2015 IL App (1st) 131623-U

THIRD DIVISION
September 16, 2015

No. 1-13-1623

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division
	)	
JUAN RODRIGUEZ,	)	No. 96 CR 19145 (03)
	)	
Petitioner-Appellant.	)	The Honorable
	)	Michael Brown,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly dismissed the petitioner's petition at the second stage of postconviction proceedings, where the petitioner failed to make a substantial showing that his trial and appellate counsels were ineffective for failing to argue that his inculpatory statements were the product of an illegal seizure.

¶ 2 Following a 1996 indictment and jury trial, the petitioner, Juan Rodriguez, was convicted of the 1978 murders of the victims Lawrence Lionberg (Lionberg) and Carol Schmal (Schmal) based on accountability principles. He was sentenced to 80 years' imprisonment. Initially, the petitioner's conviction was reversed and the cause was remanded for a new trial based on the

circuit court's failure to instruct the jury on the affirmative defense of compulsion. *People v. Rodriguez*, No. 1-98-1760 (1999) (unpublished order pursuant to Illinois Supreme Court Rule 23). On remand, following a bench trial, the petitioner was found guilty of both murders under theories of accountability, felony murder during an armed robbery and felony murder during a kidnapping, and sentenced to consecutive terms of 40 years' and 25 years' imprisonment. The petitioner's convictions and sentences were affirmed on direct appeal. *People v. Rodriguez*, No. 1-01-0818 (2002) (unpublished order pursuant to Illinois Supreme Court Rule 23). The petitioner now appeals from the second-stage dismissal of his petition for

relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2010). He contends that the circuit court erred in not permitting his petition to proceed to an evidentiary hearing because he made a substantial showing that his constitutional rights were violated where his trial and appellate counsels were ineffective for failing to challenge the use of his inculpatory statements to police during his bench trial. The petitioner also contends, and the State concedes that his *mittimus* must be corrected to reflect 1671 days of sentencing credit. For the reasons that follow, we affirm and order the *mittimus* corrected.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. In July 1996, together with codefendants Ira Johnson (Ira), and Arthur Robinson (Robinson), the petitioner was charged with 12 counts of murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 1996)), stemming from his involvement in the May 11, 1978, murder, armed robbery and aggravated

kidnapping of the two victims, Lionberg and Schmal and the rape and deviate sexual assault of Schmal.[1]

¶ 5 The following evidence was adduced at the petitioner's second bench trial. Clemente Mireles (Mireles) testified that he was the manager of the full service Clark Gas Station located at 180th and Halsted Streets in Homewood, Illinois, where the victim, Lionberg worked the midnight shift as the service attendant. Mireles testified that May 11, 1978, was Lionberg's first day on the job. Mireles arrived at the gas station at about 6:30 a.m. to relieve Lionberg and found that the gas station was in disarray and that Lionberg was gone. Mireles found pillows and cigarettes on the floor and out on the driveway. Mireles stated that he knew "something was wrong" so he called the police and filed a missing persons report. He further averred that after he completed an inventory of the store, he discovered that there were a number of items missing, including about 175 to 200 packs of cigarettes, $300, and some vests and jackets.

¶ 6 Marvin Simpson (Simpson), a lifelong friend of the petitioner and the codefendants, next testified that he spent May 10, 1978, outside of his mother's house on Lexington Circle in Ford Heights, a suburb south of Chicago. Simpson was repairing his car while Ira and several other men were drinking beer and smoking marijuana. Simpson testified that at about 4 p.m., Dennis Johnson (Dennis)[2] approached him and asked if Simpson could drive him to Homewood "to pick up some money." Simpson told Dennis that he could not because his

[1] We note that prior to the indictment of the petitioner, four individuals, Dennis Williams, William Rainge, Kenneth Adams, and Verneal Jimerson, were originally charged, prosecuted and convicted for the murders of Lionberg and Schmal. See *People v. Jimerson*, 166 Ill. 2d 211 (1995); *People v. Williams*, 147 Ill. 2d 173 (1991); *People v. Rainge*, 211 Ill. App. 3d 432 (1991). These men were subsequently exonerated after an investigation and DNA analysis excluded them as the offenders and led to the arrest of the codefendants and the petitioner.

[2] We note that Dennis Johnson died before any charges against him were issued.

car was not running. A few minutes later the petitioner arrived in his car—a Buick Electra 225. Dennis approached the petitioner and offered him $10 to take him to Homewood to "pick up some money." According to Simpson, the petitioner agreed and Dennis gave him $10. Simpson then observed the petitioner drive away with Dennis and the codefendants Ira and Robinson in his car.

¶ 7 Simpson testified that later that night, sometime after midnight, he was sitting alone on the porch of his girlfriend's home, when he saw the petitioner's car pull up, and some people get out. Simpson initially could not see the faces of the individuals who got out of the vehicle and could not state exactly how many people got out. He averred that a few minutes later he recognized the petitioner, Ira and a third person standing at the back of the petitioner's car. Ira and the other person walked into a nearby field, while the petitioner remained at the back of his car, leaning against it "like he was intoxicated." Simpson then heard about four gunshots before observing Robinson and Ira, who was carrying a handgun, running away from the nearby abandoned townhouses. Simpson also observed the petitioner getting into his car.

¶ 8 Simpson testified that after hearing gunshots, he became scared and so got into his car and left. Simpson went to Robinson's mother's home, which was a block away. About half an hour to an hour later, at about 1 a.m., he saw Dennis, Ira, Robinson and the petitioner on Lexington Circle. Ira and Dennis were selling cigarettes and key rings, and Dennis was wearing a vest. According to Simpson, the petitioner was sitting in his car, about 15 feet away and did not speak to Dennis, Ira or Robinson. Simpson testified that he approached the petitioner and spoke to him briefly before heading home.

¶ 9 Simpson further testified that on May 11, 1978, he learned that two bodies were found in the

townhouses in the area where he had been earlier that morning. Simpson testified that he called the police that day, but the police did not come to speak to him. Simpson again telephoned the police about three or four days later, from a hospital, where he was being treated after having been hit by a drunk driver. The police again did not come to speak to him. Simpson called the police a third time, while still being treated at the hospital. Finally, about four or five days later, several officers came to the hospital to speak to him. Simpson told the officers that they had "the wrong four guys in jail," but did not tell them everything that he had witnessed on the night in question because he was scared of Dennis and Ira, as well as the police. On cross-examination, Simpson admitted that between 1978 and 1996, he remained silent about what he knew because he was afraid that Ira and Dennis would harm him if he told the police he was a witness to the murders.

¶ 10 The State next called Cook County State's Attorney investigator Sean McCann. Investigator McCann testified that at 6:30 p.m., on May 29, 1996, he interviewed the petitioner for the first time regarding the petitioner's involvement in the 1978 murders of the victims. The interview was conducted in the petitioner's home, and Cook County State's Attorney investigator Thomas Pritchett and the petitioner's girlfriend were also present. During this interview, the petitioner told Investigator McCann that on the evening of May 10, 1978, he drove Ira, Dennis and Robinson to a liquor store in Chicago. After arriving there, the petitioner realized that he was too drunk to drive, so Robinson drove, and the petitioner fell asleep in the back seat of the car. When he awoke, Ira and Robinson were sitting in the front seat with a white man sitting between them, and a white woman was sitting next to him in the back seat. The petitioner asked what was going on, and Dennis told him to shut up and pointed a gun at him. The petitioner fell back asleep. The petitioner awoke at some abandoned townhouses on Cannon Lane in Ford Heights.

Everyone exited the car and entered one of the houses. The petitioner then left after someone threw him his keys. Before he left, however, Dennis threatened him and told him not to say anything. The petitioner told Investigator McCann that a few days later a police officer from Ford Heights spoke to him. The petitioner told the officer he knew nothing about the murders and explained that he did so because Dennis had threatened his family.

¶ 11 Investigator McCann testified that he next interviewed the petitioner at 6:30 p.m. on May 31, 1996, at the investigators' office in the Markham courthouse.[3] Cook County State's Attorney Investigator Melvin Trojanowski and State's Attorney Robert Milan were also present. According to Investigator McCann, during this interview the petitioner made a statement similar to the one he had made to the investigator previously in his own home. This time, however, the petitioner told Investigator McCann that there was no white man in the car when he woke up, just a white woman, and that he believed the incident occurred in 1983. The petitioner also stated that it was Robinson, and not Dennis who went into the liquor store to get beer. In addition, the petitioner told the investigator that while Dennis had a gun he did not point it at the petitioner when the petitioner woke up inside the car and asked what was going on. The petitioner added that he moved to Texas one month after the murders occurred.

¶ 12 Cook County State's Attorney investigator John Duffy next testified that together with another investigator he went to the petitioner's home on June 14, 1996. The petitioner agreed to accompany the investigators to the Markham courthouse and they drove him there in their car.

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[3] At the petitioner's first, jury, trial Investigator McCann testified that he telephoned the petitioner and left a message indicating that he wished to "question him further on the incident and set up a time to pick him up." According to Investigator McCann's testimony, the petitioner returned the investigator's telephone call and agreed to a time, after which Investigator McCann picked the petitioner up at his home and drove him to the Markham courthouse.

The interview at the courthouse began at about 6:50 p.m. Before asking the petitioner any questions, Investigator Duffy told the petitioner that Ira was in prison and that Dennis was dead. Investigator Duffy also advised the petitioner of his *Miranda* rights, and the petitioner "cooperated" with him, stating that "he wished to talk."

¶ 13 The petitioner then made a statement similar to the one he had made to Investigator McCann on May 31, 1996. The petitioner told Investigator Duffy that on the evening of May 10, 1978, he Simpson, Robinson, Ira and Dennis were outside of Simpson's apartment drinking beer. When they ran out of beer, the petitioner drove Ira, Dennis and Robinson to the liquor store, and once there, the petitioner decided he was too drunk to drive. One of the other men drove, and the petitioner passed out in the back seat. The petitioner further told Investigator Duffy that when he awoke, a white woman was sitting next to him, and pushed him and told him to move over. The petitioner asked what was going on, and Dennis showed him a gun and told him to shut up. The petitioner told Investigator Duffy that five people were in the car, but he never mentioned the presence of a white man. The petitioner also told Investigator Duffy that they drove to some abandoned townhouses on Cannon Lane and entered a townhouse. The petitioner stated that he stayed on the first floor for 20 minutes, retrieved his keys from Dennis, and left. Before leaving, Dennis threatened him by saying "I know where you live."

¶ 14 Investigator Duffy testified that sometimes later that evening the petitioner was served with a subpoena for blood samples and was taken to a nearby hospital where those blood samples were obtained. The petitioner was then returned to the Markham courthouse where he spent the night in the same room he had been interviewed in before, which Investigator Duffy described as his own office, which, at the time, was also being used as the courthouse library.

¶ 15 Investigator Duffy testified that he interviewed the petitioner again the next morning at about

9 a.m. and the petitioner repeated the same story. However, the petitioner added that he did not know where the men had picked up the white woman or what they were going to do to her. Investigator Duffy averred that between 12 p.m. and 3 p.m. he periodically checked on the petitioner to see if he needed to use the bathroom or needed something to eat or drink.

¶ 16 At about 3 p.m., Investigator Duffy interviewed the petitioner a third time in the same room, in the presence of Investigator McCann. The petitioner told Investigator Duffy to get a pencil and paper because he was going to tell the truth. The petitioner then told the investigator that on the evening of May 10, 1978, he was visiting his parents and wound up on Lexington Circle drinking beer with Ira, Dennis and Robinson. After driving his car to the liquor store, they drove to a gas station. The petitioner remained inside the car, sitting in the driver's seat, while Ira went to the trunk and Dennis and Robinson went inside the gas station. A white woman walked toward the car and a white man was inside the gas station. Dennis grabbed the man, pointed a gun at him and walked him to the car. Robinson followed, carrying cigarettes and vests. The petitioner pushed the release button to open the trunk and Robinson placed the items inside. The man was placed in the front seat and the woman was placed in the back seat. Dennis then told the petitioner to let Robinson drive, so the petitioner got in the back seat. He and Dennis sat in the back seat on either side of the woman, and Robinson and Ira sat in the front seat on either side of the man. The petitioner told Investigator Duffy that Dennis said they had to take the man and the woman because they had seen them.

¶ 17 Investigator Duffy further testified that the petitioner told him that they drove to some abandoned warehouses on Cannon Lane, where everyone got out of the car. Ira walked the man away from the building and toward the creek while everyone else went inside. As the petitioner entered the building he heard two gunshots from outside. Ira came back inside and Dennis asked

him if he had killed the man. Ira said yes, and Dennis went outside. The petitioner then heard a single gunshot. According to the petitioner's statement to Investigator Duffy, Ira and Robinson then took the woman upstairs while the petitioner remained by himself on the first floor, for about 35 minutes. As the petitioner himself subsequently proceeded upstairs, he ran into Robinson who was walking down. Once he reached the top of the stairs, the petitioner saw the woman naked and kneeling on the floor. Dennis was standing behind her holding a gun to her head. The petitioner yelled, "Don't do it," but Dennis shot the woman twice in the back of the head. The petitioner told the investigator that Dennis, Ira and he then went downstairs, where Dennis told him, "I know where you Mexicans live."

¶ 18 According to Investigator Duffy, the petitioner said that he walked outside and saw that his car was parked in a different location than it had been earlier. The petitioner got into his car and drove back to the location where they had been drinking earlier (Lexington Circle), where he met Dennis and Ira. Dennis then gave the petitioner $12 and told him that was all they got from the robbery. The petitioner told the investigator that he felt cheated because he thought the other men had obtained more money from the gas station. When the petitioner checked the trunk of his car the following morning, he observed that the items that Robinson had placed in the trunk were gone.

¶ 19 Assistant State's Attorney (ASA) John Eannace next testified that he interviewed the petitioner at the Markham courthouse on June 15, 1996, at about 8 p.m. in the presence of Investigator Duffy. ASA Eannace read the petitioner his *Miranda* rights, and the petitioner stated that he understood those rights. The petitioner was then interviewed about the murders for approximately 90 minutes. According to ASA Eannace, the petitioner then chose to have his statement memorialized by a court reporter.

¶ 20 The petitioner's memorialized statement was taken at 3:23 a.m. the following morning, June 16, 1996, in the State's Attorney's Office. The statement was then transcribed by the court reporter. ASA Eannace testified that he reviewed the transcript with the petitioner and that the petitioner made three corrections to the statement before signing it at about 5:15 a.m. The court-reported statement was then published into evidence. The statement was consistent with the statement the petitioner had given to Investigator Duffy at 3 p.m. the previous day; however, it did not include the petitioner's statement that he felt cheated because he only received $12 from the armed robbery. In addition, according to that court reported statement, the petitioner told ASA Eannace that while he was at the Markham courthouse, he had been fed, given things to drink and had been permitted to use the bathroom and that nobody had threatened him or promised him anything in exchange for his statement.

¶ 21 On cross-examination, ASA Eannace acknowledged that the petitioner had been in the Markham courthouse for 36 hours before giving his statement. On cross-examination, ASA Eannace further acknowledged that after making the court-reported statement the petitioner was released. A warrant for his arrest was not issued until over two weeks later, on July 2, 1996, and he was arrested on July 3, 1996.

¶ 22 After the State rested, the petitioner proceeded by way of stipulation. It was stipulated that if called to testify Lieutenant George Nance, Lieutenant Howard Vanick and Investigator David Capelli would all testify that on May 17, 1978, Simpson told them that "Dennis will do anything when high" and was "getting high on heroin, hard stuff, etc." It was further stipulated that if called to testify David Protess (Protess) and Renee Brown (Brown) would testify that on March 22, 1996, they spoke to Simpson who told them that on the night of the crime, Dennis and Ira were "shooting up." Simpson also told Protess and Brown that he heard gunshots while kissing

his girlfriend and then minutes later he "heard footsteps running real fast." It was further stipulated that Simpson told Protess and Brown that they were all sitting outside drinking beer when Dennis and Ira got into Ira's Chrysler. Brown would further testify that on March 29, 1996, Simpson received the transcript from his March 22 statement, made corrections and then signed it. Public notary, R. Mata would testify that on April 4, 1996, Simpson under oath subscribed to and signed a sworn affidavit according to which, on the night of the incident, Dennis and Ira asked Simpson if he wanted to go with them but he declined. Dennis and Ira then got into Ira's car--a Chrysler, and left. According to Simpson's affidavit, Simpson and his girlfriend were on the back porch kissing when he saw Ira running around the building to get into his car.

¶ 23 It was further stipulated that if called to testify Investigators John O'Mara and Thomas Pritchett would state that they spoke with Simpson on May 15, 1996. Investigators Pritchett and Sean McCann would state that they spoke to Simpson on May 17, 1996, and May 20, 1996. Investigators Duffy and Brian Regan would testify that they spoke to Simpson on June 13, 1996, and that Simpson told them that after he heard several gunshots he saw Ira get into his Chrysler and drive off.

¶ 24 The parties further stipulated that if called to testify ASA Chuck Burns (Burns) and certified shorthand reporter Janet K. Lupa (Lupa) would state that on June 18, 1998, Simpson testified under oath before a grand jury. Burns and Lupa would state that during that grand jury testimony, Simpson averred that Dennis and Ira were "shooting up dope" and Simpson was drinking a can of beer and "smoking some reefers." Simpson also stated that he did not know who owned the car that he saw but that Ira drove it "all the time."

¶ 25 It was further stipulated that on July 1, 1996, Simpson gave an interview for NBC News

where he stated that he was standing out one night just sitting down there drinking beer when he saw Ira running to a gray Chrysler, and then Ira driving the car around the corner where he picked up his brother, Dennis.

¶ 26 It was also stipulated that if called to testify Protess and Rob Warden would state that on August 15, 1996, they spoke to Simpson who averred that on the night in question Simpson and nine to ten men were sitting under a huge oak tree drinking beer and smoking pot, when Simpson observed Ira getting into a gray car and driving around the block.

¶ 27 In addition, the parties stipulated that if called to testify Judge Daniel Kelly, defense counsel Julie McBride, certified court reporter Pamela C. Taylor and ASAs Alison Perona and Darren O'Brien would testify that on April 23, 1997, under oath Simpson stated that on the night of the offense, he and the others were sitting under the big oak tree drinking beer. Simpson guessed that the men left at about 10 p.m., and he did not see them again until the early morning hours on Lexington Circle. Simpson further averred that he did not hear Dennis ask the petitioner if he wanted to make $10, but saw the money changing hands. When asked what he was doing on the porch, Simpson said he was drinking a beer and smoking a reefer. Simpson also testified that he did not see the petitioner at all "out there that night."

¶ 28 The parties further stipulated that in each of the aforementioned statements, Simpson never averred that: (1) he saw the petitioner's car pull up to the abandoned townhouses; (2) he saw the petitioner at the abandoned town homes; or (3) he had a conversation with the petitioner in the early morning hours on Lexington Circle. In addition, the parties stipulated that in each of these prior statements, except for the April 23, 1997, statement, Simpson never stated that he observed the petitioner receiving $10 from Dennis.

¶ 29 After hearing all of the evidence, the trial judge found the petitioner guilty of both murders

under theories of accountability, felony murder during and armed robbery and felony murder during a kidnapping, and sentenced him to consecutive prison terms of 40 and 25 years.

¶ 30 After the petitioner's conviction was affirmed on direct appeal (see *People .v Rodriguez*, No. 1-01-0818 (May 30, 2002) (unpublished order pursuant to Illinois Supreme Court Rule 23)), the petitioner filed a *pro se* postconviction petition, asserting in part, that his trial counsel rendered ineffective assistance by failing to challenge the use of his incriminating statements at trial. Specifically, the petitioner asserted the following facts. On May 29, 1996, investigators went to his home and questioned him about the murder. Three days later, May 31, 1996, Investigator McCann went to the petitioner's home and asked the petitioner to accompany him to the Markham police department to reinterview him regarding the murders. On June 14, 1996, investigators went to the petitioner's home again and asked him to go the Markham courthouse, where he was questioned in a "more custodial interrogatory setting," which resulted in him making "a self-incriminating statement." The petitioner further asserted that as a result of his "illegal arrest," the information the investigators illegally obtained from him was used as key evidence against him at trial. In addition, the petitioner maintained that his trial counsel was aware of the illegal and improper police conduct which produced the inadmissible evidence but failed to challenge the use of his statements at trial and that but for this error of counsel the outcome of his trial would have been different. Finally, the petitioner also alleged that his appellate counsel rendered ineffective assistance by failing to raise non-frivolous issues, including trial counsel's ineffectiveness.

¶ 31 In support of his *pro se* petition, the petitioner attached portions of his bench trial transcript, where he moved for judgment of acquittal, including, *inter alia*, the defense counsel's argument that: (1) the petitioner's statement was taken 36 hours into his interrogation; (2) the

State "carve[d] out" portions of the petitioner's statement, which supported its case; and (3) the State did not have enough evidence to arrest the petitioner after holding him in custody for 36 hours and extracting a statement from him, as the investigators allowed him to leave following his interrogation.

¶ 32 The circuit court summarily dismissed the *pro se* petition. This appellate court, however, reversed and remanded the cause for a second-stage postconviction proceeding. See *People v. Rodriguez*, No. 1-03-2089 (January 19, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). In doing so, we found that the petitioner had met the low threshold and stated non-frivolous claims of ineffective assistance of trial and appellate counsels, on the basis of counsels' failure to argue that his inculpatory statements to police should have been suppressed as the product of an illegal seizure. See *People v. Rodriguez,* No. 1-03-2089 (January 19, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). We declined to address whether trial counsel's decision was based on a professionally reasonable tactical decision or if it was the result of incompetence. *Rodriguez*, No. 1-03-2089 (January 19, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). We noted that "[p]erhaps trial counsel chose not to file a motion to suppress [the petitioner's] statements because he believed that [the petitioner] voluntarily chose to be questioned, or because he wanted [the petitioner] to tell his story through the statement, rather than to testify, to show that he was not culpably involved." *Rodriguez,* No. 1-03-2089 (January 19, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 33 On remand, the petitioner was appointed counsel. Postconviction counsel filed a certificate pursuant to Rule 651(c) (Ill.S.Ct.651(c) (eff.Feb.6, 2013)) stating that he would not be amending the *pro se* petition. The State then filed a motion to dismiss, arguing that the petitioner voluntarily accompanied the investigators to their office and was not seized at any time prior to

making an inculpatory statement on the afternoon of June 15, 1996. Postconviction counsel filed a response to the State's motion arguing that the petitioner's voluntary presence at the courthouse evolved into an illegal seizure because the petitioner was questioned repeatedly after being advised of his *Miranda* rights, taken to the hospital for a blood sample, and held overnight. The circuit court agreed with the State and granted the State's motion to dismiss. The petitioner now appeals contending that the circuit court erred in dismissing his postconviction petition where he made a substantial showing of ineffective assistance of both trial and appellate counsels.

¶ 34 II. ANALYSIS

¶ 35 We begin by noting the familiar principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a means by which a criminal defendant may challenge his conviction on the basis of a "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)); see also *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). 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); *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 36 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005); see also *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). 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).

At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); see also *People v. Towns*, 182 Ill. 2d 491, 501 (1998) ("In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true."). In addition, the trial court may not "engage in fact-finding or credibility determinations," and any factual disputes raised by the pleadings must be advanced to and resolved at an evidentiary hearing. See *People v. Childress*, 191 Ill. 2d 168, 174 (2000); *People v. Domagala*, 2013 IL 113668, ¶ 35; see also *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing"); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Nevertheless, a petitioner's nonfactual assertions, which amount to conclusions, will be insufficient to require an evidentiary hearing, and the petition will be dismissed at the second stage of postconviction proceedings. *People v. Rissley*, 206 Ill.2d 403, 412 (2003). Our review of the trial court's dismissal of a postconviction petition at the second stage is *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 37 A. Ineffective Assistance of Trial Counsel for Failure to File a Motion to Suppress

¶ 38 On appeal, the petitioner first asserts that he made a substantial showing that he was denied his constitutional right to effective representation of trial counsel because of counsel's failure to file a motion to suppress and argue that his inculpatory statements to police were the inadmissible fruit of an illegal seizure. The petitioner asserts that trial counsel should have filed a motion to suppress because he was seized without probable cause when he was questioned

repeatedly by the State's Attorney's investigators for over 36 hours inside the Markham courthouse. For the reasons that follow, we disagree.

¶ 39 It is well settled 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. Lacy*, 407 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 petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 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); see also *Domagala*, 2013 IL 113688, ¶ 36 ("a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' ") (quoting *Strickland*, 466 U.S. at 694). Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶11; see also *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 40 Where, as here, the petitioner contends at the second stage of postconviction proceedings that counsel was ineffective for failing to file a motion to suppress his statements, in order to establish the second, prejudice, prong of *Strickland*, the petitioner must make a substantial showing: (1) that the motion to suppress was meritorious; and (2) that there is a reasonable probability that the verdict would have been different absent the excludable evidence. See *People v. Henderson*, 2013 IL 114040, ¶15 ("We now clarify that where an ineffectiveness claim is

based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed."); see also *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.")

¶ 41 For the reasons that follow, we find that the petitioner has failed to make a substantial showing that his motion to suppress was meritorious on the basis that his inculpatory statements were obtained after he was illegally seized, so as to establish the requisite prejudice.

¶ 42 The fourth amendment of the United States constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; accord Ill. Const.1970, art. I, § 6; see *People v. Anthony*, 198 Ill. 2d 194, 201 (2001) (" 'This court has construed the search and seizure language found in section 6 [of the Illinois Constitution] in a manner that is consistent with the Supreme Court's fourth amendment jurisprudence.' "). A person is seized within the meaning of the Fourth Amendment when the police, "by means of physical force or show of authority, ha[ve] in some way restrained" that person's liberty. *People v. Gherna*, 203 Ill. 2d 165, 177-78 (2003) (quoting *Florida v. Bostick*, 501 U. S. 429, 434 (1991)); see also *People v. Perkins*, 338 Ill. App. 3d 62, 666 (2003). In other words, a seizure occurs if, in light of all the circumstances, "the conduct of the police would lead a reasonable innocent person *** to believe that he or she was not 'free to decline the officer's request or otherwise terminate the encounter.' " *Gherna*, 203 Ill. 2d at 178.

¶ 43 Our supreme court has repeatedly held that there are only three tiers of police-citizen encounters that do not constitute an unreasonable seizure. See *Gherna*, 203 Ill. 2d at 176; see also *People v. Surles*, 2011 IL App (1st) 100068, ¶ 21. The first tier involves the arrest of a citizen, which must be supported by probable cause. See *Surles*, 2011 IL App (1st) 100068, ¶ 21; see also *Gherna*, 203 Ill. 2d at 176. The next tier of such encounters involves a temporary investigative seizure conducted by the police under the standards set forth by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968) and codified by section 107-14 of the Illinois Criminal Code of 1968 (Criminal Code) (725 ILCS 5/107-14 (West 2010)). See *Surles*, 2011 IL App (1st) 100068, ¶ 21; *Gherna*, 203 Ill. 2d at 177. The final tier of police-citizen encounters involves those encounters which are consensual, *i.e.*, " 'involve [] no coercion or detention and therefore do[] not involve a seizure.' " *Gherna*, 203 Ill. 2d at 177 (quoting *People v. Murray*, 137 Ill. 2d 382, 387 (1990)); *Surles*, 2011 IL App (1st) 100068, ¶ 21.

¶ 44 In Illinois, a person has not been seized within the meaning of the fourth amendment when he voluntarily accompanies the police. See *Gomez*, 2011 IL App (1st) 092185, ¶ 59; see also *People v. Redmond*, 341 Ill. App. 3d 498, 507 (2003) ("When one voluntarily accompanies police officers, he has not been arrested and has not been 'seized' in the fourth amendment sense.") Although a person who voluntarily consents to interrogation at a police station does not implicitly agree to remain there indefinitely while the police investigate the crime in order to obtain probable cause for an arrest (*Lopez*, 229 Ill.2d at 353–54), "[i]t is difficult to say when an interviewee's presence at the police station that begins voluntarily transforms into a coerced stay." *People v. Anderson*, 395 Ill. App. 3d 241, 250 (2009). In fact, the police have no legal obligation to tell the interviewee that he does not have to remain at the station for the interview. See *People v. Cosby*, 231 Ill. 2d 262, 288 (2008); *Ohio v. Robinette*, 519 U.S. 33, 33-34 (1996)

("The Fourth Amendment does not require that a lawfully seized defendant be advised that he is 'free to go' before his consent to search will be recognized as voluntary."). Accordingly, to determine whether a seizure has occurred we look to the totality of circumstances in each case and decide " 'whether a reasonable person innocent of any crime, would have believed that he was not free to leave.' " *Jackson*, 348 Ill. App. 3d at 728 (quoting *People v. Williams*, 303 Ill. App. 3d 33, 40 (1999)); see also *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 227 (2010) ("[A]n arrest occurs when a person's freedom of movement is restrained by physical force or a show of authority; the test for determining whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable, innocent person would have considered himself free to leave[.]") (citing *Washington*, 363 Ill. App. 3d at 23-24)); *People v. Gomez*, 2011 IL App (1st) 09185, ¶ 58 (citing *People v. Melock*, 149 Ill. 2D 423, 437 (1992)); *Surles*, 2011 IL App (1st) 100068, ¶ 24 (citing *People v. Vasquez*, 388 Ill. App. 3d 532, 549 (2009)); see also *People v. Washington*, 363 Ill. App. 3d 13, 23 (2006); see also *Jackson*, 348 Ill. App. 3d at 728 (citing *People v. Delaware*, 314 Ill. App. 3d 363, 367 (2000)); see also *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

¶ 45 The factors to be considered in this analysis include, but are not limited to: (1) the time, place, length, mood and mode of the encounter between the suspect and the police; (2) the number of police officers present; (3) any indicia of formal arrest or restraint, such as the use of handcuffs, weapons or other restraints; (4) the intention of the officers; (5) the subjective belief or understanding of the suspect; (6) whether the suspect was told he could refuse to cooperate and was free to leave; (7) whether the suspect was transported in a police car; (8) whether the suspect was told he was under arrest; (3) whether the suspect was told he was free to leave; and (9) the language used by the officers. See *Surles*, 2011 IL App (1st) 100068, ¶24; *Gomez*, 2011

IL App (1st) 09185, ¶ 58; *Jackson*, 348 Ill. App. 3d at 728 (citing *Delaware*, 314 Ill. App. 3d at 370 and *Williams*, 303 Ill. App. 3d at 40); see also *People v. Willis*, 244 Ill. App. 3d 868, 875 (2003); *Washington*, 363 Ill. App. 3d at 24. "No factor is dispositive and courts consider all of the circumstances surrounding the detention in each case." *Washington*, 363 Ill. App. 3d at 24 (citing *People v. Reynolds*, 257 Ill. App. 3d 792, 800 (1994)).

¶ 46 In the present case, using the factors above, we conclude that the petitioner has failed in his burden to make a substantial showing that a reasonable person in his shoes, innocent of any crime, would not have felt free to leave. The record before us affirmatively demonstrates that the petitioner never had any contact with the police but rather voluntarily cooperated with the investigation that was being conducted by the State's Attorney's Office. After initially speaking with the State's Attorney's investigators in his own home, the petitioner arranged to meet with them again and agreed to be picked up and taken to the Markham courthouse. Subsequently, on June 14, 1996, the petitioner again voluntarily agreed to accompany the State's Attorney's investigators to the Markham courthouse. On this occasion, only two investigators came to the petitioner's home. The record is devoid of any mention of restraints (weapons, handcuffs, etc.) used by the investigators either at the petitioner's home or at Markham courthouse. In addition, there is no evidence or claim by the petitioner that he was placed or held in a cell, or ever transported to a police station. Rather, the record establishes that the petitioner was interviewed and remained inside the investigator's office, which the investigator testified was also being used as the courthouse library. There was testimony at the petitioner's trial that there were telephones in the office, but the petitioner never asserted in his petition that he attempted to or asked to use a telephone or that he at any time asked to leave. There was no evidence that the petitioner was locked in the office and the petitioner does not claim that he was. Additionally, the petitioner

himself admitted in his court-reported statement that he had been provided with food and drink while at the courthouse and that he had been permitted to sleep and use the bathroom.

¶ 47 Although the petitioner emphasizes that he was given *Miranda* warnings before his later interviews—conduct that can supporting a finding that a person was in custody, we find little significance in this fact under the circumstances here. The petitioner acknowledges that the first several statements he gave to the investigators were voluntary. In these statements the petitioner informed the investigators that: (1) he knew the other suspects and had known them for years; (2) he drove with the suspects in his car earlier that evening; (3) he was present in the car (although "sleeping" or "passed out" by his original account) during the robbery at the gas station and the abduction of the victims; (4) he awoke to see one of the victims seated next to him in the backseat; and (5) he arrived in his car at the scene of the murders. Having placed himself squarely in the middle of the events leading to Lionberg's and Schmal's murders, it was objectively reasonable for the investigators to give the petitioner *Miranda* warnings. Thus, this factor does not weigh in favor of finding that the petitioner was in custody.

¶ 48 While the petitioner did remain in the courthouse overnight after submitting to a court ordered DNA test, the record is devoid of any evidence that he was told that he was either under arrest or not free to go home. What is more, the petitioner himself makes no such allegations in his petition. Nor could he, since the record affirmatively establishes that after he made his last, recorded statement to the State's Attorney, the petitioner was permitted to go home, and was not arrested until 19 days after making this statement. Under this record, we are compelled to conclude that there was no legal basis upon which the petitioner's trial counsel could have filed a motion to suppress the petitioner's statement on the basis of an illegal seizure. See *Gomez*, 2011 IL App (1st) 09185, ¶ 58.

¶ 49 In doing so, we have considered the decisions in *People v. Ollie*, 333 Ill. App. 3d 971 (2002) and *People v. Centeno,* 333 Ill. App. 3d 604 (2002) cited to by the petitioner, and find them inapposite. Neither of those cases involved a defendant arranging with the police to be interviewed. Nor did the defendants in either of those cases go home after making their inculpatory statements to the police.

¶ 50 Although we find that the petitioner's postconviction petition was properly dismissed at the second stage for the reasons articulated by the trial court, the record discloses an additional basis for dismissal, *i.e.*, that, viewed objectively, a reasonably competent attorney could have decided that pursuit of a motion to suppress was not in the petitioner's interest because his later statements—in which he professed to be telling the truth—were essential to his defense of compulsion. Thus, even if counsel concluded that the petitioner was arguably in custody when he gave his last two statements, the record reveals that there existed sound, strategic reasons to refrain from pursuing a motion to suppress. See *People v. Hughes*, 2015 IL App (1st) 131188, ¶ 29 ("In reviewing the dismissal of a postconviction petition, the reviewing court may affirm on any basis supported by the record."); see also *People v. Johnson*, 208 Ill. 2d 118, 129 (2003) ("[A] reviewing court can sustain the decision of a lower court for any appropriate reason, regardless of whether the lower court reliedon those grounds and regardless of whether the lower court's reasoning was correct.")

¶ 51 On this point, we take issue with the characterization of the petitioner's last two statements as "inculpatory" and his earlier statements as "exculpatory." In all of his statements, the petitioner cast himself as a non-participant in the robbery, abduction, rape and murders. In the first series of statements, the petitioner informed the investigators that he was "asleep" or "passed out" in the back seat of his car during the robbery and abduction and that he left the scene immediately

after the group returned to the townhomes and so was not present for either the murder of Lionberg or the rape and murder of Schmal. In his last two statements, the petitioner still maintained that he did not participate in any of the crimes, but abandoned his inherently unbelievable account that he was unconscious during their commission and instead informed the investigators that although he was aware of the crimes as they unfolded, he knew nothing of them in advance and was intimidated into remaining with the group due to threats by Dennis Johnson. Thus, although the petitioner's story changed, he consistently portrayed himself as a witness, not a perpetrator and we do not believe, therefore, that his later statements can fairly be characterized as inculpatory.

¶ 52 On the issue of defense counsel's competence, it bears noting that the petitioner was represented by different defense counsel at his first and second trials. The petitioner's first attorney used the entirety of his statements, as well as the petitioners' testimony regarding the reasons why he failed to either prevent his friends' criminal activity or report it to police afterwards, to argue at length that the petitioner acted under compulsion and fear of reprisal against him and his family. Without the later statements, no compulsion defense existed. This is so because if the petitioner stuck to his original version, he was unaware of the earlier crimes and left before the rape and murders were committed. Thus, without use of the later statements, the petitioner's defense would have depended entirely on a jury's acceptance of his claim that although he was with the offenders earlier in the evening and drove them in his car, he was totally unaware of the robbery and abduction and conveniently left the scene immediately before the murders. In view of Simpson's testimony that he saw the petitioner in the company of the perpetrators (who were selling the proceeds of the robbery) shortly after the murders, no competent defense counsel would have preferred the latter strategy to the former.

¶ 53 Indeed, defense counsel's presentation of evidence that the petitioner acted under compulsion was so persuasive that it led to the reversal of his first convictions and remand for a new trial due to the trial court's failure to instruct the jury on the defense. New defense counsel on remand likewise refrained from pursuing a motion to suppress, although there was nothing precluding him from doing so. And, as at the petitioner's first trial, the focus of counsel's arguments on the petitioners' behalf was the statements in which the petitioner claimed he was threatened by Dennis Johnson and unable to leave because he was afraid of what would happen to him and his family. Although counsel wisely chose not to have his client testify given the obvious weaknesses in the petitioner's various explanations for his conduct at his first trial, the entirety of the petitioner's statements enabled counsel to pursue the compulsion defense.

¶ 54 Thus, the record "affirmatively rebut[s]" (*Domagala*, 2013 IL 113688, ¶ 35 (2013)) the petitioner's ineffective assistance claim because the objective facts disclosed by the record are that two different attorneys elected not to pursue a motion to suppress and this strategy enabled the petitioner to pursue the only viable defense available to him: compulsion.

¶ 55 As noted above, in reversing the first-stage dismissal of the petitioner's postconviction petition, another panel of this court observed that "the record does not reflect whether counsel's decision not to file a motion to suppress was based on a professionally reasonable tactical decision or if it was the result of incompetence." *People v. Rodriguez*, 1-03-2089 (January 19, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). We are not bound by this observation given that it was made in the context of the low threshold applicable to first stage review of postconviction claims and, in any event, was *dicta*. On further review of the record we conclude it is obvious that the decision of two different attorneys not to file a motion to suppress was, viewed objectively, the product of a sound, rational trial strategy and because that strategy

enabled the petitioner to assert the only viable defense available to him, he was not prejudiced by counsels' decisions. For this additional reason, the petitioner's claim was properly dismissed at the second stage.

¶ 56 Accordingly, for all of the reasons articulated above, we conclude that the petitioner has failed to make a substantial showing that his motion to suppress was meritorious so as to meet the second prong of *Strickland* and proceed to the third stage of postconviction proceedings on his ineffective assistance of trial counsel claim. For the same reasons, we find that the petitioner has also failed to make a substantial showing of ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. Accordingly, we affirm the trial court's dismissal of the petition.

¶ 57 B. *Mittimus*

¶ 58 The parties to this appeal agree that the petitioner's *mittimus* must be corrected to reflect the 1671 days the petitioner spent in custody from his arrest on July 3, 1996, until January 28, 2001, the day before he was sentenced. The record supports this conclusion and we therefore order that the *mittimus* be so corrected.

¶ 59 III. CONCLUSION

¶ 60 For the aforementioned reasons, we affirm the judgment of the circuit court and order the *mittimus* corrected.

¶ 61 Affirmed; mittimus corrected.