

FOURTH DIVISION  
APRIL 18, 2013

No. 1-11-3782

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 JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	10 CR 5563 (02)
	)	
RAUL NOA,	)	The Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.

Justice Fitzgerald Smith concurred in the judgment.

Justice Epstein specially concurred.

ORDER

HELD: The defendant's sentence pursuant to the sentencing enhancement provision for the offense of armed robbery was affirmed where the sentencing enhancement for armed robbery was held unconstitutional under the proportionate penalties clause because the sentence for armed robbery was more severe than the sentence for the identical offense of armed violence based on robbery with a category I or II weapon (720 ILCS 5/33A-3(a) (West 2000)), but the armed violence statute was subsequently amended, thereby reviving the armed robbery sentencing enhancement, pursuant to *People v. Blair*, 2013 IL 114122 (March 21, 2013).

¶ 1

## BACKGROUND

¶ 2 Defendant, Raul Noa, was charged by indictment and convicted in a bench trial of the offenses of armed robbery with a firearm, armed habitual criminal, unlawful use of a weapon by a felon, aggravated unlawful use of a weapon carried in a vehicle, aggravated unlawful use of a weapon carried on or about his person, and aggravated unlawful restraint.

¶ 3 The following facts were adduced at defendant's bench trial and from defendants' statement of facts, which the State has adopted for purposes of this appeal.

¶ 4 Robert Wojdulewicz testified that around 12:35 p.m. on September 19, 2009, he was driving west with his wife in his vehicle on Belmont Avenue near Central Avenue when he saw someone running out of a jewelry store on the right-hand side of the street. The man he saw was dressed in dark clothing and had something black covering his face. The man jumped into a white van, which was parked outside of the jewelry store facing west. Wojdulewicz pulled his vehicle up next to the van and looked at the driver. As the van pulled ahead of him, Wojdulewicz read the vehicle's plate number to his wife and asked her to write it down. He then saw the van turn right and proceed north on Central Avenue. Wojdulewicz called 911 to report what he had seen, including the van's direction and license plate number. Wojdulewicz identified defendant in a lineup later that evening, and also subsequently at trial, as the man he had seen driving the white van.

¶ 5 The owner of Belmont Jewelers, Dionizy Kacprzyk, testified with the aid of a Polish interpreter that on September 19, 2009, at around 12:30 p.m., two men came into his store holding guns. Both of the men had their faces veiled. The taller of the two men stood by the

No. 1-11-3782

door, while the shorter man jumped over the counter and put a gun under Kacprzyk's chin.

Kacprzyk understood that the men wanted him to open the safe, but he was in shock and did not move. When Kacprzyk failed to open the safe, the shorter man smashed a glass showcase and put jewelry from it into a black bag. Approximately 15 minutes earlier, defendant had come into the store offering to sell some jewelry, but Kacprzyk had responded that the store does not buy jewelry and defendant left.

¶ 6 After the shorter man put the jewelry from the case into a black bag, Kacprzyk heard honking coming from a white van outside. He identified defendant in court as the driver of the van. He recognized defendant from when he had walked in trying to sell jewelry 15 minutes earlier. When defendant began honking and gesturing from the van, the shorter man jumped back over the counter and, in the process, knocked over one of the glass showcases with his foot. The two men lifted up the veils covering their faces as they exited the store and then ran into the white van with the bag of jewelry. The van drove away.

¶ 7 Police arrived and an officer took Kacprzyk to Cicero, where he identified the tall man who had stood by the door during the robbery and identified defendant as the driver of the van. Kacprzyk also identified various pieces of jewelry recovered nearby as jewelry that had been taken from his store.

¶ 8 Three police officers also testified: Detective Steve Tanaka, David Ciancio of the Cicero police department, and Brian Dorsch, of the Chicago police department, 25th District. The officers testified that, after 1 p.m., Chicago and Cicero police officers pursued a white van in Cicero that matched the description of the vehicle involved in the robbery. After Chicago police

No. 1-11-3782

followed the van for about three-quarters of a block, the van slowed down and two people exited from the sliding back passenger door. The police chased the two men on foot and caught one of the men, finding jewelry scattered nearby. Meanwhile, a Cicero police officer spotted the van driving with its sliding door open and activated his vehicle's lights and followed the van for about two blocks. The van accelerated and the Cicero officer continued pursuit. The van ultimately stopped at 21st Street in Cicero when it was blocked by squad cars. Defendant was ordered out of the van and placed in custody.

¶ 9 Later, at the 25th District Chicago police station, Officer Dorsch recovered a silver chrome Jennings firearm from the van. The weapon was located inside the upper half of the van's steering column, which could be accessed by lifting up a portion of the column that was covered by velcro. When Kacprzyk viewed the firearm, he indicated that it looked similar to the gun that had been used to rob him, but he could not positively identify it as the same gun. Officer Dorsch acknowledged in his testimony that he never saw defendant with the firearm.

¶ 10 Defendant testified that on September 19, 2009, two of his son's friend's Mr. Aguilar and Mr. Barbaro, both of whom he believed to be around twenty years old, came to his home at approximately 10:30 a.m. They asked defendant to drive them to a girl's house about 45 minutes away, and then to pawn some jewelry, because neither of them had a driver's license. Defendant agreed and drove them, but the girl was not at home, so they proceeded to what they believed was a pawn shop, where defendant tried to pawn the jewelry that Aguilar and Barbaro gave to him to sell. Defendant testified he was told that the store was not a pawn shop and he left, at which point he and Aguilar and Barbaro went to get lunch.

No. 1-11-3782

¶ 11 Defendant testified that while they were eating, Aguilar and Barbaro insisted that they could successfully pawn the jewelry and so all three then returned to the store. Defendant testified that he waited in the car and did not see Aguilar and Barbaro leave his van with any guns. Defendant maintained that he never had any knowledge that the men intended to rob the store. Defendant testified that when he realized what was occurring inside the store, he panicked and began honking his horn. Aguilar and Barbaro exited the store, opened the van's passenger door and, once inside with their guns, refused to get out at a nearby intersection and instead directed defendant to drive them back to Cicero.

¶ 12 Defendant testified that it took approximately an hour to drive back to Cicero and, during that time, Aguilar and Barbaro never gave him any of the jewelry they had stolen from the store. When Aguilar and Barbaro saw police coming, they jumped out of the van and started running. Defendant continued driving to his house, but he was stopped and arrested by the police officers. Defendant testified that he had never seen the weapon that was recovered from his van, which his wife also drove, and that he never gave any guns to Aguilar and Barbaro on September 19th.

¶ 13 The State introduced into evidence photographs of the jewelry recovered during the chase of Aguilar and Barbaro, and the parties stipulated that it was the jewelry taken from Belmont Jewelers. The parties also stipulated that the firearm removed from the van's steering column was not tested for fingerprints or DNA evidence.

¶ 14 At the close of the evidence, the trial court found defendant guilty of armed robbery under a theory of accountability. The court found defendant not guilty of being an armed habitual criminal, not guilty of the counts of unlawful use of a weapon, and not guilty of aggravated

No. 1-11-3782

unlawful restraint because the court could not find that defendant personally possessed a gun.

The court entered judgment on November 14, 2011.<sup>1</sup>

¶ 15 The court denied defendant's motion for a new trial and sentenced him to 24 years of imprisonment, with three years of mandatory supervised release. The 24-year sentence was comprised of nine years' imprisonment for armed robbery, with an additional 15 years' imprisonment pursuant to the firearm enhancement under the armed robbery sentencing statute. Defendant appeals his sentence for armed robbery because the 15-year enhancement was rendered void *ab initio* when the Illinois Supreme Court held the statute's sentencing section unconstitutional, and the legislature has taken no action to revive the section's legal effectiveness. As we explain in our analysis, we affirm defendant's sentence.

¶ 16

#### ANALYSIS

¶ 17 Defendant argues that the 15-year enhancement was rendered void *ab initio* when the Illinois Supreme Court held the statute's enhanced sentencing section unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63 (2007). The legislature took no action to amend the sentencing enhancement for armed robbery, instead amending the armed violence statute. See Pub. Act 95-688 (eff. Oct. 23, 2007). Defendant argues that this amendment did not revive the sentencing enhancement for armed robbery. The State argues that when a law is held unconstitutional based on the proportionate penalties clause (Ill. Const. 1970, art. I, § 11) the law becomes unenforceable, not void *ab initio*, and that the unconstitutional law becomes enforceable again, or

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<sup>1</sup> On August 6, 2012, we allowed defendant to amend his notice of appeal to reflect the correct judgment date of November 14, 2011.

No. 1-11-3782

is revived, whenever the legislature cures the disproportionality, regardless of whether the legislature specifically amends the law that was itself held unconstitutional. A constitutional challenge to a statute may be raised at any time and is subject to *de novo* review. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 12.

¶ 18 The Illinois Supreme Court has recently squarely addressed the same issue before us and held that the amendment of the armed violence statute in Public Act 95-688 (eff. Oct. 23, 2007) revived the sentencing enhancement for armed robbery. *People v. Blair*, 2013 IL 114122 (March 21, 2013). Following our State's precedent, under our *de novo* review, we are bound to conclude that defendant's sentence under the armed robbery enhancement statute is not void.

¶ 19 In *Blair*, the Illinois Supreme Court reviewed the history of the armed robbery sentencing enhancement statute. See *Blair*, 2013 IL 114122, ¶¶ 11-17. A brief reiteration of that summary is helpful in understanding the evolution of the concept of revival of the sentencing enhancement. The sentencing enhancement for armed robbery was held unconstitutional for violating the proportionate penalties clause in *People v. Lewis*, 175 Ill. 2d 412 (1996), where at the time armed robbery, a Class X felony, was punishable by a term of imprisonment of between 6-30 years (720 ILCS 5/18-2(b) (West 1994)), but armed violence predicated on robbery with a category I weapon, also a Class X felony, with identical elements, was punishable by a term of imprisonment of 15 to 30 years (720 ILCS 5/33A-2, 33A-3 (West 1994)). *Lewis*, 175 Ill. 2d at 418. The legislature then adopted a 15-year sentencing enhancement for armed robbery in Public Act 91-404 (eff. Jan. 1, 2000), which enacted a new sentencing scheme that required that 15 years be added to a Class X sentence for armed robbery where the defendant was armed with a

No. 1-11-3782

firearm, 20 years if the defendant discharged a firearm, or 25 years if the defendant discharged a firearm causing great bodily harm or death. 720 ILCS 5/18-2 (West 2000). Because of this enactment, the sentence for armed robbery while armed with a firearm became greater than the sentence for armed violence based on robbery with a category I or II weapon and was held unconstitutional in *People v. Walden*, 199 Ill. 2d 392 (2002) using the cross-comparison approach in analyzing a constitutional claim of disproportionate penalties. Subsequently, however, in *People v. Sharpe*, 216 Ill. 2d 481, 519 (2005), the Illinois Supreme Court overruled and abandoned the cross-comparison proportionate penalties clause analysis, thereby overruling *Walden*.

¶ 20 In *Hauschild*, the Illinois Supreme Court applied the identical elements test to a claim of a violation of the proportionate penalties clause and held that the 15-year enhancement under the armed robbery statute violated the proportionate penalties clause because the sentence for armed robbery was more severe than the sentence for the identical offense of armed violence based on robbery with a category I or II weapon (720 ILCS 5/33A-3(a) (West 2000)). *Hauschild*, 226 Ill. 2d at 86-87. At the time, the armed robbery statute (720 ILCS 5/18-2(a)(2) (West 2000)) provided a greater sentence than that provided by the armed violence statute (720 ILCS 5/33A-2(a) (West 2000)) for the same conduct, and therefore the armed robbery statute's more severe penalty was unconstitutional. *Id.* In *Hauschild*, the Illinois Supreme Court also held that its holding in *Sharpe* "effectively 'revived' the constitutionality of the 15-year add-on penalty for armed robbery while armed with a firearm" because the cross-comparison proportionate penalties analysis had been overruled. *Hauschild*, 226 Ill. 2d at 76-77. The Court then held that *Sharpe*,

No. 1-11-3782

which was of constitutional dimension, applied retroactively to the defendant's case, whose case was pending on direct appeal when *Sharpe* was decided, and held that the defendant in *Hauschild* was subject to the 15-year armed robbery sentencing enhancement. *Hauschild*, 226 Ill. 2d at 78, 81.

¶ 21 Shortly after the *Hauschild* decision, the legislature amended the armed violence statute so that it no longer punished conduct identical to that of the armed robbery statute, thereby addressing the proportionate penalties issue so that this provision was no longer unconstitutional. See Pub. Act 95-688 (eff. Oct. 23, 2007) (amending 720 ILCS 5/33A-2(a)). However, while the legislature amended the armed violence statute, it did not also amend the armed robbery statute. The Illinois Supreme Court reiterated adherence to its holding in *Hauschild* in *People v. Clemons*, 2012 IL 107821, specifically stating that "*Hauschild* remains the law as to the meaning of the armed violence statute prior to its amendment by Public Act 95-688." *Clemons*, 2012 IL 107821, ¶ 19.

¶ 22 Most recently, in *Blair*, the Illinois Supreme Court explained the void *ab initio* doctrine when a statute is held facially unconstitutional, as with the armed robbery sentencing enhancement provision:

"Contrary to defendant's argument, the void *ab initio* doctrine does not mean that a statute held unconstitutional 'never existed.' As we recognized in *Perlstein v. Wolk*, 218 Ill. 2d 448 (2006), ' "[t]he actual existence of a statute," ' prior to a determination that the statute is unconstitutional, ' " is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial

No. 1-11-3782

declaration." ' ' " *Blair*, 2013 IL 114122, ¶ 29 (quoting *Perlstein*, 218 Ill. 2d at 461, quoting *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940)).

¶ 23 The Illinois Supreme Court went on to explain, "[t]he power to enact laws, and the concomitant power to repeal those laws, reside in the General Assembly" and that its "function is to interpret those laws, determining and giving effect to the legislature's intent." [Citations omitted.] *Blair*, 2013 IL 114122, ¶ 30. The court also explained that a void statute does not cease to exist but, rather, is unenforceable: "[A] statute declared unconstitutional by [the Illinois Supreme Court] ' "continues to remain on the statute books" ' [citations] and unless and until the constitutional violation is remedied, [the Court's] decision stands as an impediment to the enforcement of the statute." *Id.*

¶ 24 The court clarified that while, ordinarily, when a statute is declared by the court as unconstitutional, the remedy is to amend or reenact that particular statute. However, under the identical elements test of a proportionate penalties violation, "which arises out of the relationship between two statutes," even if only the statute with the greater penalty is found to be unconstitutional, the unconstitutional violation of the proportionate penalties clause "is entirely dependent upon the existence of the comparison statute, *i.e.*, the statute with identical elements but a lesser penalty." *Blair*, 2013 IL 114122, ¶ 32. Because of this "peculiar feature" of an identical elements proportionality violation, the legislature has a choice of remedies: "The legislature may amend the challenged statute held unconstitutional, amend the comparison statute, or amend both statutes." *Id.* The court in *Blair* then followed its holding in *Hauschild*

No. 1-11-3782

and held that, "as in *Hauschild*, the legislature revived the unconstitutional statute by curing the proportionality violation through amendment of the comparison statute." *Blair*, 2013 IL 114122,

¶ 35. Thus, Public Act 95-688 remedied the proportionate penalties violation by amending the armed violence statute so that robbery can no longer serve as a predicate offense for armed violence and, therefore, effectively revived the sentencing enhancement to armed robbery. *Blair*, 2013 IL 114122, ¶ 37. Thus, the court affirmed the defendant's sentence pursuant to the enhanced term in section 18-2(b) of the armed robbery statute and reversed the Appellate Court's contrary judgment. *Blair*, 2013 IL 114122, ¶ 40.

¶ 25 We are bound to follow the holding of *Blair* in affirming defendant's sentence in this case under the same statutory sentencing enhancement for armed robbery. As defendant's case was pending on direct appeal when *Blair* was decided, and *Blair* is of constitutional dimension, it applies to defendant's case and we are bound to follow this holding. See *Hauschild*, 226 Ill. 2d at 78 (holding that *Sharpe*, which was of constitutional dimension, applied retroactively to the defendant's case, whose case was pending on direct appeal when *Sharpe* was decided). Pursuant to the Illinois Supreme Court's holding in *Blair*, the armed robbery enhanced firearm sentencing enhancement was revived by Public Act 95-688 and the circuit court correctly applied the enhancement to defendant's armed robbery sentence. Therefore, we affirm defendant's sentence.

¶ 26 Affirmed.

¶ 27 Justice Epstein, specially concurring:

¶ 28 I concur in the result.