

NOTICE  
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2016 IL App (5th) 130279-U

NO. 5-13-0279

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	Nos. 07-CF-51 & 07-CF-1264
	)	
ROBERT PLAIR,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.  
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in dismissing the defendant's petition for postconviction relief at the first stage where his petition stated the gist of a constitutional claim of ineffective assistance of counsel. The failure to attach affidavits, records, or other evidence to his petition was not fatal to his claim because the only proof he could supply other than his own sworn statement would be an affidavit from his attorney.

¶ 2 The defendant, Robert Plair, appeals the summary dismissal of his *pro se* postconviction petition. For the following reasons, we reverse and remand.

¶ 3 **BACKGROUND**

¶ 4 In January 2007, the defendant was charged with violating an order of protection against Patricia Taylor. On May 14, 2007, the defendant entered a negotiated guilty plea

for a 24-month term of probation in exchange for pleading guilty to the felony charge of violating an order of protection for going within 500 feet of Patricia. The State presented a factual basis that on January 5, 2007, the defendant entered Patricia's apartment, pulled a knife on her, forced her to lie on the couch, told her that he would burn down her home, and then left. The defendant stipulated to the factual basis. The trial court found a factual basis for the guilty plea and accepted the plea. The trial court sentenced the defendant to 24 months' probation and ordered him to have no contact with Patricia. The trial court advised the defendant of his right to appeal and the need to first file a motion to withdraw his plea and vacate the judgment.

¶ 5 On October 22, 2007, the defendant was charged with two counts of armed violence. On November 5, 2007, the State filed a petition to revoke the defendant's probation. On August 11, 2008, he entered a partially negotiated plea of guilty to one count of armed violence and the probation revocation petition. The State agreed to dismiss count 2 of the armed violence indictment in exchange for the plea.

¶ 6 The State presented a factual basis that on October 20, 2007, Patricia was walking down the street when she ran into the defendant. He asked her for money to buy beer, and, when she refused to give it to him, he stabbed her in the chest and arm with a knife with an eight-inch blade. The defendant stipulated to the factual basis. The trial court found that a factual basis existed and accepted his guilty pleas. The court further found that the defendant had been advised of the charges against him, his potential sentences, his constitutional rights, and the consequences of his pleas. Following a sentencing hearing on September 29, 2008, the trial court sentenced the defendant to 22 years'

imprisonment in the Department of Corrections followed by 3 years of mandatory supervised release on the armed violence charge and 6 years' imprisonment in the Department of Corrections on the petition to revoke probation, with the sentences to run concurrently.

¶ 7 The defendant mailed a *pro se* motion to reduce sentence on October 26, 2008. The trial court filed the motion on October 31, 2008, and denied it the same day, finding that jurisdiction was "now vested in the appellate court." The defendant did not take a direct appeal from his guilty pleas.

¶ 8 On February 22, 2013, the defendant filed a *pro se* postconviction petition in which he raised several allegations that he received ineffective assistance from his guilty plea counsel. Among his claims, he alleged that he asked his counsel to appeal his guilty pleas, but she informed him that he had to appeal himself at his place of incarceration.

¶ 9 On May 10, 2013, the trial court dismissed the defendant's postconviction petition, finding that he failed to state a claim for ineffective assistance of counsel in that he failed to show that his counsel's performance was deficient or that he suffered prejudice as a result. The defendant filed a timely notice of appeal.

¶ 10 ANALYSIS

¶ 11 The defendant argues that the trial court erred in dismissing his *pro se* postconviction petition because he stated the gist of a constitutional claim that his guilty plea counsel provided ineffective assistance by disregarding his request to file a postplea motion, thereby depriving him of his right to an appeal.

¶ 12 This court reviews the trial court's summary dismissal of a defendant's postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Post-Conviction Hearing Act (the Act) provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his constitutional rights. See 725 ILCS 5/122-1 *et seq.* (West 2012). "A postconviction proceeding is a collateral attack on the conviction and is not intended to relitigate a defendant's guilt or innocence." *People v. Rivera*, 342 Ill. App. 3d 547, 548 (2003). The Act creates a three-stage process for the adjudication of postconviction petitions. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court reviews the postconviction petition to determine whether it is "frivolous or \*\*\* patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. *Id.* "A petition is frivolous or patently without merit only if it has no arguable basis in law or fact." *People v. Usher*, 397 Ill. App. 3d 276, 279 (2009). Stated another way, a petition is frivolous or patently without merit if the allegations, taken as true and liberally construed, fail to present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Because most postconviction petitions are drafted at this stage by defendants with little legal knowledge or training, the threshold for surviving first-stage review is low. *Hodges*, 234 Ill. 2d at 9. A *pro se* defendant need only present a limited amount of detail in the petition and is required only to allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Id.* The petition need not include legal argument or citations to legal authority. *Edwards*, 197 Ill. 2d at 244.

¶ 13 If the postconviction petition is not dismissed as frivolous or patently without merit, it advances to the second stage, where counsel may be appointed to an indigent defendant. *Id.* at 245-46. The State may file responsive pleadings. *Id.* at 246. At this stage, the trial court determines whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Id.* The petition is dismissed if no such showing is made. *Id.* If a substantial showing of a constitutional claim is set forth, the petition advances to the third stage, where the trial court conducts an evidentiary hearing. *Id.*

¶ 14 A claim of ineffective assistance of counsel must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Usher*, 397 Ill. App. 3d at 280. Under *Strickland*, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance resulted in prejudice. *Id.* "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. "This 'arguable' *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding." *People v. Tate*, 2012 IL 112214, ¶ 20.

¶ 15 In *Edwards*, the defendant filed a *pro se* postconviction petition alleging that, following the entry of his guilty plea, his attorney refused his request to file an appeal and became totally unavailable in regard to the case. *Edwards*, 197 Ill. 2d at 241. The trial

court dismissed the petition as frivolous and patently without merit, and the appellate court affirmed. *Id.* The supreme court found that the defendant alleged that he repeatedly asked his attorney to file an appeal but that she failed to do so and, for purposes of deciding whether the defendant's petition was frivolous, the allegation must be taken as true. *Id.* at 253. The court further found that nothing in the record indicated that the defendant's counsel reviewed the plea proceedings for error or consulted with the defendant regarding grounds for an appeal before deciding not to file a motion to withdraw the guilty plea. *Id.* at 253-54.

¶ 16 In deciding the case, the court relied on the reasoning in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). *Id.* at 250. In *Flores-Ortega*, the Supreme Court held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a professionally unreasonable manner. *Edwards*, 197 Ill. 2d at 250 (citing *Flores-Ortega*, 528 U.S. at 477). Following *Flores-Ortega*, our own supreme court held that, at the first stage of postconviction proceedings, prejudice under *Strickland* is presumed from trial counsel's failure to file a requested motion to withdraw the defendant's guilty plea. *Edwards*, 197 Ill. 2d at 253. The court explained that "a *pro se* defendant, even if he pled guilty, cannot be required to demonstrate how his appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a requested appeal." (Emphasis omitted.) *Id.* The court held that the trial court erred in concluding that the defendant's ineffective assistance of counsel claim was so completely lacking in substance that it was frivolous or patently without merit. *Id.* at 257.

¶ 17 In the instant case, the defendant alleged in his postconviction petition that he asked his counsel to appeal and that she told him "he would have to do that himself at the place of his incarceration." He further alleged that he "felt something was not right and tried to correct the injustice by his request to [defense counsel] to appeal." The defendant tried to perfect his appeal by filing a *pro se* motion to reduce his sentence. The motion was placed in the prison mail on October 26, 2008, within 30 days of his September 29, 2008, sentencing, but not file marked until October 31, 2008. The trial court denied the motion as untimely. Nothing in the record contradicts the defendant's assertion regarding his request for his guilty plea counsel to perfect his appeal or her refusal to do so. A lawyer who disregards a defendant's instructions to file an appeal acts in a professionally unreasonable manner, and, at the first stage of postconviction proceedings prejudice is presumed. See *Id.* at 250-53. The defendant, therefore, stated the gist of a constitutional claim that his trial counsel was ineffective for failing to appeal his guilty pleas despite his request.

¶ 18 The State argues that the defendant's contention that he was deprived of his right to a direct appeal based upon the ineffectiveness of his trial counsel was not supported by the record or by required affidavit. Section 122-2 of the Act provides that the postconviction 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).

¶ 19 The purpose of section 122-2 is to show that a defendant's postconviction allegations are capable of objective or independent corroboration. *People v. Hall*, 217 Ill.

2d 324, 333 (2005). "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." *Id.*

¶ 20 In the instant case, it can be easily inferred that the only proof the defendant could supply other than his own sworn statement concerning his request to his attorney to file an appeal would be an affidavit from his attorney. The defendant's claim that he asked his counsel to file an appeal depends solely on communication between him and his attorney. The failure to attach "affidavits, records, or other evidence" supporting his allegations as required by section 122-2 of the Act is, therefore, not fatal to his claim.

¶ 21 The defendant's assertion in his postconviction petition that his attorney failed to honor his request to perfect an appeal from his guilty pleas states the gist of a meritorious constitutional claim for ineffective assistance of counsel. Because he could not reasonably be expected to obtain an affidavit from his trial counsel to support his claim, the defendant's sworn statements in support of the claim are sufficient, at the first stage of proceedings, to satisfy section 122-2. Accordingly, we conclude that the defendant's petition sets forth an arguable legal and factual basis upon which to support his ineffective assistance of counsel claim, and the trial court erred when it summarily dismissed his postconviction petition. In so holding, we do not express an opinion as to whether the defendant will ultimately prevail on his ineffective assistance of counsel claim.



¶ 22

## CONCLUSION

¶ 23 For the foregoing reasons, we reverse the trial court's summary dismissal of the defendant's petition for postconviction relief and remand the cause to the trial court for second stage postconviction proceedings.

¶ 24 Reversed and remanded.