2019 IL App (2d) 170269-U
No. 2-17-0269
Order filed October 9, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ESTEBAN ZARAGOZA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 09-CF-663 Honorable James C. Hallock, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's postconviction petition, which alleged that trial counsel was ineffective for not consulting with him about an appeal: a rational defendant in his position would have wanted to appeal, and there was a reasonable probability that, but for counsel's deficient failure to consult with him, he would have appealed.

¶ 2 Defendant, Esteban Zaragoza, appeals from the third-stage denial of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Defendant first contends that the trial court erred when it failed to recognize that trial counsel's admission at the evidentiary hearing that he did not consult defendant about the possibility of an appeal was

sufficient evidence to conclude that counsel rendered ineffective assistance. Defendant second contends that the trial court improperly excluded as hearsay his family members' testimony about discussions with trial counsel concerning an appeal. We agree with defendant on the first point; we therefore reverse the denial and remand the matter to permit the filing of a late notice of appeal. We do not address defendant's second point, as the first is dispositive.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on a count each of unlawful delivery (within 1000 feet of a school) of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2), 407(b)(1) (West 2008)), unlawful delivery of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2008)), and unlawful possession of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/402(c) (West 2008)). Retained counsel entered an appearance for defendant.

¶ 5 Defendant waived the right to a jury trial; the court found him guilty on all counts after a trial at which identity was at issue. Defendant moved for a new trial, asserting that the State had failed to provide sufficient evidence that defendant was the person who had sold the cocaine and that the sale took place within 1000 feet of a school. The court denied the motion.

¶ 6 On October 20, 2010, the court sentenced defendant to six years' imprisonment, fines, and fees on the first count. Defendant did not file a postsentencing motion or a notice of appeal.

¶ 7 On October 25, 2011, defendant filed a postconviction petition in which he alleged, among other things:

> "Counsel was ineffective for not challenging [certain] substantial issues on Zaragoza's direct appeal. In fact counsel failed to file Zaragoza's direct appeal, when his dad and himself was led to believe counsel was going to file a Notice of Appeal[.]"

Defendant signed a verification affidavit that stated that he "h[ad] read and understand [*sic*] the above Petition for Post-conviction Relief" and that everything in it was true and correct to the best of his recollection. Defendant also attached an evidentiary affidavit of his own, handwritten in Spanish, that said, among other things:

"Y despues que me declararón cumpable le dige a mi abogado de que apela ra el caso y despues supe que el no lo hizo y que mi papa esta furioso por que no puso la apelación."

Apparently because this affidavit was in Spanish, the trial court did not consider it. An affidavit of defendant's father also was attached, but it described only the financial arrangements for defendant's father to pay counsel.

¶ 8 On January 10, 2012, the court entered an order dismissing defendant's petition at the first stage. Concerning the claim at issue, the order stated:

> "Petitioner's claim that trial counsel failed to file an appeal is insufficient to demonstrate the gist of a claim of ineffective assistance of counsel. The Illinois Supreme Court has made clear that an attorney who 'disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable,' thereby giving rise to a post-conviction claim of ineffective assistance of counsel. *People v. Edwards*, 197 Ill. 2d 239, 250 *** (2001) ***. However, Petitioner does not allege that trial counsel ignored Petitioner's requests to file an appeal; rather, Petitioner contends that Petitioner and his father were 'led to believe counsel was going to file a Notice of Appeal,' which counsel did not do. Because Petitioner does not allege that counsel disregarded Petitioner's specific instructions to file an appeal, Petitioner fails to demonstrate the gist of a claim of ineffective assistance of counsel as established in *Edwards*."

¶ 9 Defendant filed a timely notice of appeal.

¶ 10 In that appeal, defendant asked us to consider a certified translation of the affidavit that was not part of the record on appeal. The relevant portion of that translation states, "And after I was declared guilty, I told my attorney to appeal my case and then I found out he did not do so, and my father was furious because he did not make an appeal." We declined to consider the translation, noting that, because that translation was not before the trial court, we could not consider it on appeal. On that point, we cited *Owen Wagener & Co. v. U.S. Bank*, 297 Ill. App. 3d 1045, 1049-50 (1998), which held that a reviewing court should not consider documents that were not before the trial court. We nevertheless concluded that the trial court erred in dismissing the petition at the first stage:

> "Given the gist[-of-a-constitutional-claim] standard of [*People v.*] *Hodges*, [234 Ill. 2d 1, 9 (2009)], even without defendant's evidence affidavit or its translation, defendant's allegation that counsel led him and his father to believe that counsel would file a notice of appeal, but did not, was sufficient to avoid first-stage dismissal." *People v. Zaragoza*, 2013 IL App (2d) 120127-U, ¶ 13.

We concluded that, although a fully stated claim for ineffective assistance of counsel requires an allegation that defendant told counsel to file an appeal, the absence of that explicit allegation did not prevent defendant from stating the *gist* of a claim, as the petition contained evidence from which a court could infer such an instruction.

¶ 11 On remand, the court appointed postconviction counsel for defendant. Defendant, however, retained new counsel, who filed an amended petition. The petition addressed both the claim that defendant or his family asked trial counsel to file a notice of appeal and the claim that trial counsel deficiently failed to consult with defendant concerning an appeal. It further claimed

other deficiencies in trial counsel's performance, such as a failure to file a motion to suppress evidence. It did not supply any evidence to support the claim that counsel had failed to consult defendant. It relied on, among other things, the translation of defendant's affidavit we had rejected. However, counsel puzzlingly failed to include the translated affidavit as an exhibit.

¶ 12 The State answered, asking the court to set a date for an evidentiary hearing. Postconviction counsel moved for leave to obtain an evidence deposition of defendant, arguing that, because defendant had been deported while his petition was pending, his out-of-court testimony was needed to go forward with the proceedings. The court denied the motion, ruling that Illinois Supreme Court Rule 414 (eff. Oct. 1, 1971) did not provide for a deposition of the kind sought.

¶ 13 An evidentiary hearing took place on April 6, 2017, with defendant's trial attorney, Liam Dixon, and two of defendant's family members testifying. Defendant was not present. Postconviction counsel asked the court to consider the footnote in our Rule 23 order in which a fragment of the translated affidavit appeared. The court stated only that it would "accept the Second District opinion [*sic*]."

¶ 14 Defendant's first witness was his 23-year-old daughter, Yvonne Zaragoza. Postconviction counsel asked her what happened on October 20, 2010, in that same courtroom, between defendant and Dixon. After an initial sustained hearsay objection, postconviction counsel asked Yvonne, "Do you ever remember your father asking his attorney to file an appeal on his behalf?" The State objected, Yvonne said that she did remember such a request, and the court sustained the objection on the basis that the answer was hearsay. Yvonne further testified that she "told [Dixon] that if we [*sic*] can file an appeal" and that Dixon said that he would "do that." The court allowed Yvonne's statement to Dixon, but excluded her testimony that he

would "do that" as hearsay. The court also excluded testimony that Yvonne knew that her family had paid Dixon $5000 for an appeal "[b]ecause my grandfather told me to tell [Dixon] that we wanted to file an appeal."

¶ 15 Defendant's father, also named Esteban Zaragoza, testified through a translator, explaining that he had been unable to speak to Dixon directly because of the language barrier, but had directed Dixon to take $5000 from the bond money for an appeal. Esteban said that he had signed a piece of paper to allow Dixon to have the money. Postconviction counsel made an offer of proof that defendant's two sons would testify as his daughter did concerning a conversation about an appeal.

¶ 16 Dixon testified for the State. He said that defendant never asked him to appeal. On cross-examination, he agreed that he had never discussed an appeal with defendant; the only mention of an appeal that he was aware of was the court's admonishment to defendant. He further agreed that the trial and its associated proceedings had been defendant's "first encounter with the law." On redirect, he said that he did not "recall" a conversation with defendant about an appeal. On recross, Dixon said that it was "possible" that defendant might have asked for an appeal.

¶ 17 Postconviction counsel argued in closing that this court "interpreted" the affidavit to say, "I asked my lawyer to file an appeal." The trial court declined to consider defendant's affidavit or its translation. Further, it disbelieved Yvonne and Esteban:

> "The Court concludes that the testimony from these family members is a plan to say anything to undo the conviction of the Petitioner for the delivery of a controlled substance and thus the unwrapping of his deportation by federal authorities.

> The Court finds that as to the claim of ineffective assistance of counsel for the failure to initiate an appeal, the Petitioner has failed to convince the Court that Attorney Dixon was ever retained for an appeal."

It also noted that defendant's bond money would not have paid for an appeal. It further ruled that it lacked jurisdiction to order that defendant be allowed to file a late notice of appeal. As soon as the court announced its decision, postconviction counsel asked the clerk to file a notice of appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues that, because "trial counsel admitted that he never consulted with [defendant] about an appeal, let alone filed a notice of appeal, *** [defendant] established a substantial deprivation of his constitutional right to effective assistance of counsel." In the alternative, he argues that he must receive a new evidentiary hearing "because the trial court erred by sustaining the State's hearsay objections, [given that] the Illinois Rules of Evidence do not apply in postconviction proceedings and the testimony was not offered to prove the truth of the matter asserted."

¶ 20 The State responds, "There is no indication anywhere in the record that defendant directed his trial counsel to file an appeal." Further, the record does not show that "defendant direct[ed] a family member to tell Mr. Dixon he wanted him to file an appeal on his behalf." Moreover, "the circuit court admonished defendant about his appellate rights, especially about his rights on appeal if he were found to be indigent." It further suggests that trial counsel did not have any reason to discuss an appeal with defendant:

> "Based on the trial court's ruling denying all of defendant's post-trial motion issues, all of which were based on reasonable doubt, Mr. Dixon would not have had a good faith

> reason for filing a notice of appeal. It is apparent from the record that defendant did not have funds to hire Mr. Dixon to represent him on appeal. Further, defendant had been admonished about the availability of [the Office of the State Appellate Defender (OSAD)] to represent him. Therefore, Mr. Dixon would have had no reason to believe defendant wanted him, a private attorney, to represent him on appeal."

It suggests that, because defendant failed to develop as postconviction claims any claims that counsel might have pursued on direct appeal, he cannot have provided sufficient evidence that counsel should have discussed an appeal with him. The State further argues that any error that the court might have committed in ruling that certain testimony was hearsay was not reversible error.

¶ 21 We hold that defendant showed by the preponderance of the evidence (1) that trial counsel did not consult with defendant concerning an appeal, (2) that counsel's representation was therefore deficient, and (3) that defendant suffered prejudice in that there was a reasonable probability that he would have asked for an appeal had counsel consulted with him.

¶ 22 At the third stage of a proceeding under the Act, the petitioner has the burden to show, by the preponderance of the evidence, a denial of a constitutional right. *E.g.*, *People v. Coleman*, 2013 IL 113307, ¶ 92.

> "Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *** When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

Here, the court's determination that trial counsel was credible (and that defendant's family was not) was a necessary part of the denial, so our review is for manifest error.

¶ 23 The United States Supreme Court, in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), held that, when a defendant claims that counsel's deficient conduct deprived him or her of an appeal to which he or she was entitled, the "now-familiar test" of *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), applies. *Flores-Ortega*, 528 U.S. at 476-77. That is, "[a] defendant claiming ineffective assistance of counsel must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant." (Internal quotation marks and citation omitted.) *Flores-Ortega*, 528 U.S. at 476-77.

¶ 24 If a defendant asks counsel to file an appeal and counsel fails to do so, that defendant is entitled to a "new" appeal without having to show that that appeal would have any merit; prejudice is presumed. *Flores-Ortega*, 528 U.S. at 477.

¶ 25 When the defendant has not given counsel specific instructions concerning an appeal, counsel *may* be constitutionally required to "consult" with the defendant, that is, to "advis[e him or her] 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. The *Flores-Ortega* Court refused to impose on attorneys a bright-line rule as to *Strickland*'s first prong; it declined to hold that representation is *per se* deficient if counsel fails to consult the defendant about his or her interest in an appeal after any conviction. It "instead h[e]ld that counsel 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. "In making this determination, courts must take into account all the information counsel knew or should have known." *Flores-Ortega*, 528 U.S. at 480. Although the *Flores-Ortega* Court did not *mandate* such consultation, it noted that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal." *Flores-Ortega*, 528 U.S. at 479. Moreover, a defendant's decision to have a trial weighs significantly in favor of consultation: "[A] highly relevant factor in this inquiry will be 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." *Flores-Ortega*, 528 U.S. at 480.

¶ 26 To satisfy *Strickland*'s second prong, a defendant must show that he or she was prejudiced by counsel's deficient failure to consult concerning an appeal: "[the] defendant must 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." *Flores-Ortega*, 528 U.S. at 484. However, the *Flores-Ortega* Court "rejected any requirement that [a] would-be appellant 'specify the points he would raise were his right to appeal reinstated.' " *Flores-Ortega*, 528 U.S. at 485 (quoting *Rodriquez v. United States*, 395 U.S. 327, 330 (1969)). Instead, the Court recognized that the loss of an entire judicial proceeding is "even more serious" than the total deprivation of counsel at a critical stage discussed in *United States v. Cronic*, 466 U.S. 648 (1984). *Flores-Ortega*, 528 U.S. at 483. Thus, just as the *Cronic* Court held that prejudice must be presumed when a defendant is totally deprived of counsel at a critical stage, the *Flores-Ortega* Court held that, because no presumption of reliability can be accorded to judicial proceedings that never took place, the loss of an appeal due to counsel's deficiency must be presumed to be

prejudicial. *Flores-Ortega*, 528 U.S. at 483. Therefore, " '[t]hose whose right to an appeal has been frustrated should be treated exactly like any other appellan[t].' " *Flores-Ortega*, 528 U.S. at 485 (quoting *Rodriquez*, 395 U.S. at 330).

¶ 27 Here, the trial court rejected Yvonne and Esteban's testimony that they had conveyed to Dixon defendant's desire for an appeal. It therefore rejected defendant's claim that Dixon had failed to file a requested appeal. That ruling must stand. The trial court, because it was present for the witnesses' testimony and could observe the witnesses' demeanor, had the superior ability to weigh the witnesses' credibility; its judgment of the witnesses' credibility is thus entitled to deference on review. *E.g.*, *People v. Radojcic*, 2013 IL 114197, ¶ 34. The court concluded that Yvonne and Esteban were prepared to "say anything to undo the conviction of the Petitioner." (The evidence that the court excluded as hearsay would not plausibly alter this kind of credibility determination.) We have no basis to reject the court's rejection of Yvonne and Esteban's testimony on this point.

¶ 28 The court did not address the implications of Dixon's admission he did not consult with defendant concerning an appeal, a claim that defendant raised in his petition and that the court did not dismiss at the second stage. But Dixon's testimony was uncontradicted by other testimony or by the record. Moreover, although the court did not comment on Dixon's credibility, it accepted as credible his testimony that defendant had not requested an appeal. We thus conclude that no consultation occurred.

¶ 29 We thus next must address whether defendant showed either (1) that a rational defendant in his position would want to appeal or (2) that he demonstrated to counsel that he was interested in appealing. See *Flores-Ortega*, 528 U.S. at 480. We note that, because the court rejected his family members' testimony, and because a translation of his Spanish affidavit was never before

the trial court, defendant did not demonstrate that he told Dixon that he wanted to appeal. However, we deem that he succeeded in demonstrating that a rational defendant would have wanted to appeal. We start from the *Flores-Ortega* Court's position that routine consultation concerning appeal is "the better practice" (*Flores-Ortega*, 528 U.S. at 479) and that a defendant's decision to go to trial is a "highly relevant" factor weighing in favor of the need for such consultation (*Flores-Ortega*, 528 U.S. at 480). Moreover, the immigration consequences gave an importance to his conviction that it would not have for another defendant. For these reasons, we conclude that the failure to consult with defendant was deficient.

¶ 30 The State suggests two reasons that counsel did not need to consult with defendant: (1) no meritorious basis for appeal existed; and (2) the court's admonishment of defendant about his appeal rights was so clear that no further consultation was necessary. We reject both.

¶ 31 First, the appeal was not so clearly without potential merit that a rational defendant would not have wanted to appeal. Dixon testified that he deemed the reasonable-doubt issue that he raised in the posttrial motion to be meritorious. Moreover, contrary to what the State suggests, the trial court's denial of the posttrial motion is irrelevant to the merits of that issue on appeal. Appellate courts review *all* sufficiency-of-the-evidence claims under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (as adopted by *People v. Collins*, 106 Ill. 2d 237, 261 (1985)) regardless of whether they were raised in posttrial motions. Further, if trial counsel is reasonable, he or she will take into account that a different attorney may spot issues that he or she missed. Such a lawyer will recognize that defendants sometimes succeed on appeal with claims of plain error or other claims that are raised for the first time on appeal. Thus, unless counsel is completely certain that an appeal would be futile or unwanted, the prudent step is to undertake the "purely ministerial task" of filing a notice of appeal—a task that "imposes no great

burden on counsel." *Flores-Ortega*, 528 U.S. at 474. Here, Dixon could not have been so certain, given that he stood by the merits of his posttrial motion.

¶ 32 Second, the court's admonishment of defendant concerning appeal was not so clear that it could replace an appropriate consultation with counsel. To be sure, the *Flores-Ortega* Court suggested that admonishments *might* be so informative as to make consultation superfluous:

> "We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. *** [F]or example, suppose a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information." (Emphasis in original.) *Flores-Ortega*, 528 U.S. at 479-80.

The *Flores-Ortega* Court's example does not suggest that merely adequate admonishments *typically* substitute for the "better practice" of consultation, but indicates only that a court can give such clear and informative admonitions. Here, the admonitions were not so clear and informative as to serve as a substitute for consultation. The court told defendant, "Before you could file an appeal, you need to file a motion to reconsider sentence." Further, "I don't quite honestly know what I could reconsider since you're getting the minimum, but that's procedurally what would have to be filed." It then explained that, if defendant could not afford private counsel on appeal, the court could appoint the OSAD to represent him at no expense to him. This admonishment was potentially confusing in that it suggested that defendant's ability to appeal was dependent on filing a meritless postsentencing motion; the court did not discuss other kinds of errors that an appeal might raise. Furthermore, defendant's limited familiarity with criminal proceedings—he had only a prior conditional discharge—and his reliance on an

interpreter meant that defendant was particularly likely to need assistance understanding the admonishments. The admonishments were thus not a substitute for the consultation.

¶ 33 In the last step in our analysis, we conclude that defendant "demonstrate[d] 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." *Flores-Ortega*, 528 U.S. at 484. Initially, we reject the State's suggestion that defendant's inability to pay was relevant. A reasonable consultation would have addressed whether funds were available for private counsel and, if not, would have reminded defendant that the court could appoint OSAD if defendant's funds were exhausted. If anything, defendant's eligibility for appointed appellate counsel would *increase* the likelihood that he would appeal, as the appeal would then not financially burden him or his family. Furthermore, defendant's immigration status gave him every reason to appeal even if he had very limited hope of gaining a reversal. The trial court concluded that the immigration consequences of defendant's conviction were motivation enough for defendant's father and daughter to perjure themselves: "[T]he testimony from these family members is a plan to say anything to undo the conviction of the Petitioner for the delivery of a controlled substance and thus the unwrapping of his deportation by federal authorities." If defendant were aware of what was going to happen, he presumably would have been willing to take the much smaller step of asking for an appeal. *Cf. Lee v. United States*, 582 U.S. __, __, 137 S. Ct. 1958, 1967-68 (2017) (a defendant may rationally decide to go to trial without a defense to gain a small chance of avoiding deportation). Although defendant might not have recognized his risk of deportation, counsel must have. If counsel had conveyed that risk to defendant, defendant most likely would have asked for an appeal.

¶ 34 The State argues that defendant overstates the importance that fear of deportation would have played in his decision to seek an appeal if Dixon had consulted with him. It argues that, although defendant points to evidence that he arrived in the United States as a 1-year-old, the document that he cites actually refers to his father, and that defendant had arrived from Mexico when he was 18. Assuming that the State is correct, defendant might be somewhat more willing to return to Mexico than if he came to the United States as an infant. However, even so, defendant, who was born in 1970, would have been in the United States for approximately 30 years when he was charged. Moreover, his father and daughter lived in the United States. A desire to avoid deportation would have thus remained a strong motivation for appeal. We thus hold that defendant met the second prong of the *Strickland* test, showing "a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we reverse the denial of defendant's petition and remand the cause solely to allow the clerk to file a late notice of appeal, as is permitted by *People v. Ross*, 229 Ill. 2d 255 (2008). "[W]hen a postconviction petitioner demonstrates that defense counsel was ineffective for failing to file a notice of appeal, the trial court may allow the petitioner leave to file a late notice of appeal." *Ross*, 229 Ill. 2d at 271. As the trial court appointed OSAD to represent defendant in this current appeal, we extend that appointment to allow OSAD to represent defendant in his direct appeal.

¶ 37 Reversed and remanded with directions.