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FIRST DIVISION
March 28, 2011

No. 1-07-3453

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	Nos. 92 CR 4451
)	& 92 CR 4453
JONATHAN JUDKINS,)	
)	Honorable
Defendant-Appellant.)	Thomas J. Condon,
)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

ORDER

HELD: The circuit court properly dismissed defendant's postconviction petitions in two separate cases without an evidentiary hearing where defendant failed to make a substantial showing of a violation of a constitutional right.

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Defendant Jonathan Judkins, who was convicted of two first degree murders after separate jury trials, appeals the second-stage dismissals of his petitions for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). Defendant argues the circuit court erred in dismissing his petitions without an evidentiary hearing because he made a substantial showing of a violation of a constitutional right. Specifically, he contends he was denied effective assistance of counsel where appellate counsel did not challenge on direct appeal the denial of defendant's pretrial motions to quash his arrest, which asserted the police lacked both reasonable suspicion to justify the initial traffic stop and probable cause to justify defendant's arrest.

We affirm the circuit court's dismissal of defendant's postconviction petitions because he has failed to make a substantial showing of a violation of a constitutional right.

I. BACKGROUND

This appeal involves the second-stage dismissal of two postconviction petitions in case numbers 92 CR 4451 and 92 CR 4453, which were consolidated.

In 1994, in case number 92 CR 4453, defendant was tried for the January 11, 1992 aggravated kidnapping, armed robbery, and fatal shooting of James Lamont Ford. The State's evidence established that defendant and Eric Taylor forced the victim at gunpoint to get into their car, took him to an outdoor location a few miles away, stripped him naked, and fatally shot him in the head. On January 29, 1992, when the victim's friends identified defendant in a police lineup as one the abductors, they informed the police that defendant was wearing the victim's stolen jacket, pants and shoes. Following the jury trial, defendant was convicted and sentenced

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to natural life imprisonment for murder followed consecutively by a 30-year sentence for armed robbery and a 15-year sentence for aggravated kidnapping.

On direct appeal, this court affirmed his conviction and sentence. *People v. Judkins*, 1-94-3868 (July 26, 1996) (unpublished order under Supreme Court Rule 23). Defendant filed his first postconviction petition in January 1997, and the circuit court denied it in March 1997. On appeal, appointed counsel sought leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court reviewed the record and agreed there were no arguable bases for collateral relief. *People v. Judkins*, No. 1-97-1384 (October 17, 1997). In September 2003, defendant filed a successive postconviction petition, contending, *inter alia*, that he received ineffective assistance of appellate counsel for failure to challenge on direct appeal the trial court's erroneous denial of his motion to quash arrest. This petition was eventually consolidated with the petition defendant filed in case number 92 CR 4451.

Less than three weeks after the fatal shooting of Ford, defendant was involved in another murder. In case number 92 CR 4451, defendant, in 1997, was tried jointly with codefendant Taylor for the January 29, 1992 fatal shooting of Ronnie Mays. The State's evidence established that defendant and Taylor accosted the victim while he was in the front passenger seat of a car parked in an alley. Defendant and Taylor displayed shotguns. The driver of the car fled while defendant and Taylor fired gunshots into the car. Defendant, Taylor, and a third man then left the alley in a Buick. Shortly thereafter, Taylor returned on foot and drove the car containing May's body to another location. About one hour later, defendant, Taylor, and a third man were arrested after a traffic stop. Defendant was later identified as one of the offenders during police lineups.

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On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Judkins*, 1-98-0412 (January 21, 2000) (unpublished order under Supreme Court Rule 23). Defendant filed an amended postconviction petition in this matter in October 2005, contending, *inter alia*, that he received ineffective assistance of appellate counsel for failure to challenge on direct appeal the trial court's erroneous denial his motion to quash arrest where there was no probable cause to arrest him. This petition was eventually consolidated with the petition filed in 92 CR 4453.

On November 16, 2007, the circuit court granted the State's motions to dismiss defendant's petitions in both 92 CR 4451 and 92 CR 4453, and defendant filed the appeal now before this court.

II. ANALYSIS

The Act provides that a defendant may challenge his conviction for violations of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2004). Here, defendant's petitions were dismissed at the second stage of the three-stage process established under the Act for adjudicating postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2004). At the second stage of the proceedings, the State is required to either answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2004). A defendant is not entitled to a third-stage evidentiary hearing unless the allegations set forth in the petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998).

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In reviewing the sufficiency of the petition, all well-pleaded facts are taken as true. *Coleman*, 183 Ill. 2d at 378-79. However, nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. *Coleman*, 183 Ill. 2d at 381. A court may properly dismiss the petition if its allegations are based upon matters of record and those allegations are contradicted by the record from the original trial proceedings. *Coleman*, 183 Ill. 2d at 381-82. We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

On appeal, defendant contends he is entitled to an evidentiary hearing because he made a substantial showing that he received ineffective assistance from appellate counsel, who failed to challenge in both 92 CR 4451 and 92 CR 4453 the denial of defendant's motions to quash arrest based on the lack of both reasonable suspicion to support the traffic stop and probable cause to support his arrest.

The State argues that defendant's appeal in 99 CR 4453 is a successive postconviction petition and, thus, subject to the procedural hurdle of the cause and prejudice test. Because the Act contemplates the filing of only one postconviction petition, a successive petition must be filed with leave of court, which may be granted only if a petitioner demonstrates cause and prejudice. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Furthermore, because defendant's claim does not assert actual innocence, the strict application of the statutory bar is only relaxed where fundamental fairness so requires. *Pitsonbarger*, 205 Ill. 2d at 458-60; *People v. Flores*, 153 Ill. 2d 264, 279 (1992). Cause is some objective factor, external to the defense, which impeded counsel's efforts to raise the claim in an earlier proceeding. *Pitsonbarger*, 205

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Ill. 2d at 460. To show prejudice, a petitioner must show that the claimed error so infected the entire trial that the resulting conviction or sentence violates due process. *Pitsonbarger*, 205 Ill. 2d at 464.

We agree with the State that defendant's appeal in 92 CR 4453 is a successive petition and he has failed to address the cause and prejudice test. Nevertheless, defendant essentially avoids this procedural hurdle because his successive petition in 92 CR 4453 is consolidated with his first postconviction petition in 92 CR 4451. Defendant's appeal here is limited to his identical claims in both petitions that his appellate counsel rendered ineffective assistance by failing to challenge the January 29, 1992 traffic stop and arrest for lack of reasonable suspicion and probable cause, respectively. Defendant complains that his illegal arrest led to the police lineups that resulted in various occurrence witnesses identifying him as an offender in the separate shootings of Ford and Mays. Under these circumstances, our review of defendant's claim in 92 CR 4451 as an initial postconviction petition will obviate any review of the same claim in 92 CR 4453 under the cause and prejudice test for a successive postconviction petition.

To prevail on a claim of ineffective assistance of appellate counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *People v. Johnson*, 206 Ill. 2d 348, 378 (2002). A defendant who claims appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and there was a reasonable probability that counsel's decision prejudiced defendant. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001).

Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues, which in counsel's judgment, are without merit, unless counsel's appraisal of the merits is patently erroneous. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference, and if the underlying issue is nonmeritorious, then the defendant has suffered no prejudice. *Rogers*, 197 Ill. 2d at 223.

First, defendant argues that counsel should have challenged on appeal the unlawful stop of defendant because the testimony of the arresting officer, Officer Marovich, clearly established that he had no reasonable suspicion to stop the car in which defendant was a passenger. According to defendant, Officer Marovich's testimony established that he stopped the Camaro driven by Taylor based on nothing more than a mere hunch where Officer Marovich had observed the car's occupants engage in entirely innocent activity.

Defendant seriously mischaracterizes Officer Marovich's testimony at the hearing on the motions to quash. Our review of the record establishes that Officer Marovich clearly testified that he stopped the car driven by Taylor based upon specific, articulable facts and reasonable inferences that led him to reasonably suspect that the three occupants of the car might have committed or been about to commit a crime. Specifically, Officer Marovich drove his police car to an apartment complex area around 2 a.m. on January 29, 1992, based on a complaint that some people might be attempting to break into and steal cars. At the scene, a resident of the apartment complex approached Officer Marovich and told him that the occupants of a Camaro and a Buick had been in and out of those cars, walking around the parking lot area of the apartment buildings,

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and looking into cars. Further, Officer Marovich observed Taylor and defendant exit the Camaro and speak to the occupants of the nearby parked, reddish-maroon Buick. Officer Marovich, who was a 15-year veteran of the police force, was familiar with the area, which had a high incidence of auto thefts and burglaries, and knew that auto thefts usually involved two cars. Taylor and defendant returned to their Camaro and drove away. Officer Marovich followed the Camaro, while other officers were designated to deal with the Buick. When Officer Marovich called in the license plates, he learned that the Buick had been reported stolen. Officer Marovich then curbed the Camaro about six blocks from the apartment complex parking lot.

The record refutes defendant's claim that Officer Marovich unlawfully stopped the Camaro based on a mere hunch that its occupants might have been engaged in unlawful activity. Officer Marovich's testimony established that he had specific and articulable facts which taken together with rational inferences from those facts reasonably warranted the minimal intrusion of stopping the Camaro. See *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906, 88 S. Ct. 1868, 1880 (1986); *People v. Brownlee*, 186 Ill. 2d 501, 518 (1999). Trained police officers are allowed "latitude in assessing the 'whole picture' based upon the totality of the circumstances, including considerations of modes or operation of certain kinds of lawbreakers and various practical, objective considerations in determining whether there is reasonable suspicion that a crime has been committed." *People v. Mata*, 178 Ill. App. 3d 155, 160-61 (1988). In accordance with *Terry*, Officer Marovich was allowed to briefly detain the occupants of the Camaro to investigate the possibility of criminal activity. Because the record refutes defendant's claim that Officer Marovich unlawfully stopped the Camaro, there is no merit to defendant's assertion that

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appellate counsel was patently wrong for declining to advance this claim.

Next, defendant argues that counsel should have challenged on direct appeal defendant's unlawful arrest because Officer Marovich's testimony clearly established that he had no probable cause to arrest him. According to defendant, Officer Marovich's testimony established that he had no specific information indicating that defendant had committed a crime but, at best, merely had information that defendant was near other people who were suspected of criminal activity. Specifically, defendant claims that, before Officer Marovich arrested defendant, Officer Marovich knew that, of the three Camaro occupants, only Taylor and Michael Austin matched the description of the two suspects involved in the Harvey homicide. The record, however, refutes defendant's characterization of the facts known to Officer Marovich before he arrested defendant.

According to the record, Officer Marovich testified that when he curbed the Camaro, he asked the driver, Taylor, for his driver's license and insurance card. Taylor could not produce those documents and was taken into custody for a traffic violation. While Officer Marovich was with the Camaro, he learned the following: the Buick had been stolen from Harvey; defendant and Michael Austin were from Harvey; officers had arrived at the Buick's location in the parking lot and one occupant of the Buick (Gary Austin) fled the scene; and a shotgun was found in the back of the Buick. Furthermore, Officer Marovich had seen defendant talking with the occupants of the Buick before defendant left the parking lot in the Camaro. In addition, another officer arrived at Officer Marovich's location and informed him that a shooting homicide had occurred in Harvey within the hour, a reddish Buick was involved in that shooting, and the occupants of

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the Camaro matched the description of the offenders wanted in that shooting. At that point, defendant and Michael Austin were also arrested. Officer Marovich did not know how many offenders were involved in the Harvey shooting.

Officer Marovich testified that a total of four suspects were arrested and transported to the police station. Later, when Officer Marovich was writing his police report, he learned that the Harvey police were looking for two suspects and the clothing and physical description of those two suspects. In his report, Officer Marovich indicated that the clothing and physical description of the Harvey homicide offenders matched Taylor and Michael Austin. Defense counsel thoroughly cross-examined Officer Marovich concerning a discrepancy between his testimony and his police report, which indicated that, before defendant's arrest, Officer Marovich was informed that the Harvey police "were looking for two male subjects armed with shotguns."

"Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008). Questions of probable cause "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *People v. Love*, 199 Ill. 2d 269, 279 (2002), quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890, 69 S. Ct. 1302, 1310 (1949).

The record refutes defendant's allegation that Officer Marovich knew before defendant's arrest that he did not fit a description of the Harvey homicide offenders. According to the record, Officer Marovich did not know the clothing and physical description of the Harvey offenders

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before he arrested defendant. He was merely told that the occupants of the Camaro matched the description of those offenders. After defendant's arrest, Officer Marovich learned the clothing and physical description of the Harvey offenders and indicated in his report that Taylor and Michael Austin matched that description. The record refutes defendant's claim that Officer Marovich received information during the *Terry* stop that implicated just Taylor and Michael Austin and simultaneously exculpated defendant. Consequently, there is no merit to defendant's assertion that appellate counsel was patently wrong for declining to advance defendant's claim that Officer Marovich lacked probable cause to arrest him.

III. CONCLUSION

The record refutes the assertions defendant proffered to support his challenges to his *Terry* stop and arrest. Consequently, defendant's claims are totally lacking in merit, and appellate counsel was not patently wrong for choosing not to raise those particular arguments. Because defendant fails to establish any basis for appellate counsel to challenge the denial of the motion to quash, appellate counsel's performance did not fall below an objective standard of reasonableness and defendant fails to satisfy the first prong of Strickland. Accordingly, defendant fails to make a substantial showing of ineffective assistance of appellate counsel so as to require an evidentiary hearing. See People v. Gordon, 378 Ill. App. 3d 626, 640 (2007) (the failure to satisfy either prong of the Strickland test precludes a finding of ineffective assistance of counsel).

The circuit court correctly granted the State's motions to dismiss defendant's postconviction petitions, which failed to make a substantial showing of a violation of a

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constitutional right. Accordingly, we affirm the judgment of the circuit court.

Affirmed.