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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
Plaintiff-Appellee, )	of Du Page County.
v. )	
JOSE R. BELMONTE, )	No. 05—CF—1320
Defendant-Appellant. )	Honorable
	Mark W. Dwyer,
	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Burke and Schostok concurred in the judgment.

**ORDER**

*Held:* Trial court did not err in denying defendant's postconviction petition where trial court found defense counsel's testimony that defendant did not wish to file a direct appeal credible.

Defendant, Jose R. Belmonte, appeals from an order of the circuit court of Du Page County denying his petition for postconviction relief following an evidentiary hearing. We affirm.

On April 24, 2007, defendant was convicted following a jury trial of the offenses of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(i) (West 2004)) and predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2004)). On June 20, 2007, he was

sentenced to three years' incarceration in the Illinois Department of Corrections on the offense of aggravated criminal sexual abuse and six years' incarceration on the charge of predatory criminal sexual assault of a child, to be served consecutively. Defendant did not file a direct appeal. On July 2, 2008, this court denied defendant's motion for leave to file a late notice of appeal without prejudice to his filing a post-conviction petition.

On August 27, 2008, defendant filed a postconviction petition in which he alleged the ineffective assistance of his trial counsel for failure to file a notice of appeal. The court appointed counsel, and after denying the State's motion to dismiss, set the postconviction petition for a hearing.

At the hearing, defendant testified that he was represented at trial by assistant public defender Ricky Holman. Following sentencing, defendant "told [Holman] I wanted to appeal my case because I was unhappy with the sentence." According to defendant, Holman said defendant was lucky because the judge gave him the minimum sentence, and if the judge got upset by an appeal being filed, the judge could give him more time. Defendant testified that he told Holman "either way I want to appeal because I am not—I am not happy." With that, Holman told defendant he was "done with my case. He had nothing to do with the case." Defendant testified that he tried further communication with Holman from the Department of Corrections but was unable to reach him. Defendant testified that he called Holman from the Du Page County jail when he was there for a few weeks, but Holman "never answered me." Defendant presented no other evidence and rested.

The State called Ricky Holman as its only witness. Holman testified that he had been an assistant public defender for approximately eight years. He recalled defendant and defendant's case. Holman testified that he reviewed the presentence investigation report with defendant prior to sentencing and told him at that time that if he did not appeal, any trial issues would not be reviewed.

According to Holman, he gave defendant his “appeal rights” after the judge pronounced sentence. (The transcript of the sentencing hearing shows that the trial court also fully admonished defendant of his right to appeal both his convictions and sentence). Holman testified that he and defendant then walked into an area of the courtroom where prisoners are held before being transported to the county jail where Holman asked defendant if he wanted to appeal. According to Holman, “[defendant’s] reply to me was no, I can do the time.” Holman stated: “I remember that specifically [,] distinctly. I rarely get any type of a statement like that.” Holman testified that defendant never requested that he file a notice of appeal. Holman’s practice is to ask everybody, “including the defendant,” whether they want him to file an appeal. Holman routinely filed posttrial motions on behalf of clients, “[b]ut the appeal, I won’t do it unless my client asks me to.” On cross-examination, Holman did not recall whether an interpreter was present when he discussed the appeal with defendant in the holding area after sentencing. Holman stated that the “full sum and substance” of that conversation with defendant was one question: “Do you wish to appeal the case?”

The trial court stated that it “accepted Mr. Holman’s description of the events following the sentencing hearing where he asked and the defendant indicated that he did not wish [a] notice of appeal to be filed.” The trial court ruled that there was no evidence of ineffective assistance of counsel and denied the postconviction petition. Defendant filed a timely appeal.

Defendant contends that Holman’s memory of the event was “uncertain, inconsistent and unreliable,” and that any discussion Holman had without an interpreter present would have been “unreliable.” Defendant requests that we vacate the trial court’s order denying the postconviction petition and give him leave to file a late notice of appeal.

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)) provides a procedural method by which a person under a criminal sentence can challenge his conviction as being the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). In noncapital cases, the Act contemplates three distinct stages. *People v. Barkes*, 399 Ill. App. 3d 980, 985 (2010). At the first stage, the trial court must examine the petition independently and dismiss if it is frivolous or patently without merit. *Barkes*, 399 Ill. App. 3d at 985; 725 ILCS 5/122—2.1(a)(2) (West 2008). If the petition is not summarily dismissed, it proceeds to the second stage where the court appoints counsel to an indigent defendant who may amend the petition, after which the State moves to dismiss or answers the petition. *Barkes*, 399 Ill. App. 3d at 985-86; 725 ILCS 5/122—4, 122—5 (West 2008). At the second stage, if the court determines that the petition makes a substantial showing of a constitutional violation, the petition proceeds to the third stage for an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001); 725 ILCS 5/122—6 (West 2008). Following a third-stage evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be disturbed unless it is manifestly erroneous. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008). In *People v. Ross*, 229 Ill. 2d 255, 271 (2008), our supreme court held that when 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.

Ineffective assistance of counsel claims are evaluated under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). Under *Strickland*, the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice. *People v. Johnson*, 218 Ill.

2d 125, 143-44 (2005). The filing of a notice of appeal is a ministerial task, and defense counsel's performance in failing to file a notice is substandard. *Ross*, 229 Ill. 2d at 262. Regarding prejudice, prejudice may be presumed when defense counsel's ineffectiveness rendered appellate proceedings nonexistent, denying the defendant's right to appeal. *Ross*, 229 Ill. 2d at 262.

Here, the trial court afforded defendant a third-stage evidentiary hearing on his claim that Holman was ineffective for failing to file a notice of appeal. Defendant complains that Holman's testimony was self-contradictory because Holman testified that he gave defendant his "appeal rights," then testified that he asked him only whether he wished to appeal. However, Holman was clear that those were two different conversations. Holman explained defendant's appeal rights after defendant was sentenced but before they walked into the holding area where Holman asked whether defendant wanted to appeal. Holman testified:

"After the Judge had pronounced sentence and I gave [defendant] his appeal rights, we walked back to the area of the courtroom—it's a little hallway where the prisoners are kept before they go into the jail. And when I walked back to [defendant], I asked him—I said do you want me to appeal this case? And his reply was no, I can do the time."

Defendant further claims that Holman's testimony was hesitant and indecisive because Holman did not recall whether a translator was present for the conversation in the holding area. This is of little consequence, given that Holman testified that he "specifically" and "distinctly" recalled that defendant told him he did not want to appeal, something Holman rarely heard. Nor is defendant's argument persuasive that he did not understand Holman because a translator may not have been present at the holding-area conversation with Holman. Defendant did not allege in his postconviction

petition that Holman misunderstood his wishes because of a language barrier. Moreover, at the postconviction hearing, defendant testified fluently in English without an interpreter.

Defendant's final point is that he would have no reason not to have wanted to appeal. The State suggests that defendant decided to forego an appeal because of an Immigration hold on him. After sentencing defendant, the trial court inquired whether he wanted appellate counsel appointed. Defendant replied, "No, because I'm just going to do five other months and I have the immigration hold, so I wouldn't think it would make any sense." Defendant claims now that this statement was made because he misunderstood the amount of credit on his sentence he would receive. However, his statement after sentencing that he did not wish to have appellate counsel appointed, for whatever reason, supports Holman's testimony that defendant shortly thereafter told Holman not to file a notice of appeal. In contrast, defendant's testimony that Holman told him the trial court would get upset by an appeal and enhance defendant's sentence was incredible.

Two witnesses testified at the postconviction hearing—defendant and Holman. The issue was which one was more credible, and the trial court found that Holman was credible. It is well settled that it is the function of the trier of fact to assess the credibility of witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Consequently, the trial court's determination was not manifestly erroneous. Accordingly, we affirm the judgment.

Affirmed.