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).

2016 IL App (4th) 140923-U

NOS. 4-14-0923, 4-14-0924 cons.

FILED
October 31, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Jersey County
HENRY W. HERSMAN,	)	Nos. 02CF222
	)	04CF177
Defendant-Appellant.	)	
	)	Honorable
	)	Joshua A. Meyer,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Because guilty pleas by defendant defeat the claim in his petition for relief from judgment, the trial court did not err by dismissing the petition *sua sponte*.

¶ 2 Defendant, Henry W. Hersman, filed a *pro se* pleading, which he called "Petition for Relief of Judgement [*sic*] Due to Overlooked and Recently Discovered Evidence." He gave this pleading the caption of two cases, in which, some nine years ago, he pleaded guilty and was sentenced to imprisonment: Jersey County circuit court case Nos. 02-CF-222 and 04-CF-177. *Sua sponte*, the trial court dismissed the pleading for lack of subject matter jurisdiction. Defendant appeals.

¶ 3 Even though we disagree with the trial court's conclusion that it lacked subject matter jurisdiction, we affirm the trial court's judgment in the two cases because the pleading at issue—which, given its title, must be understood to be a petition for relief from judgment (see

735 ILCS 5/2-1401 (West 2014))—clearly is unmeritorious in the light of defendant's guilty pleas. His petition for relief from judgment impermissibly contradicts his guilty pleas. Therefore, we uphold its *sua sponte* dismissal.

¶ 4 I. BACKGROUND

¶ 5 On July 14, 2004, defendant entered partially negotiated pleas of guilty to charges in case Nos. 02-CF-222 and 04-CF-177. In the latter case, he pleaded guilty to drug charges, and those pleas really are not relevant to this appeal. The relevant pleas are in the other case, case No. 02-CF-222. In that case, he pleaded guilty to, among other charges, five counts of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2002)) and five counts of aggravated arson (720 ILCS 5/20-1.1 (West 2002)).

¶ 6 Why did the information in case No. 02-CF-222 have five counts of attempt (first degree murder)? It was because there were five victims: defendant's ex-wife, their two children, and her parents. The State wrote a count for each victim. These five counts of attempt (first degree murder) are identical in their wording except that there are different victims from one count to another. We will use count I as an example. It alleged that on December 21, 2002, defendant committed attempt (first degree murder) in that, with the intent to perform first degree murder, he "performed a substantial step toward the commission of that offense, in that he set fire to a vehicle, and rammed said vehicle into the residence at 7567 Route 111, Piasa, Jersey County, Illinois, knowing James C. Arbuthnot to be present" and "knowing said act could have caused the death of James C. Arbuthnot."

¶ 7 Count VI, one of the counts of aggravated arson, alleged that "while committing an arson," defendant "knowingly partially damaged a building of James C. Arbuthnot, being a

residence located at 7567 Route 111, Piasa, Jersey County, Illinois, knowing that James C. Arbuthnot was present therein."

¶ 8 On July 15, 2004, the day after entering the guilty pleas, defendant filed a *pro se* motion to withdraw them. On July 23, 2004, his defense counsel, Eric Pistorius, who had represented him in the guilty-plea hearings, followed up on July 23, 2004, with an amended motion to withdraw the guilty pleas. On August 20, 2004, after hearing testimony from defendant and arguments by the attorneys, the trial court vacated the guilty pleas to four of the five counts of aggravated arson (counts VII to X) but otherwise denied the amended motion to vacate the guilty pleas.

¶ 9 On September 22, 2004, the trial court held a sentencing hearing in the two cases. Witnesses testified in aggravation and mitigation. One of the witnesses in aggravation was James C. Arbuthnot, who testified that after his wife awakened him in the early morning hours of December 21, 2002, he heard an engine revving, whereupon he went to a window of their house and looked outside just in time to see flames coming from inside a vehicle before that vehicle moved toward the house and crashed into it.

¶ 10 At the conclusion of the sentencing hearing, the trial court found defendant to be guilty but mentally ill. In case No. 02-CF-222, the court sentenced him to 28 years' imprisonment for each of the five counts of attempt (first degree murder), 20 years' imprisonment for the remaining count of aggravated arson, and 10 years' imprisonment for possession of an incendiary device (720 ILCS 5/20-2(a) (West 2002)). In the other case, case No. 04-CF-177, the court sentenced him to five years' imprisonment for each of seven counts of unlawful delivery of a controlled substance, hydrocodone (720 ILCS 570/401(d) (West 2004)). The court ordered that all these prison terms run concurrently.

¶ 11 The public defender renewed the amended motion to withdraw the guilty pleas and, alternatively, moved for reconsideration of the sentences. On November 4, 2004, the circuit court heard and denied both motions.

¶ 12 Defendant took a direct appeal in the two cases, and on March 23, 2007, we affirmed the judgments. *People v. Hersman*, No. 4-04-0946, slip order at 2 (March 23, 2007) (unpublished order under Supreme Court Rule 23). Specifically, we rejected defendant's arguments that "the trial court [had] erred by (1) finding him fit to stand trial without a fitness hearing, (2) failing to allow him to withdraw his guilty plea, and (3) failing to find any factors in mitigation at sentencing." *Id.* On November 29, 2007, the supreme court denied leave to appeal.

¶ 13 On June 16, 2014, defendant filed, *pro se*, a "Petition for Relief of Judgement [*sic*] Due to Overlooked and Recently Discovered Evidence." (The order from which he appeals addressed other filings, too, but as he makes clear in his opening brief and reply brief, he intends to contest only the dismissal of this particular petition, the one he filed on June 16, 2014. Any contention regarding other petitions or motions would be forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived", *i.e.*, forfeited).) In this petition, defendant claimed that Aburthnot, in his testimony in the sentencing hearing, committed perjury. The alleged perjury was Arbuthnot's testimony as to what he saw when he looked out the window of his house in the early morning of December 21, 2002. He testified he "saw flames coming from the inside of a vehicle along with the engine being revved up very high" before the vehicle lurched forward and struck the house. Defendant claims that Arbuthnot gave a different account to the police. In a statement dated December 21, 2002, and attached to defendant's petition, Arbuthnot wrote that when the car crashed through the wall, he "called out to his wife to get everyone out of the house as the engine compartment was on fire."

¶ 14 The falsehood becomes even clearer, defendant argues, when one considers what Arbuthnot told the 9-1-1 dispatch center. The fire marshal's report, also attached to the petition, begins with the following sentence: "02:53 hours Macoupin County 911 Dispatch Center received a 911 call from 7576 Rt. 111, Piasa. The caller stated a vehicle crashed into the residence and burst into flames."

¶ 15 Thus, defendant reasons in his petition, he did not purposefully set fire to the car's interior while he was inside the car, revving up the engine—contrary to the impression Arbuthnot gave in his testimony in the sentencing hearing. Rather, according to the statements that Arbuthnot made to the 9-1-1 dispatch center and to the police (as defendant interprets them), the car first crashed into the house, and only then did the "engine compartment" catch on fire—the car first "crashed into the residence," and only then did it "burst into flames." The petition concludes that, contrary to Arbuthnot's allegedly perjurious testimony, "[defendant] therefore did not set fire to the car prior to running into the house[;] rather[,] the engine compartment caught fire after the crash." "[T]his me[a]nt there was no on[-]purpose fire, therefore no intent to kill anyone, therefor[e] no attempt first degree murder and no intended aggravated arson."

¶ 16 On October 6, 2014 (after waiting for an intervening appeal to be resolved), the trial court entered an order stating, in relevant part: "June 16th Petition: This Court lacks jurisdiction to proceed on Petition. Petition is dismissed ***."

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues that his petition for relief from judgment (735 ILCS 5/2-1401 (West 2014)), instead of being jurisdictionally barred, was a valid means of collaterally

challenging the trial court's judgment. The supreme court has said: "[S]ection 2-1401 *** provides a basis for obtaining relief from judgments based on false testimony." *People v. Brown*, 169 Ill. 2d 94, 107 (1995). Defendant admits he brought his section 2-1401 action after the expiration of the two-year period of limitation in section 1401(c) (735 ILCS 5/2-1401(c) (West 2014)), but he points out that, under *People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009), "the two-year period contained in section 2-1401 is a statute of limitation[s] and not a jurisdiction prerequisite," and given that an expired period of limitations is an affirmative defense that the State would have to raise, a circuit court "may not, *sua sponte*, dismiss [a section 2-1401] petition on the basis of [un]timeliness."

¶ 20 The State, however, disagrees with the basic premise that the document defendant filed on June 16, 2014, had to be construed as a petition pursuant to section 2-1401. The State argues that, under *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010), "[c]ircuit courts are not required to recharacterize defendants' filings."

¶ 21 Defendant's response is quite simple: there is no need to recharacterize the document he filed on June 16, 2014; rather, the document should be taken for what it plainly calls itself: a petition for relief from judgment ("Petition for Relief of Judgement [*sic*] Due to Overlooked and Recently Discovered Evidence").

¶ 22 We agree with defendant's argument as far as it goes. *Stoffel* is indeed distinguishable. In that case, the defendant argued the trial court had erred by declining to recharacterize, as a postconviction petition, a filing that explicitly referred to itself as a " 'petition for relief from judgment' " and explicitly said it was brought " 'pursuant to' *** section 2-1401." *Id.* at 317. The supreme court held that although a trial court *may* treat an "improperly labeled pleading" as a postconviction petition, it *need not* do so. *Id.* at 324. In the

present case, however, there is no "improperly labeled pleading." *Id.* The pleading of June 16, 2014, calls itself a petition for relief from judgment, and that is how defendant wants the pleading to be treated. Granted, the petition does not cite section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), but "petition for relief from judgment" is a legal term of art that unmistakably signifies a petition pursuant to section 2-1401.

¶ 23 Because a petition for relief from judgment "commences an entirely new proceeding and is not merely a continuation of the original proceeding," we agree with defendant that the trial court was mistaken in its conclusion that it lacked subject matter jurisdiction to adjudicate this petition. *Manning v. Meier*, 114 Ill. App. 3d 835, 840 (1983).

¶ 24 It does not necessarily follow, though, that the dismissal of the petition was incorrect. We review the trial court's judgment, not its reasoning. *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 18. "[A] reviewing court can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." (Internal quotation marks omitted.) *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 16.

¶ 25 In our *de novo* review (*Berrios*, 387 Ill. App. 3d at 1063), we uphold the dismissal of the section 2-1401 petition because the record shows the petition to be clearly unmeritorious (see *People v. Vincent*, 226 Ill. 2d 1, 13 (2007) ("We agree with those federal cases and hold that a trial court may dismiss a claim sua sponte *** without notice where the claimant cannot possibly win relief." (Internal quotation marks omitted.))). Specifically, we refer to defendant's guilty pleas in case No. 02-CF-222.

¶ 26 Defendant cannot possibly win the relief he seeks in his section 2-1401 petition because on July 14, 2004, in case No. 02-CF-222, he knowingly and voluntarily pleaded guilty to

five counts of attempt (first degree murder), and each of those counts alleged that he "performed a substantial step toward the commission of [first degree murder], in that he set fire to a vehicle, and rammed said vehicle into the residence." Later, in the sentencing hearing, that is precisely what Arbuthnot testified defendant had done. Defendant cannot now turn around and, in the teeth of his guilty pleas, claim that Arbuthnot lied in that respect. See *People v. Green*, 17 Ill. 2d 35, 42 (1959). Defendant is estopped from denying that he "set fire to a vehicle, and rammed said vehicle into the residence" (see *People v. Feldman*, 409 Ill. App. 3d 1124, 1128 (2011)), an essential element of the offense of attempt as alleged in the information (720 ILCS 5/8-4(a) (West 2002)("does any act which constitutes a substantial step toward the commission of that offense")). He also is estopped from denying that he committed aggravated arson. See *id.* He is bound by his guilty pleas, and he may not contradict the essential elements of the offenses to which he pleaded guilty. See *Green*, 17 Ill. 2d at 42; *Feldman*, 409 Ill. App. 3d at 1128.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 29 Affirmed.