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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-CF-344
	)	
MARTIN MARTINEZ,	)	Honorable
	)	David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that defense counsel induced his guilty plea with a promise that his sentence would not exceed eight years' imprisonment: defendant's claim was foreclosed by the record of his plea hearing, during which he assured the court that he had received no such promise, and in any event defendant's verifying affidavit belied his claim.

¶ 2 Defendant, Martin Martinez, filed a postconviction petition in the circuit court of Kane County, alleging, among other things, that his trial counsel was ineffective because he promised defendant that if he entered an open guilty plea his sentence would not exceed eight years in prison even though the applicable sentencing range was 6 to 30 years. The trial court granted the State's

motion to dismiss defendant's postconviction petition as to all claims. Defendant appeals, contending that he made a substantial showing of the ineffective assistance of trial counsel related to the sentencing promise and that the trial court erred in dismissing his postconviction petition as to that claim. Because defendant failed to make the required substantial showing as to that claim, we affirm the dismissal of defendant's postconviction petition.

¶ 3

### I. BACKGROUND

¶ 4 The facts relevant to this appeal are as follows. Defendant entered a nonnegotiated (open) guilty plea to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)) and was sentenced to 15 years' imprisonment. On direct appeal, we vacated and remanded because trial counsel failed to file a certificate under Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Martinez*, No. 2-08-0140 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant filed a motion to reconsider his sentence, a motion to withdraw his guilty plea, a Rule 604(d) certificate, and a postconviction petition. The trial court denied the motion to withdraw the guilty plea and the motion to reconsider the sentence, and defendant appealed. This court vacated the denial of those motions and remanded for the filing of a new, valid Rule 604(d) certificate, for defendant to file, if necessary, a new motion to withdraw the guilty plea and/or reconsider the sentence, and for a new motion hearing. *People v. Martinez*, 2012 IL App (2d) 101219-U.

¶ 6 As for the postconviction petition, defendant alleged that he was denied the effective assistance of counsel in the following respects. He claimed that he asked trial counsel to file a motion to withdraw the guilty plea within 30 days of his plea but counsel did not do so. He also

asserted that trial counsel failed to adequately consult with him such that he did not fully understand the plea proceedings or the consequences of pleading guilty. He further claimed that trial counsel promised him that, if he rejected the State's offer of eight years in prison in exchange for his pleading guilty, and instead entered an open guilty plea, he would receive a sentence of no more than eight years. He also alleged that trial counsel instructed him not to challenge what was stated in court and to agree with what the trial judge said during the plea proceeding.

¶ 7 Defendant subsequently filed a corrected postconviction petition to which he attached his verifying affidavit. Relevant to this appeal, defendant stated the following in his affidavit. His trial counsel told him that trial counsel "could do better than what the prosecutor had offered [him] to settle this case." The State presented an "alternative" offer under which defendant would be allowed to plead guilty to one charge and the sentence "would be up to the judge." Based on that offer, defendant informed his trial counsel that "[he] would plead guilty if [trial counsel] would assure [him] that there would be a 'cap' on the sentence of eight (8) years." He further told trial counsel that "if there was no promise of a cap then [he] would accept the plea offer which the prosecutor [previously] had made." Trial counsel "assured [defendant], again, that he could do better for [him] than what the prosecutor [had] offered." According to defendant, he agreed to plead guilty "based on [trial counsel's] assurances." Prior to the plea proceeding, trial counsel also instructed defendant "not to challenge anything that was said in court, and that [defendant] was to agree with everything that the judge said to [him]." Defendant "pleaded guilty with the belief that [he] would not be sentenced for more than eight (8) years as [trial counsel] assured [him] that [he] had a high chance of receiving a six (6) year sentence."

¶ 8 In its written order granting the State’s motion to dismiss defendant’s postconviction petition, the trial court made the following rulings pertinent to this appeal. It found that the record of the plea proceeding contradicted defendant’s postconviction claim that his trial counsel made sentencing promises to him. The trial court pointed out that, during the plea proceeding, defendant was twice admonished that the applicable sentencing range was 6 to 30 years and both times defendant stated that he understood. The trial court also noted that, when asked whether anyone had made promises of any kind as to what his sentence would be, defendant answered no. The trial court further stated that defendant understood what had been explained to him and that he had no questions. Based on those findings, the trial court determined that defendant was aware when he pleaded guilty that a 30-year sentence was possible and that no promises had been made to defendant regarding the sentence. The trial court, in turn, ruled that defendant’s assertion that he pleaded guilty based on trial counsel’s promise of an eight-year sentencing cap had been contradicted by the record and did not constitute a substantial showing of a constitutional violation. Accordingly, the trial court dismissed that claim.

¶ 9 The record of defendant’s plea proceeding reflects that the trial court admonished him that “[t]he lowest sentence that [he could] receive under the law [was] six years and the greatest sentence [was] 30 years.” The trial court then asked defendant if he understood that this was the possible penalty, to which defendant responded, “Yes.” For a second time, the trial court stated that it would determine the sentence and that it “could be as low as six years, it could be as great as 30 years in prison, it could be somewhere in between; do you understand?” Defendant stated that he did. Further, the trial court asked defendant if “anyone made any threats to cause [him] to plead guilty” or if “anyone made any promises of any kind as to what [his] sentence would be?” Defendant, respectively, answered no. Defendant also answered “yes” when asked if he was pleading guilty

freely and voluntarily. Finally, defendant indicated that he understood what the trial court said to him and that he had no questions.

¶ 10

## II. ANALYSIS

¶ 11 A postconviction proceeding not involving the death penalty contains three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court must, within the prescribed time, review the petition and determine whether it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. If the petition is not dismissed at stage one, then it advances to the second stage, where counsel may be appointed (725 ILCS 5/122-4 (West 2010)) and the State is allowed to file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2010)). *Hodges*, 234 Ill. 2d at 10-11.

¶ 12 At the second stage, the trial court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). “If no such showing is made, the petition is dismissed.” *Edwards*, 197 Ill. 2d at 246. If a substantial showing is set forth, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. Our review of a second-stage dismissal is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 13 The right to effective assistance of counsel extends to the decision to reject a plea offer. *People v. Curry*, 178 Ill. 2d 509, 518 (1997). In reviewing a claim of ineffective assistance of counsel in such a context, a court applies the familiar two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Curry*, 178 Ill. 2d at 518. Under the first part, a defendant must show that his attorney’s assistance was objectively unreasonable under prevailing professional norms. *Curry*, 178 Ill. 2d at 519. To satisfy the second part, a defendant must show that there is 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.

¶ 14 It is well settled that a defendant's acknowledgment in open court, during a plea proceeding, that there were no agreements or promises regarding his plea serves to contradict a postconviction claim that he pleaded guilty in reliance upon an alleged promise by his trial counsel regarding the sentence. *People v. Torres*, 228 Ill. 2d 382, 396-97 (2008) (citing *People v. Greer*, 212 Ill. 2d 192, 211 (2004)). When a defendant is asked in open court whether any promises had been made to cause him to enter his guilty plea, and he answers "no," his own words refute any postconviction allegations to the contrary. *Greer*, 121 Ill. 2d at 211.

¶ 15 In our case, the record from defendant's plea proceeding clearly refutes his postconviction claim that trial counsel made promises to him regarding his sentence that induced him to forgo the State's initial offer and to enter an open guilty plea. The trial court twice admonished him as to what the potential sentence was, which did not include an eight-year cap. Defendant indicated unequivocally that he understood what the applicable sentencing range was. Additionally, the trial court asked defendant if he had been promised anything, including anything related to his sentence, to cause him to plead guilty. Defendant answered no. Finally, the trial court asked defendant if he understood what it had advised him, which included the admonishments and the question about any sentencing promises, and defendant stated that he did understand. Such an acknowledgment by defendant in open court, that there were no promises made regarding his sentence, trumps his later postconviction allegations to the contrary. See *Torres*, 228 Ill. 2d at 396-97. Accordingly, we affirm the trial court's dismissal of defendant's postconviction claim on that basis.

¶ 16 Defendant attempted to avoid this result by asserting in his affidavit that his trial counsel advised him “not to challenge anything that was said in court” and “to agree with everything that the judge said to [him].” Based on this assertion, defendant contends that his in-court response, that no promises were made, should not be relied on to refute his postconviction claim that such promises had in fact been made. He also relies on *People v. Owsley*, 66 Ill. App. 3d 234 (1978), as support for this argument.

¶ 17 We reject this argument. Assuming the truth of defendant’s assertion that trial counsel told him not to challenge anything and told him to agree with everything the trial court said, such instructions did not include how to answer the trial court’s open-ended question as to whether any promises had been made. Trial counsel’s alleged instructions to defendant simply did not cover answering the trial court’s direct questioning.

¶ 18 Further, *Owsley* is distinguishable from this case. In *Owsley*, the defendant’s trial counsel inaccurately advised her regarding her sentence and then, when she pointed out such inaccuracies, her trial counsel advised her that there would be no benefit in bringing such inaccuracies to the trial court’s attention. *Owsley*, 66 Ill. App. 3d at 236. Here, in contrast, trial counsel did not direct defendant to deny any promises made about sentencing. The *Owsley* case involved a unique situation, not present here, and provides defendant no support.

¶ 19 There is an additional basis to affirm in this case. Defendant’s verifying affidavit belied his claim that trial counsel actually promised him that there was an eight-year cap on his sentence. A close reading of defendant’s affidavit shows that he never specifically stated that his trial counsel promised him that if he pleaded guilty he would not be sentenced to a term longer than eight years. Rather, he merely stated that he informed trial counsel that he would plead guilty if trial counsel

would assure him that there would be an eight-year cap on his sentence and, if there was no promise of such a cap, then he would accept the State's original plea offer. Instead of further asserting that trial counsel promised him such a cap, defendant stated that trial counsel "assured [him], again, that [trial counsel] could do better for [him] than what the prosecutor had offered." That was not a promise that there would be a cap of eight years. Instead, it was, at most, merely a statement that trial counsel would do his best to get defendant a sentence less than eight years.

¶ 20 Defendant's other relevant assertion in his affidavit, that he pleaded guilty based on his "belief that [he] would not be sentenced for more than eight (8) years," also offers no support. That assertion included the qualifying phrase "as [trial counsel] assured [him] that [he] had a high chance of receiving a six (6) year sentence." Again, this is not a promise of an eight-year cap, but rather, a statement that defendant had a "chance" of getting a sentence less than eight years.

¶ 21 Because the affidavit in support of the postconviction petition belied defendant's assertion of a promise related to a sentencing cap of eight years, defendant failed to make a substantial showing of a constitutional violation in that regard. See *People v. Coleman*, 183 Ill. 2d 366, 381 (1998) (nonfactual assertions that merely amount to conclusions are not sufficient to require a hearing on a postconviction petition). Therefore, we affirm the trial court's dismissal of the postconviction petition on that additional basis.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the order of the circuit court of Kane County dismissing defendant's postconviction petition.

¶ 24 Affirmed.