FIRST DIVISION
March 31, 2017

No. 1-14-3484

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. 11 CR 17122
	)	
DOUGLAS WILLIAMS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of the defendant's postconviction petition is reversed and the cause is remanded for second stage proceedings where the defendant presented the gist of a constitutional claim that he received ineffective assistance of counsel based on counsel's failure to file a notice of appeal.

¶ 2 Defendant Douglas Williams appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, Mr. Williams contends that the circuit court erred in dismissing his petition because he presented an arguable claim that his trial counsel was ineffective for failing to file a timely

notice of appeal. For the following reasons, we reverse the dismissal of Mr. Williams's petition and remand for second-stage proceedings.

¶ 3 BACKGROUND

¶ 4 Defendant Douglas Williams—along with codefendants Jamie Monden and Barron Brown, who are not parties to this appeal—was charged with first degree murder with respect to the July 2009 shootings of Loweton Harmon and Philip Straight, and attempted first degree murder and aggravated discharge of a firearm for the related shooting of Jonathan Thompson.

¶ 5 Mr. Monden entered into a plea agreement with the State in January 2013, agreeing to testify against Mr. Williams and Mr. Brown in exchange for a 15-year sentence. Mr. Monden testified against Mr. Williams at a jury trial that began in July 2013. The facts presented at trial were that, in July 2009, while Mr. Williams was driving a car in which Mr. Monden and Mr. Brown were passengers, Mr. Brown used a gun to shoot at a vehicle occupied by Mr. Harmon, Mr. Straight, and Mr. Thompson, resulting in the deaths of Mr. Harmon and Mr. Straight. The defense theory at trial was that Mr. Williams was not accountable for the shooting and that he was simply "in the wrong place at the wrong time." After two days of hearing witness testimony, including the testimony of Mr. Williams in his own defense, the jury deadlocked and the trial court declared a mistrial.

¶ 6 On September 5, 2013, after a conference was held pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012), Mr. Williams pled guilty to one count of first degree murder, with respect only to Mr. Straight. In exchange for his cooperation with the State in any subsequent related proceedings, the State agreed to recommend a prison sentence of 25 years. The stipulated factual basis for the plea presented by the State was as follows:

> "On [July 5, 2009, at approximately 1:30 a.m.], the defendant, along with his co-defendants [Jamie Monden] and Barron Brown, were seated in a car that

> the defendant, Douglas Williams, was driving. While Douglas Williams was driving the car, the defendant, Barron Brown, shot a dangerous weapon which caused the death of Philip Straight."

¶ 7 After hearing the basis for the plea, the court found "that Mr. Williams underst[ood] the nature of the charges, the possible penalties, his legal rights, and that he [was] pleading guilty voluntarily and knowingly." The court entered the plea of guilty and continued the case for sentencing.

¶ 8 Counsel for Mr. Williams filed a motion to withdraw his guilty plea on October 4, 2013, alleging that Mr. Williams "was not in a proper state of mind to properly consider the State's offer along with his other options," due to the "full weight and effect of his experience in prison and the prospect of a sentence in excess of 80 years." Mr. Williams's counsel also alleged that Mr. Williams "could not speak and discuss the plea agreement with his family prior to the court date" and that he was forced to make the decision whether to plead guilty "without a reasonable amount of time to consider all his options."

¶ 9 Following argument on October 16, 2013, the court denied the motion to withdraw the guilty plea and, that same day, sentenced Mr. Williams to 25 years in prison. After sentencing Mr. Williams, the court informed him of his appellate rights, which Mr. Williams indicated he understood. On June 26, 2014, this court denied Mr. Williams's *pro se* motion for leave to file a late notice of appeal.

¶ 10 Four days later, on June 30, 2014, Mr. Williams filed the *pro se* postconviction petition that is the subject of this appeal. In his petition, Mr. Williams made two arguments: (1) the trial court erred by not granting his motion to withdraw his guilty plea; and (2) his counsel was ineffective for failing to file a timely notice of appeal. Specifically, Mr. Williams alleged the following: he entered a plea of guilty to first degree murder on October 16, 2013; before he pled

guilty, he was "tried by a jury in which the State [sought] to prosecute under an accountability theory which resulted in a hung jury"; on the same day his plea was entered and he was sentenced, Mr. Williams filed a motion to withdraw the plea and the motion was denied; and the trial court should have granted the motion because the fact that the "motion to withdraw the guilty plea was filed the same day he entered it [wa]s evidence that he did not 'clearly and unequivocally [waive]' his 6th amendment right *** to a trial by jury." Mr. Williams further alleged that his trial counsel provided ineffective assistance by failing to file a notice of appeal based on the denial of his motion to withdraw his guilty plea. Mr. Williams argued that counsel's neglect of such a basic duty "is presumed prejudicial" and the outcome in this case would have been different had counsel filed a notice of appeal because Mr. Williams would not have pled guilty to murder "and the Appellate court would have probably revers[ed] the court's denial" of his motion to withdraw the plea.

¶ 11 The circuit court dismissed Mr. Williams's postconviction petition on September 23, 2014. In its written order, the court held that it had not erred in denying Mr. Williams's motion to withdraw the guilty plea because Mr. Williams had failed to show that there was doubt as to his guilt or a misapprehension of the facts or the law when he entered his guilty plea. With respect to Mr. Williams's claim of ineffective assistance, the circuit court stated:

> "Petitioner has not demonstrated in any manner that counsel was retained for an appeal. Petitioner fails to include a copy of a retainer agreement, or a receipt of funds given to counsel as payment for the appeal. Further, no affidavits are attached to the instant petition that substantiate Petitioner's claim. Petitioner failed to obtain an affidavit from his attorney stating that he had agreed to file an appeal but failed to do so, or even [spoke] with petitioner regarding the appeal. Petitioner could have included affidavits from family members stating that,

> despite repeated requests or assurance, petitioner's counsel failed to file an appeal. Petitioner also could have included copies of his correspondence with counsel regarding the appeal."

The circuit court concluded that Mr. Williams had failed to show his trial counsel's representation fell below an objective standard of reasonableness and that, therefore, his claim of ineffective assistance was without merit. The court dismissed the petition as frivolous and patently without merit.

¶ 12 JURISDICTION

¶ 13 The circuit court denied Mr. Williams's *pro se* postconviction petition on September 23, 2014, and Mr. Williams timely filed his notice of appeal from that dismissal on October 14, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651 (eff. Dec. 1, 1984)).

¶ 14 ANALYSIS

¶ 15 On appeal, now represented by the office of the State Appellate Defender, Mr. Williams contends that his *pro se* postconviction petition should not have been summarily dismissed because he presented an arguable claim that his trial counsel was ineffective for failing to file a notice of appeal. He makes no argument on appeal with respect to the allegation in his petition that the court erred in not granting the motion to withdraw his guilty plea.

¶ 16 In noncapital cases, postconviction proceedings consist of three possible stages. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage of proceedings, which is the stage at issue here, a petition may only be dismissed if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit where it "has no arguable

basis either in law or in fact" and relies on "an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16-17. A meritless legal theory is a theory that is "completely contradicted by the record" and fanciful factual allegations include those allegations that are "fantastic or delusional." *Id.* "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 17 "Most postconviction petitions are drafted by *pro se* defendants, and accordingly, the threshold for a petition to survive the first stage of review is low." *People v. Allen*, 2015 IL 113135, ¶ 24. "If a petition alleges sufficient facts to state the gist of a constitutional claim, even where the petition lacks for legal argument or citations to authority, first-stage dismissal is inappropriate." *Id.* Setting forth the "gist" of a constitutional claim requires only "a limited amount of detail" and the petitioner "hence need not set forth the claim in its entirety." (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). However, the petitioner is not excused from "providing factual support for his claims; he must supply sufficient factual basis to show the allegations in the petition are capable of objective or independent corroboration." (Internal quotation marks omitted.) *Allen*, 2015 IL 113135, ¶ 24. The allegations in a postconviction petition must be taken as true and construed liberally. *Id.* ¶ 25. If a petitioner presents "legal points arguable on their merits" in his petition, his petition is not frivolous. (Internal quotation marks omitted.) *Id.*

¶ 18 When a postconviction petitioner alleges a claim of ineffective assistance of counsel, that petition may not be dismissed at the first stage of proceedings "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." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010).

¶ 19 Looking at the record as a whole, we find that, in his petition, Mr. Williams presented the gist of an ineffective assistance of counsel claim based on his counsel's failure to file a notice of

appeal. An arguable claim can be made from the record before us that counsel's performance, in failing to file a notice of appeal, fell below an objective standard of reasonableness and that Mr. Williams was prejudiced by this deficiency.

¶ 20 It is undisputed that " 'a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.' " *Edwards*, 197 Ill. 2d at 250 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000)). Here, however, it is not clear either in Mr. Williams's petition or in the record whether Mr. Williams instructed his trial counsel to file a notice of appeal. Mr. Williams argues that we can liberally construe the allegation that his counsel failed to file a notice of appeal to mean that his "counsel failed to fulfill [his] desire to appeal the denial of the motion to withdraw the plea." While that may be true, there is still a question as to whether Mr. Williams informed counsel of that desire. Because there is no evidence on the record before us supporting the contention that Mr. Williams actually notified counsel of his desire to appeal, we cannot presume that he did so. See *Allen*, 2015 IL 113135, ¶ 24 (a defendant is required to provide *some* factual support for his postconviction claims).

¶ 21 In summarily dismissing the petition, the trial court focused almost exclusively on the fact that the record contains no evidence demonstrating that trial counsel disregarded instructions from Mr. Williams to file a notice of appeal. However, even in the absence of such evidence, the United States Supreme Court has made clear that a criminal defendant may have a sixth amendment claim where trial counsel failed to consult with the defendant about taking an appeal. *Flores-Ortega*, 528 U.S. at 478. The Court in *Flores-Ortega* refused to adopt a *per se* rule that counsel must always consult with a defendant about an appeal, but held instead that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal" in two circumstances: (1) when there is reason to think "that a rational defendant would want to

appeal," or (2) when there is reason to think "that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. In either of these circumstances, counsel's failure to consult with the client brings counsel's performance "below an objective standard of reasonableness." *Petrenko*, 237 Ill. 2d at 497.

¶ 22 As to whether counsel's failure to consult with the defendant in either of these circumstances would result in prejudice to the defendant, the Court in *Flores-Ortega* noted that, in these instances, "counsel's alleged deficient performance arguably [leads] not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Flores-Ortega* at 483. Thus, the Court held that to show prejudice in these circumstances, a defendant need only "demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. As the Court recognized, this prejudice inquiry is similar but not identical to the inquiry used to determine whether counsel performed deficiently and may, in some instances, be satisfied by the same evidence. *Id.* at 486. It is not the defendant's burden to show, in a postconviction petition based on an attorney's failure to file a notice of appeal, that the appeal would have been successful. *Flores-Ortega,* 528 U.S. at 480, 486; *Edwards*, 197 Ill. 2d at 253.

¶ 23 It is at least arguable, based on the record in this case, that both of the circumstances that the Supreme Court found could give rise to a constitutional duty for trial counsel to consult with a criminal defense client were present. First, there is some evidence that a rational defendant in Mr. Williams's position would have wanted to appeal. In the motion to withdraw the guilty plea, Mr. Williams's counsel gave very specific reasons for asking the court to allow Mr. Williams to withdraw the plea, including that he was forced to make a decision without a reasonable amount of time to consider his options or an opportunity to consult with his family. The record also demonstrates that before Mr. Williams pled guilty he went to trial, and that trial resulted in a

hung jury. These facts suggest the possibility of nonfrivolous grounds for an appeal which suggests that a reasonable defendant in Mr. Williams's situation would want to appeal. *Flores-Ortega*, 528 U.S. at 480. While there is no absolute right to withdraw a guilty plea, factors mandating the right to withdraw a plea include those in which "there is doubt of the guilt of the accused, or where the accused has a defense worthy of consideration by a jury, or where the ends of justice will be better served by submitting the case to a jury." *People v. Mercado*, 356 Ill. App. 3d 487, 494 (2005). In examining the merits of a motion to withdraw a guilty plea, courts have also found significant how quickly a defendant moves to withdraw his plea. *Id.* at 498. We note that, while Mr. Williams alleged in his petition that he filed a motion to withdraw his guilty plea on the same day the plea was entered, the record contradicts this point, indicating that his motion to withdraw was actually filed 29 days after he pled guilty. Regardless, even if it was 29 days later, Mr. Williams timely moved to withdraw his plea shortly after he pled guilty.

¶ 24 As to the second circumstance—whether the record indicates that this defendant reasonably showed counsel that he was interested in appealing—we observe that Mr. Williams's conduct throughout this case suggested that he would want to appeal the denial of his motion to withdraw his guilty plea. He initially pled not guilty and went to trial, where he testified in his own defense. Then, after a hung jury in his first trial, and facing the prospect of going through a second trial and the possibility of receiving a very long sentence, Mr. Williams agreed to plead guilty and cooperate with the State in a codefendant's trial, in exchange for the State's agreement to recommend a sentence of twenty-five years. Mr. Williams then presumably quite soon thereafter directed his counsel to file a motion to withdraw that plea. A defendant's plea of guilty may indicate to his counsel that he did not want to appeal. *Flores-Ortega*, 528 U.S. at 480. Here, however, Mr. Williams did not appear to be seeking "an end to judicial proceedings" (*id.*) even after he agreed to plead guilty, since he quickly sought to withdraw that plea.

¶ 25 The Supreme Court in *Flores-Ortega* stated that, "[o]nly by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.* We find that, taken as a whole, the facts of this case support an arguable theory that a rational defendant in Mr. Williams's place would likely have wanted to file an appeal and even more strongly support a theory that Mr. Williams himself demonstrated to his counsel conduct consistent with an interest in an appeal. Accordingly, it is arguable that counsel's performance was deficient based on his failure to consult with Mr. Williams about filing a notice of appeal.

¶ 26 We acknowledge that the Supreme Court noted in *Flores-Ortega* that a "highly relevant factor" in determining whether counsel had a constitutional duty to consult with a defendant about an appeal is "whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." 528 U.S. at 480. Although Mr. Williams's conviction in this case came after a guilty plea, we also find significant, particularly at this first stage of postconviction proceedings, that he initially went through a trial that resulted in a deadlocked jury and also timely filed a motion to withdraw his guilty plea. Thus, as noted above, Mr. Williams's plea of guilty did not necessarily mean that he sought "an end to judicial proceedings." In addition, although the guilty plea would have limited the issues that Mr. Williams could have raised on appeal, he certainly could have raised the argument that the trial court should have allowed him to withdraw his plea. In these circumstances, we do not find that Mr. Williams's guilty plea undermines his contention that he presented the gist of a claim that his counsel had a constitutional duty to consult with him about an appeal.

¶ 27 As to the prejudice prong, we find that Mr. Williams showed that "there [wa]s a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. This is supported both by Mr. Williams's attempt to file a late notice of appeal approximately eight months after his motion to withdraw the guilty plea was denied and by his immediately filing this *pro se* postconviction petition when his motion to file a late notice of appeal was denied. Again, we highlight that we are considering Mr. Williams's petition in light of the standard at the first stage of postconviction proceedings, where he need only establish that he was arguably prejudiced.

¶ 28 The State relies on *People v. Torres*, 228 Ill. 2d 382, 384 (2008), where our supreme court affirmed a circuit court's dismissal of a defendant's postconviction petition at the first stage of proceedings. In *Torres,* the defendant filed a postconviction petition claiming ineffective assistance of counsel, in part based on his lawyer's failure to consult with him about an appeal. *Id.* at 390. However, the defendant in *Torres* did not enter a guilty plea following a trial but immediately sought to plead guilty to the charges against him. *Id.* at 385-86. Moreover, the defendant in *Torres* did not file a timely motion to withdraw the guilty plea, but rather filed a motion to withdraw the plea along with his postconviction petition. *Id.* at 391. Thus, the defendant's trial counsel presumably knew nothing of the motion to withdraw the guilty plea. Our supreme court noted:

> "[D]efendant's counsel knew that their client had pled guilty and had expressly indicated that he sought an end to the judicial proceedings. Counsel also knew that the evidence against their client was beyond overwhelming, leaving no serious grounds for a trial defense on the issue of guilt. *** Under these circumstances, there was simply no reason for defendant's lawyers to think that defendant was dissatisfied or would want to appeal. Accordingly, we conclude

> that this particular defendant did not 'reasonably demonstrate[ ] to counsel that he was interested in appealing' (*Flores–Ortega*, 528 U.S. at 480), and he is thus unable to satisfy the second part of the *Flores–Ortega* test." *Torres*, 228 Ill. 2d at 403.

In contrast here, Mr. Williams did not immediately seek to plead guilty, and his prompt motion to withdraw that plea indicated that he no longer sought an end to judicial proceedings. It is significant that here Mr. Williams filed his motion to withdraw the guilty plea through counsel, putting counsel on express notice that he wanted to continue to contest his conviction. Moreover, the evidence against Mr. Williams was not overwhelming, and Mr. Williams did not lack a defense to the charges against him, as evidenced by his initial deadlocked jury trial. Accordingly, we are not persuaded by *Torres*.

¶ 29 The State also argues that Mr. Williams did not present a sufficient argument that he received ineffective assistance of counsel because he has not shown that an appeal of the denial of his motion to withdraw his guilty plea would have been successful. As noted above, we believe that the record reflects nonfrivolous grounds for appealing the denial of Mr. Williams's motion to withdraw, which is a far lower burden than showing that the appeal would have been successful. Moreover, a defendant may succeed on a sixth amendment claim simply by showing that the record demonstrates that defense counsel had a basis for believing that the defendant would have appealed and that the defendant would have, in fact, appealed, had he been consulted, regardless of the merits of that appeal. *Flores-Ortega*, 528 U.S. at 480, 486. As the Illinois Supreme Court has observed, "*Flores-Ortega* thus establishes 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 in original.) *Edwards*, 197 Ill. 2d at 253.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we reverse the circuit court's summary dismissal of Mr. Williams's petition and remand for second stage proceedings.

¶ 32 Reversed and remanded.