2017 IL App (1st) 143770-U

FIRST DIVISION
May 1, 2017

No. 1-14-3770

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. MARCO URENA-CARDENAS, Petitioner-Appellant.	) Appeal from the Circuit Court of) Cook County, Criminal Division))) No. 95 CR 2646 (02))) Honorable Thaddeus L. Wilson,) Judge Presiding)

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed petitioner's postconviction petition. Petitioner cannot show that his trial counsel was ineffective for failing to file a notice of appeal when petitioner fled during trial and was subsequently tried and sentenced *in absentia*.

¶ 2 Petitioner Marco Urena-Cardenas was convicted *in absentia* of delivery of a controlled substance, unlawful use of a weapon by a felon, and armed violence, and was sentenced to 30 years in prison. Petitioner turned himself in to authorities approximately 12 years later, and, after further proceedings, was resentenced to a 20-year term of imprisonment. Following his

resentencing, petitioner filed a postconvictiom petition where he raised several claims of ineffective assistance of counsel. The trial court summarily dismissed the petition. On appeal, petitioner argues that the trial court erred in dismissing his postconviction petition when his trial counsel was ineffective for failing to file a notice of appeal following his conviction. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On December 20, 1994, petitioner delivered over 900 grams of cocaine to an undercover police officer while armed with a handgun. Petitioner was subsequently arrested and charged with delivery of a controlled substance, armed violence, and unlawful use of a weapon by a felon. He was released on bond pending trial.

¶ 5 Petitioner's trial commenced on January 24, 1996. Petitioner and co-defendant Santos Sanchez were tried in separate, simultaneous bench trials.

¶ 6 At trial, Bridgeview police officer Luis Dominguez and DEA agent James Walsh testified consistently that, on December 19, 1994, they along with other officers met with a confidential informant to plan a controlled buy of cocaine from petitioner to co-defendant Sanchez. Later that day, Officer Dominguez, while under cover, and a confidential informant met co-defendant Sanchez at a gas station. There, Sanchez agreed to sell two kilograms of cocaine for $21,000 each, with the delivery to be completed at a gas station the following day.

¶ 7 The next day, officer Dominguez and a second confidential informant contacted co-defendant Sanchez. They brought $44,000 in prerecorded bills to Sanchez at the gas station. Agent Walsh surveyed the area from a car parked in a nearby lot. Agent Walsh saw co-defendant Sanchez and officer Dominguez meet with DEA special agent Mitchum in Mitchum's parked car

in the lot. After inspecting the money in the parking lot, co-defendant Sanchez made a call from a nearby pay phone.

¶ 8 Petitioner arrived at the gas station in a blue Cadillac. Officer Dominguez and agent Walsh saw petitioner speaking with co-defendant Sanchez. Sanchez informed Officer Dominguez and the confidential informant that he would have to go to a house at 6634 South Richmond for the drugs.

¶ 9 Once they arrived there, petitioner and officer Dominguez proceeded inside the house, and officer Dominguez asked where the cocaine was. Petitioner pulled a kilogram-sized package from under his coat and placed it on the table. Officer Dominguez cut a small opening in the package of cocaine to verify its contents, and announced to those present he would leave the package of cocaine on the table while he retrieved the money. Dominguez left the house and gave an arrest signal. Several agents entered, arrested those present and seized the cocaine. Agent Walsh arrested petitioner in the house. When he asked petitioner if he had a weapon on him, petitioner said he did, and agent Walsh recovered a 9 mm handgun from petitioner's waistband. Petitioner was given his *Miranda* rights and made a statement in the presence of Agent Walsh and Officer Dominguez.

¶ 10 Following the officers' testimony, the parties agreed to continue the case until the next day for a hearing on the admissibility of petitioner's statement.

¶ 11 The next day, petitioner did not appear in court and the State moved to proceed *in absentia.* Petitioner's counsel reported that he tried to contact petitioner but received no response. Counsel objected to proceeding because he was not sure if petitioner had been given proper *in absentia* admonishments. After obtaining and reviewing the bond court transcripts, counsel

informed the court that petitioner was admonished regarding his rights of being tried *in absentia* and the trial resumed.

¶ 12 Agent Walsh was recalled and testified that petitioner gave a post-arrest statement at the house. Petitioner's statement indicated that he purchased the cocaine from someone named Kevin for $17,500 and planned to sell it to co-defendant Sanchez for $19,000. Kevin worked for someone named Gustavo whose organization brought approximately a thousand kilograms of cocaine into Chicago every two weeks. A few weeks earlier, petitioner assisted in unloading one thousand kilos from a truck in Chicago. Petitioner then stated that he bought the gun found on his person from "Shorty Gee," a Gangster Disciple.

¶ 13 Dr. Arthur Druski, a forensic chemist with the Chicago police crime lab, testified that the suspect brick of cocaine recovered by officer Dominguez weighed 992.0 grams and tested positive for the presence of cocaine.

¶ 14 The State admitted petitioner's certified copy of conviction for possession of a stolen motor vehicle. The State rested. The defense rested without presenting any evidence. The trial court found petitioner guilty of all counts. Subsequently, petitioner failed to appear in court when trial counsel filed a motion for a new trial which the trial court ultimately denied.

¶ 15 Over defense counsel's objection to sentencing petitioner without a pre-sentence investigation report, the trial court sentenced petitioner to 30 years in prison. The trial court noted that, because he was absent, petitioner could not be given his appeal rights. Defense counsel commented "[j]ust a matter of course, judge, I believe his appeal rights are given at the point that he is reached in custody." No direct appeal was filed.

¶ 16 After approximately 12 years, petitioner returned to the trial court's jurisdiction in 2008. On February 18, 2009, through newly retained counsel, petitioner filed a motion under section

115-4.1 of the Code of Criminal Procedure, 720 ILCS 5/115-4.1 (West 2012), seeking to vacate his conviction and sentence. Petitioner argued that the court should resentence him because his due process and fairness rights were violated when he was sentenced without a presentence investigation ("PSI"). Petitioner also contended that his convictions for unlawful delivery of a controlled substance and armed violence could not stand under the one-act one-crime rule, because the armed violence conviction was predicated on the unlawful delivery of a controlled substance conviction.

¶ 17 The trial court held that petitioner's rights were not violated and denied his motion for a new sentencing hearing but merged his conviction for the armed violence count into the delivery of a controlled substance count. The court found that there was not enough information to conclude whether the PSI had been ordered, and even if no PSI was ordered, petitioner cannot claim his fundamental fairness and due process rights were violated because he contributed to the lack of a PSI. The court vacated the sentence for the armed violence and imposed the same sentence for the remaining convictions.

¶ 18 On appeal, we affirmed the trial court's judgment. *People v. Urena-Cardenas*, No. 09-1886, at *6 (unpublished order under Illinois Supreme Court Rule 23). Petitioner sought review by the Illinois Supreme Court, and on March 30, 2011, the Supreme Court vacated petitioner's sentence and remanded the case to the trial court for a new sentencing. *People v. Urena-Cardenas*, No. 11-0834 (2011). Before petitioner's resentencing, he filed a postconviction petition on June 20, 2011, alleging that: (1) his right to due process was violated where he was sentenced without a PSI; and (2) that his due process rights were violated where the trial court lost his trial records, resulting in a one-year delay of his appeal, and that his conviction cannot stand without a trial record.

¶ 19 On September 9, 2011, the trial court reviewed the petition and indicated that it had an opportunity to review the transcripts of petitioner's sentencing hearing and noted that petitioner was sentenced without a PSI. The court docketed the petition to second stage proceedings, appointed counsel for petitioner, and ordered a PSI. Following a resentencing hearing, the court sentenced petitioner to 20 years in prison. The court denied petitioner's postconviction request for a new trial. Petitioner filed a motion to reduce his sentence which the trial court denied. Petitioner then filed a notice of appeal—his appeal was docketed, but petitioner later moved to dismiss his own appeal, and his motion was granted.

¶ 20 On March 4, 2014, petitioner filed a *pro se* postconviction petition where he alleged that: (1) the State violated the Confrontation Clause by failing to disclose the identity of two confidential informants, (2) trial counsel, among other reasons, was ineffective for failing to file a notice of appeal when he was convicted *in absentia*; (3) appellate counsel was ineffective for failing to retrieve his co-defendant's transcripts for purposes of appeal; and that (4) his resentencing counsel was ineffective. The trial court summarily dismissed the petition and found that all issues raised were "frivolous and patently without any merit." This appeal follows.

¶ 21 ANALYSIS

¶ 22 The Illinois Post–Conviction Hearing Act (Act) provides a process by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122–1 *et seq.* (West 2012). A postconviction action is a collateral attack on a prior conviction and sentence, "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). The Act "provides for postconviction proceedings that may consist of as many as three stages." *Id.* at 472. 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). This court reviews the trial court's summary dismissal of a defendant's postconviction petition *de novo. People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶ 23 On appeal, petitioner only argues that the trial court erred in dismissing his petition where his trial counsel was ineffective for failing to file a notice of appeal following his conviction *in absentia*. Petitioner contends that counsel's deficient performance in failing to file a notice of appeal deprived him of an appeal that he would have otherwise taken, and that, even if counsel was unable to reach petitioner, counsel still bore a duty to protect petitioner's ability to appeal.

¶ 24 In turn, the State argues that, while the trial court properly dismissed the petition, the court should have evaluated it as a successive postconviction petition. The State insists that petitioner had filed another initial petition, prior to his resentencing, and accordingly, the instant petition was a successive petition subject to the cause and prejudice test, 725 ILCS 5/122–1(a–5), (f) (West 2012). Since petitioner could have raised the ineffective assistance of counsel claim in his first postconviction petition, but failed to do so, petitioner cannot satisfy the "cause" prong. The State maintains that petitioner cannot satisfy the "prejudice" prong as petitioner never directly claimed in his petition that he would have pursued a direct appeal had he been given the opportunity, and never contacted his attorney after disappearing during his trial to indicate his willingness to pursue such an appeal.

¶ 25 We disagree with the State's contention that the instant petition was a successive petition. Section 122-1 of Act provides:

> "A proceeding under [the Act] may be commenced within a reasonable period of

> time after the person's conviction notwithstanding any other provisions of this Article. * * *
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> Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure."
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> 725 ILCS 5/122–1(a–5), (f) (West 2012).

¶ 26 Our supreme court explained, "as used in the [Act], the word 'conviction' is a term of art which means a final judgment that includes both a conviction *and* a sentence." (Emphasis in original.) *People v. Hager,* 202 Ill. 2d 143, 149 (2002). Illinois courts rely on federal "*habeas* case law in interpreting and applying the Act." *People v. Jenkins*, 2016 IL App (1st) 133286, ¶¶ 16-20 quoting *Hodges,* 234 Ill. 2d at 12. Federal *habeas* law similarly restricts the right of a defendant to file successive challenges to a conviction. *Magwood v. Patterson,* 561 U.S. 320, 330-31 (2010).

¶ 27 In *Magwood,* Magwood used an application for a writ of *habeas corpus* to challenge both a finding of guilt and the sentence imposed on him. *Magwood v. Patterson,* 561 U.S. at 331. The federal court granted the writ, and the proceedings led the state court to hold a new sentencing hearing. *Id.* at 329. Following the imposition of a new sentence, Magwood again applied for a writ of *habeas corpus,* and the district court again granted the writ. *Id.* The United States Court of Appeals for the Eleventh Circuit reversed the district court's judgment, holding that Magwood's petition did not meet the stringent criteria for a "second or successive" petition for a writ of *habeas corpus. Id.* The Supreme Court reversed the Eleventh Circuit's decision and

reinstated the district court's judgment. The *Magwood* court said:

> "According to Magwood, his 1986 resentencing led to a new judgment, and his first application challenging that new judgment cannot be 'second or successive' * * *. We agree.
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> We have described the phrase 'second or successive' as a 'term of art.' * * * [B]oth [the statute's] text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged.
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> * * * [T]he existence of a new judgment is dispositive." *Magwood,* 561 U.S. at 331–38.

¶ 28 The State argues that we should adopt the rule established in *Suggs v. United States*, 705 F.3d 279, 285 (7th Cir. 2013) which is contrary to *Magwood*. In *Suggs* the court held that where a prisoner who has been resentenced pursuant to a successful § 2255 petition and in a second petition challenges only his underlying, undisturbed conviction, the second petition is successive and subject to 28 U.S.C. § 2244's gate-keeping requirements. In reaching this conclusion, the court relied on pre-*Magwood* Seventh Circuit precedent, which stated that "any challenge to an error preceding the resentencing 'must be treated as a collateral attack on the original conviction and sentence, rather than as an initial challenge to the last sentence.' " *Id.* at 283 (quoting *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001)). The court found that its precedent answered the question and that "it would be premature to depart from our precedent where the Court has not asked us to." *Id.* at 284.

¶ 29 *Suggs* was not a unanimous decision. The dissent argued that *Magwood* "abrogated *Dahler'* s claims-based approach" and that "*Magwood*'s interpretation of § 2244(b) is clear enough to require a departure from circuit precedent." *Suggs*, 705 F.3d at 288 (Sykes, J., dissenting). The dissent would have joined the circuits that apply *Magwood* 's framework to second-in-time petitions that follow resentencing and challenge an underlying conviction. See e.g., *Johnson v. U.S.*, 623 F.3d 41, 45-46 (2d Circ. 2010); *In re Brown*, 594 Fed. Appx. 726, 729 (3d Cir. 2014); *In re Gray*, 850 F.3d 139, 143 (4th Cir. 2017); *King v. Morgan*, 807 F.3d 154, 159 (6th Cir. 2015); *Wentzell v. Neven*, 674 F.3d 1124, 1127-28 (9th Cir. 2012); *Insignares v. Security, Florida Department of Corrections*, 755 F.3d 1273, 1281 (11th Cir. 2014).

¶ 30 Similarly, we decline to follow *Suggs*. Instead we follow the directives imposed by *Magwood* requiring that a petition filed after a new sentencing not be treated as a successive petition. See *People v. Jenkins*, 2016 IL App (1st) 133286, ¶ 20; *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011). Petitioner filed a postconviction petition on June 30, 2011. The court resentenced petitioner on February 10, 2012, and the imposition of the new sentence constituted a separate "conviction" for purposes of the Act. Accordingly, petitioner's instant petition filed in 2014, was not successive and the trial court properly evaluated it as an initial petition.

¶ 31 Next, we need to determine whether counsel's failure to file a notice of appeal in the instant case constituted ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A

defendant, and not his attorney, has the ultimate right to decide whether to appeal in a criminal case. *People v. Ramey*, 152 Ill. 2d 41, 54 (1992).

¶ 32 Relying on *Roe v. Flores–Ortega*, 528 U.S. 470 (2000), and *People v. Usher*, 397 Ill. App. 3d 276, 280 (2009), defendant argues that the allegations of his petition, viewed against the backdrop of the trial record, state at least the gist of a claim of ineffective assistance of counsel because, but for counsel's failure to file a notice of appeal, he would have filed a direct appeal. We find that that both cases are distinguishable from the instant case.

¶ 33 In *Roe,* the United States Supreme Court held that pursuant to *Strickland v. Washington*, 466 U.S. 668, counsel has a constitutionally imposed duty to consult with the defendant about an appeal when the defendant has reasonably demonstrated a desire to appeal. In *Roe*, the Court addressed a defendant's federal *habeas* petition alleging that his trial counsel was ineffective because she failed to file a notice of appeal after counsel promised to do so. *Roe* held that to assert a successful claim of ineffective assistance of counsel under *Strickland* in this context, the defendant must establish (1) that counsel failed to properly consult with him, and (2) this deficient performance "deprive[d] defendant of an appeal that he otherwise would have taken[.]" *Roe*, 528 U.S. at 484. The Court held that trial counsel's performance would also be unreasonable if he does not follow a defendant's instructions to file a notice of appeal. *Id.* at 477.

¶ 34 In addition, the Court rejected a bright-line rule that counsel must always consult with a defendant regarding an appeal, noting that such a rule would be inconsistent with *Strickland* and common sense. *Roe*, 528 U.S. at 479-80. The Court observed that trial counsel had a duty to consult with defendant under certain circumstances, including when defendant reasonably demonstrated that he had a desire to appeal or if a rational defendant in his position would have wanted to appeal. *Id*. at 484.

¶ 35 Unlike *Roe*, here, petitioner fled during his trial, was tried *in absentia* and failed to allege any facts in the petition that would have indicated that he instructed counsel to file a notice of appeal, or that counsel ignored such a request, or whether counsel did or did not consult defendant about filing an appeal. Moreover, here, trial counsel did not have a duty to consult a client who admittedly disappeared during his trial and made himself unavailable to consult. As noted by the trial court, where petitioner fled from trial and "spent years evading capture," he failed to indicate to his trial counsel any interest in filing an appeal. Under these circumstances, there was simply no reason for petitioner's counsel to think that petitioner was dissatisfied with the trial or would want to appeal. Accordingly, petitioner's reliance on *Roe* is misplaced.

¶ 36 In *People v. Usher*, 397 Ill. App. 3d 276, 279 (2009), the appellate court reversed the trial court's summary dismissal of the defendant's post-conviction petition alleging that trial counsel was ineffective for failing to file a notice of appeal. In *Usher* the defendant was present for his trial, for his motion for a new trial and for his sentencing. *Id*. Following sentencing, the defendant filed another motion for a new trial and to reconsider the sentence. *Id*. at 277. Defendant also presented additional witness testimony in support of his motion for a new trial. *Id*. The court denied the motion for a new trial. *Id*.

¶ 37 Subsequently, without the defendant being present, trial counsel informed the court of his intention to withdraw the defendant's motion to reconsider the sentence and the trial court ordered counsel to first consult the defendant. *Id*. at 278. Trial counsel advised the court that he was unable to reach the defendant and he would go ahead with the motion. *Id*. The court then denied the motion. *Id*. Several years later, defendant wrote a letter to the court clerk inquiring about the status of his appeal. *Id*. The court notified defendant that a notice of appeal was not filed. Defendant filed a postconviction petition and alleged, among other things, that his counsel

was ineffective for failing to file a notice of appeal and the court dismissed it. *Id*. at 279. On appeal, the defendant argued that trial counsel was ineffective for failing to consult him regarding filing an appeal. *Id.*

¶ 38 The appellate court, following *Roe*, found that defendant demonstrated a desire to appeal and that a rational defendant would have wanted to appeal where defendant went to trial, presented witnesses in his defense, and presented witness testimony pursuant to his motion for a new trial. *Id.* at 283-84. The court noted that the record further supported the defendant's allegation that counsel never consulted him regarding the possibility of an appeal as there was a breakdown of communication between him and his trial counsel after his sentence. *Id.* at 284. The court noted that prejudice was established where the record indicated that defendant, as reflected by his actions, made repeated efforts to determine the status of his appeal, reasonably believed that an appeal has been perfected—circumstances that indicated that he would have timely appealed had he been consulted by counsel. *Id.*

¶ 39 Unlike *Usher*, petitioner here was tried *in absentia*, did not participate in presenting his defense, at sentencing or during the presentation of a motion for a new trial, and remained at large for more than a decade. Unlike *Usher*, petitioner's actions did not indicate that he was interested in appealing his conviction and, just as the trial court observed, he would "rather abscond from justice." We find that *Usher* is, therefore, distinguishable from the instant case.

¶ 40 Petitioner argues that counsel's performance was unreasonable because he did not file a notice of appeal based on a "mistaken belief" that he could not file a notice of appeal following petitioner's trial *in absentia*. After sentencing petitioner, the trial court noted that, because petitioner was absent, the court was unable to inform him of his rights to file an appeal. In response, trial counsel commented, "[j]ust a matter of course, Judge, I believe that his appeal

rights are given at the point that he is reached in custody." Contrary to petitioner's argument, counsel's comment does not demonstrate his belief that his client had no appeal rights or that he was precluded from filing a notice of appeal. Instead, the record reflects that counsel was merely commenting on the court's inability to admonish petitioner about his appeal rights.

¶ 41 Petitioner next argues that trial counsel should have filed a notice of appeal even if counsel did not consult with petitioner pursuant to *People v. Partee*, 125 Ill. 2d 24 (1988) and *People v. Stark*, 121 Ill. App. 3d 787 (1984). Both cases are distinguishable because they did not involve claims of ineffective assistance of counsel for failure to file a notice of appeal where a defendant was tried and sentenced *in absentia*.

¶ 42 In *Partee*, our supreme court held that the appellate court had jurisdiction over the defendant's appeal from the final and appealable order of defendant's conviction and sentence *in absentia* without first moving for a hearing to determine whether his absence from trial was willful. *Id.* at 28. The court also adhered to the "century old rule" that an appellate court has the discretionary power to refuse to hear a fugitive's appeal unless and until the fugitive returns. *Id.* at 37. The court did not address or stated that trial counsel had a duty to file an appeal under these circumstances or that counsel's performance in not filing a notice of appeal constituted deficient performance.

¶ 43 Similarly, in *People v. Stark*, 121 Ill. App. 3d 787, 789 (1984), the appellate court did not address an ineffective assistance of counsel claim. The defendant was sentenced *in absentia* and trial counsel filed a timely notice of appeal without consulting defendant. *Id*. The State filed a motion to dismiss the appeal, arguing that there was no affirmative showing of record that the defendant desired to appeal. *Id*. The appellate court held that it was not improper for trial counsel to file a notice of appeal prior to consulting with defendant and that an affirmative showing that

defendant desired an appeal was not a condition precedent to filing the notice. *Id*. The court in *Stark* recognized that whether to file a notice of appeal is a merely an exercise of professional judgment, but did not impose a duty to file a notice of appeal when a defendant did not consult with counsel. *Id*.

¶ 44 The instant case involves a situation different from *Starks* because counsel did not file an appeal after petitioner's trial and sentence *in absentia*. Here, petitioner fled from his trial and did not inform his defense counsel that he was interested in appealing his conviction. Through his own actions, petitioner foreclosed his trial counsel's opportunity to even discuss the possibility of an appeal and, just as noted by the trial court, petitioner "cannot now take advantage of his own wrongdoing" and claim that counsel's performance was deficient. Under these circumstances, we find that trial counsel's performance was not unreasonable.

¶ 45 Finally, petitioner failed to establish that he was prejudiced by counsel's failure to file a notice of appeal. A defendant is prejudiced where there is a reasonable probability that, but for counsel's failure, he would have timely appealed. *People v. Edwards*, 197 Ill. 2d 239, 252 (2001). Here, petitioner never stated in his petition that he would have pursued an appeal had he been given the opportunity. Even if a notice of appeal had been filed, the appellate court has discretionary jurisdiction to hear a fugitive's appeal unless and until the fugitive returns. *Partee*, 125 Ill. 2d at 37-38. Petitioner never indicated in his petition that he would have come out of hiding and returned to the jurisdiction of the court to pursue a direct appeal. Instead, he admittedly disappeared during his trial and was a fugitive from 1996 until he reappeared in court in 2008. Therefore, petitioner cannot show that he was prejudiced by counsel's alleged deficient performance. Based on the circumstances alleged in the petition, the trial court did not err in dismissing petitioner's claim of ineffective assistance of counsel.

¶ 46 CONCLUSION

¶ 47 Based on the foregoing, we affirm.

¶ 48 Affirmed.