

No. 1-12-2005

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 25634
)	
CARNELL JACKSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not provided ineffective assistance of counsel with respect to an unsuccessful motion to suppress his videotaped confession, where the statute that defendant contends should have been cited in support of that motion was not effective at the time the confession was made, and was, therefore, neither binding nor persuasive authority.

¶ 2 After a jury trial, defendant-appellant, Carnell Jackson, was convicted of first-degree murder and sentenced to a term of 45 years' imprisonment. Defendant now appeals, contending that he was provided ineffective assistance of counsel by both his trial counsel and the attorney representing him in the posttrial proceedings below. We disagree and, therefore, affirm defendant's conviction.

¶ 3 I. BACKGROUND

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¶ 4 Defendant was charged by indictment with—*inter alia*—multiple counts of first-degree murder, all of which generally alleged that defendant shot and killed Antonio Stroud on or about October 8, 2003. Prior to trial, defendant's trial counsel filed a motion to suppress all of defendant's statements to the police, including his videotaped confession to the murder. In that motion, defendant's trial counsel asserted that defendant's statements should be suppressed due to a number of purported *Miranda* and other constitutional violations that had occurred at the time defendant was interrogated and, ultimately, provided the videotaped confession.

¶ 5 At the hearing on that motion, the evidence established that defendant was placed in custody on October 18, 2003. Defendant was then questioned by the police and an assistant state's attorney on a number of occasions over the next two days, culminating with defendant providing a videotaped confession on October 20, 2003. None of the interrogations prior to the recording of the videotaped murder confession were electronically recorded. The failure to electronically record those prior, custodial interrogations was not challenged by defendant's trial counsel. The motion to suppress was ultimately denied, and this matter proceeded to a jury trial in July of 2005.

¶ 6 The trial proceedings and the evidence presented at trial need not be set out in detail for purposes of resolving this appeal. It is sufficient to note that the evidence at trial included defendant's videotaped statement implicating himself in the murder of the victim. At the conclusion of the trial, defendant was found guilty of first-degree murder.

¶ 7 Defendant's trial counsel then filed a posttrial motion for a new trial which argued—*inter alia*—that the circuit court erred in denying the motion to suppress. That motion did not include an argument based upon the failure to record the interrogations that preceded defendant's videotaped confession. Defendant himself then filed a *pro se* motion for a new trial that asserted

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his trial counsel was ineffective for failing to interview and/or present certain witnesses at trial. Thereafter, defendant obtained new counsel. Defendant's posttrial counsel filed an amended posttrial motion that also asserted—*inter alia*—that defendant's trial counsel was ineffective for failing to interview and present certain witnesses at trial. During the posttrial proceedings, trial counsel's performance was never challenged on the basis that the failure to electronically record the interrogations that preceded defendant's videotaped confession was never raised in support of the motion to suppress. Defendant was denied any posttrial relief, and he was then sentenced to a term of 45 years' imprisonment.

¶ 8 A timely direct appeal was filed by defendant's posttrial counsel. However, on April 28, 2011, defendant's appeal was dismissed for want of prosecution after no timely appellant's brief was filed. While defendant's posttrial counsel attempted to have this order vacated, and in doing so admitted that the failure to file a timely appellant's brief was due solely to his own inadvertence, that effort was rejected by this court on May 25, 2011. Defendant thereafter filed a *pro se* "notice of appeal" from the dismissal of his appeal in the circuit court, but that effort was rejected by an order of the circuit court entered on November 23, 2011.

¶ 9 On April 4, 2012, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (720 ILCS 5/122-1 *et seq.* (West 2010). Therein, defendant contended—*inter alia*—that he was denied effective assistance of appellate counsel because his direct appeal had been dismissed due solely to the neglect of defendant's posttrial counsel. Counsel was appointed to represent defendant in the postconviction proceedings, and the State conceded this issue. Therefore, on June 27, 2012, the circuit court entered an order—by agreement—granting defendant leave to file a late notice of appeal pursuant to *People v. Ross*, 229 Ill. 2d 255, 262-71 (2008) (recognizing that the circuit court has authority to grant late

notices of appeal in postconviction proceedings involving claims that a direct appeal was unperfected due to ineffectiveness of appellate counsel, and noting that "an appeal is perfected by filing a notice of appeal, and later filing a docketing statement, the record, and an appellant's brief."¹ That late notice of appeal was filed the same day.

¶ 10

II. ANALYSIS

¶ 11 On appeal, defendant contends that his trial counsel provided ineffective assistance of counsel by failing to support the motion to suppress his videotaped confession with a citation to section 103-2.1 of the Code of Civil Procedure (Code) (725 ILCS 5/103-2.1 (West 2004)), a statute that defendant contends would have made that confession presumptively inadmissible due to the failure to electronically record the pre-confession interrogations. He further contends that the attorney representing him in the posttrial proceedings provided ineffective assistance when, in challenging trial counsel's competence, he did not note this failure on the part of trial counsel. Defendant, therefore, asks this court to reverse his conviction and remand for a new trial.

¶ 12 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that,

¹ See also, *People v. Moore*, 133 Ill. 2d 331, 337 (1990) (noting that "either a motion to reinstate an appeal, addressed to the appellate court, or a post-conviction attack, addressed in the first instance to the trial court, can be utilized to obtain relief where a direct appeal has been dismissed due to the neglect of defendant's attorney.").

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but for counsel's errors, the result of the proceedings would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010).

¶ 13 While defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Our supreme court has held that "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). A defendant has the burden of establishing any such prejudice. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006).

¶ 14 Defendant first contends that, if only his trial counsel had cited to section 103-2.1 of the Code, the motion to suppress his videotaped confession would have been granted. He further contends that, had the videotaped confession been suppressed, there is a reasonable probability that the outcome of his trial would have been different.

¶ 15 It is true that defendant was subjected to unrecorded custodial interrogations in the days prior to the videotaping of his ultimate confession to the murder of the victim on October 20, 2003. It is also the case that section 103-2.1 of the Code generally provides that such a videotaped confession is presumptively inadmissible as substantive evidence in any criminal trial involving first-degree murder where—again, as was the case here—any prior custodial interrogations were not themselves electronically recorded. 725 ILCS 5/103-2.1(b), 2.1(d) (West 2004).

¶ 16 However, as defendant himself recognizes on appeal, this specific section was added to the Code by Pub. Act 93-206 (some parts eff. July 18, 2003; some parts eff. July 18, 2005) (adding 725 ILCS 5/103-2.1) (Act). While portions of that Act were immediately effective when it was approved on July 18, 2003, the legislature specifically indicated that the addition of

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section 103-2.1 to the Code would not become effective until two years after the Act had become law; *i.e.*, July 18, 2005. *Id.* As such, the requirements imposed by this section regarding the electronic recording of custodial interrogations in murder cases were not yet in effect at the time defendant was questioned and provided his videotaped confession in October of 2003.

¶ 17 Nevertheless, defendant contends that section 103-2.1 to the Code should be applied retroactively to this matter, and that his trial counsel was, therefore, ineffective for failing to cite to this section in support of the motion to dismiss. We disagree.

¶ 18 It is well understood that "[t]he cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, and the plain language of the statute is the best indication of that intent." *People v. Martin*, 2011 IL 109102, ¶ 21. As such, "[r]eviewing courts will not depart from the statute's plain language by reading into it conditions, exceptions, or limitations that contravene legislative intent." *In re Andrew B.*, 237 Ill. 2d 340, 348 (2010). It is also well understood that in determining a statute's possible retroactive application, "the threshold inquiry is whether the legislature has expressly prescribed the statute's temporal reach. If it has, that expression of legislative intent must be given effect absent some constitutional prohibition against doing so." *People v. Brown*, 225 Ill. 2d 188, 201 (2007).

¶ 19 We find that the legislature clearly prescribed the temporal reach of section 103-2.1, when it indicated that the portion of the Act adding this section to the Code would not become effective until July 18, 2005. Such a construction requires nothing more than properly following the plain language of the Act (*Martin*, 2011 IL 109102, ¶ 21), and refuses to improperly depart from that plain language by reading into the Act any conditions, exceptions, or limitations (*In re Andrew B.*, 237 Ill. 2d at 348). Having come to this conclusion regarding the legislature's intent, we are bound to give that intention effect absent any constitutional prohibition. *Brown*, 225 Ill.

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2d at 201; *Caveney v. Bower*, 207 Ill. 2d 82, 94-5 (2003). Defendant has not cited to any constitutional prohibition against enforcing the evident, prospective temporal reach expressed by the legislature, and this court is unaware of any such prohibition. We are, therefore, bound to conclude that the requirements of section 103-2.1 should not be applied retroactively to this matter.

¶ 20 Indeed, our own supreme court reached the same conclusion in *People v. Amigon*, 239 Ill. 2d 71 (2010). There, our supreme court addressed the possible retroactivity of section 103-2.1, and specifically held that "the legislature's express decision to delay the enforcement of the electronic recording requirement until 2005 *** establishes its intent that the statute not be applied retroactively ***." *Id.* at 86. Defendant contends that *Amigon* is not controlling here because, in that case, the confession occurred over 10 years prior to the effective date of section 103-2.1 and there were certain concessions regarding retroactivity made on appeal by counsel for the defendant. We disagree. While those factors were present and mentioned in the *Amigon* decision, our supreme court's ultimate resolution of this issue relied primarily upon an application of the legal precepts cited above in construing the clear language used by the legislature. *Id.*

¶ 21 Because we conclude that section 103-2.1 of the Code did not apply retroactively to this matter, we find that defendant's trial counsel was not ineffective for failing to cite to section 103-2.1 as controlling authority in support of the motion to suppress the videotaped confession. See *People v. Mercado*, 397 Ill. App. 3d 622, 634 (2009) ("Defense counsel is not required to make losing motions or objections in order to provide effective legal assistance.").

¶ 22 Nevertheless, defendant further contends that—even assuming section 103-2.1 was not *controlling* authority—his trial counsel was ineffective for failing to cite to its requirements as

persuasive authority in support of the motion to suppress. However, we find that citation to additional statutory requirements that were not yet in effect would not have cast the procedures actually followed in this case in a negative light, so as to support the motion to suppress. Rather, it would merely have highlighted the fact that those procedures were completely proper and legally sufficient at the time of defendant's interrogations and his videotaped confession. To the extent that section 103-2.1 could possibly have provided any persuasive weight in defendant's favor, we conclude that his trial counsel's decision not to cite to that statutory provision is presumed to be a matter of trial strategy. "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *People v Smith*, 2012 IL App (1st) 102354, ¶ 86 (quoting *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998)).

¶ 23 We, therefore, reject defendant's contention that his trial counsel provided ineffective assistance with respect to the arguments made in support of the unsuccessful motion to suppress, as his failure to cite to section 103-2.1 neither fell below an objective standard of reasonableness nor caused defendant any possible prejudice. *Wheeler*, 401 Ill. App. 3d at 313. We additionally reject defendant's assertion that the attorney representing him in the posttrial proceedings provided ineffective assistance when, in challenging trial counsel's competence, he did not note this failure on the part of trial counsel. As defendant concedes on appeal, if his trial counsel was not ineffective in this regard, his posttrial counsel "cannot be assailed owing to any failure to more completely attack the competence of [trial counsel's] performance."

¶ 24

III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.