

CUMULATIVE DIGEST

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§37-1

Parole & Mandatory Supervised Release

§37-1(a)

Generally

People v. McChriston, 2014 IL 115310 (No. 115310, 1/24/14)

The trial court's failure to mention a term of mandatory supervised release (MSR) in its oral and written sentencing orders did not mean that the Department of Corrections (DOC) impermissibly added MSR to defendant's sentence in violation of the separation of powers clause of the Illinois Constitution or the federal constitutional right to due process.

1. Under the Illinois Constitution, the legislative, executive and judicial branches are separate, and the power to impose a sentence is exclusively a function of the judiciary. At the time defendant was sentenced (2004), the Unified Code of Corrections (Code) mandated that the term of MSR for defendant's Class X felony was three years. 730 ILCS 5/5-8-1(d)(1). The code also provided that "every sentence shall include as though written therein a term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d). Consequently, the plain language of the Code provides that the sentence shall include a period of MSR as if it were written within the sentence. The sentencing order issued by the trial court thus included a term of MSR even if the court did not mention MSR at sentencing or in the sentencing order. Since MSR was automatically included "as though written therein," the DOC did not add to defendant's sentence by imposing a term of MSR, and no violation of the separation of powers occurred.

The subsequent legislative history of section 5-5-1(d) provides further evidence that no violation occurred. In 2011, this section was amended and now reads "the mandatory supervised release term shall be written as part of the sentencing order." The amended statute requires the court to explicitly write the MSR term in the sentencing order, and stands in contrast to the language in the previous statute, "as though written therein," whose plain and ordinary meaning suggests that the legislature intended the mandatory MSR term to apply even if not specifically written in the sentencing order. The purpose of the amendment was to change the prior rule and now require the court to specify the MSR term in its sentencing order.

2. The trial court's failure to mention MSR in its oral and written sentencing orders did not mean that the DOC impermissibly imposed MSR in violation of defendant's federal due process rights. The cases relied on by defendant, **Hill v. United States ex rel. Wampler**, 298 U.S. 460 and **Earley v. Murray**, 451 F.3d 71, do not require a different result.

In **Wampler**, the United States Supreme Court held that it was impermissible for a clerk to add a provision to the trial court's sentencing order requiring the defendant to remain in prison until he paid his fines. Since the addition of this requirement was discretionary, the decision to impose it was committed entirely to the trial court and must be expressed in the court's sentence. The provision added by the clerk was therefore void.

In **Earley**, the Second Circuit Court of Appeals applied **Wampler** to a case where a New York court failed to mention MSR in the oral or written sentencing order. **Earley** recognized that New York law mandated a specific term of MSR and the trial court thus had no discretion about whether to impose MSR. **Earley** nonetheless found that **Wampler** stood for the proposition that only the court's judgment establishes a defendant's sentence, and

therefore a sentence may not be increased by a non-judicial agency.

Decisions of the Second Circuit Court of Appeals construing New York law have no power to enjoin the enforcement of Illinois statutes. **Earley** thus has no consequence in Illinois until an Illinois court endorses its analysis. Moreover, **Earley's** broad reading of **Wampler** is unpersuasive. **Wampler** involved a discretionary sentencing option, while **Earley** and the present case involve a mandatory sentence with no discretionary power afforded to the trial court. Unlike **Wampler**, the enforcement of a mandatory MSR term in this case was not an increase in sentence since the MSR term attached to defendant's sentence automatically as though written into the sentence. Accordingly, no due process violation occurred in this case.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Rinehart, 2012 IL 111719 (No. 111719, 1/20/12)

The Code of Corrections provides that the MSR term for certain sex offenses "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4). The court construed this statute to reflect the intent of the legislature to abandon the structure of determinate MSR terms and adopt a structure of indeterminate or extended MSR terms for sex offenders precisely because it viewed sex offenses differently, due to the risk of recidivism. The MSR term for those sex offenders is therefore an indeterminate term of three years to life.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

Walker v. Hill, 241 Ill.2d 479, 948 N.E.2d 601 (2011)

1. Procedural due process protections under the Federal and Illinois Constitutions are triggered when a citizen has a legitimate claim of entitlement to a constitutionally protected liberty interest. A properly convicted person does not have a constitutional right to be conditionally released on parole before his sentence expires. However, a State may create a protected liberty interest in its parole system by mandating a prisoner's release when the parole authority determines that certain prerequisites exist.

The Illinois parole structure does not require that parole be granted when certain conditions exist. Instead, the legislature has required that parole requests be denied under certain circumstances, and left the question of parole to the complete discretion of the Prisoner Review Board in all other circumstances. Because prisoners do not have a legitimate expectation of parole under specified circumstances, procedural due process protections do not apply to the Prisoner Review Board's actions.

Because procedural due process protections do not apply, the trial court properly dismissed claims that defendant's parole hearings were fundamentally unfair because the Review Board considered: (1) the fact that defendant had originally been sentenced to death, although that sentence was overturned, and (2) prison disciplinary infractions which defendant claimed were false and motivated by a biased DOC employee.

2. The *ex post facto* clauses of the United States and Illinois constitutions prohibit the enactment of laws which retroactively alter the definition of a crime or increase the punishment for a criminal act. *Ex post facto* principles were not violated where the Prisoner Review Board changed its interpretation of 730 ILCS 5/3-3-5(c)(2), which requires that parole be denied if the defendant's release would deprecate the seriousness of the offense, between the time defendant was sentenced and his parole hearing.

By definition, a discretionary parole system is subject to modification based on experience and new insights. Furthermore, this issue does not involve the retroactive application of a change in a rule or a statute, but a change in the way the Prisoner Review

Board exercises its discretion through an existing rule. The Board does not violate the *ex post facto* clauses of either the State or federal constitutions because it modifies the manner in which it exercises its discretion.

3. Similarly, the *ex post facto* clauses were not violated by an amendment to a statute governing the frequency of parole hearings. Under U.S. Supreme Court and Illinois precedent, a decrease in the frequency of parole hearings is *ex post facto* only if there is a sufficient risk that the defendant's punishment for the crimes will be increased. An amendment which creates only a speculative possibility that punishment will be increased is not *ex post facto*.

Here, the amendment to 730 ILCS 5/3-3-5(f), which governs the frequency of parole hearings, did not create a substantial risk that punishment will be increased. When defendant was convicted, §3-3-5(f) provided for a parole hearing every 12 months. In 1996, the statute was amended to allow the Prisoner Review Board to extend the time between hearings up to three years if it is not reasonable to expect that parole will be granted in that period. Because extended periods between parole hearings are permitted only when there is no reasonable likelihood that parole will be granted, the Prisoner Review Board has authority to tailor the frequency of parole hearings to the particular circumstances, and an inmate may seek a parole hearing at any time based upon new facts or extraordinary circumstances, there is no reasonable likelihood that the amendment will result in increased punishment. Thus, no *ex post facto* violation occurred.

The dismissal of defendant's complaint seeking declaratory and *mandamus* relief was affirmed.

People v. McCurry, 2011 IL App (1st) 093411 (No. 1-09-3411, 11/23/11)

Under 730 ILCS 5/5-8-1(d)(4), the mandatory supervised release term for criminal sexual assault "shall range from a minimum of three years to a maximum of the natural life of the defendant." Noting a conflict in appellate precedent, the court concluded that §5-8-1(d)(4) was intended to require the trial court to set an indeterminate MSR term of three years to natural life, with the Prisoner Review Board deciding, on a case-by-case basis, when a particular offender is unlikely to reoffend and can be safely released from MSR.

The court rejected the argument that the trial judge is required to set an MSR term of a fixed number of years between three years and natural life. The court concluded that the goal of preventing recidivism would not be served by having the trial judge set an MSR term at sentencing and having the Prisoner Review Board determine, years later, whether the offender is likely to recidivate. (**Note:** This issue is currently pending before the Illinois Supreme Court in **People v. Rinehart**, No. 111719.)

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Rinehart, 406 Ill.App.3d 272, 943 N.E.2d 698 (4th Dist. 2010)

Generally, 730 ILCS 5/5-8-1(d)(2) provides a two-year-term of MSR for a Class 1 or Class 2 felony. However, the MSR term for convictions of criminal sexual assault, predatory criminal sexual assault of a child, and aggravated criminal sexual assault "shall range from a minimum of three years to a maximum of the natural life of the defendant." 720 ILCS 5/5-8-1(d)(4).

At defendant's sentencing for criminal sexual assault, the trial court did not impose a term of MSR. Instead, it stated that DOC would impose a term of MSR between three years and natural life. Defendant then received a natural life MSR term from DOC.

Because MSR is a component of the authorized sentence and is included in the sentencing statute, the Appellate Court concluded that the legislature intended for the trial

court to set a specific MSR term. The court acknowledged that 730 ILCS 5/3-3-8 permits the Prisoner Review Board to terminate MSR early under certain circumstances, but held that the authority to initially specify the term lies with the trial judge. The court rejected **People v. Schneider**, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010), which held that the legislature intended for the trial court to set an indeterminate MSR term and for DOC to decide when MSR is to be terminated.

The court vacated the natural life MSR term imposed by DOC and remanded the cause with directions for the trial court to set a MSR term.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

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People v. Hawkins, ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 110792, 6/16/11)

730 ILCS 5/3-7-6(a) provides that incarcerated persons are responsible for reimbursing the State for the costs of their incarceration. 730 ILCS 5/3-12-5 provides that persons who perform a work assignment while in prison may receive wages, a “portion” of which shall be used to offset the cost of the committed person’s incarceration and the remainder of which is to be deposited in the individual’s account.

After finding that the above statutes were ambiguous concerning what assets may be seized to satisfy the obligation to pay incarceration costs, the court concluded that the legislature intended that only the “portion” identified under 730 ILCS 5/3-12-5 is available for reimbursement of the costs of incarceration. The court concluded that a literal interpretation of the statutes would create absurd results because prisoners would be encouraged to work to learn a new trade and to accumulate money to assist in reintegrating into the community, only to have that money seized as partial payment of the costs of incarceration.

Thus, only the 3% of defendant’s prison wages which DOC had seized under 730 ILCS 5/3-12-5 was available to satisfy defendant’s obligation to pay for his incarceration. Approximately \$11,000 which defendant had been able to save from his wages while he was incarcerated could not be seized by DOC.

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