2020 IL App (1st) 172104-U

FOURTH DIVISION
June 17, 2020

No. 1-17-2104

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 23251
	)	
ISAAC PEREZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition claiming ineffective assistance of appellate counsel for failure to raise an issue on appeal affirmed where the underlying issue lacked arguable merit.

¶ 2 Defendant, Isaac Perez, was convicted in a jury trial of the armed robbery of Canusco Figueroa and was sentenced to mandatory life imprisonment as a habitual offender. His conviction and sentence were affirmed on direct appeal. This appeal arises out of the summary dismissal of defendant's petition for post-conviction relief claiming ineffective assistance of

counsel for failure to challenge the denial of defendant's pretrial motion to suppress identification.

¶ 3 The record shows that, prior to defendant's trial, counsel for defendant filed a motion to suppress identification, alleging the lineup viewed by Figueroa was suggestive because the composition of the lineup and the conduct of the police officers improperly suggested to Figueroa that defendant was the perpetrator of the offense.

¶ 4 Before the hearing on defendant's motion to suppress, defense counsel provided the court with the transcripts of a motion to suppress identification from defendant's prior trial for a separate offense. In that case, defendant was charged and convicted of the November 8, 2008, armed robbery of Elizabeth Gonzalez and Tanairi Colon, both of whom viewed, and identified defendant in, the same lineup as Figueroa.

¶ 5 The transcripts from that prior case indicated that trial counsel had argued that the lineup was suggestive because petitioner was the tallest person in the lineup, had a different complexion than three of the participants, and had different hair than one of the participants. Counsel further argued that Gonzalez did not consider the other four participants when she immediately identified petitioner, which made her identification "questionable." Counsel also pointed to Colon's testimony that she took about five minutes to identify defendant, arguing that she "took a long time" to identify defendant, and that the court could therefore "assume that there was doubt in her mind."

¶ 6 The court denied defendant's motion to suppress identification in the prior case involving Gonzalez and Colon, concluding that the lineup was not suggestive. The court noted that all the participants were of the same complexion and appeared to be approximately the same age.

Gonzalez's identification was immediate, the witnesses viewed the lineup separately, and neither witness was told whom to pick.

¶ 7 In addition to the transcripts from the hearing on the motion to suppress identification in the prior case involving Gonzalez and Colon, defense counsel in the instant case also requested that the court consider the testimony of Figueroa, when she testified in the prior case as an other-crimes witness. In that case, Figueroa testified that on October 28, 2008, she was dropping off her nine-year-old son at her mother's home. At that time, she saw a man ride up on a bicycle, lay the bicycle down, and walk up to the porch where she and her son were standing. Figueroa identified defendant as the person who approached her. Defendant pulled out a kitchen knife and told Figueroa that if she cared about her son, she would give him all of her money and jewelry. Figueroa gave defendant her money and jewelry, and defendant fled. Figueroa reported the offense, and on November 22, 2008, the police called her to come to the station and view a lineup. The officer said that they "had arrested somebody with the same characteristics that [Figueroa] ha[d] told them." Figueroa went to the police station and identified defendant in a lineup as the person who robbed her at knifepoint. When she viewed the lineup, Figueroa "knew right away who was" the perpetrator. Figueroa testified that she was able to recognize defendant because, during the offense, she "saw his features and his face. And [Figueroa] [could not] erase that when [she] saw the knife."

¶ 8 On cross-examination, Figueroa testified that she did not remember telling police that the person that robbed her was five-foot-nine or five-foot-ten, or that he weighed approximately 130 to 140 pounds. She remembered telling police that the offender was thin, and that the offender looked Latino, Mexican or Puerto Rican. She did not recall stating that the offender specifically looked Puerto Rican, or that the offender wore a blue baseball cap.

¶ 9 Relying on the transcripts of the above testimony, defense counsel in the instant case argued that the lineup was suggestive because the police had told Figueroa that they had caught someone who matched her description, and her expectation and belief was that she would identify someone. Counsel further argued that the construction of the lineup was suggestive in that the age, height, weight and distinguishing characteristics of the participants suggested that the only person that Figueroa could identify was defendant.

¶ 10 The State responded that the court had already ruled that the same lineup was not suggestive in the prior case involving Gonzalez and Colon, and that Figueroa immediately recognized defendant as the man who had held her up at knifepoint. The State argued that any inconsistencies in her testimony were explained by Figueroa's inability to speak English and the fact that she testified through a Spanish interpreter.

¶ 11 The court again ruled that the lineup was not suggestive, and that the other individuals in the lineup were about the "same age, complexion, et cetera." The court acknowledged that defendant was the tallest in the lineup, but stated that the other participants possessed "features [that] appear[ed] to be very much alike." The court noted that Figueroa picked defendant out because "she paid attention to his face," and that her identification of defendant was immediate. The court found "no basis to believe" Figueroa's identification was "anything other than recognition from the lineup of persons with these similar features."

¶ 12 The matter proceeded to a jury trial, during which Figueroa testified that on October 28, 2008, she was working at a daycare facility when she received a phone call requesting that she pick up her nine-year-old son from school because he was sick. Figueroa picked up her son, and brought him to the doctor's office. After leaving the doctor, Figueroa and her son went to

Figueroa's mother's home, located on the first floor of 1931 North St. Louis Avenue in Chicago, where she intended to leave her son with her mother and return to work.

¶ 13 As Figueroa and her son arrived, she observed a man, whom she identified as defendant, pass by on a bicycle. Figueroa opened the gate to her mother's house, went up a few stairs, and rang the doorbell. At that point, Figueroa saw that defendant had "leaned his bike about two houses down" and was coming back towards her. Defendant came through the gate, and walked up the stairs to where Figueroa and her son were standing. Defendant asked Figueroa about "someone who lived upstairs" but she did not know the person to whom he was referring.

¶ 14 Defendant then pulled out a kitchen knife, which she estimated was about 8 to 12 inches long. Defendant touched Figueroa's son and said "if you love him very much, you're going to give me everything you have" including a necklace that Figueroa was wearing. Figueroa testified that during this time, she was standing about a foot from defendant, and was looking at defendant's face and "his features."

¶ 15 Figueroa then opened her bag and gave defendant an envelope with money that she was going to use to pay bills. She also removed her necklace and gave it to defendant. Defendant took those items, and told Figueroa "not to scream or say anything because he knew where [she] lived." Defendant then grabbed his bicycle and fled. Figueroa testified that the entire incident lasted about five minutes.

¶ 16 Figueroa then went to a nearby school where someone called 911. When the police arrived, Figueroa communicated with the officers through an interpreter because Figueroa was crying and upset. Figueroa explained what had happened, and gave a description of the offender.

¶ 17 About four weeks later, Figueroa was contacted by the Chicago Police Department, and she was asked to come to the police station to view a lineup. Figueroa reviewed and signed a

lineup advisory form, then viewed a lineup containing five individuals. Figueroa identified defendant "right away." She testified that she recognized defendant's "face, [and] his features" including his mouth and jaw area.

¶ 18 On cross-examination, Figueroa testified that she described the offender as "a male Puerto Rican" and that he had a hat. She denied describing the hat as a baseball cap, and testified instead that the offender was wearing a knit hat "for the cold." Figueroa otherwise could not remember what description she gave to the responding officer.

¶ 19 When Figueroa spoke to a detective five days later, she described the offender as a Puerto Rican male, with a light complexion, and wearing a brown sweater with a design of "little squares." Figueroa testified that she had described the offender as "skinny," and later clarified that she described "his face as skinny." She thought that she may have described the offender as being 130 to 140 pounds.

¶ 20 Detective Kischner of the Chicago Police Department testified that he was assigned to investigate the October 28, 2008, robbery of Figueroa. On November 22, 2008, Detective Kischner learned that defendant had been arrested approximately a block away from where the robbery had occurred. Detective Kischner believed that defendant fit the physical description of the offender in the case he was investigating, and he contacted Figueroa to come to the station to view a lineup.

¶ 21 When Figueroa arrived, Detective Kischner spoke to her using a Spanish interpreter, and explained the lineup process. Detective Kischner read from, and provided her with, a lineup advisory form which was signed and entered into evidence at trial. The advisory form indicated that Figueroa "underst[oo]d that the suspect may or may not be in the lineup," and that she was "not required to make an identification." By signing the advisory form, Figueroa further agreed

that she "d[id] not assume that the person administering the lineup *** knows which person is the suspect."

¶ 22 Upon viewing the lineup, Figueroa "immediately" identified defendant. Detective Kischner explained that there is a curtain which covers a window between Figueroa and the lineup participants, and "[t]he minute I opened the curtain she said numero quattro [*sic*]" meaning, number four in Spanish, identifying defendant who was seated fourth in the lineup.

¶ 23 On cross-examination, Detective Kischner testified that when defendant was arrested, he told the arresting officers that he was 5'11" and weighed 207 pounds. Defendant had brown hair, a medium complexion, and was 38 years old.

¶ 24 The State rested, and the defense presented a stipulation that if called, Detective Carillo would testify that:

> "he spoke to Ms. Figueroa on November 2, and that Ms. Figueroa gave a description of the offender to the detective, and the description she gave is the following: That the offender is a male Puerto Rican, 5'9"/5'10", 130/140 pounds, light complexion, skinny face, heavy stubble of [*sic*] face, over bite with teeth showing and short hair. The offender was wearing a blue baseball hat and a brown sweater with a square design."

¶ 25 The defense rested, and the parties presented closing arguments. After deliberations, the jury returned a verdict finding defendant guilty of armed robbery. Defendant was sentenced to a mandatory natural life sentence as a habitual offender, based on previous 1997 and 2006 convictions for Class X armed robbery.[1]

[1] The record shows that at the time of sentencing in this case, defendant was serving a mandatory

¶ 26 On direct appeal, this court affirmed defendant's conviction and sentence over defendant's arguments that the trial court violated Illinois Supreme Court Rule 431(b) by failing to ask the prospective jurors whether they understood and accepted the principles enumerated in that rule, and that the habitual criminal provision under which he was sentenced is unconstitutional as applied to him.

¶ 27 On June 28, 2017, defendant filed a *pro se* post-conviction petition. Defendant contended that he was denied his right to the effective assistance of appellate counsel, where appellate counsel "failed to raise [the] obvious [and] meritorious issue that the trial court erred in denying [his] motion to suppress identification." Specifically, defendant alleged that the "extreme height disparity" between himself and the other lineup participants rendered the lineup "impermissibly suggestive." Defendant also asserted that inconsistencies in Figueroa's descriptions of her assailant "undermine[d] the reliability of the lineup procedure and demonstrate[d] that the suggestive nature of the lineup gave rise to Figueroa['s] mistak[en] [identification]" of defendant. Defendant further claimed that trial counsel was ineffective for failing to "investigate and subpoena" defendant's son as an alibi witness, and that appellate counsel was ineffective for failing to argue that he was not eligible for sentencing as a habitual criminal on direct appeal.

¶ 28 On July 11, 2017, the court dismissed the petition, finding that it had no merit.

¶ 29 In this court, defendant alleges that he sufficiently alleged the gist of a constitutional claim of ineffective assistance of appellate counsel, based on counsel's failure to argue on direct appeal that the trial court erred in denying his motion to suppress identification.

¶ 30 We initially note that defendant has concentrated his appellate arguments on this claim, and thus has abandoned the remaining claims set forth in his postconviction petition, forfeiting

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natural life sentence under the habitual criminal provision, which had been imposed on his convictions for two counts of armed robbery in the prior case involving Gonzalez and Colon.

them for review. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 31 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings are commenced by the filing of a petition in the circuit court in which the original proceedings took place. *People v. Rivera*, 198 Ill. 2d 364, 368 (2001). Section 122–2 of the Act requires that defendant set forth in the petition the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting those allegations or explain their absence. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001).

¶ 32 Defendant need only set forth the "gist" of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122–2.1(a)(2) (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). A petition is frivolous or patently without merit if it has no arguable basis in law or in fact. *Id.* at 16. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* In assessing the sufficiency of a petition, all well-pled allegations are taken as true unless contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). We review the summary dismissal of a postconviction petition *de novo. Id.* at 389.

¶ 33 Claims of ineffective assistance of appellate counsel are measured against the same standard as claims of ineffective assistance of trial counsel. *People v. Paleologos*, 345 Ill. App. 3d 700, 703 (2003). To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a

result. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was thereby prejudiced. *Hodges*, 234 Ill. 2d at 17. Prejudice means that there is a reasonable probability that, absent the deficient performance, the result of the proceeding would have been different. *People v. Houston*, 229 Ill.2d 1, 11 (2008). Because both prongs of *Strickland* must be satisfied before a petitioner can prevail, courts may resolve ineffectiveness claims by reaching only one component of the *Strickland* analysis. *People v. Wiley*, 205 Ill. 2d 212, 230-31 (2001).

¶ 34 It is well-settled that appellate counsel need not brief every conceivable issue on appeal, and counsel is not ineffective for not raising issues which, in his or her judgment, are without merit, unless his or her appraisal of the merits is patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference, and unless the underlying issue is meritorious, a petitioner cannot show prejudice from the failure to raise the issue on appeal. *People v. Coleman*, 168 Ill. 2d 509, 523 (1995); *Smith*, 195 Ill. 2d at 190.

¶ 35 In this appeal, defendant argues that appellate counsel was ineffective for failing to challenge the denial of his motion to suppress identification on direct appeal, because the lineup procedures used, as well as the composition of the lineup, were unduly suggestive.

¶ 36 "Criminal defendants have a due process right to be free from identification procedures that are unnecessarily suggestive and conducive to irreparable mistaken identification." (Internal quotation marks omitted.) *People v. Jones*, 2017 IL App (1st) 143766, ¶ 27. To suppress an identification, a trial court must find both "(1) that the confrontation was unduly suggestive, and

(2) that the identification was not independently reliable." *People v. Lacy*, 407 Ill. App. 3d 442, 459 (2011).

¶ 37 When reviewing a lineup identification, a court utilizes a two-part inquiry. First, a defendant has the burden of proving that the pretrial identification was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *People v. Rodriguez*, 387 Ill. App. 3d 812, 829 (2008); see also *People v. Brooks*, 187 Ill. 2d 91, 126 (1999); *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 236. Second, if the defendant establishes that the identification was unduly suggestive, then the burden of proof switches to the State to make "a clear and convincing showing, based on the totality of the surrounding circumstances, that 'the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime.' " *People v. McTush*, 81 Ill. 2d 513, 520 (1980) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting, joined by Brennan, J.)); see also *Rodriguez*, 387 Ill. App. 3d at 829. In other words, the State must then show that the witness's identification is " 'independently reliable.' " *Rodriguez*, 387 Ill. App. 3d at 829 (quoting *People v. Ramos*, 339 Ill. App. 3d 891, 897 (2003)). A trial court's factual determination that an identification procedure was not unduly suggestive will not be reversed unless it is against the manifest weight of the evidence. *People v. Gaston*, 259 Ill. App. 3d 869, 874 (1994). However, the court's ultimate determination on a motion to suppress is reviewed *de novo. People v. Sorenson*, 196 Ill. 2d 425, 431 (2001).

¶ 38 We first address defendant's argument that Figueroa's identification was tainted by "suggestive police procedure." He specifically notes that Figueroa's testimony revealed that the police told Figueroa they caught someone who matched her description, that she should "identify

the person with the references that [Figueroa] had given them," and that she should pick out the person who had features like the offender.

¶ 39 Defendant also points to "recent legislation" that provides several factors to consider in adjudicating a motion to bar an eyewitness identification. 725 ILCS 5/107A-2 (West 2016). Defendant specifically contends that the identification in this case failed to meet several of those recommendations, including that the lineup be conducted by an "independent administrator," that no one present know the identity of the suspect, and that the lineup be audio and video recorded. *Id.* Defendant further contends that, contrary to that recent legislation, Figueroa was not told that it was as important to exclude innocent persons as to identify a perpetrator, and that the investigation would continue whether or not an identification was made. *Id.* Defendant also contends that the legislation indicates that at least five fillers should be used, if practicable, whereas only four fillers were used here. *Id.* Finally, defendant contends that the statute indicates that, if there are multiple witnesses, the suspect's position in the lineup shall be different for each witness, whereas here, the record indicates that defendant's position in the lineup was not changed after Gonzalez, Colon, or Figueroa viewed the lineup. *Id.* Defendant acknowledges that the statute on which he relies was not enacted at the time of the lineup in this case and clarifies that he is not "claiming that appellate counsel was ineffective for not raising issues related to Section 107A-2," but argues that, nonetheless, this Court should consider the delineated factors when determining the propriety of the instant lineup.

¶ 40 In response, the State contends that defendant has added new claims that were not included in his post-conviction petition, regarding both the directives in 725 ILCS 5/107A-2, and the suggestion that the police told Figueroa that they found someone who matched her description and that they needed her to select an individual with features that were similar to

those she had described. The State contends that defendant has forfeited these new claims by failing to argue them in his post-conviction petition.

¶ 41 The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act, and accordingly, any issues to be reviewed must be presented in the petition filed in the circuit court. *People v. Jones*, 211 Ill. 2d 140, 148 (2004); *People v. Pendleton*, 223 Ill. 2d 458, 470 (2006) ("[C]laims not raised in a postconviction petition cannot be argued for the first time on appeal."). In evaluating whether a petitioner has forfeited review of an issue by failing to raise it below, the court must give the *pro se* petition "a liberal construction" and view it "with a lenient eye, allowing borderline cases to proceed." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48. However, the issues raised in the petition "must bear some relationship to the issue[s] raised on appeal." *Id.*

¶ 42 In light of our supreme court's direction that petitions should be construed liberally, we find that defendant is not raising new claims on appeal that were not presented in his postconviction petition. Rather, he is presenting arguments in support of his claim, which bear enough of a relationship to the issue raised in his petition—namely, that appellate counsel was ineffective for failing to challenge the denial of defendant's motion to suppress identification—to allow for appellate review.

¶ 43 Nevertheless, we are unpersuaded by the merits of defendant's arguments. Section 107A-2, enacted by the Illinois legislature on January 1, 2015, sets forth standards and protocols to be utilized by law enforcement officers during their investigative identification endeavors. While there is no dispute that some of the identification procedures employed in the instant case did not strictly comply with some of the statute's mandates, the statute was not in effect when Figueroa

viewed the lineup in 2008. Given that the statute did not govern the lineup procedures utilized in this case, it is not relevant to inform a review of the propriety of the procedures used in this case. See *People v. Corral*, 2019 IL App (1st) 171501, ¶ 96; *People v. Moore*, 2015 IL App (1st) 141451, ¶ 21, *overruled on other grounds by People v. Hardman*, 2017 IL 121453 (declining to address the applicability of section 107A-2 because it "[did] not govern the lineup proceedings in [that] case."). This conclusion holds especially true here, where we are ultimately reviewing the propriety of appellate counsel's failure to raise the issue on appeal—it is axiomatic that counsel cannot raise an issue based on a statute that has not yet been enacted.

¶ 44 Defendant also asserts that the composition of the lineup was unduly suggestive, in that he "stands out" from the other participants because he is significantly larger and taller than them. Additionally, defendant points out that "two of the men have longer hair than defendant," and "three of the men have facial hair," while defendant "appears to have a five-o'clock shadow." Defendant further contends that "[t]wo of the men have readily apparent tattoos on their hands, whereas defendant has no visible tattoos," and defendant "is wearing tennis shoes" that are "antiseptically white."

¶ 45 The law does not require that lineups contain near identical participants. *People v. Johnson,* 149 Ill.2d 118, 147 (1992). As stated above, a trial court's factual determination that an identification procedure was not unduly suggestive will not be reversed unless it is against the manifest weight of the evidence, *i.e.*, an opposite conclusion is apparent or the findings appear to be unreasonable, arbitrary, or not based on evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006); *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). Illinois Courts have repeatedly held that height differences do not render lineups impermissibly suggestive. See *People v. Miller*, 254 Ill. App. 3d 997, 1005 (1993); *People v. Harrison*, 57 Ill. App. 3d 9, 13 (1978) (holding that lineup

was not suggestive, even though the defendant was the only participant who fit the description of the perpetrator as being "very tall"—"It is not required that all men placed in a line-up must be physically identical, and differences in size among them (if not too great) are of little consequence."); *People v. Wyatt*, 23 Ill. App. 3d 587, 592 (1974) (lineup identification was properly admitted where the petitioner was 6'4" tall, while others in the lineup ranged in height from 5'9" to 6'0", even though the victim had described the offender as being "tall.").

¶ 46 In light of this authority and the circumstances of this case, appellate counsel would have faced a virtually insurmountable hurdle in showing that the trial court's ruling was against the manifest weight of the evidence. In particular, in defendant's appeal from his convictions in the case involving Gonzalez and Colon, this court considered the same lineup that is at issue in this case, and we previously determined that "the relatively minor differences in appearance *** do not make the lineup suggestive." *People v. Perez*, 2016 IL App (1st) 131303-U, ¶ 40. Nevertheless, this court has again reviewed the photograph of the lineup in the record, which shows five men, including defendant, all with similar physical features, skin tone, age, hair color and eye color. We remain unpersuaded that the minor differences in appearance between defendant and the other lineup participants created an arguable basis for an ineffective assistance claim based on appellate counsel's failure to raise the denial of defendant's motion to suppress Figueroa's identification on appeal.

¶ 47 We are also unpersuaded by defendant's argument that the lineup was unduly suggestive because the police suggested to Figueroa that they had found someone matching her description. An identification is not rendered unreliable simply because the witness knows that a suspect is in custody; such fact is not suggestive *per se*, but rather states the obvious. *People v. Johnson*, 123 Ill. App. 3d 1008, 1013 (1984); *Harrison*, 57 Ill. App. 3d at 13 ("[W]henever the victim of a

crime is asked to come to the police station to look over persons arrested, there is an unavoidable intimation that the police have someone in custody who might be the perpetrator of the crime."); see also *People v. Ortiz*, 2017 IL App (1st) 142559, ¶¶ 25-26 (finding pretrial identification procedures not unduly suggestive, noting the witness signed a lineup advisory form informing him that police had a suspect in custody but the suspect may or may not be in the lineup). Defendant's suggestion is also significantly weakened by the fact that Figueroa signed a lineup advisory form, indicating her understanding that "the suspect may or may not be in the lineup," that she was "not required to make an identification," and that she should not "assume that the person administering the lineup *** knows which person is the suspect."

¶ 48 Finally, even if appellate counsel were able to make a viable claim that the lineup was unduly suggestive, which we do not find, the record contains strong evidence that Figueroa identified defendant based on her own independent recollection, which would allow the State to overcome any possible showing of suggestiveness. *People v. Enis*, 163 Ill. 2d 367, 398 (1994); *People v. McTush*, 81 Ill. 2d 513, 520 (1980) ("While it is the defendant's burden to establish that the pretrial confrontation was impermissibly suggestive [citation], once accomplished, the State may nevertheless overcome that obstacle, by a clear and convincing showing, based on the totality of the surrounding circumstances, that 'the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime.' [Citation.]"); *Brooks*, 187 Ill. 2d 91, 129 (1999) (finding that the testimony at the pretrial hearing and at trial provided a sufficient account of events to determine whether the identification had an independent basis, rendering it unnecessary to remand for further proceedings). In evaluating the reliability of an identification, the court considers (1) the witness's opportunity to view the suspect during the offense, (2) the witness's degree of attention, (3) the accuracy of any prior descriptions given, (4) the witness's

level of certainty at the time of the identification, and (5) the length of time between the crime and the identification. *People v. Slim,* 127 Ill. 2d 302, 307–08 (1989) (citing *Neil v. Biggers,* 409 U.S. 188, 199–200 (1972)).

¶ 49 As this court discussed in the direct appeal from defendant's conviction, Figueroa testified unequivocally that defendant was the man who robbed her. She immediately identified defendant at the lineup and again at trial, and never wavered in her identification. Moreover, Figueroa specifically testified to her high level of attention during the incident, and that she focused specifically on defendant's face and features. She further testified that defendant was standing only a foot away from her and her son, and that she had five minutes during the offense with which to observe defendant. There was no other testimony or evidence presented which contradicted Figueroa's identification of defendant. In these circumstances, even if appellate counsel could meritoriously claim that the lineup had been conducted improperly, the trial court's denial of defendant's motion to suppress would not have been reversed where the identifications had an independent basis in fact.

¶ 50 After reviewing the record in this case, we find that the circuit court did not err in summarily dismissing defendant's postconviction petition because he failed to present an arguable claim that he was prejudiced by appellate counsel's failure to challenge the denial of his motion to suppress identification on appeal where such a claim lacked any arguable merit. See *People v. Easley*, 192 Ill. 2d 307, 328 (2000) (holding that unless the underlying issues are meritorious, a petitioner has suffered no prejudice from counsel's failure to raise them on appeal).

¶ 51 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition at the first stage of proceedings.

¶ 52 Affirmed.