

No. 1-12-3362

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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 Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 06CR3227
)	
JAMES HAMPTON,)	
)	The Honorable
Defendant-Appellant.)	Charles P. Burns,
)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

Held: Second-stage denial of postconviction petition affirmed where defendant is unable to make a substantial showing that he was deprived of the effective assistance of both trial and appellate counsel. Affirmed.

¶ 1 Defendant James Hampton appeals from an order of the circuit court dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/1223-1, *et seq.*

(West 2010)). On appeal, defendant contends that his petition made a substantial showing of the ineffective assistance of both trial and appellate counsels.

¶ 2

I. BACKGROUND

¶ 3

Following a jury trial in 2007, defendant was found guilty of the first degree murder of Pierce Watkins and sentenced to 23 years' incarceration for the murder, plus an additional 25-year enhancement for personally discharging a firearm that proximately caused the death of the victim, for a total of 48 years' imprisonment. The following evidence was adduced at trial.¹

¶ 4

i. The Motion to Suppress Statements

¶ 5

Defendant was arrested and charged with the murder of Watkins on January 17, 2006. Watkins was the ex-boyfriend of Dora King, defendant's girlfriend at the time. Watkins and King had a child together. Subsequent to his arrest, defendant confessed to the murder. Prior to trial, defendant filed a motion to suppress the confession.

¶ 6

In defendant's motion to suppress, he alleged that his statements were obtained in violation of his constitutional rights where one of the detectives advised him he would only be charged with manslaughter if he confessed, but would receive a life sentence if he did not admit that he shot the victim. Defendant alleged that another detective falsely advised him that evidence had been found which implicated defendant and that he "had no choice" but to confess. Defendant also alleged in his motion that the audio confession contained statements that were directly supplied to him by the detectives to be recited.

¶ 7

At the hearing on defendant's motion to suppress, Detective Robert Cordaro testified that at approximately 2:20 a.m. on January 17, 2006, he went to defendant's home and asked

¹ Many of these facts are taken from defendant's direct appeal to this court. *People v. Hampton*, No. 1-07-2319 (2009) (unpublished order under Supreme Court Rule 23).

him to come to the police station for questioning in connection with the shooting death of Watkins. Defendant complied. Detective Cordaro specifically testified that he went to defendant's home looking for witnesses to the crime and that he did not handcuff defendant. Detective Cordaro stated that he interviewed defendant at Area 5 police station in a second floor interview room in the presence of Detective Landano. The interview began around 3:20 a.m. and lasted approximately 15 minutes. After the interview, Detectives Cordaro and Landano went back to the scene of the crime to search for more witnesses.

¶ 8 Detective Cordaro testified he interviewed defendant again around 4:50 a.m. for about 30 minutes. They were in the same interview room, again with Detective Landano. Detective Cordaro testified that during this second interview, defendant gave a different version of events than when originally interviewed. Due to the "content of the interview" and the "inconsistencies to the scene," the detectives "felt that [defendant] knew more and that he could be a possible suspect in the case." Consequently, at approximately 5:41 a.m., Detective Cordaro turned on an electronic recording device and gave defendant his *Miranda* warnings from memory. Thereafter, Detective Cordaro and defendant had a seven-minute conversation during which defendant made admissions in regards to the shooting death of Watkins. Detective Cordaro testified that he and his partner then left the interview room to search for other witnesses.

¶ 9 Detectives Cordaro and Landano returned at approximately 7:10 a.m. and had another interview with defendant, which lasted 10 minutes. They had a subsequent five minute interview with defendant at 10:56 a.m. During this time, an Assistant State's Attorney arrived. Charges were approved against defendant at 3:40 that afternoon.

¶ 10 Detective Cordaro testified he never made any threats or promises to defendant, that he did not tell defendant he would only be charged with manslaughter if he confessed, that he did not tell defendant what to say, and that, prior to turning on the electronic recording device, he did not supply information to defendant regarding the shooting. Detective Cordaro also testified that defendant was offered food and water while at the police station.

¶ 11 Detective Cordaro further testified that police procedure is to use recording devices only once a witness becomes a suspect. He testified that, in defendant's second interview, defendant indicated he had seen someone by the name of "Bookie" come out of an alleyway and produce a handgun. Defendant told Detective Cordaro that the victim threw some papers down, and that Bookie then shot the victim. The victim immediately fell to the ground. Detective Cordaro testified that the story was inconsistent with evidence found at the scene, including a trail of cartridge casings that ran from the alley, across the street, across the parkway, and onto a sidewalk where the victim was found on a corner. Detective Cordaro testified that they decided to record the subsequent interview with defendant due to these inconsistencies.

¶ 12 Detective Landano testified in similar fashion. Detective Landano specifically testified that defendant was not handcuffed when he was transported as a witness to the police station, and that he was not handcuffed to a metal rod once in the interview room. The State rested.

¶ 13 Attorney Steve Watkins testified for the defense. He testified that he arrived at the police station at approximately 3:30 p.m. on January 17, 2006. Although he asked to see defendant, he was not permitted to do so for approximately 45 minutes. He then met with defendant, who informed him he had talked to the police approximately 20 minutes prior.

¶ 14 James Hampton Sr., defendant's father, testified that police came to his house looking for Dora King in the early morning hours of January 17, 2006. King left with the police. The police returned later, looking for defendant. Hampton testified that they handcuffed defendant and escorted him out of the residence. Later that day, Hampton contacted attorney Watkins, asking him to represent his son. Hampton testified he called the police station at approximately 1:00 p.m., told a detective that he had retained an attorney for defendant, and instructed them not to question defendant further until the attorney arrived.

¶ 15 Defendant testified on his own behalf. He testified that, when police officers returned to his residence for the second time on the night of the shooting, they handcuffed him and brought him to the police station. Defendant testified that a police officer chained his handcuffs to a pole in an upstairs holding room. He claimed he was not advised of his *Miranda* rights before one of the detectives began asking him about his relationship with the victim. The officers did not tell him he had the right to remain silent.

¶ 16 Defendant testified that, the second time the detectives entered the holding room, one of them told him he knew defendant had something to do with what happened, and that King had told him defendant had a past confrontation with the victim, and that he should confess. Defendant testified that he told the detectives he had nothing to do with it, and they again left the room.

¶ 17 Then, the detectives came back to the holding room for a third time. Defendant did not know how much time had elapsed between the visits because he had fallen asleep. Defendant testified that one of the detectives told him he believed defendant was the shooter, and told defendant to talk to the State's Attorney about getting a manslaughter charge if he confessed. Defendant also testified that the detective told him he would get life in prison if

he did not confess. Defendant claimed that the detectives told him they had evidence piled against him. Defendant stated that the detectives never told him his parents were at the police station, or that an attorney had been contacted and was en route to the police station.

¶ 18 According to defendant, he agreed to talk to the State's Attorney because he thought if he was going to have to go to jail for something he did not do, he should go for the least amount of time possible. Defendant claimed that he was not advised his statement was being recorded. After his statement, he was then advised that an attorney was outside waiting to speak to him.

¶ 19 On cross-examination, defendant testified he fabricated the story about "Bookie" in the second interview because detectives had told him he could leave if he said he had witnessed something. Defendant further testified that, during his third interview with the detectives, he told them the same story he had told them earlier, but told them he was the shooter rather than Bookie. Defendant then claimed that, on his way to the police station, a police officer told him that the victim had been killed near King's house, so he reiterated that in his statement. Defendant testified that the detectives did not tell him the story he gave on the recorder, and that they never told him to say anything.

¶ 20 The trial court denied the motion to suppress, finding there was no evidence that anybody affirmatively interfered with defendant meeting with his attorney, particularly in light of the fact that the confession was recorded many hours prior to defendant's father calling the station to inform them his son had an attorney. The court further found that this was the case of someone being questioned as a witness before he became a suspect, and that defendant was properly given his *Miranda* warnings before he gave his statement. The court additionally found that the testimony of the detectives rebutted defendant's allegations that he

was coerced, and that the detectives were more credible witnesses than was defendant.

Regarding the issue of whether defendant was properly given his *Miranda* warnings, the court stated:

"THE COURT: Okay. Well, this is clearly, according to the evidence, a situation where someone becomes a suspect while they're being questioned as a witness.

Now, counsel would suggest that the police can't do what they did in this case, which is to receive information from someone that they have been informed might know something, this Dora, that the defendant might have been present at the scene of the crime, and then go and try to speak to the defendant.

And here the evidence is that the defendant agrees to go to the police station. There is a conflict in the evidence about whether he's handcuffed at the time. And it's the defendant and his father against the police as far as that is concerned. I'm not even so sure that that's determinative; or but as far as that's concerned, I believe the testimony of the police that when they take him there, he's not handcuffed, and that they just want to talk to him as a witness.

And they start talking to him, and he, you know, he keeps saying that he didn't tell them anything and he told them he didn't know anything about; [sic] but then, of course, they testify differently and he ends up testifying differently on cross-examination that, oh, yes, he was giving them statements about being there. And he in fact corroborates their testimony that it got to the point where he tells them about seeing this other person do the shooting, this Bookie person, which they feel is inconsistent with what they have learned at the scene of the crime in terms of the answer that the officer gave. This was the first officer, Cordaro I

think, who says that what he is saying that the defendant tells him that Pierce Watkins drops where he's standing. And they know that was inconsistent with the scene because the scene showed that there was a trail of cartridge casings running from the alley across the street, across the parkway on to the sidewalk, and at the corner and Pierce Watkins ended up on the corner on the sidewalk. So we knew that was inconsistent, and it's at that point that they decide they better give the defendant his Miranda warnings and activate the ERI, which is exactly what they did.

So I guess the defense argument is that if the defendant was really just a witness, they had to give him his Miranda warnings before they could ask him what he knew. And I don't agree with that, and the defense doesn't cite any case that supports that position either.

The defendant was given his Miranda warnings at the appropriate time when it became clear that he might be more than just a witness, and the other allegations that the defendant makes are rebutted by the testimony of the officers
***."

¶ 21 Defendant's motion to suppress his statements was denied.

¶ 22 ii. The Trial

¶ 23 At trial, the evidence, including the video tape of defendant's confession, showed that in the fall of 2005, victim Watkins was a student at Austin High School. Watkins had a child with Dora King. Watkins and King broke up but remained in contact with one another, and King began dating defendant. Watkins and defendant did not get along. In December 2005, King and Watkins got into an altercation during which Watkins broke defendant's car

window with a stick. A few weeks later, on January 16, 2006, defendant shot and killed the victim.

¶ 24 Following the jury trial, defendant was found guilty of first degree murder. The trial court sentenced defendant to a term of 48 years' incarceration.

¶ 25 iii. The Direct Appeal

¶ 26 On direct appeal, defendant claimed that: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) he was denied a fair trial where the jury received inconsistent jury instructions and the general verdict form did not support the 25-year firearms add-on. *People v. Hampton*, No. 1-07-2319 (2009) (unpublished order under Supreme Court Rule 23). We affirmed defendant's conviction, finding that the State proved him guilty beyond a reasonable doubt, and finding no error in the jury instructions. *People v. Hampton*, No. 1-07-2319 (2009) (unpublished order under Supreme Court Rule 23).

¶ 27 iv. The Postconviction Petition

¶ 28 Defendant filed the instant postconviction petition in July 2010.² In it, he alleged: (1) the trial court improperly shifted the burden of proof in the hearing on his motion to suppress statements; (2) he was denied his right to a fair trial where his rights were violated when his statements were taken in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004), and used against him at trial; (3) he was denied the effective assistance of trial counsel; and (4) he was denied the effective assistance of appellate counsel. The court docketed his petition for second-stage proceedings, and appointed counsel for petitioner. Counsel elected to stand on the original petition. The State filed a motion to dismiss the petition. After hearing

² An initial postconviction petition was filed on December 15, 2009. Defendant withdrew that petition on January 6, 2010.

arguments on the motion to dismiss, the court granted the motion dismissing the petition. Defendant appeals.

¶ 29

II. ANALYSIS

¶ 30

On appeal, defendant first contends he made a substantial showing that both his trial counsel and appellate counsel were ineffective for not properly challenging the admissibility of his confession to the police because, under *Siebert*, 542 U.S. 600, it was obtained in violation of his right against self-incrimination. Specifically, defendant maintains his petition should move to a third-stage evidentiary hearing where, although his trial counsel filed a motion to suppress his statements, and the trial court denied the motion, the trial court would have granted the motion had his trial counsel based the motion on *Siebert*. Defendant maintains that he was also denied the effective assistance of appellate counsel where appellate counsel failed to address this issue.

¶ 31

Defendant admits he made incriminating statements to two detectives while at the police station on the night of the shooting. Defendant argues:

"Prior to 5:41 a.m. the detectives interrogated [defendant] twice—at about 3:20 a.m. and 4:50 a.m.—without advising him of his *Miranda* rights. The detectives belatedly advised [defendant] of his rights prior to his statements at 5:41 a.m. The detectives' two-step interrogation process violated *Miranda* and its progeny for two reasons. First, [defendant's] unwarned interrogations at 3:20 a.m. and 4:50 a.m. were custodial because they occurred in the coercive environment of an Area 3 interrogation room, and the detectives questioned [defendant] in a hostile,

confrontational manner that would lead a reasonable person to believe that he was in custody. Second, the *Miranda* warnings given at 5:41 a.m. did not remedy the detectives' failure to advise [defendant] of his rights at 3:20 a.m., because the evidence shows that the detectives considered [defendant] a suspect at the outset of his interrogation and deliberately used a prohibited strategy of questioning first, and warning later. See *Missouri v. Siebert*, 542 U.S. 600, 615-17, 621-22 (2004).

Because the detectives deliberately used a question first, warn later strategy, [defendant's] post-warning statements were inadmissible under *Siebert*. However, [defendant's] trial counsel and appellate counsel both failed to argue that [defendant's] statements were inadmissible under *Siebert*. If trial counsel and appellate counsel had properly raised this issue, [defendant's] incriminating statements, which were the primary piece of evidence against him, would have been suppressed."

¶ 32 We begin by noting the well-established principles regarding postconviction proceedings. The Act provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009), quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 33 Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. The Act creates a three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage of postconviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At this stage, to proceed further, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*People v. Jones*, 211 Ill. 2d 140, 144 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)). Accordingly, the trial court may summarily dismiss a petition as "frivolous and patently without merit" only where the petition "has no arguable basis either in law or in fact," *i.e.*, "is one which is based on an indisputably meritless legal theory or a fanciful legal allegation." *Hodges*, 234 Ill. 2d at 17.

¶ 34 Where, as here, a petition advances to the second stage of the postconviction process, the State may file a motion to dismiss. 725 ILCS 5/122-5 (West 2010). To survive such motion, a petitioner must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or appropriate affidavits. *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). An evidentiary hearing is only required when the allegations of the petition, supported by the trial record and accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Hobley*, 182 Ill. 2d 404,

427-28 (1998). We review a circuit court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28.

¶ 35 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004); *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007). "Based on the second-stage procedural posture of the instant case, the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *Makiel*, 358 Ill. App. 3d at 106, citing *Coleman*, 168 Ill. 2d at 381. The issue of incompetency of counsel is to be determined after a consideration of the totality of counsel's conduct. *People v. Stewart*, 101 Ill. 2d 470, 493 (1984).

¶ 36 Moreover, "[a] defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise the issue was

objectively unreasonable and that, but for his failure, defendant's conviction or sentence would have been reversed.' " *Jones*, 399 Ill. App. 3d at 372, quoting *People v. Griffin*, 178 Ill. 2d 65, 74 (1997)). If the underlying issue is nonmeritorious, the defendant cannot show prejudice from the failure to raise it on appeal. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001); see also *Coleman*, 168 Ill. 2d at 523.

¶ 37 In the case at bar, defendant contends that his trial and appellate counsel were ineffective for not properly challenging the admissibility of, and allowing into evidence, his pre- and post-*Miranda* statements. He argues that, had the argument been properly made before the trial court: (1) his first two interviews would be suppressed because he was interviewed in violation of *Miranda* because he was in police custody when the statements were made; and (2) his later statements, made after he was advised of his *Miranda* rights, would also be suppressed because they were inadmissible under *Siebert* where the detectives used an unconstitutional "ask first, warn later" tactic. We disagree where here, reliance on *Siebert* would have been a futile exercise, as *Siebert* does not apply in this context.

¶ 38 In *Siebert*, the United States Supreme Court considered the use of the "question first, warn later" interrogation tactic to obtain an incriminating statement from a suspect. Writing for a plurality of the court, Justice Souter replaced the previous rule that a voluntary but unwarned statement did not warrant the presumption of compulsion, and subsequent warnings usually sufficed to remove the conditions that rendered the earlier statement inadmissible with a presumptive rule of exclusion where the tactic was used deliberately. In order to determine whether "*Miranda* warnings delivered mid-stream could be effective enough to accomplish their object[]" the court considers the following factors: "the completeness and detail of the questions and answers in the first round of interrogation, the

overlapping content of the two statements, the timing and setting of the first and the second, the continuity of the police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Siebert*, 542 U.S. at 615. Where consideration of the above factors leads to the conclusion that a reasonable person, in the same position as the suspect, would not have understood from the mid-stream warnings that he retained a choice about continuing to talk, the subsequent statement is inadmissible. See *Siebert*, 542 U.S. at 617.

¶ 39 In a concurring opinion, Justice Kennedy agreed that the deliberate use of the "question first, warn later" tactic was improper, but that its use should not render a subsequent statement inadmissible where "curative measures" such as a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning, were taken that would allow "the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Siebert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 40 Our supreme court adopted Justice Kennedy's concurring opinion as controlling authority on the issue in *People v. Lopez*, 229 Ill. 2d 322, 323 (2008). Under *Lopez*, the court first determines whether the police deliberately used the "ask first, warn later" tactic. In the absence of any evidence of a deliberate use of the tactic in questioning the defendant, the *Siebert* analysis ends. *Lopez*, 229 Ill. 2d at 360 ("If there is no evidence to support a finding of deliberateness on the part of the detectives, our *Siebert* analysis ends.") Where there is evidence that officers deliberately used the question first, warn later technique, statements taken after *Miranda* warnings will be excluded unless "curative measures were taken, such as a substantial break in time and circumstances between the statements, such that the defendant would be able to distinguish the two contexts and appreciate that the interrogation has taken

a new turn.' " *Lopez*, 229 Ill. 2d at 361, quoting *Siebert*, 542 U.S. 622 (Kennedy, J., concurring).

¶ 41 *Lopez* and *Siebert* are not applicable here because this is not a case where the officers deliberately used a question first, warn later technique. See *Lopez*, 229 Ill. 2d at 360 ("If there is no evidence to support a finding of deliberateness on the part of the detectives, our *Siebert* analysis ends").

¶ 42 On the most basic level, this case differs from *Siebert* and *Lopez* because, in those cases, the defendant was interrogated and provided an incriminating statement *before* *Miranda* warnings were given. Here, on the other hand, defendant did not provide an incriminating statement until *after* being given *Miranda* warnings.

¶ 43 Additionally, the evidence here does not support a finding of deliberateness on the part of the detectives. See *Lopez*, 229 Ill. 2d at 360 ("If there is no evidence to support a finding of deliberateness on the part of the detectives, our *Siebert* analysis ends"). We are aware that generally police officers will not admit on the record that they deliberately withheld *Miranda* warnings in order to obtain a suspect's confession. See *Siebert*, 542 U.S. at 616, n. 6 (plurality op.); *Lopez*, 229 Ill. 2d at 361. However, our supreme court in *Lopez* relied on reasoning from the Ninth Circuit's decision in *U.S. v. Williams*, 435 F. 3d 1148, 1158-59 (2006), to craft "an analytical framework for determining whether deliberate misconduct occurred during an interrogation without direct evidence." *Lopez*, 229 Ill. 2d at 361. Specifically, the court stated:

"The *Williams* court instructs: '[I]n determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence

such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning.' *Williams*, 435 F. 3d at 1158. The *Williams* court considered the following factors, originally set forth by the *Siebert* plurality to determine the admissibility of a postwarning statement, as guidelines for assessing evidence objectively: 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.' *Williams*, 435 F. 3d at 1159, citing *Siebert*, 542 U.S. at 615, 124 S.Ct. at 2612, 159 L.Ed.2d at 657 (plurality op.)." *Lopez*, 229 Ill. 2d at 361-62.

¶ 44 Working within this framework, we consider first the objective evidence in this case. The defendant, who was not a minor, accompanied the detectives to the station as a witness to the shooting. He was not handcuffed. He was interviewed in an interview room twice, the first time for approximately 15 minutes, and then, about an hour later, again for about 30 minutes. Prior to the third interview, the detectives *Mirandized* defendant, and then defendant made an incriminating statement. While at the station, defendant was offered food and water. He was allowed to sleep.

¶ 45 Regarding the subjective evidence available here, the evidence from the hearing on the motion to suppress shows that defendant voluntarily accompanied the police officers to the station on the night of the shooting. The trial court even considered this voluntariness, finding:

"THE COURT: So I guess the defense argument is that if the defendant was really just a witness, they had to give him his Miranda warnings

before they could ask him what he knew. And I don't agree with that, and the defense doesn't cite any case that supports that position either.

The defendant was given his *Miranda* warnings at the appropriate time when it became clear that he might be more than just a witness, and the other allegations that the defendant makes are rebutted by the testimony of the officers[.]"

¶ 46 In addition, the officers specifically testified that they brought defendant in as a witness to the shooting. The officers then testified to a series of two short interviews with defendant. After the second interview, in which defendant changed his story and provided details to the officers that did not mesh with the facts of crime scene, the officers became suspicious of defendant. It was at that point that defendant became a suspect and the officers read him his *Miranda* warnings and turned on the recording system. It was only then, in a third interview and after the *Miranda* warnings, that defendant incriminated himself.

¶ 47 Considering both the available objective and subjective evidence, there is no inference that the detectives engaged in a "question first, warn later" interrogation technique. See *Lopez*, 229 Ill. 2d at 360 ("If there is no evidence to support a finding of deliberateness on the part of the detectives, our *Siebert* analysis ends"). Therefore, even if defense counsel had relied on *Siebert* in the motion to suppress, such argument would have been futile. We find no error in the dismissal of defendant's second-stage postconviction petition where the trial court properly found that defendant failed to make a substantial showing that he was deprived of the effective assistance of counsel.

¶ 48 Additionally, we find no error in the dismissal where there is no showing of the ineffective assistance of appellate counsel for failing to raise a nonmeritorious issue on

appeal. See *Rogers*, 197 Ill. 2d at 222 (If the underlying issue is nonmeritorious, the defendant cannot show prejudice from the failure to raise it on appeal).

¶ 49 Finally, defendant claims that trial counsel was ineffective for relying on *People v. McCauley*, 163 Ill. 2d 414 (1994), in the motion to suppress, rather than on *Siebert*. This claim fails, however, because defendant is unable to show resulting prejudice where, pursuant to the above analysis, he cannot establish that relying on *Siebert* would have been effective. See *Palmer*, 162 Ill. 2d 475-76 (failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim).

¶ 50 III. CONCLUSION

¶ 51 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 52 Affirmed.