2013 IL App (2d) 121028-U
No. 2-12-1028
Order filed November 13, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-2892
PATRICK BENNER,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: At evidentiary hearing on postconviction petition, judge's conduct did not deprive defendant of due process, and the denial of postconviction claim of ineffective assistance of trial counsel was not manifestly erroneous.

¶ 2 Defendant, Patrick Benner, was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2004)), and this court affirmed the judgment on direct appeal (*People v. Benner*, No. 2-09-0375 (2010) (unpublished order under Rule 23)). Defendant subsequently filed a postconviction petition in which he alleged that his trial counsel, Patrick Provenzale, rendered ineffective assistance for (1) misapprehending and misinforming him of the sentencing consequences of a finding of guilt

on the charge and (2) failing to obtain a plea agreement on a lesser offense, which would allow defendant to avoid a prison sentence and sex offender registration.

¶ 3 The circuit court advanced the petition to a third-stage evidentiary hearing. The court granted the State a directed finding on defendant's ineffective assistance claim and denied the petition. The court found that (1) Provenzale had, in fact, pursued a plea agreement, but the State had rejected it, and (2) Provenzale had adequately advised defendant of the sentencing consequences of the charge. Defendant appeals, alleging that, in the postconviction proceedings, he was deprived of due process in that (1) the postconviction judge excluded certain polygraph test results of defendant's sister; (2) the judge left the courtroom during the defense's offer of proof on the excluded polygraph evidence; and (3) the judge had an "undisclosed relationship with the family of the attorney whose conduct was challenged within the fabric of the postconviction proceedings." Defendant also renews his claim that Provenzale was ineffective for misapprehending and misinforming him of the conviction's sentencing consequences and for failing to obtain a plea agreement. We affirm.

¶ 4 FACTS

¶ 5 Defendant's postconviction petition alleged that trial counsel was ineffective for misapprehending and misinforming him of the consequences of his conviction and for failing to obtain a plea agreement on a lesser charge to avoid those consequences. Defendant's conviction of criminal sexual assault is a Class 1 felony (see 720 ILCS 5/12-13(b)(1) (West 2004)), punishable by 4 to 15 years' imprisonment, without the possibility of probation (see 730 ILCS 5/5-5-3(c)(2)(H) (West 2004)). The trial court imposed the minimum four-year prison term.

¶ 6 The Department of Corrections (DOC) prescribes rules and regulations for the early release of prisoners on account of good conduct (730 ILCS 5/3-6-3(a)(1) (West 2004)), but the truth-in-

sentencing statute provides that a prisoner convicted of certain crimes, including criminal sexual assault, "shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment" (730 ILCS 5/3-6-3(a)(2)(ii) (West 2004)). This "truth-in-sentencing" statute mandates that defendant serve at least 85% of his sentence. The conviction also subjects defendant to sex offender registration. See 730 ILCS 150/2, 3 (West 2004). Defendant claims that Provenzale was ineffective for failing to correctly advise him before trial that a criminal sexual assault conviction would mandate (1) 4 to 15 years' imprisonment, without the possibility of probation; (2) service of 85% of his prison term under the truth-in-sentencing statute; and (3) sex offender registration.

¶ 7 At the hearing on the petition, Kathleen Benner, defendant's sister, testified that, when defendant was arrested in 2006, she was licensed to practice law in Illinois but was unemployed. Kathleen occasionally spoke with Provenzale about the case from 2006 through 2008. Provenzale told Kathleen that defendant might be sentenced to 12 months' in custody, for which he would serve about 3 months. Provenzale never mentioned sex offender registration. On September 9, 2008, the date defendant was found guilty, Provenzale told Kathleen and her family in the courtroom corridor that defendant could be sentenced to 12 to 18 months' imprisonment and would serve 3 to 4 months. Kathleen and her family were shocked at the severity of the sentence.

¶ 8 Within a few days of the conviction, Provenzale called Kathleen with some "bad news." Provenzale told Kathleen that he had been mistaken and that defendant actually faced a minimum sentence of four years' imprisonment, with 85% to be served, and mandatory sex offender registration, possibly for life. A few days later, Kathleen and her family met Provenzale at his office,

where he reiterated the newly-discovered sentencing consequences of the conviction. At the hearing on the postconviction petition, Provenzale denied telling the family that he made a mistake.

¶ 9 Defendant supplemented the postconviction petition with an affidavit from Kathleen, and on redirect examination, Kathleen testified that the affidavit was truthful and consistent with her testimony. The court sustained the State's objection to that testimony. Kathleen then began testifying about a polygraph examination she underwent in preparation for her testimony. The court again sustained the State's objection to her testimony and barred all polygraph examination evidence. Kathleen admitted on cross-examination that, on December 26, 2008, she sent Provenzale an email stating that her family was "very happy with [his] work."

¶ 10 Following Kathleen's testimony, defense counsel asked to present an offer of proof on the excluded polygraph examination evidence. Citing his prior decision to exclude the evidence, the postconviction judge responded that he would leave the courtroom during the offer of proof to avoid being influenced by Kathleen's testimony. Once the postconviction judge left the courtroom, Kathleen testified that she submitted to a polygraph examination regarding the truthfulness of her affidavit. Defense counsel presented the polygraph report as an exhibit, and the report stated that "the purpose of the [psychophysiological detection of deception] examination was to verify the truthfulness of [Kathleen's] statements regarding information provided to her by her brother's attorney and the veracity of information she provided in an affidavit."

¶ 11 Provenzale testified that he had been with the law firm of Ekl, Williams, and Provenzale for 12 years, had represented defendant since 2006, and previously had been a Du Page County prosecutor for 5 years. Provenzale testified that, before the trial, he twice told defendant and his father, Michael Benner, that criminal sexual assault carries a mandatory minimum prison sentence

and is not eligible for probation. Provenzale could not recall the exact dates on which he made the statements, but he recalled that the discussions took place once at his former office and once at his current office. Provenzale also testified that providing such information is his "custom or habit" when he meets with a client for the first time. Provenzale could not recall advising defendant or his family about sex offender registration, mandatory consecutive sentences based on the multiple charges defendant initially faced, or truth-in-sentencing provisions. However, Provenzale testified that he was present at defendant's arraignment.

¶ 12 Provenzale testified that, in February 2006, he began meeting with Kane County prosecutors to negotiate a dismissal of the felony charges or a reduction to a misdemeanor charge. Provenzale identified a series of email exchanges with defendant's father throughout 2006 regarding his efforts to negotiate a plea agreement. Provenzale testified that the negotiations were unavailing because the State refused to dismiss the charges or reduce them in any way. Provenzale attempted to reach an agreement with the State, but "[t]here wasn't a lot coming on the other end." Provenzale negotiated initially with assistant State's Attorney Dave Belshan, who told him that a plea agreement would "have to come from somebody above [him]." Provenzale then contacted Jody Gleason, the Chief of the Criminal Division of the State's Attorney's office, who said the State would not accept a guilty plea to a lesser charge. Provenzale attempted to renew negotiations with Belshan and Clint Hull, another prosecutor, and they told Provenzale that they needed to consult the complainant. After consulting the complainant, Hull and Belshan declined to negotiate further, and the case went to trial.

¶ 13 Provenzale recalled that, in the courtroom corridor immediately following the conviction, he might have told defendant and his family that, if the sentence did not require 85% service, defendant would get "day-for-day" credit, which meant defendant would serve 18 to 24 months in prison.

Provenzale did not recall a telephone conversation with Kathleen, but he recalled meeting the family at his office. Provenzale did not recall mentioning consecutive sentences or sex offender registration. It did not occur to Provenzale to ask for a sentence on the charge of criminal sexual abuse, which is the lesser-included offense of criminal sexual assault.

¶ 14 Defendant testified that he hired Provenzale because he had experience prosecuting sex crimes in Du Page County. Defendant and at least one family member met with Provenzale several times. Defendant was not told about mandatory minimum sentences for each of the three counts, truth-in-sentencing, consecutive sentences, or sex offender registration. Provenzale told defendant that any plea offer from the State would include "jail time," but that there was "no chance we would take that," and the matter was not discussed again.

¶ 15 Defendant testified that, in the courtroom corridor following the conviction, Provenzale told defendant, Kathleen, and their parents that the longest sentence would be about a year. Provenzale thought that defendant's lack of a criminal history made probation a possibility. A four-year mandatory minimum sentence, truth-in-sentencing, and sex offender registration were not discussed. Soon thereafter, Provenzale admitted in his office that he was mistaken about the sentence, and defendant was "blown away," shocked, and disappointed by the news. Although defendant was upset, he did not fire Provenzale, who continued representing defendant through sentencing. Defendant did not recall that, during his arraignment, he was informed that a conviction of criminal sexual assault would entail a 4- to 15-year sentence. Defendant's father and mother corroborated the testimony of defendant and Kathleen. Defendant's father acknowledged that he had sent Provenzale email messages stating that he had represented defendant "well."

¶ 16 Defendant rested his case but later obtained new counsel. The circuit court permitted counsel to reopen the proofs and introduce more evidence. Defendant's new testimony was mostly redundant. Pursuant to its prior order, the trial court barred evidence of a polygraph examination of defendant's father. The circuit court granted the State's motion for a directed finding and denied defendant's petition. Defendant's timely appeal followed.

¶ 17 ANALYSIS

¶ 18 A. Due Process

¶ 19 1. Admissibility of Polygraph

¶ 20 On appeal, defendant argues that he was denied due process when the circuit court excluded evidence of Kathleen's polygraph examination results. We note that the trial court also excluded evidence of a polygraph examination of defendant's father, but defendant's appellate argument addresses only Kathleen's examination.

¶ 21 Generally, evidence regarding polygraph examinations is inadmissible. *People v. Baynes*, 88 Ill. 2d 225 (1981). There are several reasons for the rule. First, the results are not sufficiently reliable to use as proof of guilt or innocence. Second, because polygraphs are quasi-scientific in nature, jurors may give them undue weight despite their inherent unreliability. *People v. Taylor*, 101 Ill. 2d 377, 391-92 (1984). Third, admission of unreliable evidence might impinge upon the integrity of the judicial process. *Baynes*, 88 Ill. 2d at 244.

¶ 22 Courts have barred polygraph test results from criminal trials, even when the parties stipulate to admissibility (*Baynes*, 88 Ill. 2d at 244), from sentencing hearings in capital cases (*People v. Szabo*, 94 Ill. 2d 327 (1983)), from hearings on posttrial motions (*People v. Yarbrough*, 93 Ill. 2d 421 (1982)), and from post-conviction proceedings (*People v. Hilliard*, 109 Ill. App. 3d 797, (1982)).

Because the scientific reliability of the exam does not depend on the test subject, polygraph examination results are inadmissible regardless of whether the test subject is the defendant or a witness. *People v. Gard*, 158 Ill. 2d 191, 204 (1994).

¶ 23 Despite the well-settled rule that polygraph examination results are inadmissible, defendant argues that Kathleen's results are admissible because they did not implicate his guilt or innocence and Kathleen had not testified at trial. Defendant's position is directly refuted by *Hilliard*.

¶ 24 Hilliard was convicted of murder based on his minor stepson's testimony that (1) Hilliard woke him at their home on the date of the offense and said he was going to kill a man in the basement, (2) he watched Hilliard retrieve a knife from the pantry, (3) he watched Hilliard use that knife to stab the man in the basement, and (4) after the stabbing, he and Hilliard went through a gangway and through an alley to a place where Hilliard threw the knife on a roof. The boy led the police to the knife, and Hilliard was convicted. The boy later recanted his testimony, and Hilliard filed a postconviction petition. At the evidentiary hearing, the boy persisted in his recantation and testified that he had lied in his previous testimony because his mother told him to do so. The trial judge framed the issue simply as whether the boy had lied at Hilliard's murder trial. If he did lie, there was no question that the lies contributed to the guilty verdict. *Hilliard*, 109 Ill. App. 3d at 799.

¶ 25 The postconviction court admitted the results of a polygraph examination that indicated that the boy, in fact, had seen Hilliard retrieve the knife and later throw it on the roof. The examination also indicated that the boy believed that Hilliard stabbed the victim but did not actually witness the stabbing. *Hilliard*, 109 Ill. App. 3d at 799-800.

¶ 26 On appeal of the denial of the postconviction petition, the Appellate Court, First District, held that the postconviction court had erred in admitting the results of the polygraph examination. The

court concluded that "Illinois courts have held that polygraph evidence is not admissible even when no question of guilt or innocence is presented," such as at sentencing (*People v. Ackerman*, 132 Ill. App. 2d 251, 254 (1971)) or at juvenile transfer hearings (*People v. Reese*, 90 Ill. App. 3d 284, 290 (1980)). *Hilliard*, 109 Ill. App. 3d at 801. The court further rejected Hilliard's assertion that a postconviction judge's discretion in evidentiary matters permits the admission and consideration of the results of a polygraph examination. *Hilliard*, 109 Ill. App. 3d at 801.

¶ 27 Defendant attempts to distinguish this case from *Hilliard*, but he draws minor distinctions that are unrelated to the rationale supporting the exclusion of polygraph examination evidence from criminal proceedings. The results are not sufficiently reliable, and admission of unreliable evidence might impinge upon the integrity of the judicial process. *Baynes*, 88 Ill. 2d at 244. Consistent with *Hilliard* and *Baynes*, we conclude that the trial court did not err in excluding the results of Kathleen's polygraph examination.

¶ 28 In urging us to depart from *Hilliard*, defendant relies upon *People v. Jefferson*, 184 Ill. 2d 486 (1998), where our supreme court carved out an exception to the general rule against admitting polygraph evidence. Jefferson claimed at trial that she confessed because she was promised she would be released to visit her child, who only had a few hours left to live. The trial court allowed the State to introduce evidence that, shortly before giving the statement to police, defendant was scheduled to take a polygraph exam. The supreme court upheld the admission of the polygraph evidence for the purpose of providing an alternative explanation for the reason behind Jefferson's confession. While the results of a polygraph exam were still deemed inadmissible, the supreme court held that, if a defendant makes a statement and later claims the statement was coerced or induced by promises made by authorities, evidence of his or her polygraph exam is admissible to rebut that

claim. *Jefferson*, 184 Ill. 2d at 496-97. The supreme court extended the *Jefferson* rule to witness testimony as well. See, *e.g.*, *People v. Jackson*, 202 Ill. 2d 361 (2002). We reject defendant's claim that *Jefferson* authorizes the admission of Kathleen's polygraph examination results. The *Jefferson* court specifically declined to depart from the well-settled rule that the results of such tests are inadmissible. *Jefferson*, 184 Ill. 2d at 497.

¶ 29 2. Offer of Proof

¶ 30 Defendant next argues that the postconviction judge committed reversible error by leaving the courtroom during the defense's offer of proof on the excluded polygraph evidence. When a trial court refuses to admit evidence, a formal offer of proof is needed to preserve an appealable issue. *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). Trial courts are required to permit counsel to make offers of proof, and a refusal to permit an offer generally is error. *People v. Thompkins*, 181 Ill. 2d 1, 9 (1998). An offer of proof serves two functions: (1) disclosing to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action, and (2) providing the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful. *Thompkins*, 181 Ill. 2d at 10. Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper. *Peeples*, 155 Ill. 2d at 457-58. An adequate offer of proof is the key to preserving a trial court's error in excluding evidence. *Thompkins*, 181 Ill. 2d at 10. The failure to make an adequate offer of proof forfeits the issue on appeal. *Peeples*, 155 Ill. 2d at 458.

¶ 31 Defendant argues that *Thompkins* compels reversal of the denial of postconviction relief. On post-conviction review of Thompkins' two murder convictions, he was granted an evidentiary

hearing on his claim that he was denied effective assistance of counsel at his sentencing hearing because his counsel failed to adequately investigate and present mitigating evidence. The circuit court conducted the evidentiary hearing and concluded that Thompkins was not denied effective assistance of counsel at sentencing. Thompkins appealed and argued that the circuit court erred during the evidentiary hearing by refusing to allow him to make several offers of proof, by leaving the bench during another offer of proof, and by ordering the offers of proof to be stricken from the record. *Thompkins*, 181 Ill. 2d at 9.

¶ 32 The circuit judge refused to hear Thompkins' offers of proof concerning the testimony of not just one or two witnesses, but a total of five witnesses, which included four expert witnesses and two fact witnesses. *Thompkins*, 181 Ill. 2d at 11. Four of the witnesses were available to provide offers of proof by way of live testimony, but the circuit court repeatedly denied Thompkins the opportunity to make his offers of proof and at one point stated: " 'I don't need that offer of proof. Neither does the Supreme Court.' " *Thompkins*, 181 Ill. 2d at 11. Furthermore, during Thompkins' offer of proof of one witness, the circuit judge left the courtroom and refused to hear it. The circuit court also repeatedly struck from the record the materials which Thompkins sought to submit for the court's consideration in lieu of live offers of proof. *Thompkins*, 181 Ill. 2d at 11-12. Holding that "[t]his combination of events resulted in clear error" (*Thompkins*, 181 Ill. 2d at 12), our supreme court ordered that the evidentiary hearing be reopened. *Thompkins*, 181 Ill. 2d at 23-24.

¶ 33 While the best practice would have been to remain in the courtroom, we disagree with defendant that the postconviction judge's conduct requires reversal for a new hearing on the petition. The postconviction judge's refusal to remain in the courtroom during the offer of proof was an isolated event that did not result in the cumulative error found to be reversible in Thompkins. The

postconviction court held a complete hearing on the admissibility of the challenged evidence and allowed counsel to make the offer of proof. Thus, defense counsel disclosed to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action. Also, the hearing on admissibility and the offer of proof provide this court with a record to determine whether exclusion of the evidence was erroneous and harmful. The postconviction judge's absence during the offer of proof, though error, did not prejudice defendant because the offer of proof provides an adequate record from which we conclude that the polygraph examination evidence is inadmissible.

¶ 34 3. Postconviction Court's Alleged Bias

¶ 35 Defendant also contends that he was deprived of due process because the postconviction court was biased in favor of Provenzale. Defendant argues that certain comments show that the denial of the petition was based, at least in part, by the postconviction court's bias in favor of Provenzale. In support, defendant cites the following comments by the court:

> "The court finds that Attorney Patrick Provenzale comes from one of the most reputable law firms in all of northern Illinois. Attorney Provenzale's partner is Terry Ekl, who is a famous lawyer, who has been interviewed on national TV. Patrick Provenzale's mother was a judge. Patrick Provenzale's partner is presently a judge. Patrick Provenzale's older brother was this court's prosecutor in this court's courtroom in 1990. Patrick Provenzale was a prosecutor in Du Page County handling very serious felony offenses."

¶ 36 Defendant accurately cites *People v. Steidl*, 177 Ill. 2d 239 (1997), for the proposition that a court may not consider an attorney's performance in other cases when deciding a claim of ineffective assistance in the pending case. Steidl's postconviction petition claimed, *inter alia*, that

the postconviction judge relied on personal knowledge of trial counsel's performance in other cases to make his decision on Steidl's claims of ineffective assistance of counsel. *Steidl*, 177 Ill. 2d at 265. Upon denying Steidl an evidentiary hearing on his postconviction petition, the judge stated:

> "Petitioner's trial counsel has appeared before [me] on numerous other occasions involving both criminal and civil cases and has effectively represented clients. In a serious felony case tried before this Court, the Court recalls a defendant being found not guilty by a jury although the evidence against the defendant was substantial. The result was probably attributable to counsel's tactics in presenting the case to the jury.
>
> The court is also aware of a homicide case tried by petitioner's trial counsel to a jury in Vermilion County, Illinois. In that case, the defendant was found not guilty by jury in spite of eyewitness testimony. A result, again, probably attributable to trial counsel's tactics. In the pending post-conviction petition, the court is of the opinion petitioner has failed to establish ineffective assistance of counsel falling below an objective standard of reasonableness or that he was prejudiced by his attorney's performance so as to deny him a fair trial." *Steidl*, 177 Ill.2d at 265-66.

¶ 37 Our supreme court determined that these comments indicated that the postconviction judge improperly relied on personal knowledge of trial counsel's performance in previous cases to determine counsel's competency in the present case. The court observed that, "[w]hile all judges come to the courtroom influenced, either consciously or unconsciously, by the experiences, associations, and prejudices developed over a lifetime, they are expected to make an effort to put those predilections aside and make determinations based only upon the evidence presented." *Steidl*, 177 Ill. 2d at 266. Accordingly, the supreme court held that the judge's remarks were prejudicial

error in that they indicated that his associations with counsel rendered him biased against Steidl's ineffective-assistance claims, and therefore, the judge must be recused from further consideration of the case. *Steidl*, 177 Ill. 2d at 266.

¶ 38 Defendant argues that the postconviction court's comments in this case are as egregious as those in *Steidl* and compel reversal for a new evidentiary hearing. Although the postconviction judge erred in relying on information that is both outside the record and irrelevant to Provenzale's representation in this matter, we conclude that the error is not reversible.

¶ 39 In rendering his decision, the judge recounted in detail the evidence presented, including the witnesses' communications and Provenzale's efforts to obtain a plea agreement on a lesser charge. The judge found that defendant "appeared only to remember the facts that were good for his case" and commented that defendant denied being arraigned, which undermined his credibility. The judge further noted that Kathleen admitted attending the arraignment but did not recall the court's admonitions regarding potential sentences, which appeared to be self-serving testimony. Calling the postconviction petition a case of "buyer's remorse," the judge found that, despite Provenzale's best efforts, the State accepted no plea agreement, which left defendant with "all of the ramifications of what the General Assembly legislates on this offense." The judge found that Provenzale "did everything he could, going all the way up the chain of command in the State's Attorneys office in Kane County and could not get a plea bargain; so therefore, without any plea bargain, any offer from the prosecutor, defendant is left with going to trial and suffering the ramifications of a finding of guilty."

¶ 40 We emphasize that we do not condone the postconviction judge's comments. However, even to the extent that the postconviction judge improperly mentioned information about the background

of Provenzale, his family, and his associates, there is no indication that the judge was biased in favor of Provenzale or antagonistic toward defendant. The trial court's ultimate ruling was based on the evidence presented at the hearing.

¶ 41 B. Ineffective Assistance Claim

¶ 42 Finally, defendant argues that, even if his due process rights were not violated during the evidentiary hearing, the denial of the petition must be reversed because the evidence supports his ineffective assistance claim. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a) (West 2012). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. English*, 2013 IL 112890, ¶ 21. To be entitled to postconviction relief, a defendant must establish a substantial deprivation of federal or state constitutional rights in the proceedings that produced the challenged judgment. *English*, 2013 IL 112890, ¶ 21.

¶ 43 The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *English*, 2013 IL 112890, ¶ 22. Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *English*, 2013 IL 112890, ¶ 22. However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *English*, 2013 IL 112890, ¶ 22.

¶ 44 The Act provides a three-stage process for adjudicating postconviction petitions. *English*, 2013 IL 112890, ¶ 23. In this case, the petition advanced to a third-stage hearing. See 725 ILCS 5/122-6 (West 2012). After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. *English*, 2013 IL 112890, ¶ 23.

¶ 45 Defendant's postconviction claim was the denial of effective assistance of counsel, which is guaranteed by both the United States and Illinois Constitutions. See U.S. Const., amend. VI; Ill. Const.1970, art. I, §8. The purpose of this guarantee is to ensure that the defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *People v. Pineda*, 373 Ill. App. 3d 113, 117 (2007). The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Strickland*, 466 U.S. at 696; *Pineda*, 373 Ill. App. 3d at 117. "However, there is a strong presumption of outcome reliability, so to prevail, a defendant must show that counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 686).

¶ 46 Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland*, 466 U.S. at 687, and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984)). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*, defense counsel is ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 687; *Pineda*, 373 Ill. App. 3d at 117. A court need not

decide whether counsel's performance was deficient before analyzing whether the defendant was prejudiced. *Pineda*, 373 Ill. App. 3d at 117.

¶ 47 We conclude that the circuit court's denial of defendant's ineffective assistance claim is not manifestly erroneous. See *English*, 2013 IL 112890, ¶ 23. The court heard evidence to support a finding that Provenzale's performance was objectively reasonable. We assess counsel's performance using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *Ramsey*, 239 Ill. 2d at 433. As a result, counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Ramsey*, 239 Ill. 2d at 433.

¶ 48 Defendant claims that counsel's representation was objectively unreasonable for misapprehending and misinforming him of the potential sentencing consequences and failing to obtain a plea agreement on a lesser offense. However, Provenzale testified that, shortly after being hired, he accurately informed defendant and his father about the consequences of a guilty finding. The court also recalled that, at the arraignment, defendant was admonished of the potential penalties of each charge he faced, including the criminal sexual assault charge of which he was ultimately convicted. Thus, there was evidence that Provenzale did not misinform defendant. Also, Provenzale testified that he contacted several prosecutors in the State's Attorneys office to obtain a plea agreement on a lesser charge; but he was unsuccessful, which left defendant with only the option of going to trial.

¶ 49 Furthermore, a finding that defendant was not prejudiced by counsel's performance is not manifestly erroneous. The burden is on the defendant to affirmatively prove prejudice. *Strickland*,

466 U.S. at 693; *Pineda*, 373 Ill. App. 3d at 117. To establish prejudice, the 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.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 694). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Pineda*, 373 Ill. App. 3d at 117 (quoting *Strickland*, 466 U.S. at 694). The prejudice component of *Strickland* entails more than an "outcome-determinative test"; rather, the defendant must show that deficient performance of counsel rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000); *Pineda*, 373 Ill. App. 3d at 117.

¶ 50 Even if Provenzale actually misadvised defendant regarding the sentencing consequences, defendant has failed to prove that he was prejudiced. First, the postconviction judge, who also served as the trial judge, found that defendant had been properly admonished of the charges at his arraignment. Second, the State never offered a plea agreement on a lesser charge. Provenzale sought to reduce the charges to a misdemeanor, which would allow probation as a punishment, but the witnesses testified that the State neither made nor accepted such an offer. Throughout the prosecution, the State persisted in its position that a conviction must result in "jail time." Without the State agreeing to reduce the charges, defendant could not avoid the potential consequences of a criminal sexual assault conviction, which were (1) 4 to 15 years' imprisonment, without the possibility of probation; (2) service of 85% of his prison term under the truth-in-sentencing statute; and (3) sex offender registration. Defendant received the absolute minimum sentence of four years' imprisonment for criminal sexual assault. The postconviction court found that defendant was properly admonished at his arraignment, and that finding is not manifestly erroneous. Even if

Provenzale had misadvised defendant about the seriousness of the sentencing consequences of a conviction, defendant could not have acted on this knowledge to avoid those consequences by pleading guilty to a lesser charge.

¶ 51 CONCLUSION

¶ 52 For the reasons stated, the denial of defendant's postconviction petition is affirmed.

¶ 53 Affirmed.