

No. 1-12-2923

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).

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. 11 CR 4113
)	
DARIUS ELAM,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant's aggravated battery with a firearm conviction is affirmed because the automatic transfer provision of the Juvenile Court Act of 1987 is constitutional. His aggravated discharge of a firearm conviction however is vacated pursuant to the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Darius Elam was convicted of aggravated battery with a firearm and aggravated discharge of a firearm and sentenced to concurrent terms of 10 and 8 years in prison, respectively. He appeals, challenging the constitutionality of the automatic transfer provision of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130 (West 2010)),

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because he was charged and tried as an adult per the automatic transfer statute. Defendant also contends his aggravated discharge of a firearm conviction must be vacated pursuant to the one-act, one-crime doctrine. For the following reasons, we affirm in part, vacate in part, and correct the mittimus.

¶ 3 At trial, Shaniqua Smith testified that she, her boyfriend Jamal White, and three others entered the 51st Street Green Line CTA station at approximately 8 p.m. on January 29, 2011. Inside the station, a verbal and physical altercation broke out between defendant and his friends and White. Smith had known defendant for approximately four years. When the fight ended, Smith, White, and White's brother started riding an escalator up to the elevated platform. Footage from the train station's cameras showed that as the altercation was ending between the two groups, defendant spoke to an individual, who handed him something. The camera footage and screen captures from one of the cameras showed defendant then went through the turnstile, ran to the base of the escalator, and aimed a handgun at Smith and her friends. Smith was shot in the arm and fell to the ground. She was later taken to Provident Hospital.

¶ 4 Assistant State's Attorney Krystyn Dilillo testified that she met with defendant and his mother on February 3, 2011. Defendant gave a typewritten statement in which he admitted that after fighting with White and his friends, he asked his friend Bo-Bo for a firearm. When he reached the bottom of the escalator, defendant fired the handgun twice. After he fired the first shot, he saw a spark of metal. He then fired a second shot and ran away, throwing the weapon into a vacant lot.

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¶ 5 The trial court found defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm. At a later hearing, the court sentenced defendant to 10 years in prison for aggravated battery with a firearm and 8 years in prison for aggravated discharge of a firearm, ordering the sentences to run concurrently.

¶ 6 This appeal followed.

¶ 7 On appeal, defendant first asserts that the automatic transfer provision of the Act is unconstitutional because it mandates that a juvenile charged with certain offenses be treated as an adult and exposed to mandatory adult criminal sentences without regard to a juvenile's lessened culpability and greater capacity for change. Thus, defendant contends the transfer provision violates the eighth amendment of the United States Constitution (U.S. Const. amend. VIII), the Illinois proportionate penalties clause (Ill. Const. 1970, art. I, § 11), and both the federal and state due process clauses (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2). In support of his argument, defendant relies primarily on the United States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455(2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005).

¶ 8 Pursuant to the automatic transfer provision, a juvenile who is at least 15 years old and charged with certain enumerated offenses is required to be prosecuted in criminal court and, if convicted, sentenced as an adult. 705 ILCS 405/5-130 (West 2010); *People v. Patterson*, 2014 IL 115102, ¶ 91. The enumerated offenses include aggravated battery with a firearm where the juvenile personally discharged the firearm. 705 ILCS 405/5-130(a)(1)(iii); *Patterson*, 2014 IL 115102, ¶ 91. We review the constitutionality of a statute *de novo*. *Patterson*, 2014 IL 115102,

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¶ 90.

¶ 9 During the pendency of defendant's appeal, our supreme court in *Patterson* upheld the constitutionality of the automatic transfer provision, rejecting the same due process, eighth amendment, and proportionate-penalties arguments that defendant now makes. *Id.* ¶¶ 89, 93-98, 106. With respect to the defendant's due-process claim, the *Patterson* court reasoned that the decisions in *Roper*, *Graham*, and *Miller* all involved the eighth amendment, not the due process clause, and a constitutional challenge raised under one theory cannot be supported by law based on another provision. *Id.*, ¶ 97. The court further noted that it had rejected a due-process claim similar to the defendant's in *People v. J.S.*, 103 Ill. 2d 395 (1984). *Patterson*, 2014 IL 115102, ¶¶ 93-94. The *Patterson* court found no reason to depart from its holding in *J.S.* despite the more recent Supreme Court decisions in *Roper*, *Graham*, and *Miller*. *Id.* ¶ 98.

¶ 10 The *Patterson* court likewise rejected the defendant's eighth amendment and proportionate-penalties claims, recognizing that it had previously concluded the purpose of the automatic transfer provision was to protect the public, not to punish defendants. *Id.* ¶¶ 105-06. The supreme court was not persuaded that it should abandon its long held view that the transfer statute was purely procedural. *Id.* ¶ 105. Because the eighth amendment and proportionate-penalties clauses applied only where a punishment or penalty had been imposed, the *Patterson* court rejected the defendant's eighth amendment and proportionate-penalties claims. *Id.* ¶¶ 101, 106.

¶ 11 Defendant acknowledges the decision in *Patterson* and recognizes that our court is bound by it. Nonetheless, he requests that his case be held in abeyance until a petition for rehearing in

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Patterson is resolved and the time for filing a petition for *certiorari* in the United States Supreme Court has passed. We note that our supreme court denied the petition for rehearing in *Patterson* on January 26, 2015, and we decline defendant's request to hold his case in abeyance until a potential federal appeal in *Patterson* is resolved. Defendant also argues that *Patterson* was wrongly decided and thus seeks to preserve his argument for federal constitutional review. In particular, defendant argues the *Patterson* decision was founded upon the incorrect premise that the transfer statute's purpose is to protect the public and not punish the defendant, and that the decision fails to withstand scrutiny in light of *Roper*, *Graham*, and *Miller*. To the extent defendant seeks to preserve his claim, he is free to do so. However, as a court of review, we are bound by the *Patterson* decision and must follow established precedent. See, e.g., *In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 32. Accordingly, we reject defendant's claim that Illinois's automatic transfer provision is unconstitutional.

¶ 12 Defendant next argues, and the State concedes, that his conviction for aggravated discharge of a firearm must be vacated pursuant to the one-act, one-crime rule, as it was based on the same physical act as his aggravated battery with a firearm conviction. We accept the State's concession and agree.

¶ 13 A defendant cannot be convicted of multiple offenses that are based on the same single physical act. *People v. Almond*, 2015 IL 113817, ¶ 47 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Where a defendant is convicted of two offenses based on the same physical act, we must vacate his conviction for the less serious offense. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Although defendant forfeited review of his one-act, one-crime argument by failing to raise it in

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the proceedings below, we may consider his claim under the second prong of the plain-error doctrine. *People v. Artis*, 232 Ill. 2d 156, 165 (2009).

¶ 14 Here, the State charged defendant with aggravated battery with a firearm in that he knowingly or intentionally caused an injury to Smith by means of discharging a firearm. 720 ILCS 5/12-4.2(a)(1) (West 2010). It charged defendant with aggravated discharge of a firearm based on defendant knowingly discharging a firearm in the direction of Smith. 720 ILCS 5/24-1.2(a)(2) (West 2010). Thus, both of defendant's convictions were premised on the same physical act, *i.e.*, his shooting of Smith. Accordingly, his conviction for aggravated discharge of a firearm must be vacated. See *People v. Boyd*, 307 Ill. App. 3d 991, 999 (1999) (vacating the defendant's conviction for aggravated discharge of a firearm as an included offense of his aggravated battery with a firearm conviction where the State's indictment did not allege the defendant shot more than once at the victim).

¶ 15 For the reasons stated, we affirm defendant's aggravated battery with a firearm conviction and, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we vacate defendant's aggravated discharge of a firearm conviction and direct the clerk of the circuit court to correct the mittimus to reflect the same. See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 93 (ordering the clerk to correct the mittimus to reflect proper convictions).

¶ 16 Affirmed in part and vacated in part; mittimus corrected.