

2019 IL App (1st) 162633-U

Nos. 1-16-2633 & 1-16-2762  
Consolidated

Order filed April 26, 2019

SIXTH DIVISION

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 455
	)	
REMEL RUTLEDGE,	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Presiding Justice Delort and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court erred in dismissing defendant's section 2-1401 petition where his sentence for armed robbery was unconstitutionally disproportionate to the identical offense of armed violence predicated on robbery. We vacate defendant's sentence and remand for resentencing.

¶ 2 Defendant Remel Rutledge<sup>1</sup> appeals the dismissal of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), arguing that his sentence for armed robbery violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) in that, under the law in effect on the date of the offense, armed robbery was punished more severely than the identical offense of armed violence predicated on robbery. For the reasons that follow, we reverse the dismissal of defendant's section 2-1401 petition, vacate the improper sentence, and remand for resentencing.

¶ 3 Following a bench trial, defendant was found guilty of attempt murder, aggravated battery with a firearm, aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, armed robbery while carrying a firearm, and armed robbery involving the personal discharge of a firearm causing great bodily harm. The evidence established that defendant and a co-offender entered a cellular phone store in Chicago on July 27, 2005, brandished firearms, and demanded money. Defendant took cash from the store owner, repeatedly shot him, and fired at another man who tried to flee the building.

¶ 4 After a sentencing hearing, the trial court imposed concurrent terms of 15 years for attempt murder; 7 years for aggravated unlawful use of a weapon; and, for armed robbery involving the personal discharge of a firearm causing great bodily harm, a term of 40 years, consisting of a 15-year sentence plus a 25-year firearm enhancement. The mittimus also lists sentences for defendant's other offenses, which merged. These included 15 years for aggravated battery with a firearm; 15 years for armed robbery while carrying a firearm; and 7 years for

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<sup>1</sup> Throughout the parties' briefs, defendant's last name appears as "Ruthledge." In this order, we adopt the spelling used by defendant in his *pro se* section 2-1401 petition and in prior orders of this court.

unlawful use of a weapon by a felon. The trial court stated that it “took into account all the statutory factors in aggravation and mitigation.”

¶ 5 On direct appeal, we affirmed defendant’s convictions over his challenge to the sufficiency of the evidence and the trial court’s recollection of the evidence. *People v. Rutledge*, No. 1-08-1231 (2010) (unpublished order under Supreme Court Rule 23). Subsequently, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)), alleging (1) actual innocence, (2) denial of counsel during a lineup, (3) ineffective assistance of counsel, (4) failure to disclose evidence, (5) insufficient evidence, (6) excessive sentencing, and (7) cumulative error. The circuit court summarily dismissed defendant’s petition, and we affirmed. *People v. Rutledge*, 2012 IL App (1st) 110071-U.

¶ 6 On April 21, 2015, defendant filed the instant petition for relief from judgment. He alleged the 25-year firearm enhancement for armed robbery violated the proportionate penalties clause of the Illinois Constitution, as the elements of the offense were identical to armed violence predicated on robbery but mandated a longer sentencing range. Pursuant to *People v. Hauschild*, 226 Ill. 2d 63 (2007), defendant asked the circuit court to vacate the firearm enhancement. On January 28, 2016, the circuit court dismissed defendant’s petition, finding that *Hauschild* did not apply to his 25-year firearm enhancement, but only to the 15-year firearm enhancement at issue in *Hauschild*.<sup>2</sup> Defendant filed a motion to reconsider, which the circuit court denied on April 25, 2016.

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<sup>2</sup> Generally, the circuit court may not summarily dismiss a section 2-1401 petition within 30 days of filing, during which time the State may file a response. *People v. Matthews*, 2016 IL 118114, ¶ 8. Defendant, however, does not raise this issue as a basis for challenging the dismissal of his petition.

¶ 7 Between June 2016 and September 2016, defendant filed multiple late notices of appeal in the circuit court and a motion for leave to file a late notice of appeal in this court. These filings culminated in two consolidated proceedings, appeal numbers 16-2633 and 16-2762. On August 16, 2018, we entered an order allowing defendant's motion to amend his late notice of appeal to reflect that he appealed from the circuit court's judgment of April 25, 2016.

¶ 8 On appeal, defendant contends the circuit court erred in dismissing his section 2-1401 petition because the 25-year firearm enhancement for armed robbery violates the proportionate penalties clause of the Illinois Constitution. Therefore, defendant asks this court to vacate the enhancement and reduce his sentence to 15 years. The State agrees the enhancement was improper, but maintains that defendant's entire 40-year sentence should be vacated and the cause remanded for resentencing.

¶ 9 Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) is a civil remedy that extends to criminal cases and provides a comprehensive, statutory procedure for vacating a final judgment that is more than 30 days old. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* In general, "[v]oidness challenges stemming from the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time," including in a section 2-1401 petition. *People v. Ligon*, 2016 IL 118023, ¶ 9. After the expiration of the 30-day period in which the State may file a responsive pleading, the circuit court may dismiss a petition that is "deficient as

a matter of law.” *People v. Matthews*, 2016 IL 118114, ¶ 8. We review the circuit court’s dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 10 The proportionate penalties clause of the Illinois Constitution 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.” Ill. Const. 1970, art. 1, § 11. Relevant here, a penalty violates the proportionate penalties clause if it exceeds the sentence for another offense with identical elements. *Ligon*, 2016 IL 118021, ¶ 10. Whether a statute violates the proportionate penalties clause is a question of law that is reviewed *de novo*. *People v. Charleston*, 2018 IL App (1st) 161323, ¶ 33.

¶ 11 On July 25, 2005, the date of defendant’s offenses, section 18-2(a)(4) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/18-2(a)(4) (West 2004)) provided that a person commits armed robbery when, in committing a robbery, he “personally discharges a firearm that proximately causes great bodily harm \*\*\* to another person.” In comparison, the armed violence statute stated that a person commits armed violence when he “personally discharges a firearm \*\*\* that proximately causes great bodily harm, \*\*\* to another person while committing any felony defined by Illinois law.” 720 ILCS 5/33A-2(c) (West 2004). The statute excluded certain felonies from functioning as predicate offenses for armed violence, but did not preclude robbery. *Id.* Thus, when defendant’s offenses occurred, the statutory elements of armed robbery in violation of section 18-2(a)(4) of the Criminal Code and armed violence predicated on robbery were identical. Notwithstanding, the offenses had different sentencing ranges. Public Act 91-404 (eff. Jan. 1, 2000) provided that armed robbery in violation of section 18-2(a)(4) of the Criminal Code was a Class X felony with a mandatory firearm enhancement of 25 years to life (720 ILCS

5/18-2(b) (West 2004)), while armed violence predicated on robbery was a Class X felony with a sentencing range of 25 to 40 years (720 ILCS 5/33A-3(b-10) (West 2004)).

¶ 12 In *People v. Harvey*, 366 Ill. App. 3d 119 (2006), this court concluded that the sentencing enhancement for armed robbery in violation of section 18-2(a)(4) of the Criminal Code violated the proportionate penalties clause. *Id.* at 130 (“the 25-year mandatory add-on penalty for armed robbery/discharging a firearm and causing great bodily harm [citation] violates the proportionate penalties clause because the penalty \*\*\* is more severe than the penalty for the identical offense of armed violence predicated on robbery”). Subsequently, in *Hauschild*, our supreme court followed *Harvey* in finding a 15-year enhancement for armed robbery while carrying a firearm also violated the proportionate penalties clause. *Hauschild*, 226 Ill. 2d at 86-87. After *Hauschild*, the General Assembly enacted Public Act 95-688 (eff. Oct. 23, 2007), which amended the armed violence statute to exclude robbery as a predicate felony. Consequently, “armed violence and armed robbery no longer have identical elements for purposes of proportionality review.” *People v. Blair*, 2013 IL 114122, ¶ 21.

¶ 13 Defendant’s offenses occurred on July 27, 2005, before Public Act 95-688 took effect. Thus, on that date, armed robbery involving the personal discharge of a firearm causing great bodily harm was punished more severely than armed violence predicated on robbery, despite having identical elements. Therefore, we agree with the parties that defendant’s 25-year firearm enhancement for armed robbery violates the proportionate penalties clause. See *Ligon*, 2016 IL 118021, ¶ 10. As such, we reverse the denial of defendant’s section 2-1401 petition and vacate the firearm enhancement.

¶ 14 Defendant further contends we should reduce his sentence to a term of 15 years without remanding for resentencing, as the trial court imposed 15-year sentences for his other Class X felonies and did not “indicate any desire to further punish [him].” In the alternative, he agrees with the State that this court should vacate his entire sentence for armed robbery in violation of section 18-2(a)(4) of the Criminal Code, and remand for resentencing under the law in effect prior to Public Act 91-404 (eff. Jan. 1, 2000).

¶ 15 Our supreme court has explained that, “when an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.” *Hauschild*, 226 Ill. 2d at 88-89. As here, when an enhancement is vacated, remand for resentencing is appropriate because “[t]he trial court had to the opportunity to view and weigh the significance of all the evidence and thus is in a better position than [the reviewing court] court to impose a sentence.” *People v. Herron*, 2012 IL App (1st) 090663, ¶ 29. This procedure allows the trial court “to reevaluate defendant’s sentence in light of his cumulative sentence and to then resentence him within the range.” *Hauschild*, 226 Ill. 2d at 89. Therefore, we remand to the trial court for resentencing under the law in effect prior to Public Act 91-404 (eff. Jan. 1, 2000).

¶ 16 In summary, we reverse the dismissal of defendant’s section 2-1401 petition, vacate his sentence for armed robbery under section 18-2(a)(4) of the Criminal Code, and remand to the trial court for resentencing on that offense. Defendant’s other convictions remain unaffected.

¶ 17 Reversed in part, vacated in part, and remanded.