not the result of coercion or promises, and that "you're agreeing to withdraw the post-conviction petition as it relates to the first three matters." Defendant waived a pre-sentencing investigation, and the court sentenced him on the convictions for murder, ACSA, and concealment to concurrent prison terms of 40, 22, and 2 years respectively. The court admonished defendant regarding his appeal rights, including that he could file within 30 days a written motion to reconsider his sentence or to withdraw his plea.

¶ 13 In April 2009, defendant filed the instant *pro se* post-conviction petition challenging his MSR term. Post-conviction counsel was appointed and certified in November 2009 that no amendment was needed to adequately present defendant's claims.

¶ 14 The State filed a motion to dismiss, arguing in relevant part that defendant was properly admonished regarding MSR during his 1993 guilty plea hearing and that his 1993 plea was open rather than negotiated as required for *Whitfield* relief. The State argued that the 2006 proceeding was a resentencing upon his 1993 guilty plea, which he had not withdrawn.

¶ 15 On November 30, 2010, following argument by the parties, the court granted the motion to dismiss. This appeal timely followed.

¶ 16 On appeal, defendant contends that the dismissal of his post-conviction petition was erroneous because he made a substantial showing that he entered a new, negotiated, guilty plea in 2006 but was not then admonished that his sentence included three years of MSR.

¶ 17 Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)(2) (West 2010)), the circuit court may summarily dismiss a petition within 90 days of filing if it is frivolous or patently without merit. When a petition is not summarily dismissed, a second stage of proceedings commences: counsel is appointed, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-2.1(b), -4, -5 (West 2010). At the second stage, a defendant must make a substantial showing of a constitutional violation to avoid dismissal, and we review *de novo* such a dismissal. *People v. Gomez*, 409 Ill. App. 3d 335, 338-39 (2011).

¶ 18 A negotiated guilty plea "is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. Rs. 604(d) (eff. Feb. 6, 2013), 605(b), (c) (eff. Oct. 1, 2001). While a defendant cannot

appeal from a negotiated plea "challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment," a defendant may appeal from an open or non-negotiated plea so long as he files either a motion to reconsider the sentence "if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d).

¶ 19 Under *Whitfield*, a defendant convicted on a negotiated plea who is not admonished that his agreed-upon sentence includes a term of MSR is entitled to have the MSR term deducted from his prison term to approximate the benefit of his bargain. *People v. Snyder*, 2011 IL 111382, ¶¶ 27-28. Conversely, where the plea is not negotiated – where there is no agreement as to sentencing – there is no benefit of the bargain and such relief is inappropriate. *Id.*, ¶ 30.

¶ 20 Here, the record belies the allegation that defendant entered a new, negotiated, guilty plea at the 2006 resentencing. Firstly, this court remanded for second-stage post-conviction proceedings. Even where this court remands to expressly allow a defendant to withdraw his guilty plea – which we did not do here – such an order merely enables a defendant to withdraw his plea in the circuit court if he so chooses. At the time of the resentencing hearing, defendant's 1993 open plea of guilty was still in effect.

¶ 21 Secondly, at the resentencing hearing, the parties and court consistently referred to defendant withdrawing his post-conviction claims other than the sentence claims and to the State conceding error on the latter. Conversely, no mention was made of defendant withdrawing his 1993 plea. While the court made various references to defendant pleading guilty, it elicited from defendant, and expressly found, that he was standing upon his earlier plea. Though not dispositive, we consider it telling that the court did not make the admonishments required by Supreme Court Rule 402(a) before a court may accept a guilty plea: reading of the charges,

description of all applicable sentencing ranges, and waiver of the right to a trial including confrontation of witnesses. Similarly, the court did not set forth the factual basis for defendant's plea but merely elicited that he stood upon the factual basis set forth for his plea in 1993. And in the same vein, the court admonished defendant of his appeal rights from an open plea rather than a negotiated one; that is, that he could file either a motion to withdraw his plea or a motion to reconsider his sentence. In sum, though the court from an abundance of caution incorporated some of the trappings of a guilty plea hearing, it is clear that neither the parties nor the court treated the resentencing hearing as a new guilty plea hearing where a negotiated plea was being entered, but instead as the final disposition of a post-conviction petition.

¶ 22 Lastly, we consider it key that, because defendant entered an open guilty plea in 1993, he could have at that time filed a motion to reconsider his sentence raising the very sentencing claims of the 2000 petition as supplemented and, had that motion been denied, properly taken a direct appeal challenging his sentencing alone. That he obtained sentencing relief years later on a post-conviction petition, and that the State conceded the sentencing errors, does not convert his plea into a negotiated plea.

¶ 23 Accordingly, the petition did not make a substantial showing of a meritorious claim and its dismissal was proper. The judgment of the circuit court is affirmed.

¶ 24 Affirmed.