

22-7141
IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2023

DONALD LEE MCDONALD.SR

Petitioner

-VS-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent

Supreme Court, U.S.
FILED

FEB 24 2023

OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the decision of the First District Appellate court of Illinois denying Petitioner's proportionate penalty clause claim conflicts with the decision of the United States Supreme Court in Solem v. Helm, 436 U.S. 277, 103 S.Ct. 3001 (1983), in violation of the 8th and 14th Amendment to the United States Constitution; where Petitioner was sentenced to natural life under the Illinois Habitual Criminal Act for a violation of a non-violent felony.

POINTS AND AUTHORITIES

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JURISDICTION

On December 12, 2019 petitioner filed a pro se petition for relief from judgment that alleged (1) his offense was not a forcible felony and did not involve violence, making his life sentence void as a violation of the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I§ 11) and the Eighth Amendment of the United States Constitution (U.S. Const., Amend. VIII); (2) the trial court erred in denying his motion to quash arrest as his warrantless arrest was unconstitutional pursuant to People v. Bass 2019 IL App(1st) 160640.

On June 30, 2020 the circuit court dismissed defendant's petition. The court found, inter alia, that defendant was constitutionally sentenced as a habitual criminal and he was not arrested on an investigative alert. Ignoring People v. Smith, 2022 IL App(1st) 190691.

On October 27, 2020, petitioner filed a motion for leave to file a late notice of appeal. The Office of the State Appellate Defender, which represented petitioner on appeal filed a motion for leave to withdraw as appellate counsel, citing Pennsylvania v. Finley, 481 U.S. 551 (1987). On December 22, 2021 the court denied counsel's motion until counsel moved the Illinois Supreme Court for a supervisory order for the filing of a late notice of appeal because the clerk of the circuit court failed to notify petitioner that the circuit court had denied petitioner's motion.

On January 20, 2022, the Supreme Court granted petitioner's motion for a supervisory order and directed the court to treat his October 27, 2020, motion for leave to file late notice of

appeal as properly perfected appeal. McDonald v. Gordon, No. 128059 (ILL. Jan. 20, 2022). Counsel filed another motion for leave to withdraw and on May 4, 2022 Petitioner responded. Counsel's motion was granted and the court affirmed the circuit court's decision. (unpublished pursuant to Illinois Supreme Court Rule 23 and included herein in Appendix A.)

No petition for rehearing was filed. Petitioner was given to December 9, 2022 to timely file petition for leave to appeal to the Illinois Supreme Court by the clerk of the court. On December 2, 2022 petitioner's petition was filed and on January 25, 2023 the Illinois Supreme Court Denied leave to appeal. (the order of the Illinois Supreme Court denying petitioner's request for review is attached hereto as Appendix B).

Therefore, the court has jurisdiction pursuant to 28 U.S.C. § 1651 and this Court's Rule 10 (c).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment provides that; "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment provides that: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

720 ILCS 5/5-4.5-95, and 720 ILCS 5/12-13(a)(3).

STATEMENT OF THE CASE

On December 12, 2019 petitioner filed a pro se petition for relief from judgment in the circuit court of Cook County. The issues raised were; (1) his conviction was not for a forcible

felony which did not involve violence, making petitioner's sentence void as a violation of the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970 art. I § 11); and the Eighth Amendment to the United States Constitution (U.S.C.A. Const. Amend. 8); and (2) the trial court erred and abused its discretion in denying his motion to quash arrest and suppress his statement as petitioner's arrest was without a warrant supported by affidavit in violation of Article I Section II of the Illinois Constitution of 1970 and pursuant to People v. Bass, 2019 IL App(1st) 160640 ¶43(finding that "arrest based solely on investigative alerts, even those supported by probable cause, are unconstitutional under the Illinois Constitution.

On June 30, 2020 the circuit court dismissed petitioner's petition. The court found that Petitioner was sentenced constitutionally as a habitual offender and he was not arrested based on an investigative alert and failed to notify petitioner of the court's decision making him file a late notice of appeal. The court failed to address the state legislature's amendment to the habitual criminal statute that required offenses to be forcible felonies and that the first conviction had to have occurred after the defendant was twenty one years of age. Petitioner's first conviction occurred when he was 18 and his current conviction is not a forcible felony. Nor did the court address the retroactive nature of procedural amendments in Illinois law.

As stated, petitioner appealed to the appellate court and raised the same issues, they affirmed and the state supreme court denied review.

ARGUMENT

Whether the decision of the First District Appellate Court of Illinois denying Petitioner's proportionate penalty clause claim violates the 8th, and 14th Amendment of the United States Constitution and conflicts with this Court's decision in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983); where Petitioner was sentenced to natural life without parole under the Illinois Habitual Criminal Act for a violation of a non-violent felony.

Consistent with Illinois Supreme Court Rule 651(c) Appellant had a right to a reasonable level of assistance. The office of the State Appellate Defender's motion for leave to withdraw as counsel on appeal based on counsel's view that petitioner's cause has no arguable issues of merit is inconsistent with the law and facts of the case. 735 ILCS 5/2-1401(f), Article I Section 2 and 6 of the Illinois Constitution, and Amendments 8 and 14 of the United States Constitution.

Section 2-1401(f) holds. "Nothing contained in this section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief."

On July 1, 2021 the Illinois Legislature amended the Habitual Criminal Act (Act) to require, "the first conviction must occur after defendant is twenty one (21) years of age; and requires the defendant be convicted of a forcible felony. See 720 ILCS 5/5-4.5-95(a)(b). Petitioner's claim in the circuit court was that his instant offense is not a forcible felony. Petitioner asked the state court in the pursuit of equal protection should determine whether the new statute supports petitioner's claim as jurisdiction is created by statute and the Illinois Constitution gives courts their subjectmatter jurisdiction through statute also. And appointed counsel's argument that Petitioner's use of section 2-1401(f) to address this issue is inconsistent with Illinois Constitution.

According to People v. Lawton, 212 Ill.2d 285,(2004) "one of the guiding principles in the administration of 2-1401 relief is that the petition invokes the equitable powers of the circuit court to prevent enforcement of a judgment when doing so would be unfair, unjust or unconscionable. Smith v. Airoom Inc., 114 Ill.2d 209, 225, 102 Ill. Dec. 368, 499N.E.2d 1381(1986). The Court has said that petitions filed under the statute may also be used to challenge judgments claimed to be defective for legal reasons. Sarkissian v. Chicago Board of Education, 201 Ill.2d 95 (2002). There, the Chicago Board of Education was allowed to use section 2-1401 to challenge prior judgments against it on the grounds that the manner in which it had been served did not comply with statutory requirements.

In People v. Harvey, 196 Ill.2d 444, 257 Ill.Dec. 98, 753 N.E.2d 293(2001), the defendant was permitted to proceed under section 2-1401 in raising an unsuccessful challenge to an extended term sentence based on claim that it did not meet requirements of the sentencing statute. In holding that section 2-1401 does not permit actions such as appellant's, counsel imposed restrictions that the language of the statute does not include. The Office of the State Appellate defender has failed to identify that even wrong remedy is not fatal under section 2-1401(f).

The courts have said relief should be granted under section 2-1401(f) when necessary to achieve justice according to law. To accomplish that goal, the statute is to be construed liberally, In re Marriage of Hoppe, 220 Ill. App.3d 271, 282-83, 162 Ill.Dec. 276, 580N.E.2d186(1991). A section 2-1401 petition for relief from a final judgment is the forum in a criminal case to correct

errors of fact occurring in the prosecution of a cause, unknown to the petitioner and the court at the time judgment was entered, which if known then, would have prevented its rendition. People v. Haynes, 192 Ill.2d 437, 460-61 (2000).

The Court said in People v. Ligon, 48 N.E.3d 654 (2016) "a criminal statute under the proportionate penalty clause may be raised at any time, prohibiting the application of waiver and even forfeiture. In People v. Guerara, 216 ILL.2d 533 (2005) the Court was more to petitioner's point where his voidness challenge was timely before the Court in Cook County. Even in Sarkissian v. Chicago Board of Education, 201 Ill.2d 95, 104-05 (2002) the Court said "A motion to vacate a void judgment is properly raised in a petition for relief from judgment. Fundamental fairness is more about justice than it is about finality, especially if someone got it wrong.

The Court has consistently held that proceedings under section 2-1401 petitions are essentially complaints inviting responsive pleadings subject to the rules of Civil Proceedings. Ostendorf v. International Harvester Co., 89 Ill.2d 273, 279 (1982). And as with complaints in civil matters, when the opposing party elects to forego filing an answer on the merits, the respondent is deemed to have waived any question as to the petition's sufficiency, and the petition will be treated as properly stating a cause of action. Windmon v. Banks, 31 IL App.3d 870, 873, 335 N.E.2d 116 (1975). On appeal any claim of insufficiency will be deemed to have been defaulted and an appellate defender acting as counsel for the appellant cannot waive this default in the guise of friendly fire.

Petitioner's claim that his conviction was not for a violent felony because no force was alleged, cannot be allowed to support a natural life sentence as the Legislature intends. 720 ILCS 5/5-4.5-95(a)(b) effective July 1, 2021. Procedural amendments are retroactive and this claim is sufficeint as a matter of law. Since respondent did not answer the petition, it should constitute an admission of all well pleaded facts, here, the trial court should have decided the case on the pleadings, affidavits and supporting material before it, including the record of the prior proceedings. Ostendorf 89 Ill 2d at 286.

If "[N]othing contained in this section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief,"(5/2-1401(f)) and Due Process requires the court to impliment formal proceedings carred out regularly, fairly, and in accordance with established rules and principles, There should not be one rule for sex offenders under 2-1401, one for murderers under 2-1401, and one for robbers under 2-1401. Due process under section 2-1401 should provide opportunities to be heard and defend one's right to life and liberty. The circuit and appellate courts, with appointed counsel's help, have conspired to undermine Petitioner's liberty interest with decisions that ignore statutes which form their subject matter jurisdiction in the name of what, justice, if so, not by law.

Had counsel professionally examined the record of the trial court and made amendments to the petition necessary for an adequate presentation, counsel would have seen that the claims put

forward by appellant are supported by new legislation from the Illinois Legislature. A natural life sentence under the Act based on convictions for non-forcible offenses like criminal sexual assault (a)(3) must violate the proportionate penalty clause because the use of force, a violent crime is being punished the same as a non-violent crime under the Act.

The identical offenses of aggravated criminal sexual assault and criminal sexual assault with the use of force (a)(1) are punished the same as consent with a fourteen year old who was not threatened. The Legislature must not have considered proportionality under the Act because all criminal sexual assaults are not the same and should not be punished the same as criminal sexual assault under (a)(1) thru (a)(3). This concept omitts the "seriousness of the offense." Look at aggravated criminal sexual assault, is the use of force the same, as intercourse without force or threats, the trauma to the victims.

In analyzing a proportionate penalties challenge, the ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense. 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." People v. Ligon 206 N.E.2d 654(2016).

Under the identical elements test, the Supreme Court has consistently held that, "...if the legislature determines that

the same elements merits two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense. People v. Sharpe, 206 Ill.2d 481, 522 (2005).

Where a lesser included offense yields the same penalty as a more harsh offense, this Court should hold the penalties are unconstitutionally disproportionate and the greater penalty for the lesser offense should not stand.

Criminal sexual assault 720 ILCS 5/12-13(a) is a class one felony, "a second or subsequent conviction for a violation of this section or under any similar statute of this State or any other state for any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexualt prohibited under this section is a class x felony." Criminal sexual assault (a)(1) is substantially more serious than (a)(3). Although appellant's conviction under (a)(3) is not substantially equivalent to or more serious than the sexual assault prohibited under section (a)(1)(denying the trial court subject matter jurisdiction to enhance Petitioner's sentence under the statute) his class one felony conviction was enhanced to class x.

Aggravated criminal sexual assault, 720 ILCS 5/12-14(West 1995) is committed when, the accused displayed, threatened to use, or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon, or the accused caused bodily harm to the victim; or the accused acted in such a manner as to threaten or endanger the life of the victim or any other person."

The accused commits criminal sexual assault, 720 ILCS

5/12-13 (West 1995) if he or she commits an act of sexual penetration by the use of force, or threatens to use." A person threatens force by displaying, threatens to use, or uses a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim to reasonably believe it to be a dangerous weapon.

A person commits criminal sexual assault, 1720 ILCS 5/11-1.20(a)(3) (West 2013), if that person commits an act of sexual penetration and is a family member of the victim, and the victim is under 18 years of age.

The framers of the 8th Amendment to the United States Constitution adopted the language and principles of proportionality as did Illinois. The consistent theme of the time was the American's must have all the rights of English subjects. So the constitutional principle of proportionality has been recognized explicitly in the Supreme Court of the United States for more than a century. That court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. The court has also held as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Robinson v. California, 370 U.S. at 667, 82 S.Ct at 1420.

SCOTUS' proportionate analysis under the 8th Amendment, applied to the states by the fourteenth Amendment is also guided by objective factors: (1) the gravity of the offense and harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction; and (3) the sentence imposed for com-

mission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001(1981). Helm's sentence violated the principles of the 8th Amendment and the Illinois Constitution, Art. I. Section 11, this State's "ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense." Guevara, 216 Ill.2d 533, 543 (2005).

So a violation of the 8th Amendment should be the same as a violation of Art. I, Sec. 11, because "the gravity of the offense and the harshness of the penalty, Coker v. Georgia, 433 U.S. 584, 592, (7 S.Ct. 286(1977)) is identical to, "if it is so cruel, degrading or disproportionate to the offense that the sentence shocks the moral sense of the community." Ligon, 2016 IL 118023. This Court must use its supervisory authority to correct an apparent fundamental miscarriage of justice. And criminal sexual assault under (a)(3) is not substantially equivalent to nor more serious than (a)(1). The legislature has not set the sentence under the Act, "to restore citizens to useful citizenship," art. I sec 11. Ill. Const. 1970, but recidivism. A sentence in Illinois that doesn't consider the seriousness of the crime and the objective of restoring individuals to useful citizenship is an excessive sanction. U.S.C.A. 8. Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting) Roper v. Simmons, 543 U.S. 551, 560(2005). The 8th Amendment forbids extreme sentences that are 'grossly' disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 997, 1001(1991).

Appellant's sentence of life imprisonment without the possibility of parole relating to his commission of a nonviolent crime is significantly disproportionate to his crime. Solem v.

Helm, supra, now see People v. Tolbert, 2021 IL.App (1st) 180117-u and Harmelin, 501 U.S. at 1001 (8th Amendment prohibits extreme sentences that are grossly disproportionate to the crime); People v. Knox, 2014 ILApp (1st) 120349. Appellant's sentence is grossly disproportionate to his crime and in violation of both state and federal constitutions. Solem, 463 U.S. 277 (1983).

A sentence that violates the constitution is void from inception, and may be challenged at any time, in any court, either directly or collaterally. People v. Davis, 2014 IL 15595. "All penalties shall be determined both according to the seriousness of the crime, and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970. The Legislature failed to consider section (a)(3)'s seriousness under the Act or the goal of restoring offenders to useful citizenship." Webster's Dictionary defines "determined" as resolute; firm. It does not mean consider, which is defined as "to think about in order to understand or decide." So when our courts say the Legislature have considered the seriousness of the offense, and restoring the offender to useful citizenship when enacting these recidivist laws, that is an unlawful abridgement of the Illinois Constitution because in Illinois, courts are not allowed to consider the seriousness of the offense and restoring the offender to useful citizenship, courts are commanded to "determine" "shall determine" resolutely and firmly decide according to the seriousness of the offense and restore to useful citizenship. (Ill. Const. art. I Sec. 11). Nowhere does the constitution allow the courts to "consider restoring offenders to useful citizenship." They are to determine. Therefore, the trial court violated its subject matter jurisdiction

in sentencing Appellant to natural life based on recidivism and not restoring him to useful citizenship. Petitioner's natural life sentence is void, this Court must issue a supervisory order to the trial court to resentence Appellant according to the Illinois' Constitutional command to restore him to useful citizenship.

Appellant ask this Court to also take judicial notice that Section 5/5-4.5-95(4)(E) of the Act now holds, "The first offense was committed when the person was 21 years of age or older," and requires the offenses to be forcible felonies. Pursuant to 5ILCS 70/4 statute on statutes, 5/5-4.5-95(4)(E) must be applied to any judgment or punishment and shall conform to the law in force at the time of such proceeding, requires procedural laws such as this to be applied retroactively. Again, Appellant's sentence should be vacated and he sentenced according to the constitutional command to be restored to useful citizenship.

Courts review de novo the dismissal of a section 2-1401 petition sua sponte by the circuit court. People v. Vincent, 226 Ill.2d 312 Ill. Dec. 617, 871 N.E.2d 17(2007)

The Court in Caveney v. Bower, 207 Ill.2d 82, 92, 287 Ill. Dec. 1, 797 N.E.2d 596 (2003), found "section 4 of the statute on statutes represents a clear legislative directive with respect to a statutory amendment or repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not. Appellant contends the amendment to 720 ILCS 5/33B-1, now 730 ILCS 5/5-4.5-95(4)(E) is procedural and applies retroactively to appellant where his first offense was committed when he was 18 years of age and 5-4.5-95 (4)(E) now requires individuals to be at least 21 years of age or older

when the first offense was committed, and that each offense be a forcible felony, which Petitioner's current offense is not. See People v. Ortiz, 2016 IL App(1st) 133294, 408 Ill.Dec. 469, 65 N.E.3d 945.

Wherefore, Petitioner respectfully request he be granted review and appointment of counsel to better present his issue.

Respect submitted,

Date: 2-15-23

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