FIRST DIVISION
October 19, 2015

No. 1-13-1361
2015 IL App (1st) 131361-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	
	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	07 CR 14183
v.	)	
	)	Honorable
DENNIS RIVERA,	)	Mary Margaret Brosnahan,
	)	Judge Presiding.
Defendant-Appellant.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

Held: Trial court's finding that defendant did not receive ineffective assistance of counsel for failing to inform defendant of mandatory consecutive sentences was not manifestly erroneous where the evidence supported the trial court's finding that there was no six-year plea offer tendered.

¶ 1 Following a bench trial, defendant Dennis Rivera was convicted of six counts of predatory criminal sexual assault and sentenced to six consecutive six-year terms in prison. Defendant now appeals, arguing that we should vacate the trial court's denial of his posttrial

motion alleging ineffective assistance of counsel because two of the court's factual findings were manifestly erroneous. For the following reasons, we affirm.

¶ 2 We will recount only those facts necessary to this appeal. At a status hearing on March 3, 2010, the Assistant State's Attorney stated, "Judge, I had tendered an offer. That offer is withdrawn." The trial court replied, "I'll note the State is revoking their offer." There is no evidence in the record of any details of the alleged offer.

¶ 3 On June 24, 2011, over a year later, another status hearing was held. The following colloquy took place:

> "THE COURT: Is there a need for any *Curry* admonishments? In other words, have any offers been made to the defendant that are less than what he might be facing if he is convicted of the charges at trial?
>
> [ASSISTANT STATE'S ATTORNEY]: No, Judge.
>
> [DEFENSE COUNSEL]: Judge, could I make a record about something else? [Defendant] from day one has persisted of his innocence. I have asked him if he wants me to obtain an offer, he says no, he doesn't want me to ask for an offer and therefore I would not."

¶ 4 Following a bench trial, defendant was convicted of six counts of predatory criminal sexual assault and sentenced to six years in prison for each count. The sentences were required by statute to run consecutively. See 730 ILCS 5/5-8-4(a)(ii) (West 2007).

¶ 5 Defendant retained a new attorney to represent him in posttrial proceedings. Defendant's new defense counsel filed a motion alleging that defendant's trial counsel had been ineffective for failing to inform defendant of the penalties he would face if convicted. In his motion, defense counsel alleged that the State had offered defendant a six-year sentence in exchange for

a plea of guilty as to one count of predatory criminal sexual assault, that defendant's trial counsel had failed to advise defendant that he was subject to mandatory consecutive sentences, and that the penalty range was 36 to 80 years in prison rather than 6 to 30 years as told to him by his trial counsel. New defense counsel further alleged that defendant would have accepted the State's plea offer of six years if defendant's original trial counsel had properly advised him of the potential penalties defendant was facing.

¶ 6 Defendant's affidavit, which was attached to the motion, stated that he first learned that he would face consecutive sentences when his new attorney visited him in jail after his trial, on August 21, 2011. He further stated that his original defense counsel had informed him of the State's offer of six years during a meeting in which defendant's fiancé, Myra Torres, was present.

¶ 7 In Torres' affidavit, also attached to the motion, she stated that when she and defendant discussed the case with defendant's original counsel, counsel advised defendant that the applicable penalty range was 6 to 30 years in prison, but he did not advise defendant that the applicable range applied to each count. Torres further alleged that defendant's trial counsel advised defendant that he would likely be sentenced to 12 to 15 years in prison if he was found guilty at trial.

¶ 8 The State responded to defendant's posttrial motion, stating in part that defendant "had not been offered a plea deal," and that both defendant's trial counsel and the trial court advised defendant of the applicable penalty range.

¶ 9 An evidentiary hearing was conducted on defendant's posttrial motion for ineffective assistance of counsel. Defendant and Torres testified as to the facts set forth in their affidavits. They testified that sometime in January 2011, defendant and Torres discussed the case with

defendant's trial counsel in his office, and that trial counsel conveyed to them the State's plea offer of six years. They testified that trial counsel stated that the penalty range for defendant was 6 to 30 years, and that he would likely get 12 to 15 years in prison if he was found guilty at trial. They testified that trial counsel never informed defendant that he was subject to mandatory consecutive sentences.

¶ 10 After hearing this testimony, the trial court stated that it wanted to hear from defendant's trial counsel. The hearing was continued. Subsequently, defendant's trial counsel testified that he vaguely recalled meeting in his office with defendant and Torres prior to trial, but that he had no independent recollection of the case, and did not remember discussing a plea offer or the possible penalties with defendant. Trial counsel testified that a plea offer was something he might or might not record in his case file, but he did not review his case file prior to the hearing because he had given it to defendant's new counsel.

¶ 11 In making its ruling, the trial court stated, "I believe, without question, there was never any offer of six years tendered to this defendant." The trial court stated that there were never any negotiations of a plea offer, to its knowledge. The trial court continued, stating, "I do not believe the assertion of the defendant or the affidavits filed by [d]efense witnesses that in [defense counsel's] office he on his own made up and tendered an offer of six years." The court opined that the State would have a record of that offer. The trial court found that defendant was admonished and that it was spread of record the possible penalties that defendant would be facing should the case go to trial. The trial court denied defendant's motion for ineffective assistance of trial counsel, and defendant now appeals.

¶ 12 Defendant contends on appeal that the trial court's finding that defendant did not receive ineffective assistance of counsel was manifestly erroneous where it was based on two erroneous

findings of fact: that the State never tendered a plea offer, and that defendant was admonished of the applicable penalties for his potential convictions while the plea offer was pending.

¶ 13 A determination of whether defense counsel provided ineffective assistance of counsel involves a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance of counsel claim. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009). However, if a trial court reached a determination on the merits of a defendant's posttrial ineffective assistance of counsel claim, we reverse only if the trial court's action was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) (the question of whether defendant's ineffective assistance of counsel claims are meritorious is necessarily grounded in the specific facts of the case, so it is appropriate for us to give deference to the finding of the trial court). In this case, the trial court reached a determination on the merits of defendant's ineffective assistance of counsel claim. Therefore, we review the trial court's determination for manifest error. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25. "Manifest error" is error that is clearly plain, evident, and indisputable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 14 Here, we find that the trial court's determination was not manifestly erroneous. Our supreme court has recognized a sixth amendment right to effective assistance of counsel during plea negotiations, holding: "A criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." *People v. Curry*, 178 Ill. 2d 509, 528 (1997). This right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *Id.*

¶ 15 Claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *People v. Hale*, 2013 IL 113140, ¶ 15. However, we may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). To establish prejudice, the defendant must establish that there is a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer. *Curry*, 178 Ill. 2d at 531. This showing of prejudice must encompass more than a defendant's own " 'subjective, self-serving' " testimony. *Id*. (quoting *Turner v. Tennessee*, 858 F. 2d 1201, 1206 (6th Cir. 1998), *vacated on other grounds*, 492 U.S. 902 (1989)). Rather, there must be "independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice," and not on other considerations. *Curry*, 178 Ill. 2d at 532. The disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered supportive of a defendant's claim of prejudice. *Hale*, 2013 IL 113140, ¶ 18.

¶ 16 The United States Supreme Court, in *Missouri v. Frye*, 566 U.S. —, 132 S. Ct. 1399 (2012), stated that:

> "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the

> end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. —, 132 S. Ct. at 1409.

¶ 17 Here, based on our examination of the record, defendant cannot demonstrate the initial requirement to establish prejudice, *i.e.*, that there is a reasonable probability that he would have accepted a six-year plea offer had he been afforded effective assistance of counsel. See *Hale*, 2013 IL 113140, ¶ 21 (absent defendant's demonstration of this factor, prejudice cannot be proven and there is no need to address the additional factors set forth in *Frye*). This is due in large part because we find that it was not against the manifest weight of the evidence for the trial court to find that no six-year plea offer was ever given. Initially, we note that defendant contends that because the State acknowledged on the record that it tendered an offer to defendant, "the court's subsequent finding to the contrary was manifestly erroneous." However, the trial court did not make a finding that no offer was ever tendered. Rather, it found that there was never a *six-year* plea offer tendered. There is no question that an offer was made and then withdrawn, as indicated by the record. But while defendant and his fiancé testified that defense counsel told them a six-year plea offer had been tendered by the State, the trial court found their testimony to be incredible. See *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985) (credibility of witnesses and weight to be given their testimony are determinations which are exclusively within the province of the trier of fact and it is the role of the fact-finder to resolve any inconsistencies or conflicts in the evidence). We find that this credibility determination was not against the manifest weight of the evidence where the evidence shows that the trial court had no knowledge of any plea negotiations, the State did not have a record of a six-year plea offer, and defense counsel stated on June 24, 2011, that "from day one [defendant] has persisted of his innocence. I

have asked him if he wants me to obtain an offer, he says no, he doesn't want me to ask for an offer and therefore I would not."

¶ 18 Moreover, even if we were to find that a six-year plea offer was made, the only evidence defendant offered regarding why he chose not to plead guilty was his own self-serving testimony that, if he had known that there were mandatory consecutive sentences, then he would have taken the six-year offer. See *Hale*, 2013 IL 113140, ¶ 30 (rather than providing independent, objective confirmation that defendant's rejection of proffered plea was based upon counsel's erroneous advice, defendant's "sole, self-serving claim that he otherwise would have been 'inclined' to accept the State's plea offer is unsupported, denied by counsel, and refuted by the record.") Accordingly, because we find that the trial court's finding that there was no six-year plea offer tendered was not against the manifest weight of the evidence, it follows that it was not manifest error for the trial court to conclude that defendant did not receive ineffective assistance of counsel for trial counsel's alleged failure to inform him of the potential penalties he was facing while such offer was pending.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.