2015 IL App (1st) 130852-U

THIRD DIVISION
September 2, 2015

No. 1-13-0852

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	11 M5 00287
	)	
JOSE SALCEDO,	)	The Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason concurred in the judgment.
Justice Pucinski dissented in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by summarily dismissing defendant's postconviction petition as frivolous and patently without merit where the petition's allegations were uncorroborated by the attached affidavits and evidence, and failed to state the gist of a constitutional claim of ineffective assistance of trial counsel. Furthermore, private counsel had no right at the first stage of proceedings to an order compelling trial counsel to turn over defendant's file.

¶ 2 This appeal arises from the trial court's summary dismissal of defendant Jose Salcedo's petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2012). On appeal, defendant contends that the trial court erred in dismissing his petition where

he set forth the gist of a constitutional claim of ineffective assistance of trial counsel. Specifically, defendant claims that counsel rendered ineffective assistance by failing to seek the suppression of the murder weapon and defendant's statements due to an insufficient factual basis to support the probable cause necessary for the issuance of a search warrant. Defendant further asserts the trial court erred when it denied his motion to compel trial counsel to copy defendant's client file for postconviction counsel's review. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 28, 2005, Keith Thomas was shot to death as he made his way to pick up his mother from the Chicago Transit Authority (CTA) elevated train station. Thomas was driving north on Pulaski Road when he was shot several times by defendant, who claimed that Thomas intentionally collided with his vehicle and then brandished what appeared to be a gun. After shooting Thomas, defendant fled the scene, but was apprehended several days later during the execution of a search warrant in a separate narcotics investigation. The .45-caliber gun used in the shooting was recovered during the search of defendant's home. No gun was recovered from Thomas' automobile, but a gray cell phone was found in his lap. Because this court previously examined the facts of this case in the course of defendant's direct appeal, we will provide only the background necessary to understand this appeal.

¶ 5 A. Trial

¶ 6 At trial, the State's theory was that a minor traffic collision with Thomas so enraged defendant that he caught up to Thomas' car, he rolled down his window, and intentionally fired multiple shots at Thomas, resulting in his death. The defense described an alternate scenario where defendant, driving with his three-year-old son, perceived the collision as an intentional action. Defense counsel argued that defendant had a heightened sense of fear due to his previous

experience as the victim of a shooting and a similar experience where, after a traffic collision, another driver pulled a gun on him. Thus, defendant reacted to what he perceived to be a gun in Thomas' hand by firing several shots at him. The defense argued that defendant's actions were justified under self-defense, or alternatively, amounted only to second degree murder based on an unreasonable belief that self-defense was warranted.

¶ 7 At trial, the evidence showed that at about 5:30 p.m. on September 28, 2005, Michael Considine was driving to the CTA Orange Line train station when he stopped his car at a red light at the intersection of 51st Street and Pulaski Road. After hearing a series of gunshots, Considine observed a red car, driven by an 18- to 22-year-old Hispanic male with short hair, driving away at a high rate of speed as a gray or white car drifted across the southbound lanes of Pulaski Road and came to rest against the curb.

¶ 8 When Officer John Svienty and his partner arrived there at 5:45 p.m., they observed a gray car facing northwest resting against the curb in the southbound lanes and an unresponsive individual, later found to be Thomas, inside the car. Thomas and the car had been shot several times and a gray cell phone was in his lap. In addition, Officer Svienty spoke to Considine, who described the offender and his vehicle. When Detective Roger Murphy and his partner arrived at about 6:15 p.m., Detective Murphy observed a cell phone in Thomas' lap and damage to his car, specifically bullet holes, shattered glass, and scrapes on the front left bumper. Moreover, the police found fired cartridge cases from a semiautomatic gun in the street and recovered fired .45-caliber bullets from Thomas' car, but did not find a gun inside his car.

¶ 9 The parties stipulated to the testimony of several police officers who searched defendant's apartment. Officer Alfonso Castillo obtained a search warrant for defendant's apartment and his person as part of an unrelated narcotics investigation. When Officer Castillo

and his partner were conducting surveillance outside defendant's apartment on October 3, 2005, they saw him leave his garage in a maroon 2000 Chevrolet Impala. The officers stopped him, recovered his apartment keys and seized his car. Inside the apartment, the officers recovered a .45-caliber semiautomatic Ruger firearm, a magazine containing seven .45-caliber rounds of ammunition, and an additional round in the chamber. During the search, the officers also recovered a second magazine loaded with six .45-caliber rounds of ammunition, a 9-millimeter Davis Industries pistol, which had two 9-millimeter rounds in the chamber, a box of .357 Magnum Winchester ammunition, a box of 9-millimeter Winchester ammunition, and a box of .45-caliber Winchester ammunition. Furthermore, the officers recovered a bulletproof vest and identification indicating that defendant lived at the apartment. After arresting defendant, the officers observed that his physical appearance and car matched the description of the person who shot Thomas. Officer Castillo also recalled that a .45-caliber gun was used in the shooting and notified the detectives investigating the shooting of defendant's arrest. The investigating detectives, Detective Murray and Detective Szudarksi, took custody of defendant, who gave a videotaped statement regarding the shooting.

¶ 10 In his statement, defendant said he was driving on Pulaski Road after dropping his girlfriend off, when Thomas drove up behind him and bumped his car "a little bit." Defendant stated that Thomas "didn't hit me hard, but he bumped me." Thomas then passed defendant on the right. Defendant did not know Thomas and no words were exchanged between them. In addition, defendant stated he did not want to "deal with" the situation, but became angry because his "shorty," his three-year-old son, was in the backseat of the vehicle. Defendant said Thomas "tried to get away from me," but defendant "caught up" to him and shot at him five or six times

with a .45-caliber gun. Furthermore, defendant claimed he did not fire the entire clip because he did not want to kill Thomas. After the shooting, defendant drove home.

¶ 11 Forensic evidence showed no signs of paint transfer between the cars. Although there was a white to light-gray colored smear on defendant's bumper, there was an insufficient quantity of paint for a comparison. Furthermore, fired bullets and cartridge cases recovered from the scene were fired from the .45-caliber Ruger firearm recovered from defendant's apartment.

¶ 12 Defendant testified on his own behalf that on the day in question, he and his son had been driving home after dropping off defendant's girlfriend at Daley College. Defendant then saw a gray car, which swerved behind him and bumped into the rear of his car. Defendant "heard the bumper crack," but felt the impact only "a little bit." As defendant activated his right turn signal and attempted to pull over, believing the collision was an accident, the gray car hit him on the right side of the car at the rear quarter panel. Defendant then "knew it was intentional, on purpose."

¶ 13 During the incident, defendant was frightened due to a previous incident, in which a van hit the car that he and his sister were traveling in and a person in the van pointed a gun at them. Defendant and his sister escaped before any shots were fired. Defendant was also shot three times in a separate incident. In addition, defendant owned a bulletproof vest because he was afraid of being shot again. On the day of this incident, however, defendant was not wearing the protective vest.

¶ 14 Defendant further testified that the gray car cut him off again. Defendant did not call the police, however. Instead, he removed his gun from his waistband, keeping it concealed from other drivers, and rolled down his window because the rain obstructed his view. As defendant passed the gray car, he saw something gray in the driver's hand and believed it to be a gun. He

was scared because "either it was him or me and I got my son in the back seat." Accordingly, he fired five or six shots "[r]eal fast" without aiming. Afterward, defendant was afraid and drove home. He did not know Thomas had died. At home, defendant put the gun away, but did not call the police. In the days between the incident and defendant's arrest, defendant had taken his car to an auto repair shop where the car's bumper was repaired, but did not have the car repainted. We note that an employee of an auto repair shop somewhat corroborated defendant's account of the repairs.

¶ 15 Moreover, defendant testified that when the police executed a search warrant at his home on October 3, 2005, the police recovered the two loaded weapons, ammunition, and bulletproof vest, and took him into custody. At the police station, defendant was interviewed first about the drug case and later about the shooting. Specifically, the detectives "pretty much [told] me that somebody was ramming me and I was with my son." The detectives did not let him talk, but rather, kept talking and telling him what happened. Defendant testified that although the detectives told him that he was scared and shot the victim six times because he was defending himself, it happened to be true.

¶ 16 Following closing arguments, the jury found defendant guilty of first degree murder, rather than second degree murder based on unreasonable self-defense, and aggravated discharge of a firearm. The trial court sentenced him to 28 years in prison for first degree murder, 25 years in prison for discharging a firearm causing death, and a concurrent sentence of 10 years in prison for aggravated discharge of a firearm.

¶ 17 B. Direct Appeal

¶ 18 Defendant appealed this conviction, claiming that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), erroneously submitted an initial

aggressor instruction to the jury, and improperly prohibited defendant from presenting evidence regarding the victim's prior acts of aggression. Defendant also asserted that trial counsel was ineffective for stipulating to the recovery of firearm-related evidence from defendant's home. We affirmed, finding among other things, that trial counsel stipulated to firearm evidence as a matter of trial strategy. Specifically, counsel used such evidence as support for the defense theory that defendant had a heightened sense of fear. *People v. Salcedo*, 2011 IL App (1st) 083148, *appeal denied*, No. 113126 (Ill. Nov. 30, 2011).

¶ 19 Shortly after we affirmed the judgment below, appellate counsel received from trial counsel Officer Castillo's application for a search warrant. We note that prior to the issuance of our opinion, appellate counsel had not informed this court that counsel was still seeking that document. Appellate counsel then filed a petition for rehearing to address whether trial counsel rendered ineffective assistance of counsel by failing to seek suppression of the murder weapon and defendant's statements due to an insufficient factual basis for the search warrant, relying on the recently obtained search warrant application. We subsequently denied defendant's petition for rehearing. See *People v. Clinton*, 397 Ill. App. 3d 215, 231 (2009) (citing 210 Ill. 2d R. 367(b)) (observing that litigants may not raise a new argument in a petition for rehearing).

¶ 20 C. Postconviction Proceeding

¶ 21 On November 15, 2012, defendant, through private counsel, filed a postconviction petition alleging that trial counsel was ineffective for failing to litigate a motion to suppress evidence of the murder weapon and statements made by defendant as a result of an invalid search warrant. Specifically, defendant alleged that the warrant application's allegations were insufficient to establish probable cause. We note that although trial counsel had filed and withdrawn a motion to quash arrest and suppress evidence before trial, that motion had not

expressly pertained to the search warrant application. In addition, defendant alleged that Rodolfo Zarate "appears to be" the John Doe referenced in the search warrant application, but provided false information to the police. Defendant further alleged that trial counsel "knew about Zarate" but failed to seek suppression of the evidence on that basis. Moreover, trial counsel was ineffective for failing to request a hearing to challenge John Doe's veracity pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

¶ 22 Among the attachments to defendant's petition were Officer Castillo's search warrant application, as well as affidavits from Zarate and Juan Salcedo (Juan), defendant's brother. The search warrant application stated that Officer Castillo and John Doe informant "now appear before" the judge on October 3, 2015. In addition, Officer Castillo and John Doe both signed and swore to the application's contents. This document alleged that John Doe purchased cocaine on "numerous occasions" from defendant at 2623 South Kildare Avenue. John Doe also alleged defendant "always had cocaine on hand" and that John Doe successfully purchased cocaine every time he visited defendant's apartment. On September 1, 2005, John Doe entered defendant's apartment and purchased cocaine from him. Inside defendant's apartment, defendant asked John Doe how much cocaine he wanted, retrieved a large bag of a powdered substance from a cabinet in the living room, and poured a quantity of the substance into another bag for John Doe in exchange for $25. John Doe, who had ingested cocaine over the last three years, inhaled the substance he had purchased from defendant and felt the same euphoric sensation as his previous experiences with cocaine. After John Doe took Officer Castillo to the location of defendant's apartment, John Doe identified him from a photograph. Both Officer Castillo and John Doe signed the document as complainants. We further note that the warrant was executed on the day it was issued, October 3, 2005.

¶ 23 Zarate alleged in his affidavit that after he was arrested in September 2005, he provided false information to the police in exchange for help on his robbery charge. Specifically, Zarate told police he purchased drugs from defendant. Zarate made the prior statement only because the police told him to. Zarate's affidavit did not, however, allege that he was John Doe or state that he appeared before a magistrate.

¶ 24 Juan's affidavit alleged that in 2007, trial counsel's associate attorney showed Juan an individual's statement regarding his purchase of cocaine from defendant. This statement was not, however, the warrant application and Juan did not know whether the statement had identified the speaker as John Doe. Nonetheless, Juan identified Zarate from a photograph attached to the statement and later accompanied Zarate to trial counsel's office, where Zarate met with counsel for 30 minutes. Juan further alleged, however, that trial counsel subsequently stated that Zarate "denied ever making a statement that he bought drugs from [defendant]," in contrast to the petition's allegation that Zarate had made a false statement to that effect. Similarly, Juan acknowledged that Zarate had also told him that he never told the police that he purchased drugs from defendant. Furthermore, Juan alleged that Zarate never specified that he had ever spoken to the police at all.

¶ 25 After filing defendant's petition, defendant's attorney requested that the postconviction court compel trial counsel to turn over defendant's client file for her review. The trial court denied counsel's requests, noting that such requests were improper during the first stage of proceedings. The trial court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals.

¶ 26 I. ANALYSIS

¶ 27 A. Ineffective Assistance of Counsel

¶ 28 On appeal, defendant asserts that the trial court erred by summarily dismissing his postconviction petition because he presented the gist of a constitutional claim that trial counsel provided ineffective assistance by failing to pursue a motion to suppress evidence of the murder weapon and defendant's statements to police. Defendant contends that Zarate was the John Doe informant relied upon in the search warrant application, but he lied to the police. In addition, counsel knew this information, yet failed to contest the validity of the search warrant. Defendant further argues that the search warrant application did not otherwise establish probable cause for the search of defendant's home. We review the summary dismissal of defendant's petition *de novo*, and as a result, may affirm on any basis in the record. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 29 The Act provides a procedural mechanism to inquire into the substantial denial of constitutional rights, that were not, or could not be, adjudicated on direct appeal. *People v. Peeples*, 205 Ill. 2d 480, 509-10 (2002). At the first stage of proceedings, the trial court independently reviews the defendant's petition and will summarily dismiss the petition within 90 days if the allegations are frivolous or patently without merit. *People v. Harris*, 224 Ill. 2d 115, 125-26, 129 (2007); 725 ILCS 5/122-1 (West 2012). In addition, the petition is to be liberally construed, taking the allegations as true. *Harris*, 224 Ill. 2d at 126. A petition is frivolous or patently without merit, however, where it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009). Specifically, petitions may be summarily dismissed when based on an indisputably meritless legal theory, or fanciful allegations, such as delusional ones. *Hodges*, 234 Ill. 2d at 16-17.

¶ 30 As most postconviction petitions are filed *pro se*, the threshold for providing sufficient substantive legal arguments and facts to show the gist of a claim is a low one. *Allen*, 2015 IL

113135, ¶ 24. Thus, petitions are only required to include "some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 10 (2009) (quoting *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008)). In addition, section 122-2 (725 ILCS 5/122-2 (West 2012)) requires a defendant to attach to his petition "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." (Internal quotation marks omitted.) *Delton*, 227 Ill. 2d at 253. The purpose of this requirement is to demonstrate that the petition's allegations can be corroborated. *Hodges*, 234 Ill. 2d at 10. Conversely, conclusory and unsupported allegations are not permitted. *Delton*, 227 Ill. 2d at 258. Furthermore, the attached affidavits and evidence must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations. *Delton*, 227 Ill. 2d at 254. The failure to attach these supporting affidavits and evidence, or explain their absence, by itself is fatal to the petition. *Id*. at 255.

¶ 31 1. John Doe's Veracity

¶ 32 At the first stage of proceedings, "a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to establish either prong of this test will preclude a finding of ineffective assistance of counsel. *People v. Mabry*, 398 Ill. App. 3d 745, 752 (2010). In addition, there is a strong presumption that trial counsel's decisions, actions, and inactions are sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Furthermore, matters of trial strategy are virtually unchallengeable, even when the course of action taken by trial counsel was ultimately unsuccessful. *People v. Fuller*,

205 Ill. 2d 308, 331 (2002). Similarly, decisions concerning the presentation of witnesses or evidence are matters of trial strategy, and thus, are generally immune from claims of ineffective assistance of counsel. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 63. To overcome the presumption that counsel's decision not to pursue a motion to suppress evidence was a matter of strategy, a defendant must show both that (i) a reasonable probability exists that the motion would have been granted, and (ii) the trial's outcome would have been different. *People v. Miller*, 2013 IL App (1st) 110879, ¶ 72. Simply put, defendant is entitled to competent counsel, not perfect representation. *Fuller*, 205 Ill. 2d at 331.

¶ 33 Here, the trial court properly dismissed defendant's petition with respect to defendant's claim that counsel knew John Doe provided false information in connection with the warrant application, yet failed to pursue a motion to suppress on that ground. Defendant's argument rests on three premises: (1) Zarate was John Doe; (2) Zarate provided false information to the police; and (3) trial counsel knew that Zarate was John Doe and that he supplied false information to police. Although defendant has attached affidavits and evidence to his petition, these documents do not corroborate his allegations, as required by section 122-2.

¶ 34 Defendant, on appeal, acknowledges that "it is unclear from the facts currently known to post conviction counsel if Zarate is actually the John Doe listed." Similarly, the petition's allegation that Zarate was the John Doe informant relied on in the search warrant application is not corroborated by the attachments to defendant's petition. Furthermore, none of the attached affidavits specifically identified Zarate as John Doe.

¶ 35 Although Zarate's affidavit stated he provided the police with false information, he did not claim that he appeared before the magistrate, as the warrant application shows John Doe did. Thus, Zarate's affidavit does not confirm he is John Doe, nor does it preclude the possibility that

a different individual was John Doe and provided the police with truthful information. In addition, Juan's affidavit asserts that after trial counsel personally met with Zarate, counsel reported that Zarate, "denied ever making a statement that he bought drugs from [defendant]." According to the warrant application, however, John Doe did make such a statement. Defendant does not dispute that John Doe made such a statement, but instead, suggests only that the statement was not truthful. Accordingly, Juan's affidavit, which indicated that Zarate made no statement whatsoever, rebuts the possibility that Zarate is John Doe. It follows that defendant's second premise is irrelevant. Even if Zarate lied to the police, that would have no bearing on the veracity or reliability of John Doe, a different individual.

¶ 36 More importantly, Juan's affidavit contradicts defendant's assertion that trial counsel knew Zarate was John Doe and that he lied to police. Juan's affidavit claims trial counsel met with Zarate for 30 minutes, after which, trial counsel stated that Zarate "denied ever making a statement that he bought drugs from [defendant]." Although it appears that trial counsel was aware of Zarate, counsel, after speaking to Zarate, was apparently not persuaded that he was John Doe. This was entirely reasonable given that John Doe gave a statement to the police, while Zarate claimed to have given no statement whatsoever.

¶ 37 Not only has defendant failed to provide affidavits supporting his allegations, but defendant's affidavits rebut his own allegations. *Cf. Hodges*, 234 Ill. 2d at 17-18 (reversing the summary dismissal of petition which clearly presented the respects in which petitioner's constitutional rights were violated and satisfied the corroboration requirements of section 122-2 with signed affidavits of three witnesses providing independent corroboration of defendant's allegations). Thus, defendant's factual allegations are delusional. Defendant cannot overcome the

presumption that trial counsel, as a matter of sound trial strategy, declined to pursue a motion to suppress after interviewing a witness who effectively indicated that he was not John Doe.

¶ 38 We similarly find defendant has not shown trial counsel was ineffective for failing to seek a *Franks* hearing. Affidavits supporting search warrants are presumed to be valid. *People v. Vauzanges*, 158 Ill. 2d 509, 516-17 (1994). Where a defendant makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the warrant affidavit, and the statement is necessary to finding probable cause, the defendant is entitled to a hearing. *Id*. (citing *Franks*, 438 U.S. at 155-56). As stated, Juan's affidavit rebutted the possibility that Zarate was John Doe and Zarate's own affidavit did not suggest otherwise. Accordingly, trial counsel could not have made even a preliminary showing based on the information Zarate allegedly gave him and counsel was not deficient for failing to seek a *Franks* hearing.

¶ 39 2. Allegations Supporting Probable Cause

¶ 40 We also find defendant's petition failed to show that trial counsel was ineffective for failing to file a motion to suppress evidence based on the alleged insufficiency of the warrant application. Although trial counsel's decision to pursue a motion to suppress is a matter of trial strategy, we must consider whether the motion would have been meritorious and if the search warrant application provided a substantial basis for the finding of probable cause. *People v. Kornegay*, 2014 IL App (1st) 122573, ¶¶ 20-21.

¶ 41 The Fourth Amendment states, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. In addition, a judicial finding of probable cause for a search warrant should be granted great deference by reviewing courts.

People v. Lenyoun, 402 Ill. App. 3d 787, 792 (2010). Our duty is simply to ensure that the issuing magistrate had a substantial basis for concluding that probable cause existed, using commonsense considerations that are factual and practical, and not substitute our judgment for that of the magistrate. *Kornegay*, 2014 IL App (1st) 122573, ¶¶ 21-23. When reviewing whether a magistrate had a substantial basis for concluding that probable cause existed, the court's analysis generally does not turn on any one factor. *People v. Phillips*, 265 Ill. App. 3d 438, 447 (1994). Instead, we generally consider whether the totality of the circumstances indicated there was a fair probability that evidence of a crime would be found in a certain place, pursuant to *Illinois v.* Gates, 462 U.S. 213, 238-39 (1983). *Phillips*, 265 Ill. App. 3d. at 447; see also, *People v. Tisler*, 103 Ill. 2d 226, 245-46 (1984) (adopting the *Gates* "totality of the circumstances" standard for resolving questions of probable cause involving an informant's tip). Factors for assessing an informant's reliability include the informant's personal observations, the degree of detail given, police corroboration of the information, and whether the informant testified at the probable cause hearing. *Kornegay*, 2014 IL App (1st) 122573, ¶ 35. Furthermore, deficiencies in one factor may be augmented by other supporting information. *Id*.

¶ 42 Our appellate court has applied differing approaches, however, when the confidential informant has appeared before the magistrate issuing the warrant. In *Phillips*, the court held that because the informant appeared before the magistrate, the hearsay concerns in *Gates* were not at issue and thus, *Gates*' totality of the circumstances test did not apply. *Phillips*, 265 Ill. App. 3d, at 448. Instead, the informant's appearance before the judge was itself sufficient. *Id*. at 448. Specifically, *Phillips* found that the judge had the opportunity to observe the informant's demeanor and personally assess his credibility. *Id*. In contrast, this court more recently declined to find an informant's appearance was dispositive where the record did not show the informant

was actually questioned. *People v. Smith*, 372 Ill. App. 3d 179, 183-84 (2007); see also *People v. McCarty*, 223 Ill. 2d 109, 142, 153 (2006) (although not at issue, the supreme court considered the totality of the circumstances where the informant had appeared before the magistrate). Notwithstanding the *Smith* court's determination, the court found in considering the totality of the circumstances that the informant's appearance supported his reliability, regardless of whether he was questioned. *Smith*, 372 Ill. App. at 184. Assuming the totality of the circumstances test applies, we find the record supports the magistrate's determination that the informant was reliable.

¶ 43 The search warrant application states, "Officer Alfonso J. Castillo***and John Doe now appear before the undersigned judge." Defendant acknowledged in his petition that the application for the search warrant indicates that John Doe appeared before the magistrate and signed the application under oath. Thus, contrary to defendant's assertion on appeal, a plain reading of this affidavit, signed by Officer Castillo, John Doe, and the judge who issued the search warrant, indicates that both Officer Castillo and John Doe were present before the court. In addition, John Doe's appearance before the judge eliminated the ambiguity of relying on an unknown informant. See *United States v. Johnson*, 289 F.3d 1034, 1040 (7th Cir. 2002) (holding that evidence of an on-the-record exchange between the court and the informant is not required because the very presence of the informant and his ability to be questioned is indicia of his reliability, as it eliminates the ambiguity of relying on an unknown hearsay declarant), overruled on other grounds, *United States v. Vaughn*, 433 F. 3d 917 (7th Cir. 2006)). That the record is unclear whether the magistrate questioned John Doe directly, does not weaken the magistrate's finding of probable cause for the search of defendant's home. See *Kornegay*, 2014 IL App (1st) 122573, ¶ 36.

¶ 44 Moreover, the warrant application relied on substantial and detailed information provided by John Doe, who attested to purchasing cocaine from defendant at his home "on numerous occasions" and stated that defendant "always had cocaine on hand." See *Smith*, 372 Ill. App. 3d at 184 (holding that the magistrate had a substantial basis for finding probable cause when a confidential informant attested to purchasing crack cocaine from defendant several times over six months, identified the defendant and his home, and appeared before the magistrate). John Doe also described in detail, a specific occasion, on September 1, 2005, when John Doe visited defendant's home and purchased cocaine from him. In addition, John Doe provided detailed information of defendant's narcotic trade, including where defendant kept his stash of cocaine, and confirmed defendant's identity and location for the police. We further observe that the magistrate could have found John Doe's willingness to acknowledge his drug use to a police officer enhanced his credibility. Although defendant suggests several ways in which the warrant application might have been stronger, we need only examine what information was presented to the magistrate. Based on the aforementioned factors, the magistrate had a substantial basis for determining that probable cause existed to believe that controlled substances would be found in defendant's home.

¶ 45 We also reject defendant's contention that the search warrant was stale. A search warrant is considered stale when too much time has elapsed between the facts alleged in the search warrant application and the issuance of the warrant. *People v. Donath*, 357 Ill. App. 3d 57, 64 (2005). In addition, whether the defendant was engaged in a continuing course of criminal activity constitutes a significant factor in this analysis. *People v. Sellers*, 237 Ill. App. 3d 545, 549 (1992) (holding that where defendant was alleged to have sold narcotics for six years, the

15-day delay between the time that contraband was first observed and the issuance of the warrant was not too remote).

¶ 46 In the instant case, the search warrant application states that John Doe purchased cocaine from defendant at his home 33 days before the issuance of the search warrant. *Cf. People v. Damian*, 299 Ill. App. 3d 489, 493-94 (1998) (finding insufficient probable cause in light of the six-week period between the controlled buy of cocaine and the request for a search warrant, the general unreliability of the informant, and the lack of information indicating the defendant was engaged in a continuing course of criminal conduct). Because John Doe indicated that defendant always had cocaine on hand and was engaged in a continuing course of criminal conduct, the issuing magistrate acted reasonably when determining that the information was not stale. Deferring to the judgment of the issuing magistrate, the record reflects a substantial basis for the magistrate to determine that probable cause existed. Accordingly, trial counsel was not ineffective for failing to file a motion to suppress based on alleged lack of probable cause where no reasonable likelihood existed that the motion would have been granted.

¶ 47 B. Discovery

¶ 48 Finally, we reject defendant's contention that the trial court erred when it dismissed defendant's motion to compel trial counsel to copy defendant's trial file for postconviction counsel's review. The rules of discovery for both civil and criminal cases do not apply to postconviction proceedings. *People v. Fair*, 193 Ill. 2d 256, 264 (2000). Although the trial court is to independently review petitions at the first stage of postconviction proceedings, our supreme court has implicitly held that the trial court has discretion to grant or deny requests for discovery at the first stage. *Harris*, 224 Ill. 2d at 139-40. With that said, frequently ordering discovery without sufficient rationale risks overtaxing scarce judicial resources. See *Fair*, 193 Ill. 2d at

264. Accordingly, the trial court may order discovery only when the moving party demonstrates good cause, considering the totality of circumstances. See *People v. Jakes*, 2013 IL App (1st) 113057, ¶ 25.

¶ 49 Here, defendant has not identified any tangible manner in which opening discovery would further support the arguments raised in his petition. Instead, he seeks a broad and unconstrained inquiry into the record, an improper fishing expedition. See *People v. Hickey*, 204 Ill. 2d 585, 598 (2001). In addition, while defendant cites the Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010) in support of his position that he is entitled to obtain his trial record from trial counsel, those rules do not grant defendant the ability to exercise that right in any manner he sees fit. Furthermore, defendant has failed to articulate how a defendant's right to the reasonable assistance of counsel at the second stage of proceedings has any bearing at the first stage. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). We also reject defendant's assertion that the Act's purpose of allowing inquiry into issues that could not have been raised on direct appeal is defeated by the lack of discovery. Defendant was entitled to corroborate his postconviction claims with evidence outside the record on direct appeal. Moreover, he was allowed to explain why specific supporting evidence could not be attached to his petition. Defendant was not, however, entitled to use the Act to conduct a fishing expedition. Because defendant has failed to establish good cause for opening discovery in the first stage of proceedings, we find no error.

¶ 50 III. CONCLUSION

¶ 51 Defendant has failed to demonstrate that the trial court erred when it summarily dismissed his petition as frivolous and patently without merit. Additionally, defendant's claim that the trial court erred when it denied defendant's motion to compel trial counsel to copy

defendant's trial file for postconviction counsel's review is also baseless. In light of our determination that remand is not warranted, we need not consider defendant's request for his petition to be transferred to a new trial court judge. For the foregoing reasons, we affirm the trial court's judgment.

¶ 52 Affirmed.

¶ 53 PRESIDING JUSTICE PUCINSKI, dissenting.

¶ 54 With great respect I dissent.

¶ 55 The complaint for the search warrant was not in the record. We do not know from the briefs if this is a result of the Clerk of the Court's document control process but we do know that appellate counsel requested a copy from the trial counsel who then took more than 10 months to provide one. Presumably, if the appellate counsel had received the complaint timely, he could have requested the clerk of the court to prepare a supplemental record. That was not done. Therefore appellate counsel could not raise the issue on appeal.

¶ 56 The first stage of a post conviction petition is for the defendant to present the gist of an argument that something went wrong in his trial. He is required to support his argument with documentation.

¶ 57 His trial counsel refuses to release a copy of his trial file.

¶ 58 The trial court denied his motion to order the production of the file to post conviction counsel.

¶ 59 Without the ability to have his trial file the defendant cannot meaningfully be said to have access or even knowledge of documents which may support his argument.

¶ 60 Here we have a different attorney working on the post conviction petition. For the trial counsel to keep the file hostage is troubling on many levels.

¶ 61 First, the defendant hired private counsel to represent him at trial, so his access to his own file should be routine.

¶ 62 Second, the defendant hired another private counsel to work on his post conviction petition, in which he argues that trial counsel was ineffective, which is reason enough to be suspicious about trial counsel's unwillingness to turn over a copy.

¶ 63 Third, there is some basis for concern, since trial counsel would not even turn over a copy of the complaint for the search warrant for more than 10 months after appellate counsel requested it. Really, a simple copy of a simple document….10 months…that should be unacceptable by any standard.

¶ 64 Fourth, post conviction petitions are specifically in place so that defendants can argue about matters that were not or could not be raised in the appellate court – the whole principle is to provide an effective way to protect constitutional rights.

¶ 65 It is unconceivable to me that justice can be better served by denying a defendant the right to a copy of his own file so that post conviction counsel can properly review the material and determine what if any issues can be raised and then properly raise them.

¶ 66 I agree with defendant that the trial court in this matter skipped to the third stage analysis while at the same time hamstringing defendant's ability to provide an adequate first stage. petition.

¶ 67 Common sense and the very reason for the post conviction petition act requires us to remand this case to the circuit court, to a different judge, to order the trial counsel to turn over a copy of his client's file so that post conviction counsel can prepare an adequate and well researched petition or, in the alternative, advise her client that there are no issues of merit.