2013 IL App (2d) 111064-U
No. 02-11-1064
Order filed April 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 89-CF-1488
	)	
VINCENT REYNA,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to show he was prejudiced by trial counsel's erroneous advice about sentencing range for first-degree murder, and he also failed to establish that he was not aware of the possibility of an extended-term sentence, particularly in light of the fact that the record is materially incomplete.

¶ 2 I. INTRODUCTION

¶ 3 On January 17, 1990, defendant, Vincent Reyna, pleaded guilty to first-degree murder (Ill. Rev. Stat. 1989, ch. 38, par 9-1(a)). The State agreed to a sentencing cap of 80 years' imprisonment. The trial court imposed a sentence of 65 years' imprisonment. Subsequently, defendant filed a

petition seeking postconviction relief. See 725 ILCS 5/122-1 *et seq.* (West 2010). The trial court denied relief following an evidentiary hearing. This appeal followed. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant pleaded guilty to the murder of his step-mother. He entered his plea when he was 17 years old. On the day of the final pre-trial conference, the State approached defendant's attorney with an offer to resolve the case (the transcript of this hearing was destroyed in a flood while in the possession of the court reporter). The parties requested a conference with the trial judge in accordance with Illinois Supreme Court Rule 402 (eff. February 1, 1981). The Assistant State's Attorney (ASA) present at the conference testified at the evidentiary hearing on defendant's petition. He stated that, at the conference, the State offered to agree to an 80-year sentencing cap in exchange for a plea of guilty to murder as it was charged in three counts of the indictment. According to the ASA, defendant remained in the courtroom in the jury box during the conference. After the conference, defendant was brought before the trial judge and advised of "the position that each party took." The ASA stated that the agreement was that defendant would plead guilty and his sentence would not exceed 80 years (defendant, conversely, testified that the judge told him his "standard rights that he tells any defendant once they plead guilty"). Defendant then pleaded guilty.

¶ 6 Defendant testified that he only became aware of the Rule 402 conference after it happened. Following the conference, defendant's trial counsel met with defendant and defendant's father. The attorney stated that the sentencing range for first-degree murder was 20 to 40 years' imprisonment and that since defendant was pleading guilty, the judge would likely be more lenient in sentencing (Trial counsel testified that he did, in fact, tell defendant that the range for first-degree murder was 20 to 40 years' imprisonment and that he could face life if the crime was found to be exceptionally

brutal or heinous). Defendant attached to his postconviction petition an affidavit from his father corroborating his testimony. Defendant testified that his attorney told him he was going to plead guilty and that he should just state that he understood when the judge asked him questions. Defendant claimed that he was never told of the 80-year sentencing cap. Defendant stated that he was surprised when the judge imposed a 65-year sentence at the subsequent sentencing hearing. He tried to get his trial attorney to file post-sentencing motions. The time to file motions elapsed, and none were ever filed. Defendant testified that he would not have pleaded guilty if he had known a 65-year sentence was possible. He also testified that he was never advised of the possibility of an extended-term sentence.

¶ 7 The trial court expressly found that defendant was not credible and that defendant's trial attorney and the ASA were credible. Accordingly, the trial court found that the facts as alleged by defendant were "simply not true and there was no ineffective assistance of counsel as alleged by defendant." Further, defendant's petition was untimely, as he made no showing that the delay in filing it was not due to his culpable negligence. Moreover, the trial court found that the reason the record contained no indication that defendant was advised of the possibility of an extended-term sentence was that the court reporter's notes of the hearing at which defendant entered his plea had been destroyed in a flood. Finally, the trial court stated that, based on the testimony, it was "convinced beyond a shadow of a doubt the defendant was in fact well aware of the fact that he could receive more than 20 to 40 years."

¶ 8 III. ANALYSIS

¶ 9 Defendant raises two main issues on appeal. First, he asserts that he was deprived of the effective assistance of counsel. Second, he alleges that the trial court improperly found that he had

been advised that an extended-term sentence was possible from a silent record. We find neither contention persuasive.

¶ 10 Following an evidentiary hearing, a trial court's ruling on a postconviction petition is reviewed using the manifestly-erroneous standard. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. We owe substantial deference to the trial court under this standard, and the burden on the appellant of demonstrating error is a heavy one. *Id*. Error is manifest where it is clear, plain, evident, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). With these standards in mind, we turn to the issues raised by defendant.

¶ 11 A. Ineffective Assistance of Counsel

¶ 12 A criminal defendant has a constitutional right to the effective assistance of counsel relating to the entry of a guilty plea. *Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1405 (2012). We evaluate counsel's performance in this context using the familiar test that was first set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Accordingly, defendant must show that his attorney's representation fell below a standard of objective reasonableness and that he suffered prejudice as a result. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 36. Whether counsel's performance fell below a standard of objective reasonableness is assessed with respect to prevailing professional norms. *People v. Colon*, 225 Ill. App. 3d 125, 135 (2007). Further, a defendant shows prejudice by establishing a reasonable probability that the result of the proceedings would have been different. *Id*. Regarding the entry of a guilty plea, prejudice is established where a defendant shows that but-for counsel's unprofessional errors, he or she would have rejected the plea and chosen to go to trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). The failure to satisfy either prong of the *Strickland* analysis precludes a finding of ineffectiveness. Hence, we may address either prong first, and if it is dispositive, we need not

address the other prong. See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) ("We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied."); *People v. Shelton*, 401 Ill. App. 3d 564, 584 (2010) ("In view of our disposition of the first prong of the *Strickland* analysis, we need not address whether defendant suffered prejudice as a result of defense counsel's alleged deficiencies.").

¶ 13 Defendant claims he received ineffective assistance because his trial attorney advised him incorrectly about the sentencing range for first-degree murder and also failed to inform him of the possibility of an extended-term sentence. Defendant asserts that his trial attorney told him the sentencing range for first-degree murder was 20 to 40 years' imprisonment. An affidavit from defendant's father, which accompanied defendant's postconviction petition, corroborates this assertion. Moreover, defendant's trial counsel testified that he told defendant "the sentence for murder was 20 to 40 years in prison, but if the State proved it was conducted in an exceptionally brutal heinous fashion he's looking at life." This is incorrect, as the applicable sentencing range was actually 20 to 60 years' imprisonment (it also makes a sentence of natural life possible for crimes accompanied by exceptionally brutal and heinous conduct). Ill. Rev. Stat. 1989, ch. 38, par. 1005-8-1; *People v. Johnson*, 227 Ill. App. 3d 800, 816 (1992) ("Here, defendant was convicted of first degree murder, for which he can be sentenced to a term of 20 to 60 years in prison."). Thus, it appears from the record that trial counsel did give defendant incorrect advice regarding the sentencing range for first-degree murder.

¶ 14 However, defendant has not established that he was prejudiced by this erroneous advice. The trial court found that defendant "was in fact well aware of the fact that he could receive more than 20 to 40 years." This finding is supported by evidence in the record, specifically, the ASA's testimony that the judge advised the defendant of the sentencing cap, which was 80 years. The trial

court, as was its prerogative, found the ASA credible. *People v. Bailey*, 409 Ill. App. 3d 574, 586 (2011). As evidentiary support existed for the trial court's finding, the finding is not manifestly erroneous. See *People v. Abrams*, 205 Ill. App. 3d 295, 303 (1990). Thus, defendant was advised of, and was hence aware that, he could be sentenced to a term of imprisonment of up to 80 years.

¶ 15 Despite being aware of the 80-year sentencing cap, defendant persisted in his desire to plead guilty. We find it difficult to believe that defendant's knowledge of the sentencing range for the underlying crime was 20 to 60 years rather than 20 to 40 years would have had any bearing on defendant's decision. Logic dictates that his knowledge of the sentencing cap would have been far more important to his decision to plead guilty; indeed, it made the underlying sentencing range irrelevant. We recognize that defendant denies being aware that he was facing up to 80 years' imprisonment; however, the trial court found defendant's testimony on this point incredible. We further recognize that defendant testified that he would not have pleaded guilty if he had known a 65-year sentence was possible. Aside from the trial court's findings regarding defendant's credibility, the State calls our attention to the supreme court's holding in *People v. Rissley*, 206 Ill. 2d 403, 459 (2003), quoting *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988): "The bare allegation that, but for the mistaken advice, a defendant would have insisted on trial, without something more, is not enough. Standing alone, such an allegation is 'subjective, self-serving, and * * * insufficient to satisfy the *Strickland* requirement for prejudice.' " The court also approvingly cited the following passage from *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995): "[Appellant's] self-serving statements that, but for his counsel's inadequate advice he would have pleaded not guilty, *unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial,* is insufficient to demonstrate

the required prejudice." (Emphasis added by supreme court.) Thus, in this case, not only is defendant's claim not credible–as the trial court found–but it is insufficient even if it were believed.

¶ 16 In other words, defendant has failed to establish a reasonable probability that he would not have pleaded guilty had he been properly advised of the sentencing range regarding the underlying offense. Quite simply, his knowledge that he could be sentenced to up to 80 years' imprisonment rendered that knowledge of little materiality. As such, defendant cannot show that he suffered any prejudice, and his claim of ineffective assistance of counsel necessarily fails.

¶ 17 B. Defendant's Knowledge of the Possibility of an Extended-Term Sentence

¶ 18 Defendant calls our attention to section 1005-8-2(b) of the Unified Code of Corrections, which states:

> "If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that a sentence under this Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice." Ill. Rev. Stat. 1989, ch. 38, par. 1005-8-2(b).

Where the record does not indicate that defendant was aware he or she was subject to an extended-term sentence, the proper remedy is to vacate the extended-term sentence so that a nonextended-term sentence can be imposed. *People v. Taylor*, 368 Ill. App. 3d 703, 707 (2006). Section 1005-8-2 does not expressly require a trial court to admonish a defendant about the possibility of an extended-term sentence. *Id*. By its plain language, the statute requires only that defendant's knowledge of an extended-term sentence appear in the record. *Id*. Hence, while admonishments are one way such information could appear in the record, the statute is satisfied if there is any indication that defendant was aware an extended-term sentence was possible. *Id*. A trial court need not use the phrase

"extended term" or recite the section number of the governing statute to comply with section 1005-8-2(b). *People v. Cavins*, 288 Ill. App. 3d 173, 182 (1997). Further, the fact that a defendant was sentenced to a term within the range of which he or she was advised is a significant consideration. *Id*. at 179.

¶ 19 Thus, regardless of whether defendant ever heard the phrase "extended-term sentence," the fact that he was advised that he faced up to 80 years' imprisonment, as found by the trial court, and that he was sentenced within that range is sufficient to satisfy the statute. Moreover, defendant does not provide any sustained analysis regarding the issue of the missing record. Defendant acknowledges that the court reporter's notes from the sentencing hearing were destroyed in a flood. While it is true that section 1005-8-2(b) requires the record to reflect defendant's knowledge of the possibility of an extended-term sentence, it is also true that defendant, as the appellant, bore the burden of providing this court with an adequate record to conduct meaningful review of the issues presented (*People v. Liekis*, 2012 IL App (2d) 100774, ¶ 31). In the absence of such a record, we generally presume that the trial court's order complied with the law. *People v. Steward*, 406 Ill. App. 3d 82, 87 (2010). For example, in *In re Kenneth F.*, 332 Ill. App. 3d 674, 678 (2002), we held as follows:

> "Before proceeding further, however, we note that respondent has waived this argument. On January 14, 1998, the trial court adjudicated the minors neglected. Neither a transcript of this proceeding nor a bystander's report (see 166 Ill.2d R. 323(c)) appears in the record. The burden is on the appellant to present a sufficient record on appeal to substantiate any claims of error. [Citation.] Any doubts arising as a result of omissions in the record must be resolved against the appellant. [Citation.] Given this omission, we must

> presume that the trial court acted properly and that respondent received the proper admonishments."

Defendant does not explain why the same rule should not control here.

¶ 20 In sum, we do not find this argument persuasive. Moreover, we agree with the trial court's observation that the reason that defendant's knowledge of the possibility of an extended-term sentence does not expressly appear in the record because the record was destroyed.

¶ 21 IV. CONCLUSION

¶ 22 Having rejected both of defendant's arguments, we affirm the judgment of the circuit court of Lake County. Parenthetically, we note that the trial court also found that defendant's petition was untimely as he had not established that the delay in filing this petition and raising these issues was not due to his culpable negligence. As defendant does not contest this finding, it provides an alternate basis for us to affirm the trial court. See *People v. Jones*, 2012 IL App (1st) 093180, ¶ 6.

¶ 23 Affirmed.