

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).

FOURTH DIVISION
December 12, 2013

No. 1-12-1474

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, Illinois,
)	County Department,
v.)	Criminal Division.
)	
JAMES WORTHEM,)	No. 07 CR 9711
)	
Defendant-Appellant.)	Honorable
)	Lauren Gottainer Edidin
)	Judge Presiding

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it found that the defendant could not proceed to the third stage evidentiary hearing with his postconviction petition. The defendant made a substantial showing that appellate counsel was ineffective for failing argue that the police lacked probable cause to arrest the defendant.

¶ 2 Following a bench trial in the circuit court of Cook County, the defendant, James Worthem, was found guilty of robbery and sentenced as a Class X offender to 20 years' imprisonment. The defendant here appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2002). He

No. 1-12-1474

contends that his petition should have proceeded to an evidentiary hearing because he made a substantial showing that he was denied his constitutional right to effective representation by appellate counsel, where counsel failed to argue that the police lacked probable cause to arrest the defendant. For the reasons that follow, we reverse and remand for a third stage postconviction evidentiary hearing.

¶ 3 I. BACKGROUND

¶ 4 The record before us contains the following relevant facts and procedural history. On April 22, 2007, the defendant was charged with one count of robbery against the 51-year-old victim, Concepcion Solis.

¶ 5 A. Pre-Trial Proceedings

¶ 6 During discovery, the defendant filed a motion requesting the production of any photographs, whether of the defendant or another person, in the event that photographs were used to identify the defendant. At a pre-trial status hearing on July 27, 2007, the State tendered general case reports, and stated that "there are still photos outstanding." The trial court asked defense counsel whether the photographs were necessary, and defense counsel responded that he needed to file a motion to quash arrest and suppress evidence. At the next pre-trial hearing, in response to the defendant's oral request for photographs, the State acknowledged that the police reports reference "a photo array or something similar" but stated that the detective who "was supposed to bring it *** had failed to appear, and *** it as not followed up on." The trial court told the Sate to "[m]ake sure you get that" for the defendant's presentation of his motion to quash arrest and suppress evidence.

No. 1-12-1474

¶ 7 On the next hearing date, the trial court asked the parties about the nature and status of the photographs. The State responded that the defendant was the "named offender," and that the victim had identified him from photographs on the squad car computer and then later in a lineup. The State indicated that it was not certain that the squad car photographs could be found, but stated that the identification procedure showed that the defendant was properly charged. The trial court then told the defendant that "this is an important decision in terms of whether or not you withdraw your motion or not on the probable cause." The defendant chose to proceed with his motion to quash arrest and suppress evidence and that motion was heard simultaneously with the defendant's bench trial. The State never produced the photo array at that hearing/trial.

¶ 8 B. Bench Trial/Hearing on Motion to Quash Arrest and Suppress Evidence

¶ 9 At the defendant's simultaneous bench trial and motion to quash arrest hearing, Officer Michael Nolan (hereinafter Officer Nolan) first testified that at about 5 p.m., on April 22, 2007, he was in a marked squad car with his partner, Officer Saldonado patrolling the area near Springfield and Grand Avenues in Chicago, when he was "flagged down" by the victim, Conception Solis. The officer let Solis into the squad car. Solis spoke Spanish, and even though neither Officer Nolan or his partner spoke Spanish, from their conversation with Solis they understood that either a robbery or "some sort of disturbance" had occurred. After speaking with Solis, Officer Nolan proceeded to 3958 Grand Avenue. Once there, according to Officer Nolan, Solis pointed in the direction of "Offender No. 2," who was later identified as Annette Garcia (hereinafter Garcia). Garcia was standing on the sidewalk, and Officer Nolan exited his squad car and detained her. Officer Nolan then radioed for a Spanish speaking officer, and Officer

No. 1-12-1474

Alverado arrived on the scene.

¶ 10 By translation from Officer Alverado, Solis told the officers that she was walking on the 3900 block of West Grand Avenue when she noticed that she was being followed by Garcia, and another individual, whom she described as a white 40-year-old male, approximately 5' 9" or 5' 10" tall and weighing 198 pounds. Solis stated that as she proceeded to the corner of Grand Avenue and Pulaski Road she noticed that she was being followed only by the male suspect.

¶ 11 Officer Nolan further testified that Solis told him that the man continued to follow her until the intersection of LeMoyne Street and Pulaski Road where he then pushed her to the ground and snatched her purse. Solis told Officer Nolan that she chased the offender eastbound on LeMoyne Street and then southbound in the east alley of Pulaski Road. According to Officer Nolan, Solis then saw Garcia "assist [the offender] in the rear gate of 3958 on Grand Avenue" and the offender going into the building. Solis then returned to the front of 3958 West Grand Avenue where she was confronted by Garcia. Officer Nolan testified that after that, Solis called 911.

¶ 12 The following colloquy next occurred:

"Q [ASA]: As you approached the rear of 3958 Grand [Avenue], what did you observe?

A [Officer Nolan]: I observed an individual matching the description given by Mrs. Solis Conception.

Q [ASA]: Do you see that person here in court today?

A [Officer Nolan]: Yes.

No. 1-12-1474

Q [ASA]: And is that the same person you have identified as James Worthem [the defendant]?

A [Officer Nolan]: Yes.

Q: When you saw Mr. Worthem [the defendant], where was he?

Mr. Vongher [the public defender]: Objection, Judge. Mischaracterizing the evidence.

The Court: He's indicating he saw a person that matched the description and that he identified him as Mr. Worthem [the defendant].

Mr. Vongher [the public defender]: Is the officer saying he saw Mr. Worthem [the defendant] on the street?

The Court: Is that your testimony?

The witness [Officer Nolan]: I'm saying I saw someone that matched the description given to me that I now know was Mr. Worthem [the defendant].

Q [ASA]: Is the person who you saw the same person who is here?

Mr. Vongher [The public defender]: Objection, Judge.

The witness [Officer Nolan]: Yes.

The Court: Basis?

Mr. Vongher [the public defender]: She just asked him is the same person he saw on the street Mr. Worthem [the defendant]. I don't think he is saying that.

The Court: Are you saying that?

The witness [Officer Nolan]: Yes.

No. 1-12-1474

The Court: That was my understanding. Okay. It will be allowed. Go ahead."

¶ 13 Officer Nolan next testified that when he initially saw "the defendant," "the defendant" was 20 feet away in the upper foyer area of the rear entrance of the apartment at 3958 Grand Avenue. The officer saw "the defendant" go inside the door. He stated that it was not more than 20 minutes from when Conception Solis first flagged him down to when he observed "the defendant." Officer Nolan stated that he gave chase to "the defendant" but that he was unable to apprehend him.

¶ 14 Officer Nolan averred that when he returned to his squad car, he showed Solis three photographs on the computer in his vehicle, but that Solis could not identify the offender from any of those photographs. Officer Nolan could not recall whom the photographs he showed to Solis depicted. He was certain, however, that none of the photographs depicted the defendant.

¶ 15 Officer Nolan further testified that after returning to his squad car, he interviewed Garcia. Garcia told the officer that she lived in an apartment at 3958 Grand Avenue with her boyfriend, whose name was James Worthem. Officer Nolan averred that he used his squad car computer to pull up a photograph of the defendant, and showed it to Garcia, who identified the photograph as that of her boyfriend. Officer Nolan admitted that he never showed this photograph to Solis, even though she was still at the scene of the crime.

¶ 16 Officer Nolan testified that after speaking with Garcia and Solis he wrote a police report about his investigation and turned it over to detectives at Area 5. He was not involved in the case after that.

¶ 17 On cross-examination, Officer Nolan admitted that contrary to his testimony on direct

No. 1-12-1474

examination, he never observed the defendant at the scene of the crime, but rather only an individual matching the defendant's description. Specifically, the following colloquy took place:

"Q [the public defender]: And the person that you claim to have seen now in the apartment, was that Mr. Worthem [the defendant] or just a male white?

A [Officer Nolan]: I believe it would be Mr. Worthem [the defendant].

Q [the public defender]: You believe it to be Mr. Worthem [the defendant.] Was it him or was it a male white?

A [Officer Nolan]: It was individual matching the description given by Mrs. Solis.

Q [the public defender]: Was it Mr. Worthem [the defendant]? Was it this person that you saw or someone that looked like him?

A [Officer Nolan]: It was someone who looked like him.

Q [the public defender]: So as you sit here today, you don't know if that was Mr. Worthem [the defendant] who you saw, correct?

A [Officer Nolan]: Correct."

¶ 18 The victim, Conception Solis, next testified that at about 5 p.m., on April 22, 2007, she was walking down Grand Avenue with her purse under her arm when she observed "that fellow with another female," following behind her. Solis made an in-court identification of the defendant as "that fellow." She stated that when she turned onto Pulaski Road, the defendant approached her from behind and asked her for money. Solis was angry and shouted "No," but the defendant grabbed her arm and snatched her purse. Solis chased after the defendant following him down an alley. She stated that she then saw a woman, whom she had seen with the

No. 1-12-1474

defendant before, open a rear gate to a building so that the defendant could run into that building. Solis testified that she walked back to the street side of that apartment building and asked an individual standing on that corner whether she knew the woman or man she had just seen. At that moment, Solis observed the female offender exit the apartment building. When Solis approached her and told her she was going to call the police, the woman started following Solis and asking her that they "settle in a good way." Solis stated that she then ran to a payphone and called the police. When the police arrived, Solis told them what had happened. She explained that because she spoke Spanish, a couple of the neighbors in the adjoining stores helped translated for her, so that the officers could understand.

¶ 19 Solis acknowledged that the officers asked her to get into the squad car and that they later showed her several photographs on the squad car computer. Contrary to Officer Nolan's testimony, Solis testified that she was able to identify "him," from those photographs. She did not asked, nor did she testify that "the him" she was referring to was "the defendant."

¶ 20 Solis next acknowledged that the following day, she went to the police station where she identified the defendant from a line-up as the offender.

¶ 21 On cross-examination, Solis admitted that when she first observed the male offender she noticed that he had tattoos around his neck.

¶ 22 Detective Eric Oswald next testified that on April 22, 2007, he was assigned to investigate the robbery reported by Solis. Detective Oswald averred that, with the help of a translator, he first spoke to Solis at Area 5 police station. According to Detective Oswald, Solis had bruises around one of her biceps. Detective Oswald averred that Solis told him that she was

No. 1-12-1474

shown around three to five photographs by the police officers and that she had identified the person who had robbed her.

¶ 23 Detective Oswald next spoke to Garcia. The record reveals the following colloquy:

"Q [ASA]: And when you were speaking to Miss Garcia did you learn more information regarding the potential offender?

A [Detective Oswald]: Yes, I did.

Q [ASA]: And who did you learn that to be?

A [Detective Oswald]: James Worthem [the defendant].

Q [ASA]: Do you see him in court?

A [Detective Oswald]: Yes, I do, sitting to the right of his counsel wearing the beige DOC uniform.

Ms. Sheridan [ASA]: May the record reflect the in-court identification of the defendant, James Worthem?

The Court: Yes.

Q [ASA]: Were you able to show Miss Garcia a photo of the defendant, Mr. Worthem [the defendant]?

A [Detective Oswald]: Yes.

Q [ASA]: And did she identify that photo?

A [Detective Oswald]: Yes.

Q [ASA]: Who did she identify that photo to be?

A [Detective Oswald]: Mr. James Worthem."

No. 1-12-1474

Detective Oswald admitted that he did not show a photograph of the defendant to Solis. He explained, however, that he never shows a "single photograph" to a victim for identification purposes, and that, in any event, Solis had to go to the hospital to check out her arm.

¶ 24 Chicago police officer Matthew Scott next testified that at about 4 p.m. on April 23, 2007, he was assigned to investigate the robbery that had occurred near 1459 North Pulaski Road. After reviewing Officer Nolan's police report and speaking with detectives at Area 5 police station, Officer Scott proceeded to the area near Grand Avenue and Pulaski Road to search for the offender. Near 1427 North Kildare Road, Officer Scott observed the "person who was wanted for that robbery." Officer Scott made an in-court identification of the defendant as that person. When asked how he knew what the offender looked like, Officer Scott explained that he had a description, as well as a photograph.

¶ 25 Officer Scott further testified that he placed the defendant under arrest and took him to Area 5 police station for questioning. After the defendant waived his *Miranda* rights, he told Officer Scott that he lived in the second floor rear apartment of 3958 West Grand Avenue.

¶ 26 On cross-examination, Officer Scott admitted that when he observed the defendant walking near 1427 North Kildare Road, he did not have an arrest warrant for the defendant. The officer also acknowledged that he did not observe the defendant committing any crime when he placed him into custody. Officer Scott acknowledged, and the State stipulated, that Officer Scott detained the defendant solely on the basis of Officer Nolan's investigation report, which did not include a name of a suspect. Rather, Officer Scott averred that under "possible offender" that report stated "a white male in his forties." Officer Scott admitted that this description alone

No. 1-12-1474

would "not have been sufficient" to permit him to make an arrest without a warrant. Officer Scott explained, however, that the report also stated: "possible offender No. 1 matches description, Worthem James." Nevertheless, he also admitted that the report does not list the defendant as the offender, but only as "a possible offender."

¶ 27 Chicago police detective Ralph Benavides next testified that at about 8:30 p.m. on April 23, 2007, he conducted a lineup, wherein Solis identified the defendant as the offender. After the lineup, Detective Benavides proceeded to interview the defendant. Detective Benavides testified that he advised the defendant of his *Miranda* rights but that the defendant waived those rights and agreed to speak with him without the benefit of counsel.

¶ 28 According to Detective Benavides, the defendant stated that he and his girlfriend, Garcia, planned the robbery. The defendant told Detective Benavides that he followed Solis to LeMoyné Street and Pulaski Road and grabbed her purse intending to return to 3958 West Grand Avenue. The defendant told the detective that he ran west on LeMoyné Street and then south through the east alley of Grand Avenue. Garcia then helped him by opening the rear gate to 3958 West Grand Avenue, so that he could run inside. The defendant told Detective Benavides that the back gate of that building was always locked and that Garcia had the only key. The defendant stated that he shared the proceeds of the robbery with Garcia, who "went out to buy some crack with it." According to Detective Benavides, the defendant also stated that when the police arrived and began questioning Garcia, he went to the rooftop and hid Solis's purse there.

¶ 29 Detective Benavides testified that other officers were dispatched to the roof of 3598 West Grand Avenue, where they retrieved Solis's purse. The purse contained a phone book containing

No. 1-12-1474

Solis's name.

¶ 30 On cross-examination, Detective Benavides acknowledged that he picked out the participants for the lineup from which Solis identified the defendant. He admitted that out of all of the participants, only the defendant had noticeable tattoos on his neck. Detective Benavides further admitted that he did nothing during the lineup to conceal those tattoos.

¶ 31 On cross-examination, Detective Benavides also admitted that he did not videotape the defendant's confession, nor memorialize it in any way, so that other than his testimony, there is not evidence that the defendant actually made any inculpatory statements to police.

¶ 32 Chicago police detective Bruce Kischner testified that after speaking with Detective Benavides and the defendant on April 23, 2007, he went to 3958 Grand Avenue to recover Solis's purse. The detective was able to retrieve the purse only with the help of the Chicago fire department, because the purse was on top of the roof close to the back alley.

¶ 33 After the State rested its case-in-chief, the 39-year-old defendant testified on his own behalf. He acknowledged that on April 22, 2007, he was living with Garcia in the second-floor rear apartment of 3958 West Grand Avenue, and explained that he and Garcia have a 12-year-old daughter. According to the defendant, he and Garcia were engaged but "it was not working out," because when the defendant recently returned from prison he realized that Garcia was working as a prostitute. The defendant averred that on April 22, 2007 at about 5 p.m., he was not with Garcia, but rather with another woman--Aurora Fidorka, at Fidorka's home near LeMoyne Street and Ridgeway Avenue. The defendant testified that he did not return home to 3958 West Grand Avenue until 3 a.m. on the morning of April 23, 2007. Once there, he saw that the doors to the

No. 1-12-1474

apartment were broken down, that the apartment was in disarray, and that all of his daughter's computers and stereos were gone.

¶ 34 The defendant left his apartment to look for Garcia, but could not find her. After about 45 minutes he returned home and found Garcia inside. She told him she had been arrested by the police for assault as to Solis. Garcia also told the defendant that the police were looking for him for robbery. The defendant denied robbing Solis and stated that he had never met her in his life. The defendant admitted that he did not call the police at that point, but rather went back to Fidorka's house.

¶ 35 The following day he was arrested by police on his way to work. The defendant averred that as he was walking down the street on his way to work, with his cane,¹ three officers exited an unmarked squad car and rushed towards him with guns drawn. One of the officer "slapped" the defendant in the face with a photograph and said "Is that you?" The defendant testified that after the officer "roughed [him] up and cuffed [him]" they took him to Area 5 police station.

¶ 36 The defendant denied confessing to Detective Benavides. He denied taking Solis's purse or knowing its location on the rooftop of Garcia's apartment building. The defendant denied even being able to climb to the rooftop because of the use of his cane.

¶ 37 After the defendant's testimony, as part of the defendant's case-in-chief, the parties stipulated that if recalled to testify, Officer Scott would state that he prepared a Chicago Police Department arrest report which states that Solis reported on the April 23, 2007, that she was not

¹The record reveals that defendant asserts that in 2006 he was shot in the thigh and since then has had to walk with a cane.

No. 1-12-1474

injured.

¶ 38 Before closing his case-in-chief, defense counsel made a note for the record that although Garcia was subpoenaed to appear and testify in court, she failed to show up on two occasions. In addition, the defendant had informed defense counsel that he did not want Garcia to testify.

¶ 39 After the defense rested, by way of rebuttal, the State introduced into evidence, certified copies of the defendant's four convictions for armed robbery, retail theft, financial identity theft and armed violence.

¶ 40 After the parties' closing arguments, the court denied the defendant's motion to quash arrest and found the defendant guilty of robbery. In doing so, the court noted that Solis was a very credible witness, who had ample opportunity to observe the defendant and the woman who was with him. The court also noted that it is significant that Solis followed the person who robbed her right to the defendant's building. The court observed that Solis was firm in her identification of the defendant at every stage. The court also found the testimony of the police officers to be credible. Finally, the court noted that there was additional evidence, namely the recovery of Solis's purse, which linked the defendant to the crime.

¶ 41 D. Posttrial Motions and Sentencing

¶ 42 The record reveals that at the next hearing, the defendant asked that be allowed to proceed *pro se*. Following thorough admonishments by the trial court, the defendant waived his right to counsel and filed a series of *pro se* posttrial motions, alleging, *inter alia*, that the police lacked probable cause to arrest him and that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over the photographs that Officer Nolan had shown Solis on his squad

No. 1-12-1474

car computer. The defendant argued that the State was required to "turn [] over those alleged photos off the computer that provided the sole evidence for probable cause[.]" The State responded that the photographs were not in its possession although an attempt had been made to obtain them. The State further argued that no photograph of the defendant was every shown to Solis for the purpose of identification, and that Solis, rather identified the defendant in a lineup and in court. After hearing arguments by both parties, the trial court found "there were no discovery violations" and denied all of the defendant's posttrial motions.

¶ 43 On May 8, 2008, based upon the defendant's prior criminal history, the circuit court sentenced the defendant as a Class X offender to 20 years' imprisonment, with credit for 381 days served.

¶ 44 E. Direct Appeal

¶ 45 The defendant appealed his conviction, arguing that the State had violated *Brady* by failing to produce the photo array that Officer Nolan had shown Solis. See *People v. Worthem*, No. 1-08-1308 (May 18, 2010) (unpublished order pursuant to Supreme Court Rule 23). The appellate court affirmed the defendant's conviction and sentence, rejecting his *Brady* argument by stating:

"the State did not possess the photo array, but attempted to located it form the indicated source. The State cannot be accused of withholding evidence where neither the State nor its agents are in possession of the evidence, and cannot supply that which it does not have." *Worthem*, No. 1-08-1308 (May 18, 2010) (unpublished order pursuant to Supreme Court Rule 23), at 9.

The appellate court further stated:

"even if Solis recognized someone other than defendant in those photographs, defendant cannot show that this evidence could reasonably have undermined the confidence in the outcome of the trial given her positive and unwavering identification of defendant as the offender in a post-arrest lineup and again in court." *Worthem*, No. 1-08-1308 (May 18, 2010) (unpublished order pursuant to Supreme Court Rule 23), at 11.

¶ 46 F. Post-Conviction Proceedings

¶ 47 After his direct appeal, the defendant filed a number of *pro se* documents. Relevant to this appeal, in October 2009, he filed a postconviction petition, which was docketed on November 4, 2009.² Among other things, in his postconviction petition, the defendant asserted that he was arrested without probable cause and that appellate counsel was ineffective for failing to raise this issue on direct appeal. In November 2009, the circuit court advanced the defendant's postconviction petition to the second stage of postconviction proceedings. In August 2010, the court granted the defendant's request to proceed *pro se*. On May 5, 2011, the defendant filed an amended *pro se* postconviction petition that included multiple exhibits and attachments.³ This

²The record reveals that the defendant filed an earlier postconviction petition on July 15, 2008, but that at the trial judge's urging, he voluntarily withdrew that petition in order to wait until the appellate court ruled on his direct appeal.

³These attachments included, *inter alia*: (1) sworn post-conviction pleadings previously filed by the defendant; and (2) an affidavit by Garcia. In her affidavit, among other things, Garcia denied the defendant's involvement in the crime. She also denied having given the name

No. 1-12-1474

petition sought to incorporate all of the claims of the October 2009 petition. Relevant to this appeal, in this petition, the defendant again argued that the police did not have probable cause to arrest him and that appellate counsel was ineffective for failing to raise this issue in the defendant's direct appeal.

¶ 48 On February 24, 2012, the State filed a motion to dismiss the defendant's petition, arguing that his claims were both meritless, as well as forfeited and waived. On April 27, 2012, the circuit court held a hearing on the defendant's petition. At the beginning of that hearing, the defendant sought and the court permitted him to attach additional documentation to his amended postconviction petition in response to the State's motion to dismiss. During the hearing, the defendant then read portions of those additional documents into the record. Relevant to this appeal, the defendant first read the following portion of a letter from his appellate counsel:

"I'm sorry that we could not come to an agreement as to your issue regarding the trial court's denial of the motion to quash arrest and suppress statements. As I told you on the phone, my supervisor has instructed me to leave this issue out of the brief because he feels that it does not have sufficient merit and because its presence in the brief will detract from your stronger discovery issue. However, as we discussed on July 31st, you have the option of attempting to file a supplemental brief, addressing any issues that you feel strongly about."

The defendant also read the following portions from a second letter sent to him by appellate

of her "common law husband," John Wortham, to the police. Garcia further denied that the officers at the scene of the crime showed her the defendant's photograph.

No. 1-12-1474

counsel, dated September 1, 2009:

"Please find enclosed [the] appellate court order. Unfortunately, the appellate court denied your motion for leave to file a supplemental brief. As you can see, the appellate court's decision is not based on the fact that you failed to provide nine copies required under [the] Supreme Court Rule[s]. They just simply denied it. You still have options. As I explained to you during our phone conversations, even though your direct appeal has not yet been decided, you may immediately file a postconviction petition alleging all of the errors that occurred on or off the record during the entire prosecution, including pretrial, trial and direct appeal errors. One of the errors that I believe you will want to allege is my ineffectiveness for failing to raise the issues that you attempted to raise in your supplemental brief."

¶ 49 After hearing arguments by both parties, the circuit court dismissed the defendant's petition, finding that the defendant's claim of ineffective assistance of appellate counsel was without merit. The defendant now appeals.

¶ 50 II. ANALYSIS

¶ 51 On appeal, the defendant asserts that he should have been permitted to proceed to an evidentiary hearing with his postconviction petition because he made a substantial showing that he was denied his constitutional right to effective representation by appellate counsel where appellate counsel failed to argue that the police lacked probable cause to arrest him. For the reasons that follow, we agree.

¶ 52 We begin by noting the familiar principles regarding postconviction proceedings.

No. 1-12-1474

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A postconviction action is a collateral attack on a prior conviction and sentence, and "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 53 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the second stage of postconviction proceedings, such as here, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381(1998). Instead, in order to mandate an evidentiary hearing, the allegations in the petition must be supported by the record in the case or by accompanying affidavits. *Coleman*, 183 Ill. 2d at 381. Nonspecific and nonfactual assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. *Coleman*, 183 Ill. 2d at 381, 701 N.E.2d at 1072-73. "In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true." *People v. Towns*, 182 Ill. 2d 491, 501 (1998). We review the second-stage dismissal of a post-conviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 54 It is well-established that claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacey*, 407

No. 1-12-1474

Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under the two-prong test set forth in *Strickland*, a defendant must establish both: (1) that his attorney's actions fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's conduct. See *Lacey*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill.App.3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 55 Under the first prong of *Strickland*, the defendant must prove that his counsel's performance was deficient because it fell below an objective standard of reasonableness " 'under prevailing professional norms.' " *Lacey*, 407 Ill. App. 3d at 456-57 (citing *Colon*, 225 Ill. 2d at 135); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Lacey*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill.2d at 135; *Evans*, 209 Ill.2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220.

¶ 56 Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. See *People v. Rogers*, 197 Ill. 2d 216, 223 (2001); *Edwards*, 195 Ill.2d at 163 (citing *People v. West*, 187 Ill.2d 418, 435 (1999)). Accordingly, a defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure: (1) was objectively unreasonable and (2) that

No. 1-12-1474

counsel's decision not to pursue an issue on appeal prejudiced defendant. *Rogers*, 197 Ill.2d at 223. Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill.2d 348, 362 (2000); see also *Lacey*, 407 Ill. App. 3d at 457; *Edwards*, 195 Ill. 2d at 163-64 (citing *People v. Johnson*, 154 Ill. 2d 227, 236 (1993)). Accordingly, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue. *Simms*, 192 Ill.2d at 362. Unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise it on appeal. *Edwards*, 195 Ill.2d at 164; see also *Simms*, 192 Ill. 2d at 362 ("for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal").

¶ 57 In the present case, the defendant contends that he made a substantial showing that his appellate counsel's performance was deficient because counsel failed to argue on appeal that the police lacked probable cause to arrest him, without a warrant, more than 24 hours after the crime, solely on the basis of a vague description of the perpetrator. The State apparently concedes that had the defendant's motion to quash arrest been granted, both his confession and Solis's purse would necessarily have been suppressed as fruits of the poisonous tree and the outcome of his trial would have been different. The State, nevertheless, argues that the record establishes that the police had probable cause to arrest the defendant, so that appellate counsel's decision not to raise this issue on appeal was a matter of sound trial strategy, rather than an error demonstrating deficient performance by counsel. For the reasons that follow, we disagree with the State.

No. 1-12-1474

¶ 58 First, with respect to the first prong of *Strickland*, although we acknowledge that an appellate attorney has substantial deference in choosing which issues to raise on appeal, here the record is unclear as to appellate counsel's reasons for leaving the probable cause issue out of his brief. Taking as we must, appellate counsel's letters to the defendant, as true, it is apparent that although appellate counsel was instructed by his supervisor to leave this issue out of his appellate brief, since the supervisor believed that it "lacked merit" and could potentially "detract from" the *Brady* claim, appellate counsel also advised the defendant to raise this issue on his own in a supplemental *pro se* brief with the appellate court. What is more, when this appellate court rejected the defendant's *pro se* supplemental brief, appellate counsel explicitly invited the defendant to file a postconviction petition alleging appellate counsel's own ineffectiveness for failing to raise the probable cause issue in his appellate brief. Under this record, and for the reasons that will be further discussed below, we are compelled to conclude that the defendant has made a substantial showing of the first prong of *Strickland*, so as to proceed to an evidentiary hearing to determine counsel's actual intent in failing to raise this issue on appeal.

¶ 59 Moreover, with respect to the prejudice prong of *Strickland*, we disagree with the State's surmise, as well as, apparently that of appellate counsel's supervisor, that the issue of whether the police lacked probable cause to arrest the defendant had no merit, or for that matter, that it could somehow have detracted from the *Brady* issue that appellate counsel was permitted to raise on appeal.

¶ 60 Probable cause to arrest exists when the facts known to the police officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the individual to be

No. 1-12-1474

arrested has committed a crime. *People v. Trisby*, 2013 IL App (1st) 112552, ¶ 14 (2013); see also *People v. Wear*, 229 Ill. 2d 545, 563 (2008). In other words, whether probable cause to arrest exists depends on the totality of the circumstances at the time of the arrest. *Trisby*, 2013 IL App (1st) 112552, ¶ 14; see also *Wear*, 229 Ill. 2d at 564. The standard for determining whether probable cause exists is the probability of criminal activity, not proof beyond a reasonable doubt. *Trisby*, 2013 IL App (1st) 112552, ¶ 14 (citing *People v. Hopkins*, 235 Ill.2d 453, 472 (2009)); see also *People v. Lee*, 214 Ill.2d 476, 485 (2005); *Wear*, 229 Ill.2d at 564. Whether probable cause existed in a certain situation is "governed by" commonsense practical considerations and an analysis of the totality of the circumstances at the time of arrest. *Trisby*, 2013 IL App (1st) 112552, ¶ 14; see also *People v. Sims*, 192 Ill.2d 592, 615 (2000). What is more, in reviewing a ruling on a motion to quash arrest, the trial court is given deference only with respect to its factual findings, whereas the ultimate ruling with respect to such a motion is reviewed *de novo*. *People v. \$280,020 in U.S. Currency*, 2013 IL App (1st) 111820, ¶ 25 (2013).

¶ 61 The record below is filled with inconsistent and unclear testimony by several witnesses, none of whom directly implicated or connected the defendant to the commission of the crime. For example, while Officer Nolan initially testified that he observed "the defendant" in the vicinity of the crime, he admitted on cross-examination, that he never actually viewed the defendant, but rather that he observed someone matching the description of the perpetrator, as described by the victim. Similarly, while the victim, Solis, testified that she "observed that fellow" *i.e.*, the defendant, following her, before snatching her purse, there is nothing in the record to support the conclusion that she identified the defendant as the perpetrator prior to his

arrest. While Solis testified that she identified "him" (*i.e.*, "the offender," but not "the defendant") from a photo array shown to her in a police squad car, Officer Nolan affirmatively stated that Solis was unable to pick the offender from that photo array. Strangely enough, the trial court found the testimony of both Solis and Officer Nolan credible in concluding that it established a consistency in the victim's identification of the defendant.

¶ 62 Moreover, the record rebuts the State's assertion that Garcia identified the defendant as her accomplice to police. Officer Nolan only testified that Garcia told him that she lived at 3985 Grand Avenue with the defendant, who was her boyfriend. Although the State would have us believe that Garcia told Detective Oswald that the defendant was the offender, a careful review of the colloquy between the State and the detective reveals that at best Garcia spoke of the defendant in the context of "potential offenders," and identified a photograph of the defendant as that of her live-in boyfriend. What is more, in her affidavit, attached as part of the defendant's postconviction petition, Garcia denied the defendant's involvement in the robbery and averred that she never implicated the defendant in the crime, nor gave his name to police. At this stage of postconviction proceedings, we must accept that affidavit as true. See *People v. Towns*, 182 Ill. 2d 491, 501 (1998) (At the second stage of postconviction proceedings "[i]n determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true.").

¶ 63 Under the record before us, we conclude that the only information certainly available to Officer Scott at the time of the defendant's arrest was: (1) that the offender was a white, 40-year old male, about 5'9 or 5' 10" in height, and weighing 198 pounds; (2) that Officer Nolan observed

No. 1-12-1474

someone matching that description in the vicinity of the crime scene; and (3) that Garcia spoke of the defendant in the context of "potential offenders" and named and identified the defendant as her live-in boyfriend. Because we have difficulty finding that these particular circumstances would rise to the level of probable cause to permit a warrantless arrest, we are compelled to conclude that the defendant has made a substantial showing that he was prejudiced by appellate counsel's failure to raise this issue on appeal. See *e.g., In re Woods*, 20 Ill. App. 3d 641, 646 (1974) ("a general description is insufficient to provide the probable cause necessary to justify an arrest unless it is supported by other relative facts and circumstances known to the arresting officer").

¶ 64

III. CONCLUSION

¶ 65 For the aforementioned reasons, we reverse the judgement of the circuit court and remand for a third stage evidentiary hearing on the defendant's postconviction petition.

¶ 66 Reversed and remanded for further proceedings.