2017 IL App (1st) 150311-U

FOURTH DIVISION
June 15, 2017

No. 1-15-0311

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. 11 CR 19889
	)	
JARVIS PERKINS,	)	Honorable
	)	Colleen Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's postconviction petition where we lack the authority to reduce defendant's term of mandatory supervised release and the claim is moot; and (2) defendant is entitled to offset his fines and fees order by $250 and we reduce the total assessment to $334.

¶ 2 Defendant Jarvis Perkins appeals from the trial court's dismissal of his postconviction petition at the second stage of postconviction proceedings. Defendant appeals, arguing that (1) he made a substantial showing that his due process rights were violated where his negotiated plea included a two-year term of mandatory supervised release (MSR), but he subsequently learned he was required to serve a four-year term of MSR; and (2) this court should amend the fines and

fees order to vacate a $50 court system fee and offset his $200 domestic violence fine by his presentence credit.

¶ 3 In November 2011, defendant was charged by indictment with aggravated domestic battery, possession of a stolen motor vehicle, aggravated battery, and aggravated fleeing a peace officer. In July 2012, defendant entered a plea of guilty to one count of aggravated domestic battery. The trial court advised defendant that he was pleading guilty to a Class 2 felony and based on his background, the sentencing range was 3 to 14 years. The court also stated that defendant would be required to serve two years of MSR.

¶ 4 The parties stipulated to a factual basis. If called to testify, Timothy Williams and Horace Lewis would both state that on September 26, 2011, at 1:55 a.m., they heard noise outside their residences. They each looked outside from a window and saw defendant in the vicinity. Both observed defendant hitting a woman about the body and the head. Defendant then got into a gold Pontiac and drove away. Both called 911.

¶ 5 Officer Zima would testify that he responded to the 911 call and observed the victim on the ground with a swollen head, bruising, and a laceration to the face. The victim was transported to the hospital for treatment for head trauma. Sergeant Hobart would testify that he was monitoring radio traffic and heard the call to look for a gold Pontiac. He observed a Pontiac matching that description traveling north on 88th Avenue. The vehicle was speeding by traveling 77 miles per hour in a 35-mile zone, and then ran a red light. The sergeant pursued the vehicle and found it after it struck a light pole. No one was in the vehicle when he discovered it, but defendant was found approximately 100 yards from the accident attempting to conceal himself. Defendant was then taken into custody. The parties also stipulated that the victim had a dating

relationship with defendant and they have a 7-year-old daughter. The victim suffered memory loss as a result of the incident.

¶ 6 The trial court found that there was a sufficient factual basis for the plea and that defendant understood the nature of the charge, possible penalties, his rights, such that the plea was entered freely and voluntarily. The court found defendant guilty of aggravated domestic battery and entered judgment on the finding. The court then stated that it would "go along with the recommendation and agreement of the parties." And subsequently the court sentenced defendant to a term of four years in prison, with credit for 282 days, and a total of $584 in fees and costs. The court advised defendant that upon his release, he was "required to serve two years" MSR.

¶ 7 In August 2012, defendant filed a motion to withdraw his guilty plea, based on his misunderstanding that he was required to serve 85% of his sentence. At an October 2012 hearing, defendant informed the trial court that he wished to withdraw his motion, which the court allowed.

¶ 8 In March 2014, defendant filed his *pro se* postconviction petition, alleging that his right to due process was violated because when he entered into a negotiated plea of four years in prison and was improperly advised that upon his release he would be required to serve two years of MSR. But while in prison, defendant learned that he was required to serve four years of MSR. Defendant asked the trial court to reduce his prison term to three years, the statutory minimum for aggravated domestic battery, to get the benefit of his bargain. Defendant also alleged that the trial court failed to apply his presentence credit to the $200 domestic violence fine (730 ILCS 5/5-9-1.5 (West 2012)).

¶ 9 The trial court appointed counsel for defendant. In September 2014, the State filed a motion to dismiss defendant's postconviction petition, arguing that defendant did not suffer a constitutional violation and that the State recommended a sentence, which the trial court accepted. Following arguments, the trial court took the case under advisement. In January 2015, the trial court entered a written order granting the State's motion to dismiss. In its order, the court acknowledged that "[t]here is no dispute that the trial court admonished [defendant] that he would have to serve a period of years on [MSR], but that the amount of years was incorrect." The court held it "accepted an open plea from the parties and properly admonished the defendant to the sentencing range and did advise the defendant there would be a MSR term. While the statutory MSR term is two years greater than what [defendant] was admonished, it is much less than the maximum sentence authorized by law. Therefore, [defendant] had not shown that he suffered a constitutional violation."

¶ 10 This appeal followed.

¶ 11 On appeal, defendant argues that his due process right was violated where his negotiated plea included a two-term for MSR, but defendant was required to serve a four-year term.

¶ 12 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 to 122-8 (West 2012)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89

(1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 13 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012). “Only those claims in which a substantial showing has been made entitle the defendant to an evidentiary hearing.” *People v.*

Cleveland, 2012 IL App (1st) 101631, ¶ 55 (citing *People v. Lara*, 317 Ill. App. 3d 905, 908 (2000).

¶ 14 Here, defendant asserts that his due process rights were violated when he was improperly admonished regarding the length of his term of mandatory MSR. It is undisputed that the trial court advised defendant he was subject to a two-year MSR term, but he was actually subject to a four-year term. See 730 ILCS 5/5-8-1(d)(6) (West 2010). Defendant has completed his prison sentence and is currently serving his MSR, thus, the only remedy he can seek is a reduction of his MSR. The State first responds that the record is "unclear whether defendant's plea was negotiated," and even if the plea was negotiated, the MSR term was not part of the bargain. In the alternative, the State contends that defendant's requested remedy is unavailable to this court, rendering his claim moot. We agree. Even if we presume that defendant entered into a fully negotiated plea, we are unable to grant him any requested relief and his claim is moot for the reasons that follow.

¶ 15 In *People v. Whitfield*, the supreme court held that in cases where a defendant does not receive the "benefit of the bargain," there are two possible remedies: (1) the promise must be fulfilled; or (2) the defendant must be given an opportunity to withdraw his plea. *Whitfield*, 217 Ill. 2d 177, 202 (2005) (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). There, the defendant entered into a plea agreement for concurrent terms of 25 years and 6 years in prison, but the trial court failed to advise the defendant of a mandatory three-year term of MSR. *Id.* at 180. The defendant did not ask to withdraw his plea, but sought to receive the benefit of his bargain, by reducing his 25-year sentence to 22 years, plus 3 years of MSR. *Id.* at 181. The supreme court agreed that the defendant's constitutional rights had been violated and concluded

that the equitable remedy was to reduce the defendant's sentence to 22 years followed by a MSR term of 3 years. *Id.* at 203-05.

¶ 16 Here, defendant seeks to have *Whitfield*'s holding extended to his case, even though his prison sentence has been completed. Defendant does not wish to withdraw his plea, leaving the only possible remedy as a reduction of his four-year term of MSR. The State argues that under *People v. Porm*, 365 Ill. App. 3d 791 (2006), this court cannot modify defendant's statutorily mandated term of MSR and no relief can be granted.

¶ 17 The defendant in *Porm* advanced a similar argument made by defendant here, *i.e.*, he failed to receive the benefit of his bargain where he pled guilty for a sentence of 10 years, but he was not advised of three-year term of MSR. The defendant had completed his prison sentence and sought to strike his MSR term. *Id.* at 794. The *Porm* court relied on the decision in *People v. Russell*, 345 Ill. App. 3d 16 (2003).

¶ 18 The reviewing court in *Russell* held that "[c]ourts do not have authority to strike the mandatory supervised release term imposed under this statute." *Russell*, 345 Ill. App. 3d at 22 (citing *People v. Brown*, 296 Ill. App. 3d 1041, 1043 (1998) (mandatory supervised release attaches to sentence automatically; State has no right to offer the withholding of such period and the court has no power to withhold such period in imposing sentence)). The *Russell* court held that "the only available remedy is to permit defendant to withdraw his guilty plea and vacate his sentence." *Id.*

¶ 19 Based on *Whitfield* and *Russell*, the court in *Porm* concluded

> "this court cannot grant defendant the relief he requests. In the present case, defendant argues that because he completed his term of imprisonment, 'a vacation of his plea is not warranted here' and

> he asserts that he is 'unlikely to withdraw his plea.' Thus, the only relief he requests is that we strike the MSR term from his sentence. *Whitfield* and *Russell* make clear that we do not have the authority to comply with defendant's request.
>
> *Whitfield* also makes clear that the law is settled that the only remedies available in this type of situation are to fulfill the promise bargained or to give the defendant the opportunity to withdraw his plea. Defendant's sentence has been discharged, therefore we cannot grant an equitable solution as our supreme court did in *Whitfield*, as we only have authority to modify a sentence, not strike the MSR. At this date, there is no sentence remaining to modify as it has been discharged, only the MSR period remains. As argued, defendant's claim is moot.
>
> Defendant has represented both in his post-conviction petition and again on appeal, that he does not want to take advantage of the only remedy available to him, withdrawal of his guilty plea. Under these circumstances, a remand would be futile, he is without any other appropriate or available post-conviction relief, and we affirm the dismissal of his post-conviction petition." *Porm*, 365 Ill. App. 3d at 794-95.

¶ 20 We find *Porm* controls in this case. Here, as in *Porm*, defendant has fully completed his term of imprisonment and the sole remedy he seeks is that we reduce his term of MSR to two

years. As we have discussed, this court lacks the authority to grant such a remedy, and even assuming that defendant's claim is meritorious, it has been rendered moot. *Id.* at 794-95.

¶ 21 Defendant acknowledges the decisions in *Russell* and *Porm*, but argues that both cases were wrongly decided and cites *People v. Moore*, 214 Ill. App. 3d 938, 943-44 (1991), for the proposition that we have the authority to reduce his term of MSR. In *Russell*, this court expressly declined to follow *Moore*, whose holding we found to be contrary to the plain language of section 5-8-1(d)(2) of the Unified Code of Corrections (730 ILCS 5/ 5-8-1(d)(2) (West 1998)), which governs MSR terms, and we stressed our continued adherence to the principle that courts do not have the authority to strike MSR terms from a defendant's sentence. *Russell*, 345 Ill. App. 3d at 22. We continue to adhere to that principle, as well as to our reasoning and holdings as stated in *Porm* and *Russell*. Accordingly, we find that defendant's claim is moot because we are unable to grant any remedy. Thus, the trial court properly dismissed defendant's postconviction petition.

¶ 22 Defendant also contends that he is entitled to presentence credit toward the $50 court system fee (55 ILCS 5/5-1101(c) (West 2012)), and the $200 domestic violence fine (730 ILCS 5/5-9-1.5 (West 2012)). The State agrees that defendant is entitled to credit for both.

¶ 23 A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Under section 110–14(a) of the Code of Criminal Procedure of 1963, any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is entitled, upon application, to a credit of $5 per day of presentencing incarceration, with the credit not to exceed the amount of the fine. 725 ILCS 5/110-14(a) (West 2010). Defendant was in custody for 282 days before sentencing and, therefore, is entitled to a credit against any fine under section 110-14(a). The supreme court has

held that a defendant is allowed to raise this statutory claim at any time and at any stage of the proceedings. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008).

¶ 24 We agree with the parties that defendant is entitled to presentence credit for both fines. First, the domestic violence fine is specifically designated a fine and eligible for credit under section 110-14(a). Second, Illinois courts have consistently held that the court system fee operates as a fine, and is able to be offset by presentence credit. *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21; *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30; *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17. Accordingly, defendant is entitled to offset his fines and fees order by $250 from presentence credit. We correct defendant's fines and fees order to reflect a total assessment of $334.

¶ 25 Based on the foregoing reasons, we affirm the trial court's dismissal of defendant's postconviction petition and correct the order for fines and fees as stated.

¶ 26 Affirmed as modified.