

2011 IL App (2d) 100512-U
Nos. 2—10—0512 & 2—10—1110 cons.
Order filed September 16, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—521
)	
JAIME GRANADOS-MARIN,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Bowman concurred in the judgment.

ORDER

Held: The trial court erred in summarily dismissing defendant’s postconviction petition alleging that trial counsel was ineffective for failing to perfect an appeal: defendant’s allegations that counsel told him that she would perfect an appeal, but did not, were sufficient to arguably establish that defendant communicated his desire for an appeal (such that counsel’s failure was deficient) and that, but for counsel’s failure, defendant would have timely appealed.

¶ 1 In this consolidated appeal, defendant, Jaime Granados-Marin, appeals from the dismissal of his *pro se* motion to withdraw his guilty plea (appeal No. 2—10—0512) and from the summary dismissal of his *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1

et seq. (West 2010)) (appeal No. 2—10—1110). As to appeal No. 2—10—0512, defendant concedes that his *pro se* motion to withdraw his guilty plea was properly dismissed as untimely. As to appeal No. 2—10—1110, defendant argues that his *pro se* postconviction petition was improperly dismissed, because he made a claim that his counsel was arguably ineffective for failing to perfect an appeal despite telling him that she would do so. For the reasons that follow, we affirm the denial of his *pro se* motion to withdraw his guilty plea, and we reverse the summary dismissal of his *pro se* postconviction petition.

¶ 2

I. BACKGROUND

¶ 3 On September 18, 2007, defendant entered a negotiated guilty plea to one count of predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2006)), in exchange for the dismissal of one count of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(i) (West 2006)) and a 12-year prison sentence. The factual basis for the plea established that, on January 26, 2007, defendant digitally penetrated the vagina of his 10-year-old niece. Defendant’s niece would testify that defendant committed the act, and an investigator with the Du Page County Children’s Center would testify that defendant admitted to her that he committed the act. After accepting the plea and imposing sentence, the trial court admonished defendant as follows:

“Sir, you have the right to appeal what happened here today to a higher court. You must first file a motion to withdraw your plea of guilty in this court. That motion must be filed within thirty days in writing and set forth the reasons you feel you are entitled to do that. If you don’t put down a reason, you give it up. If you don’t do anything within thirty days, you give up your right to appeal.

If you cannot afford an attorney or a transcript of what happened here, I'd provide that for you free of charge. And if you did withdraw your plea, we'd set the case down for trial, including the count the State dismissed.”

¶ 4 On December 12, 2007, defendant filed a *pro se* letter, seeking a reduction of his sentence. On December 17, 2007, the trial court dismissed the “motion” as untimely. The court also noted that the motion was improper given that the sentence had been agreed upon.

¶ 5 On April 19, 2010, defendant filed a *pro se* motion to withdraw his guilty plea. On April 30, 2010, the trial court denied it as untimely. Defendant timely appealed. (As noted above, defendant now concedes the dismissal was proper, and thus we affirm it.)

¶ 6 On September 15, 2010, defendant filed a *pro se* postconviction petition. In his petition, defendant argued the following:

“I was denied effective assistance of counsel because: (1) my attorney told me I had to plead guilty (2) my attorney did not investigate when I informed her I was forced/coerced/intimidated into signing 2 blank papers and answering questions on a video (3) my attorney told me I had to plead guilty because we could not prove I was innocent and she told me she would file the proper appeal papers if I plead guilty [and] (4) the translator did not tell me what the judge said at the 9/18/07 hearing. For example the translator did not tell me I had 30 days to withdraw my plea.”

In an affidavit attached to his petition, defendant averred that counsel told him “that she would try to figure out what was going on with [his] case and make an appeal in it, but she did not do anything.”

¶ 7 On October 12, 2010, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. In the addressing the voluntariness of defendant's plea, the court found that defendant was fully admonished of his rights before pleading guilty. The court did not address defendant's loss of the right to appeal. Defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that he made a claim in his *pro se* postconviction petition that his counsel was arguably ineffective for failing to perfect an appeal despite telling defendant that she would do so. In response, the State maintains that the court properly dismissed defendant's petition. According to the State, defendant's petition "is a comment on the voluntariness of his plea and really has nothing whatsoever to do with a desire to appeal." Nevertheless, as to the argument raised by defendant, the State maintains that the petition was properly dismissed, because defendant did not allege that he had asked his attorney to file an appeal.

¶ 10 The Act provides a remedy to defendants who have suffered substantial violations of their constitutional rights. See 725 ILCS 5/122—1 (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). When the death penalty is not involved, there are three stages to proceedings under the Act. *Edwards*, 197 Ill. 2d at 244. "Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). "[A] postconviction petition must, among other things, 'clearly set forth the respects in which petitioner's constitutional rights were violated.'" *Hodges*, 234 Ill. 2d at 9 (quoting 725 ILCS 5/122—2 (West 2006)). At the first stage, the petition's allegations, liberally construed and taken as true, need to present only the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. The petition needs to set forth just a limited amount of detail and does not need to set forth the claim

in its entirety. *Edwards*, 197 Ill. 2d at 244 . The trial court independently reviews the petition within 90 days of its filing and determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244. If the petition is not dismissed at this stage, it advances to the second stage for the appointment of counsel. *People v. Mauro*, 362 Ill. App. 3d 440, 441 (2005). At the second stage, counsel may amend the petition and the State may file a motion to dismiss or an answer. *Mauro*, 362 Ill. App. 3d at 441. If the trial court does not dismiss or deny the petition at the second stage, the proceeding advances to the final stage, where the trial court conducts an evidentiary hearing. *Mauro*, 362 Ill. App. 3d at 441-42.

¶ 11 Because this petition was dismissed at the first stage of the postconviction process, we must determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2010). A petition is frivolous or patently without merit if it “has no arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 16. A petition has no basis in law when it is based on an “indisputably meritless legal theory.” *Hodges*, 234 Ill. 2d at 16. “An example of an indisputably meritless legal theory is one which is completely contradicted by the record.” *Hodges*, 234 Ill. 2d at 16. A petition has no basis in fact if it is based on a “fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. “Fanciful factual allegations include those which are fantastic or delusional.” *Hodges*, 234 Ill. 2d at 17. We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 12 When a defendant claims that his counsel was ineffective for failing to perfect an appeal, the defendant must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *Edwards*, 197 Ill. 2d at 250-51. Pursuant to the test, to establish that counsel provided deficient performance, a defendant must show either that he told his attorney to file an appeal on his behalf or that counsel breached a duty to consult with the defendant about whether the defendant

wished to appeal. *Edwards*, 197 Ill. 2d at 250-51. Under the prejudice prong of *Strickland*, a defendant need not allege that his appeal would have been successful. *Edwards*, 197 Ill. 2d at 253. Rather, when a defendant is deprived of the appellate proceeding altogether, prejudice is presumed, though the defendant must show that but for counsel's error he would have timely appealed. *Edwards*, 197 Ill. 2d at 252. At the first stage of a postconviction proceeding, the trial court may not dismiss a petition alleging ineffective assistance of counsel if it arguably satisfies the *Strickland* test. *Hodges*, 234 Ill. 2d at 17.

¶ 13 The State maintains that the petition was properly dismissed because defendant did not allege in his petition that he wanted to appeal and that his counsel refused to assist him. Taking the allegations of defendant's petition as true, which we must at the first stage of postconviction proceedings (*Edwards*, 197 Ill. 2d at 244), defendant's counsel told defendant that "she would file the proper appeal papers if [he] plead guilty." Defendant also alleged in his affidavit that his attorney told him "that she would try to figure out what was going on with [his] case and make an appeal in it, but she did not do anything." From these allegations, it is at least a "fair inference" (*People v. Lovitz*, 101 Ill. App. 3d 704, 708 (1981)) that, when counsel told defendant that she would perfect an appeal, defendant responded not with silence or an objection but by "communicat[ing] his desire for a direct appeal" (*People v. Ross*, 229 Ill. 2d 255, 262 (2008)). Further, defendant strongly implied that he would have timely appealed had counsel filed the proper papers. Therefore, we find that defendant's petition, liberally construed, set forth minimally sufficient facts to arguably establish that his counsel was ineffective for failing to perfect an appeal.

¶ 14 Because defendant's petition, taken in its entirety, states the gist of an ineffective-assistance claim, his entire petition must advance to the second stage. See *People v. Rivera*, 198 Ill. 2d 364,

373-74 (2001). Thus, we do not address the other allegations set forth in his petition. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1024 (2003) (having found one allegation meritorious, “the *Rivera* case precludes us” from addressing the remaining allegations). Accordingly, we remand this cause to the trial court for further proceedings under the Act. *People v. Rivera*, 342 Ill. App. 3d 547, 551 (2003).

¶ 15

III. CONCLUSION

¶ 16 For the reasons stated, we affirm the trial court’s denial of defendant’s *pro se* motion to withdraw his guilty plea, and we reverse the trial court’s summary dismissal of defendant’s *pro se* postconviction petition and remand for further proceedings under the Act.

¶ 17 No. 2—10—0512, Affirmed.

¶ 18 No. 2—10—1110, Reversed and remanded.