

No. 1-16-1344

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 96 CR 4525
)	
FREDERICK JONES,)	The Honorable
)	Thomas V. Gainer, Jr.,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 Held: Petitioner's Class X armed robbery conviction is unconstitutionally disproportionate to the identical offense of armed violence with a Category III weapon, and the trial court erred in dismissing petitioner's section 2-1401 petition for relief from judgment. Reversed; vacated and remanded with directions.

¶ 2 After a bench trial, Petitioner Frederick Jones was found guilty of armed robbery, armed violence with a Category III weapon, and aggravated battery with a dangerous weapon. The

court sentenced petitioner to three concurrent terms of fifteen years' incarceration. Petitioner appealed, and we affirmed his convictions and sentences. *People v. Frederick Jones*, 1-96-2826 (unpublished order under Supreme Court Rule 23). Thereafter, petitioner 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 2014)), by which he challenged his sentence. Petitioner now appeals the denial of his § 2-1401 petition for relief from judgment, arguing that his Class X armed robbery conviction violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) in that the identical offense of armed violence with a Category III weapon is punished less severely than armed robbery, as charged in this case. For the following reasons, we vacate petitioner's conviction for armed robbery and remand for entry of judgment and sentence on the armed violence offense.

¶ 3

I. BACKGROUND

¶ 4

The underlying facts, as recited by this court in petitioner's direct appeal, are as follows:

"The State's evidence at trial established that shortly after 5 a.m. on December 27, 1995, the complainant, James Poole, stopped his car in front of the house of Felicia Reed's mother so Reed could drop off her daughter and proceed to work. Immediately after Reed exited the car, [petitioner], the child's father, confronted Reed, called her a 'bitch,' and grabbed her coat. He then punched her on the side of her face. When [petitioner] grabbed Reed's coat, her baby fell onto the street and Reed ran inside to her mother's building. Five minutes later, Reed returned to find that the complainant was bleeding from his head and his car windows were broken.

After [petitioner] struck Reed, complainant got out of his car and asked [petitioner] what was going on. [Petitioner] did not answer him, but instead picked up the

baby and placed her inside his car. [Petitioner] then removed a crowbar from his car and, accompanied by another man, approached complainant. [Petitioner] struck complainant in the head with the bar, ordered him to turn over his keys and grabbed two chains off his neck. Complainant escaped, but when he returned minutes later, he saw [petitioner] breaking his car windows. One month later, complainant identified [petitioner] in a lineup.

Detective John Gorman testified that he advised [petitioner] of his *Miranda* rights after the lineup, and [petitioner] gave a statement in which he admitted striking complainant with a tire iron and breaking his car windows. However, he denied taking any of his property. On cross-examination, Gorman stated that [petitioner] told him that he was angry at complainant because Felicia Reed was seeing other men.

[Petitioner] testified that he did not hit Reed, but he admitted striking the complainant once in the head with the tire iron. He denied taking anything from complainant or asking for the keys to his car. [Petitioner] stated that he was waiting for Reed in front of her mother's house so he could drive her to work, although she never asked him to do so. The State also introduced into evidence certified copies of [petitioner's] three prior convictions. At the conclusion of the bench trial, the trial court found [petitioner] guilty of armed robbery, armed violence, and aggravated battery with a dangerous weapon. On July 16, 1996, the trial court sentenced [petitioner.]" *People v. Frederick Jones*, 1-96-2826 (unpublished order under Supreme Court Rule 23).

¶ 5 On direct appeal, petitioner claimed that his concurrent 15-year prison sentences were excessive and that he received ineffective assistance of trial counsel where counsel failed to file a motion to reconsider his sentences. Specifically, petitioner alleged he was "penalized with higher

sentences after the bench trial because the trial court refused to accept his negotiated plea to armed robbery and insisted that he proceed to trial after he said he did not commit the crime." *People v. Frederick Jones*, 1-96-2826 (unpublished order under Supreme Court Rule 23). This court affirmed petitioner's conviction and sentences, noting that, "[a]s a Class X felon, [petitioner] could have been sentenced to between 6 and 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 1994). Given the facts in this case and [petitioner's] criminal background, which included his three prior convictions and a previous incident of domestic violence, we see no reason to disturb the 15-year sentences imposed by the trial court." *People v. Frederick Jones*, 1-96-2826 (unpublished order under Supreme Court Rule 23).

¶ 6 In October 2015, petitioner filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code. By that petition, petitioner asked the court, in pertinent part, to set aside the findings of guilt for armed robbery, armed violence, and aggravated battery with great bodily harm because they violate the Proportionate Penalties Clause. The trial court denied the petition in March 2015.

¶ 7 Petitioner appeals.

¶ 8 II. ANALYSIS

¶ 9 On appeal, petitioner contends that, in light of recent precedent regarding proportionate penalties and identical elements, his Class X armed robbery conviction must be vacated where the Class X armed robbery penalty of 6 to 30 years' incarceration is more severe than the 3 to 6 year penalty prescribed for the identical Class 2 offense of armed violence with a Category III weapon. He points out that the tire iron with which he was armed during the commission of the instant offenses qualifies as a Category III bludgeon under the armed violence statute, and argues the Class X offense of armed robbery/dangerous weapon has elements that are identical to the

elements of the Class 2 offense of armed violence while armed with a Category III bludgeon as a weapon. He contends that his armed robbery conviction must be vacated because, although it has elements identical to the Class 2 armed violence offense, it has a more severe penalty than the armed violence offense. Petitioner asks this court to vacate the Class X armed robbery conviction and remand this cause for entry of judgment and sentence on the Class 2 armed violence offense.

¶ 10 The State concedes that, in light of *People v. Ligon*, 2016 IL 118023, petitioner's armed robbery conviction should be vacated and this cause should be remanded for entry of judgment on the identical Class 2 armed violence offense.¹

¶ 11 Initially, we note here that the record provided on appeal does not contain a mittimus, nor a copy of the 1997 appellate disposition, and neither party acknowledges this shortcoming. The record provided us does include a "verification of incarceration" attached by petitioner to his § 2-1401 petition. The State does not challenge this deficit, and, having reviewed the 1997 appellate decision from court records, we find the record is sufficient to proceed regarding the limited issue before us.

¶ 12 A motion to vacate under section 2-1401 provides the procedure by which orders entered in a cause, having become final after 30 days from their entry, may nonetheless be vacated. See 735 ILCS 5/2-1401 (West 2014). The purpose of a section 2-1401 petition is to bring facts to the attention of the trial court which, if known at the time the court entered the order, would have prevented the order's entry. See *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 182 (1996). To obtain this relief, the petitioner must set forth in his section 2-1401 petition specific factual

¹ We note here that we are dismayed by petitioner's brief, prepared and filed by the Cook County Public Defender's Office, which relies primarily on an appellate version of *People v. Ligon* that, by the time petitioner's appellate brief was filed here, had been reversed by our supreme court. See *People v. Ligon*, 2016 IL 118023. Specifically, the appellant brief here relies on *People v. Ligon*, 2012 IL App (1st) 120913, and acknowledges that a petition for leave to appeal in that cause was allowed on November 26, 2014. Petitioner's attorney, however, apparently did not follow through regarding this petition for leave to appeal, as the appellate *Ligon* was reversed on February 19, 2016, and petitioner's appellant brief—relying on the appellate *Ligon*—was filed in this court one year and 5 months later.

allegations concerning: (1) the existence of a meritorious claim; (2) due diligence in presenting this claim to the trial court in the original action; and (3) due diligence in filing the petition for relief. See *S.C. Vaughan Oil Co. v. Caldwell, Trout & Alexander*, 181 Ill. 2d 489, 496 (1998); *Smith v. Airroom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). Ultimately, whether a section 2-1401 petition is granted and a final order vacated lies within the sound discretion of the trial court and will not be disturbed unless it is apparent that the court abused its discretion. See *Smith*, 114 Ill. 2d at 221.

¶ 13 "Voidness challenges stemming from the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time. *People v. Guevara*, 216 Ill. 2d 533, 542 297 Ill. Dec. 450, 837 N.E.2d 901 (2005). Further, a motion to vacate a void judgment is properly raised in a petition for relief from judgment under section 2-1401. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05, 267 Ill. Dec. 58, 776 N.E.2d 195 (2002); see also *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32, 398 Ill.Dec. 74, 43 N.E.3d 984 (a type of voidness challenge to a final judgment under section 201401 involves a challenge based on a facially unconstitutional statute)." *People v. Ligon*, 2016 IL 118023, ¶ 9.

¶ 14 Our supreme court recently issued its opinion in *People v. Ligon*, 2016 IL 118023. In *Ligon*, the defendant was found guilty of aggravated vehicular hijacking with a dangerous weapon other than a firearm, a Class X felony. After finding that this was the defendant's third Class X felony conviction, the trial court adjudged him a habitual criminal and sentenced him to natural life imprisonment. *Ligon*, 2016 IL 118023. Similar to petitioner's argument here, the *Ligon* defendant asserted in a § 2-1401 petition that his conviction for aggravated vehicular hijacking violated the proportionate penalties clause of the Illinois Constitution. *Ligon*, 2016 IL 118023, ¶ 1. The trial court dismissed the defendant's conviction, finding defendant "had

forfeited his constitutional challenge by failing to raise it in his direct appeal or postconviction petitions, and that, regardless of forfeiture, his legal arguments were not the proper subject of a petition for relief from judgment under section 2-1401." *Ligon*, 2016 IL 118023, ¶ 7. The appellate court reversed, "finding that the Class X offense of aggravated vehicular hijacking has identical elements as the Class 1 offense of armed violence predicated on vehicular hijacking with a dangerous weapon, and thus his sentence for AVH/DW violated the proportionate penalties clause because it was punished more severely than the described offense of armed violence." *Ligon*, 2016 IL 118023, ¶ 7 (quoting *People v. Ligon*, 2014 IL App (1st) 120913, ¶¶ 56, 11).

¶ 15 In its consideration of the State's appeal, our supreme court first observed that the appellate court was correct in holding that the trial court's dismissal of the petition for forfeiture was improper. The court stated: "Voidness challenges stemming from the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time." *Ligon*, 2016 IL 118023, ¶ 9. Additionally, the court stated: "a motion to vacate a void judgment is properly raised in a petition for relief from judgment under section 2-1401." *Ligon*, 2016 IL 118023, ¶ 9.

¶ 16 Article I, section 11, of the Illinois Constitution, known as the Proportionate Penalties Clause, provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *Ligon*, 2016 IL 118023, ¶ 10 (quoting Ill. Const. 1970, art. I, § 11). "In analyzing a proportionate penalties challenge, our ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense." *Ligon*, 2016 IL 118023, ¶ 10 (quoting *Guevara*, 216 Ill. 2d at 543). A sentence violates the proportionate penalties clause if: (1) it is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community; or (2) it is

greater than the sentence for a different offense comprised of identical elements. *Ligon*, 2016 IL 118023, ¶ 10 (citing *Guevara*, 216 Ill. 2d at 543). Like petitioner in the instant case, the defendant in *Ligon* based his challenge on the identical elements test.

¶ 17 Under the identical elements test, our supreme court has consistently held that " " 'if the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense.' ' " *Ligon*, 2016 IL 118023, ¶ 11 (quoting *People v. Clemons*, 2012 IL 107821, ¶ 30 (quoting *People v. Sharpe*, 216 Ill. 2d 481, 522 (2005)). "Thus, where identical offenses do not yield identical penalties, this court has held that the penalties were unconstitutionally disproportionate and the greater penalty could not stand." *Ligon*, 2016 IL 118023, ¶ 11.

¶ 18 The court then considered the State's argument that it is not appropriate to conduct an identical elements comparison between the offenses of aggravated vehicular hijacking while armed with a dangerous weapon and armed violence predicated on vehicular hijacking with a Category III dangerous weapon because the defendant was not sentenced under the aggravated vehicular hijacking statute, but under the Habitual Criminal Act. The State relied on this court's decision in *People v. Cummings*, 375 Ill. App. 3d 513, 521-22 (2007) for support. Our supreme court disagreed, overruled our conclusion in *Cummings*, and eventually determined that the two offenses did not have identical elements because the BB gun the defendant possessed during the crime did not fit within the definitional confines of a Category III weapon for purposes of armed violence. *Ligon*, 2016 IL 118023, ¶ 17-20.

¶ 19 In the case at bar, respondent was convicted of armed robbery while armed with a dangerous weapon, to wit, a tire iron. Based on the statutes in effect at the time of respondent's offense, a person commits armed robbery when he or she violates Section 18-1; and he or she

carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2 (West 1996). Section 18-1, the offense of robbery, states: "a person commits robbery when he or she takes property * * * from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 1996). Armed robbery is a Class X felony generally punishable with a sentence between 6 and 30 years. 720 ILCS 5/18-2(b) (West 1996); 730 ILCS 5/5-8-1(a)(3) (West 1996).

¶ 20 These same elements constitute the offense of armed violence: under section 33A-2(a) of the Code, "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law," with the exception of certain enumerated offenses that do not include robbery. 720 ILCS 5/33A-2(a) (West 1996). For purposes of the armed violence statute, an offender is "armed with a dangerous weapon" when he is in possession of "a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c)(1) (West 1996). A bludgeon is a listed Category III weapon. 720 ILCS 5/33A-1(c)(3) (West 1996).

¶ 21 Armed violence with a Category III weapon, which includes a bludgeon, is a Class 2 felony, punishable with a sentence of 3 to 7 years. See 720 ILCS 5/33A-3(b) (West 1996); 730 ILCS 5/5-8-1(a)(5) (West 1996). The State concedes that the tire iron with which petitioner was armed during the commission of the offenses at issue here qualifies as a Category III bludgeon-type weapon pursuant to the armed violence statute in effect at the time of the offense (720 ILCS 5/33A-2(a) (West 1996); 720 ILCS 5/33A-1(c)(1) (West 1996)).

¶ 22 The State concedes, and we agree, that petitioner's Class X armed robbery while armed with a dangerous weapon offense (720 ILCS 5/18-2 (West 1996); 720 ILCS 5/18-1 (West 1996); 720 ILCS 5/18-1 (West 1996)) has identical elements to the Class 2 offense of armed violence with a Category III weapon (720 ILCS 5/33A-2(a) (West 1996); 720 ILCS 5/33A-1(c)(1) (West

1996); 720 ILCS 5/33A-1(c)(3) (West 1996)), and that this court is compelled by the *Ligon* decision to find that the statutorily-prescribed penalty of 6 to 30 years' imprisonment for his Class X armed robbery while armed with a dangerous weapon conviction (720 ILCS 5/5-8-1(a)(3) (West 1996)) is unconstitutionally disproportionate to the 3 to 7 year penalty prescribed for the commission of the identical Class 2 offense of armed violence while armed with a Category III weapon (720 ILCS 5/33A-2(a) (West 1996)). We therefore conclude that the penalties for armed robbery while armed with a dangerous weapon and armed violence while armed with a Category III weapon in this case are unconstitutionally disproportionate. For this reason, the trial court's order denying petitioner's § 2-1401 petition was in error.

¶ 23 Having found error, we must now determine the appropriate remedy. Petitioner asks this court to vacate the Class X armed robbery conviction and remand this cause for entry of judgment and sentence on the Class 2 armed violence offense. In support, petitioner relies on *People v. Christy*, 188 Ill. App. 3d 330, 334 (1989), in which, where a Class X felony and a Class 1 felony were found to have identical elements, the defendant's conviction and sentence for the Class X offense was vacated, and the case was remanded for sentencing on the Class 1 felony. *Christy*, 188 Ill. App. 3d at 174, 181. The State concedes that vacating the armed robbery conviction and remanding for entry of judgment and sentence on the armed violence offense is the appropriate remedy here. We agree, and therefore vacate petitioner's armed robbery conviction and remand this cause for entry of judgment and sentence on the armed violence offense.

¶ 24 III. CONCLUSION

¶ 25 In summary, armed robbery while armed with a Category III weapon is comprised of the identical elements for armed violence with a Category III weapon, as both existed at the time of

petitioner's offense. Since armed robbery constituted a Class X conviction while armed violence was a Class 2 conviction, the Class X penalty is unconstitutionally disproportionate and petitioner is entitled to relief. Our supreme court in *Ligon* recognized that a § 2-1401 petition is an appropriate method for a petitioner to challenge his void sentence, and we reverse the trial court's denial of petitioner's § 2-1401 petition. See *Ligon*, 2016 IL 118023, ¶ 9. We vacate petitioner's conviction for armed robbery and remand for entry of judgment on the armed violence while armed with a category III weapon and sentence on that offense.

¶ 26 Reversed; vacated and remanded with directions.