

SIXTH DIVISION  
May 15, 2015

Nos. 1-13-2280 & 1-13-2768, consolidated

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 07 CR 21201
SAMUEL SALAS,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Rosemary Higgins-Grant,
	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* We affirmed the first-stage dismissal of defendant's postconviction petition where his claims of ineffective assistance of counsel failed to arguably establish either of the *Strickland* prongs.
- ¶ 2 Defendant, Samuel Salas, appeals the summary dismissal of his *pro se* postconviction petition which alleged ineffective assistance of trial and appellate counsel. We affirm.
- ¶ 3 The 16-year-old defendant was charged with the first-degree murder of Sergio Ojeda, who was shot and killed in an alley on September 11, 2007. Following the shooting, several men

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who had been playing soccer with Mr. Ojeda caught defendant and beat him with their fists and a brick and kicked him. Defendant got away and began to run, but police arrived on the scene and apprehended him. Defendant was transported to the hospital, where he made a statement about the shooting to Detective O'Donnell. According to Detective O'Donnell, defendant indicated in his statement that he had been riding his bicycle when a person nicknamed "AKD," whom he knew from high school, came out of a gangway and said, "What's up." AKD pulled out a handgun and fired a shot at defendant. Defendant struggled with AKD, gained partial control over the weapon, and pulled the trigger three times. The struggle continued, the gun was knocked to the ground, and defendant ran away. Defendant told Detective O'Donnell that AKD then shot him in the head.

¶ 4 Prior to trial, the State informed defendant it intended to use the statement he made at the hospital in its rebuttal case to impeach defendant "should the defendant testify contrary to that statement at trial." Defendant subsequently filed a motion to suppress his statement. Defendant alleged that: (1) the beating he had suffered at the crime scene rendered him unable to appreciate and understand the full meaning of his *Miranda* rights and, therefore, that his statement made at the hospital, while he was still bleeding from the head as a result of the beating, was not freely, voluntarily, knowingly, and intelligently given; (2) the statement was obtained as a result of an interrogation which continued even after defendant had elected to remain silent; (3) the statement was obtained as a result of officers preventing defendant from consulting with and speaking to concerned adults, specifically his mother and father, before and during his interrogation; (4) his statement was obtained as a result of a custodial interrogation that was not electronically

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recorded in violation of section 5-401.5(b) of the Juvenile Court Act of 1987 (705 ILCS 405/5-401.5(b) (West 2008)), and section 103-2.1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-2.1(b) (West 2008)); (5) the statement was obtained as the result of an interrogation that took place outside the presence of counsel after his arrest and after counsel had appeared on defendant's behalf; and (6) the statement was obtained after the officers made material misrepresentations to defendant that he might die from his injuries.

¶ 5 At the hearing on the motion, Detective O'Donnell testified that shortly after 6 p.m. on September 11, 2007, he and his partner, Detective Butler, a qualified youth officer who was training in the homicide division with Detective O'Donnell, were assigned to a homicide case. They went to the hospital to which defendant had been taken and saw him laying on a gurney in the emergency room. He was being attended to by medical personnel.

¶ 6 Detective O'Donnell spoke with the treating physician and asked for permission to speak with defendant. The physician told Detective O'Donnell that defendant had lateral fractures to the skull indicative of blunt force trauma, no gunshot wound, and that the officers could speak with him.

¶ 7 Detective O'Donnell spoke with defendant and learned his name, age, address, phone number, and mother's name and phone number. Although defendant was bleeding from the head, his demeanor was calm and he was able to lucidly answer the detective's questions. Detective O'Donnell then stepped outside the emergency room and called defendant's mother and told her that defendant was at the hospital emergency room. The conversation lasted about 30 to

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40 seconds, after which the detective returned to the emergency room and informed defendant that his mother was on the way.

¶ 8 Defendant told Detective O'Donnell he wanted to talk with the detectives even though his mother was not yet there. At this point, Detective O'Donnell did not know whether defendant was a victim or the offender. To "cover all bases," the detective gave defendant his *Miranda* warnings at 6:45 p.m. and also told him he could be tried as an adult if he was involved in the murder. Defendant said he understood and that he wanted to talk. Defendant then stated he had been "riding down the street and he got shot in the back of the head." Detective O'Donnell asked defendant if he knew "anything about the guy dead in the alley" and defendant responded that he did not "know anything about any altercation, any gun, any person being shot."

¶ 9 Detective O'Donnell left the emergency room and contacted detectives at the crime scene, who informed him that defendant was the shooter. Detective O'Donnell returned to the emergency room, informed defendant he was under arrest, and told the hospital staff to "bag" his hands for a gunshot residue (GSR) test. Detective O'Donnell noticed defendant had soot on his forehead, and he advised the hospital staff not to wipe it off so that a GSR test could be performed on it too. Defendant asked what a GSR test was, and Detective O'Donnell told him it was used to determine whether he had fired a gun.

¶ 10 Defendant stated he wanted to tell Detective O'Donnell "what happened." Detective O'Donnell reminded defendant that he had been given his *Miranda* rights and was under arrest. Defendant said he still wanted to talk. Detective O'Donnell pointed at Detective Butler and told defendant that "If you don't want to talk to me, since your parents are not here, he is a youth

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officer, you tell him you don't want to talk to me." Defendant again responded that he wanted to tell what happened. Detective O'Donnell "proceeded to talk to him for about four or five more minutes", during which defendant made the statement about firing the murder weapon three times. Detective Butler was present during all of Detective O'Donnell's conversations with defendant.

¶ 11 After a four to five minute conversation, Detectives O'Donnell and Butler left the hospital between 6:50 p.m. and 6:55 p.m. and went to the crime scene. Neither defendant's mother nor father was at the hospital when the officers departed for the crime scene. Detectives O'Donnell, Butler, and Timothy O'Brien returned to the hospital around 1 a.m. and met with defendant, who was now in a private room in the pediatric unit. Defendant's mother also was in the room. Defendant's father was at the hospital but was not in the room at that time. Detective O'Donnell set up video equipment in the room, advised defendant of his *Miranda* rights and told him he could be tried as an adult. Defendant's mother then invoked his right to remain silent and so they ended the conversation and deactivated the video equipment.

¶ 12 Defendant testified at the hearing that in the late afternoon, early evening hours on September 11, 2007, he was handcuffed and picked up from the ground in an alley by two police officers. As the officers escorted defendant out of the alley, he felt like he was in a daze, began to fall asleep, and vomited. Paramedics arrived on the scene. As they took him to the hospital, he lost consciousness. Defendant woke up in the hospital emergency room.

¶ 13 Paramedics were cleaning the back of defendant's head with a spray bottle. Sometime later, a detective entered the room and began talking to him. Defendant does not remember

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everything the detective said, but he does recall the detective telling him he had the right to remain silent. The back of defendant's head was "really hurting," and he could not focus on what the detective was saying.

¶ 14 Defendant asked to speak to his mother; he does not remember the detective's response. The detective told defendant he might die and that he should give a statement before his death. Defendant then had a conversation with the detective, but he does not remember what was said.

¶ 15 After speaking with the detective, defendant received 23 staples to the back of his head and was transferred to a room. Defendant's mother arrived at the hospital after he was in the room. Defendant was able to talk to her after she arrived. When the police came back to see him at 1 a.m., his mother was still in the room.

¶ 16 Defendant's mother, Jane Roberts (hereinafter, Ms. Roberts), testified that in the late afternoon or early evening hours on September 11, 2007, she received a phone call at home from a man who identified himself as a Chicago police officer. He told her that defendant was in the emergency room at the hospital, that he was very hurt, that there had been a gun fight in which an individual had been killed, and that defendant had been beaten on the head or possibly even shot. The officer also told her that defendant was in custody.

¶ 17 Ms. Roberts went to the hospital and saw defendant's father, Michael Salas (hereinafter Mr. Salas), in a waiting room. Ms. Roberts and Mr. Salas spoke to a "desk person," who confirmed that defendant was in the emergency room and that they were not allowed to see him. When they asked why they were not allowed to see him, the desk person made no response.

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¶ 18 After about four or five hours, medical personnel finally told them that defendant had *not* been shot in the head, but that he would remain in the hospital for further observation and tests. An officer eventually told them that defendant was in custody, that they could not see him, and that they "might as well just go home."

¶ 19 Ms. Roberts returned home and fell asleep. Sometime after midnight, she was awakened by a phone call from the police telling her that defendant was being charged with first-degree murder. Ms. Roberts returned to the hospital, but she was not allowed to immediately see defendant. Instead, she and her husband Mr. Salas waited in a hallway for officers to arrive. About 15 minutes later, officers arrived and told them there was space for only one parent in defendant's room. Ms. Roberts went into the room, met with the detectives who had brought the video camera, and invoked defendant's right to remain silent.

¶ 20 Following all the evidence, the trial court made an oral ruling denying defendant's motion to suppress. In its oral ruling, the trial court first noted: "The state of the law as I understand it is that illegally obtained evidence may be introduced for the purpose of impeachment." The trial court then found that defendant's interrogation was not required to be videotaped because it took place in the hospital instead of the police station. The trial court further found Detective O'Donnell's testimony to be straightforward, candid and credible regarding his questioning of defendant and giving the *Miranda* warnings. The trial court also found defendant was "lucid, coherent, and responsive" to Detective O'Donnell's questions in the hospital. The trial court considered the possibility that defendant's mother and father were denied access to defendant in the hospital while Detective O'Donnell "was not on the premises," but noted there was no

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testimony that anyone spoke to defendant during this period of time. The trial court noted that when the police subsequently attempted to speak with defendant in the presence of his mother, defendant's right to silence was invoked and the conversation was terminated.

¶ 21 With respect to the four to five minute conversation between defendant and Detective O'Donnell outside the presence of defendant's parents, when defendant made the statement about firing the murder weapon, the trial court stated:

"What about that four minute conversation that occurred? There is testimony that on more than one occasion [defendant], said, 'I want to talk to you,' 'you', being Detective O'Donnell. And I've already addressed what I believe to be [Detective O'Donnell's] credibility. If I thought [Detective O'Donnell] was lying, I'd say it. There is just no basis for me to say it.

Did the uniformed police officer tell \*\*\* the nurse or hospital staff that the parents could not talk to their son, the suspect in the homicide? Maybe. But again, we go back to the practical consequence of that. Inasmuch as there was no conversation between any member of the Chicago Police Department and [defendant], I don't know what jeopardy attached, and can't find any.

The State is probably sitting there saying, 'Don't forget, there was this certified youth officer. That is just a crock. That is just a crock. And somebody should take it up. Every time I get one of these youth officer cases I voice my objection to this notion that a police officer will act in the stead of a youthful suspect. It is at best a conflict. \*\*\* You tell me how a youth officer is not at least—that's just a joke. And I would hope that again



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those who have a lot more time and knowledge and insight would revisit this rubber stamping of police investigation of youthful offenders in the absence of their parents. It's just \*\*\* quite simple. Just as the State's Attorneys have people on call, so can and should the Public Defender's Office."

¶ 22 The trial court further stated:

"[Defense counsel] questions the reliability of any statement that the defendant may have uttered and points to the fact that this defendant received 23 staples to the back of his head. The question there becomes whether [Detective O'Donnell] can act in good faith upon the representations of the attending physician that said you can talk to him, and so if you cannot rely upon the opinion by the trained professional, who should you look to?

As I started out, I think the law provides for the use of illegally obtained evidence for impeachment purposes. I see no reason why this proposed statement would be an exception."

The trial court denied defendant's motion to suppress.

¶ 23 Defendant's jury trial followed. At trial, 12-year-old, Emmanuel Torres, testified that in September 2007, he lived on the second floor of an apartment building at 4511 South Spaulding Avenue in Chicago. Mr. Ojeda lived in the same building and dated one of Mr. Torres' sisters. After getting out of school at approximately 3:40 p.m. on September 11, 2007, Mr. Torres played soccer with some friends in front of Berenice Lopez's house, which was down the street from Mr. Torres's apartment building. Mr. Ojeda was in an alley playing soccer with some of his

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friends. Mr. Torres heard four or five gunshots, looked toward the alley, and saw Mr. Ojeda trying to open a fence. Mr. Torres saw a Hispanic male in a white shirt and jeans with long, "puffy" hair shoot Mr. Ojeda with a black gun from about two feet away. Mr. Ojeda did not have a gun in his hands. Mr. Torres did not see anyone other than the shooter and Mr. Ojeda in the alley at that time. Mr. Torres did not get a good look at the shooter's face.

¶ 24 Mr. Torres testified he ran across the street to a friend's house. Mr. Torres went inside the house and then peeked out a window. Mr. Torres saw a group of "gangbangers," including three youths named Salvatore, Fernando, and Vince, beating the shooter. The gangbangers had been playing soccer with Mr. Ojeda prior to the shooting.

¶ 25 Berenice Lopez testified that on September 11, 2007, she lived on the second floor of an apartment building at 4531 South Spaulding Avenue in Chicago with her parents and her two children. Mr. Ojeda was her neighbor. Shortly before 6 p.m. on September 11, 2007, Ms. Lopez was outside her building, waiting for her mother-in-law to pick up her son. Ms. Lopez saw Mr. Ojeda two houses away, walking toward an alley with Fernando, Salvatore, and another youth named Rego. After her mother-in-law picked up her son, Ms. Lopez tried to get back inside the apartment building, but the front door was locked. She began walking toward the back door, which was by the alley. Ms. Lopez saw Mr. Ojeda in the alley, running toward 45th Street. She saw nothing in his hands. Defendant, who was wearing a white shirt and jeans, was running behind Mr. Ojeda. Defendant had something black in his hand that he was holding out with an extended right arm. Ms. Lopez did not see anyone else in the alley. Mr. Ojeda was trying to open the gate to the yard where Ms. Lopez lived. Ms. Lopez turned away and heard four or five

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gunshots. Ms. Lopez turned back around and saw defendant running toward 46th Street. Mr. Ojeda was lying on the ground by the gate.

¶ 26 Ms. Lopez testified she went to Mr. Ojeda and saw that he was bleeding from the head. She ran back to the front of her building and screamed for someone to call 911. Then she saw Fernando, Rodriguez, and Vincent run over to defendant, who was three houses away from her, and they began beating him. Ms. Lopez ran over and told them to stop. Defendant grabbed Ms. Lopez and pulled her on top of him. As she tried to get up, Ms. Lopez saw a gun on the ground. Ms. Lopez testified the gun had to have come from defendant because it fell on her side and defendant was the only other person on the ground near her. Fernando picked up the gun with his shirt and began running toward 46th Street and Sawyer Avenue. The police arrived and defendant ran.

¶ 27 Ms. Lopez testified she went to the police station on the evening of September 11, 2007, and spoke with Detective Henry about the shooting. He showed her a photo array. Ms. Lopez identified a photograph of defendant as the person who shot Mr. Ojeda. Ms. Lopez returned to the police station on October 3, 2007, and picked defendant out of a lineup as the person who shot Mr. Ojeda.

¶ 28 Yvonne Nevarez, a Chicago public school teacher, testified that on September 11, 2007, she was living at 4546 South Spaulding Avenue in Chicago. At approximately 6 p.m. on that date, she was in the alley packing up her father's truck when she heard a noise and saw defendant, who was wearing jean shorts and a white T-shirt, get off a bicycle and run toward her with a black gun in his hand. Defendant ran inside Ms. Nevarez's house, and she followed him

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inside. Ms. Nevarez's sons, ages 9 and 15, were also inside the house. Ms. Nevarez told defendant to get out of her house. Defendant said, "Save me." Then defendant ran out the front door with the gun still in his hand. Defendant crossed the street, where other teenage boys began beating him. Ms. Nevarez called 911.

¶ 29 Ms. Nevarez testified that later that evening, a detective came to her house and showed her a series of photographs. She identified a photograph of defendant as the person who ran into her house with a gun. On October 3, 2007, Ms. Nevarez went to the police station and picked defendant out of a lineup as the person who ran into her house with a gun.

¶ 30 Fernando Diaz testified that, in September 2007, he lived at 5026 South Spaulding Avenue and was a member of the Satan Disciples gang. At approximately 6 p.m. on September 11, 2007, he was in the alley between Sawyer and Spaulding Avenues and 45th and 46th Streets playing soccer and drinking beer with Mr. Ojeda, Salvatore, Vincent, Fernando Rodriguez, and Rego. After they stopped playing, they went "to the front" and were "just sitting around." At some point, Mr. Ojeda began walking back toward the alley. Mr. Diaz and Salvatore followed from behind.

¶ 31 Mr. Diaz testified that, at the alley, he saw defendant get off a bicycle, pull out a gun, and begin running. Defendant was wearing a white shirt. Mr. Diaz heard five or six gunshots but did not see the actual shooting. When the shots rang out, Mr. Diaz ran and hid. After the shooting stopped, Mr. Diaz and Salvatore went back to the alley and saw defendant holding a gun. Defendant pointed the gun at Mr. Diaz and tried to fire it twice, but it just clicked because it was out of bullets. Mr. Diaz and Salvatore chased defendant, who ran into a nearby house.

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Mr. Diaz lost sight of him, but he later saw him at 46th Street and Spaulding Avenue. Mr. Diaz grabbed a rock and went after him. Fernando Rodriguez knocked defendant down and hit him with a brick. Mr. Diaz and Vincent began hitting defendant, and Mr. Diaz also kicked him in the body. Ms. Lopez ran over and told them to stop.

¶ 32 Mr. Diaz testified that the gun fell during the altercation. Mr. Diaz grabbed the gun and began running. Police stopped him at 46th Street and Sawyer Avenue.

¶ 33 Defendant testified on his own behalf that he was 16 years old on September 11, 2007, a sophomore in high school, and lived with his mother and sister at 33rd and Aberdeen Streets. Defendant was a member of the Two-Six street gang and has a tattoo of three dots on his right middle finger indicating his membership in the gang. When school let out that day at 2:30 p.m., defendant went to his friend Anthony Grasso's house at 45th Street and Kedzie Avenue to play video games. Defendant left Mr. Grasso's house at approximately 5 p.m. and borrowed his bicycle to ride to a Subway restaurant at 47th Street and Kedzie Avenue. After eating at Subway, defendant decided to visit a girl he knew who lived near Spaulding and Sawyer Avenues. Defendant began riding his bicycle on Spaulding Avenue and saw a group of boys he did not know on Spaulding Avenue near 46th Street. Defendant turned right on 46th Street in order to avoid those boys and then turned left into an alley between Spaulding and Sawyer Avenues.

¶ 34 As defendant rode down the alley, he saw a Hispanic male come out of a gangway on the left side and flash a gang sign toward defendant. Defendant testified he recognized that gang sign as indicating that the person flashing it belonged to the Satan Disciples. Defendant

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explained that he became afraid because he knew that the Satan Disciples were rivals of the Two-Six gang to which he belonged.

¶ 35 Defendant testified he could have turned around and avoided any confrontation. Instead, he continued to ride the bicycle in the direction of the person flashing the Satan Disciples gang sign. When defendant was within approximately four feet of him, the person pulled a gun from his right pocket and tried to point it at defendant. Defendant jumped off the bicycle and grabbed the person's arm. They struggled, and the person fired the gun without hitting defendant. The person eventually tired during the struggle and dropped the gun. Defendant picked up the gun and ran to the bicycle. Defendant testified he never touched the trigger, he never shot the gun while he was in the alley, and he did not shoot anyone.

¶ 36 Defendant rode the bicycle as fast as he could out of the alley toward 46th Street. Defendant thought there was a third person in the alley because as he rode toward 46th Street, he heard gunshots and felt "heat flying past [his] head." When defendant reached the end of the alley, he turned right onto 46th Street and went across Spaulding Avenue toward an alley, where his bicycle chain broke. Defendant jumped off the bicycle and saw "a whole group of guys" were chasing him. Defendant ran into the alley. Defendant still had the gun on him.

¶ 37 In the alley, defendant saw an open door to a house near a van from which people were unloading building materials. Defendant ran inside the house and screamed for help. The people inside the house screamed at him to get out. He ran out the front door, through the yard, back onto Spaulding Avenue, where he again encountered the group who had been chasing him. Defendant turned around and attempted to run into a gangway, but he slipped and fell to the

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ground. The group caught up to him and they began to punch and kick him and hit him with bricks. Defendant put his hands over his head and his knees to his chest and balled up on the ground. At some point during the beating, the gun he was holding fell to the ground.

¶ 38 Defendant testified that the beating slowed down when two women, one older and one younger, screamed for the group to stop the beating. Defendant reached up and pulled the younger woman on top of him in an effort to protect himself from the group. The group pulled her up and stopped beating defendant long enough for him to get up and run away.

¶ 39 Defendant ran through the gangway, across the alley, and into a yard, where police officers caught him. Defendant was treated at Mt. Sinai Hospital for the injuries he received from the beating. At the hospital, a detective asked defendant questions. However, defendant testified he did not remember most of the questions that were asked of him or the answers that he gave. Defendant remembered only that he told the detective that he fought with someone and got control of the gun. He did not remember telling the detective that he fired the gun three times. Defendant remembered telling the detective that the gun fell to the ground, after which he ran away.

¶ 40 In rebuttal, Detective O'Donnell testified similarly to his testimony at the suppression hearing regarding defendant's statement at the hospital that AKD pulled a gun on him and that, during the ensuing struggle, defendant pulled the trigger three times and ran away, after which AKD shot him in the head.

¶ 41 The jury convicted defendant of first-degree murder. Defendant's conviction was affirmed on direct appeal. See *People v. Salas*, 2011 IL App (1st) 091880.

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¶ 42 On April 22, 2013, defendant filed a handwritten, *pro se* postconviction petition. The postconviction court (which was different than the trial court) summarized the petition as follows:

"[P]etitioner makes a 'nested' ineffective assistance claim, arguing that appellate counsel provided ineffective assistance by failing to argue that trial counsel provided ineffective assistance by failing to argue that petitioner's statement to [Detective O'Donnell] was involuntary because there was no concerned adult present. Petitioner argues that his mother had not yet arrived, and, although [Detective O'Donnell] indicated that [Detective Butler] was a 'youth officer,' in fact he was actively investigating the case and could not serve as a concerned adult who would look after petitioner's interests."

¶ 43 The postconviction court dismissed defendant's petition at the first stage of postconviction proceedings as frivolous and patently without merit, finding that defendant's statement to Detective O'Donnell was voluntary. The postconviction court concluded:

"Because the claim that [defendant's] statement was involuntary due to the absence of a youth officer was not even arguably meritorious, [defendant] was not even arguably prejudiced by counsel's failure to raise the issue either in the trial court or on appeal. [Defendant's] counsel was therefore not constitutionally ineffective, and [defendant's] claim is without merit."

Defendant appeals.

¶ 44 "The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. [Citations.] A postconviction action is not an



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appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 45 "In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or is patently without merit. [Internal quotation marks and citation omitted.] A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id.* ¶ 9. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 46 Defendant's postconviction claim of ineffective assistance of counsel is assessed under the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Shipp*, 2015 IL App (2d) 130587, ¶ 24. "Under the Act, the trial court may not summarily dismiss a [postconviction] petition alleging ineffective assistance of counsel if: (1) counsel's performance arguably fell below an objective standard of reasonableness and (2) the defendant was arguably prejudiced as a result." *Id.* The failure to arguably establish either prong of *Strickland* is fatal to the postconviction claim. *Id.*

¶ 47 In the present case, defendant's postconviction claim of ineffective assistance asserts that his statement to Detective O'Donnell was involuntary because it was made in the absence of his parents and in front of a youth officer who had a conflict of interest when he helped investigate the case and failed to look after defendant's interests. Defendant claims his trial counsel was ineffective for arguing only that his statement was involuntary because his parents were absent, and not also arguing that his statement was involuntary because the youth officer who was

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supposed to effectively take the place of his parents was instead conflicted and investigating the case and acting antagonistically toward him.<sup>1</sup> Defendant also claims his trial counsel was ineffective at the suppression hearing following the trial court's finding that an illegal statement may be used for impeachment purposes. Defendant contends his trial counsel should have cited case law (*Mincey v. Arizona*, 437 U.S. 385 (1978) and *People v. Lefler*, 38 Ill. 2d 216 (1967)), holding that involuntary statements cannot be used for impeachment. Defendant contends his appellate counsel was ineffective on direct appeal for failing to argue trial counsel's ineffectiveness.

¶ 48 We find no ineffectiveness of either trial or appellate counsel in failing to raise the alleged involuntariness of defendant's statement based on the youth officer who was acting under a conflict of interest, or in failing to argue that involuntary statements cannot be used for impeachment, because review of the record indicates that defendant's statement was voluntarily given.

¶ 49 In determining whether a statement was voluntary, we must consider the totality of the circumstances. *In re G.O.*, 191 Ill. 2d 37, 54 (2000). Factors to consider include defendant's "age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *Id.* No single factor is dispositive. *Id.* The test of voluntariness is whether defendant made the statement freely, voluntarily and without compulsion or inducement of any

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<sup>1</sup> The issue of trial counsel's alleged ineffectiveness could have been raised on direct appeal and, thus, is forfeited. *Tate*, 2012 IL 112214, ¶ 8. However, we consider the issue on the merits because trial counsel's alleged ineffectiveness underlies defendant's claim of the ineffectiveness of appellate counsel.

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sort, or whether his will was overcome at the time he made the statement. *Id.* We review *de novo* the question of whether a statement was voluntary. *Id.* at 50.

¶ 50 In the present case, at the time of his statement, defendant was a 16-year-old high-school sophomore who had been taken to the hospital emergency room as a result of injuries incurred in the aftermath of the shooting. According to Detective O'Donnell, whose testimony the trial court found to be credible, the officers sought permission from the treating physician before speaking with defendant. The physician told Detective O'Donnell that defendant had lateral fractures to the skull indicative of blunt force trauma, but that the officers could speak with him. Detective O'Donnell initially spoke with defendant for only 30 to 40 seconds and determined that, although defendant was bleeding from the head, he was calm and able to give lucid answers to the detective's questions. Defendant gave the detective basic biographical information such as his name, age, address, phone number, and mother's name and phone number. Detective O'Donnell left the emergency room, phoned defendant's mother, then returned and told him she was on the way. Detective O'Donnell also gave defendant his *Miranda* warnings and told him he could be tried as an adult if he was involved in the murder. Defendant said he understood his *Miranda* warnings and wanted to talk. Defendant then stated he had been riding down a street and got shot in the head; he denied knowing anything about the victim's death.

¶ 51 Detective O'Donnell left the emergency room again and learned from detectives at the crime scene that defendant was the shooter. Detective O'Donnell returned to the emergency room, told defendant he was under arrest, and stated that GSR tests would be performed on him. Defendant stated he wanted to talk. Detective O'Donnell reminded defendant he was under arrest and that he had been given his *Miranda* warnings. Defendant said he still wanted to talk. Detective O'Donnell explained that the other officer present, Detective Butler, was a youth

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officer and that defendant could tell Detective Butler if he did not want to talk. Defendant stated for the third time that he wanted to talk. Detective O'Donnell and defendant then spoke for four or five minutes, during which defendant made the statement at issue.

¶ 52 The trial court found these facts, as testified to by Detective O'Donnell, to be credible and we will not substitute our judgment, therefore. *People v. Fort*, 2014 IL App (1st) 120037, ¶ 28. On these facts, the totality of the circumstances indicates that defendant's statement was voluntary where: the officers received assurances from the physician that defendant was physically capable of having a conversation with them; defendant was calm and lucid when speaking with the officers; defendant was given his *Miranda* warnings, warned he could be tried as an adult, and informed about the presence of the youth officer who could stop the questioning at defendant's request; defendant indicated he understood his *Miranda* warnings and repeatedly stated he wanted to talk; the duration of questioning was brief, only a few minutes in total; and there was no physical or mental abuse.

¶ 53 We note, though, that in addition to the traditional factors considered in the totality of the circumstances test for determining the voluntariness of a statement, our supreme court has also recognized an additional factor in cases involving juveniles: the presence of a "concerned adult." *People v. Murdock*, 2012 IL 112362, ¶ 32. "This factor considers whether the juvenile, either before or during the interrogation, had an opportunity to consult with an adult interested in his welfare." *Id.* "In weighing this factor, courts also consider whether the police prevented the juvenile from conferring with a concerned adult and whether the police frustrated the concerned adult's attempt to confer with the juvenile." *Id.*

¶ 54 Our supreme court has held:

"[A] juvenile's confession should not be suppressed merely because he was denied the opportunity to confer with a parent or other concerned adult before or during the interrogation. [Citation.] The concerned adult factor is particularly relevant in situations in which the juvenile has demonstrated trouble understanding the interrogation process, he asks to speak with a concerned adult, or the police prevent the concerned adult from speaking with him. [Citation.] The concerned adult factor is just one of the many factors to be examined when determining whether a juvenile's [statement] was voluntary."

*Id.* ¶ 33.

¶ 55 Defendant contends that the officers prevented his parents from speaking with him and that, in conjunction with the youth officer who had a conflict of interest and acted antagonistically toward him and failed to protect his interests, his statement was arguably involuntary such that trial counsel was ineffective for failing to raise the issue of the youth officer's conflict of interest, and appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness.

¶ 56 First, we examine how the absence of defendant's parents affected the voluntariness of his statement. Detective O'Donnell testified that, contrary to preventing defendant from speaking with his parents prior to his statement, the detective actually called defendant's mother prior to his statement and told her that he was in the hospital. Detective O'Donnell then returned to the emergency room and informed defendant that his mother was on the way. Even though defendant knew his mother was coming to the hospital, defendant stated he wanted to talk before her arrival. Defendant was then given his *Miranda* warnings, he was told Detective Butler was a youth officer who could stop the questioning at defendant's behalf, and he made the statement at issue.

¶ 57 Detective O'Donnell's testimony indicates that the police did not prevent the concerned adult (*i.e.*, his mother) from speaking with him prior to his statement, but rather encouraged her presence at the hospital. As discussed, the trial court found Detective O'Donnell's testimony credible and we will not substitute our judgment, therefore. As this is not a case where a police officer affirmatively refused to let a concerned adult see defendant prior to the giving of his statement, it is distinguishable from the cases cited by defendant (*People v. Griffin*, 327 Ill. App. 3d 538 (2002), and *People v. McDaniel*, 326 Ill. App. 3d 771 (2001)), in which the appellate court found statements to be involuntary based, in part, on the officers' frustrating the attempts of the defendants' parents to confer with them before or during questioning.

¶ 58 Defendant contends, though, that Detectives O'Donnell and Butler arguably prevented his father from speaking with him prior to the statement. We disagree. The evidence indicated only that defendant told the detectives the contact information for his mother, and that Detective O'Donnell immediately called her and gave her defendant's location. Defendant's mother arrived at the hospital after defendant had given his statement, at which point she also saw defendant's father in the hospital, and a "desk person" told them they were not allowed to see defendant; however, there was no evidence presented as to when defendant's father arrived at the hospital, what officers (if any) he spoke to prior to and upon his arrival, and when (or by whom) he was first told he could not see defendant. Thus, on this record, there was no evidence that Detectives O'Donnell and Butler were given any contact information for defendant's father or knew he was coming to the hospital, nor was there any evidence that defendant's father arrived at the hospital prior to or during defendant's statement, or that Detectives O'Donnell and Butler were aware of his presence at the hospital and prevented him from seeing defendant before or during the giving of the statement. In fact, to the contrary, Detective O'Donnell specifically testified that

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defendant's father was not present at the hospital at the time of the giving of the statement, and that the detective was first aware of his presence at the hospital only at about 1 a.m., which was hours after the statement had been given. Detective O'Donnell's testimony, found to be credible by the trial court (and, for which, we will not substitute our judgment), belies defendant's claim that his father was arguably prevented from talking to him prior to his statement.

¶ 59 Next, we consider how the youth officer's alleged failure to protect defendant's interests affected the voluntariness of his statement. In Illinois, two lines of cases have developed as to the role of a youth officer: one line of cases holds that a youth officer is a type of physical guardian whose role is to verify that a juvenile's parents have been notified, ensure that the juvenile has been given *Miranda* warnings, and ensure that the juvenile is properly treated, fed, given access to the restroom, and not coerced. *People v. Murdock*, 2012 IL 112362, ¶ 49. Another line of cases holds that a youth officer must take a more active role and demonstrate an interest in the juvenile's welfare and affirmatively protect his rights (*id.*), such as by speaking with defendant and/or his parents. *In re Marvin M.*, 383 Ill. App. 3d 693, 714 (2008).

¶ 60 In the present case, while Detective Butler was acting in his role as youth officer, defendant's mother was called and informed of her son's location at the hospital, defendant was *Mirandized*, and defendant was told that he could tell Detective Butler whenever he wanted to stop the questioning. Thus, Detective Butler's duties as a youth officer were fulfilled under the physical guardian line of cases.

¶ 61 Detective Butler arguably did not fulfill his duties as a youth officer under the affirmative advocacy line of cases, where he never spoke to defendant or his parents. However, the failure of a youth officer to perform his duties does not make a juvenile's statements *per se* involuntary, as "there is no requirement that a [youth] officer be present when a minor is questioned."

*Murdock*, 2012 IL 112362, ¶ 52. Rather, the totality of the circumstances must be examined to determine the voluntariness of defendant's statement. *Id.* As discussed, the totality of the circumstances here indicates that defendant's statement was voluntary where: the physician indicated defendant was physically capable of talking with the detectives; defendant was calm and lucid when speaking with the officers; defendant initiated the conversation leading to his statement even after being told his mother was on the way; he was given his *Miranda* warnings, which he indicated he understood, and was told he could be tried as an adult if he was involved in the murder; he was informed that Detective Butler was the youth officer who he could talk to about stopping the conversation; and the conversation itself was brief, only a few minutes in duration and was not the result of any physical or mental abuse.

¶ 62 Thus, defendant's postconviction claims of ineffective assistance of trial counsel did not even arguably establish either the reasonableness or prejudice prongs of the *Strickland* test, where the ineffectiveness claims were based on trial counsel's failure to effectively argue both the involuntariness of his statement and the inadmissibility of his involuntary statement for impeachment purposes, but the totality of the circumstances shows that defendant's statement was voluntary and, thus, properly admitted. Because defendant's claims of ineffectiveness of trial counsel were not arguably meritorious, appellate counsel's failure to raise these claims on direct appeal was not arguably objectively unreasonable or prejudicial to defendant and, thus, also was not arguably ineffective under either prong of the *Strickland* test.

¶ 63 As defendant's postconviction claims of ineffectiveness of trial and appellate counsel failed to arguably establish either prong of the *Strickland* test, the postconviction court did not err in summarily dismissing defendant's petition.



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¶ 64 For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not determine whether defendant was correct in arguing here that an involuntary statement may not be admissible for impeachment purposes.

¶ 65 Affirmed.