

2013 IL App (2d) 120003-U
No. 2-12-0003
Order filed May 31, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-397
)	
JOSEPH J. FOLLIS,)	Honorable
)	Fernando L. Engelsma,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* We affirmed the trial court's summary dismissal of defendant's postconviction petition, on the ground that defendant did not comply with section 122-2: because his own affidavit did not qualify as such, he did not provide independent corroboration of his claim that counsel did not consult with him about an appeal; further, because defendant asserted that one or both of his parents were present for every meeting with counsel, he could have provided such independent corroboration, by way of affidavits from his parents.

¶ 2 Defendant, Joseph J. Follis, appeals from an order summarily dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He argues that his petition's assertions of trial counsel's failure to consult with him concerning an appeal stated the gist

of a claim under the rule in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). We hold that, because defendant's affidavit concerning counsel's lack of proper consultation also averred that one or both of his parents were present during every meeting he had with counsel, the petition did not meet the Act's standards for corroboration. We therefore affirm.

¶ 3

I. BACKGROUND

¶ 4 A grand jury indicted defendant on a count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)) (defendant, on August 8, 2007, fired a .32-caliber revolver toward Luis Perez and hit him in the shoulder), and a count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)) (defendant fired the same weapon in the direction of an unspecified person other than Perez). Defendant retained counsel. He waived a jury trial and later entered a blind guilty plea to the aggravated battery with a firearm count; the State dismissed the second count.

¶ 5 For the factual basis of the plea, the State said that defendant had told the police that he had taken the gun out a lockbox in his room and had gotten into a vehicle with his associates, Victor and Angel. They drove to "Adrian's crib." Defendant saw a group of people outside. Victor started demanding the gun from defendant, and Angel was telling him to shoot, but he initially did neither. Then Angel and Victor both started telling him to shoot, and "Victor said[, ']man[,] you're a bitch.'" Defendant "let five shots go," one of which hit Perez.

¶ 6 At sentencing, Detective Shane C. Woody of the Belvidere police department said that defendant had initially denied being the shooter, but, after admitting his presence at the shooting, had consistently described the others in the vehicle as pressuring him to shoot. Woody said that Boone County law enforcement had noticed what they construed as a power struggle between the established Sureño 13 gang and the encroaching Latin Kings gang. The police found graffiti in

defendant's bedroom that implied a Latin Kings affiliation. Victor and Angel were known Latin Kings affiliates. Adrian Cazares, whose house defendant shot at, was a Sureño 13. Perez was apparently not defendant's intended target, although some evidence suggested that he too was a Sureño 13.

¶ 7 According to Woody, both Victor and Angel admitted that they had urged defendant to shoot. Angel admitted that he had sold the gun, which was stolen, to defendant. Victor admitted calling Angel to get Angel to drive the others to the site of the shooting. The incident that led to the shooting involved Victor using a sword in a fight with Sureño 13 affiliates and getting "jumped."

¶ 8 The court said that it had considered all the statutory factors in aggravation and mitigation. It noted that the sentencing range was 6 to 30 years. It said that exceptions existed to the rule that the shooter was the person most accountable in a shooting case with codefendants and found that the other two in the car gave defendant a strong push that nevertheless fell short of facilitating the offense. It noted that Victor had received a 14-year sentence, but that occurred after a trial. It found a good chance existed that defendant, based on his attitudes, would never commit another offense. It agreed that he had no significant record. It said that defendant's gang involvement made any sentence near the minimum inappropriate. It also said that, although many defendants did not have a chance to be out on bond for a year and a half, it was bound to note that defendant had behaved well during that time. It sentenced defendant to 12 years' imprisonment. The court then admonished defendant of his appeal rights. This took place on February 23, 2009. Defendant did not file a postsentencing motion.

¶ 9 On September 26, 2011, defendant, through retained counsel other than trial counsel, filed a petition under the Act. He asserted, among other things:

“Defense counsel should have discussed the possibility of appeal with the Defendant, advised him of his appellate court rights, and ultimately either filed the Notice of Appeal, or requested that the Appellate Defendant [*sic*] be appointed to represent the Mr. Follis [*sic*]. Defense counsel took no affirmative steps to protect Mr. Follis’ rights. The appellate rights were forfeited because a timely appeal was not filed.”

The petition lacked a verification.¹ It did include an affidavit of defendant’s in which he averred that “[d]uring the time my felony matter was pending every time I met with [trial counsel], one or both, of my parents were present for the meeting.” He further averred that trial counsel “did not file an appeal on my behalf, nor did he ever explain to me that I could have an appellate public defender appointed to represent me if I wanted to file an appeal.”

¶ 10 The court summarily dismissed defendant’s petition on December 1, 2011. It ruled that, because defendant did not allege that he expressed a desire to appeal, and because nothing suggested merit to the appeal, he did not state a claim for ineffective assistance of counsel for failure to file a notice of appeal. Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant, citing *Flores-Ortega*, asserts that the petition stated the gist of a claim for ineffective assistance of counsel based on trial counsel’s failure to properly consult with defendant about his desire to appeal. The State responds that, because defendant did not allege that

¹ There is a split in this district with respect to whether a lack of verification appropriately gives rise to a first-stage dismissal. See *People v. Cage*, 2013 IL App (2d) 111264, ¶¶ 7-11 (discussing this split and the various cases adopting the different positions). However, we need not resolve this split today, because the record provides an alternate basis to affirm, as discussed *infra*.

he had given counsel any basis to think that he wanted to appeal, he did not state the gist of an ineffective-assistance claim.

¶ 13 This court need not address the merits of the ineffective-assistance-of-counsel claim. Because defendant explicitly averred facts showing that his parents' affidavits were available to support his claims of counsel's conduct, the Act required those affidavits, not his, so the supporting documents were not sufficient. Section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)) requires a "petition [to] have attached thereto affidavits, records, or other evidence supporting its allegations or [to] state why the same are not attached." The lack of necessary affidavits or other section 122-2 support is a proper basis for summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Because we can affirm on any basis that would have been proper in the trial court (*e.g.*, *People v. Dent*, 408 Ill. App. 3d 650, 654-55(2011)), we can affirm a summary dismissal for lack of section 122-2 support despite the trial court's having dismissed on another basis.

¶ 14 Defendant asserts that he stated the gist of a claim for ineffective assistance of counsel under *Flores-Ortega*. That case holds:

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Flores-Ortega*, 528 U.S. at 480.

Under *Flores-Ortega*, to “consult” means to “advis[e] the defendant about the advantages and disadvantages of taking an appeal, and [to] mak[e] a reasonable effort to discover the defendant's wishes.” *Flores-Ortega*, 528 U.S. at 478.

¶ 15 To have properly supported his claim under *Flores-Ortega*, defendant, pursuant to section 122-2, would have needed to either provide a proper affidavit to support his allegation that no proper consultation occurred or else explain why such an affidavit was not available. The only affidavit attached to the post-conviction petition filed in this case, defendant's own affidavit, was not proper support, for reasons we now explain.

¶ 16 That a defendant's own affidavit is not proper section 122-2 support is the strong implication of several supreme court decisions, particularly *People v. Hall*, 217 Ill. 2d 324 (2005) and *Collins*. In *Hall*, the court explained:

“[T]his court has stated that the purpose of section 122-2 is to show a defendant's postconviction allegations are capable of *objective or independent corroboration*. [Citation.] Failure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney.” (Emphasis added.) *Hall*, 217 Ill. 2d at 333.

In *Collins*, the court recognized “that requiring the attachment of ‘affidavits, records, or other evidence’ will, in some cases, place an unreasonable burden upon post-conviction petitioners.” *Collins*, 202 Ill. 2d at 68 (quoting 725 ILCS 5/122-2 (West 2000)). It pointed to a case concerning a petition in which the “defendant alleged that he relied upon certain misrepresentations that were ‘whispered to him’ by his attorney following the entry of his guilty plea,” as an example of one in which the burden would be unreasonable. *Collins*, 202 Ill. 2d at 68 (quoting *People v. Williams*, 47 Ill.2d 1, 2 (1970)). In that case, the verified petition describing the circumstances (without any separate affidavit from defendant) was sufficient to explain why no independent affidavit was

present. The implication of these cases is clear; a defendant's verification or affidavit can explain why no independent corroborating documentation is available, but it is not itself independent corroborating documentation or a substitute for such documentation. See *People v. Teran*, 376 Ill. App. 3d 1, 4 (2007) (so reasoning).

¶ 17 Thus here, defendant's affidavit did not provide independent corroborating documentation pursuant to section 122-2. Further, unlike in *Williams*, because defendant specifically averred that one or both of his parents were present every time that he consulted with counsel, his claim about counsel's conduct was capable of independent verification—by means of his parents' affidavits. Those affidavits were surely available to him, and the defendant has not offered any explanation for the lack of the independent corroborating documentation. Defendant thus did not comply with section 122-2. Accordingly, we affirm on that basis.

¶ 18

III. CONCLUSION

¶ 19 For the reasons stated, we affirm the dismissal of defendant's postconviction petition.

¶ 20 Affirmed.