

No. 1-12-2312

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. 99 CR 8281
)	
ORLANDO HENRIQUEZ,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held:* Where defendant entered a negotiated guilty plea and was not admonished of the accompanying mandatory supervised release (MSR) term, the trial court did not abuse its discretion in reducing defendant's sentence by three years, rather than permitting him to withdraw his plea.

¶ 2 Defendant Orlando Henriquez and five co-defendants, who are not parties to this appeal, were charged in connection with the March 2, 1999, murder of Michael Marchany. On May 13, 2002, defendant entered a negotiated guilty plea to first degree murder and attempted armed robbery in exchange for concurrent, respective terms of 45 and 15 years' imprisonment.

¶ 3 On appeal, this court granted defendant's motion for summary remand on the basis of inadequate guilty plea admonishments. After the case was remanded and the trial court provided the necessary postplea admonishments, defendant filed a motion to withdraw his guilty plea alleging that he lacked the intellectual ability to understand the plea or its consequences. The trial court ordered that defendant be examined to determine his fitness at the time of his guilty plea, and he was evaluated by Dr. Roni Seltzberg, who reported in a letter to the court her conclusion that he was fit to stand trial at the time of his plea. At the hearing on defendant's motion, defendant presented the testimony of Dr. Antoinette Kavanaugh, who found "sufficient reason to doubt that [defendant] had a comprehensive understanding *** of what the plea meant and its consequences" at the time of his plea. The court, however, found that Dr. Kavanaugh's testimony was incredible, and that no credible evidence existed to show that defendant was not aware of the consequences of his plea. The court denied the motion, defendant appealed, and this court affirmed that order. *People v. Henriquez*, No. 1-06-2080 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On May 26, 2009, defendant filed the *pro se* post-conviction petition at bar. In it, he alleged that his public defender was operating under a conflict of interest because defendant had alleged the ineffectiveness of a prior counsel from the same office, and that the trial court failed to admonish him that he would be subject to a three-year term of mandatory supervised release (MSR) at the conclusion of his sentence. The trial court dismissed the petition as frivolous and patently without merit on September 15, 2009. Defendant appealed, and this court entered an order remanding the case for further proceedings because defendant's petition was summarily dismissed more than 90 days after the deadline for doing so. *People v. Henriquez*, No. 1-09-2849 (2010) (dispositional order).

¶ 5 Upon remand, defendant's *pro se* petition was withdrawn, and appointed counsel filed a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), a supplemental petition, and defendant's affidavit. Defendant asserted that he would not have pleaded guilty had he been admonished on the MSR term, and requested that he be allowed to vacate his plea. The State filed an answer on April 26, 2012, conceding that defendant did not receive a proper admonishment on the MSR term, and that his sentence should be reduced by three years as a result. The State contended that this remedy was appropriate because this was a 1999 case, and it would be prejudiced if defendant was permitted to withdraw his plea more than 13 years after the crime occurred.

¶ 6 At the hearing on defendant's motion, defendant stated that he did not want a reduction in his sentence to account for the MSR term of which he was not admonished, and, instead, reiterated his request to withdraw his guilty plea. The State responded that defendant was not necessarily entitled to his choice of remedy, arguing:

"While great consideration is given to what the defendant wants, the issue of whether or not the State would be unduly prejudiced in trying a case at this late date is one this court can consider. *** [O]bviously we are talking about a situation here where the crime happened in 1999. We are now 13 years later.

The State would be unduly prejudiced in trying to try this case now. Witnesses disappear. Both police and civilians memories fade. And to try to properly try this case now would unduly prejudice the State."

¶ 7 On July 24, 2012, the circuit court issued a written order denying defendant's request to withdraw his guilty plea, and instead ordered a three-year reduction of his sentence.

¶ 8 In this appeal, defendant asserts that he received a more onerous sentence than he agreed to, and that he should therefore be able to withdraw his plea pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005). He contends that the three-year sentence reduction is an inadequate remedy

and that his preference to withdraw his plea should have been given "considerable, if not controlling, weight." *Whitfield*, 217 Ill. 2d at 205, quoting *Santobello v. New York*, 404 U.S. 257, 267 (1971) (J. Douglas concurring).

¶ 9 As an initial matter, the State contends that this court should not entertain defendant's *Whitfield* claim, as he did not raise it on direct appeal or in his previous motions to withdraw his plea. Our supreme court, however, rejected a similar argument in *Whitfield*, 217 Ill. 2d at 188. In concluding that there was no procedural default, the *Whitfield* court emphasized two facts: (1) the trial court did not admonish defendant about MSR; and (2) defendant did not learn about the imposition of MSR until he was in prison, sometime after the time to directly appeal had expired. *Whitfield*, 217 Ill. 2d at 188. Accordingly, the supreme court found that defendant "could not have raised the error in a motion to withdraw his plea or a direct appeal" (*Whitfield*, 217 Ill. 2d at 188) and addressed the merits of his claim. We reach the same conclusion here.

¶ 10 It is undisputed that defendant was not admonished about the MSR term, and there is no evidence that he could have raised the issue in a prior filing because there is no indication that he had knowledge of the issue since the trial court failed to apprise him of the MSR term that gives rise to his claim. Accordingly, we find no procedural default, and address the merits of defendant's claim that the trial court erred by not granting him the remedy of his choice.

¶ 11 Defendant specifically asserts that the trial court should have permitted him to withdraw his guilty plea, rather than reduce his sentence by three years, based on the court's failure to admonish him regarding his MSR term under *Whitfield*, 217 Ill. 2d at 195. The State concedes that a *Whitfield* violation occurred, but maintains that the reduction in defendant's sentence is the appropriate remedy under the circumstances of this case.

¶ 12 Defendant initially requests that this issue be reviewed *de novo*, framing it as whether the court followed the law in consideration of defendant's request to withdraw his plea. The State disagrees, observing that this is an appeal from a hearing at the third stage of post-conviction proceedings. It thus contends that the court's determinations must be upheld unless they are manifestly erroneous, and, in the case of a *Whitfield* violation, the court may exercise its discretion in determining an appropriate remedy. We agree.

¶ 13 In *Whitfield*, the supreme court held that where defendant pleads guilty in exchange for a specific sentence pursuant to a negotiated plea agreement and the court fails to admonish him that a mandatory supervised release (MSR) term would be added to that sentence, the sentence imposed is more onerous than what defendant agreed to, in breach of the plea agreement and in violation of due process. *Whitfield*, 217 Ill. 2d at 195. The supreme court found that two remedies exist when defendant has not received the benefit of his bargain: (1) the promise must be fulfilled, or (2) defendant must be allowed to withdraw his guilty plea. *Whitfield*, 217 Ill. 2d at 195. Although the supreme court found that defendant's preference should be given significant weight, it also indicated that the ultimate decision regarding the "'fashioning of an appropriate remedy" is "largely a matter of the exercise of the sound discretion of the court according to the circumstances of each case.'" *Whitfield* 217 Ill. 2d at 204, quoting *United States v. Bowler*, 585 F.2d 851, 856 (7th Cir. 1978). The supreme court then found that a sentence reduction, the relief sought by defendant, was the appropriate remedy. *Whitfield*, 217 Ill. 2d at 203–05.

¶ 14 In subsequent cases, however, where defendant's preferred remedy is to withdraw his plea rather than receive a sentence reduction, this court has examined the record to determine whether permitting that remedy would be unduly prejudicial to the prosecution. *People v. Smith*, 406 Ill. App. 3d 879, 894 (2010); *People v. Chamness*, 373 Ill. App. 3d 492, 495 (2007). In

Smith, this court considered the contention that the trial court erred by not granting defendant the relief of his choosing based on the court's failure to admonish him regarding his MSR term.

Smith, 406 Ill. App. 3d at 893. Defendant in *Smith* pleaded guilty to murder for the beating and death by drowning in a bathtub of a two-year-old child, and was sentenced to 32 years in prison.

Smith, 406 Ill. App. 3d at 879. Defendant's guilty plea came during the middle of his trial, after the State had presented the bulk of its case, including the testimony of nine witnesses. *Smith*, 406 Ill. App. 3d at 881.

¶ 15 When defendant later attempted to withdraw his guilty plea based on the court's failure to admonish him of the MSR term, defendant argued that, even though 10 years had elapsed since the victim's death, the State would not be prejudiced because the witnesses, or a transcript of their prior testimony, would be available for use at trial. *Smith*, 406 Ill. App. 3d at 894. This court found, however, that "[e]ven assuming such evidence is available, either form of evidence would be a poor substitute for live testimony presented by witnesses with fresh memories." *Smith*, 406 Ill. App. 3d at 894. We therefore concluded that, "[e]ven affording defendant's preference considerable weight, the trial court did not err under these circumstances in finding that reducing defendant's sentence was more appropriate than permitting defendant to withdraw his guilty plea and start anew. Defendant has received the bargain of his benefit and can claim no prejudice." *Smith*, 406 Ill. App. 3d at 894.

¶ 16 We find the facts of this case even more compelling than those in *Smith*, where even more time has passed since the victim's death and there are no transcripts of prior testimony which could provide a substitute for the live testimony of witnesses. We therefore conclude that, under these circumstances, the trial court did not err in finding that reducing defendant's sentence was the appropriate remedy. *Smith*, 406 Ill. App. 3d at 894.

¶ 17 Defendant alternatively requests that his case be remanded for specific findings on what prejudice, if any, the State would face if he were permitted to withdraw his plea. In support, he cites *Chamness*, 373 Ill. App. 3d at 495, where this court determined that the record was insufficient to determine whether retrial would prejudice the State, and remanded the case for the trial court to make that determination. We find *Chamness* distinguishable from the case at bar.

¶ 18 Here, unlike *Chamness*, the record indicates a number of reasons from which the court could have reasonably determined that a retrial would prejudice the prosecution. This was a capital case, and defendant was charged along with five co-defendants. The parties' discovery answers indicated 67 possible witnesses for the State, and 57 for the defense, including civilians, police officers, and an expert in neuropsychology. Even if those witnesses were still available more than 13 years after the crime at issue, their current testimony would be affected by the passage of time, and "a poor substitute for live testimony presented by witnesses with fresh memories." *Smith*, 406 Ill. App. 3d at 894. We therefore decline defendant's request to remand for specific findings, and affirm the order of the circuit court of Cook County.

¶ 19 Affirmed.