2019 IL App (4th) 170386-U

No. 4-17-0386

FILED
August 27, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DANTE M. BROWN,	)	No. 15CF325
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White concurred in the judgment.
Justice DeArmond dissented.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded with directions, concluding the record demonstrated the trial court failed to sufficiently admonish defendant as to the statutorily-required term of mandatory supervised release prior to accepting the negotiated guilty plea.

¶ 2 Defendant, Dante M. Brown, appeals from the trial court's judgment summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2016)). On appeal, defendant argues his prison sentence should be reduced from 12 years to 9 years as the record demonstrates his due process rights were violated when the trial court imposed the statutorily-required 3-year term of mandatory supervised release (MSR) without first admonishing him the same would be added to his negotiated 12-year prison sentence. We agree and reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 On March 6, 2015, the State charged defendant by information with one count of manufacture or delivery of a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2014) (count I)), a Class X felony. The State alleged, "on or about March 5th, 2015, *** defendant did knowingly and unlawfully possess with intent to deliver 15 grams or more but less than 100 grams of a substance containing cocaine."

¶ 6 B. Additional Information and Plea Hearing

¶ 7 On August 3, 2015, the State charged defendant by information with one count of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2014) (count II)), a Class 2 felony. The State alleged, "on or about February[] 2015, *** defendant did knowingly and unlawfully possess with intent to deliver less than one gram of a substance containing cocaine."

¶ 8 That same day, the trial court held a plea hearing. The court began the hearing by admonishing defendant as to the offense charged in count II of the information. Defendant indicated he understood the charge against him. The court then gave the following admonishment as to the possible penalties for the offense charged in count II:

> "Now, is a Class 2 felony. The normal penalty range is not less than three nor more than seven years in prison. If you have two or more Class 2 felonies or greater, then this becomes a Class X offense. It calls for a mandatory minimum sentence fixed at six years, your maximum sentence would be fixed out to 30 years

> followed by a period of mandatory supervised release of three years, and your maximum fine could be up to $200,000. So you understand those would be the absolute maximum penalties? Yes?"

Defendant responded, "Yes, sir."

¶ 9 After issuing its admonishments as to the offense charged in count II of the information and the possible penalties for that offense, the trial court asked defendant if he wished to plead guilty. Defendant indicated he did. The court admonished defendant as to the rights he was giving up if he pleaded guilty. Defendant indicated he understood. The court questioned defendant whether he was entering his plea at his own free will. Defendant indicated he was.

¶ 10 The trial court asked the State for "[t]he agreements." The State asserted:

> "[The] [S]tate has agreed to resolve the case with a sentence of 12 years[']incarceration in the Illinois Department of Corrections. The defendant has 152 days['] credit for time already served. He is to pay all fines, fees, and costs as authorized by statute to include the crime lab and violent crime fee, genetic marker grouping analysis fee, if he hasn't already satisfied that.
>
> He has a $760 credit for 152 days already spent in custody. He must pay the mandatory street value fine as assessed and as set forth in the order. If he hasn't done so, he must submit specimens of blood, saliva, or tissue as required by statute.
>
> Count I as originally charged is to be dismissed. The [S]tate has agreed to not file any additional charges out of Champaign Police

Department Champaign Police Report Number 15-1743."

On examination of the court, both defense counsel and defendant agreed with the State's recitation of the plea agreement.

¶ 11 The trial court questioned defendant if anyone promised him anything else in exchange for pleading guilty. Defendant indicated no one had. The court questioned defendant whether anyone forced him to plead guilty. Defendant indicated no one had.

¶ 12 The trial court requested a factual basis for the plea. The State indicated the evidence would show the Champaign Police Department Narcotics Unit performed a drug investigation involving defendant in February 2015. The narcotics unit conducted two controlled buys from defendant at his residence with the use of a confidential source. In each case, defendant provided cocaine to the confidential source in exchange for money provided by the narcotics unit. A search warrant later executed on defendant's home disclosed cocaine, scales, and packaging material. Defense counsel stipulated to the factual basis.

¶ 13 The trial court questioned defendant whether he desired to plead guilty to count II of the information. Defendant indicated he did. The court accepted defendant's guilty plea and then entered judgment.

¶ 14 The trial court called the matter for sentencing. The court noted, "[s]how waiver of presentence [investigation] report." The court inquired as to defendant's criminal record, to which the State stated:

> "Burglary in '97, delivery of a controlled substance in 2000, 2003 a federal offense for firearms, in 2007 manufacture and delivery of a controlled substance. The defendant does has have priors help manifesting his eligibility for a Class X."

¶ 15 Without commenting on the State's statement concerning defendant's criminal record, the trial court issued its sentencing decision:

> "The defendant will be sentenced to a period of incarceration in the Illinois Department of Corrections for 12 years. He'll get credit for 152 days served. He has the monetary obligations due and owing as set forth in the order.
>
> On motion of the [State][,] [c]ount I is dismissed. There will be no charges filed based upon the Champaign report as set forth in this order."

¶ 16 The record contains both a sentencing judgment and a sentencing order. Both the judgment and the order indicate defendant was convicted of a Class 2 felony but sentenced as a Class X offender to 12 years' imprisonment and 3 years' MSR. The sentencing order also provides the financial and general obligations imposed against defendant as well as the State's agreements.

¶ 17 Defendant did not appeal from his conviction and sentence.

¶ 18 C. *Pro Se* Postconviction Petition

¶ 19 On April 7, 2017, defendant filed a *pro se* postconviction petition. In part, defendant alleged the three-year MSR term imposed against him violated both his plea agreement and his due process rights as he was not properly admonished the same would be included as part of his negotiated sentence. Defendant requested a three-year reduction in his prison sentence.

¶ 20 D. Summary Dismissal

¶ 21 On April 19, 2017, the trial court entered a written order summarily dismissing defendant's *pro se* postconviction petition, concluding it was "frivolous, patently without merit, not to mention outrageous." In its order, the court noted defendant's petition claimed "he was not properly admonished at the time of his plea that he would be subject to a period of [MSR] of [three] years." The court found, "defendant was properly admonished."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues his prison sentence should be reduced from 12 years to 9 years as the record demonstrates his due process rights were violated when the trial court imposed the statutorily-required, 3-year MSR term without first admonishing him the same would be added to his negotiated 12-year prison sentence. The State disagrees, maintaining the record demonstrates the trial court sufficiently admonished defendant about the required MSR term. The State alternatively asserts, to the extent defendant's petition states the gist of a constitutional claim, we should remand for second-stage postconviction proceedings rather than a reduction in defendant's sentence.

¶ 25 The Act (725 ILCS 5/122-1 to 122-7 (West 2016)) "provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both." *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The adjudication of a postconviction petition follows a three-stage process. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615. In this case, defendant's postconviction petition was dismissed at the first stage. We review a first-stage dismissal *de novo*. *People v. Boykins*, 2017 IL 121365, ¶ 9, 93 N.E.3d 504.

¶ 26 At the first stage of postconviction proceedings, the trial court must decide whether the defendant's petition is "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the court determines the petition is either frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* A petition is frivolous or patently without merit if it has "no arguable basis either in law or in fact, relying instead on an indisputably meritless legal theory or a fanciful factual allegation." (Internal quotation marks omitted.) *Boykins*, 2017 IL 121365, ¶ 9.

¶ 27 Before accepting a negotiated guilty plea, a trial court must substantially comply with Illinois Supreme Court Rule 402 (eff. July 1, 2012). Rule 402 provides certain admonishments the court must give to a defendant in open court prior to accepting a guilty plea. Rule 402(a)(2) specifically 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, 2012).

¶ 28 "To substantially comply with Rule 402 and due process where a defendant enters into a negotiated plea for a specific sentence, the trial court must advise the defendant, prior to accepting his plea, that a term of MSR will be added to the sentence." *Boykins*, 2017 IL 121365, ¶ 13 (citing *People v. Whitfield*, 217 Ill. 2d 177, 194-95, 840 N.E.2d 658, 669 (2005)). While " 'there is no precise formula in admonishing a defendant of his MSR obligation,' " an admonition will be deemed to satisfy due process where " 'an ordinary person in the circumstances of the accused would understand it to convey the required warning.' " *Id.* ¶ 16 (quoting *People v. Morris*, 236 Ill. 2d 345, 366, 925 N.E.2d 1069, 1082 (2010)).

¶ 29 In this case, the trial court referenced the statutorily-required, three-year MSR term only once during the plea hearing. See 730 ILCS 5/5-8-1(d)(1) (West 2014) (providing the required MSR term). The court's reference occurred during its admonishment as to the possible penalties for the offense charged in count II of the information. Reading the court's admonition "in a practical and realistic way" (*Boykins*, 2017 IL 121365, ¶ 16), we cannot say an ordinary person in the circumstances of defendant would understand a term of MSR attached to his negotiated sentence. The court admonished defendant (1) he could be sentenced as a Class X felon only if he had two qualifying felonies, and (2) MSR attached only to the maximum 30-year Class X felony sentence. Contrary to the State's argument, the court never told defendant he "was going to be sentenced as a Class X offender" or that any Class X sentence "would be followed [by] a [MSR] period of three years." The record establishes defendant's due process rights were violated when the trial court imposed the statutorily-required, 3-year MSR term without first sufficiently admonishing him the same would be added to his negotiated 12-year prison sentence. The court clearly erred in summarily dismissing defendant's postconviction petition.

¶ 30 Where a trial court's summary dismissal of a defendant's postconviction petition is in error, the usual remedy is to remand the matter for second-stage postconviction proceedings. *People v. Buffer*, 2019 IL 122327, ¶ 45. However, where all of the facts and circumstances to decide a defendant's claim are already in the record, judicial economy may favor alternative relief. *Id.* ¶ 45-46.

¶ 31 In *Whitfield*, 217 Ill. 2d at 182, the defendant appealed from the second-stage dismissal of his postconviction petition. The supreme court found, rather than remanding for a

third-stage postconviction proceedings, the defendant was "entitled to postconviction relief" because the record "established that his constitutional rights were substantially violated." *Id.* at 202. The court identified two remedies available to a defendant who does not receive the benefit of a plea bargain as a result of improper Rule 402 admonishments: either the bargain must be fulfilled or the defendant must be afforded an opportunity to withdraw his guilty plea. *Id.* at 202-05. Based on the defendant's stated preference, the court reduced the defendant's prison sentence by three years, the term of MSR he would serve after release from prison, reasoning the modified sentence was closer to the one for which he bargained. *Id.* at 205.

¶ 32 Given defendant's requested relief and because the record establishes a clear due process violation, we find the appropriate remedy is to reverse the trial court's judgment summarily dismissing defendant's *pro se* postconviction petition and remand the matter for the trial court to accord defendant postconviction relief, that relief being the issuance of an amended sentencing judgment and an amended sentencing order providing defendant is to serve nine years' imprisonment followed by three years' MSR. See, *e.g.*, *People v. Company*, 376 Ill. App. 3d 846, 852-53, 876 N.E.2d 1055, 1060-61 (2007), overruled on other grounds by *Boykins*, 2017 IL 121365, ¶ 21, (concluding the appropriate remedy where the trial court failed to sufficiently admonish an MSR term would attach to the defendant's negotiated sentence was to grant defendant's request to enforce the negotiated plea agreement as the defendant understood it by reducing the prison sentence by the required MSR term).

¶ 33 For future cases, we strongly encourage the trial court to follow the practice outlined and encouraged by our supreme court in its 2010 *Morris* decision and then repeated in its 2017 *Boykins* decision: "Ideally, 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." *Morris*, 236 Ill. 2d at 367; see also *Boykins*, 2017 IL 121365, ¶ 15. This practice (1) ensures a defendant understands the consequences of his or her plea agreement, and (2) avoids prolonged litigation on the issue. *Morris*, 236 Ill. 2d at 368.

¶ 34 III. CONCLUSION

¶ 35 We reverse the trial court's judgment summarily dismissing defendant's *pro se* postconviction petition and remand the matter for the trial court to accord defendant postconviction relief, that relief being the issuance of an amended sentencing judgment and an amended sentencing order providing defendant is to serve nine years' imprisonment followed by three years' MSR.

¶ 36 Reversed and remanded with directions.

¶ 37 JUSTICE DeARMOND, dissenting:

¶ 38 I respectfully dissent. Our supreme court told us in *Boykins* that MSR admonishments "must be read in a practical and realistic way." It said " ' "the admonition is sufficient if an ordinary person *in the circumstances of the accused* would understand it to convey the required warning." ' " (Emphasis added.) *Boykins*, 2017 IL 121365 ¶ 16 (quoting *Morris*, 236 Ill. 2d at 366, quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983)). I understand that to mean, even with the poorly worded MSR admonishment in this case, a defendant's level of familiarity with the sentencing process is relevant. Here, defendant has received sentences including MSR terms at least three times in state court in addition to a federal sentence which, although not directly related to MSR, still reveals his familiarity with the process.

¶ 39 The common-law record reveals defendant filed a *pro se* petition for writ of *mandamus* in June 2016, almost two months before his notice of appeal, wherein he noted his allegedly improper sentence resulted in "more parole time than allowed as a class 2 Felony offender." On his own motion, his appeal from the conviction, sentence, and denial of request for *mandamus* relief was dismissed on February 16, 2017. On April 7, less than two months later, defendant filed his *pro se* postconviction petition, alleging for the first time he "was not properly admonished of the statutorily required 3 years MSR." No motion to withdraw his plea or other postsentence motion was filed raising the issue previously.

¶ 40 The objective standard of considering "an ordinary person in the circumstances of the accused" exists because we are not normally privy to the thoughts of the defendant. However, in this case, defendant's *pro se* petition for writ of *mandamus* gives us a front-row seat into defendant's mind and understanding of the MSR terms. Defendant reveals an understanding of the distinction between the MSR terms in a Class 2 felony versus those for a Class X felony. See 730 ILCS 5/5-8-1(d)(1), (d)(2) (West 2014) (stating a three-year mandatory MSR term for Class X felonies and a two-year mandatory MSR term for Class 2 felonies). As defendant clearly understood the MSR terms, I believe it is absurd for him to now argue, successfully I might add, that he was not aware of his three-year mandatory MSR term. Such manipulation of both the record and reality is concerning to me and should be to others as well.

¶ 41 This four-time convicted and incarcerated state and federal felon alleged, "[h]ad I been advised of [the 3 year MSR] requirements, I would of [*sic*] never entered into said agreement." As if the fact he had just served a 10-year sentence and was being offered a plea of

12 years when, if convicted, he was clearly subject to the full range of Class X sentences had nothing to do with it.

¶ 42 This line of attack has become the claim *de jour*, and I find it baseless for those who have been through this process multiple times. As I noted in my previous dissent in *People v. Eatman*, 2019 IL App (4th) 170249-U, in my experience there are three things with which defendants who have served penitentiary sentences are intimately familiar: presentence credit, MSR terms, and their outdate calculations. "Substantial justice," in my humble opinion, does not mean a rote recitation of words to a defendant who knows more about his MSR than anyone else in the room.

¶ 43 If defendant was someone who had never been sentenced to the penitentiary, a different result might be warranted. Here, however, defendant tells us he knew the difference between the MSR term for a Class X felony and one for a Class 2 felony *before* later claiming he did not understand. We are entitled and, I would suggest, obligated to rely on defendant's own words, in his own handwriting. I do not think a defendant who has told us he knew the difference between the MSR term he received and one for a Class 2 felony should be able to hit the MSR jackpot. For a defendant as sophisticated in the process as defendant here, I discount the poorly worded admonition so long as the proper MSR term is mentioned somewhere in the plea discussion.

¶ 44 Having said all that, I agree wholeheartedly it is the trial judge's responsibility to get it right. By simply following the script offered in *Morris*, subsequently referenced in *Boykins*, and now noted by the majority, a trial judge can avoid this issue entirely.

¶ 45 Since I disagree with the finding of a clear due process violation, based on the procedural posture of the case, I believe, at best, this matter should be returned for further hearing on the defendant's postconviction petition.