2016 IL App (2d) 150919-U
No. 2-15-0919
Order filed June 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES CASEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 07-CF-4076 Honorable Theodore J. Potkonjak, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of postconviction relief following a third-stage evidentiary hearing is affirmed; petitioner failed to make a substantial showing his attorney was ineffective.

¶ 2 Defendant, James Casey, appeals from the denial of his postconviction petition following an evidentiary hearing before Judge Potkonjak. Casey was arrested in Texas on a fugitive warrant in 2007 and taken to the Hidalgo County jail. Shortly after his arrest in Texas, he was indicted by a Lake County grand jury with 11 counts of predatory criminal sexual assault of a child and 12 counts of aggravated criminal sexual abuse. The charges stemmed from Casey's

years-long sexual abuse of his three young step-grandsons. While in custody in Texas, Casey was interviewed by two Lake County detectives. Casey signed a waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The interview was not video recorded, but was nevertheless memorialized by Casey's written statement.

¶ 3 Prior to the interview, Casey retained an attorney in Texas to represent him for the extradition proceedings. Ultimately however, he waived extradition and was transported to Illinois. In Illinois, Casey retained a new attorney, Chris Lombardo. Lombardo filed a motion to suppress the statements Casey made to the Lake County officers based on an alleged violation of Casey's *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The crux of Casey's suppression motion was that his custodial interview should have ceased when he said, "I don't want to incriminate myself" to the detectives. To the extent Casey's statement was an unambiguous invocation of the right to remain silent (*cf. Davis v. United States*, 512 U.S. 451 (1994)), Casey equivocated that invocation when he next told the detectives that he wanted to tell them "[his] side" of the story, as both detectives testified. As the trial court found, Casey's equivocation was tantamount to waiving his *Miranda* rights (see, *e.g.*, *North Carolina v. Butler* 441 U.S. 369 (1979)), and Casey's suppression motion was denied. Some months later, Casey entered a partially negotiated guilty plea to one count of predatory criminal sexual assault and two counts of aggravated criminal sexual abuse, with a sentencing cap of 30 years' imprisonment. After a hearing, the trial court sentenced Casey to an aggregate 22-year prison term. Casey neither moved to withdraw his guilty plea nor filed a direct appeal.

¶ 4 Without an appeal, Casey had three years from the day he was sentenced to file a postconviction petition under 725 ILCS 5/122-1(c) (West 2012). Casey, however, filed his *pro se* petition thirty-four days after the three-year period had lapsed, and thus 34 days too late. (A

petition's untimeliness, and whether such lateness is excused by a petitioner's "lack of culpable negligence," is not addressed at the first-stage of postconviction proceedings. *People v. Boclair*, 202 Ill. 2d 89 (2002).) Two months after Casey's *pro se* petition was filed however, Casey filed an amended postconviction petition, which was drafted by his attorney, Ralph Strathmann. The trial court did not dismiss the original or the amended petition within the 90-day timeframe (725 ILCS 5/122-2.1 (West 2012)), and so advanced it to second-stage proceedings. There, the State filed a motion to dismiss due to the petition's untimeliness, but the trial court denied the State's motion and a third-stage evidentiary hearing was held. That hearing resulted in no relief in the trial court and Casey has appealed the court's decision to us on two of the grounds he appeared to assert in his amended petition.

¶ 5 We say "appeared to assert" because Casey's amended petition, which again was drafted by counsel, is mostly an assortment of generic quotations and case citations, loosely arranged under vague headings such as "INEFFECTIVE ASSISTANCE OF COUNSEL" and "SIXTH AMENDMENT RIGHT TO COUNSEL." Little in the entire 20-page, single-spaced document could be described as presenting a cogent argument specific to this case; most of it is just copied-and-pasted generalities. (Casey's appellate brief is a double-spaced version of portions of his amended postconviction petition.) And, Casey's explanation for the lateness of his petition—that he was incarcerated, that he was originally *pro se*, and that he allegedly did not know when his petition was due—practically defines the phrase "culpable negligence." See *People v. Lander*, 215 Ill. 2d 577, 589 (2005); *Boclair*, 202 Ill. 2d at 104; *People v. Rissley*, 206 Ill. 2d 403, 421 (2003). At any rate, the trial court considered Casey's petition on the merits after a third-stage evidentiary hearing, and that is the judgment we are tasked with reviewing. Thus, like the trial court, we consider the merits of Casey's two contentions.

¶ 6 The first claim in Casey's amended petition is that he received ineffective assistance from his Illinois attorney, Chris Lombardo. Casey asserts generally that Lombardo should also have sought the suppression of Casey's statement to the Lake County detectives on "sixth amendment grounds" under the United States Constitution. More specifically, Casey notes that he retained a Texas attorney to contest his extradition after he was arrested and charged. Thus, citing *Michigan v. Jackson*, 475 U.S. 625 (1986), Casey argues that Lombardo should have asserted that the Lake County detectives were forbidden from questioning him without "his attorney" present pursuant to the rule in *Michigan v. Jackson*. Normally, this argument would have been waived by virtue of Casey's guilty plea; however, Casey suggests that if Lombardo had raised a *Michigan v. Jackson* claim, his statements would have been suppressed and he would not have pled guilty. Instead, he claims he would have proceeded to a trial where he would have challenged his accusers' credibility. See generally *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Sharifpour*, 402 Ill. App. 3d 100, 115 (2010).

¶ 7 We note that Casey's suppression hearing, at which Lombardo supposedly should have presented the *Michigan v. Jackson* argument, was held in January 2009. In December 2009, the United States Supreme Court overturned *Michigan v. Jackson* (see *Montejo v. Louisiana*, 556 U.S. 778 (2009)). Nevertheless, at the time of the suppression hearing, *Michigan v. Jackson* was the law of the land and we measure Lombardo's effectiveness by the state of the law at that time. *People v. Cathey*, 2012 IL 111746, ¶ 26. That said, at the time of Casey's suppression hearing, it had been clearly established by our state supreme court that the right to counsel does not attach in extradition proceedings—on the basis that such proceedings are largely administrative, not substantive—and so does not implicate the right to deal with the police exclusively through counsel under *Michigan v. Jackson*. See *People v. Young*, 153 Ill. 2d 383, 401-06 (1992). We

note that our supreme court's holding in *Young* was in harmony with decisions in a number of other jurisdictions (including Texas) at the time of Casey's suppression hearing. *Judd v. Vose*, 813 F.2d 494 (1st Cir. 1987); *State v. Falcon*, 196 Conn. 557 (1985); *State v. Jeleniewski*, 147 N.H. 462 (2002); *State v. Taylor*, 354 N.C. 28 (2001); *Green v. State*, 872 S.W.2d 717, 724 (Tex. Crim. App. 1994) (en banc). Accordingly, a *Michigan v. Jackson* claim would have been futile in Casey's position; thus, the trial court correctly determined that attorney Lombardo was not ineffective for "failing" to raise the issue.

¶ 8 In addition, in his amended petition, Casey also asserted that "ILLINOIS PROVIDES GREATER CONSTITUTIONAL PROTECTION THAN THE FEDERAL CONSTITUTION." Casey makes the same assertion in his appellate brief, and while it is undeniably true in some respects, Casey never directly explains how that principle applies here. In support of his assertion, Casey has relied almost exclusively on our supreme court's decision in *People v. McCauley*, 163 Ill. 2d 414 (1994), but *McCauley* is distinguishable. The rule from *Michigan v. Jackson* was that a defendant who has invoked his right to deal with the police through counsel is the only person who can set aside his invocation. In *McCauley*, our supreme court held that the police may not deny an attorney the right to speak with the defendant if his or her attorney is at the police station and requests to speak to the defendant. But Casey never claimed that his extradition attorney was at the police station in Texas, and sought to speak with him while he was being interviewed by the Lake County detectives. Thus, to the extent our state constitution provides "greater" *Miranda* protections vis-à-vis *McCauley*, it is unclear how Casey's claim would fit within those protections. Attorney Lombardo was not ineffective for failing to press this assertion as well.

¶ 9 Casey's second contention is that Lombardo was ineffective for "losing" Casey's ability

to bring a direct appeal. Citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), Casey argues that Lombardo "was under a duty to at least consult with defendant about pursuing an appeal or other post-conviction relief." In *Flores-Ortega*, the Supreme Court explicitly rejected a bright-line rule that counsel must consult with a criminal defendant about the right to appeal in every case. *Id* at 489. Instead, the court held that counsel has a duty to consult with the defendant about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id*. at 480.

¶ 10 At the evidentiary hearing on Casey's postconviction petition, Lombardo testified that he *did* consult with Casey; that he advised Casey regarding his right to seek the withdrawal of his plea and his right to appeal. According to Lombardo, Casey "did not want to vacate his plea. He was very clear on that point." The trial court credited Lombardo's testimony, and Casey has not shown that the trial court's decision to do so was against the manifest weight of the evidence. See *People v. Daniels*, 388 Ill. App. 3d 952, 955 (2009). Moreover, Casey has not clearly stated what nonfrivolous issue he would have raised in his direct appeal, if any. Under the circumstances, Lombardo was not obligated to further consult with Casey.

¶ 11 The judgment of the Circuit Court of Lake County is affirmed. In addition, we grant the State's request and assess Casey statutory State's Attorneys fees of $50 (55 ILCS 5/4-2002 (West 2012)) as part of our judgment.

¶ 12 Affirmed.