

NOTICE
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2011 IL App (4th) 100416-U

Filed 11/2/11

NO. 4-10-0416

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARKELE D. POWELL,)	No. 07CF2066
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held*: 25-years-to-life enhancement was not unconstitutionally vague.

¶ 2 This case involves the constitutionality of one of the "15/20/25-to-life" sentence-enhancement amendments. See Pub. Act 91-404, § 5, eff. January 1, 2000. Specifically, this court is called upon to evaluate the constitutionality of the sentencing enhancements in the context of attempt (first degree murder).

¶ 3 Ordinarily, the baseline sentence for the crime of attempt (first degree murder) is 6 to 30 years' imprisonment. 720 ILCS 5/8-4(c)(1) (West 2006) ("attempt to commit first degree murder is the sentence for a Class X felony"); 730 ILCS 5/5--8-1(a)(3) (West 2006) ("except as otherwise provided in the statute defining the offense, for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years"). In 2000, however, the legislature enacted Public Act 91-404, which amended the sentencing provisions of each of several different

felonies, including attempt (first degree murder) (see 720 ILCS 5/8-4(c)(1)(B),(C),(D) (West 2006)), when a firearm is involved in the commission of the felony. Pub. Act 91-404, § 5, eff. January 1, 2000.

¶ 4 These amendments add a mandatory additional term of years to whatever sentence would otherwise be imposed. The degree of enhancement depends upon the degree of involvement of the firearm. Commission of attempt (first degree murder) while simply armed with a firearm adds a mandatory 15-year enhancement to the sentence (see 720 ILCS 5/8-4(c)(1)(B) (West 2006)); personally discharging a firearm while committing attempt (first degree murder) adds a mandatory 20-year enhancement (see 720 ILCS 5/8-4(c)(1)(C) (West 2006)); and personally discharging a firearm while committing attempt (first degree murder) and proximately causing a death or severe bodily injury thereby requires that the circuit court increase the sentence by 25 years' up to life imprisonment (see 720 ILCS 5/8-4(c)(1)(D) (West 2006)).

¶ 5 In December 2007, defendant Markele D. Powell, was indicted in the circuit court of Champaign County on one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a) (1) (West 2006)) and one count of attempt (first degree murder) (720 ILCS 5/8-4(a), 9--1(a)(1) (West 2006)), in connection with the shooting of Indea Dorsey on November 26, 2007. A jury found him guilty of aggravated battery with a firearm and attempt (first degree murder). Finding the two offenses merged, the trial court sentenced him to imprisonment for 75 years.

¶ 6 On direct appeal, this court affirmed defendant's convictions and sentences. *People v. Powell*, No. 4-08-0398 (May 28, 2009) (unpublished order under Supreme Court Rule 23). In February 2010, defendant *pro se* filed a postconviction petition arguing (1) the trial court

should have found him unfit to stand trial and (2) his sentence was excessive. In May 2010, the trial court dismissed the petition finding defendant had forfeited his claims by failing to raise them on direct appeal.

¶ 7 Defendant argues the 25-to-life enhancement is unconstitutionally vague and is not reasonably designed to remedy the harm the legislature sought to address. Defendant did not raise this issue in his postconviction petition. Our supreme court has clearly stated that "[t]he question raised in an appeal from an order dismissing a post[]conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act." (Emphasis added.) *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063, 1075 (1998). Moreover, section 122-3 of the Post-Conviction Hearing Act (Act) provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122–3 (West 2008). In light of the prevailing standard of review and the plain language of section 122–3 of the Act, our supreme court has held that a claim not raised in a postconviction petition may not be asserted for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004) (*Jones II*); *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004) (*Jones I*). Defendant acknowledges his claim was not included in his petition but argues that the issue can be raised on appeal because an unconstitutional statute is void and may be attacked at any time or in any court. See *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004).

¶ 8 All statutes are presumed to be constitutional. *In re R.C.*, 195 Ill. 2d 291, 296, 745 N.E.2d 1233, 1237 (2001). The party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation. *R.C.*,

195 Ill. 2d at 296, 745 N.E.2d at 1237. It is our duty to construe acts of the legislature so as to affirm their constitutionality and validity if we can reasonably do so. *R.C.*, 195 Ill. 2d at 296-97, 745 N.E.2d at 1237.

¶ 9 A vagueness challenge is a due process challenge, examining whether a statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. *People v. Greco*, 204 Ill. 2d 400, 415-16, 790 N.E.2d 846, 856 (2003). When considering a vagueness challenge to a statute, a court considers not only the language used, but also the legislative objective and the evil the statute is designed to remedy. *R.C.*, 195 Ill. 2d at 299, 745 N.E.2d at 1239. A statute satisfies due process if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited; and (2) the statute provides sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions. *Greco*, 204 Ill. 2d at 416, 790 N.E.2d at 856-57.

¶ 10 The 25-to-life enhancement to the crime of attempt (first degree murder) states that "the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that *** an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(D) (West 2006).

¶ 11 Defendant argues the 25-to-life enhancement is unconstitutionally vague "because

it encourages the arbitrary and discriminatory imposition of sentences as the statute contains no criteria to guide judges in the imposition of sentences within the applicable sentencing range."

We disagree.

¶ 12 The 25-to-life enhancement plainly and unambiguously notifies a person of ordinary intelligence that if he or she personally discharges a firearm during an attempt to commit first degree murder, and proximately causes a death or great bodily harm, those acts require the circuit court to increase the sentence by 25 years' up to life imprisonment (see 720 ILCS 5/8-4(c)(1)(D) (West 2006)). Due process requires fair notice, which section 8-4(c)(1)(D) provides.

¶ 13 Further, section 8-4(c)(1)(D) provides sufficiently definite standards for trial courts to fairly administer the law. The range of sentences permissible for a particular offense is set by statute. *People v. Fern*, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 210 (1999). Contrary to defendant's argument that a sentence pursuant to section 8-4(c)(1)(D) is left "to the whim" of the trial court, the permissible range of sentences set by statute is 31 years to natural life for attempt (first degree murder). Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *Fern*, 189 Ill. 2d at 55, 723 N.E.2d at 210. The trial court is to consider "all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *People v. Barrow*, 133 Ill. 2d 226, 281, 549 N.E.2d 240, 265 (1989).

¶ 14 Section 8-4(c)(1)(D) plainly and unambiguously establishes a sentencing range of "25 years or up to a term of natural life *** added to the term of imprisonment imposed by the

court." In this case, the permissible range of sentences set by statute is 31 years to natural life for attempt (first degree murder). Trial courts commonly determine sentences within statutorily defined ranges in the sound exercise of their discretion. *People v. Hickman*, 163 Ill. 2d 250, 258, 644 N.E.2d 1147, 1150 (1994). Section 8-4(c)(1)(D) is not unconstitutionally vague.

¶ 15 Defendant also argues the 25-to-life enhancement is unconstitutionally vague because "it is not a reasonable method of achieving the legislature's objective of deterring the use of firearms." We disagree.

¶ 16 The legislature has determined that firearm use is a serious problem because of the real danger that such weapons can cause accidental lethal injury. See *People v. Sharpe*, 216 Ill. 2d 481, 531, 839 N.E.2d 492, 522 (2005). In order to combat this problem the legislature has decided to impose a sentencing enhancement of 25 years to life when a perpetrator discharges a firearm during the commission of a serious felony and causes serious harm to another person by doing so. "To pass muster under the due process clause, a penalty must be reasonably designed to remedy the particular evil that the legislature was targeting." *Sharpe*, 216 Ill. 2d at 531, 839 N.E.2d at 523. The legislature clearly spelled out its intent in enacting the firearm enhancements in a codified statement of legislative intent. See 720 ILCS 5/33A-1(a), (b) (West 2000). In this statement, the legislature notes the serious threat to the public health, safety, and welfare caused by the use of firearms in felony offenses. The legislature states that its intent is to impose particularly severe penalties in order to deter the use of firearms in the commission of felonies, and that it believes that the use of firearms in the commission of felonies needs to be punished even more severely than offenses such as aggravated battery with a firearm and aggravated discharge of a firearm. See 720 ILCS 5/33A-1(a), (b) (West 2000). Moreover, our supreme

court has held that "[u]nquestionably, the 15/20/25-to-life enhancements are reasonably designed to remedy the particular evil the legislature was targeting." *Sharpe*, 216 Ill. 2d at 532, 839 N.E.2d at 523. We find no due process violation in the legislature's determination that the social ill being addressed merits the penalty imposed.

¶ 17 To the extent defendant argues for the first time on appeal that the trial court "did not explain how she apportioned the sentence," defendant has forfeited this issue by failing to raise it in his postconviction petition. See *Jones II*, 213 Ill. 2d at 505, 821 N.E.2d at 1097; *Jones I*, 211 Ill. 2d at 148, 809 N.E.2d at 1239.

¶ 18 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 19 Affirmed.