THIRD DIVISION
September 28, 2018

No. 1-16-0720

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 4055
	)	
ALBERTO ZAVALA,	)	Honorable
	)	Colleen A. Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County denying the petition for postconviction relief is affirmed; defendant cannot show prejudice from rejecting plea offer based on trial counsel's deficient performance in allegedly failing to inform defendant of correct mandatory minimum sentence due to application of statutory enhancements and consecutive sentencing where defendant failed to establish reasonable probability defendant would have accepted the plea but for trial counsel's allegedly deficient performance.

¶ 2 In 2006, following a bench trial, the circuit court of Cook County convicted defendant, Alberto Zavala, of one count of first degree murder and one count of home invasion. The court sentenced defendant to an aggregate sentence of 56 years' imprisonment. Defendant's

convictions and sentence were affirmed on direct appeal. In 2010 defendant sought postconviction relief. After two appeals and two remands, defendant's petition for postconviction relief proceeded to an evidentiary hearing. At the conclusion of the evidentiary hearing the court denied defendant's petition.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Only a brief summary of the facts leading to defendant's conviction and sentence is necessary for an understanding of the issues in this appeal. Charles Conrick was indebted to defendant for $18,000. Defendant asked Conrick about robbing someone to obtain the money Conrick owed him. Conrick knew the murder victim in this case, Phillip McGovern, had a large amount of cash and drugs in his home. Defendant and Conrick agreed that the victim would be robbed and the proceeds used to repay Conrick's debt. Defendant approached Robert Orosco about the plan, and Orosco agreed to find men to conduct the robbery. Orosco initially contacted Marco Canas and Leonardo Delavega, and later Alfredo Herrera, to conduct the robbery. On October 2, 2001, the day of the robbery and murder, defendant and Orosco drove past the victim's home while Canas, Delavega, and Herrera waited in another vehicle parked down the street from the victim's home. After defendant and Orosco confirmed the victim was home, they drove past the parked car and gave the other three a signal to proceed with the robbery. Defendant and Orosco then drove away. During the robbery, McGovern's fiancé exchanged gunfire with one of the robbers and McGovern was shot and killed. Defendant's trial did not occur until 2006. Before defendant's trial, Conrick and Orosco were found not guilty for charges arising from this incident, Herrera pleaded guilty to murder in exchange for a 29-year sentence, and Canas pleaded guilty to murder in exchange for a 20-year sentence. The State tried Delavega simultaneously with defendant. Delavega was found guilty of murder and home

invasion and he received an aggregate sentence of 76 years' imprisonment. The trial court sentenced defendant to 20 years' imprisonment for the murder conviction with a 15-year enhancement because of the use of a firearm for a total of 35 years, and 6 years' imprisonment for home invasion with a 15-year enhancement because of the use of a firearm for a total of 21 years, and ordered the sentences to run consecutively, for an aggregate sentence of 56 years' imprisonment. After sentencing, defendant's trial attorney filed a motion to reconsider sentence. Defendant's motion to reconsider sentence argued the firearm enhancements should not apply because defendant was convicted based on accountability and did not personally possess or discharge a firearm. The motion also argued the conviction for home invasion should merge into the murder conviction. Defendant's attorney argued, as he had done at the sentencing hearing, for an unenhanced sentence of 20 years' imprisonment for murder.

¶ 6 Defendant filed a direct appeal of his conviction and sentence and this court affirmed. *People v. Zavala*, No. 1-07-0287 (unpublished order under Supreme Court Rule 23). In July 2008 defendant filed a motion *pro se* pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). The trial court dismissed the section 2-1401 petition and defendant appealed. While that appeal was pending defendant filed *pro se* a petition for postconviction relief. The court dismissed the petition as frivolous and patently without merit, and defendant appealed. The appellate court consolidated the appeals, reversed, and remanded. Defendant then filed, with the assistance of privately retained postconviction counsel, an amended postconviction petition. Defendant's amended postconviction petition argued for the first time that trial counsel never informed defendant that sentencing enhancements would apply if he was found guilty or that his sentences would be consecutive, and thus counsel failed to properly advise defendant of the true consequence of rejecting a plea offer from the State. The

amended petition was supported by defendant's affidavit. Defendant's affidavit stated, in pertinent part, as follows:

> "My [trial] Attorney *** entered plea negotiations, initially My attorney secured a plea offer of (10)-years from the State, with the stipulation that I testify at the trial of a co-defendant. My attorney never mentioned anything about enhancements or consecutive sentences being applied to me if I refused this offer, and had I known about the consecutive sentencing or enhancements, I would have accepted that Offer;
>
> My Attorney *** obtained a second Offer after declining the first offer, this time it was for (20)-years with no stipulations. Again I refused, because my attorney never told me about any consecutive sentencing or sentence enhancements if I refused this offer, so unknowingly, I declined the offer without knowing what the true consequences were a second time, and had I known about the mandatory consecutive sentencing and sentence enhancements, I would have accepted the initial plea offer[.]"

¶ 7 The State filed a motion to dismiss the amended petition, which the trial court granted. Defendant appealed, and this court reversed for an evidentiary hearing on the amended petition.

¶ 8 Defendant testified at the evidentiary hearing that in April or May 2004 his trial attorney informed him the State was offering a 10-year sentence in exchange for defendant's guilty plea to home invasion and defendant's testimony against a codefendant. Defendant testified that at that time his attorney told him the most imprisonment time defendant would receive was 20 years because defendant was a first-time offender. Defendant also testified that his trial attorney did not mention sentence enhancements or consecutive sentencing. Defendant testified he spoke to his family and then in a phone call he informed his attorney he wanted to reject the offer.

Defendant testified that at that point his attorney again told him that if he refused the offer he could potentially receive up to a 20-year sentence as a first-time offender. In June or July 2005, defendant's attorney informed defendant the State was offering a 20-year sentence in exchange for his guilty plea to first degree murder with no stipulations. Defendant testified his attorney again told him that if he rejected the offer the most he would get was a 20-year sentence, and again his attorney did not mention consecutive sentences. Defendant testified he told his attorney the offer made no sense. A few days later defendant spoke to his attorney by telephone and rejected the offer. When defendant rejected the second offer his attorney did not mention sentence enhancements or consecutive sentences. On cross-examination, defendant testified no plea offers were ever discussed in open court. Defendant did not mention the plea offers or that he was told he would receive a 20-year sentence at his sentencing hearing. Defendant also agreed on cross-examination that he did not raise this ineffective assistance of counsel claim at any time prior to the filing of his amended postconviction petition.

¶ 9 Defendant's father and brother both testified at the evidentiary hearing. Defendant's father testified to conversations he had with defendant's trial attorney. Defendant's father testified that in April or May 2004 defendant's attorney told him that if defendant testified against one of the codefendants the State would offer him 10 years' imprisonment for his guilty plea and in June or July 2005 defendant's attorney told him the State offered a 20-year sentence for defendant's guilty plea. Defendant's father testified that defendant's attorney never mentioned sentence enhancement or consecutive sentences. On cross-examination defendant's father agreed none of the offers were put in writing. Defendant's brother testified he was present for conversations between defendant's father and defendant's attorney acting as a translator. Defendant's brother testified that during these conversations there was no discussion of sentence enhancement or consecutive sentencing. Defendant's brother also testified there was no mention

of any plea offers in open court. Defendant's brother testified he discussed the plea offers with defendant over the telephone on numerous occasions but they never discussed enhanced sentences or consecutive sentencing.

¶ 10 The State called one of the assistant state's attorneys (ASA) who had handled the case to testify at the evidentiary hearing. The ASA originally assigned to the case became a judge and the second ASA took over the case in 2005. The original ASA testified by stipulation that "she did not make any formal plea offers of any kind to either of [defendant's] attorneys." The second ASA testified that to his knowledge before he took over the case the State made no formal plea offers to defendant and he never made a formal offer to defendant's attorney. The second ASA testified he would not have offered a 20-year sentence because of the sentence enhancements in this case and to offer a plea to less than murder would have to be approved by a supervisor. The second ASA testified that any formal offers would have been memorialized in writing.

¶ 11 Defendant's trial attorney also testified at the evidentiary hearing. Defendant's attorney testified defendant never had a "Rule 402" conference[1] and defendant was not interested in pleading guilty. The attorney testified the State made a conditional offer for 10 years' imprisonment but he told defendant it was not a formal offer and the State would have to get approval. If approved the offer would be put on the record. Defendant's attorney testified he told defendant the possible sentencing range for first degree murder was 20 to 60 years. He told defendant there were possible add-ons to the sentence for first degree murder. Defendant's attorney testified he told defendant the sentencing range for home invasion was 6 to 30 years plus a 15-year add on if it was determined that the enhancement applied through the theory of

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[1] See Ill. S. Ct. R. 402 (eff. July 1, 2012) (Pleas of Guilty or Stipulations Sufficient to Convict).

accountability. Defendant's attorney testified he told defendant consecutive sentencing was a possibility. Defendant's attorney stated he explained the potential sentences to defendant on numerous occasions. He also testified that he told defendant the law was "in flux" with regard to whether the firearms sentencing add-ons applied to defendants convicted based on accountability and hopefully it would not apply in this case. Defendant's attorney testified defendant told him that codefendant Orosco was a relative and defendant would never testify against him. Defendant also told his attorney he would never plead guilty to something he was not responsible for. Defendant's attorney testified he spoke to defendant again about pleading guilty to first degree murder in exchange for a 20-year sentence without precondition. Defendant's attorney testified this was not a formal offer. The attorney testified the law was unsettled as to whether consecutive sentencing applied to one convicted based on accountability. He denied telling defendant he would not receive consecutive sentences. According to defendant's attorney, defendant's immediate response to the 20-year plea deal was to reject it, telling the attorney he (defendant) was not going to plead guilty to any charge. Defendant's attorney testified he spoke to defendant's family about the 10-year offer and the 20-year offer. The attorney denied telling defendant's father the State had made a firm offer in either instance. The attorney testified he and the family did not discuss the 20-year offer in depth because defendant immediately rejected it.

¶ 12 On cross-examination the attorney testified there was a Rule 402 conference in this case and he did not believe the State was seeking sentence enhancements during that conference. The attorney testified defendant did not wish to participate because he had no intention of pleading guilty. Later defendant's attorney clarified he was referring to Rule 402 conferences between the State and the codefendants in this case. Defendant's attorney did not attend the codefendants' Rule 402 conferences. Defendant's attorney stated the law was in flux as to whether the

sentence enhancement would apply to a defendant convicted based on accountability and therefore the minimum sentence was unclear. He denied telling defendant or defendant's family that defendant's sentence would be 20 years because defendant was a first-time offender. The attorney testified that he told defendant he would ask for a 20-year sentence and that defendant could get it if the trial judge agreed the enhancement did not apply because defendant was convicted based on accountability. Defendant's attorney argued at sentencing that neither enhanced sentencing nor consecutive sentencing applied where the defendant is convicted based on accountability. Defendant's attorney testified at the evidentiary hearing that he explained the possibility of enhanced sentences to defendant, but the attorney did not think they applied. Defendant's attorney agreed that in two letters addressing complaints by defendant, he (the attorney) stated he had "secured" plea offers, but the attorney testified he did not use the word "secured" to mean a formal offer; rather, the offers were conditioned on defendant being receptive to them.

¶ 13 Defendant's family hired a second attorney in 2003 to assist defendant's attorney with this case. Defendant's second attorney testified at the evidentiary hearing that he never received any formal plea offers from the State, although it was not his role to discuss possible pleas with the State. He spoke to defendant several times and defendant was adamant about going to trial and not pleading guilty.

¶ 14 During arguments, defendant's postconviction attorney asked the trial court to grant the petition for postconviction relief and remand and permit defendant to plead anew. Defendant interrupted his attorney and, after a consultation, defendant's postconviction attorney informed the trial court defendant wished to proceed *pro se* and argue that he should be allowed to accept the State's 20-year offer. Defendant's postconviction counsel stated as follows to the court:

> "I have explained to him the State's position that he heard at the hearing. He does have some notations in the record where there is some discussion of talk going back and forth, but I explained to him talk going back and forth is not an offer made. People talk all the time about that. Nevertheless, he looks to those comments in the record as going to the fact that they were negotiating back and forth. Again, his remedy would be requesting this court to reinstate that offer and let him take it."

The court responded postconviction counsel could make the argument in rebuttal.

¶ 15 After the State's argument the matter was continued for the trial court's ruling. In the interim defendant filed a motion *pro se* asking to represent himself because his postconviction counsel was mistaken about the appropriate remedy. Defendant attached several documents to his *pro se* pleading, including a transcript defendant asserted undermined the second ASA's testimony he would not have made such low offers, and alleged evidence of defendant's trial attorney's belief that the firearm sentencing enhancements did not apply in accountability cases.

¶ 16 The trial court denied defendant's request to proceed *pro se* in postconviction proceedings. The court found no formal offers were made, defendant was reasonably advised of the sentencing consequences, and defendant was adamant about not wanting to plead guilty. The court denied defendant's petition for postconviction relief.

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal defendant argues the trial court erred in denying his petition for postconviction relief because the evidence established that his trial counsel's performance was objectively unreasonable where his trial counsel "misadvised him of the applicable sentencing range he faced" and he was prejudiced when "he received the significantly greater sentence of 56 years."

"The Post-Conviction Hearing Act (Act) ([citation]) provides a method by which a criminal defendant can assert that his conviction was the result of a substantial denial of his rights under the United States Constitution or Illinois Constitution or both. [Citation.]" *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 88. The Act provides for three stages. "At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. English*, 406 Ill. App. 3d 943, 951-52 (2010). Where, as here, a postconviction petition advances to a "third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse the court's decision unless it is manifestly erroneous. [Citation.]" *Id*. at 952. " 'Manifestly erroneous' means arbitrary, unreasonable and not based on the evidence. [Citations.]" (Internal quotation marks omitted.) *People v. Carter*, 2017 IL App (1st) 151297, ¶ 132.

¶ 20 "The sixth amendment guarantees a criminal defendant the right to effective assistance of trial counsel at all critical stages of the criminal proceedings, including the entry of a guilty plea. [Citation.]" *People v. Brown*, 2017 IL 121681, ¶ 25. "A criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer. (Emphasis omitted.) 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. [Citations.]" (Internal quotation marks omitted.) *People v. Hale*, 2013 IL 113140, ¶ 16 (quoting *People v. Curry*, 178 Ill. 2d 509, 528 (1997)). Claims of ineffective assistance of counsel are governed by the familiar two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984), under which "a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance." *Brown*, 2017 IL 121681, ¶ 25. To show prejudice in the plea bargain context where the defendant claims he was prejudiced in rejecting the State's plea offer due to

counsel's alleged deficient performance, "a defendant must show that he would have accepted the plea offer but for counsel's erroneous advice, that the State would not have rescinded the offer, and that the trial court would have accepted it." *People v. Brown*, 2015 IL App (1st) 122940, ¶ 66 (citing *Hale*, 2013 IL 113140, ¶ 19).

> "This showing of prejudice must encompass more than a defendant's own ' "subjective, self-serving" ' testimony. [Citations.] 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. [Citations.] 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. [Citation.]" *Hale*, 2013 IL 113140, ¶ 18.

This court may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Id.* ¶ 17.

¶ 21 In *Missouri v. Frye*, 566 U.S. 134 (2012), the prosecution transmitted a written plea offer to the defendant's attorney, but the defendant's attorney did not advise the defendant that the offer had been made and the offer expired. *Frye*, 566 U.S. at 138-39. The defendant later pleaded guilty without an agreement and received a harsher penalty than what was offered in the plea offer. *Id.* at 139. The defendant sought postconviction relief alleging his attorney's "failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel." *Id.* The case raised the question of "whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both." *Id.* at 145. The Court held defense counsel does have the duty "to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* The Court noted that "[a]ny exceptions to

that rule need not be explored here, *for the offer was a formal one* with a fixed expiration date." (Emphasis added.) *Id.* The Court then held that to show prejudice from the breach of this duty, "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 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." *Id.* at 147.

¶ 22 In *Lafler v. Cooper*, 566 U.S. 156 (2012), a companion case to *Frye*, the prosecution offered to dismiss two charges and recommend a favorable sentence on two remaining charges on two separate occasions. *Cooper*, 566 U.S. at 161. Each time the respondent rejected the offer "allegedly after his attorney convinced him that the prosecution would be unable to establish [the respondent's] intent to murder" the victim. *Id.* The respondent rejected a less favorable plea offer on the first day of trial, and the trial proceeded to a guilty verdict after which the respondent received a sentence 3 ½ times longer than the sentence he was offered in the plea deal. *Id.* In *Cooper* it was conceded that the respondent's "counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 160. The question before the Court was "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of [a] plea offer and the defendant is convicted at the ensuing trial." *Id.* at 163. The Court held that to establish prejudice in the context of a plea "a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* at 163. Where the ineffective advice leads to the rejection of a plea offer, "a defendant must show that but for the ineffective advice of counsel there is a

reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164. Applying those standards to the case before it, the Court found there was no need to address the question of whether the respondent's trial counsel's performance was deficient because "the fact of deficient performance has been conceded by all parties" (*id.* at 174); and, "[a]s to prejudice, [the] respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. [Citation.]" *Id.* at 174.

¶ 23 In this case, defendant argues he was prejudiced by his trial attorney's deficient performance because the evidence established (a) the plea offer was significantly less than the sentence defendant received; (b) there was a reasonable probability he would have accepted the State's offers but for counsel's deficient advice; and (c) there was a reasonable probability both offers, but particularly the 20-year offer, would have been formally ratified by the State and the trial court. The sentences raised in the plea discussions between the State and defendant's trial attorney were clearly significantly less than the aggregate 56-year sentence defendant received. In support of his argument there was a reasonable probability he would have accepted the State's offers but for counsel's deficient advice, defendant, in addition to his own testimony, relies on the "repeated plea discussions between the State and the defense and the testimony of [defendant's] brother and father regarding the plea offers" as evidence defendant was "receptive to pleading guilty and would have accepted the pleas had he been properly advised of the mandatory minimum." Defendant states the record is "replete with evidence that [defendant] and the State were in plea negotiations," and his trial attorney testified that the State extended two

"conditional" offers. Defendant argues that his trial attorney's testimony that the State's offers were not formal offers was impeached by trial counsel's letters in which he wrote he "secured" offers. In support of his argument there was a reasonable probability both offers would have been formally ratified by the State and the trial court defendant points to evidence that two codefendants, "both of whom were principally liable for the shooting pled guilty to identical and virtually identical sentences," and "there was nothing inherently improper about either plea offer" where the State could have amended the indictment to allow for a lower sentence. In his reply defendant argued the State's response conceded by omission the propriety of both the 10 and 20-year plea offers.

¶ 24 The State responds the principles surrounding ineffective assistance of counsel in the context of a rejected plea offer do not even apply because there was never a formal offer by the State in this case. The State argues controlling precedent from the United States Supreme Court expressly applied these principles to formal plea offers, and, moreover, "when the allegation involves informal plea discussion, as here, a defendant cannot establish prejudice." The State argues that absent a formal offer a defendant can never prove there was a reasonable probability he would have agreed to plead guilty, the State would have agreed to amend the indictment, and the court would have ratified the plea. Additionally, the State argues defendant failed to show prejudice in this case because he failed to prove he would have pleaded guilty but for his trial attorney's deficient performance. Specifically, the State points to (1) the absence of testimony by defendant that he would have accepted a plea offer but for counsel's misadvice or an explanation of why he rejected the State's offers, (2) defendant's testimony at the hearing that he wanted to go to trial and fight this case, and (3) defendant's statements to his trial attorney that he was not willing to entertain a plea requiring him to testify against a codefendant because Orosco was a relative and that he was not going to plead guilty to any charges because he did not

commit the offense. The State acknowledged defendant's affidavit but called it "highly suspect that his own hearing testimony never mentioned why he chose not to plead guilty" and, regardless, "the court's decision to believe defense counsels and the ASA, rather than defendant was not against the manifest weight of the evidence."

¶ 25 In reply, defendant argued that the State faulting him for not testifying at the evidentiary hearing that he was willing to plead guilty and agreeing that he wished to fight his case is "a misrepresentation of [defendant's] testimony." Defendant argues his admission to the silence of the trial record as to the specific plea offers and his "desires to plead guilty" is "very different from [defendant] claiming that he would have gone to trial regardless of counsel's misadvice;" and defendant's silence before trial regarding a plea is not dispositive because there would have been no occasion for him to express his desire, as the parties did not make a record of "the specific plea offers at issue here in open court." Defendant notes his affidavit, and his testimony at the evidentiary hearing that (1) his trial attorney failed to advise him of the minimum sentence he faced and defendant then rejected the State's 10-year offer, and (2) because his attorney told him the most he would be sentenced to would be 20 years he rejected the State's offer. Moreover, defendant argues Illinois courts have never required a defendant to testify he would have accepted the State's offer but for trial counsel's incorrect advice.

¶ 26 In denying defendant's petition for postconviction relief the trial court held, in pertinent part, as follows:

> "THE COURT: Both [of defendant's trial attorneys] testified the Defendant was adamant that he did not wish to plead guilty to anything and wanted to go to trial similar to the situation the State cited in *People vs. Miller*, 393 Ill. App. 3d 629, a 2009 Appellate Court case in which the Appellate Court in that case found that Miller, the Defendant, proceeded to trial because he wanted to

avoid serving even the minimum sentence and that when making that decision, he lost his gamble.

But in making evaluations as to whether or not Counsel was ineffective in and Defendant making that decision, that decision was entirely up to the Defendant and I find that the attorney did reasonably inform the Defendant of all sentencing consequences.

So as a result, I find that the Petitioner has failed to meet their burden and has not shown that he received ineffective assistance of counsel."

¶ 27 In *People v. Miller*, 393 Ill. App. 3d 629 (2009), the defendant was convicted of first degree murder and sentenced to 47 years in prison for the murder. *Miller*, 393 Ill. App. 3d at 629. The defendant filed a petition for postconviction relief alleging that 2 ½ years before the defendant was tried and convicted of murder the State offered the defendant a sentence of 20 years' imprisonment in exchange for his guilty plea. *Miller*, 393 Ill. App. 3d at 629-30. The petition asserted that his pretrial counsel's "failure to inform him that his first degree murder charge carried a sentencing enhancement of at least 25 years deprived him of effective assistance of counsel regarding his decision to reject the plea offer." *Id*. The defendant attached to his petition his own affidavit in which the defendant averred that "he would have accepted the purported plea offer of 20 years' imprisonment from the State made in February 2001, had his pretrial attorney informed him of the sentencing enhancement." *Id*. at 631. The trial court summarily dismissed the petition, and the defendant appealed. *Id*. The appellate court affirmed. *Id*. at 640. The *Miller* court found that the "defendant's claim that had he known he faced a longer minimum sentence following trial, without more," was not enough to persuade it the defendant would have acted differently when the plea was offered. *Id*. at 637. Rather, the court found the record made clear "that the defendant was motivated by a desire to contest the

charges" (*id*.), and that "the defendant proceeded to trial because he wished to avoid serving even the minimum sentence" (*id*.).

¶ 28 In *Miller*, the court relied upon an inference from the fact the defendant in that case rejected an offer of the minimum unenhanced sentence for first degree murder while aware that he faced as many as 60 years' imprisonment. See *id*. at 636. The court held "[t]he only reasonable inference to be drawn from the defendant's rejection of the minimum sentence of 20 years for first degree murder is that the defendant desired to pursue his constitutional right to trial, to assert his claim of self-defense. In other words, his overriding desire was to fight the first degree murder charge." *Id*. at 636. In this case, we need not rely on any inference to find defendant did not reject the State's offers *because* of the information he received from his trial counsel regarding his potential sentence. There is ample evidence in the record from which the trial court could find that had defendant known he faced a minimum of 56 years' imprisonment (if he did not know—a question we do not answer) he would not have acted any differently when presented with the State's offers, whether conditional or not. See *id*. at 637.[2]

¶ 29 Defendant testified on cross-examination he never stated he wanted to enter a blind plea and he wanted to go to trial. Defendant agreed his trial attorney litigated a motion to suppress

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[2] Defendant contends the trial court relied on *Miller* to hold trial counsel in this case did not provide deficient performance, and he questions the validity of *Miller* in the wake of *Cooper* and *Frye* because the *Miller* court allegedly "made a legally unsupportable distinction between misadvice *** and neglect," which defendant argues runs counter to the United States Supreme Court's "sweeping" holdings that counsel is ineffective if his or her errors lead a defendant to reject a plea offer. We disagree with defendant's assessment of the trial court's holding. The trial court in this case found defendant's situation similar to that of the defendant in *Miller* because here, defendant was "adamant that he did not wish to plead guilty to anything and wanted to go to trial" similar to the defendant in *Miller*, who the appellate court found "desired to pursue his constitutional right to trial" (*Miller*, 393 Ill. App. 3d at 636). Even if we are wrong, "[w]e may affirm the trial court's judgment on any basis supported by the record, regardless of the actual reasoning or grounds relied upon by the circuit court. [Citation.]" *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

defendant's statement because defendant wanted to fight his case. Defendant's trial attorney testified that "during the conversations that I had had *** with [defendant,] he was not interested in participating in a 402 Conference." Defendant's attorney stated defendant "was not interested in pleading guilty and therefore he did not want to participate in a conference." Counsel testified he spoke to defendant about the possibility of a plea of guilty to home invasion and a 10-year sentence if defendant testified against Orosco. Counsel stated that defendant "indicated to me at that time and on numerous other occasions that we spoke about it that Mr. Orosco was a relative of his; that he would never testify against him and he would never plead guilty to a charge that he wasn't responsible for." Defendant's trial attorney testified that after Orosco went to trial and the possible plea deal became a "moot point," he spoke to defendant again about the possibility of pleading guilty. Counsel testified that defendant "said that he did not want [to] plead guilty, he was not responsible for the homicide, and therefore he wanted to go to trial." Counsel specifically spoke to defendant about pleading guilty in exchange for a 20-year sentence about a month or two before defendant's trial. Counsel testified that when he spoke to defendant about the 20-year sentence defendant's "immediate response *** was that he was not going to plead guilty to any type of charge." Counsel testified he spoke to defendant's family on several occasions but he "really didn't discuss" the possibility of a plea for 20 years' imprisonment "because it was rejected [by defendant] the same day it was approached." Counsel informed the family defendant was going to go to trial and any pursuit of a 20-year offer "was not going to happen because [defendant] did not want to take any type of plea." The second attorney defendant hired to assist his first trial attorney testified that he also spoke to defendant about whether or not defendant was open to the possibility of pleading guilty. The second attorney testified he had a discussion with defendant about defendant "possibly wanting his defense team

to negotiate some sort of plea deal if he would be willing to testify." However, defendant "was adamant that he was going to trial. He wouldn't testify or he wouldn't plead guilty."

¶ 30 At a third-stage evidentiary hearing "the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts. [Citation.]" *People v. Domagala*, 2013 IL 113688, ¶ 34. "This court may not substitute its judgment for that of the trial court and will not reverse its decision unless it is clearly evident, plain, and indisputable that the decision was erroneous." *People v. Chatman*, 357 Ill. App. 3d 695, 704 (2005). Here, we cannot say the trial court's decision that defendant failed to prove that "he would have accepted the plea offer but for counsel's erroneous advice" is erroneous. *Brown*, 2015 IL App (1st) 122940, ¶ 66. Defendant's arguments to the contrary are unpersuasive. Defendant argues the "repeated plea discussions provide objective evidence defendant was receptive to pleading guilty." However, both of defendant's trial attorneys provided testimony directly contrary to that inference, and the trial court was free to credit their testimony over defendant's affidavit and any inferences that might be drawn from the evidence. See *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007) ("an inference is merely a deduction that the fact finder may draw in its discretion, but is not required to draw as a matter of law. [Citation.]" (Internal quotation marks omitted.)). Defendant's affidavit is contradicted by his own testimony at the evidentiary hearing. Defendant's argument that he was merely testifying to the silence of the record with regard to plea negotiations is unavailing; defendant affirmatively stated he wanted to "go to trial" and "fight his case." The trial court as the trier of fact was free to weigh defendant's testimony and to accept or reject as much or as little of it as it chose. *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶ 130. The fact defendant may have been offered a sentence lower than the minimum he faced if he rejected the plea, or that there was "nothing inherently wrong about [the] plea offer" is

immaterial if the evidence establishes "that defendant's rejection of the proffered plea was not based upon counsel's alleged erroneous advice but *** upon other considerations." *Hale*, 2013 IL 113140, ¶ 28. Here the evidence established that, as in *Hale*, defendant "clearly and expressly, on many occasions, *** indicated a desire for trial." *Id.* ¶ 26.

¶ 31 This court may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Hale*, 2013 IL 113140, ¶ 17. Assuming, *arguendo*, counsel's performance fell below an objective standard of reasonableness, defendant failed to prove "that there is a reasonable probability that he would have accepted the *** plea offer had he been afforded effective assistance of counsel." *Id.* ¶ 21. Defendant failed to prove his rejection of the pleas were based upon counsel's alleged erroneous advice. See *id.* ¶ 28. "Absent defendant's demonstration of this factor, prejudice cannot be proven." *Id.* ¶ 21. We have no need to address defendant's other arguments. The trial court's judgment defendant failed to prove *Strickland* prejudice is not arbitrary, unreasonable, or not based on the evidence. *Carter*, 2017 IL App (1st) 151297, ¶ 132. Accordingly, the trial court's judgment denying the petition for postconviction relief is affirmed.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.