

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).

2017 IL App (4th) 150589-U

NO. 4-15-0589

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 21, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
GARY MATTHEW SAMELA,)	No. 13CF1416
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed, concluding the trial court erred by dismissing defendant's postconviction petition at the first stage where the petition stated the gist of a claim of ineffective assistance of counsel.

¶ 2 In April 2014, defendant, Gary Matthew Samela, entered an open guilty plea to four counts of failure to register as a sex offender (730 ILCS 150/3(a) (West 2012)). The trial court sentenced defendant to concurrent terms of 14 years' imprisonment on each of the four counts. In April 2015, defendant filed a *pro se* postconviction petition, alleging various claims of ineffective assistance of counsel. In June 2015, the court dismissed defendant's postconviction petition at the first stage, finding it frivolous and patently without merit.

¶ 3 Defendant appeals, arguing the trial court erred by dismissing his postconviction petition at the first stage because it adequately stated a gist of a constitutional claim. We reverse.

¶ 4 I. BACKGROUND

¶ 5 In October 2013, the State charged defendant with failure to register in accordance with the Sex Offender Registration Act (1) within three days of establishing an Internet protocol address (count I); (2) within three days of establishing a cellular telephone number (count II); within three days of establishing a second cellular telephone number (count III); and without notifying the Bloomington police department of his travel itinerary when he was temporarily absent from his current address for three or more days (count IV). 730 ILCS 150/3(a) (West 2012). The State also charged defendant with child photography by a child sex offender (count V) (720 ILCS 5/11-24(b)(3) (West 2012)) and distribution of harmful material (count VI) (720 ILCS 5/11-21(b)(1)(A) (West 2012)).

¶ 6 In April 2014, defendant entered an open guilty plea to counts I to IV and the trial court dismissed counts V and VI. At the plea hearing, the trial court admonished defendant that, based on his prior criminal history, he was subject to mandatory Class X sentencing with a minimum term of 6 years' imprisonment and a maximum of 30 years' imprisonment, followed by a 3-year term of mandatory supervised release.

¶ 7 In June 2014, the trial court held a sentencing hearing. The presentence investigation report (PSI) shows defendant had prior felony convictions for (1) child abduction, (2) transportation of a minor, (3) child sex offender in a school zone, (4) human trafficking, and (5) violating the Sex Offender Registration Act. After reviewing the PSI, letters written on defendant's behalf, hearing argument, and hearing defendant's statement in allocution, the court sentenced defendant to concurrent terms of 14 years' imprisonment on each of the four counts. The court fully admonished defendant as to his appeal rights under Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001), including the requirement of filing in the circuit court a written postsentencing motion to reconsider the sentence or to withdraw the guilty plea.

¶ 8 In September 2014, defendant filed a *pro se* late notice of appeal, alleging his trial counsel was ineffective and stating, in part, "Defendant's attorney promised him that a notice of appeal would be filed but failed to do so." This court allowed the late notice of appeal and docketed the appeal as No. 4-14-0783. Appointed counsel moved to dismiss the appeal, asserting this court did not have jurisdiction because no timely postplea motion to reconsider the sentence or motion to withdraw the guilty plea was filed. In January 2015, this court dismissed defendant's appeal in case No. 4-14-0783.

¶ 9 In April 2015, defendant filed a *pro se* postconviction petition. Defendant's petition alleged (1) trial counsel was ineffective for failing to file the postplea motion necessary to challenge defendant's sentence, despite his immediate request that counsel do so; (2) appellate counsel was ineffective for failing to amend his late notice of appeal to include trial counsel's ineffectiveness; (3) appellate counsel was ineffective for moving to dismiss his appeal instead of filing a motion to withdraw; and (4) the trial court erred by improperly considering a third cellular telephone and a human-trafficking offense in aggravation and imposed an excessive sentence. In June 2015, the trial court entered a written order dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant appeals the first-stage dismissal of his post-conviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-8 (West 2014)) provides a collateral means for a defendant to challenge a conviction or sentence for a violation of a federal or state constitutional right. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). At the first stage of postconviction proceedings, the trial court must decide,

without considering argument by the State, whether the defendant's petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). Summary dismissal as frivolous or patently without merit is appropriate "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009). "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. Harris*, 366 Ill. App. 3d 1161, 1166-67, 853 N.E.2d 912, 917 (2006) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). We review *de novo* a trial court's dismissal of a postconviction petition without an evidentiary hearing. *Id.* at 1167, 853 N.E.2d at 917.

¶ 13 Before we turn to the merits of defendant's postconviction petition, we must first determine whether the petition has satisfied the evidentiary requirements of section 122-2 of the Postconviction Act. 725 ILCS 5/122-2 (West 2014). The State asserts summary dismissal of defendant's petition was justified because it was not in compliance with section 122-2 of the Act, which requires the attachment of "affidavits, records, or other evidence supporting" the petition's allegations or an explanation of why supporting documents were not attached. 725 ILCS 5/122-2 (West 2014). However, based on the allegations in the petition, it appears no one other than defendant and his attorney were privy to communications regarding the postplea motions necessary to preserve defendant's right to appeal. Citing *People v. Hall*, 217 Ill. 2d 324, 333-34, 841 N.E.2d 913, 919 (2005), defendant argues his failure to attach independent corroborating documentation or to explain its absence may be explained where the only affidavit he could have attached to support his allegations, other than his own, would have been that of the attorney whose competence is being challenged. Defendant argues, "the 'difficulty or impossibility of

obtaining such an affidavit is self-apparent.' " *Id.* at 333, 841 N.E.2d at 919 (quoting *People v. Williams*, 47 Ill. 2d 1, 4, 264 N.E.2d 697, 698 (1970)).

¶ 14 Defendant's postconviction petition alleged (1) trial counsel was ineffective for failing to file the postplea motion necessary to challenge defendant's sentence, despite his immediate request that counsel do so; (2) appellate counsel was ineffective for failing to amend his late notice of appeal to include trial counsel's ineffectiveness; (3) appellate counsel was ineffective for moving to dismiss his appeal instead of filing a motion to withdraw; and (4) the trial court erred by improperly considering a third cellular telephone and a human trafficking offense in aggravation and imposed an excessive sentence. In support of his verified petition, defendant attached (1) the written sentencing order; (2) the portion of the sentencing hearing transcript with the State's argument regarding the evidence in aggravation; (3) the late notice of appeal, which indicates trial counsel provided ineffective assistance; (4) the office of the State Appellate Defender's motion to dismiss the appeal; and (5) this court's order dismissing his appeal.

¶ 15 These records and other evidence are sufficient to satisfy the requirements of section 122-2 for the purposes of surviving the first stage of postconviction proceedings. See *People v. Rivera*, 342 Ill. App. 3d 547, 550, 795 N.E.2d 1016, 1020 (2003). Although defendant did not attach his own affidavit stating he asked his attorney to file an appeal and that his attorney failed to do so, his petition sufficiently sets forth these claims and the record does not contradict these claims. Indeed, the record shows no motion to reconsider sentence or notice of appeal was filed by counsel. The record shows that defendant filed a *pro se* late notice of appeal, which alleged he asked his attorney to file a notice of appeal and the attorney failed to do so. The late notice of appeal included an allegation of ineffective assistance of counsel. The absence

performance by an objective standard of competence under prevailing professional norms." *Id.* To survive the first-stage of postconviction proceedings, it must only be arguable that counsel's performance was deficient. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1213.

¶ 19 Here, defendant alleges he immediately told his attorney he wished to appeal after he was sentenced. The record contains no postplea motions to preserve defendant's right to appeal, as required by Illinois Supreme Court Rule 604 (eff. Jul 1, 2017). The record shows defendant filed a *pro se* late notice of appeal, which this court allowed. Ultimately, this court dismissed for lack of jurisdiction because no motion for reconsideration of the sentence or motion to withdraw the guilty plea had been filed. Taking as true defendant's allegations that he specifically told his attorney he wanted to appeal and his attorney failed to take the necessary steps to preserve defendant's right to appeal, we conclude defendant has stated the gist of a constitutional claim. See *People v. Edwards*, 197 Ill. 2d 239, 253-54, 757 N.E.2d 442, 451 (2001) (finding a gist of a constitutional claim where defendant alleged he asked his attorney to file an appeal and nothing in the record indicated counsel reviewed plea proceedings before deciding not to file a postplea motion); see also *People v. Usher*, 397 Ill. App. 3d 276, 282, 920 N.E.2d 1135, 1140 (2009) (defendant's postconviction petition stated gist of claim of ineffective assistance of counsel based on failure to file appeal).

¶ 20 In light of the record and defendant's postconviction petition, we conclude defendant stated at least an arguable claim that his counsel's performance was deficient. Under the second prong of the *Strickland* analysis, a defendant must show he was arguably prejudiced by counsel's deficient performance. However, prejudice is presumed where, as here, a defendant's trial counsel fails to initiate an appeal upon request. *Edwards*, 197 Ill. 2d at 251-52, 757 N.E.2d at 449-50. Therefore, defendant was not required to demonstrate the trial court

would have granted a motion to reconsider the sentence or that his appeal would have had merit. Defendant's postconviction petition stated a gist of a constitutional claim and the trial court erred in summarily dismissing the petition as frivolous and patently without merit. Accordingly, we reverse and remand for further postconviction proceedings.

¶ 21 B. Other Claims Raised in the Postconviction Petition

¶ 22 Because we have found defendant's claim of ineffective assistance of trial counsel based on counsel's failure to file a postplea motion states the gist of a constitutional claim, we do not address defendant's other claims raised in his postconviction petition. Section 122-2.1 of the Postconviction Act (725 ILCS 5/122-2.1 (West 2016)) 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). Therefore, the entire petition must be reinstated because at least one of the issues stated the gist of a constitutional claim.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we reverse the trial court's judgment.

¶ 25 Reversed.