

SECOND DIVISION

March 15, 2016

No. 1-14-0336

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. 10 CR 11210
)	
JAMES SHORT,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.

Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the trial court's order denying defendant's request for resentencing where the record does not reflect that his now-vacated conviction influenced the trial court's sentencing decision.

¶ 2 Defendant, James Short, appeals from an order of the circuit court granting in part and denying in part his *pro se* petition for relief from judgment under section 2-1401 of the Code of

Civil Procedure (Code) (735 ILSC 5/2-1401 (West 2010)). Short contends that the trial court properly vacated his conviction for aggravated unlawful use of a weapon, but erred by not granting his request to be resentenced where the record shows that his now-vacated conviction influenced the trial court's sentencing decision. We are unpersuaded, and affirm. The same trial judge who sentenced Short heard the petition. Viewed in context, the trial court did not solely consider Short was carrying a gun, as Short suggests, but shot someone with the gun he was carrying. And, as the trial and sentencing judge was in the best position to discern the import of the comments made during the sentencing.

¶ 3

BACKGROUND

¶ 4 In connection with the 2010 shooting of Eric Felters, Short was charged by indictment with attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, unlawful possession of a firearm by a gang member, aggravated battery, and aggravated unlawful use of a weapon. A full recitation of the facts can be found in the opinion of Short's direct appeal. *People v. Short*, 2014 IL App (1st) 121262, ¶¶ 6-62.

¶ 5 As relevant to this appeal, before trial, Short pleaded guilty to unlawful possession of a firearm by a gang member and aggravated unlawful use of a weapon. At trial, Felters and another witness testified they attended a house party which the police shut down. As Felters stood outside of the house, the driver of an SUV stopped next to him. Felters and the occupants began shouting at each other and Felters struck the front passenger with his fist through the open car window. Short, who was sitting in the back seat, took out a gun and fired one shot at Felters, which went through his forearm and struck him in the chest. A jury convicted Short of aggravated battery with a firearm, but not guilty of attempted murder.

¶ 6 On April 5, 2012, the trial court sentenced Short to 11 years' imprisonment for aggravated battery with a firearm and 5 years for possession of a firearm by a gang member. The court merged Short's guilty plea for aggravated unlawful use of a weapon with his conviction for possession of a firearm by a gang member. In determining Short's sentence, the trial court stated: "And what I can't get out of my mind is we're talking about, basically, at this point is a fist fight, and an individual brings a gun to a fist fight." The trial court again stated that Short brought a gun to a fist fight and shot somebody and concluded that "the sentence is necessary to deter others from committing the same crime. You can't carry guns; you can't shoot people; it's just that simple."

¶ 7 In October 2013, Short filed the petition for relief from judgment under section 2-1401. Short contended that his conviction for aggravated unlawful use of a weapon should be vacated in light of the supreme court's decision in *People v. Aguilar*, 2013 IL 112116. He further argued for reduction of his sentence due to the trial court's comments at the sentencing hearing which indicated his conviction for aggravated unlawful use of a weapon influenced the term imposed on his convictions. On January 17, 2014, the same trial court judge who imposed Short's sentence ruled on his section 2-1401 petition. The court vacated Short's conviction for aggravated unlawful use of a weapon, but denied his request for resentencing finding that the gist of the court's comments were about bringing a gun to a fist fight, which it believed was the basis for Short's sentence for aggravated battery with a firearm.

¶ 8 ANALYSIS

¶ 9 Short contends that this court should remand for resentencing because the trial court relied on his conviction for aggravated unlawful use of a weapon in determining his concurrent terms of 11 and 5 years' imprisonment. He maintains the trial court's comments during the

sentencing hearing that "[y]ou can't carry guns" and that Short brought "a gun to a fist fight" shows the trial court considered his now-vacated conviction in determining the sentence. The State responds that remand is unnecessary where the same trial court judge imposed Short's sentence and ruled on his section 2-1401 petition, and the court expressly stated that it did not rely on Short's vacated conviction in determining the sentence.

¶ 10 Section 2-1401 of the Code "provides a comprehensive statutory procedure by which final orders and judgments may be challenged more than 30 days after their entry." *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). In criminal proceedings, a section 2-1401 petition seeks to correct errors of fact that occurred in the prosecution of a case which were unknown at the time of trial and which, if known, would have prevented the judgment being entered. *People v. Johnson*, 352 Ill. App. 3d 442, 444 (2004). To obtain relief under section 2-1401, a defendant must show both a meritorious defense and due diligence in presenting it (*Pinkonsly*, 207 Ill. 2d at 565) or demonstrate that the underlying judgment is void (*People v. Thompson*, 2015 IL 118151, ¶¶ 31-32).

¶ 11 We initially note that the parties disagree about the standard of review to be applied. Short contends, citing *People v. Vincent*, 226 Ill. 2d 1, 18 (2007), we should review the circuit court's ruling *de novo*. The State responds, citing *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51, we should review the circuit court's dismissal for abuse of discretion. In his reply brief, Short maintains reliance on *Warren County* is misplaced because that case involved a civil matter and the application of the *de novo* standard review as applied in *Vincent* "has never been questioned in criminal cases."

¶ 12 Contrary to Short's contention, *Vincent* did not eliminate the abuse of discretion standard of review for section 2-1401 petitions in criminal cases. The court in *Vincent* concluded that "the

abuse of discretion standard is improper in section 2-1401 proceedings in which either judgment on the pleadings or dismissal for failure to state a cause of action has been entered." *Vincent*, 226 Ill. 2d at 15. In *Warren County*, the supreme court held that where a section 2-1401 petition presents a fact-dependent challenge to a final judgment, we review the circuit court's decision for an abuse of discretion. *Warren County*, 2015 IL 117783, ¶ 51. The court explained that "*Vincent* must be viewed in its narrow context of a section 2-1401 petition that raises a purely legal challenge to a judgment by alleging that it is void under subsection (f) of section 2-1401 [citation.]" *Id.* ¶ 47.

¶ 13 The trial court did not dismiss Short's petition on the pleadings nor did it dismiss the petition for failure to state a cause of action. Instead, the trial court granted Short's petition and vacated his conviction. Therefore, we find that the issue before us is not related to the merits of the section 2-1401 petition. Rather, the only question before us concerns the trial court's denial of Short's request for a reduction in his sentence following the grant of section 2-1401 relief. This presents a sentencing issue, and the well-established rule is that decisions on sentencing or resentencing are subject to review for an abuse of discretion. See, e.g., *People v. Fern*, 189 Ill. 2d 48, 53 (1999) (sentencing); *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010) (resentencing). Accordingly, we will review the trial court's denial of Short's request to be resentenced for abuse of discretion.

¶ 14 Short's section 2-1401 petition challenged his conviction for aggravated unlawful use of a weapon and his concurrent terms of 11 and 5 years' imprisonment imposed on his conviction for aggravated battery with a firearm, and his guilty pleas for aggravated unlawful use of a weapon, and unlawful possession of a firearm by a gang member. In ruling on Short's petition, the circuit

court vacated Short's conviction for aggravated unlawful use of a weapon, but declined to resentence him stating that its sentencing determination was based on Short's other convictions.

¶ 15 Short contends that the trial court's comments at the sentencing hearing that Short brought "a gun to a fist fight" and that "[y]ou can't carry guns; you can't shoot people," affirmatively show that the trial court considered his now-vacated conviction for aggravated unlawful use of a weapon in determining his sentence. He maintains that the court relied on this conviction. Contrary to Short's assertions, however, the trial courts comments, when viewed in context, do not show that the court considered the vacated conviction in imposing the sentence on the remaining conviction. *People v. Maggette*, 195 Ill. 2d 336, 354-55 (2001).

¶ 16 The same judge who originally sentenced Short also declined to resentence him finding that the gist of the his comments at sentencing directed at Short bringing a gun to a fist fight, which it believed was the basis for Short's sentence for aggravated battery with a firearm. Short's argument, therefore, relies on a few comments. We are certainly not in a better position to discern their import than the judge who made them. Moreover, the court's comments, when viewed in context, show that the trial court did not solely consider Short was carrying a gun, as Short suggests, but rather that he used the gun he was carrying to shoot someone. Short points out that the court stated that he brought "a gun to a fist fight," but the court went on to say "[a]nd he shoots somebody, not to scare the person, 'cause he shoots from a very [,] very close range and shoots him and strikes him right in the chest." Similarly, Short points out that the court stated that "[y]ou can't carry guns [,]" but the court went on to say that "you can't shoot people [.]" The record thus does not affirmatively show that the trial court considered Short's now-vacated conviction for aggravated unlawful use of a weapon in determining the sentence, and we find that the trial court did not abuse its discretion in denying him the relief requested.

¶ 17 Short, nonetheless, compares this case to *People v. Alejos*, 97 Ill. 2d 502 (1983) and *People v. Johnson*, 314 Ill. App. 3d 444 (2000). In *Alejos*, the defendant was convicted of voluntary manslaughter and armed violence based on voluntary manslaughter, and sentenced to concurrent terms of seven years imprisonment. *Alejos*, 97 Ill. 2d at 503, 511. The supreme court vacated the defendant's conviction for armed violence based on voluntary manslaughter and found that the trial court's repeated reference to the defendant's use of a gun showed that it was influenced by the vacated conviction in determining the defendant's sentence. *Id.* at 511-12. The supreme court remanded the case for resentencing finding that the trial court's comments were directed at the fact that the defendant used a gun, "a factor which the trial judge obviously, but mistakenly determined merited enhanced criminal punishment." *Id.* at 512.

¶ 18 Unlike in *Alejos*, the record does not affirmatively show that the trial court expressly relied on vacated factual circumstances in determining the Short's sentence. As discussed, the record shows that in announcing its sentencing decision, the trial court emphasized Short use of a weapon he was carrying to shoot someone, which was the basis for Short's sentence for aggravated battery. By contrast, in *Alejos*, the supreme court held the trial court should not have considered the defendant's use of a gun in determining his sentence. *Alejos*, 97 Ill. 2d at 512.

¶ 19 Similarly, in *Johnson*, the defendant was found guilty of aggravated vehicular hijacking and armed robbery, and in determining his sentence, the trial court stated that the defendant was found guilty of "two very serious charges." *Johnson*, 314 Ill. App. 3d at 451. On appeal, this court upheld the defendant's conviction for aggravated vehicular hijacking, but reversed his conviction for armed robbery and then remanded the case for resentencing. *Id.* This court determined resentencing to be necessary where the defendant was no longer found guilty of "two very serious charges," as the trial court stated. *Id.*

¶ 20 But here, even though the trial court vacated Short's conviction for aggravated unlawful use of a weapon, the import of the trial court's comments still applied to Short's remaining convictions. The trial court's comments at sentencing, when viewed in context, do not affirmatively show that the trial court considered the vacated conviction in determining his sentence, as the court's comments did in *Johnson*. The trial court's observations that Short used the gun that he brought to a fist fight to shoot someone was the basis for the sentence for aggravated battery with a firearm and does not affirmatively indicate that the trial court enhanced the sentence based on his conviction for aggravated unlawful use of a weapon. *Maggette*, 195 Ill. 2d at 354-55.

¶ 21 Affirmed.