2017 IL App (2d) 150325-U
No. 2-15-0325
Order filed June 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE A. GUTIERREZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 07-CF-3904 Honorable Brian P. Hughes, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Defendant's postconviction petition stated the gist of a meritorious claim for ineffective assistance of counsel and should not have been summarily dismissed.

¶ 2 Defendant, Jose A. Gutierrez, appeals a judgment summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant contends that his petition stated the gist of a meritorious claim that his attorney was ineffective for failing to appeal the 15-year sentence imposed on defendant's open plea of guilty to criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)). We reverse and remand.

¶ 3 Defendant was originally charged with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2006)) and criminal sexual assault, both based on the allegation that, on July 3, 2007, he grabbed the victim in a department-store parking lot and forcibly penetrated her vagina with his finger. The former charge also alleged that the victim fell and suffered bodily harm. On May 14, 2008, the parties presented the trial court, Judge George Bridges presiding, with an agreement: the State would dismiss the first charge and defendant would plead guilty to the second, with no agreement on sentencing. After hearing the factual basis and admonishing defendant, the court accepted his plea and ordered a presentencing investigation report (PSIR).

¶ 4 The PSIR, which defendant's probation officer filed with the court on June 23, 2008, disclosed the following. According to the victim, defendant trailed her through a store; after she exited, he put her into a bear hug, knocking them both to the ground, then inserted two fingers into her vagina while pressing his head against her breasts to prevent her from resisting. He then fled. Defendant told the police that, inside the store, the victim said " 'hi' " to him; outside, he approached her and hugged her. He denied having penetrated her vagina and he said that he backed off when she threatened to call the police. He thought that she had been " 'initiating things' " and should accept some responsibility because of her provocative attire.

¶ 5 The PSIR stated further as follows. In July 1998, defendant was arrested at a store after he followed a woman and then masturbated behind a clothes rack. He received a year of court supervision. In November 2001, he was arrested for assault and disorderly conduct; the result was a judgment in January 2002 for bond forfeiture. In 2003, defendant was found guilty of criminal trespass to a building and received a year of court supervision. In December 2003, he was deported. In 2006, he was arrested for retail theft and battery, receiving six months' supervision; later, his supervision was revoked and he was sentenced to pay court costs, fees, and

fines for retail theft. In April 2007, he was arrested for disorderly conduct; in a department store, he saw a woman wearing a mini-skirt and masturbated. In June 2007, a conviction was entered.

¶ 6 Defendant, who was 34 years old at sentencing, stated that he illegally entered the country at age 17 or 18; he was deported in 2003 but later reentered illegally. He was married to one woman but lived with another, Anna Vazquez, with whom he had had three children.

¶ 7 Dr. Karen Chantry, a court-appointed evaluator, reported that defendant's "sexually offending actions" had "the quality of an obsession that he [could not] resist." She considered him a high risk to reoffend. In an addendum to the PSIR, dated June 27, 2008, Gerald Blain, MS, LCPC, who had evaluated defendant, opined that he appeared to be at "high risk for developing sexual[ly] aggressive tendencies towards wom[e]n," as he "easily justifie[d] and rationalize[d] his choices." Defendant was "a very poor candidate" for sex-offender treatment and his scores on standardized tests all placed him "in the high end of the range of risk."

¶ 8 On July 8 and 9, 2008, Judge Bridges held a sentencing hearing. A Vernon Hills police detective testified that, on October 9, 2007, a store security camera showed that defendant had followed a young woman around, then crawled under a display table and masturbated; defendant admitted the allegation and cooperated with the police. Vazquez testified that she had lived with defendant for 15 or 16 years. He had never been violent toward her or her children and had helped to support them.

¶ 9 In sentencing defendant, the judge stated as follows. No mitigating factors applied. In aggravation, defendant had consistently seen his victims as partly responsible for his offenses. Moreover, after being deported, he had reentered the country illegally. Defendant had engaged in increasingly deviant behavior, escalating from public indecency to criminal sexual assault. A lengthy sentence was necessary to protect society and to deter others. Thus, defendant received

the maximum, 15 years in prison. 730 ILCS 5/5-8-1(d)(4) (West 2006). After pronouncing the sentence, the judge admonished defendant as follows:

> "[Y]ou have the right to appeal. And since this is a fully negotiated plea, if you seek to challenge any aspects of your plea or sentence, you must as a precondition to filing an appeal file with this court within 30 days of today's date a written motion seeking leave to withdraw your plea of guilty and to vacate the judgment."

Defendant stated that he understood. The judge continued:

> "If you would file that written motion and I heard and granted that motion, I would allow you to withdraw your plea of guilty to this charge, I would vacate the judgment, I would then set this charge for trial. Any charges that were dismissed or withdrawn at the request of the State, they would be reinstated and they would also be set for trial."

Neither party expressed disagreement with the judge's characterization of the plea or with any of the admonishments. Defendant did not file a postjudgment motion or an appeal.

¶ 10 On December 1, 2014, defendant filed a *pro se* postconviction petition. As pertinent here, it alleged that defendant's attorney "did not put in for a motion to withdraw plea or a appeal [*sic*] notice on sentence [*sic*]. Neither did he file a Motion to Reconsider." The petition attached a short affidavit that did not address this particular claim.

¶ 11 The trial court summarily dismissed the petition. As pertinent here, the court's written order first noted the following. Because the plea had not been fully negotiated, defendant had not needed to move to withdraw it in order to challenge his sentence. As to counsel's failure to move to reconsider the sentence, the petition did not allege that defendant ever asked his attorney to do so. The court then turned to the claim that counsel had been ineffective for failing to file an

appeal. The court noted that, under *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000), and *People v. Ross*, 229 Ill. 2d 255, 261 (2008), counsel can be ineffective for depriving his client of an appeal that he otherwise would have taken. However, here there was no allegation or indication that (1) defendant had specifically instructed his attorney to file an appeal (see *Flores-Ortega*, 528 U.S. at 477); or (2) any duty to consult with defendant had been triggered, which required reason to believe that (a) a rational defendant would have wanted to appeal, based on the existence of nonfrivolous grounds or (b) defendant reasonably demonstrated to his counsel that he was interested in appealing (see *Flores-Ortega*, 528 U.S. at 480; *People v. Torres*, 228 Ill. 2d 382, 396 (2008)). After the court denied defendant's motion to reconsider the summary dismissal, he timely appealed.

¶ 12 On appeal, defendant contends that his petition stated the gist of a meritorious claim that his attorney was ineffective for failing to move to reconsider his sentence and failing to appeal.

¶ 13 We set out the general principles governing this appeal. We review *de novo* the summary dismissal of a postconviction petition. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). At this stage, the petition need allege only the gist of a meritorious constitutional claim. *Id.* at 244. The factual allegations of the petition must be taken as true and construed liberally in favor of the defendant. *People v. Usher*, 397 Ill. App. 3d 276, 279 (2009). To establish ineffective assistance, a defendant must show that (1) counsel's performance was objectively unreasonable; and (2) the defendant suffered prejudice, *i.e.*, it is reasonably probable that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). A meritorious ineffective-assistance claim can be based on counsel's failure to appeal a judgment that was entered on a guilty plea. *Edwards*, 197 Ill. 2d at 448; see *Flores-Ortega*, 528 U.S. at 477-78. A meritorious claim can also be based on counsel's

failure to move to reconsider the sentence that was entered on a guilty plea. See *People v. Hughes*, 329 Ill. App. 3d 322, 325-26 (2002).

¶ 14 We first clarify that, although the petition's pertinent factual allegations were both terse and garbled, they did, when construed liberally, allege both that (1) trial counsel failed to file an appeal from the judgment, and specifically the sentence; and (2) trial counsel failed to move to reconsider the sentence. On the latter score, we note that the pertinent allegation referred to *both* a "motion to withdraw the plea" and "a motion to reconsider" and faulted trial counsel for filing neither. It is a fair construction that the allegation, however inartfully phrased by the *pro se* defendant, encompassed both the failure to appeal and the failure to file a motion to reconsider the sentence. On appeal, defendant cites both failures as ineffective assistance. We hold that the combination of failures that the petition alleged amounted to a viable claim of ineffective assistance for depriving defendant of an appeal.

¶ 15 Courts have elaborated on when a petition states a meritorious claim that trial counsel was ineffective for failing to appeal from a judgment entered on a guilty plea. A lawyer who disregards the defendant's specific instruction to file a notice of appeal is professionally unreasonable (*Flores-Ortega*, 528 U.S. at 477-78; *Edwards*, 197 Ill. 2d at 250), and prejudice will be presumed (*Flores-Ortega*, 528 U.S. at 483; *Edwards*, 197 Ill. 2d at 251). If the defendant did not specifically instruct the attorney to file a notice of appeal, ineffective assistance can still be demonstrated by showing that the attorney failed to consult with the defendant about filing an appeal and that either (1) a rational defendant would have wanted to file an appeal (for example, because there were nonfrivolous grounds for an appeal) or (2) the defendant reasonably demonstrated that he desired to appeal. See *Flores-Ortega*, 528 U.S. at 480; *Torres*, 228 Ill. 2d at 396.

¶ 16 We hold that defendant's petition stated the gist of a meritorious claim. It alleged that his attorney was ineffective for failing to take the two steps that would have enabled defendant to obtain an appeal: (1) filing a motion to reconsider the sentence and obtaining a ruling on it; and (2) (assuming that the trial court would have denied the motion) filing a notice of appeal. These two arguably unreasonable omissions resulted in the failure to file an arguably nonfrivolous appeal. Therefore, the petition stated the gist of a meritorious claim under *Flores-Ortega*. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 17 Defendant's petition did not allege that he explicitly instructed his attorney to file a notice of appeal or that he reasonably demonstrated to counsel that he desired to appeal. It did, however, allege facts to show that a rational defendant would have wanted to file an appeal, because there was a nonfrivolous issue that could have been raised: whether defendant's prison sentence was an abuse of the trial court's discretion.

¶ 18 Although a prison sentence was certainly appropriate, we cannot say that a challenge to the imposition of the maximum sentence would have been a frivolous ground for an appeal. Counsel arguably should have recognized as much. Also, although the trial court's erroneous admonishments might reasonably have misled *defendant* into believing that moving to reconsider the sentence was improper, counsel should have realized that, as the plea was not negotiated, the motion was permissible. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). And counsel should have known that filing the motion was essential to preserving the sentencing challenge on appeal. "No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged." Ill. S. Ct. R. 604(d) (eff. July 1, 2006);

see *People v. Ahlers*, 402 Ill. App. 3d 726, 732-33 (2010) (issues not raised in motion to reconsider sentence are forfeited on appeal).

¶ 19 We conclude that defendant's petition stated the gist of a meritorious claim of ineffective assistance of counsel. Therefore, we reverse the judgment of the circuit court of Lake County, and we remand the cause for the appointment of counsel for defendant and for second-stage proceedings under the Act.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Lake County is reversed, and the cause is remanded.

¶ 21 Reversed and remanded.