

No. 1-13-3565

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 02 CR 20249
)	
TYRIN SMITH,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed at the second stage of proceedings under the Post-Conviction Hearing Act because the petition failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant Tyrin Smith appeals from the circuit court's dismissal, upon the State's motion, of his amended petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant contends that the court erred in dismissing the petition because it made a substantial showing that he was denied the effective assistance of appellate counsel when appellate counsel failed to challenge the denial of

defendant's motion to quash arrest and suppress evidence on direct appeal. Defendant further contends that if this court finds that he has made a substantial showing of a constitutional violation, a determination must be made as to whether the untimely filing of the petition was due to defendant's culpable negligence. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the June 9, 2002, shooting death of the victim Daniel DuPree. The matter proceeded to a jury trial where defendant was found guilty of first degree murder and sentenced to 50 years in prison.

¶ 4 Prior to trial, on June 30, 2005, the trial court held a hearing on defendant's motion to quash arrest and suppress evidence.

¶ 5 Defendant testified that on the afternoon of July 6, 2002, he was standing by a curb with two people when an unmarked police car containing two officers pulled up. An officer exited the car and asked whether anyone in the group had just been robbed. After everyone answered no, the officer asked if anyone had any warrants. The officer then asked everyone, but defendant specifically, if it was "okay" if everyone sat in the police car while he checked for warrants. Defendant "volunteered" to sit in the car. Defendant and two other men then got in the backseat. He was in the middle. The officer got back into the car and drove to a police station. Defendant was taken to an interrogation room and handcuffed to a wall. At this point, no one had told defendant that he was under arrest. He was not brought before a judge for four days. During those four days, he was asked questions 15 to 20 times, and placed in numerous lineups.

¶ 6 During cross-examination, defendant testified that on July 6, 2002, he had a braided hairstyle and there was a "possibility" that he was wearing a white t-shirt, but denied that he was in a car that day.

¶ 7 Sergeant Joseph Gorman testified that on the afternoon of July 6, 2002, he received a phone call from a person who identified himself as Jay Arthur Mackey. Mackey's name was familiar to Gorman as a witness to a homicide. The individual on the phone told Gorman that the person who shot the victim was "driving around" in a white Toyota. The caller gave Gorman the car's license plate. The caller described the shooter as "a male black," with braided hair wearing a white "do-rag" and a white t-shirt. Gorman, who was "generally familiar" with the facts of the homicide, asked the caller to come to the police station and talk to one of the detectives assigned to the case. The caller stated that the shooter was driving in the area where the victim was shot, so Gorman gathered several other officers in order to try to locate the alleged shooter.

¶ 8 After Gorman and another officer drove around the area for 30 to 60 minutes, Gorman called the police station to see if Mackey was there in order to obtain additional information, but Mackey had not arrived yet. Gorman continued to drive around and ultimately observed a white Toyota Celica with a license plate that matched the one described by the caller. Defendant, who was wearing a white do-rag and a white t-shirt, was in the car. Gorman placed defendant under arrest. Defendant was not with a group of people and no one else was taken to the police station.

¶ 9 During cross-examination, Gorman testified that he had never spoken to or met Mackey before the phone call. Although he was a supervisor and knew about current homicide investigations, he had not done any of the witness interviews related to the victim's case.

¶ 10 During redirect, Gorman testified that when Mackey came to the police station that evening he verified that Mackey was the caller. Mackey then identified defendant in a line-up.

¶ 11 When the trial court began to make its findings, the court stated that because Gorman had never met Mackey and did not confirm that the person on the phone was actually Mackey until

after defendant was arrested, "in essence" Gorman received an anonymous tip. The State offered to clarify Gorman's knowledge and Gorman was recalled to the stand.

¶ 12 Gorman then testified that when he arrived at work, he reviewed certain reports including a progress report detailing an interview with Mackey during which Mackey stated that he observed the person who shot the victim. Although Gorman was not present at this interview, he reviewed the report detailing that interview.

¶ 13 Ultimately, the trial court found that the information relayed in the phone call was not an anonymous tip because the witness had been interviewed by another officer, said that he observed the shooter's face, and then called back to say that the shooter was in a particular car. Gorman went out, based upon that phone call, and found a car and person that matched the caller's description. The court concluded that these facts "sound[ed] like probable cause" and denied the motion to quash arrest and suppress evidence. The matter proceeded to a jury trial.

¶ 14 At trial, DeCarlos Toro, Berklin "Owens" Fowles and Jay Arthur Mackey all identified defendant as the person with a gun who told their group to put their money on the ground and then instructed them to climb over a guardrail and lie down. Mackey further testified that defendant fired one gunshot in the air and one at the group. The victim suffered a fatal gunshot wound. About a month after the shooting, Mackey observed defendant in the neighborhood, recognized defendant, and called the police. Defendant was also identified at trial by Chicago police officer Larry Neuman, who was off-duty at his home when he heard gunshots and observed defendant, holding a gun, run to a car. The jury found defendant guilty of first degree murder and he was sentenced to 50 years in the Illinois Department of Corrections.

¶ 15 Defendant then appealed, contending that he was not proven guilty beyond a reasonable doubt because the identification evidence was "vague and uncertain," and that he was deprived of a fair trial due to prosecutorial misconduct during the State's rebuttal argument. This court affirmed defendant's conviction on appeal. See *People v. Smith*, No 1-07-0177 (2009) (unpublished order under Supreme Court Rule 23).

¶ 16 In May 2011, defendant filed a *pro se* petition for postconviction relief alleging, *inter alia*, that he was denied the effective assistance of appellate counsel by counsel's failure to challenge the trial court's denial of defendant's motion to quash arrest and suppress evidence on direct appeal. The circuit court docketed the petition and appointed postconviction counsel.

¶ 17 On October 4, 2012, postconviction counsel filed an amended petition and a certificate pursuant to Supreme Court Rule 651(c) (eff. Apr. 26, 2012). The amended petition alleged, in pertinent part, that appellate counsel erred by not raising the denial of defendant's motion to quash arrest and suppress evidence on direct appeal because the trial court erred by "too broadly" construing the standard for imputing knowledge amongst police officers.

¶ 18 The State then filed a motion to dismiss alleging, *inter alia*, that defendant's postconviction petition was untimely because it was filed more than six months after defendant's direct appeal was decided on September 11, 2009. The motion argued that because defendant did not file a petition for leave to appeal, his postconviction petition should have been filed by April 16, 2010. However, defendant's *pro se* postconviction petition was dated May 11, 2011, and filed in the circuit court on May 26, 2011.

¶ 19 Postconviction counsel filed a second amended petition for postconviction relief alleging that defendant was not culpably negligent because he believed that his privately retained

appellate counsel would handle all of his appeals, including a petition for leave to appeal.

However, appellate counsel declined to file a petition for leave to appeal based upon nonpayment of fees. Defendant was not able to file the petition for leave to appeal within the applicable 35-day period because he was transferred to another prison and placed in disciplinary segregation due to an altercation with another inmate, and did not have his property for a month. The petition alleged that defendant only acted in self-defense after he was provoked, and that once defendant had access to his papers, he attempted to compel appellate counsel to continue working on his case by contacting the Illinois Attorney Registration and Disciplinary Committee. Defendant then filed a *pro se* petition for leave to appeal which was denied on November 23, 2010. He filed a *pro se* postconviction petition within six months of that denial.

¶ 20 In granting the State's motion to dismiss, the circuit court noted that defendant's petition was untimely, as it was not filed within six months of the date that his direct appeal became final on October 15, 2009. However, the court thought that the appellate court might not agree with this conclusion, so it addressed the merits of defendant's petition. The court found, in pertinent part, that because Gorman had probable cause to arrest defendant, appellate counsel was not ineffective for failing to challenge the denial of the motion to quash arrest and suppress evidence on direct appeal. Defendant filed a motion to reconsider. In denying the motion, the circuit court stated that the petition was not dismissed solely because it was untimely; rather, the court's conclusion as to the timeliness of the petition was "advisory" and that it had therefore considered and ruled on the substantive issues raised in the petition.

¶ 21 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction.

725 ILCS 5/122-1 (West 2010); *People v. Davis*, 2014 IL 115595, ¶ 13. If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage where counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2010)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2010)).

¶ 22 At the second stage of proceedings under the Act, it is the defendant's burden to make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Therefore, all well-pled facts in the petition that are not rebutted by the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473. If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third stage evidentiary hearing where the circuit court serves as a fact-finder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, at ¶¶ 34, 46. We review the circuit court's dismissal of a postconviction petition at the second stage of proceedings under the Act *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 23 Here, defendant contends that the circuit court erred when it granted the State's motion to dismiss because he made a substantial showing of a constitutional deprivation, that is, he was denied the effective assistance of appellate counsel because counsel failed to challenge the trial court's denial of defendant's motion to quash arrest and suppress evidence on direct appeal.

¶ 24 To show an attorney's representation was ineffective, a defendant must establish that counsel's performance was deficient and that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* test applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced him. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence to refrain from raising issues that are without merit in counsel's judgment, unless counsel's judgment is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). This court therefore reviews the merits of the underlying issue or claim in order to determine whether a defendant was prejudiced because a defendant suffers no prejudice when appellate counsel fails to raise a nonmeritorious claim on appeal. See *Simms*, 192 Ill. 2d at 362.

¶ 25 In the case at bar, defendant argues that because Gorman could not confirm that the person on the phone actually was Mackey, the tip was "anonymous" and therefore not reliable enough to provide probable cause. Defendant further argues that even imputing the knowledge of the investigating officer to Gorman, the "bare accusations" contained in the phone call were not enough to provide Gorman with probable cause.

¶ 26 Probable cause for an arrest exists when facts known to an officer, at the time of the arrest, would lead a reasonably cautious person to believe that the person to be arrested committed a crime. *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008). Probable cause can be based on information provided by a third party, anonymous or identified, as long as it bears some

indicia of reliability. *People v. Adams*, 131 Ill. 2d 387, 397 (1989). An officer's reasonable suspicion may be founded on the statements of a member of the public, if that "concerned citizen" is sufficiently reliable. *People v. Sanders*, 2013 IL App (1st) 102696, ¶ 15. "Where officers are working together in investigating a crime, the knowledge of each constitutes the knowledge of all, and probable cause can be established from all the information collectively received by the officers." *People v. Ortiz*, 355 Ill. App. 3d 1056, 1065 (2005).

¶ 27 On appeal, a reviewing court should consider an individual's "veracity, reliability, and basis of knowledge" when examining a tip given to police officers. *People v. Sparks*, 315 Ill. App. 3d 786, 792 (2000). A tip's reliability is sufficiently supported when it is accompanied by "predictive information and readily observable details" that officers can subsequently confirm. *Sanders*, 2013 IL App (1st) 102696, ¶ 15. We review *de novo* the trial court's ultimate decision to grant or deny a motion to quash arrest and suppress evidence. *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 28 Initially, we reject defendant's contention on appeal that this case falls under the holding of *Florida v. J.L.*, 529 U.S. 266 (2000), because the caller in this case was "essentially" anonymous. See *Id.* at 270-71 (an anonymous tip did not contain the required "indicia of reliability" when "[a]ll the police had to go on * * * was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information"). Here, unlike *J.L.*, the caller was not anonymous. Rather, the caller phoned the police station, identified himself as Mackey, and explained the basis of his knowledge, that is, he was present when defendant shot the victim.

¶ 29 The record further reveals that at the time of defendant's arrest, Gorman had probable cause to believe that defendant had committed a crime. Gorman testified that he was familiar with the investigation into the victim's death and recognized Mackey's name as one of the witnesses. He also testified that he had reviewed a progress report which detailed an interview with Mackey during which Mackey stated that he observed the person who shot the victim. Gorman further testified that during the phone conversation, Mackey identified himself and stated that he observed the person who shot the victim driving a white car in the general area where the shooting took place. Mackey described the car including its license plate and gave a detailed description of the person inside including the person's race, hairstyle, and clothing. Gorman then relocated to the area, and ultimately found defendant, who matched the physical description given in the phone call, in a white car with the same license plate as detailed in the call. Gorman later confirmed that Mackey was in fact the person that he had spoken to on the phone.

¶ 30 Although Gorman did not speak to the caller face-to face, the caller identified himself and the basis for his knowledge, *i.e.*, he observed defendant shoot the victim, and gave a detailed description of defendant, defendant's method of conveyance, and the general area where defendant could be found. Additionally, the caller agreed to come to the police station later to speak with investigators, presumably permitting officers to locate him if the tip turned out to false. The information conveyed in the phone call contained "predictive information and readily observable details" that Gorman was able to subsequently confirm. See *Sanders*, 2013 IL App (1st) 102696, ¶ 15. Ultimately, because the information relayed by Mackey during the phone call had indicia of reliability (see *Adams*, 131 Ill. 2d at 397), and in light of the facts known to

Gorman at the time of defendant's arrest, through his review of the report detailing Mackey's interview and the phone call, a reasonably cautious person could believe based upon the totality of the circumstances that defendant had committed a crime (see *Wear*, 229 Ill. 2d at 563-64). Therefore, probable cause to arrest defendant existed, and the trial court properly denied the motion to quash arrest and suppress evidence. See *Close*, 238 Ill. 2d at 504.

¶ 31 Accordingly, defendant cannot show that he was prejudiced by appellate counsel's failure to challenge the trial court's denial of the motion to quash arrest and suppress evidence on direct appeal. See *Rogers*, 197 Ill. 2d at 223 (a defendant is not prejudiced by appellate counsel's failure to raise an issue on direct appeal when that underlying issue was nonmeritorious). Defendant failed to make a "substantial showing of a constitutional violation" (*Domagala*, 2013 IL 113688, ¶ 35), and, consequently, the circuit court correctly dismissed his postconviction petition.

¶ 32 Because we find that the amended postconviction petition failed to make a substantial showing of a constitutional violation, we need not reach defendant's contention on appeal that a ruling must be made on the question of whether the petition's untimely filing was due to defendant's culpable negligence.

¶ 33 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.