

SIXTH DIVISION
March 4, 2011

No. 1-08-2259

NOTICE: This order was filed under Supreme Court Rules 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
) the Circuit Court
Plaintiff-Appellee,) of Cook County
)
v.) No. 00 CR 18776
)
RONALD CHRISTMAS,) Honorable
) Vincent M. Gaughan,
Defendant-Appellant.) Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

O R D E R

Held: Summary dismissal of defendant's postconviction petition is affirmed over defendant's contention that he presented the gist of constitutional claim of ineffective assistance of appellate counsel.

Defendant Ronald Christmas appeals the summary dismissal of his *pro se* postconviction petition. We affirm.

Following a 2002 jury trial, defendant was found guilty of the first degree murder of Thomas Shears and sentenced to 39 years in prison. We affirmed that judgment on direct appeal.

People v. Ronald Christmas, No. 1-02-3575 (2004) (unpublished order under Supreme Court Rule 23) (*Christmas I*). After our entry of that order, defendant was tried for the first degree murder of Antoine Smith. Following a 2005 bench trial, defendant was found guilty of Smith's murder and sentenced to a mandatory term of natural life. We affirmed that judgment on direct appeal. *People v. Ronald Christmas*, No. 1-05-1513 (2007) (unpublished order under Supreme Court Rule 23) (*Christmas II*). The facts supporting defendant's convictions have been set out in detail in *Christmas I* and *Christmas II*. We revisit them here to the extent necessary to understand the issue raised on appeal.

About 10:30 p.m. on July 6, 2000, Sergeant Harrison Speakes received a call about a shooting that occurred near 4600 South State Street. There, Speakes saw defendant entering a building at 4555 South State and detained him. Officer Raymond Piwnicki arrived, conducted a field interview and discovered that defendant did not live in the building, was not visiting anyone and had no identification. Defendant was arrested for criminal trespass on State-supported land.

Detective Cyro Komorowski testified that on July 6, 2000, he was investigating the shooting of Thomas Shears. Komorowski learned that defendant had been arrested near the scene of the crime. He also learned that defendant's description was similar in height, weight and clothing to one of the shooters in the Shears case. On July 7, 2000, Komorowski questioned defendant who gave him names of alibi witnesses. After finding that no one corroborated his alibis, Komorowski questioned defendant again on July 8, 2000. About 7:30 p.m. on that date, defendant admitted to shooting Shears and was placed under arrest for murder. On July 9, at 7:18 p.m., defendant gave a videotaped confession to the Shears shooting and was identified

from a lineup as the shooter by an eyewitness, Ronald Parker.

Detective John Murray testified that on July 8, 2000, he was investigating the July 3, 2000, shooting of Antoine Smith and learned defendant was in custody as a suspect for the murder of Shears. Defendant matched the description of the offender in the Smith shooting. After defendant confessed to the Shears shooting, Murray conducted a lineup on July 8, 2000, for the Smith shooting. Eyewitnesses to the shooting, Steven Smith and Charles Gardner, identified defendant as the offender. On July 9, 2000, defendant confessed to shooting Smith and made a videotaped confession.

Before trial in either case, defendant filed motions in both cases to quash arrest and suppress evidence. After separate hearings, the motions to quash arrest were denied. The motions to suppress evidence were argued together and denied.

Defendant was then tried and convicted by a jury of the first degree murder of Thomas Shears. Defendant appealed that conviction, arguing that the trial court erred in denying his motion to quash arrest and suppress evidence because police lacked probable cause to arrest him for trespass to State-supported land. We agreed with defendant that his arrest was unlawful but found that his subsequent confession was sufficiently attenuated from the illegal arrest and properly admitted at trial. *Christmas I*, No. 1-02-3575, order at 9-13. After considering the factors set out in *Brown v. Illinois*, 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261-62 (1975), we noted that defendant was advised of his *Miranda* rights before he confessed, the record was devoid of flagrant police misconduct and an intervening factor - the police investigation of defendant's false alibis - broke the causal connection between the arrest and

confession. *Christmas I*, No. 1-02-3575, order at 10-13. We also found that defendant's confession, made before Parker's lineup identification, served as intervening probable cause and supported admission of Parker's identification at trial. *Christmas I*, No. 1-02-3575, order at 13.

Defendant was then tried for the first degree murder of Antoine Smith. Before trial, defendant moved again to quash his arrest and suppress evidence based on our ruling in *Christmas I* that his arrest in the Shears case was illegal. The trial court denied the motion, relying on our finding in *Christmas I* that the confession and Parker's lineup identification in the Shears case were admissible.

Defendant was then convicted of the first degree murder of Antoine Smith. We affirmed that judgment on direct appeal, over defendant's contention that his confession and lineup identifications by Steven Smith and Charles Gardner were a direct result of his illegal arrest. *Christmas II*, No. 1-05-1513. Relying on our decision in *Christmas I*, we noted that although we agreed with defendant that his initial arrest was illegal, we found once he confessed to shooting Shears, police had probable cause to arrest him and at that point he was under lawful arrest. *Christmas II*, No. 1-05-1513, order at 5. We found it unnecessary to conduct an attenuation analysis because the lineup identification was the result of a lawful arrest. *Christmas II*, No. 1-05-1513 at 6. We then determined that the subsequent lineup identifications for the murder of Smith were admissible, given that defendant was properly in custody based on his confession to the murder of Shears. *Christmas II*, No. 1-05-1513, order at 6.

On April 6, 2006, defendant filed a petition for a writ of *habeas corpus* in the United States District Court for the Northern District of Illinois. In the petition, defendant alleged that

he was being held unlawfully because in *Christmas I* this court violated his fourth amendment rights by: (1) finding that there was an intervening factor that sufficiently attenuated his statement from the illegal arrest; and (2) determining that the police conduct during his arrest was not purposeful and flagrant. The district court denied the petition, finding that in *Christmas I* we provided defendant with a “full and fair consideration of his fourth amendment claims” and that our application of the *Brown* factors was not unreasonable. See *United States of America ex rel. Christmas v. Battaglia*, No. 06 C 1897 (N.D. Ill. Feb. 6, 2007) (mem. op.).

On May 15, 2008, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged that he was deprived of his right to effective assistance of appellate counsel on appeal from Smith’s murder (*Christmas II*) because counsel did not argue that we erred in *Christmas I* in finding that defendant’s initial statement to police in which he admitted killing Shears was sufficiently attenuated from his illegal arrest. He claims that counsel should have argued that Detective Komorowski’s confrontation of defendant with his false alibis could not have served as an intervening circumstance to support attenuation because defendant’s communication of the existence of the alibis was a direct consequence of his unlawful arrest. In support of his argument, defendant attached to his petition this court’s decision in *People v. Simmons*, 372 Ill. App. 3d 735, 867 N.E.2d 507 (2007).

The trial court summarily dismissed defendant’s *pro se* postconviction petition on July 21, 2008. In its written order, the court concluded that our holding in *Christmas I* was proper and that appellate counsel was not ineffective for failing to raise a non-meritorious issue that had previously been decided by this court. Defendant now appeals from that order.

A postconviction petition will be summarily dismissed at the first stage of proceedings if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2006). A petition is considered frivolous or patently without merit if it has no arguable basis in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204 (2009). For a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim (*Hodges*, 234 Ill. 2d at 9-10), supported by the record or accompanying affidavits (725 ILCS 5/122-2 (West 2006)). Where the record contradicts the defendant's allegations, the dismissal of his petition will be upheld. *People v. Rogers*, 197 Ill. 2d 216, 222, 756 N.E.2d 831 (2001).

Here, defendant contends that the trial court erred in summarily dismissing his petition because he presented the gist of a constitutional claim of ineffective assistance of appellate counsel for failing to challenge our ruling in *Christmas I* that defendant's confession and lineup identification were attenuated from his unlawful arrest.

A claim of ineffective assistance of appellate counsel is reviewed under the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *People v. Marshall*, 381 Ill. App. 3d 724, 731, 886 N.E.2d 1106 (2008). To prevail on a claim that appellate counsel was ineffective for failing to raise an issue on appeal, a defendant must allege facts demonstrating both that such failure was objectively unreasonable and that he was prejudiced by counsel's decision. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831 (2001); *People v. Robinson*, 217 Ill. 2d 43, 61, 838 N.E.2d 930 (2005). To establish prejudice a defendant must show that there is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v.*

Petrenko, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198 (2010), quoting *Strickland*, 466 U.S. at 694.

“Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel’s appraisal of the merits is patently wrong.” *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975 (2000).

We first note that defendant’s ineffective assistance claim is belied by the record. The record shows that counsel in *Christmas II* did argue that defendant’s initial arrest was unlawful and that his lineup identifications and confession were a direct result of his illegal arrest. Although counsel did not frame the argument in the manner defendant does here, *i.e.*, that counsel should have challenged our attenuation analysis in *Christmas I* by citing allegedly contrary case law, counsel did contend that defendant was held unlawfully and that evidence obtained as a result of that unlawful detention should be suppressed. We resolved the issue against defendant given our finding in *Christmas I* that, despite the unlawful arrest, defendant’s confession in the Shears case was not the result of the arrest.

This aside, we cannot say that counsel’s decision not to challenge our ruling in *Christmas I* in the manner suggested by defendant was patently erroneous. The record shows that our attenuation analysis in *Christmas I* has twice been found proper. Once by this court in *Christmas II* and once by the federal district court. We believe that in *Christmas I* we accurately applied the *Brown* factors in determining whether defendant’s confession was sufficiently attenuated from his unlawful arrest. These factors include: (1) whether Miranda warnings were given; (2) the temporal proximity between the arrest and confession; (3) the presence of intervening

circumstances; and (4) the purpose of flagrancy of police misconduct. See *People v. Bramlett*, 341 Ill. App. 3d 638, 651, 793 N.E.2d 203 (2003), citing *Brown*, 422 U.S. at 603-04.

Defendant asserts that the third and fourth factors weigh in his favor and that counsel was ineffective for failing to cite to numerous cases which allegedly support defendant's argument. See *People v. Gabbard*, 78 Ill. 2d 88, 99, 398 N.E.2d 574 (1979) (identification of a defendant in a lineup is not an intervening circumstance); *People v. Beamon*, 255 Ill. App. 3d 63, 69-70, 627 N.E.2d 316 (1993) (confronting a defendant with incriminating statements made against him by others does not serve as an intervening circumstance if the persons who made the statements were also arrested unlawfully); *People v. Stofer*, 180 Ill. App. 3d 158, 170, 534 N.E.2d 1287 (1989) (statements of codefendants obtained as a result of information provided by a defendant during the course of his unlawful arrest are not intervening circumstances); *People v. Reynolds*, 257 Ill. App. 3d 792, 805, 629 N.E.2d 559 (1994) (incriminating statements made by witnesses whose names were given to police by a defendant while he was unlawfully detained cannot be considered independent intervening events); *People v. Simmons*, 372 Ill. App. 3d 735, 745-46, 867 N.E.2d 507 (2007) (the defendant's arrest and lengthy detention evidenced purposeful and flagrant police misconduct where police "rounded up defendant and then conducted a fishing expedition in order to establish probable cause"); *People v. Scott*, 366 Ill. App. 3d 638, 648, 852 N.E.2d 531 (2006) (confronting the defendant with the crime scene amounted to flagrant and purposeful police misconduct); *People v. Jackson*, 374 Ill. App. 3d 93, 107-08, 869 N.E.2d 895 (2007) (finding flagrant and purposeful police misconduct where the defendant's unlawful detention was investigatory in nature and a "fishing expedition").

We are unpersuaded by defendant's argument that counsel's failure to cite to these cases was objectively unreasonable because they are factually distinguishable from the case here. Unlike in the cases mentioned, here defendant was confronted with information that his alibis were false and police did not act purposefully or flagrantly. As we did in *Christmas I*, we continue to find *People v. Tankson* persuasive. *People v. Tankson*, 92 Ill. App. 3d 328, 332, 415 N.E.2d 1218 (1980) (knowledge that the results of a police investigation contradicted the defendant's alibi was held to be a significant intervening circumstance sufficient to establish attenuation). This is especially so where, unlike the cases relied on by defendant, there was no evidence here of flagrant or purposeful police misconduct. Police suspected defendant of the Shears shooting based on information provided by Parker and arrested defendant because they believed he was trespassing on State-supported land. See *Tankson*, 92 Ill. App. 3d at 332 (“[w]hile police investigation of [defendant's] alibi accounts may not constitute an intervening circumstance as contemplated by *Brown*, there is no evidence to indicate that the defendant was arrested as a pretext for some collateral, improper objective of the police”). We cannot say defendant was prejudiced by counsel's decision not to rely on these cases such that the result of his *Christmas II* appeal would have been different or that the trial court erred in summarily dismissing his postconviction petition. *People v. Oliver*, 367 Ill. App. 3d 826, 834, 856 N.E.2d 1144 (2006).

The judgment of the trial court is affirmed.

Affirmed.