2018 IL App (1st) 160111-U

SIXTH DIVISION
AUGUST 10, 2018

No. 1-16-0111

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. 07 CR 2266
	)	
CHRISTOPHER KRONENBERGER,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant-appellant's post-conviction petition is affirmed, as the petition failed to state an arguable claim that he was prejudiced by the ineffective assistance of his counsel on direct appeal.

¶ 2 A jury found the defendant-appellant guilty of first degree murder, following the denial of his pre-trial motion to suppress his videotaped confession. On direct appeal, this court issued an opinion affirming his conviction, upon concluding that the videotaped confession was voluntary. *People v. Kronenberger*, 2014 IL App (1st) 110231. The defendant filed a petition for relief under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2014),

claiming that his appellate counsel was ineffective for failing to raise an additional argument challenging the admissibility of the defendant's videotaped confession. The trial court summarily dismissed the postconviction petition, and the defendant appealed. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The defendant's conviction arose from the October 2005 death of Alexander Duran, whose body was found inside a burned vehicle in Marquette Park in Chicago. Duran's cell phone records revealed a number of calls to the defendant. The defendant was initially questioned by police in January 2006 but was released without being charged.

¶ 5 In February 2006, police were told by Edward Kozeluh (Edward) that his son, Emil Kozeluh (Emil) and the defendant had discussed an incident in which they shot a man and then burned him in his car. Edward told the police that another young man was involved in the crime. Upon further investigation, the police discovered telephone records indicating that the defendant had called David Pina on the date that Duran's body was discovered. Pina told investigators that the defendant offered Pina money in exchange for burning a car in the park.

¶ 6 Police arrested the defendant shortly before midnight on December 26, 2006. After questioning by a number of officers over the next few hours,[1] the defendant gave a videotaped statement at approximately 3:30 a.m. In that statement, the defendant admitted that he and Emil planned to rob Duran on the night of the murder. The defendant stated that Emil shot Duran, but that the defendant did not know that Emil would do so.

¶ 7 The defendant filed a pretrial motion to suppress his incriminating statements, which argued that he was not provided *Miranda* warnings, that police did not scrupulously honor his

[1]The questioning of the defendant in the interview room at the police station was videotaped.

invocation of his right to remain silent or his request for an attorney, and that his statements were obtained as a result of psychological coercion. At the hearing on the motion to suppress, the defendant stated that two officers questioned him as they transported him to the police station without advising him of his *Miranda* rights, and that he was subsequently questioned by a number of officers in an interview room, also without being advised of his *Miranda* rights. He testified that he told police that he did not want to speak further, yet the questioning continued.

¶ 8 The defendant testified that, after he asked for an attorney, he was left alone in the interview room. After about an hour, one of the transporting officers arrived to bring him downstairs for fingerprinting. The transporting officer told him that he had "f****d up" by not talking to detectives, that the defendant had "one more chance" to speak with detectives, and that he was then brought back to the interview room. The defendant denied telling the transporting officer that he wished to reinitiate conversation with police. However, he acknowledged that, after he was returned to the interview room, he told an officer that he wanted to have a conversation about the murder.

¶ 9 The trial court also heard testimony from Detective Gary Bush, who testified that he and Officer Joseph Biggane transported the defendant to the police station. Detective Bush testified that he gave the defendant *Miranda* warnings in the police vehicle. On the way to the police station, the defendant told Detective Bush that he and Emil had planned to rob Duran, but that he did know that Emil would shoot him. Detective Bush testified that around midnight, the defendant was placed in an interview room where he was interviewed by other detectives.

¶ 10 Detective Bush testified that he and Officer Biggane returned to the interview room around 1 a.m., spoke to the defendant to obtain information to complete an arrest report, and left after about 40 minutes. At about 1:43 a.m., Detective Brogan entered the interview room.

Shortly before 3 a.m., Detective Bush and Officer Biggane returned to take the defendant downstairs to a separate area for processing. In the stairwell, the defendant told Detective Bush that he wanted to speak to the detectives again. Detective Bush then readvised the defendant of his *Miranda* rights, and the defendant again stated that he wished to speak with detectives. At about 3:20 a.m., the defendant was returned to the interview room.

¶ 11 The trial court denied the motion to suppress. The trial court explicitly found Detective Bush's testimony credible that he gave the defendant *Miranda* warnings in the police vehicle. The trial court found that the defendant did not invoke his *Miranda* rights until 2:10 a.m., when he asked for an attorney, after which the police ceased conversing with him. The court also credited Detective Bush's testimony that the defendant reinitiated the conversation with police, before confessing to his involvement in the crime.

¶ 12 At the ensuing jury trial, the State's evidence included testimony that the victim, Duran, owned a green Cadillac. An eyewitness testified that on the evening of October 12, 2005, she saw a car on fire in Marquette Park and observed a teenage male leaving the park.

¶ 13 The State called Pina, who testified that he was 15 years old at the time of the crime. On that date, the defendant called Pina and offered him $100 to burn a car. Later that evening, Emil drove Pina and the defendant to Marquette Park. Pina saw a container of gasoline in Emil's vehicle and later noticed that Emil had a gun in his waistband. In the park, Pina observed Emil speak with a man in a Cadillac. The defendant also approached the Cadillac and sat in the passenger seat before returning to the first vehicle. As the defendant was walking back to the Cadillac, Pina heard a gunshot and then saw Emil "messing with a gun." As Pina walked away from the scene, he heard an explosion.

¶ 14 The parties stipulated to telephone records reflecting calls between the defendant and Duran, as well as two calls between the defendant and Pina, on the date of the incident.

¶ 15 The State also called Edward, Emil's father. Edward claimed that he did not recall discussing the murder with police in February 2006, but the State confronted him with his grand jury testimony, in which he claimed to have witnessed a conversation between Emil and the defendant describing Duran's shooting. The State also presented the testimony of a police officer and an Assistant State's Attorney, both of whom testified that Edward had volunteered information about the murder.

¶ 16 The State also called Detectives Nolan, Bush, and Brogan, each of whom testified regarding the interrogation of the defendant. The jury was shown portions of the defendant's videotaped conversations with these detectives. Detective Bush, consistent with his pretrial testimony, testified that the defendant confessed to his involvement in the crime as he was transported to the police station.

¶ 17 Detective Brogan testified that he spoke with the defendant in two separate conversations. In the second conversation, at approximately 3:30 a.m., the defendant admitted that he had intended to rob Duran, but stated that he did not expect Emil to shoot him or to set a fire.

¶ 18 The defense presented two witnesses. First, a forensic scientist testified that DNA retrieved from a jacket and a condom from the crime scene did not match either the defendant or Duran. The second defense witness was a police sergeant who testified that Pina told police that the defendant offered him $200, rather than $100 as stated in Pina's trial testimony.

¶ 19 During deliberations, the trial court permitted the jury to view the defendant's videotaped statements. The jury found the defendant guilty of first degree murder, and the trial court sentenced the defendant to 60 years' imprisonment.

¶ 20 The defendant filed a direct appeal, arguing that the trial court erred in denying his motion to suppress. Specifically, the defendant argued that "he had twice invoked his right to remain silent during police interrogations, which was not scrupulously honored by the police." *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶ 26. He otherwise argued that "coercive statements" by police nullified the *Miranda* warnings he was given. *Id.*

¶ 21 Our decision on direct appeal noted that, in reviewing a ruling on a motion to suppress, the trial court's factual findings are subject to the deferential "manifest weight of the evidence" standard, but the ultimate question of whether the motion should have been granted is reviewed *de novo*. *Id.* ¶ 28 (citing *People v. Lopez*, 2013 IL App (1st) 111819, ¶ 17.) We concluded that the trial court's findings were supported by the evidence, which showed "that the defendant was provided *Miranda* warnings on three occasions after he was arrested." *Id.* ¶ 30.

¶ 22 Our opinion on direct appeal subsequently rejected the defendant's claims that, at two different points, he had invoked his right to remain silent. We first examined the defendant's claim that he had invoked his right to remain silent at 12:57 a.m. by nodding his head after being asked if he was "done talking." Our opinion explained that our review of the videotaped interrogation showed that "[t]he defendant was advised of his right to silence and right to counsel," he "indicated his desire to have a conversation with the detectives" and he "at times answered the detectives' questions, at times did not answer, and at times lamented on the dire circumstances in which he now found himself." *Id.* ¶ 34. We noted that the defendant gave no verbal response when asked "You don't want to talk to me anymore?" and "We done talking?"

but we rejected the defendant's claim that he invoked his right to remain silent. *Id*. ¶¶ 34-35. We explained that, although the defendant "made some very slight movements of his head," those movements "certainly did not rise to the level of an unambiguous and unequivocal invocation of the right to silence." *Id.* ¶ 35.

¶ 23 We also agreed with the trial court that the evidence did not support the defendant's separate claim that he invoked his right to silence at 2:07 a.m. *Id.* ¶ 37. We noted that, in an earlier conversation with Detective Brogan between 1:43 and 1:57 a.m., "the defendant had supplied some information about the crime" and that, in the 2:07 a.m. conversation, Detective Brogan sought "to verify whether the defendant had more to add regarding the crime by asking 'Are you done talking to me?' and 'are you done talking to all of us?' to which the defendant responded 'yeah.' " *Id.* In the context of the prior questioning, the defendant's response "did not indicate a desire to end all questioning so as to rise to the level of an unambiguous and unequivocal invocation of the right to silence." *Id.*

¶ 24 Our opinion on direct appeal further concluded that, even assuming *arguendo* that the defendant had earlier invoked his right to silence, the suppression of his eventual confession was not warranted because he (1) invoked his right to counsel at 2:09 a.m.; (2) that request was "scrupulously honored" and (3) the defendant reinitiated conversation with police. *Id.* ¶ 40.

¶ 25 Notably, our opinion on direct appeal discussed in detail the exchange which forms the primary basis for the petition:

> "Our review of the videotaped interrogation shows that, at 2:09 a.m., during a three-minute conversation (from 2:07 a.m. to 2:10 a.m.) between Detective Brogan and the defendant, the defendant asked, 'Why can't I have a lawyer here with me?' Detective

> Brogan clarified by asking, 'You want a lawyer?' to which the defendant responded 'Yeah.' Detective Brogan then stated, 'Okay. I can't talk to you anymore,' stood up from a sitting position and tried to exit the interview room. The defendant then called after him, asking 'Why can't you talk to me?' to which Detective Brogan stated that 'Once you ask for a lawyer it's your constitutional right to have one. *** I can't talk to you without the presence of your lawyer from now on, that it. *** So if you want a lawyer, you're good to go.'
>
> We find that, as demonstrated by the exchange highlighted above, the defendant unequivocally invoked his right to counsel at 2:09 a.m., which the police scrupulously honored. The videotape further shows that, after invoking his right to counsel, the defendant was left alone in the interview room until 2:53 a.m., when Detective Bush took him out of the room for processing." *Id.* ¶¶ 39-40.

¶ 26 Our opinion also noted that the trial court credited Detective Bush's testimony that the defendant subsequently reinitiated conversation with the police, that Detective Bush readvised him of his *Miranda* rights, and the defendant again stated that he wanted to speak with detectives. *Id.* ¶ 40. We also noted that the videotape showed that after the defendant was joined in the interview room by Detective Brogan at 3:30 a.m., he "admitted that he reinitiated conversation with the police, and acknowledged that he was revoking his right to counsel" before he proceeded to discuss the crime. *Id*. We thus concluded that, "even had the defendant

unambiguously and unequivocally invoked his right to silence at 12:57 a.m. and 2:07 a.m., and the police failed to scrupulously honor those requests, the later invocation of his right to counsel was scrupulously honored by the police and the subsequent videotaped confession was admissible, where it was made after the defendant had been readvised of his rights and he had reinitiated conversation with the police." *Id.*

¶ 27 We also rejected the defendant's arguments that "threats, coercion and deception" by the police precluded him from voluntarily waiving his *Miranda* rights or otherwise voluntarily providing a statement. *Id.* ¶ 41. Rather, viewing the comments in context of the entirety of the interrogation, we did not find that any complained-of comments nullified the *Miranda* warnings. We remarked that "detectives told the defendant throughout the interrogation that he had no obligation to answer questions, that they could leave him alone if he wished, and that the defendant could choose to have the presence of counsel at any time." *Id.* ¶ 43. We also specifically rejected the defendant's claim that the detectives' "threats, misrepresentations, and promises of leniency" resulted in an involuntary statement in violation of his due process rights. *Id.* ¶ 44. We concluded that, "[u]nder the totality of the circumstances *** the defendant's subsequent videotaped confession was voluntary." *Id.* ¶ 47.

¶ 28 Finally, our opinion on direct appeal additionally concluded that even the erroneous admission of the confession would be "harmless error" in light of the other evidence of guilt:

> "Even assuming, *arguendo*, that the defendant's inculpatory statement *** was somehow involuntary, the use of his videotaped conversation at trial was harmless error where it was merely duplicative of the oral incriminating statement he gave to the police during his transport to Area One after his arrest ***.

> Although we find no error in the admission of the defendant's videotaped confession, we also find that the evidence presented at trial, aside from the videotaped confession, overwhelmingly established the defendant's guilt." *Id.* ¶ 48.

Thus, our opinion on direct appeal affirmed the judgment of the circuit court. The defendant's petition for leave to appeal was denied in September 2014.

¶ 29 On August 20, 2015, the defendant filed his petition for postconviction relief (the petition) pursuant to the Act. The petition claims that his appellate counsel was ineffective by failing to assert an additional argument challenging the admissibility of his confession. Whereas his direct appeal emphasized his claimed invocation of his right to remain silent, the petition argues that his counsel on direct appeal was "ineffective for failing to argue that police detectives did not scrupulously honor [his] request for an attorney, and their statements concerning that right precluded [the defendant] from knowingly, intelligently, and voluntarily reinitiating the interrogation."

¶ 30 The petition relies primarily on the exchange between the defendant and Detective Brogan beginning at 2:09 a.m., in which the defendant expressed his desire for a lawyer:

> "Defendant: [W]hy can't I have a lawyer with me?
>
> Detective Brogan: You want a lawyer?
>
> Defendant: Yeah.
>
> Detective Brogan: Okay. I can't talk to you anymore.
>
> Defendant: Why can't you talk to me?
>
> Detective Brogan: I can't talk to you without a lawyer. It's your f***ing right. I can't – once you ask for a lawyer, it's your

constitutional right to have one, okay? I can't talk to you without the presence of your lawyer from now on, that's it.

Defendant: Right, but you don't want to talk to me with a lawyer. I don't understand that.

Detective Brogan: Well, the lawyer's gonna get here and tell you not to talk to us.

Defendant: If we –

Detective Brogan: That's what they're going to tell you.

Defendant: Of course they—

Detective Brogan: And we can't talk about it until then and once they get here, that's what they're gonna tell you. If you had a lawyer here, would you have something to say about what went on that night?

Defendant: That's what I want to talk to a lawyer about, man.

Detective Brogan: Well, they're going to tell you not to talk to the police. That's what they're going to f***ing say. That's what they all tell you.

Defendant: 'Cause you guys are trying to get me for murder, that's probably why they'll tell me that.

Detective Brogan: Right.

Defendant: If they think you're helping me out then, you know what I'm saying, what –

> Detective Brogan: We're not helping you out. You're helping yourself out or no one's helping you. That's the situation, kid – that's the situation. You're helping yourself or no one's helping you. To be honest with you, did you think I'm looking to help you?
>
> Defendant: No.
>
> Detective Brogan: Do you? You think I'm looking to hurt you, do you?
>
> Defendant: No.
>
> Detective Brogan: Okay, 'cause I'm stuck in the middle. Personally, I don't know you. I have no history with you at all, but I know that somebody's out there's f***ing dead. So, if you want a lawyer, you're good to go, okay?"

¶ 31 After this exchange, Detective Brogan left the defendant alone in the interview room for about 40 minutes, after which Detective Bush arrived to transport the defendant to another area to process the arrest. However, the petition claims that Detective Brogan's response to the defendant's request for a lawyer effectively precluded him from voluntarily reinitiating conversation with police. Specifically, the petition urges that that the detective improperly suggested to the defendant that he could "help" himself by speaking to police without an attorney, and "that there was no reason to receive advice from an attorney because *** all lawyers tell suspects not to speak to police." Thus, the petition argues that Detective Brogan failed to honor the invocation of the defendant's right to counsel, violating *Edwards v. Arizona*, 451 U.S. 477 (1981) ("[A]n accused ** having expressed his desire to deal with the police only

through counsel, is not subject to further interrogation *** until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police"). In turn, the petition argues that the defendant's appellate counsel was ineffective for failing to argue that Detective Brogan's comments "violated *Edwards v. Arizona*, and otherwise precluded [the defendant] from making a knowing, intelligent, and voluntary waiver of his *Miranda* rights."

¶ 32 The petition recognizes that ineffective assistance of counsel requires that counsel's performance was objectively unreasonable, and that there was resulting prejudice. The petition claims that it was objectively unreasonable for appellate counsel to fail to argue that Detective Brogan violated *Edwards* and "coerced" the defendant into reinitiating conversation with detectives. With respect to prejudice, the petition argues that "there is at least a reasonable probability of a different outcome on appeal" but for counsel's ineffectiveness, because there is a "reasonable probability of a different trial outcome, absent the videotaped statement."

¶ 33 The petition recognizes our conclusion on direct appeal that, even if the confession was involuntary, its admission was harmless error due to the additional evidence of the defendant's guilt. The petition urges that our opinion was incorrect, because a more stringent "harmless error" standard applies where the error is the admission of an involuntary confession. See *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (holding that erroneous admission of a coerced confession will be deemed harmless error only if the State demonstrates that the confession "did not contribute to [defendant's] conviction."). The petition argues that admission of the videotaped statements could not be harmless, as they were viewed repeatedly by the jury and there were "glaring deficiencies" in the State's other evidence. The petition further urges that since confessions have a profound impact on a jury, the videotaped statements cannot be

discounted as simply "duplicative" of the testimony that the defendant made incriminating statements on the way to the police station.

¶ 34 On November 5, 2015, the trial court entered an order summarily dismissing the petition as "frivolous and patently without merit." The trial court reasoned that the petition's argument regarding the invocation of the right to counsel was "previously raised" and decided on direct appeal. The trial court concluded: "[the defendant]'s claim that police failed to scrupulously honor his invocation of his right to counsel is without merit, and therefore [the defendant]'s claim that his appellate counsel was ineffective for failing to raise this issue on appeal must fail."

¶ 35 On November 24, 2015, the defendant filed a timely notice of appeal, affording us jurisdiction. Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014); Ill. S. Ct. R. 651 (eff. Feb. 6, 2013).

¶ 36 ANALYSIS

¶ 37 The defendant now seeks reversal of the dismissal of his petition by the circuit court, disputing the court's conclusion that the defendant's argument was already raised on direct appeal. He asserts that his direct appeal raised a "similar but legally distinct claim," that police failed to scrupulously honor his right to remain silent, whereas his petition focuses on his request for an attorney. He argues that his petition "set forth the gist of a claim that appellate counsel was ineffective for failing to challenge Detective Brogan's response to his request for a lawyer under *Edwards v. Arizona*," which precluded him from voluntarily reinitiating his conversation with police before his confession.

¶ 38 In response, the State urges that dismissal of the petition was proper "under *res judicata* principles" because its claims "are virtually identical" to those rejected on direct appeal. The State contends that the petition is based on the "very same fifth amendment structure" discussed in our prior opinion, and that "the only distinction" is that the petition focuses on different

statements by Detective Brogan. The State emphasizes that, on direct appeal, our court "painstakingly reviewed the entire interrogation" and explicitly found that the defendant's invocation of his right to counsel was scrupulously honored, and that the defendant reinitiated conversation with police before he confessed. The State otherwise argues that the petition does not state a claim for ineffective assistance because the defendant "cannot establish that his appellate counsel was deficient" for failing to argue an *Edwards* violation, and that the defendant cannot establish prejudice because "any error was harmless beyond a reasonable doubt."

¶ 39 We first note the standard of review upon the summary dismissal of a petition pursuant to the Act (725 ILCS 5/122-1 *et seq*. (2014)). The Act "provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. [Citations.] A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. English*, 2013 IL 112890, ¶ 21.

¶ 40 "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. [Citation.] 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." *People v. Tate*, 2012 IL 112214, ¶ 9. We review the summary dismissal of a postconviction petition *de novo*. *Id.* ¶ 10.

¶ 41 We next note that, although the State invokes *res judicata* as a bar to this petition, that doctrine is inapplicable to this type of claim. "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues *** that were not, and could not have been, adjudicated previously on direct appeal. [Citation.] Issues that were raised and decided on direct appeal are

barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. [Citation.] However, the doctrines of *res judicata* and forfeiture are relaxed *** *where the forfeiture stems from the ineffective assistance of appellate counsel* ***. [Citation.]" (Emphasis added.) *English*, 2013 IL 112890, ¶ 22. The instant petition is based upon the alleged ineffectiveness of appellate counsel—a claim that, logically, could not have been raised on direct appeal—and thus we do not find that *res judicata* is applicable.

¶ 42 We thus consider whether the petition's claim of ineffective assistance of appellate counsel was subject to dismissal. When a postconviction petition asserts that appellate counsel provided ineffective assistance, "[t]he familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), applies ***. [Citation.]" *People v. Golden*, 229 Ill. 2d 277, 283 (2008). Under the *Strickland* test, "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. [Citation.] Specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Veach*, 2017 IL 120649, ¶ 30. If either prong of the *Strickland* test cannot be met, the ineffective assistance claim fails. See *id.* Moreover, "[i]f it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient. [Citation.]" *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 43 Applying the *Strickland* standard to claims regarding *appellate* counsel, "[a] petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice, *i.e.*, there is a reasonable

probability that, but for appellate counsel's errors, the appeal would have been successful. [Citation.]" *Golden*, 229 Ill. 2d at 283. We further recognize that, since summary dismissal of a first-stage postconviction petition is only proper if it lacks arguable merit, we review whether the petition *arguably* stated a claim of ineffective assistance. *Tate*, 2012 IL 112214, ¶ 19 ("At the first stage of postconviction proceedings under the Act, 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." (Emphases in original.)) [2]

¶ 44 The defendant claims that his petition meets both prongs of the applicable inquiry, because (1) his appellate counsel "was arguably unreasonable" by failing to argue that police did not honor his request for counsel; and (2) that it is arguable that this claim, if raised, would have changed the outcome of his direct appeal. Specifically, he claims "it is arguable this Court would have found suppression warranted" and that this "would arguably have led to a new trial, because it is more than arguable that the suppression of a confession would not be harmless error in this case."

¶ 45 We disagree, as we find that the petition does not meet the prejudice prong of the applicable *Strickland*-based standard. After careful review of the record, including our opinion on direct appeal, we do not find that it is even "arguable" that the result of the direct appeal would have been different, even if defendant's appellate counsel articulated the arguments set forth in the petition from which this appeal arose. Rather, the explicit findings of our opinion on

[2]If the petition had advanced to a second-stage proceeding under the Act, where the petitioner must make a "substantial showing of a constitutional violation" to avoid dismissal, it would be "appropriate to require the petitioner to 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Tate*, 2012 IL 112214, ¶ 19. However, when the appeal is from a first-stage summary dismissal, a "different, more lenient formulation applies." *Id.*

direct appeal make clear that, viewing the entirety of the interrogation, we would still have found the confession voluntary and admissible.

¶ 46 We reiterate that the crux of the direct appeal was the propriety of the trial court's denial of the motion to suppress, which depended upon the ultimate question of whether the confession was voluntary, under the "totality of the circumstances" of the interrogation. *People v. Murdock*, 2012 IL 112362, ¶ 29. Accordingly, for the petition to state arguable "prejudice" from appellate counsel's performance, there must be an arguable chance that we would have concluded the confession was involuntary, had appellate counsel set forth the petition's arguments relating to the defendant's request for counsel and Detective Brogan's response thereto. However, we cannot discern an "arguable" probability that the appeal would have been successful, even if counsel on direct appeal, had made those arguments. Rather, it is apparent from our opinion on direct appeal that we carefully considered the *entire* record of the interrogation, *including the same comments by* Detective Brogan that form the basis of the petition which the trial court rejected. Under the totality of the circumstances, we concluded that the defendant's request for counsel was scrupulously honored, that he reinitiated conversation with the police, and that his confession was voluntary.

¶ 47 Specifically, we note that our opinion emphasized that the trial court credited Detective Bush's testimony that the defendant reinitiated conversation with the police, and that the trial court's factual finding on that point was entitled to great deference. *Kronenberg*, 2014 IL App (1st) 110231, ¶ 40. Further, our opinion found that the videotape showed that, at the beginning of the 3:30 a.m. conversation in which he confessed, "the defendant admitted that he reinitiated the conversation with the police, and acknowledged that he was revoking his right to counsel." *Id.* None of the arguments in the petition, which the trial court rejected, would have precluded

our reliance on that evidence. Thus, even had his direct appeal more heavily relied upon Detective Brogan's comments in response to the defendant's invocation of his right to counsel, our prior opinion already carefully considered the *entirety* of the interrogation and concluded that the defendant's fifth amendment rights were honored. We discern no "arguable" probability that we would have reached a different conclusion as to the voluntariness of the confession, even if appellate counsel had made the slightly different arguments urged by the petition.[3] Thus, the petition does not meet the prejudice-based prong of the *Strickland* inquiry regarding the effectiveness of appellate counsel. Accordingly, the petition had no arguable basis, and thus its summary dismissal was proper.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 49 Affirmed.

[3]As we find no arguable prejudice on this basis, we need not address the parties' additional arguments as to whether, assuming *arguendo* that the confession was involuntary, its admission would be "harmless error" under the standard articulated in *Arizona v. Fulminante*, 499 U.S. 279 (1991).