

No. 1-09-0938

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
Plaintiff-Appellee,) of Cook County
)
v.) No. 00 CR 12807
)
KEDRON JONES, JR.,) Honorable
) Stanley Sacks,
Defendant-Appellant.) Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and Robert E. Gordon concurred in the judgment.

ORDER

- ¶1 **Held:** Summary dismissal of defendant's postconviction petition is affirmed over defendant's contentions that he presented the gist of a constitutional claim of ineffective assistance of trial counsel and that the State violated the discovery requirements of *Brady v. Maryland*.
- ¶2 Defendant Kedron Jones, Jr. appeals the summary dismissal of his *pro se* postconviction petition. We affirm.

¶3 Following a 2004 jury trial, defendant was found guilty of the first degree murder and robbery of Arthur Hill and was sentenced to consecutive terms of 35 and 15 years in prison. We affirmed that judgment on direct appeal over defendant's contentions that: (1) his arrest and the evidence it yielded should have been suppressed because police lacked probable cause to arrest him based solely on a tip from Ronald Pollard, the actual shooter; (2) his confession was coerced and should have been suppressed because it was made after a 59-hour detention; and (3) his trial counsel was ineffective. *People v. Kedron Jones, Jr.*, No. 1-04-2088 (2007) (unpublished order under Supreme Court Rule 23) (*Jones*). Defendant then filed this *pro se* postconviction petition which was summarily dismissed by the trial court.

¶4 Defendant appeals, arguing that the trial court erred because his petition presented the gist of a constitutional claim of ineffective assistance of trial counsel and that the State violated the discovery requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). The facts supporting defendant's convictions have been set out in detail in *Jones*. We revisit them here as necessary to understand the issues raised on appeal.

¶5 Defendant was convicted on evidence showing that he and Pollard agreed to rob a drug dealer on April 10, 2000. Defendant obtained a gun from his son, Kedron Jones III (Jones III), and a man named Hawk. Defendant and Pollard then drove in Pollard's car to the Pavilion Apartment complex at 5441 East River Road. Jones III and Hawk followed in another car. When the group arrived at the apartment complex, Hawk gave Pollard the gun. Pollard walked toward the complex alone. Pollard returned about 30 minutes later and told defendant he had robbed a convenience store inside the complex instead of the drug dealer and shot Hill, the clerk.

1-09-0938

Defendant gave Jones III \$500 in cash, explaining that Pollard had robbed and shot a clerk.

Defendant told Jones III to dispose of the gun.

¶6 Defendant was arrested at 11 a.m on April 21, 2000, after Pollard, who was in custody for a drug charge, told police that defendant was involved in Hill's murder and robbery. At 10 p.m. on April 23, 2000, defendant made an inculpatory statement to Assistant State's Attorney Jeff Allen. At 4:03 a.m. on April 24, 2000, defendant made a videotaped statement. Later that morning, he appeared before a judge for a probable cause hearing. The judge determined that Pollard's tip gave police probable cause to arrest defendant.

¶7 Defendant claims that before trial he filed a *pro se* motion to quash his arrest. Defendant alleges that he attached to the motion an affidavit from Pollard dated April 3, 2001. In the affidavit, Pollard averred that defendant did not know of Pollard's plan to murder Hill. Pollard also averred that the statements he made to police at the 12th district police station implicating defendant in the murder were false and inaccurate. Defendant maintains that after he filed his *pro se* motion to quash arrest, the court appointed the office of the public defender to represent him and that counsel withdrew his *pro se* motion. The record does not show that defendant filed a *pro se* motion to quash or that it was later withdrawn by counsel.

¶8 Before trial, defense counsel filed motions to quash defendant's arrest and suppress his statements. Defense counsel argued that defendant's statements should have been suppressed because they were the "fruit" of an arrest without probable cause. Counsel claimed that Pollard's tip that defendant was involved in Hill's murder was unreliable and did not give police probable cause to arrest defendant. Counsel also claimed defendant's statements were involuntary because

police physically abused him.

¶9 At the hearing on defendant's motion to suppress statements for lack of probable cause, Detective Demosthenes Balodimas testified that about 8 a.m. on April 21, 2000, he received a telephone call from an officer in the 12th district who said Pollard had been arrested on a narcotics offense. Pollard told the detectives in the 12th district that he had information about Hill's murder. Balodimas said "Pollard told me he was in Red or Red Dog's apartment at the hotel." Pollard also told Balodimas that "Red did a lick [robbery] and that he [Red] had shot a *** honkey [white person] in the head." Pollard told Balodimas that Red's name was "Kenneth" Jones and that he was a 40- to 45-year-old African-American male. In a later conversation, Pollard said Red lived in room 622 of the Viceroy Hotel. Pollard told Balodimas that defendant's son drove defendant to and from the murder and the son disposed of the gun used.

¶10 At a hearing on the combined motions, Detective Balodimas testified that he went to room 622 of the Viceroy Hotel on April 21, 2000, with his partner Detective Randy Daniel Troche and two other officers. Defendant answered the door and said his nickname was "Red" and that his real name was Kedron Jones. Balodimas told defendant that the officers were conducting an investigation and asked if defendant would accompany the officers to the police station. Defendant agreed to do so. Before entering the police car, defendant was handcuffed and advised of his *Miranda* rights by Balodimas. Balodimas said he never saw an officer strike or threaten defendant in the interview room.

¶11 Detective Troche testified he and Balodimas went to defendant's apartment on April 21,

1-09-0938

2000, while investigating the murder and robbery of Hill. Defendant allowed Troche to enter the apartment and agreed to go to the police station with him. At the station, Troche and Balodimas placed defendant in an interview room. Troche said he did not see Detective Charles Redman strike or threaten defendant.

¶12 On cross-examination, Troche said he did not have a warrant for defendant's arrest. He said Balodimas gave him defendant's name as "Ken something Jones." In the interview room, there was a ring attached to the wall but defendant was not handcuffed to it.

¶13 Detective Redman testified that he was present in the interview room with defendant. Redman denied striking, threatening or making promises to defendant. He also said that he did not see another officer hit defendant.

¶14 Assistant State's Attorney Allen testified that he met with defendant in the company of Assistant State's Attorney Robert Milan and Detective Barney Graf. Allen said he advised defendant of his *Miranda* rights before interviewing defendant. Defendant spoke with Allen and elected to give a videotaped statement. The State entered into evidence paperwork signed by defendant to show he consented to the statement.

¶15 Assistant State's Attorney Milan testified that he was the supervisor of the State's Attorney felony review unit on April 23, 2000. On that date, Milan was in the interview room with Allen, Graf and defendant. Milan said that at times, he and Allen were alone in the interview room with defendant and that defendant never complained of being struck or threatened by the officers. Defendant also never complained of pain.

¶16 Defendant testified that he was in bed with a woman when he heard a key start unlocking his apartment door at the Viceroy Hotel. The door was “slung open” and four or five officers came into the apartment with their guns drawn. The officers handcuffed defendant and placed him against a wall. Defendant said the officers did not show him an arrest warrant. Defendant was then taken to the police station. There, Detective Redman slapped him in the face and head. Defendant said that Detective Graf also struck him and “stomped” him in the groin. Defendant found bruises on his inner arm when he went to the bathroom. He also noticed there was blood in his urine. Defendant said he made his statement when he was “kind of worn out,” and told police exactly what they wanted to hear. Defendant received medical treatment at Cermak Hospital and was referred to an urologist.

¶17 On cross-examination, defendant denied having the nickname “Red.” He said he was handcuffed while in the interview room. Defendant said he was beaten for three days and that police had not told him of Hill’s murder or armed robbery when he made his statement.

¶18 Officer Patrick Learnahan testified in rebuttal that he was working at the police station lockup on April 22, 2000. Learnahan did not see visible injuries on defendant nor hear him complain of injuries.

¶19 Defense counsel tried to secure defendant’s medical records from Cermak Hospital, where he was treated while in custody. Counsel did not produce the records because the hospital had not been able to locate them. The parties stipulated that the hospital lost the records. Counsel informed the court that she spoke with Dr. Anagalate, one of the doctors who treated defendant, and that he agreed to testify at the hearing on defendant’s motion to suppress

statements. Counsel rested without presenting Dr. Anagalate's testimony. Counsel also did not call Pollard as a witness. The trial court denied defendant's motions to quash arrest and suppress statements.

¶20 After the hearing on defendant's motion to suppress statements, defendant's medical records were discovered. The records were dated January 23, 2001, signed by Dr. Anagalate and showed defendant complained of groin pain as a result of a trauma he sustained six months earlier.

¶21 On January 5, 2009, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged his trial counsel was ineffective for: (1) withdrawing his *pro se* motion to quash arrest; (2) failing to call codefendant Pollard as a witness either at the motion to quash arrest hearing or at trial; (3) failing to call Dr. Anagalate as a witness at trial; and (4) failing to produce his medical records at the hearing on the motion to quash arrest to support his contention that he was kicked in the groin. Defendant also claimed the State violated the discovery requirements of *Brady* when it failed to tender defense counsel a "Community Alert" that police issued the day after Hill's murder. Defendant alleged that the alert contained Pollard's picture and description. Defendant also raised a claim of ineffective assistance of appellate counsel based on counsel's failure to raise these arguments on direct appeal.

¶22 Defendant attached to his petition a file-stamped copy of his "*pro se*" motion to quash arrest, dated May 3, 2001. The record shows that this motion was filed by a public defender. Defendant also attached his medical records and Pollard's affidavit. In the affidavit, Pollard averred that defendant did not know of Pollard's plan to murder Hill and that defendant was

innocent of all charges. Pollard also averred that the statements he made to police at the 12th district police station implicating defendant in the murder were false and inaccurate. Defendant did not attach the community alert to the petition. Rather, he attached a partial transcript from Pollard's trial of Detective Graf's testimony discussing the alert.

¶23 The trial court summarily dismissed defendant's *pro se* postconviction petition on March 13, 2009. In its written order, the court concluded that our holding in *Jones* was proper, defendant's trial counsel was not ineffective and there were no *Brady* violations. Defendant appeals.

¶24 A postconviction petition will be summarily dismissed at the first stage of proceedings if it is either frivolous or patently without merit, 725 ILCS 5/122-2.1(a)(2) (West 2006). A petition is frivolous or patently without merit if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204 (2009). For a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim (*Hodges*, 234 Ill. 2d at 9-10) supported by the record or accompanying affidavits. 725 ILCS 5/122-2 (West 2006). If the record contradicts the defendant's claims, the dismissal of his petition will be upheld. *People v. Rogers*, 197 Ill. 2d 216, 222, 756 N.E.2d 831 (2001).

¶25 Defendant first contends that the trial court erred in summarily dismissing his petition because he presented the gist of a constitutional claim of ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove both that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. *Strickland v.*

Washington, 466 U.S. 668, 687-88 (1984). To establish deficient performance, a defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42, 864 N.E.2d 196 (2007). To establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 327, (2011). If either prong of the *Strickland* test is not met, the defendant's claim fails. *Perry*, 224 Ill. 2d at 342. We need not consider whether counsel's performance was deficient before determining whether the defendant was prejudiced by the alleged deficiencies. *Perry*, 224 Ill. 2d at 342.

¶26 Here, defendant claims his trial counsel was ineffective for: (1) withdrawing defendant's *pro se* motion to quash arrest; (2) failing to investigate the contents of the motion; (3) failing to present Pollard's affidavit or testimony to the trial court either at the hearing on the motions to quash and suppress or at trial; and (4) failing to call Dr. Anagalate as a witness at the hearing on the motion to suppress to testify about defendant's groin injury.

¶27 We first note that the record does not support defendant's ineffectiveness claim. The record shows defendant did not file a *pro se* motion to quash arrest but, rather, filed the motion through counsel. The record also does not show that defendant's appointed counsel later withdrew this motion or otherwise failed to investigate the contents of the motion. Defendant does not allege in his petition that he told his attorney about the *pro se* motion or Pollard's affidavit. Given this, defendant's ineffectiveness claim is not supported by the record. 725 ILCS 5/122-2 (West 2006).

¶28 Deficiency of the record aside, counsel’s decision not to call Pollard and Dr. Anagalate as witnesses at the hearing on the motion to suppress defendant’s statements is a matter of trial strategy that is generally not subject to attack on the grounds of ineffectiveness of counsel. *People v. Tate*, 305 Ill. App. 3d 607, 612, 712 N.E.2d 826 (1999), citing *People v. Flores*, 128 Ill. 2d 66, 85-86, 538 N.E.2d 481 (1989). Counsel’s decision benefits from a strong presumption that it was proper. *Perry*, 224 Ill. 2d at 241-42. After carefully examining the record, we find that defendant has failed to establish he was prejudiced by counsel’s decision because he cannot show there is a reasonable probability that the outcome of the motion to suppress hearing or trial would have been different had it not been for this alleged error by his trial counsel.

¶29 The record shows defense counsel filed a motion to suppress defendant’s statements, arguing that defendant’s statements were the “fruit” of an arrest without probable cause. Counsel claimed that Pollard’s tip that defendant was involved in Hill’s murder was unreliable and did not give police probable cause to arrest defendant. The court denied the motion. Although counsel did not present Pollard’s affidavit to the court, we cannot say there is a reasonable probability that had the affidavit been presented it would have changed the outcome of the proceeding. Pollard’s affidavit is dated April 3, 2001, nearly a year after defendant’s arrest. In the affidavit, Pollard averred that the statement he made to police which led to defendant’s arrest was “false and inaccurate.” Pollard did not deny making the statement to police. Pollard’s recantation of his statement to police does not negate probable cause to arrest defendant because the existence of probable cause depends on the totality of the circumstances and facts known to police at the time of the arrest. See *People v. Tisler*, 103 Ill. 2d 226, 2236-37, 469 N.E.2d 147

(1984).

¶30 Similarly, counsel's decision not to call Pollard as a witness at trial does not undermine our confidence in the outcome in light of defendant's videotaped statement. Defendant said in his statement he and Pollard planned to rob a drug dealer, he drove Pollard to the scene of the crime, he saw Pollard take a gun to the apartment complex and he waited for Pollard to return. When Pollard returned, he told defendant he had robbed a convenience store instead of a drug dealer and fired the gun inside the store. Defendant acknowledged giving his son \$500 in cash and telling him to dispose of the gun used in the crime.

¶31 In reaching this conclusion, we are unpersuaded by *People v. Makiel*, 358 Ill. App. 3d 102, 830 N.E.2d 731 (2005), cited by defendant. Here, unlike *Makiel*, Pollard's testimony would not have directly contradicted the evidence at trial. The contents of Pollard's affidavit do not entirely conflict with defendant's statement. Defendant never said he entered the apartment complex or shot the clerk. He also never said he knew Pollard would rob the convenience store and shoot the clerk.

¶32 We also cannot say that counsel was ineffective for not calling Dr. Anagalate as a witness at the motion to suppress hearing where, in light of the medical records, there is not a reasonable probability that Anagalate's testimony would have changed the outcome of the proceeding. We first note that defendant has failed to support his claim with an affidavit from Anagalate, detailing the contents of his alleged testimony. See 725 ILCS 5/122-2 (West 2006). The record shows defense counsel was aware of Anagalate's willingness to testify but did not present him as a witness. As mentioned, counsel's decision was a matter of trial strategy which benefits from a

strong presumption that it was proper. *Perry*, 224 Ill. 2d at 241-42. Again, defendant has failed to show he was prejudiced by counsel's decision. The medical records do not show that defendant's groin injury was the result of police brutality. Rather, the records show that defendant said the pain was from a trauma he suffered six months before being treated in January of 2001. Defendant was in police custody in April of 2000, two months before the trauma that caused his groin injury.

¶33 Defendant next contends that he presented the gist of a constitutional claim that the State violated the discovery requirements of *Brady* when it failed to tender the defense a "Community Alert" that police issued soon after Hill's murder. Defendant alleges that the alert contained Pollard's picture and description. He argues that had the defense been tendered the alert, it would have been able to rely on it during the hearing on the motion to suppress to adversely affect Pollard's credibility at the time he told police defendant was involved in the murder. Defendant claims if Pollard had been viewed as a suspect when he made those statements, the court's probable cause determination would have differed.

¶34 The State is required to disclose to defense counsel any information material to the guilt or punishment of the accused. *Brady*, 373 U.S. at 87. To establish a *Brady* violation a defendant must allege: "(1) [t]he evidence at issue [was] favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Here, defendant has failed to show that he was prejudiced by the State's alleged failure to disclose the alert.

¶35 We first observe that defendant's violation of a *Brady* claim is not supported by the record because he has failed to attach to his petition the alert that is the basis of his claim. See 725 ILCS 5/122-2 (West 2006).

¶36 Insufficient record aside, defendant has failed to establish a *Brady* violation. Under the third *Brady* factor, a defendant must show that he was prejudiced by the State's failure to disclose evidence that is material to his guilt. *Brady*, 373 U.S. at 87. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *People v. Harris*, 206 Ill. 2d 293, 311, 794 N.E.2d 181 (2002).

¶37 The alert in question is not material evidence such that the State's failure to disclose it to the defense undermines our confidence in the outcome of the hearing on defendant's motion to suppress statements. Contrary to defendant's argument, Detective Graf did not testify that the alert pictured, named or otherwise implicated Pollard as a suspect in Hill's murder at the time he gave police the tip which gave rise to probable cause to arrest defendant. Graf testified that the alert contained a clothing description of the offender. In light of this, even if counsel were in possession of the alert, she would not have been able to rely on it to adversely affect Pollard's credibility at the time he told police defendant was involved in the murder. The trial court did not err in concluding there was no *Brady* violation and in summarily dismissing defendant's postconviction petition.

¶38 The judgment of the trial court is affirmed.

¶39 Affirmed.