

No. 1-11-2597

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14641
	)	
MARTINO MOSBY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Pierce concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant waived those issues he raises for the first time on appeal; defendant failed to present an arguable claim of ineffective assistance of trial counsel; order of circuit court of Cook County summarily dismissing defendant's first-stage post-conviction petition affirmed.
- ¶ 2 Defendant Martino Mosby appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, he contends that he raised arguable claims

that he was denied his constitutional right to appeal, and that his trial counsel was ineffective for failing to consult with him about his right to appeal.

¶ 3 The record shows that on November 19, 2009, 16-year-old defendant, who was charged as an adult, entered a negotiated plea of guilty to aggravated battery with a firearm and was sentenced to 14 years' imprisonment. At the guilty plea proceeding, following a Supreme Court Rule 402 (eff. July 1, 2012) conference, the court told defendant that he would serve the 14-year sentence agreed to during the conference at 85%, which was "nine years." Defendant then indicated that no one threatened or promised him anything in order to make him plead guilty, and that he was pleading guilty of his own free will. The parties stipulated to a factual basis for the plea which provided that at 10 p.m. on July 17, 2009, defendant encountered five woman walking on the sidewalk near 7447 South Vernon Avenue in Chicago. All of the women would make a positive in-court identification of defendant, who had an ongoing conflict with one of the women, Gabriella Williams, who was a former love-interest, and his current girlfriend, Sharika Wood, who was not present. Upon approaching these woman, defendant pulled out a gun, fired it once in the air, then fired it again, hitting Kara Urban in the left leg. Defendant then struck Dominique Parker on the side of the head with the gun. The court accepted the factual basis as sufficient to prove defendant guilty beyond a reasonable doubt, and entered a conviction on that finding.

¶ 4 The court then properly admonished defendant of his appeal rights pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Defendant indicated that he understood these admonishments. He did not file a post-plea motion or an appeal.

¶ 5 Instead, on April 29, 2011, defendant filed the instant *pro se* post-conviction petition alleging that he sent several letters to the "Judges" starting on November 21, 2009, asking for an appeal, but never received a response. Defendant further alleged that his filing of the post-

conviction petition after the due date was not due to his negligence because when he was transferred to the St. Charles Correctional Center November 20, 2009, "petitioner states attorney" did not show him "how to file motions or petitions," and was told by his intake counselor to send letters to his judge asking for an appeal. He further alleged that he got in contact with "petitioner states attorney," on December 22, 2009, asking for an appeal, but was told that his deadline was past. Defendant maintained that he therefore filed a motion for a supervisory order to appeal in the Illinois Supreme Court on January 15, 2010, which was docketed, and denied on March 24, 2011.<sup>1</sup> Defendant alleged that his "rights under the Constitution of the United States of Illinois were substantially denied or deadline was not due to his negligence" because he did not receive effective assistance of trial counsel where counsel did not show him how to file motions or petitions.

¶ 6 The court dismissed defendant's petition. In doing so, the court noted that defendant did not present any grounds for relief, and instead, simply stated that his constitutional rights were violated, and that he had been asking judges for an appeal, but had not received a response. The court found that the issues raised were "insufficient."

¶ 7 In its written order, the court repeated the statements it made at the proceeding on the petition. In addition, the court noted that defendant's bald allegation of constitutional deprivation is insufficient under the Act. The court further noted that there was no indication in the record that defendant filed a motion to withdraw his guilty plea in the trial court setting out his reasons for withdrawal within 30 days of his plea. The court dismissed the petition finding that it was devoid of any claims which would afford defendant relief under the Act.

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<sup>1</sup>Defendant's brief does not include any information regarding these alleged supreme court proceedings.

¶ 8 On appeal, defendant first contends that he raised an arguable claim that he was deprived of his constitutional right to appeal where his trial counsel failed to consult with him about an appeal, he was given incorrect advice by the prison intake counselor on how to appeal, and the trial judge, after being informed that defendant wished to appeal, did nothing. He further maintains that his very young age and lack of sophistication rendered the error egregious, and that he faced another hurdle to perfecting an appeal where it would have placed his attorney in the untenable position of having to argue his own ineffectiveness where he made no objection to the court's statement that 85% of 14 years was 9 years when, in fact, it was almost 12 years. He claims that all these factors "converged" to deprive him of the right to appeal. Defendant does not claim that he was improperly admonished by the court regarding how to appeal from his guilty plea.

¶ 9 As an initial matter, the State maintains that defendant failed to comply with the procedural requirements of the Act where he failed to provide a notarized verification affidavit in violation of section 122-1(b) (725 ILCS 5/122-1(b) (West 2010)). We observe that there is a split in the districts, and even within the Second District, as to whether the failure to provide a verification affidavit pursuant to section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010)) is fatal to a petition at the first stage (*People v. Carr*, 407 Ill. App. 3d 513, 515-16 (2011) (Second District, fatal); *People v. Cage*, 2013 IL App (2d) 111264, ¶14 (not fatal); *People v. Stephens*, 2012 IL App (1st) 110296, ¶85 (First District and Fourth district cases cited therein, not fatal), but that this district has repeatedly held that it is not (*Stephens*, ¶85 (see cases cited therein)). We find no reason to depart from the conclusion that the failure to include a verification affidavit is not fatal to the petition.

¶ 10 As to the merits, the State contends that defendant has expanded the issues raised in his petition, essentially raising new issues for the first time on appeal. Defendant responds that his

petition is to be liberally construed, and is not required to set forth a constitutional claim in its entirety, but need only allege enough facts to make out a claim under the Act.

¶ 11 We observe that defendant alleged in his petition that he received ineffective assistance of trial counsel for failing to inform him how to file motions or petitions, that he was told by his prison intake counselor to send letters to his judge asking for an appeal and sent letters to the "Judges," but did not receive a response from them, and filed a supervisory order to appeal with the supreme court, but was denied. Nowhere in defendant's petition does he allege that he was denied the right to appeal. Even allowing for the "liberal construction" to be afforded for *pro se* claims at the summary dismissal stage (*People v. Hodges*, 234 Ill. 2d 1, 21 (2009)), it is readily apparent that defendant did not allege the denial of the right to appeal claim raised here in his petition, and that he cannot characterize his claim as such where he did not do so below (*People v. Taylor*, 237 Ill. 2d 68, 75-76 (2010)). The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition* are sufficient to invoke relief under the Act. (Emphasis in original.) *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010). Allegations that are not raised in the post-conviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Where the argument raised on appeal was not raised in the petition, it is forfeited for review. *People v. Cathey*, 2012 IL 111746, ¶21; *Petrenko*, 237 Ill. 2d at 502; *People v. Pendelton*, 223 Ill. 2d 458, 475 (2006). Accordingly, we find this issue waived. *Jones*, 213 Ill. 2d at 508.

¶ 12 Defendant next contends that he presented an arguable claim that he was denied the right to effective assistance of counsel. He specifically maintains that counsel failed to consult with him about his right to appeal, and that this failure deprived him of an appeal where his actions of sending letters to the trial court asking to appeal arguably showed that he would have perfected and taken an appeal had counsel consulted with him.

¶ 13 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of a first-stage summary dismissal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, at the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19.

¶ 15 Here, defendant asserted in his petition that his counsel was ineffective for failing to inform him how to file motions or petitions to appeal his plea. He maintained that he sent letters to the trial court asking to appeal, but never received a response, and that he told counsel after the appeal deadline that he desired to appeal.

¶ 16 We observe that the trial court, pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001), admonished defendant, in relevant part, that he had 30 days to file a written motion to withdraw the guilty plea, that any issues not raised in that written motion would be waived for purposes of appeal, and that if he could not afford an attorney and a transcript, they would be provided free of charge. Defendant does not dispute that these admonishments were proper.

¶ 17 Defendant instead maintains that counsel had a duty to consult with him regarding an appeal where he sent letters to the court informing it that he desired to appeal. We observe that once a *pro se* defendant notifies the court that he wishes to withdraw his guilty plea and appeal, the protections offered by Rule 604(d) (eff. Feb. 6, 2013), *i.e.*, the appointment of counsel and the attorney certificate, are automatically triggered. *People v. Edwards*, 197 Ill. 2d 239, 256 (2001). The right to counsel also attaches where defendant files a post-plea motion. *People v. Cabrales*, 325 Ill. App. 3d 1, 6 (2001).

¶ 18 Here, defendant failed to file a post-plea motion to trigger the appointment of counsel at the post-plea stage. *Cabrales*, 325 Ill. App. 3d at 6. Furthermore, although defendant claims he informed the trial court that he wished to appeal by sending it letters two days later thereby triggering the appointment of counsel (Ill. S. Ct. R. 604(d); see also *People v. Adams*, 71 Ill. App. 3d 168, 173-74 (1979) (duty to file post-plea motions arises where the court is advised that defendant wishes to appeal)), he has not provided any supporting documentation corroborating that claim as required under section 122-2 of the Act (*People v. Coleman*, 2012 IL App (4th) 110463, ¶55). He maintains that due to his young age of 16 years he would not have the foresight to make copies of the letters he sent to the trial court. We observe that there is no such exception to section 122-2 of the Act which requires supporting documentation. 725 ILCS 5/122-2 (West 2010). The failure to provide such, as the State notes, is fatal to defendant's petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Defendant's unsupported allegation that he notified the court that he desired to appeal his plea, which would have triggered the appointment of counsel (Ill. S. Ct. R. 604(d)) and the duty of counsel to file a post-plea motion (see *Adams*, 71 Ill. App. 3d at 173-74) was self-serving, and insufficient to support an arguable claim of ineffective assistance of trial counsel to warrant relief under the Act (*People v. Brown*, 236 Ill. 2d 175, 206-07 (2010); *People v. Hughes*, 329 Ill. App. 3d 322, 325-26 (2002)).

¶ 19 In reaching this conclusion, we find defendant's reliance on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *People v. Torres*, 228 Ill. 2d 382 (2008), in support of his argument that counsel was ineffective for failing to consult with him regarding an appeal, misplaced. In *Flores-Ortega*, 528 U.S. at 474, defendant filed a federal *habeas* petition alleging his counsel was ineffective where she failed to file a notice of appeal after promising to do so. At an evidentiary hearing defendant indicated that counsel told him she was going to file an appeal, but the attorney indicated that she had no specific recollection of such; defendant was denied relief, but on appeal to the Court of Appeals for the Ninth Circuit, the denial was reversed. *Flores-Ortega*, 528 U.S. at 474-76. The Supreme Court held that counsel only has a duty to consult with defendant regarding an appeal if there is reason to think that either: (1) a rational defendant would want to appeal, *i.e.*, there are nonfrivolous grounds for appeal, or (2) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Flores-Ortega*, 528 U.S. at 480. The Supreme Court found on the record before it that it could not determine if counsel had a duty to consult with defendant, and, therefore, vacated the granting of defendant's *habeas* petition on the basis of ineffective assistance of counsel and remanded for further proceedings. *Flores-Ortega*, 528 U.S. at 484-87. Here, unlike *Flores-Ortega*, counsel did not promise defendant that he would file an appeal, and defendant did not allege that he notified counsel that he desired to appeal or withdraw his plea.

¶ 20 Defendant, however, maintains that a duty existed to consult with him regarding an appeal because there were nonfrivolous grounds for an appeal where the trial court misled him of the consequences of the plea, by informing him that 85% of 14 years, was 9 years, when in fact it was about 12 years, and that this rendered his plea involuntary. The State again notes that defendant has improperly expanded upon the claim raised in his petition, essentially raising a new issue. We agree with the State, and, accordingly, find that he has waived his claim that

nonfrivolous grounds for appealing existed where he did not raise this allegation in his petition. *Torres*, 228 Ill. 2d at 398-99; *Jones*, 213 Ill. 2d at 508. Moreover, defendant was clearly admonished that he would have to serve 85% of the 14-year sentence, and the court's simple miscalculation did not render his plea involuntary where defendant was otherwise properly admonished.

¶ 21 We further find this case akin to *Torres*. Here, as in *Torres*, 228 Ill. 2d at 401, the record shows that defendant had no defense to mount against the charges where five witnesses could positively identify him as the shooter, and he received the sentence he bargained for, and thus, no rational defendant would have appealed. Furthermore, and similar to *Torres*, defendant pled guilty, expressly indicating that he sought to end the judicial proceedings, and was also meticulously admonished by the trial court of his appeal rights, indicated that he understood them, and did not express any displeasure at that time. *Torres*, 228 Ill. 2d at 403. Under these circumstances, there was simply no reason for counsel to think that defendant was dissatisfied or would want an appeal (*Torres*, 228 Ill. 2d at 403), thereby triggering his duty to consult with him regarding an appeal (*Flores-Ortega*, 528 U.S. at 480). Furthermore, and as explained above, defendant's claim that he later notified the court of his desire to appeal, which would have triggered the appointment of counsel (Ill. S. Ct. R. 604(d)), and also the duty to consult regarding an appeal (*Flores-Ortega*, 528 U.S. at 480), was not substantiated which was fatal to his petition (*Collins*, 202 Ill. 2d at 66). We, therefore, find that defendant failed to present an arguable claim of ineffective assistance of counsel.

¶ 22 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's petition.

¶ 23 Affirmed.