

No. 1-09-0335

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	No. 04 CR 10345
)	
ANGEL NAVARRO,)	Honorable Stanley Sacks
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE MURPHY delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

ORDER

HELD: Where defendant did not state the gist of a constitutional claim of ineffective assistance of counsel, he was not entitled to remand for second-stage post-conviction proceedings; the trial court's judgment was affirmed.

Defendant Angel Navarro appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal, defendant contends that his petition stated the gist of a constitutional claim of ineffective assistance of trial and appellate counsel. Defendant specifically maintains that he was denied effective assistance of counsel because his trial attorney failed to file a motion to suppress an improperly suggestive identification. We affirm.

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Following a jury trial, defendant was found guilty of first degree murder and sentenced to 60 years' imprisonment, which included a mandatory sentencing enhancement of 20 years' imprisonment for personally discharging a firearm during the commission of the offense. Defendant's conviction was based on evidence showing that on the evening of April 6, 2004, the victim Josue Guerra died after being shot twice near the intersection of Leclair Avenue and Montana Street in Chicago. The undisputed evidence further established that defendant was arrested near the crime scene shortly after the shooting.

The State represented, through the testimony of three occurrence witnesses (Artemio Magdaleno, Heber Garcia, Carlos Colon), and through the testimony of Officer John Meer, that defendant fired three shots in the victim's direction as defendant stood on Leclair Avenue and was subsequently arrested by responding police officers.

On the evening in question, Magdaleno was walking to a store with a group of friends, including the victim, when they encountered defendant with his group. Following a verbal exchange between defendant and one of Magdaleno's friends, Magdaleno and his group continued to the store. After leaving the store, Magdaleno's group walked on Leclair Avenue towards Montana Street when Magdaleno saw defendant shooting a gun at them. Garcia was outside and heard a gunshot coming from the area in question, and then saw defendant standing alone pointing a gun. Garcia entered his nearby apartment building, heard two more shots, and then saw defendant walking along Leclair Avenue. Garcia saw defendant's face as he walked by, and observed that he was wearing a light colored shirt and white pants. Colon was in his apartment when he heard a gunshot and saw defendant from his window holding a gun. Colon stated that defendant was wearing cream colored pants and a light colored shirt.

Officer Meer testified that he heard gunshots in the area of Leclair Avenue and Montana Street and, upon reaching Leclair Avenue, he saw defendant, who was wearing a white shirt and white or beige pants, running north on Leclair Avenue. Meer pursued defendant on foot, and saw defendant pull a gun out from the waistband of his pants and hold it while running down the

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alley. Meer was about 15 to 20 feet behind defendant during the pursuit, and, at some point, defendant turned right and ran through a gangway. Meer also turned right and ran through a parallel gangway to Montana Street. When Meer saw defendant emerge onto Montana Street, he was wearing a black hooded sweatshirt, which defendant had not been wearing when Meer first saw him. Meer subsequently arrested defendant, and put him in a police vehicle for about 30 minutes.

Following defendant's arrest, Magdaleno, Garcia, and Colon identified defendant as the shooter. During the identification, defendant stood outside the police vehicle illuminated by either police flood lights or flashlights, and was wearing handcuffs and the black sweatshirt. Police subsequently recovered a loaded gun from a yard at 5022 West Montana Avenue, and it was determined that the three spent cartridges recovered from the scene of the shooting were fired from the recovered gun.

The defense called several witnesses in order to establish that the State's witnesses had mistakenly identified defendant as the shooter. The jury found defendant guilty of first degree murder, and the trial court subsequently sentenced him to 60 years' imprisonment.

We affirmed that court's judgment on direct appeal. *People v. Navarro*, No. 1-05-3692 (2008) (unpublished order under Supreme Court Rule 23). In doing so, we rejected defendant's claim that his trial counsel was ineffective, that the State made improper statements during rebuttal, and that the trial court abused its discretion in sentencing him to a 60-year prison term. *Navarro*, 1-05-3692, order at 15, 20, 23.

On December 2, 2008, defendant filed a *pro se* post-conviction petition alleging, in pertinent part, ineffective assistance of trial and appellate counsel. He specifically maintained that his trial counsel was ineffective for not challenging the show-up identification at the scene, and concomitantly, that appellate counsel was ineffective for failing to raise this claim of ineffective assistance of trial counsel.

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On January 6, 2009, the trial court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that trial counsel did not err in deciding not to file a motion to suppress the identification evidence because defendant failed to demonstrate that the show-up conducted by Officer Meer was overly suggestive. The court further held that even if counsel had filed a successful motion to suppress, the outcome at trial would have been the same because defendant could not escape the fact that the State presented three eyewitnesses who unequivocally identified him as the shooter.

In this appeal, defendant challenges the propriety of that dismissal, arguing that he raised the gist of a constitutional claim of ineffective assistance of trial and appellate counsel. He specifically asserts that his trial counsel was ineffective for failing to challenge as inadmissible three suggestive, unreliable identifications. In turn, he further contends that appellate counsel failed to challenge trial counsel's ineffectiveness.

The State initially contends that defendant failed to support his allegations with "affidavits, records or other evidence," or an explanation as to why the same are not attached. See 725 ILCS 5/122-2 (West 2008). Defendant, however, raised both trial and appellate counsel's ineffectiveness, and supported his claim with the trial and appellate records. As argued in his brief, defendant maintains that these records establish ineffective assistance of counsel. Because defendant's allegations contained in the petition are based on matters of record, no extrinsic evidence is required. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Defendant has thus satisfied section 122-2 of the Act.

The State further maintains that defendant's underlying claim of ineffective assistance of counsel is barred by the principles of forfeiture, *res judicata*, and collateral estoppel because defendant failed to raise his ineffective assistance claim on direct appeal. Where defendant has previously taken a direct appeal from a judgment of conviction, the judgment of the reviewing court is *res judicata* as to all issues decided by the court, and any other claims that could have been raised on direct appeal, but were not, are waived. *People v. Enis*, 194 Ill. 2d 361, 375

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(2000). These procedural bars are relaxed, however, where the alleged waiver stems from the incompetence of appellate counsel. *People v. Harris*, 206 Ill. 2d 1, 33 (2002). Here, defendant alleges that both his trial and appellate counsel were ineffective. Therefore, we address the merits of defendant's claim. *Harris*, 206 Ill. 2d at 33-34. Our review of the circuit court's dismissal of defendant's post-conviction petition is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

To prevail on a claim of ineffective assistance based on counsel's failure to file a motion to suppress, defendant must show that a reasonable probability exists that the motion would have been granted, and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Spann*, 332 Ill. App. 3d 425, 432-33 (2002). The question of whether to file a motion to suppress evidence is generally considered a matter of trial strategy, and is given great deference. *People v. Bryant*, 128 Ill. 2d 448, 458 (1989).

In order for an out-of-court identification to be suppressed, the identification must be unnecessarily suggestive, and such suggestiveness must give rise to a substantial likelihood of misidentification. *People v. Follins*, 196 Ill. App. 3d 680, 687-88 (1990). Although show-up identifications are inherently suggestive, they are appropriate in situations where it needs to be

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determined whether a suspect is innocent and should be released immediately; and whether the police should continue to search for a fleeing culprit. *People v. Rodriguez*, 387 Ill. App. 3d 812, 830 (2008).

In assessing the likelihood of misidentification, courts consider the following factors: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).

Here, defense counsel's failure to file a motion to suppress the identification of defendant did not prejudice him because the motion would have been futile, and counsel is not required to make futile motions in order to provide effective assistance. *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006). The motion would have been futile because it was not even arguable that the show-up was overly suggestive. Police heard gunshots in the area, saw defendant flee, and immediately pursued him. After detaining defendant, Officer Meer placed defendant in his squad car, returned to the scene of the crime, and conducted a show-up where defendant was positively identified by three witnesses. Therefore, the show-up was necessary where police were in hot pursuit of defendant within minutes of the shooting. See *Rodriguez*, 387 Ill. App. 3d at 832 (holding that the show-up was not unnecessarily suggestive where police were in hot pursuit of defendant an hour after the crime).

In reaching this result, we are not persuaded by defendant's argument that police made the show-up unnecessarily suggestive by handcuffing defendant behind his back, spotlighting him, selecting an area near the crime scene as the location for the show-up, and not sequestering the witnesses. Defendant's contentions are unsupported where the record shows that the officers' actions were necessary under the totality of the circumstances.

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The fact that defendant was handcuffed during the show-up was irrelevant because a suspect in handcuffs does not automatically weaken the veracity of an identification. See *People v. Howard*, 376 Ill. App. 3d 322, 331-32 (2007). Spotlighting defendant was non-suggestive and, instead, necessary considering it was dark outside when the show-up was conducted. See *Rodriguez*, 387 Ill. App. 3d at 832 (stating that the lighting was a necessary part of the show-up to ensure that the eyewitness was able to make a reliable identification at night). Moreover, returning defendant to the scene of the shooting was not "suggestive" where the witnesses unequivocally identified defendant as the shooter. Furthermore, while separate viewing would have been the better practice, the fact that the witnesses were not sequestered, by itself, was not enough to find that this particular show-up was unnecessarily suggestive. *Rodriguez*, 387 Ill. App. 3d at 832 (simultaneous viewing was insufficient to find that a show-up was unnecessarily suggestive).

We further find that even if defense counsel had filed a successful motion to suppress, it is not even arguable that the outcome of defendant's trial would not have been different. As this court found on direct appeal, the evidence against defendant was overwhelming. Three witnesses unequivocally testified that defendant shot the victim. See *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007) (testimony of single eyewitness was sufficient to sustain a criminal conviction). As Officer Meer approached defendant, he ran and Meer saw him pull a gun out. The murder weapon was later found in the bushes in front of the house where defendant was arrested. Defendant's claims of ineffective assistance of trial counsel thus fail to show deficient performance or prejudice.

Defendant finally alleges that appellate counsel was ineffective on direct appeal. Because we have determined that defendant's underlying claim is without merit, it cannot be said that the appellate counsel's ineffectiveness constituted incompetence. *People v. Johnson*, 183 Ill. 2d 176, 187 (1998). Therefore, defendant's allegation of ineffective assistance of appellate counsel was properly dismissed.

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For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.