

**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).

2012 IL App (4th) 110131-U

Filed 6/5/12

NO. 4-11-0131

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
SHERMAN GIBSON,	)	No. 81CF243
Defendant-Appellant.	)	
	)	Honorable
	)	Leo J. Zappa, Jr.,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Cook and McCullough concurred in the judgment.

**ORDER**

- ¶ 1     *Held:* Petition to vacate judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) was properly decided on the pleadings without an evidentiary hearing.
- ¶ 2     In 1982 defendant, Sherman Gibson, was convicted of home invasion, rape, deviate sexual assault, burglary, and felony theft and received extended-term sentences of 45 years each for home invasion, rape, and deviate sexual assault, to be served concurrently with each other and concurrently with a 7-year term for burglary. In September 2006, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)) based on newly discovered deoxyribonucleic acid (DNA) evidence excluding him as the donor of semen on a rectal swab taken from one of the victims. That victim testified defendant was the only one of two assailants who anally raped her.

The trial court denied the petition, finding defendant was not excluded from the DNA evidence in regard to a vaginal swab taken from the same victim where the evidence indicated more than one assailant vaginally raped the victim. Defendant appeals, arguing the DNA evidence entitles him to either a new trial or an evidentiary hearing as the new evidence would probably change the result upon retrial based on (1) misidentification of defendant as the assailant who committed the anal rape and (2) problems with the reliability and probative value of the DNA results in regard to his nonexclusion from the DNA found on the vaginal swab. We disagree with defendant and affirm the trial court.

¶ 3

### I. BACKGROUND

¶ 4 In June 1982, intruders, armed with a gun, broke into a home in Springfield, Illinois. The husband and wife, their infant son, and their nine-year-old-niece were present in the home. The intruders confined the husband in the bathroom, ransacked the home looking for property, and raped and sexually assaulted the wife. After approximately one hour, the intruders left, taking some of the victims' personal property.

¶ 5 At defendant's trial, both the husband and wife testified concerning the details of the break-in. Each described two of the intruders as being male, one wearing a green, hooded sweatshirt and thick white gloves and the other wearing lighter-colored pants. The wife testified she was sexually assaulted by each male intruder but only the white-gloved intruder assaulted her anally. She believed three male intruders were present in her home but she could not make an absolute positive identification of any of the intruders immediately following the break-in. After being hypnotized by detectives, the wife was able to identify the intruder in the white gloves as defendant and stated the man with the white gloves was the one who anally raped her.

¶ 6 The couple's nine-year-old niece also testified. She stated she was asleep on the couch in the victims' living room, heard a noise and woke up to find a black female standing over her. The woman told her to cover her head with a blanket and she did. She testified she was tied up by a man wearing gloves and all of the intruders left.

¶ 7 The State presented the testimony of Glenda Sue Medley, who testified she, defendant, and her cousin Allen Medley were the individuals who broke into the couple's home. Her testimony was substantially similar to that of the victims and their niece. She specifically identified defendant as the intruder wearing gloves.

¶ 8 Carolyn Madison testified she saw the Medleys and defendant hours after the break-in in possession of property belonging to the couple.

¶ 9 The State's expert serologist, Debra Fesser, testified she tested blood samples taken from defendant, Allen Medley, and the female victim and determined their blood types as AB, O, and A, respectively. Fesser also tested physical evidence recovered from the wife's person and clothing and stated the presence of seminal material consistent with the blood types of both defendant and Allen Medley. Additionally, Fesser stated a rectal swab taken from the wife tested positive for the presence of semen consistent only with defendant's blood type, AB. Further, a white shirt smeared with blood was recovered from the scene. The wife testified she believed the intruder with the white gloves had used it to wipe off a metal box, and she assumed the blood on it was his. Fesser testified the bloodstains on the white shirt were type AB and consistent with defendant's blood type. *People v. Gibson*, 357 Ill. App. 3d 480, 483, 828 N.E.2d 881, 884 (2005).

¶ 10 Defendant did not testify and was convicted and sentenced as stated. On direct

appeal, this court found error in the admission of the wife's identification testimony obtained through hypnosis but affirmed defendant's convictions and sentences finding the error to be harmless due to the serological evidence and Glenda Sue Medley's testimony identifying defendant as the intruder wearing gloves. *People v. Gibson*, 117 Ill. App. 3d 270, 278, 452 N.E.2d 1368, 1374 (1983).

¶ 11 In December 1989, defendant filed a postconviction petition, raising claims of ineffective assistance of counsel for failure to challenge the wife's hypnotically refreshed testimony and to present testimony of an alibi witness. The trial court dismissed defendant's petition and he appealed. On appeal, this court reversed and remanded with directions to hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel. *People v. Gibson*, 244 Ill. App. 3d 700, 704, 612 N.E.2d 1372, 1375 (1993). After a hearing, the court again denied defendant's petition.

¶ 12 In September 2001, defendant filed a *pro se* motion for forensic testing of evidence obtained in connection with his trial pursuant to section 116-3 of the Code of 1963 (725 ILCS 5/116-3 (West 2000)). In May 2003, the trial court denied defendant's motion. On May 12, 2005, this court reversed, holding physical evidence recovered from the wife had the potential to produce evidence materially relevant to defendant's assertions of actual innocence. *People v. Gibson*, 357 Ill. App. 3d at 489-90, 820 N.E.2d at 888-89.

¶ 13 Pursuant to this court's order, DNA testing was done on the serological evidence available in this case. Blood standards were taken from defendant, Allen Medley, and the female victim. Vaginal swabs and rectal swabs were available for testing from the original rape kit prepared at the time of the offense. On July 21, 2006, a report was prepared by the Illinois

Department of Police Division of Forensic Sciences. The report indicated defendant was excluded from the DNA profiles in the rectal swabs. Allen Medley was not. The report also indicated both defendant and Allen Medley could not be excluded from the DNA profiles in the vaginal swabs.

¶ 14 On September 7, 2006, defendant filed his *pro se* petition to vacate judgment under section 2-1401. In his petition, he alleged the judgment against him was void and should be "vacated and set aside because DNA show [*sic*] actual innocence."

¶ 15 That same day, the State filed its motion to dismiss the petition to vacate judgment with the DNA lab report attached. The State argued defendant asserted DNA results supported his claim of actual innocence but the conclusion in the lab report was "[defendant] cannot be excluded" from the DNA tested which originated in the vaginal swab.

¶ 16 On September 18, 2006, a hearing was held on the State's motion to dismiss. The State argued the DNA lab report indicated "A second human DNA profile was identified in sperm fraction of Exhibit 3B, and [defendant] cannot be excluded." The lab report indicated Exhibit 3B was the vaginal swabs. The State asked its motion to dismiss the petition to vacate judgment be allowed. Defense counsel stated he had no further argument.

¶ 17 The trial court first noted defendant asked for DNA testing. The court found the record indicates there was a rape by two individuals, one being Allen Medley and apparently defendant as his "DNA does appear in the sample taken and tests taken by the Illinois State Crime Lab; therefore, his Motion to Vacate Judgment under [section] 2-1401 is hereby denied." The court ordered a copy of the docket entry be sent to defendant denying his motion to vacate judgment. The docket entry stated the cause was called for a hearing on the State's motion to

dismiss. "Motion argued. Motion granted."

¶ 18 On February 16, 2011, this court allowed defendant's *pro se* motion for leave to file a late notice of appeal.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the trial court's dismissal of his section 2-1401 petition was erroneous because (1) the DNA results excluded him from contributing to the rectal swab, rendering the State's theory of the case impossible as he was identified as the individual who committed the anal rape and (2) the reliability and probative value of the DNA results as to the vaginal swab should be determined by a finder of fact in the context of the totality of the evidence at a new trial or at least an evidentiary hearing. We disagree.

¶ 21 We note there is a disagreement between the parties as to whether the trial court's order should be interpreted as a grant of the State's motion to dismiss the petition to vacate judgment, or if it was a denial of the petition itself. The transcript of the hearing indicates the court "denied" defendant's section 2-1401 petition to vacate judgment. The transcript states the court orders the clerk to send a copy of the docket entry "denying his motion to vacate judgment" to defendant. The docket entry states the court granted the State's motion to dismiss the petition. Thus, the State argues the petition was denied on the pleadings, not dismissed, because the report of proceedings (transcript) prevails over the common-law record (docket sheet). See *People v. Peoples*, 155 Ill. 2d 422, 496, 616 N.E.2d 294, 329 (1993). The State contends defendant forfeited his right to an evidentiary hearing for the issues raised in his section 2-1401 petition as no hearing was requested and the court was permitted to decide the petition on the pleadings and affidavits. See *Smith v. Cole*, 256 Ill. App. 3d 806, 810, 632 N.E.2d 31, 34-35 (1993).

¶ 22 Defendant contends the trial court's order should be interpreted as granting of the State's motion to dismiss. He notes the cause was called for a hearing on the State's motion to dismiss. The court directed the State to argue its motion and the State asked its "Motion to Dismiss the Petition to Vacate Judgment under [section] 2-1401 be allowed." The docket entry indicates the petition was dismissed. Defendant argues while the court did remark the petition was denied, when taken in the context of the proceedings, the record indicates the court was actually granting the State's motion to dismiss. Defendant asks this court to reverse the dismissal and remand for an evidentiary hearing at which the probative value of the DNA results can be fully considered. See *People v. Dodds*, 344 Ill. App. 3d 513, 522, 801 N.E.2d 63, 71 (2003) (once DNA testing and results are favorable to a defendant, even if only in part, an evidentiary hearing is necessary to determine the legal significance of the results). Alternatively, defendant argues, if he did forfeit his right to a hearing on his petition, this court could grant a hearing as a matter of fundamental fairness. See *People v. Steidl*, 177 Ill. 2d 239, 250, 685 N.E.2d 1335, 1340 (1997).

¶ 23 No matter which action the court took, the result is the same. The results of the DNA testing did not require vacating the judgment as void. The results did not show actual innocence. Defendant was convicted of rape, home invasion, and deviate sexual assault as well as burglary. No DNA evidence was necessary to convict him of home invasion or burglary, and the DNA evidence indicated he could not be excluded from the test results on the vaginal swab taken from the rape victim. Other evidence placed him at the scene of the crime and in possession of the victims' property.

¶ 24 Defendant spends a considerable amount of time in his appellate argument on the

unreliability of the DNA test results from which he cannot be excluded. However, that argument was not part of his allegations in his section 2-1401 petition to vacate judgment. It was not made by defendant's appointed counsel at the hearing. Counsel did not move to amend the petition in any way to include this argument. The State relied on those test results in its motion to dismiss the petition and they were the basis for the trial court's decision ending the litigation.

¶ 25 One could argue defendant's counsel did not make any argument about the reliability of the test results because he thought the hearing was on the State's motion to dismiss and not on the merits of the petition. However, the part of the test results which did not exclude defendant belied the petition's claim the results supported defendant's claim of actual innocence. If there was a question as to the reliability of that portion of the test results, it should have been raised in the petition. Otherwise, it is clear the test results do not support defendant's claim of actual innocence.

¶ 26 Relief under section 2-1401 is predicated upon proof of a claim which would have precluded entry of the judgment. *People v. Vincent*, 226 Ill. 2d 1, 871 N.E.2d 17, 22 (2007). Defendant had the burden of showing newly discovered evidence was so conclusive it would probably change the result if a new trial is granted. *People v. Hallom*, 265 Ill. App. 3d 896, 906, 638 N.E.2d 765, 772 (1994). Proceedings under section 2-1401 of the Code are subject to the usual rules of civil practice and, therefore, a section 2-1401 petition may be dismissed for legal or factual insufficiency or the failure to state a meritorious defense. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. The trial court was correct in dismissing the petition without an evidentiary hearing because such a hearing is available only if "a material issue of fact exists." *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23. No factual issue was presented as to defendant's actual innocence.

¶ 27

### III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 29 Affirmed.