

No. 2—09—0961  
Order filed May 23, 2011

**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  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05—CF—1953
	)	
ERIC M. PENCE,	)	Honorable
	)	George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Bowman and Zenoff concurred in the judgment.

**ORDER**

*Held:* The trial court properly denied defendant’s motion alleging that trial counsel was ineffective for failing to properly explain the State’s plea offer: the court was entitled to credit counsel’s testimony over defendant’s and thus to find that counsel explained the offer correctly; in any event, defendant testified only that he “may have” accepted the offer but for counsel’s alleged error, not that he would have.

Defendant, Eric M. Pence, appeals from the denial of his motion for a new trial, which was filed following this court’s remand. The issue on appeal is whether the trial court properly concluded that defendant failed to establish that he received ineffective assistance of counsel during

plea negotiations as a result of counsel's alleged failure to "properly explain[]" the State's sentencing offer to him. For the reasons that follow, we affirm.

## I. BACKGROUND

Defendant was indicted on one count of predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2002)), one count of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(i) (West 2002)), and two counts of criminal sexual assault (720 ILCS 5/12—13(a)(4) (West 2002)).

Following a bench trial, defendant was found guilty of one count of aggravated criminal sexual abuse and two counts of criminal sexual assault. The trial court sentenced defendant to nine years' imprisonment on each conviction of aggravated criminal sexual assault and to three years' imprisonment on the conviction of aggravated criminal sexual abuse, to be served consecutively.

At the sentencing hearing, defendant remarked in allocution that "[his] defense did not thoroughly represent [him]," that "there were issues of facts that [his] defense looked [*sic*] and omitted," and that the court was "denied the full picture for which [its] verdict may have changed."

On direct appeal, we agreed with defendant's argument that the trial court did not adequately inquire into the basis for defendant's remarks, and we remanded the matter for inquiry and for "further appropriate proceedings." *People v. Pence*, 387 Ill. App. 3d 989, 994-96 (2009).

On remand, defendant (now with new counsel) filed a "Supplemental Motion for a New Trial and/or Sentencing Hearing Due to Trial Counsel's Ineffective Representation at Trial." In the motion, defendant argued, *inter alia*, as follows:

"Prior to trial in this cause, the State made an offer of four years in the Illinois Department of Corrections if Defendant plead [*sic*] guilty to one count of Criminal Sexual

Assault. Defense counsel was ineffective in that Defendant first came [*sic*] aware of a four year offer after receiving a copy of [Fawell & Associates' (trial counsel's law firm)] response to the ARDC complaint filed by the Defendant. Prior to trial, Defendant was told by defense counsel that he would receive 8 years in the Department of Corrections if he plead [*sic*] guilty. If Defense Counsel would have properly explained the State's offer to the Defendant, Defendant would have accepted the plea agreement in order to avoid the risk of a more severe sentence if he was convicted. As a result of trial counsel's ineffective assistance, Defendant received a 21 year sentence.”

At the hearing on the motion, defendant initially testified that he could not remember discussing a plea agreement with trial counsel prior to trial. Then he stated that, prior to trial, trial counsel “mentioned something about eight years—a plea agreement of eight years.” Defendant's understanding was that the eight-year offer was on only the current case. At the time, there were also charges pending against defendant in McHenry County. According to defendant, he never discussed the McHenry County case with trial counsel, because trial counsel was not representing him in that matter; it was “a whole separate issue.” Defendant did not recall having a conversation with trial counsel about both cases being disposed of as a part of the plea agreement.

Defendant further testified that, after he had been sentenced, he learned that the offer in the present case had been for four years. Concerning whether his knowledge of a four-year offer would have “potentially changed [his] decision in regards to whether to proceed to trial,” the following colloquy occurred:

“A. It may have.

Q. [Trial Counsel:] Why?

A. Because he did tell me, you know, if we go to trial and lose that I could end up getting a lot of years, you know. I mean, it could be pretty bad. So it was worth considering.”

On cross-examination, defendant stated that he “may have” discussed the State’s offer with trial counsel “twice”; he could not recall exactly. According to defendant, counsel “said something to the effect that the State was willing to offer eight years.” Counsel told him that, if they went to trial and lost, “it will be a lot more.” The following colloquy occurred concerning the McHenry County case:

“Q. [Assistant State’s Attorney:] And it’s your testimony, I take it, that [trial counsel] never mentioned the Mc Henry County case even though it was currently pending; is that correct? During the discussions of this offer.

A. Not that I recall.

Q. Do you recall ever having a conversation with [trial counsel] whereby you specifically wanted to dispose of—or have both cases part of the negotiations in terms of disposing of the case with an offer or a plea agreement.

A. No, I don’t recall anything like that.

Q. Could it have happened?

A. Could it have happened?

Q. Correct.

A. I don’t know.

Q. So it could have?

A. I don't recall it happening. At the time I had a public defender representing me on that issue. So he wasn't even hired to, you know, I would say to even represent me for McHenry County.

Q. Did you ever discuss the McHenry County case with [trial counsel]?

A. He knew of it, but there was nothing to talk about.”

Defendant's mother, Marita Pence, testified that she did not recall discussing a plea agreement with trial counsel.

David Imielski, an attorney in Du Page County, testified that he had been an assistant State's Attorney for 11 years and that he was one of the attorneys who had prosecuted defendant's case. Imielski recalled discussing a plea offer with trial counsel. Imielski had decided to offer a four-year sentence on one count of criminal sexual assault. Trial counsel “was concerned about what that would—if we would plead out for four years on this case, how that would impact the [McHenry County] case.” Imielski “ended up reaching out to the State's Attorneys Office in McHenry County.” According to Imielski, “Ultimately, it was decided that we'd offer [defendant] a combined offer of eight years, four on ours, four on a similar charge out of McHenry County, for a total of—and they would be consecutive. So it would be a total of eight years.” Imielski conveyed the offer to trial counsel. It was ultimately rejected and the matter proceeded to trial. There was no doubt in Imielski's mind as to the “combined nature of that offer where it involved also McHenry County.” Imielski was not present for any discussions between trial counsel and defendant.

Philip Montgomery, defendant's trial counsel, testified that he currently worked as an assistant State's Attorney in De Kalb County. At the time of defendant's trial in 2006, Montgomery had been working as a criminal defense attorney for about eight years. Before that, Montgomery

worked as an assistant State's Attorney in Du Page County for 8½ years. Thus, at the time he represented defendant, Montgomery had over 16 years of experience in criminal trials. Montgomery was the only attorney who handled defendant's case.

According to Montgomery, his notes indicated that, on January 16, 2006, he met with defendant in the Du Page County jail. They discussed pleas at that time, and "[defendant] indicated he wasn't interested in any plea agreement whatsoever and that he wanted a bench trial." Later, prior to the April 2006 trial, Imielski made them an offer. "[T]he offer was for eight years, four in Du Page County, plus four in McHenry County. It was a consecutive sentence situation, for a total of eight, four plus four." Montgomery's notes indicated that he had "explained to [defendant] what four plus four at 85 percent means, and it was about six-and-a-half years." He could not recall exactly how many times he had discussed the offer with defendant, but he met with defendant four or five times during the week before trial. "[I]t was during those times that [they] discussed the offer."

Montgomery explained that McHenry County was involved because some of the incidents that defendant was alleged to have committed had occurred at defendant's apartment in McHenry County. When asked how the offer from McHenry County was being conveyed through Du Page County, Montgomery testified as follows:

"A. When Dave [Imielski] initially made the offer [of] four years in DuPage County, I wasn't even going to consider an offer that didn't include the McHenry County situation.

Because if he plead [*sic*] guilty and gotten four in DuPage, you know, you have no idea, potentially, what he would get in McHenry County.

So you needed an offer from both counties, because it wouldn't do you any good if you got four here and 15 there.

So I wanted Dave—Dave initially offered four. I wanted him to come back with an offer that included Mc Henry County.”

Montgomery testified that he told defendant that, if they got an offer on the case, he wanted it to include both counties. According to Montgomery, he had met with defendant 17 times in jail from the time he began representing him until after sentencing. He also met with him 12 times in court appearances.

Before announcing its ruling, the court noted that the case had been remanded “for the purposes of inquiring what defendant was talking about when he made the statement prior to sentencing regarding the defense did not thoroughly represent him.” The court stated, “I think we’ve expanded that somewhat, but as I’ve indicated, that’s okay. We might as well cover all the issues there are that are present.”<sup>1</sup> As to defendant’s claim that trial counsel was ineffective for failing to adequately explain the offer, the court stated as follows:

“I have no reason to doubt what Mr. Imielski and Mr. Montgomery said regarding the offer that was conveyed.

---

<sup>1</sup>The State does not argue on appeal that the trial court’s consideration of defendant’s supplemental motion for a new trial exceeded the scope of this court’s mandate. See *Pence*, 387 Ill. App. 3d at 994-96. Rather, the State concedes that “the sole issue raised on appeal by defendant most probably was included in this Court’s mandate.”

Sometimes defendants don't clearly understand the offer. But there was no indication from Mr. Montgomery that when he talked to the defendant that he was asked any questions regarding it or indicated the defendant did not understand it.

If truly the defendant didn't understand that it was eight years—and he clearly testified that he knew it was an eight-year offer. If he didn't clearly understand that it applied to both McHenry and DuPage, I don't think you can fault the attorney for that. I believe the attorney did, in fact, express that to him and it would make sense.

Mr. Montgomery has been an attorney for a number of years, both in private practice and as a State's Attorney. And he clearly would have known that with another case pending in McHenry County, it would make no sense to not try to package something together here for that purpose. So I don't think that that has been established.”

Defendant timely appealed.

## II. ANALYSIS

“[T]he right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial.” *People v. Curry*, 178 Ill. 2d 509, 518 (1997). A defendant's claim that he has been denied his sixth amendment right to effective assistance of counsel is evaluated under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that standard, a defendant must establish (1) that his attorney's assistance was objectively unreasonable under prevailing professional norms, and (2) that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Curry*, 178 Ill. 2d at 519. Because the defendant must establish both of these prongs, his failure to establish either one is fatal to his claim. *People v. Ceja*,

204 Ill. 2d 332, 358 (2003). “The question of whether defense counsel provided ineffective assistance requires a bifurcated standard of review, wherein a reviewing court must defer to the trial court’s findings of fact unless they are against the manifest weight of the evidence but must make a *de novo* assessment of the ultimate legal issue of whether counsel’s omission supports an ineffective assistance claim.” *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

Defendant argued in his supplemental motion for a new trial that trial counsel was deficient for failing to “properly explain[]” the State’s offer to him during plea negotiations and that, had the offer been properly explained, he “would have accepted the plea agreement in order to avoid the risk of a more severe sentence if he was convicted.” Defendant advances that same argument on appeal and also now argues that trial counsel was ineffective for failing to inform defendant of the applicable sentencing range and for failing to inform defendant that he could receive consecutive sentences. The State maintains that the latter arguments are forfeited. We agree with the State. Defendant’s motion addressed only the argument that counsel failed to “properly explain[]” the State’s offer. Defendant did not allege that he was not informed of the sentencing parameters of the charges or that he was not informed that the sentences were to be served consecutively. Because defendant failed to advance these arguments in his supplemental motion for new trial, they are forfeited. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009).

We now turn to defendant’s argument that trial counsel was ineffective for failing to “properly explain[]” the State’s offer. Defendant concedes that trial counsel told him that the State made him an offer of eight years; however, defendant argues that he thought the offer was only for the Du Page County case. He claims that he did not know that the offer was four years on the Du Page County case and four years on the McHenry County case. According to defendant, counsel’s

testimony at the hearing on the motion did not clarify “whether the words used to convey the offer were that there was an eight-year offer, \*\*\* or a four-plus-four year offer, \*\*\* or just a four-year offer.”

We find that the trial court’s conclusion that trial counsel correctly explained the offer to defendant was not against the manifest weight of the evidence. Trial counsel testified that Imielski had made an offer prior to trial of “eight years, four in DuPage County, plus four in McHenry County. It was a consecutive situation, for a total of eight, four plus four.” Moreover, trial counsel expressly testified that he had “explained to [defendant] what four plus four at 85 percent means, and it was about six-and-a-half years.” In addition, trial counsel testified that, although Imielski initially had conveyed an offer of four years on the Du Page County case, counsel had told Imielski that he would not consider any offer that did not include the McHenry County case. He testified that it would not have made sense to have defendant plead guilty in Du Page County without knowing what was going to happen in McHenry County. Trial counsel’s testimony was corroborated by Imielski, who stated that he had initiated contact with the McHenry County assistant State’s Attorney to resolve the issue raised by trial counsel. Imielski confirmed that a decision was made to make a combined offer to defendant of eight years, with four years to be served on the Du Page County case and four years to be served on the McHenry County case.

In contrast, defendant’s testimony was simply not as clear. Defendant first stated that he had no recollection of a possible plea agreement prior to trial. Then he testified that he recalled discussing a plea agreement only one time and that the State’s offer was for eight years. On cross-examination, he admitted that he may have discussed the plea with trial counsel twice. And while defendant maintains that trial counsel did not properly explain the nature of the offer, we cannot

disturb the trial court's conclusion that, based on the testimony and on trial counsel's many years of experience, trial counsel did, in fact, express the nature of the offer to defendant. The trial court found that the testimony of both trial counsel and Imielski was very credible, which defendant acknowledges, and this finding was not against the manifest weight of the evidence. See *People v. Mercado*, 356 Ill. App. 3d 487, 497 (2005) (the trial court "bears the burden of assessing the credibility of witnesses who testify at the hearing on a motion to withdraw a guilty plea").

Defendant also takes issue with the court's statement that "[i]f truly the defendant didn't understand that it was eight years—and he clearly testified that he knew it was an eight-year offer. If he didn't clearly understand that it applied to both McHenry and DuPage, I don't think you can fault the attorney for that." Citing *People v. Rutledge*, 212 Ill. App. 3d 31, 33-34 (1991), defendant argues that "[a] defendant who accepts a plea offer and later discovers he has misunderstood either the facts or the law relative to the plea, may be allowed to withdraw the plea where the misapprehension of law or fact was the result of a misrepresentation of counsel, the prosecutor, or the Court." In making his argument, however, defendant overlooks the court's comment that immediately followed the above-quoted language: "I believe the attorney did, in fact, express that to him and it would make sense." Thus, the court found that trial counsel did explain the offer to defendant, such that any alleged misunderstanding on the part of defendant did not result from a misrepresentation of counsel.

Even if this court were to find that trial counsel's performance fell below an objective standard of reasonableness, defendant's ineffectiveness claim still must fail because defendant did not show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 687, 688, 694.

Although defendant's motion averred that had he been apprised of the four-plus-four offer he would have accepted it, that was not defendant's testimony at the hearing. When defendant was asked whether he would have accepted the offer if he had known that the offer was four years on the Du Page County case and four years on the McHenry County case, to be served consecutively, he responded that "it was worth considering" and that it "may have" changed his decision to proceed to trial. This testimony was insufficient to establish the required prejudice. See *Aeid v. Bennett*, F. 3d 58, 63 (2d Cir. 2002) (defendant had to prove that he "would have accepted that offer").

### III. CONCLUSION

Accordingly, based on the foregoing, we affirm the judgment of the circuit court of Du Page County.

Affirmed.