

No. 1-12-1295

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).

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. 01 CR 9864
)	
CHARLES WASHINGTON,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice LAMPKIN concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The circuit court erred in summarily dismissing defendant's *pro se* postconviction petition at the first stage of postconviction proceedings where the petition's claim, that his post-plea counsel failed to preserve defendant's right to appeal, contained an arguable basis both in law and in fact.
- ¶ 2 Defendant Charles Washington appeals from the first-stage summary dismissal of his *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends the circuit court erred in summarily dismissing his

petition when there were arguable bases both in law and in fact for his claim that his trial attorney was ineffective for failing to file a motion to withdraw his guilty plea to preserve his right to appeal. We reverse and remand the judgment of the circuit court.

¶ 3 Defendant was charged by indictment with first degree murder, home invasion, aggravated kidnaping, criminal drug conspiracy, and aggravated unlawful restraint. The State gave notice of intent to seek the death penalty. On April 21, 2006, pursuant to a plea agreement with the State, defendant pleaded guilty to the first degree murder of Wardella Winchester; the court imposed the agreed-upon sentence of 30 years in prison; and the State dismissed the remaining indictment counts. Pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001), the court advised defendant, *inter alia*, that he had a right to appeal and that the filing within 30 days of a motion to withdraw his guilty plea was a prerequisite to taking an appeal. Neither a motion to withdraw the guilty plea pursuant to Supreme Court Rule 604(d) (eff. Dec. 13, 2005) nor a notice of appeal was filed.

¶ 4 On March 1, 2012, defendant's *pro se* postconviction petition, supported *inter alia* by his own verified statement and the transcript of his guilty plea, was docketed in the circuit court.

The petition raised a number of allegations, including the claim that defendant's

"trial counsel failed to file Motion to Reduce Charge and Sentence of Murder, to lesser charge of kidnaping which was available during the 402 conference as requested by defendant. Supreme Court Rules 604 (d), 605 (b). Here, trial counsel['s] failure to notify the reial [*sic*] court at pleadings of mitigation evidence, by motion or orally in open court that defendant wishes to file

reconsideration motion.

The trial counsel[']s failure to file requested motions violated defendant[']s due process. Counsel[']s failure to inform trial court of mitigating evidence in form of motion or orally in open court guilty plea which 'constituted waiver' of defendant[']s claim for further appellant [sic] review constituted ineffective assistance of trial counsel. **Strickland v. Washington, 466 U.S. 668.**

* * *

Therefore, by not following defendant[']s request effected [sic] defendant[']s due process to the plea bargain, and appeal."

¶ 5 Immediately following were citations to several supreme court cases headed by *People v. Wilk*, 124 Ill. 2d 93 (1988). *Wilk* held that a motion to withdraw guilty plea was a condition precedent to appeal from a judgment entered upon a guilty plea. *Id.* at 105. Under the heading "Ineffective Assistance of Trial Counsel Failing to Preservation of Issues for Appeal," the *pro se* petition stated in pertinent part: "Upon appeal any issues not raised by the defendant in the motion to reconseder [sic] the sentence or withdraw the guilty plea and vacate the judgment shall be deemed waived. [Cases cited.] In the effect of counsel not filing post-trial guilty plea motions caused defendant a server [sic] due process violation toward appeal. (Strickland, *supr.*)."

¶ 6 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. The court's written order addressed the petition's numerous claims, including the allegation that defendant received ineffective assistance of counsel when counsel failed to

preserve issues for appeal. The court rejected this contention on the basis that defendant provided no facts or documentation to support his claim, which the court described as "[b]ald, conclusory allegations."

¶ 7 On appeal, defendant argues that his petition was erroneously dismissed where its allegation, that he was denied effective assistance of counsel when his attorney failed to file requested post-plea motions necessary to preserve his right to appeal, had an arguable basis both in fact and in law. The State responds that defendant's claim has no arguable basis in fact or law, is unsupported by affidavit, and is rebutted by the record.

¶ 8 We review the circuit court's summary dismissal of a postconviction petition at the first stage *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The pleading requirements of the Act are found in section 122-2, which requires that the petition "clearly set forth the respects in which petitioner's constitutional rights were violated." Section 122-2 also requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. " 725 ILCS 5/122-2 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The allegations of a *pro se* petition are required to be taken as true and liberally construed at the first stage of postconviction proceedings, where the petition need set out only an arguable basis in law and fact. *Brown*, 236 Ill. 2d at 193.

¶ 9 A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. *Hodges*, 234 Ill. 2d at 17. The Act is an appropriate remedy for an ineffective assistance of counsel claim when the defendant's counsel has failed to file a Rule 604(d) motion to withdraw

guilty plea. *In re William M.*, 206 Ill. 2d 595, 599-600 (2003), citing *People v. Wilk*, 124 Ill. 2d 93, 107 (1988). In *People v. Edwards*, 197 Ill. 2d 239, 253 (2001), our supreme court held that, in the first stage of postconviction proceedings brought by a *pro se* defendant acting without counsel, prejudice is presumed from his trial counsel's failure to file a requested motion to withdraw guilty plea.

¶ 10 In the instant case, the imprecise and inaccurate rhetoric of defendant's *pro se* petition in the initial stage of proceedings under the Act reminds us of our supreme court's observation: "Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Hodges*, 234 Ill. 2d at 9. This recognition of a low threshold at the initial stage, however, does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation. *Id.* at 10. Nevertheless, defendant's petition reveals the following facts. After his guilty plea, defendant sought to attack his plea on several grounds, which are set out in the petition; he requested that his trial counsel file motions relating to those claims to enable him to appeal on those grounds; but counsel's "failure to file requested motions violated" his due process rights. The State argues that defendant had no right to file motions following his guilty plea other than to file a motion to withdraw the plea. However, the petition cites Supreme Court Rules 604(d) and 605, as well as *Wilk*, revealing that defendant understood the requirement that a motion to withdraw his guilty plea and vacate the judgment was a prerequisite to appeal. While poorly crafted, the petition cites *Strickland* in asserting that counsel failed to preserve defendant's various claims of error for review by not filing "post-trial guilty plea motions" which resulted in a severe "due process violation toward appeal." While the petition speaks of "motions" in the

plural and does not specifically use the term "motion to withdraw guilty plea," nevertheless his allegation that he requested counsel to prepare motions to preserve his grounds for appeal as required by Rule 604(d) cannot be described as fantastic or delusional. In the initial stage of postconviction proceedings, the allegations of defendant's *pro se* petition were required to be taken as true and liberally construed. We cannot conclude that defendant's petition, though inartfully drawn, lacked an arguable basis in fact.

¶ 11 The petition also contained an arguable basis in law, namely, that defendant was afforded ineffective representation by his counsel who failed to preserve defendant's right to challenge his guilty plea on appeal. Our supreme court has noted that "an attorney who stands with his client in a criminal proceedings, hears the admonishments of the court required by Rule 605(b)¹, and fails to adhere to Rule 604(d) by moving to withdraw the plea prior to filing a notice of appeal has fallen short of providing competent representation." *Wilk*, 124 Ill. 2d at 105. Contrary to the holding in *Wilk*, the State argues that defendant instructed his attorney to file a post-plea motion and not a notice of appeal, a ministerial act, whereas the failure to file a post-plea motion to withdraw the plea is not a ministerial act as it requires that the grounds for withdrawing the guilty plea be set out in the motion. This same argument was presented by the State and rejected in *Edwards*, 197 Ill. 2d at 253.

¶ 12 Citing *People v. Collins*, 202 Ill. 2d 59 (2002), the State asserts that the petition's summary dismissal was justified on the ground that it was not in compliance with section 122-2 of the Act, which requires the attachment of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). It

¹ The applicable subsection in this case, a negotiated plea, was Rule 605(c), which was added by amendment in 2001.

does appear from the content of the petition, however, that no one other than defendant and his attorney was privy to communications between them concerning the post-plea motions that defendant requested be filed. Citing *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005), defendant argues that his failure to attach independent corroborating documentation or to explain its absence may be explained where the only affidavit defendant could have attached to support his allegations, other than his own, would have been that of the attorney whose competence is being challenged. "The difficulty or impossibility of obtaining such an affidavit [from his attorney] is apparent." *People v. Williams*, 47 Ill. 2d 1, 4 (1970). Defendant's own affidavit was not necessary as it could not provide objective or independent corroboration of his claim. See *People v. Teran*, 376 Ill. App. 3d 1, 4 (2007). Thus, we agree with defendant that his failure to comply with section 122-2 of the Act does not warrant summary dismissal of his petition.

¶ 13 We conclude that defendant's *pro se* petition did not lack an arguable basis either in fact or in law and that the circuit court erred in dismissing the petition as frivolous and patently without merit at the first stage of postconviction proceedings. We reverse the judgment of the circuit court and remand the cause to the circuit court for second-stage postconviction proceedings at which defendant will be represented by an attorney, rather than proceeding *pro se*.

¶ 14 Reversed and remanded.