2018 IL App (2d) 15-0992-U
Nos. 2-15-0992 & 2-15-1221 cons.
Order filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	Nos. 10-CF-3103, 10-CF-3104
MIGUEL A. RICO,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's postconviction petitions at the first stage as frivolous and patently without merit. Therefore, we affirmed.

¶ 2 Defendant, Miguel A. Rico, appeals from the circuit court's denial of his first-stage postconviction petitions. Defendant was tried and convicted in two separate cases, nos. 10-CF-3103 and 10-CF-3104. In case no. 10-CF-3103 (the Chappel case), defendant was convicted of armed violence, home invasion, armed robbery, and aggravated kidnapping. 2014 IL App (2d) 120650-U, ¶ 2. We affirmed on appeal. *Id.* ¶ 27. In case no. 10-CF-3104 (the Hagy case),

defendant was convicted of home invasion, aggravated kidnapping, and residential burglary. 2014 IL App (2d) 130071-U, ¶ 2. We affirmed in part, reversed in part, and remanded for resentencing. *Id.* ¶¶ 77-78.

¶ 3 Defendant filed postconviction petitions in both cases. The circuit court dismissed both petitions at the first stage, and we consolidated the two cases on appeal. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The events leading to both the Hagy case and Chappel case took place in September 2010. We summarize the evidence adduced at those trials as follows.

¶ 6 Daniel Hagy testified that on September 1, 2010, he returned home to find the garage door open with home items misplaced. 2014 IL App (2d) 130071-U, ¶ 12. The defendant emerged from the living room wearing a hoodie, jeans, and a bandana around his face, and Daniel described him as about 5'8" with a Hispanic complexion. *Id.* ¶ 13. He had a gun, and he ordered Daniel to get on the ground. *Id.* ¶ 14. Defendant bound his hands with zip ties behind his back and ordered him into a bathroom. *Id.* Defendant eventually moved Daniel to a storage unit in the basement. *Id.* ¶¶ 15, 16. Defendant asked Daniel if he had $500 in cash, and Daniel said no. *Id.* ¶ 17. Defendant ordered him to call his girlfriend to bring over $500, or he would shoot him. *Id.* Daniel called his girlfriend to ask for the money while defendant held a knife to his neck; the call went to voicemail. *Id.* Defendant continued to check on Daniel until, at some point, he left the home. Daniel eventually heard his father return home and called out to him. *Id.* ¶ 19. His father found him in the basement behind the TV with duct tape around his wrists and ankles, and he called 911. *Id.* ¶ 21.

¶ 7 Defendant testified in the Hagy case that he was 18 years old on September 1, 2010, and that he had completed 8th grade. *Id.* ¶ 29. He denied entering the Hagy household and tying up

Daniel. *Id.* He was "surprised" that he was arrested on September 8 around 11 p.m. The police took him to the Lake County sheriff's department where he was questioned. *Id.* He slept at the police station that night, and an officer escorted him to the bathroom in the morning. *Id.* The next time he spoke with officers, they showed him pictures of the safe they found at his parents' house and told him to come forward and tell them what happened. *Id.* ¶ 30. They told him that if he did not come forward, they could arrest his parents. *Id.* Defendant felt scared and described the officers as angry, although they did not yell. *Id.* The officers left and returned to the room several times, and they told him that he could end up going to jail for life. *Id.* Defendant admitted that he made written statements to police, explaining that he did so because he did not want to spend the rest of his life in jail. *Id.* ¶ 31. He wrote what he was told to write, not what he wanted to write. *Id.* The officers then gave him lunch and a blanket and offered him a cigarette. *Id.* Defendant also made a video recording of his statements. *Id.*

¶ 8 We summarize defendant's written statement in the Hagy case as follows. On September 1, 2010, he was riding his bike when he saw a house with the garage open. He first checked whether anyone was home, and when he thought nobody was there, he grabbed some electronics. Eventually, he heard someone in the house. He saw a 6'3" guy and got scared, so he took out his gun and told the guy to get down. He said that nothing was going to happen to him. He tied him up and took him first upstairs and then to the basement. He checked on the man every 15 to 20 minutes to make sure he was ok. He packed up "all the stuff" and left the house. He was sorry for what he did. He knew it was wrong, but he was doing it for the money. He did not mean to hurt anyone. The statement was dated September 9, 2010, signed by defendant, and witnessed by Detectives Tisinai and Richards.

¶ 9 The events of the Chappel case took place on September 8, 2010. William Chappel testified that around 5 a.m., he left his Antioch home to go for a walk. 2014 IL App (2d) 120650-U, ¶ 3. Upon his return, he went to the kitchen for a cup of coffee. As he reached for the coffee pot, defendant's arm went around his chest and he felt a knife against his throat. *Id.* Chappel described defendant as 5'8" or 9", Hispanic, medium build, and wearing a hoodie. *Id.* He took Chappel's car keys and locked him in the trunk of his car. *Id.* Chappel's stepdaughter was later put in the trunk of Chappel's other car. At one point when the trunk was opened, Chappel saw defendant with his wife, Diane Staples, who was bleeding. *Id.* She had been cut by a knife in a struggle with defendant, and she required stitches. Defendant eventually bound her hands and feet and left her in a downstairs shower. Defendant took several items from Chappel's house, including computers, a computer monitor, and speakers.

¶ 10 The police received information regarding Chappel's stolen car later that day. The officers set up surveillance across the street from the car, and the home had a "no trespassing" sign in front of it. *Id.* ¶ 6. Around 11 p.m. on September 8, they observed defendant walk down the driveway, past the no trespassing sign, and towards the garage at the back of the property. *Id.* The defendant matched the suspect description, and they arrested him. *Id.*

¶ 11 A. Motions to Suppress Statements

¶ 12 On January 12, 2011, prior to trial in either case, defendant filed a motion to suppress statements. Therein, he alleged that his *Miranda* rights were not scrupulously honored at his September 9, 2010, police interrogation, including both his right to remain silent and his right to an attorney. He sought suppression of all statements and confessions following his arrest on September 8, 2010.

¶ 13 The court heard defendant's motion to suppress statements on April 12, 2011. Detective Rochelle Tisinai testified as follows. On September 9, 2010, she first spoke with defendant in the interview room along with Detective Dador around 12:55 a.m (the midnight interview). Dador read defendant his *Miranda* rights from a pre-printed form, and they began asking defendant questions, including where he had been coming from and what he had been doing earlier that evening. At some point, defendant indicated that he did not want to talk anymore, and after about an hour and a half, he asked for an attorney. Once he asked for an attorney, she and Dador got up and left the room. Prior to requesting an attorney, defendant agreed to a search of his phone. They left two photographs on the table that Dador had from the case and told defendant to knock on the door "if he changed his mind." She did not converse with defendant until around 2 p.m. later that day.

¶ 14 Her second conversation with defendant took place around 2 p.m. on September 9, 2010 (the 2 p.m. interview), after Detective Robert Richards told her that defendant wanted to speak with her. She went to the interview room, and only she and defendant were present. Defendant first asked whether she had spoken with his girlfriend. He had discussed his girlfriend during the midnight interview, stating that he had been living with his girlfriend and that he was walking from her house when he was arrested. Tisinai told him that he had requested an attorney, and therefore she could not discuss the case with him. Defendant continued to ask about his girlfriend, including whether the police went to her high school or pulled her out of class. Tisinai again replied that she could not talk about the case because he had requested an attorney.

¶ 15 Defendant next asked if he could have a smoke and if he could "chill" with Tisinai. She understood this to mean that defendant wanted to "hang out in the interview room and have a conversation" with her. Tisinai responded that she would have to read him his *Miranda* rights,

and she read them out loud using the preprinted *Miranda* rights and waiver form. Defendant signed the form at 2:10 p.m. Tisinai specifically told him that he had the right to remain silent; that what he said could and would be used against him in a court of law; that he had a right to consult with a lawyer and have a lawyer present for questioning; that even if he answered without a lawyer present, he had the right to stop answering until he spoke to a lawyer; and that if he could not afford a lawyer, one would be appointed for him. Defendant initialed the form next to each enumerated right.

¶ 16 After reading defendant his rights, Tisinai asked him whether "he had been beaten out of a gang." He responded yes. He had been having money issues, and he feared for his safety from other gang members. Tisinai eventually confronted him with details of one of the home invasions. Defendant did not deny the events; he just looked down. She suggested that the reason he would have committed a home invasion was to sell electronics to protect himself or his family. Defendant stopped speaking, and she decided to leave the interview room. The whole conversation lasted about one hour, and at no point did defendant ask for an attorney. He said that she was "nice" and seemed to care.

¶ 17 Tisinai spoke with defendant a third time on September 9, 2010, around 6 p.m. (the 6 p.m. interview). She was in another office when a detective told her that defendant wanted to speak with her. She got Richards, and the two of them went back to defendant's interview room. Only she, Richards, and defendant were present in the interview room. Defendant asked what was going on with the case, and they advised him that they had "done a search warrant of his house," and that they found some items. After she told defendant about the property found at his home, he basically said that " 'you know you got me. What else do you want me to say?' " At this point, defendant provided details about their investigation. They spoke for a couple of

hours. The detectives provided defendant an opportunity to make a written statement and eventually video recorded his statements. Tisinai testified that she and Richards did not remain in the room when defendant wrote his statement. She did not remember if they entered the room while he was writing his statement. She did not discuss with defendant what he should write.

¶ 18 Tisinai spoke with defendant again after he wrote his statement. Richards showed defendant a consent form to record his statements, and they proceeded to record his statements on video. Both she and Richards asked defendant questions during the recording. At no point during the recording did defendant ask for an attorney or stop talking.

¶ 19 On cross-examination, Tisinai testified that defendant was in the interview room for about 20 to 23 hours before he made his recorded statement. At one point during the midnight interview, defendant put his head on the table and pretended to fall asleep. At another point he told them they were "wasting your f*cking breath" talking to him and that he was not going to talk. She continued to ask him questions about the criminal investigation after this. She was "not aware" that she had to stop talking to defendant and did not stop the interview. It was her understanding that she had to stop only when he asked for an attorney. Dador also testified that he and Tisinai did not terminate the interview when defendant invoked his right to silence, only after he invoked his right to an attorney.

¶ 20 Detective Richards also testified as follows. Defendant asked to use the washroom around 2 p.m. on September 9, and he escorted him there. They did not converse at the washroom. On the way back, defendant requested to speak to the "female detective," which he understood to mean Tisinai. He put defendant back in the interview room and got Tisinai. He did not go into the room with Tisinai when she spoke with defendant at the 2 p.m. interview.

¶ 21 Around 6 p.m., defendant requested to speak with Tisinai again, and Richards was involved in the 6 p.m interview with Tisinai. The interview took place in the interview room, which was a "small six by eight cinder block." There was a table and three chairs inside. At the time, defendant did not request an attorney nor indicate that he wished to remain silent. The interview lasted around two and a half hours, and defendant made various admissions and statements regarding the case. Defendant agreed to reduce his statements to writing, and the detectives left the room while he wrote his statements. Upon returning, they obtained his consent for audio and video recordings as well.

¶ 22 The hearing was continued to a later date to address the separate issue of probable cause for his arrest. There, the State introduced an interview log that included a form for who exited and entered defendant's interview room on September 9, 2010.

¶ 23 The trial court ruled on defendant's motion to suppress statements on May 24, 2011. The court stated that it weighed the testimony of the witnesses at the hearing, and it found that the officers who testified were credible. It further found that defendant's waiver of his *Miranda* rights was made knowingly and intelligently.

¶ 24 The court found that, with respect to defendant's midnight interview, the officers continued talking to defendant after he indicated that he did not want to talk. The court therefore found that any statements given after defendant asked not to be questioned up until the time he asked for an attorney were not admissible. The court continued that, based on the log admitted into evidence, defendant spent much of his time after his first interview sleeping in the interview room. It found that defendant had several bathroom and food breaks, both for breakfast and lunch, and that he was not kept in a cell. For the most part, defendant was not interrupted by

officers. The court found that the time defendant spent in the interview room was not unreasonable.

¶ 25 The court continued that around 2 p.m. the same day, defendant indicated that he wished to talk to Tisinai. He asked to "chill" with her. The court found that defendant and Tisinai had a generalized discussion of the investigation that was reinitiated by defendant at the 2 p.m. interview. Nothing in the record indicated that defendant was pressured to reinitiate the contact. To the contrary, the officers honored his wishes. While Tisinai admitted that she erred in continuing to question him at the midnight interview, she told defendant at the 2 p.m. interview that she could not talk with him because he had requested an attorney. If he wanted to talk about the investigation, she told him they had to revisit his *Miranda* waiver. The court found that another *Miranda* waiver was executed. Therefore, the court found that defendant freely and voluntarily waived his rights to be questioned after reinitiating further communication with Tisinai. It specifically stated that defendant's waiver was knowing, intelligent, and voluntary.

¶ 26 Moreover, the court did not find that the defendant was badgered or deceived into talking. Rather, the record showed that he was left alone, that he was provided bathroom breaks, and that he reinitiated contact in order to engage in a generalized discussion of the investigation. Based on these facts and the credible testimony of the officers, the court denied defendant's motion to suppress the majority of his statements. However, his statements between when he invoked his right to silence and when he reinitiated contact were suppressed.

¶ 27 Defendant filed a second motion to suppress statements on July 21, 2011, in which he alleged that his statements were made "as a direct result of [his] will being overborne." In particular, he alleged that the police officers promised him that he would be sentenced to only six years if he confessed and that he would "get slammed" if he did not confess. They repeatedly

told him he would go to prison for a long time if he did not admit to his offenses. He also alleged that he was 18 at the time of questioning; he had not completed a course beyond the ninth grade; he was left in the interrogation room overnight for over 12 hours; and he did not have a bed or pillow to sleep on.

¶ 28 The trial court heard the second motion to suppress statements on September 20, 2011. The State called Detective Richards again, who testified as follows. He denied promising defendant leniency or making threats, including specifically denying that he promised defendant would only receive six years' imprisonment if he cooperated. On cross-examination, he admitted he "may have said" to defendant that he was facing some serious charges and that he could go to prison for a long time. He suggested that defendant cooperate with the investigation. He did not believe that he told defendant that the punishment for home invasion could be between 6 and 30 years, and he denied telling defendant that if he cooperated, he would receive only six years' imprisonment.

¶ 29 Detective Tisinai also testified again, and her testimony was largely consistent with her testimony at the prior hearing. She did not hear Richards tell defendant that if he cooperated, he would receive only six years' imprisonment. She also did not hear Richards tell defendant that he would receive more time if he failed to cooperate, and she never left Richards and defendant alone in the room together. She denied saying anything to defendant about the nature or severity of the charges he faced or that it was in his interest to cooperate.

¶ 30 Defendant testified next as follows. He described the interview room as a small room with a table, two chairs, and a window. He stayed in the room overnight. He did not make a phone call during that time, but he was given bathroom breaks. At some point, the officers told him he was being investigated for two home invasions. Richards told him that he was looking at

the rest of his life in prison. This scared defendant. Richards had spoken to the State's Attorney, and he offered him a deal of six years on the two home invasions. Richards also told him if he confessed, a sexual assault case against him would be dropped. Defendant "figured [he] had no choice" because he was on parole for home invasion and he was scared to spend the rest of his life in prison.

¶ 31 Defendant wrote his confession, but he did not write what he wanted to write; he wrote what he was told to write. He eventually agreed to have his confession recorded on video, and the officers recorded it. Defendant agreed to confess because Richards "made a deal with [him]. He told [him] that he talked to the State's Attorney and the State Attorney [*sic*] was willing to make an offer, a deal with me, that he will promise me six years at 50 percent, and I would not be charged with the sex crime."

¶ 32 The court made its findings as follows. First, it addressed defendant's education and whether he understood the proceedings and questioning that occurred in the investigation of his case. The court was able to observe defendant and hear his testimony, and it found he was able to understand the attorneys' questions, respond to cross-examination, and explain what took place during the investigation. In addition, defendant had experience with the juvenile criminal justice system. The court continued that it was "hesitant to believe" that there was any reason for the police to get authority to negotiate with a single defendant in this case. The court did not believe that the State was involved in authorizing negotiations or the 50% prison time offer.

¶ 33 The court found the officers credible. It did not find defendant's version of events credible, and it did not find that the officers made promises or threats to defendant. Accordingly, it found the defendant's statements voluntary, and it denied the second motion to suppress statements.

¶ 34 The Hagy and Chappel cases proceeded to trial, with the State proceeding on the Chappel case first. Richards and Tisinai testified in that case, and their testimony was largely consistent with their testimony at the hearings on the motions to suppress statements. Following the jury trial, defendant was convicted of armed violence, home invasion, armed robbery, and three counts of aggravated kidnapping. Defendant raised the denial of his motions to suppress in his posttrial motion. The court sentenced defendant to 30 years imprisonment for each conviction, with the terms to be served concurrently.

¶ 35 The State next proceeded with the Hagy case. Richards testified that he had entered and exited the interview room with defendant three times, although he agreed the log for the interview room showed him entering only twice. Following the jury trial, defendant was convicted of residential burglary, home invasion, and aggravated kidnapping. The residential burglary conviction merged with the home invasion conviction, and the court sentenced defendant to consecutive 30-year terms for home invasion and aggravated kidnapping.

¶ 36 B. Direct Appeals

¶ 37 Defendant appealed in both the Hagy and Chappel cases. In the Chappel case, defendant made two arguments. First he argued that the trial court erred when it denied his motion to quash and suppress because the police lacked probable cause to arrest him for criminal trespass or home invasion; and second, he argued that the court abused its discretion in sentencing him to the maximum 30-year terms. 2014 IL App (2d) 120650-U, ¶¶ 9, 16-17. We affirmed. *Id.* ¶ 27.

¶ 38 In the Hagy case, defendant made several arguments, including that the State failed to prove that he intentionally caused injury to Daniel Hagy as necessary to support his home invasion conviction, that any kidnapping was incidental to theft, and that the court abused its discretion in sentencing. We reversed defendant's conviction for kidnapping, affirmed his

conviction for home invasion, and remanded for resentencing. 2014 IL App (2d) 130071, ¶¶ 77-78. On remand, the trial court again sentenced defendant to 30 years for home invasion.

¶ 39 C. Postconviction Petitions

¶ 40 Defendant filed a postconviction petition in both the Hagy and Chappel cases. In both petitions, defendant's arguments included that his appellate counsel was ineffective for failing to argue a violation of his *Miranda* rights when detectives interrogated him after he requested an attorney, and for failing to argue that his statements to the police were made involuntarily.[1]

¶ 41 The postconviction court dismissed defendant's petitions at the first stage. The court explained its dismissal of the two common contentions—the *Miranda* violation and involuntary statements—in its September 10, 2015, order from the Hagy case. First, the court concluded that the *Miranda* issue did not have a reasonable probability of success on appeal, and there was no arguable basis to claim that appellate counsel was ineffective for not raising the issue before the appellate court. It explained that the trial court had denied defendant's motion to suppress his statements after finding that defendant was kept in a room where he was interrogated and provided bathroom and food breaks; that he was allowed to sleep and was not interrupted by law enforcement; and that defendant was the one to ask to speak with Detective Tisinai, reinitiating interrogation by asking the status of his girlfriend and whether police had spoken to his parents. In addition, defendant had been readvised of his *Miranda* rights, including his right to counsel. The court stated that defendant had "simply regurgitat[ed] the same arguments" from his motion to suppress.

[1] Each petition contained additional argument, but we only recount his arguments relevant to this appeal.

¶ 42 Second, the postconviction court concluded that there was no arguable basis on appeal that defendant's statements were involuntary statements. It explained that Detective Richards testified at the hearing on defendant's motion to suppress that he made no promises of leniency or threats against defendant. Specifically, he testified that he made no promise that if defendant cooperated, he would receive only six years' imprisonment, and he never threatened defendant with more prison time if he failed to cooperate. It continued that Detective Tisinai's testimony was largely consistent with Richards' testimony, and she testified that she did not tell defendant what amount of time he was looking at if he failed to cooperate.

¶ 43 Moreover, the trial court had found that defendant was able to understand and respond to questions and had experience in the criminal justice system. It had not found defendant's testimony credible, in particular his assertion that the detectives had to seek authority from the State to negotiate with defendant. It found the officers more credible, and credibility was the main factor in its ruling on the motion to suppress. It specifically found their testimony that promises and threats were not made to be credible.

¶ 44 Based on the importance of the trial court's credibility determinations, the postconviction court concluded that there was no reason for the appellate court to have found the trial court's credibility determinations to be against the manifest weight of the evidence. Therefore, the postconviction petitions failed to state the gist of a claim that appellate counsel was ineffective, and the court dismissed defendant's petitions as frivolous and patently without merit.

¶ 45 Defendant timely appealed.

¶ 46 II. ANALYSIS

¶ 47 Defendant appeals from the first-stage dismissal of his postconviction petitions. He argues that he presented the gist of a constitutional claim because his appellate counsel was

ineffective for (1) failing to challenge the admissibility of defendant's statements made after he invoked his right to counsel for violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and (2) failing to argue that defendant's statements to police were involuntary. We review *de novo* the summary dismissal of a postconviction petition. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 48 Criminal defendants have a constitutional right to effective assistance of counsel on direct appeal. *People v. Ross*, 229 Ill. 2d 255, 269 (2008). The *Strickland* standard applies to the adequacy of appellate counsel, and a defendant who argues that appellate counsel is ineffective must show that appellate counsel's failure to raise an issue was (1) objectively unreasonable and (2) prejudiced the defendant. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Prejudice requires that, but for appellate counsel's failure to raise a particular issue, there is a reasonable probability that the appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). A defendant must prove both prongs of the *Strickland* test, although an ineffective-assistance claim may be disposed of because defendant did not suffer prejudice without deciding whether counsel's performance was deficient. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). The prejudice inquiry requires that we examine the merits of the underlying issue. *Id.* A defendant does not suffer prejudice if appellate counsel fails to raise a nonmeritorious issue, and appellate counsel is not obligated to brief every conceivable issue. *Id.*

¶ 49 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a three-stage process for resolving claims of constitutional violations. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court must review the petition, taking the allegations as true, and determine whether it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); *Hodges*, 234 Ill. at 10. A petition is frivolous or patently without merit when the allegations, taken as true and liberally construed, fail to present the " 'gist of a

constitutional claim.' " *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174, Ill. 2d 410, 418 (1996)).

¶ 50 Our supreme court has clarified that the "gist" of a constitutional claim is merely what the defendant must describe at the first stage; it is not the legal standard used to evaluate the petition. *Hodges*, 234 Ill. 2d at 11. Whether the petitioner presented the "gist" of a constitutional claim is "to be viewed within the framework of the 'frivolous or *** patently without merit' test" under section 122-2.1 of the Act. *Id.* Accordingly, a *pro se* postconviction petition alleging a denial of constitutional rights should be summarily dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Id.* at 16. A petition lacks an arguable basis in law or fact if it is based on a meritless legal theory or a fanciful factual allegation. *Id.*

¶ 51 A. Right to Counsel

¶ 52 Defendant first argues that the postconviction court erred in dismissing his petitions because his appellate counsel was ineffective for failing to argue that his right to counsel was violated during his custodial interrogation. He contends that it was arguable that his appellate counsel's failure to challenge the denial of his motion to suppress statements was both unreasonable and prejudicial.

¶ 53 Defendant argues that the police responded to his inquiries in this case with improper answers that were reasonably likely to elicit an incriminating response. First, defendant points to his request to "chill" with Tisinai at the 2 p.m. interview. At the time he requested to "chill" with her, it had been about 12 hours since he asked for an attorney, and he had not yet spoken to an attorney, his parents, or his girlfriend. Tisinai gave him *Miranda* warnings before they talked. They talked about matters not related to the case, but once Tisinai started to probe about the case,

defendant remained silent, and she left. Defendant argues that this clearly demonstrated that he was not waiving his right to counsel.

¶ 54 Defendant next spoke with Tisinai again three hours later. At that time, defendant argues that he asked general questions such as "what is going on with the case" and who the police had spoken to. He did not receive new *Miranda* warnings, and the police responded that they had executed a search warrant on his house and found incriminating items. Defendant argues that these statements were likely to elicit an incriminating response, and, indeed, defendant responded by saying "you know you've got me. What else do you want me to say?" Thereafter, he made written and video recorded statements, which defendant argues should have been suppressed for failure to honor his right to counsel.

¶ 55 Defendant discusses several cases in support of his argument, including *People v. Olivera*, 164 Ill. 2d 382 (1995) and *People v. Flores*, 315 Ill. App. 3d 387 (2000). We address his case law in our analysis *infra*.

¶ 56 Defendant continues that even assuming that his questions evinced a desire to speak about the investigation, the detectives' responses escalated the interaction to the level of coercion. In particular, defendant contends that Tisinai violated his *Miranda* rights when, at their 6 p.m. interview, she confronted him with evidence against him in response to his inquiry about the status of the case. Defendant argues that there was "no reason other than to elicit an incriminating response" for the detectives to tell defendant about the results of their investigation. Defendant concludes that it was the detectives, not him, who initiated further conversation about the investigation after he had requested counsel.

¶ 57 Finally, defendant argues that the postconviction court applied an inappropriate standard when it dismissed his petitions. He argues that the court erred when it determined that his

argument did not have a reasonable probability of success on appeal. He also argues that the postconviction court improperly relied on *People v. Easley*, 192 Ill. 2d 307, 329 (2000), when it cited the rule that counsel is not ineffective when it refrains from raising an issue that counsel determines lacked merit, unless that determination was patently wrong. Defendant contends that the proper standard was simply whether appellate counsel's performance arguably fell below an objective standard of reasonableness and arguably prejudiced defendant.

¶ 58 The State responds as follows. The postconviction court correctly dismissed defendant's petitions at the first stage. The State specifically contends that defendant's *Miranda* argument is defeated in light of *People v. Mandoline*, 2017 IL App (2d) 150511, in which we affirmed the trial court's denial of the defendant's motion to suppress because the court properly determined that he reinitiated the discussion with police (*id.* ¶ 113). Similar to *Mandoline*, the trial court here found that defendant reinitiated contact with police when he asked to speak with Tisinai before the 2 p.m. interview. The State emphasizes that the officers' conduct here was far less egregious than the conduct in *Mandoline*, and that defendant more clearly reinitiated contact here than the defendant in *Mandoline*.

¶ 59 We hold that the postconviction court properly dismissed defendant's claim that the police violated his right to counsel. Where a defendant clearly invokes his right to counsel, as was the case here, his subsequent statements to police are admissible only if the defendant initiated further discussions with the police and knowingly and intelligently waived his right to counsel. *Olivera*, 164 Ill. 2d at 389-90. The defendant, not the police, must initiate further conversation, and the defendant must evince a willingness and desire for general discussion about the case or investigation. *Id.* at 390. If the defendant initiated conversation and evinced willingness for general discussion of the investigation, then the court must determine whether

defendant knowingly and intelligently waived his right to counsel under the totality of the circumstances. *Id.* Any waiver must not be badgered or coerced by the police. *People v. Starnes*, 273 Ill. App. 3d 476, 482 (1995). The State bears the burden of showing that the defendant initiated further conversations. *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 37.

¶ 60 Here, defendant initiated contact with the police when he asked to speak to Tisinai at the 2 p.m. interview. When Tisinai entered the interview room for the 2 p.m. interview, defendant's first questions were about his girlfriend. Defendant had talked about his girlfriend at the midnight interview, and she was part of defendant's story to the police about his arrest. He had told the police he was living with his girlfriend at the time and that he was coming from her house when he was arrested. Tisinai responded that she could not speak to him about the case because he had requested counsel. After being reminded that he had requested an attorney, defendant continued to ask whether Tisinai had gone to his girlfriend's high school or pulled her out of class. Defendant's repeated questions about his girlfriend related to the investigation and evinced a willingness and desire for general discussion about the investigation. Only after Tisinai advised him a second time that she could not speak to him because he had requested counsel did he ask her to "chill" with him.

¶ 61 At that point, Tisinai read defendant his *Miranda* rights for the second time that day, and defendant signed and initialed the preprinted *Miranda* waiver form. She specifically read him his right to counsel. They then talked for about an hour, covering topics such as his finances and gang relations. Although defendant did not answer direct questions about the home invasion at the end of the 2 p.m. interview, he never invoked his right to an attorney, and Tisinai left the room shortly after defendant stopped answering questions.

¶ 62 These facts are distinguishable from *Olivera* and *Flores*. In *Olivera*, the defendant had invoked his right to counsel, and following a lineup identification, defendant asked the officer "what happened." *Olivera*, 164 Ill. 2d at 386-87. The officer responded that he had been positively identified by witnesses as the shooter in a crime. *Id.* at 387. Our supreme court said that defendant's question of "what happened" did not evince a willingness or desire for general discussion about the investigation. The court distinguished this situation from *Oregon v. Bradshaw*, 462 U.S. 1039, 1042 (1983), where the officer responded to the defendant's question of "what is going to happen to me now" by reminding him that he did not need to speak to him; that he had requested an attorney; and that anything he said must be of his own free will. In *Olivera*, the officer did not respond with warnings but instead answered the question in a way that could and did elicit further comments from the defendant and culminated in incriminating statements. *Olivera*, 164 Ill. 2d at 391.

¶ 63 Similar to *Olivera*, the defendant in *Flores* had requested counsel, and upon returning from the restroom, he asked an officer why several new people were now in the room. *Flores*, 315 Ill. App. 3d at 393. The officer responded that the new people were State's Attorneys who were reviewing the case and deciding who would be charged. *Id.* Like in *Olivera*, the officer provided new information and did not reiterate the defendant's rights. *Id.* The *Flores* court found the officer's response more like the response in *Olivera* than in *Bradshaw* and that the officer's response was likely to elicit an incriminating statement. *Id.* at 393-394.

¶ 64 Tisinai's response to defendant's questions at the 2 p.m. interview was similar to the officer's response in *Bradshaw* and differed from the officers' responses in *Olivera* and *Flores*. Tisinai twice reminded defendant that he had requested an attorney and therefore she could not speak to him about the case. When defendant continued to ask to talk to her, she provided him

his *Miranda* rights for a second time, and he signed a *Miranda* waiver. Moreover, defendant's questions about his girlfriend related to the investigation, differing from general inquiries of "what happened" or asking about the presence of new people. Thus, the record supported that defendant reinitiated contact with police and that he evinced a general willingness to discuss the case at the 2 p.m. interview.

¶ 65 The next step is to determine whether defendant's waiver was a knowing, intelligent and voluntary waiver. *Mandoline*, 2017 IL App (2d) 150511, ¶ 103. In *Mandoline*, the defendant had invoked his right to counsel, and the police had not scrupulously honored it after his initial invocation. *Id.* ¶ 104. The officers testified that about three hours after his initial invocation, the defendant asked what was happening with the investigation. *Id.* The officers then readminstered *Miranda* warnings and had him execute a waiver form. *Id.* While defendant testified that the officers orchestrated events with promises that he could go home only if he spoke to them (*id.* ¶ 105), we deferred to the trial court's factual determinations, which were not against the manifest weight of the evidence (*id.* ¶ 106).

¶ 66 Here, like in *Mandoline*, defendant was readvised of his *Miranda* rights and executed a waiver form. Tisinai twice reminded him of his right to counsel and that she could not speak to him after he invoked it. The trial court found Tisinai credible, and it also found that defendant had experience with the criminal justice system. We note that defendant had specifically invoked his right to counsel that same day at the midnight interview, after which the police honored that right by ceasing interrogation. This demonstrated that he knew how to invoke the right and that police could not question him after he invoked it. Therefore, the record supported that defendant made a knowing, intelligent, and voluntary waiver of his right to counsel at the 2 p.m. interview.

¶ 67 Defendant continues his argument that the police also violated his right to counsel at the 6 p.m. interview by failing to provide additional *Miranda* warnings and by offering new information that coerced his response. We have already determined that the record supported that defendant waived his right to counsel at the 2 p.m. interview and that he never invoked his right to counsel again. Nevertheless, we note that the 6 p.m. interview took place upon defendant's request to speak with Tisinai, and defendant's initial question was not, as defendant suggests, a general question that did not evince a willingness to speak about the case. Rather, as defendant frames it, he asked what was going on with the case and who the officers had spoken to. These questions clearly evinced a desire to talk about the investigation. In light of defendant's *Miranda* waiver a few hours earlier and his prior invocation of his right to counsel at the midnight interview, his request to speak with Tisinai about the case at the 6 p.m. interview further demonstrated his knowing, intelligent, and voluntary waiver of his right to counsel.

¶ 68 Finally, we disagree that the postconviction court applied the wrong standard to defendant's postconviction petition. The postconviction court first provided the correct rules for review of a first-stage postconviction petition, including that a petitioner must present the gist of a constitutional claim, that the threshold at the first stage is low, and that the court should dismiss the claim if it is frivolous or patently without merit. See *Hodges*, 234 Ill. 3d at 9-12. The postconviction court noted that defendant did not argue that the trial court misapplied the law or that the trial court's findings were against the manifest weight of the evidence. Based on its review of the record, the postconviction court did not believe that defendant's *Miranda* argument would have had reasonable probability of success on appeal. Therefore, it concluded that there was no arguable basis to claim that appellate counsel was ineffective for failing to raise the issue.

¶ 69 The postconviction court applied the correct standard, that is, whether defendant's ineffective-assistance claim had any arguable basis in law or fact. See, *e.g.*, *Hodges*, 234 Ill. 2d at 11-12. In order to determine whether defendant's ineffective-assistance claim had an arguable basis in law or fact, the court had to consider the standard for ineffective assistance of appellate counsel. See *Simms*, 192 Ill. 2d at 359-62. In particular, the prejudice inquiry required an examination of the issue's probable success on appeal. *Petrenko*, 237 Ill. 2d at 497. Thus, the postconviction court properly examined the issue's reasonable probability of success on appeal en route to its conclusion that there was no arguable basis that appellate counsel was ineffective. Moreover, there is no indication that the court applied an improperly high standard when it cited *Easley* for a general rule about when appellate counsel is ineffective.

¶ 70 Accordingly, the postconviction court properly dismissed defendant's *Miranda* argument at the first stage because there was no arguable basis in fact or law that appellate counsel was ineffective for failing to raise the issue on direct appeal. Appellate counsel was not obligated to raise every conceivable issue on appeal (*People v. English*, 2013 IL 112890, ¶ 33), and appellate counsel raised several issues in both the Hagy case and Chappel case. Appellate counsel even secured partial relief in the Hagy case. Importantly, the *Miranda* issue did not have an arguably reasonable chance of success on appeal because, based on our review of the record, the underlying issue was not meritorious. See *People v. Phillips*, 2017 IL App 160557, ¶ 66 (no prejudice when counsel fails to raise nonmeritorious issue).

¶ 71 B. Voluntary Statements

¶ 72 Defendant also argues that his appellate counsel was ineffective for failing to argue that his statements to police were involuntary. He argues that the police induced his inculpatory statements with both promises of leniency and coercive threats during his September 9, 2010,

interrogations. In addition, he argues that the postconviction court applied the wrong standard when it determined that defendant's appellate counsel would have had to show that the trial court's factual and credibility determinations were against the manifest weight of the evidence.

¶ 73 Defendant stresses that on September 9, 2010, he was only 18 years old, had not completed high school, and had not previously been questioned by the police as an adult. He gave inculpatory statements during this third interview after a span of 18 hours. Moreover, he argues that Detective Richards promised him that if he confessed, he would receive six years at 50% time served and he would not be charged with a separate sex crime. Richards also said that if defendant did not confess, he would "get slammed."

¶ 74 Defendant continues that we may consider the testimony adduced at trial, where defendant presented evidence that Richards entered the interview room only twice, despite his testimony that he entered three times. Moreover, he argues the interview room logs demonstrated that Richards and Tisinai were inside the interview room while he wrote his statement. Defendant concedes that the evidence at trial was admitted only for impeachment but argues that it brought the officers' credibility into question.

¶ 75 Finally, defendant argues that the postconviction court erroneously concluded that there was "no reason to believe the appellate court would have found the trial court's finding as to the credibility of the witness was against the manifest weight of the evidence." He argues that the court's focus on the credibly findings implicitly conceded that defendant had raised the gist of a constitutional claim and that the court applied the wrong standard. In other words, he was not required to prove at the first stage that the trial court's findings were manifestly erroneous.

¶ 76 The State responds that the trial court did not believe defendant's testimony at the suppression hearings. The court found that defendant had experience with the criminal justice

system and understood the questions he was asked. It specifically did not find defendant's testimony that Richards promised leniency credible, because it did not believe that the State's Attorney was involved in authorizing negotiations in his case. The State also points to Richards' testimony that not every entry into the interview room was recorded on the log. Sometimes officers would open the door and ask the suspect if he was ok, and events like that were not recorded.

¶ 77 We hold that the postconviction court properly dismissed defendant's claim that his statements were involuntary. A defendant's inculpatory statements must be voluntary to be admissible, and the voluntary requirement is rooted in the fifth and fourteenth amendments of the United States Constitution. *In re D.L.H., Jr.*, 2015 IL 117341, ¶ 58. The general test for voluntariness " 'is whether the defendant's will was overborne at the time he confessed.' " *Id.* (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534 (1996)). The inculpatory statements must be made freely, voluntarily, and without compulsion or inducement. *People v. Slater*, 228 Ill. 2d 137, 160 (2008).

¶ 78 Courts examine the totality of the circumstances to determine whether an inculpatory statement is voluntary. *Id.* The totality of the circumstances include (1) the defendant's age, intelligence, education, experience, and physical condition at the time of interrogation; (2) the duration of the questioning (3) the presence of *Miranda* warnings; (4) the legality and duration of the detention; and (5) the presence of any physical or mental abuse, including the existence of threats or promises. *People v. Richardson*, 234 Ill. 2d 233, 253-54 (2009); see *Slater*, 228 Ill. 2d at 160. No single factor is dispositive. *Richardson*, 234 Ill. 2d at 253.

¶ 79 A promise of leniency is a factor in the totality of circumstances. See *People v. Shaw*, 180 Ill. App. 3d 1091, 1094 (1989). When a defendant confesses in reliance on a promise of

leniency, that statement may be suppressed as involuntary, but it is not *per se* inadmissible. *People v. Lee*, 2012 IL App (1st) 101851, ¶ 33-37 (affirming determination that statements were voluntary where defendant argued he only confessed based on promise that he would serve no more than seven years in prison). The ultimate question is still whether, considering the totality of the circumstances, the defendant's will was overborne. *Shaw*, 180 Ill. App. 3d at 1094.

¶ 80 Here, we first address the postconviction court's consideration of the appellate standard of review. The appellate court reviews the trial court's voluntariness finding against the manifest weight of the evidence. *People v. Willis*, 215 Ill. 2d 517, 536 (2005); *Mandoline*, 2017 IL App (2d) 150511, ¶ 116. Thus, appellate counsel would have had to contend with the manifest weight of the evidence standard in order to have had a reasonable probability of success on appeal. The postconviction court did not err in considering whether defendant provided an arguable basis that the trial court's voluntariness determination was against the manifest weight of the evidence, as that was precisely the standard that appellate counsel would have had to argue.

¶ 81 Accordingly, we consider whether defendant provided an arguable basis that the trial court's voluntariness findings were against the manifest weight of the evidence. The record supports that the trial court considered the totality of the circumstances in this case. It considered defendant's age, education, and experience, noting that defendant had experience with the criminal justice system as a juvenile. Based on the trial court's observation of defendant, it found that he was able to understand and respond to questioning. It found that defendant had received *Miranda* warnings and executed a *Miranda* waiver at the 2 p.m. interview. It found that defendant was mostly left alone, he was provided bathroom and food breaks, he was not kept in a cell, the time he spent in the interview room was not unreasonable, and that he reinitiated conversation with the police by asking to speak with an officer. All these

findings have a foundation in the testimony from the suppression hearings, and defendant largely does not contest these findings.

¶ 82 Importantly, the court found the officers' testimony credible and found defendant's testimony not credible. The court specifically did not believe defendant's testimony that the police made threats or promises. Defendant essentially wants us to reweigh credibility of the witnesses at the suppression hearing, which is not something we can do, nor was it something the appellate court on direct appeal could have done. See *People v. Clark*, 2014 IL App (1st) 130222, ¶ 26. The only additional evidence defendant points to is Richards' testimony at trial that he entered the room three times, despite the log showing he entered twice. This evidence alone does not tend to show that Richards coerced defendant's confession. Moreover, the court heard testimony from both the officers and defendant as to what occurred in the interview room, which is more probative of what happened during interrogation than simply how many times Richards entered the interview room.

¶ 83 Under the totality of these circumstances, the trial court's voluntariness determination was not arguably against the manifest weight of the evidence. Therefore, the postconviction court properly concluded that appellate counsel was not arguably ineffective for failing to raise a nonmeritorious issue, and dismissal at the first stage was appropriate.

¶ 84 III. CONCLUSION

¶ 85 For the reasons stated, we affirm the Lake County circuit court's dismissal of defendant's postconviction petitions.

¶ 86 Affirmed.