2016 IL App (1st) 143948-U

FOURTH DIVISION
April 15, 2016

No. 1-14-3948

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. 00 CR 26997 (03)
	)	
FLOYD CUMMINGS,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's Class X armed robbery conviction is unconstitutionally disproportionate to the identical offense of armed violence predicated on robbery while armed with a category III weapon, and the trial court erred in dismissing defendant's section 2-1401 petition for relief from judgment.

¶ 2 Defendant Floyd Cummings appeals the dismissal of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), 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 predicated on robbery with a Category III weapon is punished less severely than armed

robbery, as charged in this case. On defendant's motion, we deconsolidated defendant's appeal in the instant case from his appeal from the denial of leave to file his *pro se* successive postconviction petition, which will be issued under case no. 1-14-1847.

¶ 3 In June 2002, defendant was convicted of armed robbery following a jury trial. Since the armed robbery was defendant's third Class X conviction, he was subsequently sentenced to natural life under the Habitual Criminal Act. 720 ILCS 5/33B-1 (West 2000). We have sufficiently detailed the facts of this case in our previous opinion in defendant's direct appeal, *People v. Cummings*, 351 Ill. App. 3d 343 (2004), and will therefore recite only those facts necessary to dispose of the issues raised here.

¶ 4 The evidence at trial established that in October 2000, defendant and two codefendants robbed a Subway Sandwich Shop at 5300 South Kimbark Avenue in Chicago. One of the codefendants was an employee on duty at the time of the robbery and the other codefendant was her boyfriend. The employee left the employee door open following a cigarette break, and defendant and the boyfriend entered armed with a baseball bat. The manager was taken into the back room and ordered to give them the petty cash as the employee emptied the cash register. Defendant bound the manager with duct tape. Both codefendants testified that defendant smashed the videocassette recorder surveillance, but the manager testified that the boyfriend had been armed with the baseball bat. Defendant's confession that he participated in the robbery was admitted at trial. A jury found defendant guilty of armed robbery.

¶ 5 At the sentencing hearing, the trial court heard evidence that defendant had previously been convicted of murder in 1967 and armed robbery in 1984. Based on these prior convictions, the trial court found defendant to be an habitual criminal and sentenced him to a term of natural life imprisonment pursuant to the Habitual Criminal Act. See 720 ILCS 5/33B-1 (West 2000).

¶ 6 On direct appeal, defendant argued that (1) his sentence for armed robbery was unconstitutional because armed robbery and armed violence predicated on robbery committed with a category III weapon were identical offenses that had disproportionate penalties, (2) his natural life sentence was disproportionate to his involvement in the offense and his codefendants' sentences, and (3) the trial court failed to conduct an adequate inquiry into his posttrial *pro se* claims of ineffective assistance. *People v. Cummings*, 351 Ill. App. 3d 343, 344 (2004).

¶ 7 As he does in the instant appeal, defendant argued that although he was not charged with or convicted of armed violence, he should be sentenced to three to seven years' imprisonment for the Class 2 offense of armed violence predicated on robbery with a category III weapon. *Id*. at 346. Defendant observed that armed robbery was a Class X felony punishable by 6 to 30 years' imprisonment (see 720 ILCS 5/18-2(b) (West 2000)), while the identical offense of armed violence predicated on robbery with a category III weapon was a Class 2 felony punishable by three to seven years' imprisonment (see 720 ILCS 5/33A-1(c)(3) (West 2000)). *Id*. at 346. We disagreed and found that defendant's sentence of natural life imprisonment for armed robbery was not unconstitutionally disproportionate. *Id.* at 349. We rejected defendant's other claims on appeal and affirmed his conviction and sentence. *Id.* at 353.

¶ 8 In March 2005, defendant filed his first *pro se* postconviction petition, arguing that the Habitual Criminal Act was unconstitutional as applied to the facts of his case because the trial court improperly considered his 1967 murder conviction, the trial court had discretion to sentence him as an habitual criminal, and the Habitual Criminal Act violated *ex post facto* laws. The trial court dismissed defendant's petition as frivolous and patently without merit. *People v. Cummings*, 375 Ill. App. 3d 513, 515-16 (2007). Defendant filed a motion to reconsider the dismissal based on the same claims, but also asserted new claims of ineffective assistance of trial

and appellate counsel for failing to object to defendant's eligibility to be sentenced under the Habitual Criminal Act. The court denied defendant's motion. *Id.* at 516.

¶ 9 On appeal, defendant again argued that his conviction for armed robbery violated the proportionate penalties clause of the Illinois Constitution. *Id.* "As he did on direct appeal, defendant asserts that under the identical elements test, his sentence for armed robbery is unconstitutionally disproportionate because armed robbery and armed violence predicated on armed robbery committed with a category III weapon are identical offenses that have disproportionate penalties." *Id.* at 516-17. This court observed that defendant had failed to raise this claim in his postconviction petition, and our review was limited to claims raised in the petition. However, defendant asserted "the issue can be raised on appeal because an unconstitutional statute is void and may be attacked in any court at any time." *Id.* at 517. This court further found that since defendant had already raised this issue on direct appeal, the claim was barred under the doctrine of *res judicata*. *Id.* at 517-18. Defendant argued that under the fundamental fairness exception, *res judicata* should not bar his claim because the law has developed and changed since his direct appeal and filing of his postconviction petition. *Id.* at 518. Defendant relied on *People v. Harvey*, 366 Ill. App. 3d 119 (2006), *appeal allowed*, 221 Ill. 2d 654 (2006), *People v. Hampton*, 363 Ill. App. 3d 293 (2006), *vacated in part*, No. 102413 (April 19, 2007), and *People v. Andrews*, 364 Ill. App. 3d 253 (2006). *Id.*

¶ 10 We declined to consider defendant's claim as an exception to *res judicata*. "The cases relied upon by defendant to invoke the fundamental fairness exception involved situations where *res judicata* was relaxed because our supreme court issued a decision after the defendant's conviction and sentence were affirmed on direct appeal which either recognized the right that the defendant relied upon or indicated that the defendant's direct appeal had been wrongly decided."

Id. We noted that the supreme court had not issued a decision since defendant's direct appeal that "either recognized the validity of defendant's argument or indicated that defendant's direct appeal was wrongly decided." *Id.* at 520. Notwithstanding these findings, this court considered and rejected the merits of defendant's argument that his natural life sentence under the Habitual Criminal Act was unconstitutionally disproportionate, and affirmed the dismissal of defendant's postconviction petition. *Id.* at 521-24.

¶ 11 In August 2013, defendant filed a motion for leave to file a *pro se* successive postconviction petition. Defendant asserted that he had an eyewitness to the Subway robbery that demonstrated his actual innocence, and that his confession was false and coerced. In his petition, defendant asserted (1) a claim of actual innocence based on an affidavit from a witness named Allen Blanch, an eyewitness to the robbery, (2) a coerced confession, (3) denial of his right to counsel during the lineup and interrogation, (4) ineffective assistance of trial counsel for failing to argue that defendant was deprived of his right to counsel and for failing to inform defendant of the State's offer of a plea offer of 30 years in prison, (5) ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness, and (6) that defendant's Class X conviction and sentence for armed robbery is disproportionate to the penalty for the identical offense of armed violence predicated on robbery with a category III weapon. The trial court denied defendant leave to file his successive postconviction petition.

¶ 12 In September 2014, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) while his appeal of the denial of motion for leave to file a successive postconviction petition was pending. In his section 2-1401 petition, defendant argued again that his natural life sentence under the Habitual Criminal Act based on his conviction for the Class X offense of armed robbery while armed with a dangerous weapon

other than a firearm violated the proportionate penalties clause because the identical offense of armed violence predicated on a robbery with a category III weapon was punishable as a Class 2 offense. Defendant asserted that the decisions rejecting his argument on direct appeal and appeal of the dismissal of his postconviction petition were wrongly decided. He further argued that these decisions were questioned in the recent decision in *People v. Ligon*, 2012 IL App (1st) 120913, ¶¶ 13-14. The trial court dismissed defendant's section 2-1401 petition as time-barred, barred under the doctrine of *res judicata*, and that his claim was not actionable under section 2-1401.

¶ 13 This appeal followed.

¶ 14 On appeal, defendant argues that his armed robbery conviction and natural life sentence must be vacated because it violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) in that the identical offense of armed violence predicated on robbery with a category III weapon receives a less severe sentence. Specifically, armed violence predicated on robbery with a category III weapon, which includes a bludgeon, is a Class 2 felony, punishable with a sentence of three to seven years. See 720 ILCS 5/33A-3(b) (West 2000); 730 ILCS 5/5-8-1(a)(5) (West 2000). Defendant was convicted of armed robbery with a weapon other than a firearm, which is a Class X offense, generally punishable with a sentence between 6 and 30 years. 720 ILCS 5/18-2(b) (West 2000); 730 ILCS 5/5-8-1(a)(3) (West 2000). However, defendant, having been twice convicted of Class X felonies, received a natural life sentence under the Habitual Criminal Act. 720 ILCS 5/33B-1 (West 2000) (now enacted at 730 ILCS 5/5-4.5-95(a) (West 2012)). As noted above, defendant has previously raised this issue in his direct appeal and his initial postconviction, and this court rejected defendant's argument. He

has raised it in his *pro se* successive postconviction petition, and now in his section 2-1401 petition.

¶ 15 While this appeal was pending, the Illinois Supreme Court 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. 720 ILCS 5/18-4(a)(3), (b) (West 2000). After finding that this was the defendant's third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment. 720 ILCS 5/33B-1 (West 2000).

¶ 16 Similar to defendant's argument in this case, the defendant asserted in a section 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 petition, "finding that 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." *Id.* ¶ 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." *Id.* (citing *People v. Ligon*, 2014 IL App (1st) 120913, ¶¶ 56, 11).

¶ 17 In considering the State's appeal, the supreme court first observed that the appellate court was correct in holding that the trial court's dismissal of the petition for forfeiture and it was improperly raised was correct. "Voidness challenges stemming from the unconstitutionality of a

criminal statute under the proportionate penalties clause may be raised at any time." *Id.* ¶ 9. Also, "a motion to vacate a void judgment is properly raised in a petition for relief from judgment under section 2-1401." *Id.*

¶ 18 "Article I, section 11, 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.' " *Id.* ¶ 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.' " *Id.* (quoting *People v. Guevara*, 216 Ill. 2d 533, 543 (2005)). A penalty may violate the proportionate penalties clause: "(1) if it is so cruel, degrading, or disproportionate to the offense that the sentence shocks the moral sense of the community; or (2) if it is greater than the sentence for an offense with identical elements." *Id.* Like defendant in the instant case, the defendant in *Ligon* based his challenge on the identical elements test.

¶ 19 Under the identical elements test, the 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." ' " *Id.* ¶ 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." *Id.*

¶ 20 The supreme 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 defendant was not sentenced under the aggravated vehicular hijacking statute, but rather the Habitual Criminal Act. The State relied on this court's decision in *Cummings*, 375 Ill. App. 3d at 521-22, for support. The supreme court disagree and overruled our conclusion in *Cummings*. *Id.* ¶ 17.

> "Therefore, where the [Habitual Criminal Act] is a solely recidivist sentencing statute that does not define any crime and thus has no elements to compare with another statute, it has no application to the identical elements test, which requires the court to compare the elements of each offense as set forth in the statute defining it. *** Additionally, because the [Habitual Criminal Act] only comes into play following a defendant's conviction of a third Class X felony, its sentencing provisions cannot be compared to the sentences for any of the particular Class X felonies that can trigger it." *Id.* ¶ 16.

¶ 21 Since "a defendant's eventual adjudication and sentence as an habitual criminal has no effect on a court's determination of whether a qualifying offense violates the proportionate penalties clause under the identical elements test," the *Ligon* court then examined whether aggravated vehicular hijacking while armed with a dangerous weapon has identical elements as armed violence while armed with a category III weapon. *Id.* ¶ 18. The court eventually determined that the two offenses did not have identical elements because the BB gun the defendant possessed did not fit within category III weapon for armed violence. *Id.* ¶ 20.

¶ 22 In light of the holding in *Ligon*, parties filed supplemental briefs addressing the result of *Ligon* on the instant case. Defendant responded that an examination of armed robbery with a

dangerous weapon, to wit, a bludgeon, and armed violence predicated on robbery with a category III weapon would yield identical elements.

¶ 23 Based on the statutes in effect at the time of defendant'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(a)(1) (West 2000). Section 18-1 is the offense of robbery, "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 2000). Defendant was charged by indictment with armed robbery, "in that they, knowingly took United State Currency from the person or presence of Johnny Johnson, by the use of force or by threatening the imminent use of force, and they carried on or about their persons or were otherwise armed with a dangerous weapon, other than a firearm, to wit: a bludgeon."

¶ 24 In comparison, "[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 felonies, which does not include robbery. 720 ILCS 5/33A-2(a) (West 2000). "A person is considered armed with a dangerous weapon for purposes of this Article, when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c)(1) (West 2000). The listed category III weapons include a "bludgeon." 720 ILCS 5/33-1(c)(3) (West 2000).

¶ 25 In *People v. Tate*, 68 Ill. App. 3d 881, 882 (1979), the reviewing court quoted a Michigan decision compiling several dictionary definitions of a bludgeon.

> " ' "(A) short stout stick or club, with one end loaded or thicker and heavier than the other, used as a weapon." The Oxford English Dictionary, 942 (1933).
>
> "(A) short, heavy club with one end weighted, or thicker and heavier than the other." The Random House Dictionary of the English Language, 161 (unabridged ed. 1971.)
>
> "1. a short stick that usu. has one thick or loaded end and is used as a weapon. 2. something used to attack or bully." Webster's New Collegiate Dictionary, 121 (G & C Merriam Co. ed. 1975).' " *Id.* (quoting *People v. Malik*, 245 N.W.2d 434, 436 (Mich. App. 1976)).

¶ 26 Defendant cites several cases which have found a baseball bat falls under the definition of a bludgeon. See *People v. Dunlap*, 315 Ill. App. 3d 1017, 1032 (2000) (finding that a baseball bat fell under the term bludgeon in the armed violence statute); see also *People v. Workman*, 368 Ill. App. 3d 778, 780-81 (2006), *People v. Moore*, 301 Ill. App. 3d 728, 734 (1998), *People v. Jeffries*, 164 Ill. 2d 104, 109-10 (1995), *People v. Cruz*, 162 Ill. 2d 314, 319 (1994), and *People v. Fair*, 159 Ill. 2d 51, 82 (1994) (all cases in which murder victims were bludgeoned by a baseball bat).

¶ 27 Defendant concludes that the offenses contain identical elements. See also *People v. Hauschild*, 226 Ill. 2d 63, 84 (2007) (finding armed robbery while armed with a firearm is identical to offense of armed violence predicated on a robbery while armed with a category I or II weapon); *People v. Clemons*, 2012 IL 107821, ¶¶ 19-26 (*Hauschild* remains the law as to the

meaning of the armed violence statute prior to its amendment by Public Act 95-688 (eff. Oct. 23, 2007) and correctly applied the identical elements test).

¶ 28 As defendant's points out, armed robbery with a dangerous weapon other than a firearm is a Class X offense, punishable by 6 to 30 years in prison, while armed violence predicated on robbery while armed with a category III weapon is a Class 2 offense, punishable by 3 to 7 years in prison. Therefore, the armed robbery with a dangerous weapon other than a firearm sentence is unconstitutionally disproportionate to the sentence for the identical offense of armed violence predicated on a robbery while armed with a category III weapon. Defendant asks this court to vacate his conviction and remand for entry of judgment and sentence on the offense that is punished less severely, armed violence predicated on robbery while armed with a category III weapon, a Class 2 felony.

¶ 29 In its supplemental brief, the State concedes that a baseball bat is a category III dangerous weapon under the armed violence statute, citing *People v. Denby*, 102 Ill. App. 3d 1141, 1149 (1981). The State also agrees with defendant that "*Ligon* compels the conclusion that the statutorily-prescribed 6-30 years penalty for his Class X armed robbery while armed with a dangerous weapon conviction is unconstitutionally disproportionate to the 3-7 year penalty prescribed for the commission of an identical Class 2 armed violence predicated on robbery while armed with a category III weapon offense."

¶ 30 We agree with both parties. Armed robbery while armed with a dangerous weapon other than a firearm is composed of the identical elements for armed violence predicated on robbery with a category III weapon as both existed at the time of defendant's offense. Since armed robbery constituted a Class X conviction while armed violence was a Class 2, the Class X penalty is unconstitutionally disproportionate and defendant is entitled to relief. The supreme

court in *Ligon* recognized that a section 2-1401 was an appropriate method for defendant to challenge his void sentence, we reverse the trial court's dismissal of defendant's section 2-1401 petition. See *Ligon*, 2016 IL 118023, ¶ 9. We vacate defendant's conviction for armed robbery and remand for entry of judgment on armed violence predicated on robbery while armed with a category III weapon and sentence on that offense.

¶ 31 Reversed; vacated and remanded with directions.