

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).

NO. 4-10-0363

Order Filed 5/20/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
BOBBY BRADFORD,)	No. 07CF387
Defendant-Appellant.)	
)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concur
in the judgment.

ORDER

Held: Where defendant's postconviction petition set forth an ineffective-assistance-of-counsel claim based on trial counsel's failure to file a postplea motion that had both an arguable legal and factual basis, the dismissal of the petition at the first stage of the postconviction proceedings was improper.

In October 2009, defendant, Bobby Bradford, filed his *pro se* postconviction petition, arguing he was denied effective assistance of trial counsel. In January 2010, the Macon County circuit court dismissed defendant's petition, finding the issues raised by defendant were frivolous and patently without merit. Defendant appeals the dismissal, asserting he was denied effective assistance of trial counsel because counsel (1) refused to file a postplea motion and perfect defendant's appeal and (2) misinformed defendant of the sentence he would receive if he pleaded guilty. We reverse and remand.

I. BACKGROUND

In March 2007, the State charged defendant with one count of attempt (residential burglary) (720 ILCS 5/8-4(a), 19-3(a) (West 2006)) and one count of possession of burglary tools (720 ILCS 5/19-2(a) (West 2006)). The next month, the State added additional charges of armed violence (720 ILCS 5/33A-2(a) (West 2006)) and residential burglary (720 ILCS 5/19-3(a) (West 2006)). In January 2008, defendant pleaded guilty to residential burglary under an agreement with the State that provided for the dismissal of the other three charges. The guilty plea was open as to sentencing.

At the February 15, 2008, sentencing hearing, the trial court sentenced defendant to 15 years' imprisonment. The court admonished defendant of his appeal rights in compliance with Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001). Defendant did not file a postplea motion or a direct appeal.

The common-law record contains a letter from defendant that was filed on April 2, 2008, asking the circuit clerk to verify his attorney had filed a postplea motion and requesting new counsel. In the letter, defendant states the following: "I was sentenced on 2/15/08. On that date I asked my attorney, Karen Root, to file motions to withdraw my plea and seek a sentence reduction as necessary to appeal my case." The common-law record also contains an October 2, 2009, letter from defendant to the office of the State Appellate Defender regarding the status of his appeal from his guilty plea.

On October 27, 2009, defendant filed his *pro se* postconviction petition, asserting ineffective assistance of trial counsel. Defendant attached an affidavit by him to the petition. On January 21, 2010, the trial court filed a written order, dismissing defendant's petition as frivolous and patently without merit. On June 15, 2010, defendant filed a late notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

II. ANALYSIS

The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2008)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). To survive dismissal at this initial stage, the postconviction petition "need only present the

gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2008)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

Moreover, our supreme court has recently held a court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

Additionally, in considering a postconviction petition at the first stage of the proceedings, the court can examine the

following: "the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2008). We review *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

In his postconviction petition, defendant only raises claims of ineffective assistance of counsel. This court analyzes ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceedings' result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d

at 1163-64.

A. Failure To File a Postplea Motion

In his petition, defendant alleges he asked his trial counsel to file a motion to withdraw his guilty plea to seek a sentence reduction and then, if necessary, file a timely notice of appeal. Despite his counsel informing him she would do so, no motion was filed to secure relief from his sentence.

In *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), the United States Supreme Court extended *Strickland* to ineffective-assistance claims based upon trial counsel's failure to file a notice of appeal. While *Strickland*'s performance and prejudice prongs still apply, they are tailored to fit this context. *People v. Ross*, 229 Ill. 2d 255, 261, 891 N.E.2d 865, 869 (2008). Regarding performance, it is professionally unreasonable to disregard specific instructions from the defendant to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 477. That is so because counsel's failure to file the notice of appeal cannot be considered a strategic decision as "filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Flores-Ortega*, 528 U.S. at 477. As to prejudice, the defendant must demonstrate a reasonable probability exists that, but for counsel's deficient representation, the defendant would have appealed. *Ross*, 229 Ill. 2d at 262, 891 N.E.2d at 870 (citing *Flores-Ortega*, 528 U.S. at 484). In other words, "prejudice may be presumed when defense counsel's ineffectiveness rendered appellate proceedings nonexis-

tent, essentially denying the defendant's right to appeal." *Ross*, 229 Ill. 2d at 262, 891 N.E.2d at 870 (citing *Flores-Ortega*, 528 U.S. at 484). The *Flores-Ortega* Court also noted a defendant is not required to demonstrate his hypothetical appeal would have had merit to establish prejudice. *Flores-Ortega*, 528 U.S. at 486. In *People v. Edwards*, 197 Ill. 2d 239, 253-57, 757 N.E.2d 442, 450-51 (2001), the Supreme Court of Illinois rejected the State's argument *Flores-Ortega* did not apply to a defendant's request for counsel to file a motion to withdraw his guilty plea.

Here, defendant has alleged he told his trial counsel he wanted her to file a motion to withdraw his plea to challenge his sentence and then file a notice of appeal. Defendant notes he wanted to challenge his sentence because he believed he would be receiving a shorter one. Defendant's petition sufficiently alleges he informed his attorney he wanted to file a postplea motion to challenge his sentence and then an appeal and his counsel did not do so. The record does not contradict those allegations. Accordingly, we find defendant's postconviction petition sets forth an arguable legal basis for ineffective assistance of counsel based on counsel's failure to file a postplea motion.

As to the arguable factual basis, the State contends defendant's petition is factually insufficient because it did not allege defendant contacted his attorney within the 30-day period for filing a motion to withdraw his guilty plea. However, in his

affidavit, defendant states the following: "I did not understand the sentencing proceeding and when it was over I ask [sic] Attorney Root to file a motion to withdraw my guilty plea ***." While the State asserts that language does not specify when defendant directed his attorney to file the postplea motion, we read it to mean when the sentencing proceeding ended, defendant immediately talked to his attorney about filing a postplea motion. Regardless, the Second District has rejected the argument a defendant fails to state the gist of a constitutional claim when he or she fails to identify the time frame during which he or she communicated with his or her attorney. See *People v. Rogers*, 372 Ill. App. 3d 859, 868, 866 N.E.2d 1256, 1264 (2007). The State asks us to disagree with the Second District's holding, but we decline to do so.

Defendant's petition also satisfied the corroboration requirements of section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2006)) as he attached his own affidavit, setting forth the facts of his discussion with his attorney. The only other affidavit defendant could have furnished was that of his attorney, and the difficulty or impossibility of obtaining that affidavit is self-apparent and does not render the petition noncompliant with section 122-2 (see *People v. Williams*, 47 Ill. 2d 1, 4, 264 N.E.2d 697, 698 (1970)).

Moreover, even if defendant's argument that he wants to raise in his postplea motion can be considered delusional, defendant does not have to demonstrate his hypothetical motion

and appeal would have had merit to establish the prejudice prong of *Strickland*. See *Flores-Ortega*, 528 U.S. at 486. Thus, we find defendant has also set forth an arguable factual basis for his ineffective-assistance-of-counsel claim.

Since defendant's ineffective-assistance-of-counsel claim based on his counsel's failure to file a notice of appeal did not lack an arguable basis either in law or in fact, it states the gist of a constitutional claim. Our decision in no way expresses an opinion as to whether defendant will ultimately be able to prevail on his ineffective-assistance-of-counsel claim.

B. Defendant's Sentence

Since we have found defendant's ineffective-assistance claim based on counsel's failure to file a postplea motion states the gist of a constitutional claim, we do not address defendant's other ineffective-assistance claim. Section 122-2.1 of the Postconviction Act (725 ILCS 5/122-2.1 (West 2006)) does not permit the summary dismissal of individual claims. See *People v. Rivera*, 198 Ill. 2d 364, 374, 763 N.E.2d 306, 311-12 (2001). Thus, the entire petition must be reinstated because one of the issues states the gist of a constitutional claim.

III. CONCLUSION

For the reasons stated, we reverse the trial court's first-stage dismissal of defendant's *pro se* postconviction petition and remand the cause to the Macon County circuit court for further proceedings.

Reversed and remanded.