

No. 1-11-0870

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 3412
	)	
DARRYL NELSON,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Karnezis and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Denial of defendant's post-conviction petition after third-stage evidentiary hearing affirmed where circuit court's finding that defendant did not request his trial counsel to file a notice of appeal was not manifestly erroneous.
- ¶ 2 Defendant Darryl Nelson appeals from the denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) following a third-stage evidentiary hearing. He contends that the circuit court's denial of post-conviction relief was

manifestly erroneous because his right to the effective assistance of counsel was violated when trial counsel failed to file an appeal from his conviction.

¶ 3 The record shows, in relevant part, that following a jury trial in August 2006, defendant was found guilty of aggravated battery with a firearm, then sentenced in December of that year to six years' imprisonment. He did not attempt to file a direct appeal from his conviction; however, on April 15, 2008, he filed a *pro se* petition for post-conviction relief alleging, as pertinent to this appeal, that he did not file a notice of appeal from his conviction on the advice of counsel, and, further, that trial counsel was ineffective for failing to file a notice of appeal from his conviction where he made "clear and repeated requests for her to do so." Defendant attached to his petition, *inter alia*, a letter, dated September 10, 2007, that he wrote to the public defender requesting his trial transcripts. The memorandum of orders reflects that on May 8, 2008, the circuit court docketed defendant's petition and appointed counsel to represent him.

¶ 4 On May 27, 2010, post-conviction counsel filed a supplemental post-conviction petition alleging that trial counsel's failure to file a notice of appeal in accordance with defendant's request amounted to *per se* ineffective assistance of counsel. In support of this claim, counsel attached an affidavit from defendant in which he averred: "I asked my trial attorney to appeal my case. \*\*\* She advised me not to appeal, however, she told me that she would file a Notice of Appeal. I then made it clear that I wanted to appeal the case. She did not file a notice of appeal even though I repeatedly asked her to do so."

¶ 5 On March 15, 2011, the circuit court conducted an evidentiary hearing on defendant's petition. At that hearing, defendant testified that Lisa Boughton, a public defender, was appointed to represent him at trial, and that he asked her to file his notice of appeal on December 6, 2006.

¶ 6 During cross-examination, defendant stated that on the day he was found guilty, August 31, 2006, he told Boughton that he wanted to appeal, and she responded, "wait, wait, wait, let's let this sink in and see what we can come back on appeal on." He further stated that Boughton never had a conversation with him after he was sentenced. Defendant acknowledged that in his letter to the public defender, he never mentioned counsel's failure to file an appeal for him. On redirect, defendant clarified that he asked Boughton to file a notice of appeal on December 6, 2006, the day he was sentenced.

¶ 7 Boughton testified that she has been an attorney since November 1995, and has worked for the Cook County public defender's office since August 1996. During this time, she has litigated numerous motions, and conducted about 35 jury trials as well as numerous bench trials. After defendant was sentenced, she spoke with him in the lock-up about his options and informed him that he could appeal. However, defendant "basically stated to me that he didn't think that an appeal should be filed when he had testified in this matter, he had received the minimum. And basically his attitude was, you know, I'm just going to go ahead and do my time and get it over with." Thereafter, defendant never communicated to her that he wanted to file an appeal. She first learned that he wanted to do so when attorneys in her office notified her that defendant was filing a post-conviction petition. Boughton testified that she would have filed an appeal for defendant had he said that he wanted to appeal, and that she always does so for her clients regardless of their chances of success.

¶ 8 On cross-examination, Boughton stated that she has filed a notice of appeal in other cases. She also stated that she knew defendant had a right to appeal his conviction, and that he could withdraw a notice of appeal.

¶ 9 The court subsequently found that "the credibility does not fly with the defendant," that it believed Boughton's testimony "that the defendant indicated he did not want to file an appeal,"

and that "[h]e made his choice." The court then denied defendant's petition for post-conviction relief, and this appeal follows.

¶ 10 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2010)), and may consist of up to three stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)). At the third stage of proceedings, defendant is entitled to a hearing where he may present evidence in support of his petition (*Pendleton*, 223 Ill. 2d at 472-73, citing 725 ILCS 5/122-6 (West 2000)), and where he continues to bear the burden of making a substantial showing of a constitutional violation (*Pendleton*, 223 Ill. 2d at 473). Where, as here, the circuit court conducts a third-stage evidentiary hearing involving fact-finding and credibility determinations, we will not reverse the court's decision unless it is manifestly erroneous (*Pendleton*, 223 Ill. 2d at 473), *i.e.*, error that is clearly evident, plain, and indisputable (*People v. Morgan*, 212 Ill. 2d 148, 155 (2004)).

¶ 11 In this case, defendant maintains that trial counsel was ineffective for failing to file an appeal on his behalf. In *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000), the United States Supreme Court held that a claim that counsel was ineffective for failing to file a notice of appeal is subject to the "now-familiar" *Strickland* test that applies in all other such cases of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel under that test, defendant must show that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance resulted in prejudice to defendant. *Flores-Ortega*, 528 U.S. at 476-77, citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¶ 12 Defendant claims that trial counsel's failure to file a notice of appeal was *per se* ineffective assistance of counsel where he testified that he asked counsel to file such notice. The State responds that the denial of defendant's petition was not manifestly erroneous where the evidence at the post-conviction hearing established that he told counsel that he did not want to appeal his conviction.

¶ 13 We find the instant case analogous to *People v. Rovito*, 327 Ill. App. 3d 164 (2001). In that case, defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to file a notice of appeal, and attached an affidavit in which he averred that he had told counsel that he wanted to appeal, and that counsel assured him that he would take care of it. *Rovito*, 327 Ill. App. 3d at 166. At the hearing on his petition, defendant testified that he told counsel to file an appeal just after he was sentenced, and that counsel did not respond. *Rovito*, 327 Ill. App. 3d at 166. Counsel, on the other hand, testified that he never told defendant or his family, who testified in support of defendant's claim, that he would file a notice of appeal for defendant. *Rovito*, 327 Ill. App. 3d at 167. The circuit court found that defendant and his witnesses were not credible, and denied defendant's petition. *Rovito*, 327 Ill. App. 3d at 167.

¶ 14 On appeal, this court characterized the situation before it as one where both defendant and counsel claimed that defendant clearly conveyed his wishes, but in versions which were completely contrary to one another. *Rovito*, 327 Ill. App. 3d at 172. Under those circumstances, we explained that the critical question was whether counsel followed defendant's express instructions regarding the appeal, and noted that the resolution of defendant's claim rested directly on the credibility of the witnesses at the evidentiary hearing. *Rovito*, 327 Ill. App. 3d at 172, citing *Flores-Ortega*, 528 U.S. at 478. Ultimately, we concluded that the court's credibility determinations were not manifestly erroneous, and affirmed the dismissal of defendant's post-conviction petition. *Rovito*, 327 Ill. App. 3d at 177, 179.

¶ 15 Here, as in *Rovito*, the resolution of defendant's ineffective assistance of counsel claim rested on who was more credible: defendant, who testified that he told counsel to file an appeal, or Boughton, who testified that defendant told her that he did not want to file an appeal and was "just going to go ahead and do my time and get it over with." The court found Boughton to be more credible, and, on this record, we cannot say that finding was manifestly erroneous.

¶ 16 We first note that the allegations made by defendant in his post-conviction petition are dubious in light of his irreconcilable claims that he did not file a notice of appeal on the advice of counsel, but also that trial counsel failed to file a notice of appeal despite "clear and repeated requests for her to do so." Second, we note that defendant provided inconsistent testimony at the evidentiary hearing in this matter. Although he initially testified that he asked Boughton to file a notice of appeal on December 6, 2006, the date of his sentencing, he then stated on cross-examination that he asked her to file a notice of appeal on August 31, 2006, and that they never had a conversation after he was sentenced. On redirect, he clarified that he asked her to file the notice on the day he was sentenced. Counsel, on the other hand, testified consistently on her duties and her conversations with defendant regarding an appeal. In this respect, we find it significant that in defendant's only correspondence with the public defender's office, he failed to mention that counsel did not file an appeal for him. Under these circumstances, we cannot say that the trial court's determination that Boughton was more credible was manifestly erroneous (*Pendleton*, 223 Ill. 2d at 473); and, thus, find that the trial court did not err in denying defendant's post-conviction petition based on Boughton's testimony that defendant told her he did not want to appeal his conviction (*Rovito*, 327 Ill. App. 3d at 177).

¶ 17 In reaching this conclusion, we have examined *People v. Ross*, 229 Ill. 2d 255 (2008), cited by defendant as controlling, and find it distinguishable from the case at bar. In *Ross*, 229 Ill. 2d at 261-62, the trial court conducted an evidentiary hearing where defendant testified that

he told defense counsel that he wanted to appeal after he was found guilty, and counsel could not recall such a conversation. The supreme court determined that the record revealed that defendant communicated his desire to appeal to defense counsel, and that counsel was ineffective for failing to file that notice. *Ross*, 229 Ill. 2d at 262. Here, to the contrary, defense counsel directly contradicted defendant's claim, and the circuit court decided the credibility issue arising from the conflicting testimony of the witnesses in favor of the State. As discussed above, we cannot say that the court's determination was manifestly erroneous, and thus find defendant's reliance on *Ross* unavailing.

¶ 18 For the reasons stated, we conclude that the circuit court did not err in denying post-conviction relief to defendant following an evidentiary hearing, and affirm the judgment of the court to that effect.

¶ 19 Affirmed.