2018 IL App (1st) 151502-U

No. 1-15-1502

Order filed January 31, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 17094
	)	
KENDALL FRY,	)	Honorable
	)	Marguerite A. Quinn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal, upon the State's motion, of defendant's supplemental postconviction petition is affirmed because defendant failed to make a substantial showing that his constitutional rights were violated. Fines and fees order corrected.

¶ 2 Defendant, Kendall Fry, appeals from the dismissal, upon the State's motion, of his supplemental petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends that the circuit court erred in dismissing the

petition because it made a substantial showing that he was denied his right to due process when the trial court failed to inform him that that he would be required to serve a three-year term of mandatory supervised release (MSR) upon his release from prison or otherwise link the term of MSR that he must serve to his agreed-upon sentence. Defendant also challenges his fines and fees order. We affirm, and correct the fines and fees order.

¶ 3 On January 11, 2010, following a conference held pursuant to Supreme Court Rule 402 (eff. July 1, 1997), defendant agreed to enter pleas of guilty to home invasion, armed robbery, and aggravated battery causing great bodily harm in exchange for a 12-year prison sentence. The trial court then admonished defendant, *inter alia*, that home invasion and armed robbery were "Class X felonies which carry a minimum sentence of six years up to 30 years in the Illinois Department of Corrections, which would be followed by mandatory supervised release." Defendant indicated that he understood. The court next stated that "the aggravated battery that caused great bodily harm, that's a Class 3 felony, which carries with it a minimum sentence of three to five years in the Illinois Department of Corrections *** [which] would be followed by a mandatory supervised release of one year." Defendant indicated that he understood the sentencing range for this charge. The State presented the factual basis for the pleas, and the trial court accepted defendant's pleas.

¶ 4 The trial court sentenced defendant to two concurrent 12-year prison terms for the home invasion and armed robbery convictions. Defendant was also sentenced to a concurrent six-year prison sentence for the aggravated battery causing great bodily harm. Defendant was awarded 146 days of presentence custody credit and was assessed $590 in fines, fees and costs.

¶ 5 In July 2012, defendant filed a *pro se* petition for postconviction relief alleging that at no time during his plea hearing did the trial court or the State admonish him that he would be subject to a term of MSR upon his release from prison. Defendant therefore argued that because he was not admonished regarding the term of MSR he must serve upon his release from prison, before he entered his negotiated plea, the addition of the MSR term to his negotiated sentence violated "due process, fundamental fairness and principles of contract law."

¶ 6 In May 2013, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and a supplemental petition for postconviction relief. The supplemental petition alleged that "nowhere" during the actual sentencing or during the admonishments prior to the acceptance of the guilty pleas was defendant ever told that "in addition" to a 12-year prison sentence, he would have to serve a 3-year term of MSR upon his release from prison. The petition also alleged defendant was not aware that a MSR term is a part of all sentences because he was only 16 years old at the time of the offenses and this was his first criminal conviction; he only learned about the required MSR term when he arrived at his correctional facility. The petition concluded that because the addition of the MSR term required defendant to "serve" more than the 12 years to which he had agreed, his sentence should be reduced to 9 years in prison followed by a 3-year MSR term. Attached to the petition in support was defendant's affidavit in which he averred that he was "unaware" that a 3-year term of MSR would be "added" to his 12-year prison sentence. The State then filed a motion to dismiss. Following argument, the trial court granted the State's motion to dismiss. Defendant now appeals.

¶ 7 On appeal, defendant contends that the circuit court erred when it granted the State's motion to dismiss because the supplemental petition made a substantial showing that he was

denied due process when the trial court did not properly admonish him that he would be required to serve a 3-year term of MSR upon his release from prison or otherwise link the term of MSR to his agreed-upon sentence.

¶ 8 The Act provides criminal defendants a remedy to address substantial violations of their constitutional rights in their original trial or sentencing hearing. *People v. Allen*, 2015 IL 113135, ¶ 20. At the second stage of proceedings under the Act, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file a motion to dismiss or an answer to the petition (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 violation of constitutional rights. *People v. Domagala*, 2013 IL 113688, ¶ 33. When a defendant makes the required substantial showing that his constitutional rights were violated, the proceeding moves to a third stage evidentiary hearing. *Id.* ¶ 34. A defendant is not entitled to an evidentiary hearing as a matter of right; rather, in order to advance to an evidentiary hearing, the allegations in the petition must be supported by the record or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id.* At this stage of the proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 9 In the case at bar, defendant's supplemental postconviction petition was dismissed upon the State's motion. We review the dismissal of a postconviction petition without a third-stage evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473. *De novo* review means that we

perform the same analysis that the trial court would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 10 In the case at bar, defendant was convicted pursuant to a negotiated guilty plea. Before accepting a guilty plea, the trial court must substantially comply with Supreme Court Rule 402. Ill. S. Ct. R. 402 (eff. July 1, 1997). Rule 402 sets forth admonishments that a trial court must give to a defendant in open court prior to accepting his guilty plea. Specifically, Rule 402 requires a trial court to admonish a defendant about "the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997).

¶ 11 In *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005), our supreme court held that a defendant's right to due process is violated when he pleads guilty in exchange for a specific sentence and the trial court fails to admonish him, before the plea is accepted, that an MSR term will follow his prison term. In that case, the trial court failed to admonish the defendant at the negotiated plea hearing that he was required to serve a three-year term of MSR in addition to his prison sentence and did not mention the required MSR term at all. Therefore, because the defendant was completely unaware that he would be required to serve a three-year MSR term upon his release from prison, the court reduced his prison sentence by three years to give him the benefit of the bargain to which he had agreed. *Id.* at 205.

¶ 12 Subsequently, in *People v. Morris*, 236 Ill. 2d 345, 366-37 (2010), our supreme court explained that *Whitfield* requires that a trial court advise a defendant that an MSR term "will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged."

¶ 13 Specifically, the court determined that "[a]n admonishment that uses the term 'MSR' without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case." *Id.* at 366. The court stated that "[i]deally a trial court's admonishment would explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment." *Id.* at 367. The court concluded that although a "trial court's MSR admonishments need not be perfect" they "must substantially comply with the requirements of [Supreme Court] Rule 402 and the precedent of this court." *Id.* at 367. The court recognized, however, that "there is no precise formula in admonishing a defendant of his MSR obligation" but that the admonition must be read in a practical and realistic way. *Id.* at 366. Ultimately, to satisfy due process, " '[t]he admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning.' " *Id.* (quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983)).

¶ 14 In *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010), the court found that "under *Whitfield*, a constitutional violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive in exchange for his plea of guilty." Accordingly,

> "[i]f, prior to the guilty plea admonishments, the defendant knows he will be sentenced to the penitentiary in exchange for his plea of guilty, and knowing this, he is told during the guilty plea hearing that he must serve an MSR term upon being sentenced to the penitentiary, then the defendant is placed on notice that his debt to society for the

> crime he admits having committed extends beyond fulfilling his sentence to the penitentiary." *Id.*

Therefore, the court found that the trial court sufficiently admonished the defendant when it told him: " 'if you plead guilty to this, I have to sentence you to the penitentiary between 6 and 30 years. You could be fined up to $25,000. You would have to serve at least three years mandatory supervised release, which is like parole.' " (Emphasis omitted.) *Id.* at 462, 467.

¶ 15 Similarly, in *People v. Hunter*, 2011 IL App (1st) 093023, ¶¶ 4, 19, the court found that the trial court's admonishments were sufficient when the court informed the defendant that " '[a]ny period of incarceration would be followed by a period of mandatory supervised release of two years following your discharge from the Department of Corrections.' " The court acknowledged that our supreme court stated in *Morris* that a "better practice" would be to admonish defendants regarding the term of MSR they must serve when pronouncing sentence, but found that such a practice was not "mandatory" to satisfy the requirements of due process. *Id.* ¶ 14 (citing *Morris*, 236 Ill. 2d at 367); See also *People v. Boykins*, 2017 IL 121365, ¶¶ 20-21 (Sept. 21, 2017) (citing *Davis* and *Hunter* with approval while finding that trial courts are not required to expressly link MSR to the pronounced sentence in order to satisfy the requirements of due process).

¶ 16 Following *Davis* and *Hunter*, we find the record belies defendant's claim that the trial court failed to sufficiently admonish him that he must serve a term of MSR upon his release from prison before accepting his guilty pleas. Prior to the plea hearing, defendant agreed to plead guilty to home invasion, armed robbery and aggravated battery causing great bodily harm and to serve 12 years in prison. He was therefore aware that he would have to serve prison sentence. At

the plea hearing, the trial court admonished defendant that home invasion and armed robbery were "Class X felonies which carry a minimum sentence of six years up to 30 years in the Illinois Department of Corrections, which would be followed by mandatory supervised release." The court further stated that "aggravated battery that caused great bodily harm, that's a Class 3 felony, which carries with it a minimum sentence of three to five years in the Illinois Department of Corrections *** [which] would be followed by a mandatory supervised release of one year." Defendant indicated that he understood the possible penalties for each of the charges.

¶ 17 Defendant is correct that the trial court never expressly stated that defendant would serve a three-year term of MSR upon his release from prison. However, the trial court mentioned MSR when explaining the penalties associated with each charge and specifically stated that a one-year term of MSR would follow a conviction for aggravated battery causing great bodily harm. Although the trial court never expressly told defendant that a three-year MSR term would follow his 12-year prison sentence, the court specifically stated that MSR "would" follow a term of imprisonment. Therefore, in the case at bar, the admonishments were sufficient to apprise an ordinary person in defendant's circumstances of the required warning. *Morris*, 236 Ill. 2d at 366. Moreover, our supreme court recently held that a trial court is not required to expressly link the MSR term to the sentencing pronouncement in order to satisfy the requirements of due process. See *Boykins*, 2017 IL 121365, ¶¶ 20-22. We finally decline defendant's invitation, unsupported by authority, to depart from this well-reasoned precedent and adopt a different standard for juveniles.

¶ 18 Ultimately, although the trial court did not follow the "better practice" suggested by our supreme court in *Morris* when it did not specify the length of MSR that defendant must serve

upon his release from prison, the admonishment that the court gave substantially complied with Rule 402 as required in *Morris* and satisfied due process. See *Morris*, 236 Ill. 2d at 366-67. Defendant has therefore failed to make a substantial showing of a constitutional deprivation, and his supplemental postconviction petition was properly dismissed. See *Domagala*, 2013 IL 113688, ¶ 35 (a " 'substantial showing' of a constitutional violation *** is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing" would entitle a defendant to relief (Emphasis in original.)).

¶ 19 Defendant next contends that the trial court failed to give him $5 per day of credit for the 146 days he spent in presentence custody. He argues that this presentence custody credit should be used to offset the $30 children's advocacy center assessment (55 ILCS 5/5-1101(f-5) (West 2010)), and $50 court system fee (55 ILCS 5/5-1101(c)(1) (2010)). He further argues that this court should vacate the $5 court system fee assessed pursuant to section 5-1101(a) of the Counties Code (55 ILCS 5/5-1101(a) (West 2010)). The State agrees that (1) defendant is owed presentence credit for his time in custody before sentencing, (2) the $30 children's advocacy center assessment and $50 court system fee should be offset by defendant's presentence custody credit, and (3) the $5 court system fee should be vacated. We review *de novo* the imposition of fines and fees. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 20 Defendant did not raise these claims at sentencing or in his postconviction petition and, therefore, these claims are arguably forfeited. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). To determine whether or not we may address these claims, we must examine the basis of defendant's arguments on appeal. See *People v. Brown,* 2017 IL App (1st) 150203, ¶ 35 (Sept. 19, 2017). First, defendant argues that the trial court made what are essentially mathematical

errors when calculating how much he owes. Specifically, defendant argues that the fines, fees, and costs order included in his common law record does not reflect his $5 per day credit for the 146 days he spent in custody before trial, which should be applied to offset certain fines charged him. Second, defendant contends that the $5 court system fee was improperly assessed. We address the claims of mathematical error first.

¶ 21 Although defendant's request for presentence credit is raised for the first time on appeal, section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), permits this court to award a defendant presentence custody credit on "application of the defendant." Claims for presentence custody credit under section 110-14 may be raised "at any time and at any stage of court proceedings, even on appeal in a postconviction petition." *People v. Caballero*, 228 Ill. 2d 79, 88 (2008) (the defendant was entitled to $5 per day for the 118 days he spent in custody before sentencing). Granting credit is a simple ministerial act that promotes judicial economy by ending further proceedings on the issue. *People v. Woodard*, 175 Ill. 2d 435, 456-57 (1997).

¶ 22 As explained in *People v. Griffin*, 2017 IL App (1st) 143800, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017), where, as here, a case involves an appeal from a properly filed postconviction petition and it is undisputed that the appeal is properly before the court, "*Caballero*, in essence, stands for the proposition that a defendant may 'piggyback' a section 110-14 claim onto any properly filed appeal, even if the claim is unrelated to the grounds for that appeal." *Id.* ¶ 25; see also *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 7. So, we will address defendant's claim regarding presentence custody credit. *Brown*, 2017 IL App (1st)

150203, ¶ 35 (reaching the merits of defendant's claim regarding presentence custody credit raised for the first time on appeal from the summary dismissal of a postconviction petition).

¶ 23 A defendant is entitled to a $5 credit toward the fines levied against him for each day of incarceration before sentencing. 725 ILCS 5/110-14(a) (West 2010). Defendant accumulated 146 days of presentence custody credit and is entitled to as much as $730 of credit toward his eligible fines. Defendant is entitled to use this presentence custody credit to offset the $30 children's advocacy center assessment. See *Brown*, 2017 IL App (1st) 150203, ¶ 39 (applying defendant's presentence custody credit to offset the $30 children's advocacy center assessment). The fines and fees order should therefore indicate that the total amount owed by him is $560, rather than $590 as it currently states.

¶ 24 Although *Caballero* and section 110-14 permit defendant to raise his claim for the *per diem* credit in this proceeding, "they do not allow him to raise *substantive* issues concerning whether particular assessments apply to his case or whether they are properly categorized as fines or fees." (Emphasis in original.). *Brown*, 2017 IL App (1st) 150203, ¶ 40. This court has previously held that fees assessed in error are not void, nor are they independently reviewable under Illinois Supreme Court Rule 615(b). *Grigorov*, 2017 IL App (1st) 143274, ¶¶ 12-14. Accordingly, we do not have "independent subject matter jurisdiction" over these claims. *Brown*, 2017 IL App (1st) 150203, ¶ 40. Therefore, we will not address defendant's claims that the $50 court system fee is really a fine to which he should be allowed credit and that the $5 court system fee should not have been assessed in this case. *Id.* ¶ 41.

¶ 25 The fact that the State concedes that the $50 court system fee is really a fine subject to offset and that the $5 court system fee should be vacated does not persuade us to overlook our

lack of jurisdiction. See *Griffin*, 2017 IL App (1st) 143800, ¶ 22 ("It tortures the concept of a reviewing court's jurisdiction to speak of revestment of jurisdiction on appeal to address issues never presented in the first instance to the trial court."). "Moreover, the idea that the State's concession to a substantive fines or fees argument could 'revest' this court with jurisdiction would be contrary to our Supreme Court's directive that the revestment doctrine be applied narrowly." See *Brown*, 2017 IL App (1st) 150203, ¶ 42 ("Given the vast number of fines and fees cases before this court, the exception would literally swallow the rule.").

¶ 26 Defendant is entitled to presentence custody credit to offset the $30 children's advocacy center assessment, a reduction of $30. We direct the clerk of the court to correct defendant's fines and fees order. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 27 Affirmed; fines and fees order corrected.