2013 IL App (2d) 120127-U
No. 2-12-0127
Order filed July 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-663
ESTEBAN ZARAGOZA,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in summarily dismissing defendant's postconviction petition, which alleged that defense counsel was ineffective for failing to file a notice of appeal after he had "led [defendant] to believe" that he would: because the decision to appeal belongs to the defendant, the reasonable inference from defendant's allegation was that, as the claim required, defendant had asked counsel to file a notice of appeal.

¶ 2 Defendant, Esteban Zaragoza, appeals from an order dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) at the first stage. He argues that the petition stated the gist of a claim for ineffective assistance of counsel based on counsel's

failure to perfect an appeal for defendant. At issue is whether the petition was specific enough in alleging facts that implied that counsel acted ineffectively. We hold that the allegations were sufficient to imply that defendant requested an appeal. Thus, defendant stated the gist of a constitutional claim, so we reverse the dismissal of his petition and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on a count each of unlawful delivery (within 1,000 feet of a school) of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c), 407(b)(1) (West 2008)), unlawful delivery of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c) (West 2008)), and unlawful possession of a gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/402(c) (West 2008)). Retained counsel entered an appearance for defendant.

¶ 5 Defendant waived the right to a jury trial; the court found him guilty on all counts after a trial at which identity was at issue. Defendant moved for a new trial, asserting that the State had failed to provide sufficient evidence that defendant was the person who had sold the cocaine and that the sale took place within 1,000 feet of a school. The court denied the motion.

¶ 6 On October 20, 2010, the court sentenced defendant to six years' imprisonment, fines, and fees on the first count. Defendant did not file a postsentencing motion or a notice of appeal.

¶ 7 On October 25, 2011, defendant filed a postconviction petition in which he alleged, among other things:

> "Counsel was ineffective for not challenging [certain] substantial issues on Zaragoza's direct appeal. In fact counsel failed to file Zaragoza's direct appeal, when his dad and himself was led to believe counsel was going to file a Notice of Appeal[.]"

Defendant signed a verification affidavit that stated that he "read and understand the above Petition for Post-conviction Relief" and that everything in it was true and correct to the best of his recollection.

¶ 8 Defendant also attached an evidentiary affidavit of his own, handwritten in Spanish, that said, among other things: "Y despues que me declararón cumpable le dige a mi abogado de que apela ra el caso y despues supe que el no lo hizo y que mi papa esta furioso por que no puso la apelación."[1] An affidavit of defendant's father also was attached, but it described only the financial arrangements with counsel that defendant's father paid.

¶ 9 On January 10, 2010, the court entered an order dismissing defendant's petition at the first stage. Concerning the claim at issue, the order stated:

> "Petitioner's claim that trial counsel failed to file an appeal is insufficient to demonstrate the gist of a claim of ineffective assistance of counsel. The Illinois Supreme Court has made clear that an attorney who 'disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable,' thereby giving rise to a post-conviction claim of ineffective assistance of counsel. *People*

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[1]Evidently because this affidavit was in Spanish, the trial court did not consider it. On appeal, defendant has filed a certified translation; the relevant portion states, "[a]nd after I was declared guilty, I told my attorney to appeal my case and then I found out he did not do so, and my father was furious because he did not make an appeal." However, because this translation is not before the court, we do not consider it. See *Owen Wagner & Co. v. U.S. Bank*, 297 Ill. App. 3d 1045, 1049-50 (1998) (holding that a reviewing court should not consider documents which were not a part of the trial court record and were not considered by the trial court).

> *v. Edwards*, 197 Ill. 2d 239, 250 *** (2001) ***. However, Petitioner does not allege that trial counsel ignored Petitioner's requests to file an appeal; rather, Petitioner contends that Petitioner and his father were 'led to believe counsel was going to file a Notice of Appeal,' which counsel did not do. Because Petitioner does not allege that counsel disregarded Petitioner's specific instructions to file an appeal, Petitioner fails to demonstrate the gist of a claim of ineffective assistance of counsel as established in *Edwards*."

Defendant filed a timely notice of appeal.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant asserts that he sufficiently alleged that he did specifically request that counsel file a notice of appeal; the State argues that the trial court was correct in its ruling. We hold that defendant stated the gist of a constitutional claim. Relief under the Act for a substantial violation of the defendant's constitutional rights should be available to a prisoner with little legal knowledge or training. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). As we will discuss, the distinction between an allegation that counsel said that he or she would file an appeal and an allegation that the defendant told counsel to file an appeal is too hairsplitting for dismissal at the first stage of postconviction proceedings.

¶ 12 Our supreme court has stated that the purpose of the Act is to offer a defendant " 'one *complete* opportunity to show a substantial denial of his constitutional rights.' " (Emphasis added.) *People v. Free*, 122 Ill. 2d 367, 376 (1988) (quoting *People v. Logan*, 72 Ill. 2d 358, 370 (1978)). In *Hodges*, 234 Ill. 2d at 9-10, 16, it set out the circumstances under which a court can dismiss a postconviction petition at the first stage:

> "Section 122-2 of the Act requires that a postconviction petition must, among other things, 'clearly set forth the respects in which petitioner's constitutional rights were violated.' [Citation.] With regard to this requirement, a defendant at the first stage need only present a limited amount of detail in the petition. [Citations.] Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. [Citations.] In fact, we have required only that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. ***
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> [A] *pro se* petition seeking postconviction relief under the Act may be summarily dismissed as 'frivolous or *** patently without merit' pursuant to section 122-2.1(a)(2) *only* if the petition has *no arguable* basis either in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." (Emphases added.)

Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 13 Given the gist standard of *Hodges*, even without defendant's evidence affidavit or its translation, defendant's allegation that counsel led him and his father to believe that counsel would file a notice of appeal, but did not, was sufficient to avoid first-stage dismissal. At least two considerations lead to this conclusion.

¶ 14 First, to a person not familiar with the specific case law on which the court based its ruling, "he said he would do it, but did not," surely must sound at least as damning as "I told him to, but he

did not." Only the first statement invites reliance. Thus, a *pro se* petitioner is likely not to recognize that, to state a claim, he or she must also allege a request for an appeal.

¶ 15 Second, unless defense counsel's representation went awry in some different way that defendant did not recognize, counsel's indication that he intended to file a notice of appeal should have come only after defendant conveyed his desire to appeal. The law is clear that the decision whether to appeal is for the defendant alone; counsel should consult, but the defendant has the final say. See, *e.g.*, *People v. Campbell*, 208 Ill. 2d 203, 210 (2003) (the taking of an appeal is one of five kinds of decisions on which counsel should consult, but on which the defendant's choice is binding). Thus, the natural inference from defendant's statement that counsel said that he would file an appeal is that defendant told counsel that he wanted to appeal. See *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010) ("all reasonable inferences should be taken in favor of finding that the petition should proceed to an evidentiary hearing"). This inference is sufficient for us to conclude that the petition made out a claim that is arguably constitutional and for the petition thus to meet the standard of *Hodges*.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we reverse the first-stage dismissal of defendant's petition under the Act and remand the cause.

¶ 18 Reversed and remanded.