2016 IL App (1st) 142015-U
No. 1-14-2015

THIRD DIVISION
December 7, 2016

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. 09 CR 15411
	)	
JOHN BUTTS,	)	
	)	The Honorable
Defendant-Appellant.	)	William G. Lacy,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's summary dismissal of the defendant's first-stage *pro se* postconviction petition was reversed and remanded for further proceedings where the defendant's claim of ineffective assistance of appellate counsel was not frivolous or patently without merit. Had appellate counsel challenged the denial of the defendant's motion to suppress on direct appeal, the challenge would arguably have been successful and resulted in the reversal of the defendant's conviction.

¶ 2 The defendant, John Butts, appeals from the first-stage dismissal of his *pro se* postconviction petition under section 122-2.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-2.1 (West 2014)). On appeal, the defendant argues that the trial court erred in

dismissing as frivolous and patently without merit his claim that appellate counsel was ineffective for failing to challenge the denial of his motion to suppress on direct appeal. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On August 8, 2009, following an encounter with police during which the defendant was found to be in possession of a handgun, the defendant was arrested for reckless conduct (720 ILCS 5/12-5(A) (West 2008)), unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2008)). Although arrested for these offenses, the defendant was subsequently charged with armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)), unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(a)(3)(C) (West 2008); 720 ILCS 5/24-1.6(a)(2)/(3)(A) (West 2008); 720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2008)).

¶ 5 Motion to Suppress

¶ 6 The defendant filed a motion to suppress evidence in which he argued that the gun should be suppressed because the officers' search of the defendant was not consensual and because the officers lacked probable cause to arrest him for reckless conduct.

¶ 7 At the hearing on the defendant's motion to suppress, Officer Verdon of the Chicago Police Department testified to the following. Around 10:39 p.m. on August 8, 2009, he and his two partners—Officers Wesselhoff and Volt—responded to a radio dispatch that a person was calling for help in the vicinity of Jackson and Western. Upon visiting that area and finding nothing, the officers headed east on Jackson.

¶ 8 When the officers arrived at the intersection of Jackson and Oakley, Verdon observed the defendant and another man a half block south of Jackson on the east side of Oakley. The defendant was engaged in a "verbal altercation" with some men, who were inside the fence of the St. Stevens complex across the street from the defendant. He was, however, tensed up and clenching his fists, and Verdon heard the defendant shouting and yelling obscenities towards the people inside the St. Stevens complex. Although the defendant's hands were clenched, Verdon did not observe anything in them.

¶ 9 Verdon testified that at that time, there were tensions between the Traveling Vice Lords and the Black Disciples gangs in the area where the defendant was arrested. The territory of the Traveling Vice Lords was primarily within the St. Stevens complex, and the Black Disciples controlled the area outside of the St. Stevens complex.

¶ 10 The officers watched the defendant for a couple of minutes from the corner of Jackson and Oakley. They then turned their vehicle southbound on Oakley and stopped about ten feet from the defendant. The uniformed officers exited the unmarked police vehicle. Wesselhoff directed his attention to the defendant, while Verdon and Volt addressed the defendant's companion. Verdon heard Wesselhoff direct the defendant to come towards him, but could not recall how many times Wesselhoff gave that direction. The defendant did not comply with Wesselhoff's request and instead backed away from the officer. Verdon observed Wesselhoff try to grab the defendant's shirt to keep the defendant from pulling away. Wesselhoff then called out that the defendant had a gun.

¶ 11 The defendant started running north on Oakley and Verdon and Wesselhoff gave chase. The defendant continued running north past Jackson and turned west down the alley north of Jackson. Verdon, for his own safety, took a wide turn into the alley. During the time that

Verdon made the wide turn into the alley, the defendant was outside of his line of vision for approximately five seconds. When Verdon first observed the defendant after entering the alley, the defendant was about ten to twenty feet inside the alley and appeared to be rising out of a crouched position. As the defendant was rising, Verdon could observe an unidentified object in his hand. The defendant then stood up completely, threw the object over a fence and into the yard behind 214 South Oakley, and continued running. About three-quarters of the way down the alley, Verdon caught the defendant and placed him in custody.

¶ 12 A gun was later recovered from the yard.

¶ 13 Officer Wesselhoff took the stand next and testified as follows. On the night of August 8, 2009, he observed the defendant standing on the sidewalk in the vicinity of 333 South Oakley, across the street from the St. Stevens housing complex. At that time, there were major conflicts between the Traveling Vice Lords and Black Disciples gangs in the area, including around the St. Stevens complex.

¶ 14 At the time Wesselhoff observed the defendant, Wesselhoff was in his squad car with his two partners. Wesselhoff heard the defendant and another man screaming and yelling profanities at other people inside the courtyard across the street. The defendant was very animated and waving one of his hands up and down. Wesselhoff did not notice whether the people across the street were responding to the defendant. After observing the defendant's actions, Wesselhoff became concerned.

¶ 15 Wesselhoff and his partners proceeded to where the defendant was located and, upon stopping his vehicle, Wesselhoff exited and approached the defendant. The defendant had his right hand in his pocket and his left down by his side. Wesselhoff announced that he was a police officer and instructed the defendant to let Wesselhoff see his hands. Wesselhoff asked

him a second time and took a step toward him, in response to which the defendant took a step back. Again, Wesselhoff instructed the defendant to show his hands and, again, the defendant took a step back. Wesselhoff then reached out in an attempt to grab the defendant and grabbed a piece of the defendant's shirt. As the defendant backed up again, the shirt lifted up and Wesselhoff observed the butt of a gun in the defendant's waistband.

¶ 16 Wesselhoff screamed "gun" to alert his fellow officers. The defendant then fled north on Oakley and Wesselhoff and Verdon chased after him. When the defendant turned into an alley, Wesselhoff ran into an open construction lot on the corner of Jackson and Oakley. From there, Wesselhoff observed the defendant crouch down in the alley, appear to play with his waistband, and then stand up and throw what Wesselhoff believed to be the gun over a wooden fence. After observing the defendant toss the object over the fence, Wesselhoff ran out of the construction lot to the alley.

¶ 17 After this testimony, the defendant argued that his arrest should be quashed and the gun suppressed because the officers lacked probable cause to arrest him for reckless conduct, his conduct did not otherwise justify his detention, and the officers' accounts of the chase and recovery of the gun were not credible. The trial court denied the defendant's motion, finding that the officers did not seize the defendant until he was placed into custody and, by that time, having viewed the gun in the defendant's waistband, the officers had probable cause to arrest him.

¶ 18 Trial Proceedings

¶ 19 The defendant waived his right to a jury trial, and the matter proceeded to a bench trial on August 8, 2011. Wesselhoff was the first witness to testify on behalf of the State, and he offered the following testimony. At approximately 10:38 p.m. on the night of August 8, 2009, Wesselhoff and his two partners responded to a call for help in the St. Stevens area near Jackson

and Western. Finding nothing at the location, the officers proceeded to drive east on Jackson toward its intersection with Oakley. At the intersection of Jackson and Oakley, Wesselhoff observed two men, including the defendant, about a half block south of the intersection. The men started on the sidewalk on the east side of Oakley and then moved into the middle of the street. Wesselhoff heard the men screaming and yelling obscenities across the street at people inside the fence around the St. Stevens area. While doing this, the defendant was waving his fist.

¶ 20 Wesselhoff watched the defendant do this for one to two minutes and then decided that he and the officers needed to do something because it looked like "something bad[]" was about to happen. He turned his vehicle south onto Oakley and proceeded toward the defendant and his companion. Wesselhoff stopped the vehicle five to ten feet from the men, at which point the men started walking in opposite directions, with the defendant walking east back toward the sidewalk. Observing that the defendant had his right hand in his pants pocket and the other down by his side, Wesselhoff exited his vehicle, announced that he was a police officer, and instructed the defendant to let Wesselhoff see his hands. Wesselhoff gave the defendant this instruction three times while walking toward him. Each time that Wesselhoff took a step toward the defendant, the defendant took a step back. During this time, Verdon also exited the vehicle and was speaking with the defendant's companion on the other side of the officers' vehicle.

¶ 21 As Wesselhoff gave his instruction for the third time, he attempted to grab the defendant's shirt near his shoulder, but because the defendant was backing up, Wesselhoff was only able to grab the defendant's shirt in the area of his chest. The defendant turned to the left, causing the shirt to come up and revealing the butt of a gun in the defendant's waistband. Upon observing the gun, Wesselhoff shouted that the defendant had a gun. The defendant then pulled

out of Wesselhoff's grasp, and the defendant's shirt ripped in the process. The defendant ran north on Oakley, and Wesselhoff followed, as did Verdon.

¶ 22 After crossing Jackson, the defendant ran westbound into an alley. Because Verdon was closer to the defendant, Wesselhoff turned west onto Jackson and ran toward an open construction lot in an attempt to gain ground on the defendant by angling toward him. When he was about halfway across the lot, Wesselhoff observed the defendant in the alley. The defendant crouched down beside a garbage can next to a wooden fence. The defendant looked eastbound down the alley and as he turned back, he appeared to observe Wesselhoff. The defendant then jumped up, started grabbing at his waistband, threw what Wesselhoff believed to be a gun over the wooden fence and into the yard behind him, and started running again. Observing a fence separating him from the alley, Wesselhoff backtracked to the mouth of the alley where he observed the defendant and Verdon running westbound down the alley. Wesselhoff ran after them until he observed a squad car coming east down the alley. At that point, the defendant and Verdon disappeared from Wesselhoff's view and Wesselhoff heard Verdon on the radio advising that the defendant was in custody.

¶ 23 A gun was later recovered from the yard by other officers.

¶ 24 Verdon also testified at trial. According to his testimony, on the night of August 8, 2009, he, Wesselhoff, and Volt responded to a call at Jackson and Western. They did not observe anything at that location, however, so they proceeded eastbound on Jackson to the corner of Jackson and Oakley. About a half or three-quarters of the way down the block south of Jackson on Oakley, Verdon observed the defendant and another man engaged in a "verbal altercation" with a group of other men on the other side of a fence. The defendant was in an aggressive stance, with his fists up, and he was yelling to the other men on the other side of the fence.

¶ 25 After watching the men for a minute or two, the officers proceeded south on Oakley toward the men. Wesselhoff approached the defendant on the east side of the police vehicle, while Verdon and Volt approached the defendant's companion on the west side of the car. Verdon heard Wesselhoff tell the defendant to come toward him. Wesselhoff made several other comments that Verdon could not recall, but with which the defendant did not comply. Verdon looked over toward Wesselhoff and the defendant and observed Wesselhoff try to grab the defendant, who jumped back. Wesselhoff nevertheless managed to grab the middle of the defendant's shirt, and Verdon could observe that the defendant's shirt was ripped. Verdon then heard Wesselhoff shout that the defendant had a gun, and the defendant began to run northbound.

¶ 26 Verdon and Wesselhoff ran after the defendant northbound on Oakley, who turned west into an alley after crossing Jackson. Because he had been told that the defendant had a gun, Verdon took a wide turn to the alley and lost sight of the defendant for about five seconds as he did so. When Verdon was able to look down the alley, he observed the defendant about 10 to 20 feet from him, coming out of a crouching position by a fence. The defendant stood up and threw an object over the fence and into the yard behind him. After throwing the object, the defendant continued to run west down the alley and Verdon ran after him. About three-quarters of the way down the alley, Verdon was able to apprehend the defendant and place him in custody.

¶ 27 The State also presented the testimony of Officer Morales regarding the recovery of the gun and evidence the defendant's two prior convictions for manufacturing and delivering cocaine.

¶ 28 After the defendant's motion for a directed finding was denied, he took the stand to testify in his own defense. The defendant testified that on the night of August 8, 2009, he was waiting at the bus stop near the corner of Jackson and Western on his way to a party with his

cousin and a friend. While he was waiting, the defendant observed a gray Crown Victoria drive west past the bus stop on Jackson, cross Western, and then perform a U-turn and drive back east on Jackson. The defendant recognized the vehicle to be an unmarked police car. The car stopped directly in front of the defendant and his companions. Three officers exited the vehicle, and the driver, who the defendant identified as Wesselhoff, immediately ran east on Jackson toward Oakley. As he was running, Wesselhoff tripped on the curb and fell, causing the defendant to laugh. The other two officers then grabbed the three men and searched and handcuffed them. The officers told the men that they were not under arrest, but that the handcuffs were for the officers' safety. The officers then placed the three men into the vehicle and drove them into a nearby alley, where they sat for more than five minutes.

¶ 29 The defendant denied ever being in the alley outside of the officers' vehicle and denied ever standing or crouching in that alley. He also denied that his shirt was ripped at any point that night, that he ran from Wesselhoff or Verdon, that he had a gun on him, or that he tossed anything over a fence that night.[1]

¶ 30 The defense then rested. In rebuttal, the State introduced for purposes of impeachment, the defendant's prior conviction for possession of a controlled substance.

¶ 31 After closing arguments, the trial court rendered its verdict, finding the defendant guilty of all the charges.

[1] Although the defendant denied at trial that he possessed a gun or that he threw a gun over the fence in the alley, there is no issue raised on appeal regarding whether the gun recovered by police was the gun Wesselhoff testified that he observed on the defendant.

¶ 32 Sentencing & Direct Appeal

¶ 33 After an unsuccessful posttrial motion for a new trial by the defendant, the trial court found that all counts merged into the count of armed habitual criminal and sentenced the defendant to eight years' imprisonment and three years of mandatory supervised release.

¶ 34 The defendant appealed on the grounds that the trial court misstated the evidence and shifted the burden of proof to him. This court affirmed. *People v. Butts*, 2013 IL App (1st) 113459-U.

¶ 35 Postconviction Petition

¶ 36 On March 18, 2014, the defendant filed a *pro se* postconviction petition. In his petition, the defendant alleged, among other things, that appellate counsel was ineffective for failing to raise on direct appeal certain issues that the defendant brought to counsel's attention, including that the trial court erred in denying his motion to suppress evidence.

¶ 37 On May 16, 2014, after taking the matter under advisement, the trial court issued an order dismissing the defendant's *pro se* postconviction petition as frivolous and patently without merit. With respect to the defendant's argument that appellate counsel was ineffective for failing to challenge the denial of his motion to suppress, the trial court found that the defendant failed to demonstrate that had he raised the issue on appeal, his conviction would have been reversed on appeal.

¶ 38 The defendant timely appealed.

¶ 39 ANALYSIS

¶ 40 On appeal, the defendant argues that the trial court erred in summarily dismissing his postconviction petition because he stated the gist of a claim that appellate counsel was

ineffective for failing to challenge the denial of his motion to suppress on direct appeal. We agree.

¶ 41 At the first stage of postconviction proceedings, following the filing of a *pro se* postconviction petition by a defendant, the trial court has 90 days in which to review the petition and determine whether it is "frivolous or patently without merit." 725 ILCS 5/122-2.1. In conducting this review, the trial court is required to take all the allegations of the petition as true. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is frivolous or patently without merit, it may be summarily dismissed; otherwise, the petition advances to the second stage where the defendant is appointed counsel and the State may either move to dismiss or answer the petition. *Id.* at 10-11. A petition is considered frivolous or patently without merit where it has no arguable basis in either law or fact. *Id.* at 11-12. A petition has no basis in law when it is based on an "indisputably meritless legal theory," such as one that is "completely contradicted by the record." *Id.* at 16. A petition that lacks any basis in fact is one that is usually based on a "fanciful factual allegation," which includes those that are "fantastic or delusional." *Id.* at 16-17.

¶ 42 Postconviction petitions alleging ineffective assistance of counsel may not be dismissed at the first stage 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." *Id.* at 17. To sustain the second prong of this test, the defendant must demonstrate that there existed a reasonable probability that, absent appellate counsel's deficient performance, the defendant's sentence or conviction would have been reversed on direct appeal. *People v. Rademacher*, 2016 IL App (3d) 130881, ¶ 52.

¶ 43 The trial court's summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 44 The defendant contends that he sustained his first-stage burden because he presented an arguably meritorious claim for ineffective assistance of counsel. According to the defendant, appellate counsel's failure to challenge the denial of his motion to suppress on direct appeal constituted ineffective assistance, because the evidence at the hearing on the motion to suppress demonstrated that he was unlawfully detained prior to his arrest and that the discovery of the gun arose from that unlawful detention.

¶ 45 The United States and Illinois Constitutions protect citizens from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const., art. I, sec. 6. To be considered reasonable, the seizure of a person must generally be made pursuant to a warrant supported by probable cause. *People v. Thomas*, 198 Ill. 2d 103, 108 (2001). There are a number of exceptions to the warrant requirement, but only two are relevant here. First is the exception carved out by the case of *Terry v. Ohio*, 392 U.S. 1, 22 (1968), in which the United States Supreme Court held that a police officer may briefly detain a person for temporary questioning if that officer reasonably believes that the person has committed, or is about to commit, a crime. Under the second relevant exception, a person may be arrested without a warrant, so long as the officer has probable cause to arrest, *i.e.*, "the totality of the facts and circumstances known to the officer at the time of the arrest would lead a reasonable, prudent person, standing in the shoes of the officer, to conclude that a crime has been committed and the defendant was the person who committed the crime." *People v. Robinson*, 167 Ill. 2d 397, 405 (1995).

¶ 46 Before determining which, if either, of these exceptions arguably applies to the present case, we must first determine at which point in the encounter the defendant was seized. The trial court found that the latter exception applied, because the officers had probable cause to arrest the defendant at the time they took him into custody in the alley. Although there is no dispute that

the defendant was certainly seized at the time he was taken into custody in the alley, the defendant contends that he was also seized much earlier in the encounter, namely either when he was surrounded by the three officers as they exited the police car or when Wesselhoff grabbed his shirt. The record contradicts the defendant's claim that he was seized when he was "surrounded by three uniformed officers," but does support an argument that he was seized when Wesselhoff grabbed his shirt.

¶ 47 As the United Supreme Courts has clarified, "an arrest requires *either* physical force *** *or*, where that is absent, *submission* to the assertion of authority." (Emphasis in original.) *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Specifically with respect to physical force, a seizure occurs with "the mere grasping or application of physical force with lawful authority, whether or not it succeed[s] in subduing the arrestee ***." *Id.* at 624. A seizure also occurs whenever a police officer restrains an individual's ability to walk away (*Tennessee v. Garner*, 471 U.S. 1, 7 (1985)), no matter how briefly (*People v. Estrada*, 68 Ill. App. 3d 272, 275 (1979)).

¶ 48 As mentioned, the record contradicts the defendant's contention that he was detained when he was surrounded by the officers. The only evidence in the record on this issue establishes that upon exiting their vehicle, the officers split up, with Wesselhoff approaching the defendant on the east side of the vehicle and Verdon and Volt approaching the defendant's companion on the west side of the vehicle. Given this, it cannot be argued that the defendant was detained when he was surrounded by the officers, because there is no evidence that the defendant was ever surrounded by the officers. Even if one could construe Wesselhoff's lone approach to the defendant and his directives that the defendant show his hands as assertions of authority, there is no question that defendant did not submit to those assertions. The record

indicates that the defendant failed to comply with Wesselhoff's commands and, instead, repeatedly backed away from Wesselhoff. See *Hodari D.*, 499 U.S. at 626 (holding that a seizure by show of authority does not occur until the individual attempted to be seized submits to that authority).

¶ 49 It is, however, arguable that the defendant was seized when Wesselhoff grabbed his shirt. By grabbing the defendant's shirt to prevent him from moving further away, Wesselhoff exerted physical force over the defendant with the intent to restrain the defendant's ability to walk away. It makes no difference that the defendant was ultimately able to escape Wesselhoff's grasp; for whatever period of time that Wesselhoff held onto the defendant's shirt, the defendant was arguably seized. See *Hodari D.*, 499 U.S. at 624 (stating that a seizure occurs with "the mere grasping or application of physical force with lawful authority, whether or not it succeed[s] in subduing the arrestee"); *Estrada*, 68 Ill. App. 3d at 275 (even brief stops fall within the ambit of the fourth amendment).

¶ 50 The question then becomes whether the officers were justified in their seizure of the defendant at that time. We conclude that the defendant has pled an arguable claim that they were not justified in doing so. At the time that Wesselhoff seized the defendant, the following information was known to the officers: the defendant was seen yelling obscenities and waving his fist at people across the street, tensions were high between rival gangs in the area, the defendant and his companion attempted to disperse when the officers approached, the defendant had his right hand in his pants pocket, the defendant failed to obey Wesselhoff's directives to show his hands on three occasions, and the defendant backed away from Wesselhoff with each step that Wesselhoff took toward him. Whether taken together or separately, these facts arguably fail to establish a reasonable belief that the defendant had committed or was about to commit a

crime. See *People v. Shipp*, 2015 IL App (2d) 130587, ¶ 35 ("The officer must have observed unusual conduct, leading to a reasonable, articulable suspicion that the person has committed or is about to commit a crime.").

¶ 51 The State, of course, disagrees, arguing that these facts justified the officers in detaining the defendant under *Terry*, because, by doing so, the officers potentially averted a shooting. Of course, because the officers did not know that the defendant had a gun, they could not have reasonably believed that the defendant was on the brink of shooting someone. See *People v. Brown*, 343 Ill. App. 3d 617, 622 (2003) ("A *Terry* stop must be justified at its inception.").

¶ 52 Without knowing that the defendant possessed a gun, what the officers witnessed arguably amounted to no more than a vulgar one-sided argument by the defendant. There was no evidence that the men across the street from the defendant were responding or, if they were, the manner in which they were responding. Although gang tensions were known to be high in the area where the incident took place, there was nothing to suggest that either the defendant, his companion, or the men across the street were affiliated with a gang, much less rival gangs. See *People v. Harris*, 2011 IL App (1st) 103382, ¶ 15 (relying in part on the fact that the State did not present evidence that the defendant was suspected of committing any robberies or burglaries in concluding that the State failed to prove the existence of a high crime area in assessing the legality of the defendant's detention). Other than testifying that they heard defendant yelling profanities, the officers did not testify to the content of the defendant's speech, so it is unknown whether he was yelling anything that would indicate that the shouting was gang-related. Thus, although the defendant's yelling of obscenities could be construed as obnoxious and unbecoming, there was nothing to suggest that he had done or intended to do anything illegal.

¶ 53 In addition, the fact that the defendant had his hand in his pants pocket, did not comply with Wesselhoff's directives to show his hands, and backed away from the officer does not support a reasonable suspicion that the defendant had committed or was about to commit a crime, such as to justify a *Terry* stop. See *People v. Smith*, 331 Ill. App. 3d 1049, 1054-55 (2002) (holding that there were insufficient specific, articulable facts to justify the stop of the defendant where the officers observed the defendant standing in front of a known drug house in the early morning hours with his hands in his pockets and where the defendant refused to remove his hands for his pockets and backed away from the officers). As the court stated in *Smith*, the defendant's "acts were consistent with his right, in the context of a consensual police—citizen encounter, to ignore the police requests and go on his way," and the exercise of those rights cannot be used to justify a *Terry* stop. *Id.* at 1054.

¶ 54 The State contends that if the defendant was seized prior to his flight, the seizure was lawful because the officers had probable cause to arrest the defendant for disorderly conduct based on the defendant's acts of yelling obscenities and waving his fists at the people in the St. Stevens complex at a time when there was tension between rival gangs. A person commits disorderly conduct when they do any act "in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1) (West 2008). Although the reasonableness of the defendant's actions is questionable, the record does not contain any evidence that they alarmed or disturbed anyone or that he provoked a breach of the peace. Accordingly, we conclude that the defendant has presented an arguable claim that the seizure of him by Wesselhoff was unlawful.

¶ 55 The State argues that even if the defendant was seized at the time that Wesselhoff grabbed his shirt and even if said seizure was unlawful, the recovery of the gun was sufficiently

attenuated from the unlawful seizure because the seizure ended when the defendant pulled away and ran and, during that flight, the defendant abandoned the gun. Although we agree that if the officers had first learned that the defendant possessed a gun when he abandoned it during his flight from police, it would have been sufficiently attenuated from the initial unlawful seizure to be admissible. See *Hodari D.*, 499 U.S. at 629 (where officers first discovered the defendant had cocaine when he abandoned it midflight, the cocaine was not the fruit of an illegal seizure); *People v. Henderson*, 2013 IL 114040, ¶ 44 (disclosure of gun during the defendant's flight after his unlawful seizure rendered the gun admissible); *People v. Keys*, 375 Ill. App. 3d 459, 464 (2007) (drugs found after the defendant abandoned them during post-seizure flight meant the drugs were admissible). Such was not the fact pattern in this case, however. Here, the officers did not come to discover or learn of the gun during the defendant's flight; they simply recovered what they initially discovered when the defendant's shirt lifted up during Wesselhoff's arguably unlawful detention of the defendant. Under these facts, it is arguable that the gun's discovery was directly related to Wesselhoff's unlawful detention of the defendant, because it was during that unlawful detention that the officer's learned of the gun in the first place.

¶ 56 Because there is potential merit to the contention that the trial court erred in denying the defendant's motion to suppress, appellate counsel was arguably deficient in failing to raise the issue on direct appeal, which directly prejudiced the defendant. Given that all of the charges against the defendant were dependent on the existence of the gun, it is certainly arguable that his conviction would have been reversed had appellate counsel raised this issue on direct appeal. Accordingly, the defendant's postconviction claim that he received ineffective assistance of appellate counsel for counsel's failure to raise the denial of his motion to suppress on direct

appeal is not frivolous or patently without merit, because it has an arguable basis in both law and fact. Thus, the trial court erred in dismissing the defendant's *pro se* postconviction petition.

¶ 57 Having reached this conclusion, we need not address the defendant's argument that the trial court employed the wrong standard in dismissing his petition at the first stage.

¶ 58 Finally, although the defendant only raises on appeal the dismissal of his postconviction claim of ineffective assistance of appellate counsel for failure to challenge the denial of his motion to suppress on direct appeal, on remand, he is entitled to have his entire *pro se* postconviction petition docketed for second-stage proceedings. See *People v. Johnson*, 377 Ill. App. 3d 854, 858 (2007) ("[I]f some claims are subject to a dismissal at the first stage while others are not, the entire postconviction petition must be docketed for second-stage proceedings.").

¶ 59 CONCLUSION

¶ 60 For the foregoing reasons, we conclude that the defendant's claim of ineffective assistance of appellate counsel was not frivolous or patently without merit and, thus, that the trial court erred in summarily dismissing it. Therefore, we reverse the summary dismissal of the defendant's *pro se* postconviction petition and remand for second-stage proceedings on all claims in the defendant's postconviction petition.

¶ 61 Reversed and remanded.