

No. 1-12-0165

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 09 CR 16544
GARRETT MOORE,)	
)	Honorable
Defendant-Appellant.)	Stanley J. Sacks,
)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Amendment to the armed violence statute corrected unconstitutional disproportionality and therefore revived the armed robbery statute's 15-year firearm enhancement so that the firearm enhancement to defendant's armed robbery sentence was proper. The mittimus will be reduced to reflect days spent in presentencing custody.

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¶ 2 Following a bench trial, defendant Garrett Moore was convicted of armed robbery and sentenced to a prison term of 22 years, including a 15-year enhancement for committing the offense while armed with a firearm. On appeal, defendant contends that the firearm enhancement in the armed robbery statute has been found unconstitutional as a disproportionate penalty when compared to the armed violence statute, and that a subsequent statutory amendment to the armed violence statute did not revive the unconstitutional statutory provision, so that his firearm enhancement was void *ab initio*. He further contends his mittimus should be amended to reflect the correct time he spent in presentencing custody.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with one count of armed robbery while armed with a firearm against Michael Hayward on August 29, 2009.

¶ 5 The evidence at trial showed that at approximately 8:15 a.m., Hayward was pumping gas at a gas station at Fulton and Sacramento in Chicago, when he was approached by defendant. Defendant struck up a conversation with Hayward and then pulled out a handgun from the right side of his body. Hayward, a former United States Marine, recognized the gun as a 1911 A-1 or A-1 clone single action service pistol, which is a semi-automatic weapon. Defendant then aimed the gun at Hayward's head and stated, "Give me all you got." Hayward proceeded to take out of his pockets his driver's license, credit cards and \$101 in cash and dropped it on the ground while stepping back. Defendant picked up the money and entered the passenger side of a red car that was waiting on the other side of the pump. As the car was pulling out, it got stuck in traffic and Hayward was able to get a look at the license plate. Hayward then used his cell phone to call the

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police. He reported the crime and was able to provide the police with a description of defendant and the license plate number. He described defendant as wearing an orange shirt with white trim, blue denim pants with orange trim, and white Nike shoes with orange detailing.

¶ 6 Chicago police officer Carlos Ramirez testified that at about 8:45 a.m. he was directed to 2325 West Jackson in Chicago which was the address where the vehicle used in the robbery was registered. This location was a gated community with three buildings and multiple units. Officer Ramirez observed police officers entering the south entrance of the address while defendant was exiting the north entrance. Officer Ramirez detained defendant as matching the description of the robbery offender. Additional police arrived with Hayward and he was able to identify defendant as the person who had robbed him at gunpoint. Ramirez also testified that later that day, he returned to the building to retrieve the license plate that defendant subsequently stated he had removed from the vehicle used in the robbery and had hid on top of an elevator.

¶ 7 Brittne Smith testified she was the owner of a red 2001 Chevy Cavalier. During the late evening of August 28 and early morning of August 29, 2009, she had a conversation with defendant, whom she knew from the neighborhood. He had asked to borrow her car and she gave him the keys. At about 9:00 a.m. on August 29, she looked out her window and noticed police near her car. She proceeded to the parking lot and talked with the officer. She noticed her back license plate was missing.

¶ 8 Detective Lawrence Holowinski testified that he spoke to defendant who was in custody on the afternoon of August 29, 2009. Holowinski advised defendant of his Miranda rights and defendant stated he understood his rights.

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¶ 9 Detective Holowinski further testified that defendant made a statement in which he admitted that he followed Hayward into the gas station and saw Hayward present money to pay for his gas. Defendant then engaged Hayward in conversation, showed him a gun and demanded Hayward's money. Hayward threw a bundle of money, credit cards and ID cards on the pavement. Defendant then picked up the money and went to the car. He split the money with the driver of the car, giving him \$50. Defendant admitted the money found on him when he was arrested was the money he took from Hayward at the gas station. He also stated that when he returned the car to the woman he borrowed it from, he removed the rear license plate and hid it on top of an elevator at one of the apartment buildings at Jackson and Oakley.

¶ 10 On cross-examination, Detective Holowinski acknowledged that no gun was recovered. At the conclusion of Officer Ramirez' testimony, the People rested. Defendant made a motion for a judgment of acquittal which was heard and denied. The defense then rested. The trial judge, after reviewing the evidence, found defendant guilty of the armed robbery of Hayward.

¶ 11 On November 28, 2011, the trial court heard and denied defendant's motion for a new trial, before proceeding to a sentencing hearing. The pre-sentencing investigation report (PSI) indicated that defendant had no prior convictions. It also indicated he had not finished high school and had never been employed. He did not have a problem with drugs or alcohol.

¶ 12 At sentencing, the State argued in aggravation that defendant was calculated in his actions and defendant had a gun. The defense argued in mitigation defendant's youth and family connections, and that defendant had no prior convictions. Before passing sentence, the court noted "whenever a guy pulls a gun on someone and says give me your money, you're that far

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away from a murder, the gun goes off, accidentally or otherwise, guy gets killed, it's a murder.

Only bad things happen when you commit an armed robbery." The court sentenced defendant to 22 years' imprisonment, which included a 15-year firearm enhancement. On December 15, 2011, defendant filed a motion to reconsider his sentence, which was denied. Defendant now appeals his sentence.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant contends that the 15-year enhancement in the armed robbery statute has been found unconstitutional as a disproportionate penalty when compared to the armed violence statute, and that a subsequent amendment to the armed violence statute did not revive the unconstitutional portion of the armed robbery statute, so that the firearm enhancement to his sentence was void *ab initio*.

¶ 15 Although defendant did not raise this issue at trial, the constitutionality of a statute may be challenged at any time. *People v. Guevara*, 216 Ill. 2d 533, 542 (2005). Issues involving constitutionality are a matter of law and therefore reviewed *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005). A statute carries a strong presumption of constitutionality, and the party challenging the statute bears the burden of clearly establishing that it violates the constitution. *People v. Graves*, 235 Ill. 2d 244, 249 (2009).

¶ 16 Since the filing of defendant's appeal and the State's response, our supreme court has rejected defendant's argument and has resolved the issue. In *People v. Blair*, 2013 IL 114122, defendant Connie Blair was convicted of armed robbery while armed with a firearm (720 ILCS 5/18-29(a)(2) (West 2008)). *Blair*, ¶4. The trial court sentenced defendant to a term of 23 years'

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imprisonment which included a 15-year enhancement pursuant to section 18-2(b) of the armed robbery statute. *Id.* ¶4. Defendant appealed. *Id.* The appellate court held that the trial court erred by applying the 15-year enhancement. 2012 IL App (3d) 100743-U, ¶1. The appellate court rejected the State's argument that Public Act 95-688 could revive the sentencing enhancement in the armed robbery statute by amending the armed violence statute. Public Act 95-688 (eff. Oct. 23, 2007). *Id.* ¶5. According to the appellate court, when *People v. Hauschild*, 226 Ill. 2d 63 (2007), held the armed robbery sentencing enhancement in section 18-2(b) unconstitutional under the proportionate penalties clause, the enhancement was rendered void *ab initio*, and it remains unavailable at sentencing until the legislature takes some action on section 18-2(b). *Id.* The appellate court reversed and remanded for resentencing in accordance with the armed robbery statute as it existed prior to the adoption of the sentencing enhancement. State petitioned for leave to appeal. Ill. S. Ct. 315 (eff. Feb. 26, 2010). *Id.*

¶ 17 In *Blair*, our supreme court clarified the void *ab initio* doctrine. According to our supreme court the void *ab initio* doctrine does not mean that a statute held unconstitutional "never existed". *Blair*, ¶29. When a statute is held to be unconstitutional and void *ab initio*, it means only that the statute was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable. *Id.* at ¶30. As a consequence, we will give no effect to the unconstitutional statute and instead apply the prior law to the parties before us. *Id.*; see, e.g., *Hauschild*, 226 Ill. 2d at 88-89. In short, a statute declared unconstitutional by this court " 'continues to remain on the statute books' " (*Perlstein v. Wolk*, 218 Ill. 2d 448, 471 (2006) (quoting Lawrence H. Tribe, *American Constitutional Law* § 3-3, at 28 (2d ed. 1988)), and unless

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and until the constitutional violation is remedied, our decision stands as an impediment to the operation and enforcement of the statute. *Blair*, ¶30.

¶ 18 At issue in *Hauschild* was whether defendant was subject to the 15-year add-on penalty for his armed robbery conviction and, if so, whether that sentence was disproportionate to the sentence for armed violence based on robbery with a category I or II weapon. *Id.* ¶16. In *Hauschild* our supreme court held that the sentence applicable to the defendant for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because that sentence was more severe than the sentence for the identical offense of armed violence based on robbery with a category I or II weapon. *Id.* ¶20. *Hauschild* considered the effect of Public Act 91-404, which amended the armed robbery statute in response to a 1996 decision finding that the offense of armed violence predicated on robbery violated the proportionate penalties clause when compared to armed robbery. *Id.* ¶34; *Hauschild*, 226 Ill. 2d at 84, citing *People v. Lewis*, 175 Ill. 2d 412 (1996); Public Act 91-404 (eff. Jan. 1, 2000). *Hauschild* held that Public Act 91-404 revived that armed violence offense "when it amended the sentence for certain armed robberies." *Id.* Thus, *Hauschild* recognized that a statute held unconstitutional under the identical elements test for proportionality could be revived through amendment of the comparison statute. *Id.*

¶ 19 Less than five months after our supreme court's decision in *Hauschild*, the General Assembly enacted Public Act 95-688 (eff. Oct. 23, 2007), the subject of the instant appeal. *Id.*

¶21. Our supreme court has ruled that Public Act 95-688 did not amend the armed robbery statute that *Hauschild* held unconstitutional, but rather amended the armed violence statute so

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that robbery cannot serve as a predicate offense for armed violence. *Id.* Thus, Public Act 95-688 remedied the disproportionality that existed between the armed violence and armed robbery statutes. *Id.*

¶ 20 Our supreme court's decision in *Blair* has resolved inconsistent appellate rulings on whether, following the legislature's enactment of Public Act 95-688, the State can obtain an enhanced sentence for armed robbery. *Id.* ¶22. Compare *People v. Brown*, 2012 IL App (5th) 100453, and *People v. Malone*, 2012 IL App (1st) 110517 (holding that Public Act 95-688 revived the armed robbery sentencing enhancement), with *People v. Gillespie*, 2012 IL App (4th) 110151, and *People v. McFadden*, 2012 IL App (1st) 102939 (holding that Public Act 95-688 did not revive the armed robbery sentencing enhancement). *Id.*

¶ 21 The issue addressed in *Blair* is analogous to the issue in *Hauschild*, and our supreme court necessarily reached a similar result. *Blair*, ¶35. Just as Public Act 91-404 revived the offense of armed violence based on robbery by amending the armed robbery statute, our supreme court now holds that Public Act 95-688 revived the sentencing enhancement in the armed robbery statute by amending the armed violence statute. *Id.* In *Blair*, as in *Hauschild*, the legislature revived the unconstitutional statute by curing the proportionality violation through amendment of the comparison statute. *Id.* Following our supreme court's decision in *Blair*, we find the firearm enhancement to defendant's sentence was proper.

¶ 22 Lastly, defendant contends that his mittimus should be corrected to reflect 821 days spent in presentencing custody, instead of the 796 days currently reflected therein. The State agrees. The question of whether defendant's mittimus should be corrected is a purely legal issue, subject

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to *de novo* review (*People v. Jones*, 397 Ill. App. 3d 651, 656 (2009), and this court has authority to order the clerk of the circuit court to issue a corrected mittimus (Ill. S. Ct. 615(b)(1)). The record shows that defendant was arrested on August 29, 2009, and was sentenced on November 28, 2011. Accordingly, we order the mittimus be amended to reflect 821 days of presentencing credit.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, and order the mittimus to be amended to show 821 days served.

¶ 25 Affirmed, mittimus corrected.