2018 IL App (1st) 160237-U

No. 1-16-0237

Order filed September 28, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 9778
	)	
KEVIN HENDERSON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction petition did not state an arguable claim of ineffective assistance of appellate counsel for failing to raise the issue of the trial judge's closure of the courtroom during jury selection. The petition also did not state an arguable claim of trial or appellate counsel's ineffectiveness for failing to challenge the legality of the police officer's investigatory stop.

¶ 2 Defendant Kevin Henderson appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-*1 et seq*. (West 2014)).[1] On appeal, defendant contends his petition presented an arguable claim of the ineffective assistance of appellate counsel for failing to raise a meritorious claim on direct appeal, namely that the trial court closed the courtroom to the public durin*g voir dire*. In addition, defendant asserts his petition states an arguable claim that his trial and appellate counsel were ineffective for failing to challenge his detention near the crime scene and the subsequent show-up and in-court identifications.

¶ 3 Defendant was charged with three counts each of armed robbery with a firearm, aggravated unlawful restraint and aggravated battery. Defendant was tried in a joint jury trial with codefendant Perrence Washington in 2011. Both defendant and Washington were 15 years old at the time of the offenses. The facts of this case are more fully set out in our separate orders disposing of defendant's and Washington's direct appeals. *People v. Henderson*, 2013 IL App (1st) 112824-U; *People v. Washington*, 2014 IL App (1st) 113107-U.

¶ 4 Before jury selection began in this case, the trial court addressed the parties as follows:

> "There will be an order excluding witnesses from both sides during all phases of the trial including the jury selection. ***
>
> [A]ll of the seats in the courtroom are going to be filled up with jurors; just not enough room in the courtroom to do it any other way, so once the jurors come down - although jury trials are open to the public - unfortunately due to space constraints that

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

> portion of the trial will not be open to the public. Additionally as I said anyone who would be a witness would not be able to be involved in that portion either."

¶ 5 The court asked both the State and defense for a list of witnesses. The State indicated that it believed Antria Henderson was in court and asked that the trial judge "enter and continue her subpoena to tomorrow."

¶ 6 Before asking that potential jurors be brought in, the court announced to those present:

> "I am sorry, ladies and gentlemen. Just with the number of jurors that we need, there just won't be enough room for people to sit in here because they will be seated throughout the courtroom, but once the jury selection is complete, you're obviously entitled and welcome back."

¶ 7 During *voir dire*, one panel member was excused because he had a pending court case; six others were excused for cause. The trial court denied the State's request to excuse a venire member who offered different answers when she was asked if she could consider the case fairly. The trial court excused for cause, at the State's request, several jurors who had failed to disclose their criminal records when asked. Defense counsel either raised no objection to the State's challenges or acquiesced after discussion. Defense counsel sought to excuse two other venire members for cause, and the court denied both of those challenges; however, neither of those individuals was ultimately placed on the jury.

¶ 8 At trial, the State presented testimony that at about 6:30 p.m. on May 8, 2010, Jose Velasquez Sr., his son Jose Velasquez Jr. and Cesar Serrano were robbed at gunpoint in an apartment building they were remodeling on South Fairfield Avenue in Chicago. Jose Sr. testified that Jose Jr. had been working alone on the building's first floor and came to the

basement, where Jose Sr. and Serrano were working. Jose Jr. was led by a man holding a gun to Jose Jr.'s head. That man, later identified as Washington, wore a dark hooded sweatshirt and pulled the hood over his head to hide his face. Three other men came into the basement and also tried to cover their faces with hoods; one of those men was later identified as defendant. The offenders took keys, money, cell phones and jewelry from the three victims.

¶ 9 After a struggle, Jose Sr. yelled for help when the offenders ran away. Two offenders ran toward an alley, and the other two ran south on Fairfield Avenue towards 62nd Street. Jose Sr. chased the latter two offenders for half a block and then returned to the apartment building, where he called police. The police arrived in less than five minutes, and Jose Sr. described the offenders to police as five black males wearing dark hoodies. (At trial, Jose Sr. explained he later realized there were only four offenders.)

¶ 10 After listening to Jose Sr.'s description of the offenders, the police returned in less than two minutes and took Jose Sr. to a gas station at 63rd Street and California Avenue, about two blocks from the apartment building. There, Jose Sr. identified Washington as the gunman and defendant as the man who searched his pockets for valuables. Serrano also identified Washington as the gunman and defendant as one of the offenders.

¶ 11 Jose Jr. testified defendant wore a beige or gray hooded sweatshirt with a square or checkered pattern and Washington wore a dark hooded sweatshirt. Serrano testified defendant's sweatshirt was a light color and had a "different design than the other ones," and he described the design as "lines with squares."

¶ 12 Chicago police officer James Johnson testified he received a radio call about the robbery at 6:39 p.m. and arrived at the scene two minutes later with other officers. A man at the curb told

them he was just robbed by five young black males wearing hooded sweatshirts that were blue, black or gray and that they had run south on Fairfield Avenue.

¶ 13 Johnson testified they drove south on Fairfield Avenue, and two adults and several children standing near the corner of 62nd Street pointed them in the direction of California Avenue. Johnson had grown up in that neighborhood and drove to a gas station at 63rd Street and California Avenue because he knew "younger guys" who congregated there. At the gas station, Johnson saw three young black males standing on the curb; one wore a grayish hooded sweatshirt and the other two wore dark hooded sweatshirts. The three suspects were detained and identified as described in the victims' testimony.

¶ 14 Defendant presented alibi testimony from three family members. Shantal Williams, defendant's cousin, testified that at 6 p.m. on the night in question, she was with defendant at her mother's house at 6238 South California, three houses away from the gas station. Antria Henderson, who is Williams' mother and defendant's aunt, was present, as was Gladys Henderson, defendant's grandmother.

¶ 15 Williams testified she and defendant were at the house until about 6:50 p.m., when her mother sent them on an errand to the beauty supply store on the corner before the store closed at 7 p.m. As Williams and defendant walked to the corner, defendant spoke to Washington on the phone and told him to meet them at the gas station. Williams went to the beauty supply store, and defendant went to the gas station.

¶ 16 A short time later, Williams met defendant and Washington at the gas station. Williams purchased several food items with her mother's Link card. Williams said that as they left the gas station, police arrived and started "messing" with defendant and Washington, and an officer

threatened to hit defendant. Williams said two officers got out of a car and she thought the officers were Hispanic.

¶ 17 Williams went home and told her mother what had happened. She stated later in her testimony that five or six minutes elapsed between their departure from the gas station and when they were stopped by police.

¶ 18 Gladys Henderson testified that Williams returned from the store at 6:50 p.m. and told them that police had detained defendant. However, Antria Henderson testified that when Williams arrived home with the beauty shop and food purchases, she did not mention anything that occurred. Defendant called his aunt at 7:05 p.m. The parties stipulated that at 7:04 p.m. on May 8, 2010, Antria Henderson's Link card was used for a $3.88 purchase at 2810 West 63rd Street in Chicago.

¶ 19 The State presented two witnesses in rebuttal. Chicago police detective Eric Chopp testified he was present when an assistant State's attorney interviewed Williams two days before defendant's trial, and Williams said the police car that had arrived at the gas station was blue and white and had "Chicago Police" on the side. Officer Johnson, who had testified earlier that he was the first to arrive at the gas station, said he drove an unmarked black sports-utility vehicle and no other police vehicles were there at the time.

¶ 20 Following the trial, one empaneled juror failed to complete his jury service and he was replaced with an alternate juror who heard closing arguments. No objection was raised to that procedure by either the State or the defense. Defendant was convicted of three counts of armed robbery with a firearm. Defendant did not raise any issues related to *voir dire* or the makeup of

his jury in his motion for a new trial. After denying defendant's motion for a new trial, the trial court sentenced him to three concurrent 25-year terms in prison.

¶ 21 On direct appeal, defendant contended that: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) trial counsel was ineffective for failing to introduce certain evidence and acquiescing in the State's introduction of other evidence; (3) the State made improper remarks in closing argument; (4) the automatic transfer provision regarding juveniles and the 15-year firearm sentencing enhancement were unconstitutional for various reasons; and (5) his sentences were excessive. *Henderson*, 2013 IL App (1st) 112824-U, ¶ 3. This court rejected those arguments and affirmed defendant's convictions and sentences. *Id.* ¶ 94.

¶ 22 On August 7, 2015, defendant filed a *pro se* postconviction petition, alleging various claims of trial and appellate counsel's ineffectiveness. Defendant asserted his constitutional right to a public trial was violated because his family members and other spectators were excluded from the courtroom during jury selection. Defendant asserted his trial counsel was ineffective for failing to object to the courtroom closure and he was denied the effective assistance of appellate counsel because that issue was not raised in his direct appeal. Defendant argued that although the trial judge decided to bar spectators during *voir dire* because about 60 potential jurors were present, the court could have avoided the situation by calling fewer venire members at a time. In an affidavit attached to his petition, he attested in part: "When the court ordered everyone to leave the courtroom for jury selection [] there was less [than] seven of my family members in the courtroom and no more [than] 3 spectators at the most."

¶ 23 Defendant also asserted in his postconviction petition that his trial and appellate counsel were ineffective for failing to challenge the police stop that preceded the show-up identification.

He asserted that he was "detained based solely upon flimsy evidence without the suspects[']age, height, weight nor what type of pants or shoes the suspects were wearing."

¶ 24 On October 30, 2015, the circuit court dismissed defendant's postconviction petition as frivolous and patently without merit. In its written order, the court stated that several of the issues raised in defendant's petition were addressed on direct appeal and were barred by *res judicata*. The court's order stated: "The remaining issues the defendant raises in his postconviction petition were not raised on direct appeal, accordingly they have been forfeited." Defendant now appeals that ruling.

¶ 25 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights in his original trial or sentencing. *People v. Allen*, 2015 IL 113135, ¶ 20. At the first stage of postconviction proceedings, the circuit court may dismiss a petition only if it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or in fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record," and a fanciful factual allegation is one that is "fantastic or delusional." *Id*. at 16-17. Our review of a petition's dismissal without an evidentiary hearing is *de novo*. *Allen*, 2015 IL 113135, ¶ 19.

¶ 26 We first address defendant's contention that he has raised an arguable claim of the ineffectiveness of his appellate counsel for failing to raise on direct appeal the issue of his right to an open *voir dire* proceeding. As a threshold matter, the State contends our consideration of this issue is barred because any issues that defendant could have raised on direct appeal, but did

not, are forfeited. Waiver does not bar defendant from now raising this issue, as the postconviction waiver rule is relaxed where the alleged omission of the issue stems from the incompetence of appellate counsel. *People v. Mack*, 167 Ill. 2d 525, 531-32 (1995). Because defendant's postconviction claim of the ineffectiveness of his appellate counsel was not and could not have been raised on direct appeal, it is not barred by the doctrine of forfeiture. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 37 (citing *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005)); *People v. Salazar*, 162 Ill. 2d 513, 521 (1994) (appellate counsel cannot be expected to argue his own effectiveness)). Also, while the State asserts that defendant "raised ineffective assistance of counsel claims on direct appeal," this particular claim of the ineffectiveness of trial and appellate counsel was not raised on direct appeal and is not barred by *res judicata*.

¶ 27 Ordinarily, in the context of a postconviction claim, a petition alleging the ineffective assistance of appellate counsel may not be summarily dismissed if: (1) it is arguable that appellate counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced by appellate counsel's performance. *Hodges*, 234 Ill. 2d at 17; *People v. Jones*, 219 Ill. 2d 1, 23 (2006). Defendant argues that his appellate counsel was ineffective for not raising the courtroom closure issue and that he was prejudiced by counsel's performance because if appellate counsel had raised this issue on direct appeal, defendant's conviction would have been reversed as it constituted structural error without the need to demonstrate prejudice. Defendant relies on *People v. Evans*, 2016 IL App (1st) 142190, in support of his position. Defendant does not argue that his trial was otherwise fundamentally unfair or that the outcome would have been different.

¶ 28 In *Evans*, the defendant in his postrial motion and on direct appeal argued that his right to a public trial was violated because his step-grandmother was asked to leave the courtroom during jury selection. *Evans*, 2016 IL App (1st) 142190, ¶ 5. The trial court stated it did so due to the small size of the courtroom and the need to prevent the defendant's relative from contaminating the jury. *Id*. ¶ 4. *Evans* observed that the sixth amendment of the United States Constitution guarantees an accused the right to a public trial and that this right extends to the *voir dire* of prospective jurors. *Id*. ¶ 8 (citing *Presley v. Georgia*, 558 U.S. 209 (2010)). *Evans* noted that the denial of a public trial has been recognized as falling "into the limited category of 'structural errors,' which require automatic reversal without the need to show prejudice." *Evans*, 2016 IL App (1st) 142190, ¶ 8 (citing *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010)). *Evans* concluded the trial court's reasons for barring the witness were not justified and that the defendant's right to a public trial had been denied. *Evans*, 2016 IL App (1st) 142190, ¶ 17. As a result, the defendant's conviction was reversed and the cause remanded for a new trial. *Id*. ¶ 1.

¶ 29 The State does not take issue with this court's determination in *Evans*. The State argues, however, that the United States Supreme Court's recent decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), compels a different result in this postconviction proceeding. In *Weaver*, the Court rejected the assertion that a public-trial violation that is raised for the first time on collateral review constitutes structural error requiring the automatic reversal of a defendant's conviction; rather, the Court held that as with any other claim of ineffective assistance of counsel, a defendant must demonstrate prejudice. *Id*. at 1911. For the following reasons, we agree with the State.

¶ 30 In *Chapman v. California*, 386 U.S. 19, 23-24 (1967), the Supreme Court recognized that not all constitutional errors require the reversal of a defendant's conviction. This category of "harmless error" includes errors that did not contribute to the verdict. *Id*. at 24. However, in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), the Court held that some errors, now known as structural errors, cannot be deemed harmless. "[T]he defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' " *Weaver*, 137 S. Ct. at 1907 (quoting *Fulminante*, 499 U.S. at 310).

¶ 31 A defendant's right to a public trial is guaranteed by the sixth amendment, applicable to the states through the fourteenth amendment. U.S. Const. amends. VI, XIV; *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979). The right to a public trial protects the defendant and is designed to: (1) ensure a fair trial; (2) encourage the prosecution and the trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 41 (citing *Waller v. Georgia*, 467 U.S. 39, 46 (1984)). There is a presumption that all trials are to be open to the public. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984). The entitlement to a public trial extends to *voir dire* proceedings. *Presley*, 558 U.S. at 213-14 (noting the "public has a right to be present [during jury selection] whether or not any party has asserted the right"). The denial of a public trial has been included in the category of recognized structural errors. *Neder v. United States*, 527 U.S. 1, 8 (1999).

¶ 32 However, as *Weaver* observed, whether a given error is deemed structural and thus not amenable to a harmless-error analysis depends on the error involved. *Weaver*, 137 S. Ct. at 1908. Some errors, such as denying the defendant the right to conduct his own defense, are structural

because they are designed to protect the defendant's liberty and because harm is not relevant to the exercise of the right. *Id*. A second group of errors, such as when a defendant is not allowed the legal counsel of his choice, has been "deemed structural if the effects of the error are simply too hard to measure," and a third type of structural error occurs if fundamental unfairness is always the result, such as the failure to instruct the jury on reasonable doubt. Still, *Weaver* recognized that structural errors do not result in fundamental unfairness in every case. *Id.*

¶ 33 In the case of courtroom closure, the right to a public trial protects interests which do not only belong to the defendant. *Id*. at 1910. The guarantee of a public trial "is a safeguard against any attempt to employ the courts as instruments of persecution" and "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *People v. Seyler*, 144 Ill. App. 3d 250, 253 (1986). Therefore, the right to a public trial involves not only the defendant's interests but also the interests of the public and the press in an open judicial forum. *People v. LaGrone*, 361 Ill. App. 3d 532, 535 (2005) (the rights of the defendant to a fair trial and the public right of access to criminal proceedings are not always inconsistent but a "high threshold must be crossed to justify" a courtroom's closure).

¶ 34 Courtroom closures also do not always result in a fundamentally unfair trial. *Weaver*, 137 S. Ct. at 1909-10. Because a trial can be closed in the presence of exigent circumstances, a defendant's right to a public trial is not absolute. *Id*. at 1909. *Weaver* observed that an exception to a public trial can occur when a judge orders a courtroom closure after stating factual findings that supported the need to do so. *Id*.; see, *e.g.*, *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir.

1996) (appeals court affirmed the trial judge's closure of the courtroom during testimony of an undercover police officer who had witnessed a drug buy and still worked undercover).

¶ 35 Instead, the denial of a defendant's right to a public trial is classified as a structural error due to the "difficulty of assessing the effect of the error." *Weaver*, 137 S. Ct. at 1910 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n.4 (2006), and *Waller*, 467 U.S. at 49 n.9). Therefore, "while the public trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." *Weaver*, 137 S. Ct. at 1910.

¶ 36 Therefore, while a defendant may generally be entitled to automatic reversal of his conviction when a public trial violation is preserved at trial and raised on direct appeal, such as in *Evans*, *Weaver* rejected the notion that a *Strickland* prejudice inquiry can be conducted in such a "mechanical" fashion in a collateral proceeding. *Id*. at 1911 (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). *Weaver* concluded that in the context of a courtroom closure, prejudice is not automatic; instead, the burden is on the defendant to show a reasonable probability of a different outcome or to show that the error was so serious that it rendered his trial fundamentally unfair. *Weaver*, 137 S. Ct. at 1911. In so holding, *Weaver* explained a different standard is justified where the issue is raised later on collateral review, as opposed to where the issue is preserved or raised for the first time on appeal, for reasons that include an interest in the finality of judgments. *Id*. at 1912.

¶ 37 In this case, had defendant objected at the trial court level, the error could have been addressed. A trial court "can either order the courtroom opened or explain the reasons for

keeping it closed," but when a public-trial claim is raised later as an argument of ineffective assistance of counsel, the trial court has lost the ability to cure the violation. *Id*.

¶ 38 Regarding claims raised on direct appeal, *Weaver* explained:

> "[W]hen state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost." *Id*.

¶ 39 It has now been approximately eight years since the offense and seven years since defendant's trial. New trials that are ordered after collateral challenges often occur after several years have elapsed and risk our justice system's interest in the finality of judgments, which the *Weaver* court deemed to be of "profound importance." *Id*. (quoting *Strickland*, 466 U.S. at 693-94).

¶ 40 Applying *Weaver* to the facts here, we first consider whether defendant has shown prejudice as required by *Strickland*, *i.e.*, whether a reasonable probability existed that the jury would not have convicted him had his attorney objected to the closure. Defendant's prejudice claim on appeal is solely based on the automatic reversal of his conviction based on structural error. However, that claim cannot be sustained under *Weaver*. Defendant offers no argument related to the evidence in this case that the result of his trial would have been different had his counsel objected to the closure.

¶ 41 Second, we conclude that defendant's trial was not fundamentally unfair under the factors used in *Weaver*. Those factors were: (1) whether *voir dire* was conducted in a private or remote

place; (2) whether the closure was limited to jury selection; (3) whether the closure decision was made by court officers or by the judge; (4) whether members of the venire who were not chosen as jurors observed the proceedings; (5) whether a record of the proceedings was made that indicates no basis for concern; and (6) whether any harm resulted from the closure. *Weaver*, 137 S. Ct. at 1913. Examples of such harm listed in *Weaver* are: a juror who lied to the parties and the court during *voir dire*; misbehavior by a prosecutor, judge or other party; or any "suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Id*.

¶ 42 Considering each of those factors in order, *voir dire* in this case was conducted in the courtroom. The courtroom closure was limited to *voir dire* and was not in effect during the trial.

¶ 43 The record reflects that the decision to close the courtroom was made by the trial judge. In closing the courtroom, the court indicated it was necessary to exclude members of the public so that potential jurors could be seated. The court stated there was "just not enough room in the courtroom to do it any other way." It appears from those remarks that members of the venire were allowed to remain in the courtroom even when they were not being questioned. The court's remarks suggest that all venire members remained in the courtroom during closure and that the members of the public and others who were excluded were to be readmitted to the courtroom "once the jury selection is complete." The fact that the trial judge made the decision to close the courtroom to the public weighs in defendant's favor.

¶ 44 However, the next factor, the record of *voir dire*, provides no basis for concern. The court excused for cause, at the State's request, several potential jurors who had failed to fully disclose their criminal records. Even though defense counsel sought to excuse two other venire members

for cause and the trial court denied both of those challenges, neither of those individuals ultimately served on the jury. As in *Weaver*, there is no showing of any harm that resulted from the courtroom closure.

¶ 45 Defendant claimed that pursuant to the court's remarks that the entire assemblage could not remain during *voir dire*, several members of his family were required to leave the courtroom. However, defendant did not specify in his petition which family members were present when the court made its pronouncement. In his brief to this court, he states there were "about seven family members and three members of the public seated in the courtroom prior to the closure." The only person defendant mentions by name on appeal is his aunt, Antria Henderson.

¶ 46 It is relevant that, at the same time the court closed the courtroom to anyone other than the venire, the court also excluded "witnesses from both sides during all phases of the trial including the jury selection." It is a routine practice to exclude witnesses from the courtroom prior to their testimony to prevent their accounts from being shaped by those who testify before them. *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 34. The exclusion of witnesses from the courtroom is left to the sound discretion of the trial court. *People v. Dresher*, 364 Ill. App. 3d 847, 861-62 (2006). Thus, as a disclosed witness for the defense, Antria Henderson should not have remained in the courtroom during *voir dire* in any event, given the trial court's order. The same is true of defendant's cousin and defendant's grandmother, who also testified at trial.

¶ 47 In conclusion on this issue, defendant has not shown that the closure of the courtroom during *voir dire* rendered his trial fundamentally unfair under the factors set out in *Weaver*. Accordingly, defendant's postconviction petition does not state an arguable claim of appellate counsel's ineffectiveness for failing to raise the issue of the courtroom closure.

¶ 48 We note, in closing, that the public has a right to be present at *voir dire* proceedings and at trial whether or not any party has asserted that right, and the court must consider alternatives to closure "even when they are not offered by the parties." *Presley*, 558 U.S. at 214 (citing *Press-Enterprise Co.*, 464 U.S. at 503-05). Thus, when faced with such a situation such as here, the trial court is advised to consider alternatives to closure of the courtroom. One alternative to allow more spectators in the courtroom would be to divide jurors into smaller groups during *voir dire*, as the Supreme Court suggested in *Presley*, which would have aided the process in the instant case. A trial judge could also seek consent from the defense before any closure takes place or ask the defense if there are any individuals that the defendant would like to have present in the courtroom. Such actions would avoid later claims such as the one before us now.

¶ 49 The remaining issue on appeal is whether defendant stated an arguable claim of the ineffectiveness of his trial and appellate counsel for failing to challenge the legality of his investigatory stop that tainted the later showup identification near the scene and the in-court identifications. Defendant argues that a motion to suppress that evidence based on the unlawfulness of the initial stop would have succeeded because Officer Johnson lacked any individualized basis to detain him.

¶ 50 The State argues defendant has waived this claim for postconviction review because it was not raised earlier. As with defendant's first issue, his claim of defective representation is accompanied, both in his postconviction petition and on appeal, by a parallel argument that appellate counsel was ineffective for failing to raise this issue on direct appeal. Therefore, waiver does not bar defendant from now raising this issue. See *Mack*, 167 Ill. 2d at 531-32.

¶ 51 Even though this issue has been preserved for our review, defendant cannot state an arguable claim of either trial or appellate counsel's ineffectiveness for failing to raise this issue. To establish trial counsel was ineffective for failing to file a motion to suppress, a defendant must demonstrate a reasonable probability that the motion would have been granted and also that the outcome of the trial would have been different had the evidence been suppressed. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Thus, in this first-stage postconviction proceeding, defendant must show it is arguable his counsel was deficient and also that it is arguable he was prejudiced by the failure to file the motion. See *Hodges*, 234 Ill. 2d at 17.

¶ 52 Defendant asserts it is arguable that a motion to suppress his identification would have succeeded because Officer Johnson lacked a sufficient basis to detain him. He contends he was stopped by police solely because he was a black male in the vicinity of the offense wearing a hooded sweatshirt.

¶ 53 Defendant acknowledges this court rejected the same argument by his codefendant in his own appeal. See *Washington*, 2014 IL App (1st) 113107-U, ¶¶ 72-74. In finding the facts known to the officers here justified an investigatory *Terry* stop, this court noted that Officer Johnson observed Washington with the knowledge that a robbery took place minutes earlier and knowing that the offenders had fled south on Fairfield Avenue. *Id*. ¶ 74; see *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (police officer may conduct a brief, investigatory stop of a citizen based on a "reasonable, articulable suspicion of criminal activity" amounting to more than a mere hunch). In *Washington*, this court found the stop was supported by the following circumstances: Officer Johnson had heard Jose Sr.'s description of the suspects as five young black men wearing blue, black and gray hooded sweatshirts; the officer was directed by bystanders to California Avenue;

the officer knew that the gas station at California Avenue and 63rd Street was a gathering place; and the officer saw Washington, defendant and a third male, who matched the description given by the victims. *Id*. ¶ 74.

¶ 54 Defendant argues that despite our conclusion in Washington's appeal, his counsel should have argued that police lacked any "sufficient individualized suspicion" to stop him because he did not match the general description given by Jose Sr. He argues the facts known to Officer Johnson did not allow the police to detain any black male in the neighborhood who happened to be wearing a black, gray or blue hooded sweatshirt.

¶ 55 Despite defendant's attempts to distinguish his situation from that of his codefendant, he cannot state an arguable claim that a motion to suppress the evidence of his investigative stop would have succeeded, given the testimony presented to support the stop. Officer Johnson's testimony indicated he had specific and articulable facts, which taken together with rational inferences from those facts, reasonably warranted a *Terry* stop at the gas station.

¶ 56 A description given to police of a suspect's gender, race and clothing color is sufficiently specific to support a stop of an individual meeting those criteria. See, *e.g.*, *People v. Ross*, 317 Ill. App. 3d 26, 30 (2000) (offender was described as a "black man wearing a blue shirt"); see also *People v. Robinson*, 299 Ill. App. 3d 426, 430 (1998) (stop reasonable based on suspect's race, height and weight and color and type of clothing). Here, Officer Johnson testified he was told (and Jose Sr.'s testimony does not contradict) that the offenders wore hooded sweatshirts that were blue, black or gray in color. Defendant's sweatshirt was described by Jose Sr. and by Serrano as "lighter colored" than those worn by the other offenders.

¶ 57 Reasonable suspicion for a *Terry* stop can be derived, in part, when police observe individuals similar to those believed to be fleeing from a recent crime scene when the observed individuals are located in the general area where the fleeing suspects would be expected to be, given the time of the crime and the distance from the crime scene. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 25. Here, defendant and the men with him matched the description of the offenders given by the victims. Their presence within two blocks of the crime scene within approximately five minutes of the offense, along with the fact that the group corresponded with the general description that was provided, gave the officers the articulable suspicion necessary to warrant an investigatory stop. Because the police had a sufficient basis for the stop, defense counsel was not arguably unreasonable for failing to seek suppression of the identifications that followed the stop.

¶ 58 In conclusion, defendant has not stated an arguable claim of the ineffectiveness of appellate counsel for failing to challenge the courtroom closure during jury selection. Defendant did not assert the result of his proceeding would have been different had his counsel challenged that procedure or that his trial was fundamentally unfair under the factors set out in *Weaver*. Defendant also has not stated an arguable claim that his counsel was ineffective for failing to challenge the legality of the investigative stop that preceded the showup identification.

¶ 59 Accordingly, the circuit court's summary dismissal of defendant's postconviction petition is affirmed.

¶ 60 Affirmed.