NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0478**
VERSUS	*	**COURT OF APPEAL**
PERRY PAYTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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ON APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 99-2688, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *

Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Max N. Tobias Jr.)

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AFFIRMED.

Perry Payton was charged by bill of information on 14 July 1999, with four counts of distribution of cocaine, violations of La. R.S. 40:967(A). At his arraignment on 9 August 1999, he pleaded not guilty to all counts. Probable cause was found and the motion to suppress the identification was denied on 18 September 1999. On 19 October 1999, Payton withdrew his earlier pleas and entered pleas of guilty as charged on all counts. He was sentenced on 8 December 1999, to serve eighteen years on each count; the sentences are to be served concurrently. The defendant's *pro se* motion for reconsideration of sentence was denied and his motion for an appeal was granted.

At the hearing on 8 September 1999, Plaquemines Parish Narcotics Agent Leonard Farria testified that he was involved in an investigation on 24 November 1998, in which two confidential informants and an undercover agent purchased two white rocks for $40 from Perry Payton. After the purchase, Agent Farria met with the undercover agent who turned over the rocks for testing, and they proved to be crack cocaine. On that same day the undercover agent returned to the same spot and bought an additional four rocks. Again, the undercover agent handed the rocks to Agent Farria, and

the rocks tested positive for crack cocaine. A video camera was placed inside the undercover agent's vehicle for the third buy from the defendant, which occurred on 17 December 1998, when two rocks were purchased for $40. Those rocks were tested and proved to be crack cocaine.

Agent Charles Adams testified that on 25 January 1999, in Sunrise, Louisiana, he supervised an individual who purchased five rocks from the defendant.

Before addressing the assignments of error, we note an error patent in the sentences imposed. According to La. R.S. 40:967(B)(4)(b), a sentence shall be imposed "for not less than five years nor more than thirty years, with the first five years of said sentence being without benefit of parole, probation, or suspension of sentence." In the instant case, the sentences were not so imposed. Payton was sentenced to four terms of eighteen years at hard labor with credit for time served. These sentences are illegally lenient. State v. Brumfield, 93-2087 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1196, 1197-98. However, this Court cannot cure errors favorable to defendants which were not raised by the State. State v. Fraser, 484 So. 2d 122, 124-25 (La. 1986).

Payton now makes two assignment of error. He argues through counsel that the sentences imposed by the trial court are excessive, and he argues *pro se* that he received ineffective assistance of counsel because he

was advised to plead guilty to the offenses.

An appellate court reviews sentences for constitutional excessiveness under La. Const. Art. I, §20. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment or is the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677.

Payton was sentenced under La. R.S. 40:967(B)(4)(b) to eighteen years on each count, to run concurrently, and the sentencing range is from five to thirty years. He argues that he pleaded guilty with the understanding that he would not be sentenced as a multiple offender, and yet at sentencing the trial court recounted his prior offenses and announced that he was a third time offender before pronouncing sentence.

At the sentencing hearing on 8 December 1999, the trial court considered the defendant's criminal history and the fact that he has two prior convictions; the defendant was described as a "third felony offender." The court then stated that the sentence to be imposed was less than recommended by the district attorney's office. Certainly, the eighteen-year terms are in the middle range of the five to thirty years to which he was exposed. Furthermore, Payton was not found to be a third felony offender under the

Habitual Offender Law. If he had been so convicted, Payton would have received a sentence of life without benefits under La. R.S. 15:529.1(A)(2)(b)(ii).

Under the sentencing guidelines, La. C.Cr.P. art. 894.1(B)(12), one of the factors the trial court should consider is whether an offender has a history of similar offenses (when the offender is not being sentenced as a multiple offender). In this case the trial court looked at the defendant's criminal history before sentencing him to a mid-range term and then stated for the record the considerations he took into account as well as the factual basis for the sentence imposed. The court followed the guidelines of La. C.Cr.P. art. 894.1 for circumstances such as these where the defendant is not being sentenced as a multiple offender.

Considering the great discretion afforded the trial court in sentencing, we find the eighteen-year sentences for distribution of cocaine are not excessive under these circumstances. State v. Davis, 97-1827 (La. App. 4 Cir. 3/10/99), 732 So. 2d 79.

There is no merit in this assignment.

On 31 January 2000, the defendant filed a "motion for ineffective counsel" based on his claim that he was advised to plead guilty to the charges on the consideration that he would receive sentences of twelve

years. The appeal had been granted on 29 December 1999, and thus, the trial court did not consider the motion. In the interest of judicial economy, we will treat the defendant's motion as a *pro se* argument on appeal.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. State v. Prudholm, 446 So.2d 729 (La.1984); State v. Johnson, 557 So.2d 1030 (La.App. 4 Cir.1990); State v. Reed, 483 So.2d 1278 (La.App. 4 Cir.1986). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. State v. Seiss, 428 So.2d 444 (La.1983); State v. Ratcliff, 416 So.2d 528 (La.1982); State v. Garland, 482 So.2d 133 (La.App. 4 Cir.1986); State v. Landry, 499 So.2d 1320 (La.App. 4th Cir.1986).

The defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fuller, 454 So.2d 119 (La.1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the relator. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth

Amendment. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So. 2d 191, 199 (La. App. 4 Cir. 1992).

Here, the defendant argues his counsel was ineffective in advising him to plead guilty to the four counts of distribution of cocaine. The defendant maintains he was told by his attorney that each of his sentences would be twelve years, and those terms were his incentive to accept the plea. The evidence in the record does not support the defendant's position, however. The Waiver of Constitutional Rights: Plea of Guilty Form contains a line beginning "I understand that if the Court accepts my plea of guilty, the sentence in this case will be:" and the defendant wrote in "determined by the Judge." . Furthermore, at the hearing in which Payton pleaded guilty on 19 October 1999, the trial court addressed him, asking if he understood the

possible sentence he could receive and telling him the sentencing ranges, and the defendant answered affirmatively. Later in the hearing, the trial court asked:

> Do you, in fact, understand that the sentence to be imposed in this matter will be determined by the Court and that there is *no specific plea bargain agreed to in this matter, other than the fact that the State will not multiple bill you*. [Emphasis added].

The defendant answered, "Yes, sir, Your Honor." The court continued, "Knowing that, do you still which to enter your plea of guilty?" And again the defendant answered, "Yes, sir, Your Honor."

Additionally, the assistant district attorney stated for the record at the beginning of the hearing that the State had agreed not to multiple bill Payton, but no other plea agreement had been made.

While the defendant offers no evidence other than his assertion that a twelve-year sentence was offered to him, the evidence in the record provides overwhelming evidence that no specific term of imprisonment was ever discussed.

Thus, the defendant cannot prove that his counsel was deficient in advising him to plead guilty to a twelve-year term when there is no evidence in the record that the attorney did so and specific evidence exists that the defendant's understanding was that no agreement existed as to length of

sentence. Furthermore, as discussed in the first assignment of error, the defendant benefited from pleading guilty in that he avoided being sentenced under the Habitual Offender Law, which would have resulted in longer terms. Because the defendant does not show that his attorney's performance was deficient, he does not carry his burden, and his argument fails.

Accordingly, for reasons cited above, the defendant's convictions and sentences are affirmed.

AFFIRMED.