2017 IL App (1st) 151094-U

FIRST DIVISION
December 11, 2017

No. 1-15-1094

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C6 60849
	)	
DEXTER WEEKS,	)	Honorable
	)	Anna H. Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for being an armed habitual criminal. We reject the argument that the statute is facially unconstitutional. We also reject the claim that defendant was subjected to an impermissible double enhancement during sentencing. We vacate defendant's conviction for unlawful possession of a weapon by a felon because it violates the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant Dexter Weeks was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (2012)) and unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (2012)). He was sentenced to concurrent terms of ten years'

imprisonment for being an armed habitual criminal and seven years' imprisonment for unlawful use or possession of a weapon by a felon. On appeal, Mr. Weeks contends that (1) the armed habitual criminal statute is facially unconstitutional; (2) his conviction for unlawful possession of a weapon by a felon violates the one-act, one-crime rule because it is based on the same act as his conviction for being an armed habitual criminal; and (3) he was subjected to an impermissible double enhancement during sentencing because the trial court used his prior felonies as both an element of the armed habitual criminal offense and a factor in aggravation. We affirm Mr. Weeks's conviction for being an armed habitual criminal and vacate his conviction for unlawful possession of a weapon by a felon.

¶ 3 BACKGROUND

¶ 4 Mr. Weeks was charged with being an armed habitual criminal (AHC), two counts of unlawful use or possession of a weapon by a felon (UUWF), and six counts of aggravated unlawful use of a weapon. Prior to trial, the State moved to *nolle prosequi* the six counts of aggravated unlawful use of a weapon. Mr. Weeks's remaining charges were Count I (AHC), Count II (UUWF) and Count III (UUWF). Count I alleged that Mr. Weeks committed the offense of AHC in that he "knowingly or intentionally possessed a firearm *** after having been convicted of robbery under case number 08-C6-60007 and manufacture and delivery of cocaine under case number 10-C6-60202." 720 ILCS 5/24-1.7(a) (West 2012). Count II alleged that Mr. Weeks committed UUWF in that he "knowingly possessed on or about his person, a firearm, after having been previously convicted of the felony offense of robbery under case number 08-C6-60007 ***." 720 ILCS 5/24-1.1(a) (West 2012). Count III alleged that Mr. Weeks committed UUWF in that he "knowingly possessed on or about his person any firearm, after having been previously convicted of the felony offense of manufacture and delivery of cocaine, under case

number 10-C6-60202 ***." 720 ILCS 5/24-1.1(a) (West 2012). Mr. Weeks waived his right to a jury and, on March 12, 2015, the case proceeded to a bench trial. Because Mr. Weeks does not challenge the sufficiency of the evidence to sustain his convictions, we recount the facts only to the extent necessary to resolve the issues raised on appeal.

¶ 5 At trial, Park Forest police officer Hoskins testified that, on June 26, 2012, he initiated a traffic stop near Western Avenue and Fir Street on a black Chevrolet Tahoe after observing that the registration plate light was not functioning. Officer Hoskins approached the car and asked the driver for his license and proof of insurance. In addition to the driver, Officer Hoskins saw four other individuals in the car. One individual was in the front passenger seat and three individuals sat in the back of the car. Officer Hoskins identified Mr. Weeks as the individual seated directly behind the driver. Officer Hoskins noticed the smell of cannabis coming from the car and asked the driver to step out. Officer Hoskins conducted a pat down of the driver and then asked the front passenger to exit the car. Officer Hoskins continued in this fashion, asking each passenger to leave the car and then conducting a pat down, until Mr. Weeks was the sole remaining occupant. Officer Hoskins then asked Mr. Weeks to exit the car via the back door on the driver side. Officer Hoskins searched the car and discovered a revolver. The revolver was located on the floor underneath the driver seat. In relation to where Mr. Weeks was seated in the car, the gun was found where his feet would have been. Officer Hoskins acknowledged that he did not see anybody holding the revolver that was recovered.

¶ 6 The State introduced into evidence certified copies of Mr. Weeks's prior felonies: one for robbery and the other for the manufacture and delivery of cocaine.

¶ 7 The parties stipulated that, if called, Lorel Boitken, a forensic scientist with the Illinois State Police (ISP), would testify, as an expert in the field of forensic DNA, that he received a

swabbing from the revolver discovered by Officer Hoskins. Mr. Boitken found four DNA profiles, including a major DNA profile, identified on the grip of the revolver. The major profile was searched against the DNA index and was identified as that of Mr. Weeks. Additionally, the parties stipulated that Francis Senese of the ISP forensic laboratory examined the revolver and its ammunition for latent impressions suitable for comparison, but none were found.

¶ 8 Mr. Weeks was found guilty of being an armed habitual criminal and two counts of UUWF. The case then proceeded to sentencing.

¶ 9 At sentencing, defense counsel argued in mitigation that the facts of the case did not warrant a sentence above the statutory minimum because Mr. Weeks was not violent and cooperated with police. The State recommended that Mr. Weeks be sentenced to a term of ten years' imprisonment.

¶ 10 In announcing sentence, the court stated that it reviewed Mr. Weeks's presentence investigation report, which included Mr. Weeks's family history, educational background, physical health history, and criminal background. The court noted that this was a nonviolent case and that Mr. Weeks cooperated with police. The court also noted Mr. Weeks's age—24 years old at the time of sentencing—and that he received his G.E.D. while he was in custody for a previous felony were mitigating factors. In aggravation, the court pointed out Mr. Weeks's criminal history. Specifically, the court noted that, in addition to several juvenile adjudications, Mr. Weeks received two years' probation for a felony robbery in 2008. Shortly after being placed on probation, Mr. Weeks was arrested for battery and returned to the Illinois Department of Corrections on a parole violation. In 2010, while he was on mandatory supervised release, he was arrested for delivery of a controlled substance. Mr. Weeks was again on mandatory supervised release when he was arrested on these charges. The court merged the two counts of

UUWF (Count III into Count II) and sentenced Mr. Weeks to concurrent terms of ten years' imprisonment for being an armed habitual criminal (Count I) and seven years' imprisonment for UUWF (Count II).

¶ 11 JURISDICTION

¶ 12 Mr. Weeks was sentenced on April 7, 2015, and timely filed his appeal that same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 13 ANALYSIS

¶ 14 On appeal, Mr. Weeks's first argument is that the AHC statute is facially unconstitutional because it punishes twice-convicted felons for possessing a firearm, regardless of whether they were issued a Firearm Ownership Identification (FOID) card. Mr. Weeks contends, therefore, that the AHC statute violates due process because it potentially criminalizes the "wholly innocent" possession of a firearm by a twice-convicted felon, who has been authorized to possess a firearm under Illinois law via the issuance of a FOID card.

¶ 15 As Mr. Weeks acknowledges, facial challenges to the constitutionality of the AHC statute on grounds identical to those raised here have been recently and repeatedly rejected by this court. See *People v. West*, 2017 IL App (1st) 143632; *People v. Fulton*, 2016 IL App (1st) 141765; *People v. Johnson*, 2015 IL App (1st) 133663. In *Johnson*, we explained:

> "While it may be true that an individual could be twice-convicted of the offenses set forth in the armed habitual criminal statute and still receive a FOID card under certain unlikely circumstances, the invalidity of a statute in one particular set of circumstances is

> insufficient to prove that a statute is facially unconstitutional. [Citation.] The armed habitual criminal statute was enacted to help protect the public from the threat of violence that arises when repeat offenders possess firearms. [Citation.] The Supreme Court explicitly noted in *District of Columbia v. Heller,* 554 U.S. 570 (2008), that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.' [Citation.] Accordingly, we find that the potential invalidity of the armed habitual criminal statute in one very unlikely set of circumstances does not render the statute unconstitutional on its face." *Johnson*, 2015 IL App (1st) 133663, ¶ 27.

Mr. Weeks argues that these cases were wrongly decided.

¶ 16 All statutes are presumed to be constitutional, and the party challenging the statute has the "heavy burden" of overcoming this presumption by clearly establishing a constitutional violation. *People v. Patterson*, 2014 IL 115102, ¶ 90. It is our duty to uphold a statute's constitutionality "whenever reasonably possible, resolving any doubts in favor of its validity." *Id.* A facial challenge to a statute, such as the one here, is "the most difficult" because Mr. Weeks must establish that no set of circumstances exists under which the AHC statute would be valid. *People v. Greco,* 204 Ill.2d 400, 407 (2003).

¶ 17 In Illinois, the FOID Card Act restricts firearm ownership to those who possess a FOID card. 430 ILCS 65/2(a)(1) (West 2012). Under the FOID Card Act, a person who is convicted of a felon may have their FOID card revoked and seized or their application for a FOID card denied. 430 ILCS 65/8(c) (West 2012). Section 10 of the FOID Card Act, however, allows such a person to "apply to the Director of State Police or petition the circuit court ***, requesting relief from such prohibition." 430 ILCS 65/10(c) (West 2012). Relief may be granted if the following is established: (1) the applicant has not been convicted of a forcible felony within the

20 years of the application for a FOID card, or at least 20 years have passed since the end of any sentence related to such a conviction; (2) in light of his criminal history and reputation, an applicant "will not be likely to act in a manner dangerous to public safety"; and (3) a grant of relief is not contrary to the public interest. 430 ILCS 65/10(c) (West 2012). As Mr. Weeks argues, under these provisions, it is possible for a twice-convicted felon to obtain a FOID card.

¶ 18 The AHC statute, however, makes it a Class X offense for an individual twice-convicted of certain enumerated felonies to possess a firearm. 720 ILCS 5/24-1.7 (West 2012). There is no provision that exempts those awarded FOID cards from punishment. Thus, Mr. Weeks argues, Illinois law allows for the possibility that a twice-convicted felon could obtain a FOID card to possess a firearm, but, under the AHC statute, possession of a firearm would nevertheless remain criminal.

¶ 19 Mr. Weeks argues that our earlier cases on this issue are wrong because they are inconsistent with *Coram v. State*, 2013 IL 113867, in which our supreme court held that the FOID Card Act entitled the petitioner to relief from the prohibition on his obtaining a FOID card, based on a 17-year-old misdemeanor conviction, even though he would still be prohibited from owning that gun under federal law. Mr. Weeks also argues that these cases disregard the recognition in *Coram* that there must be individualized consideration of a person's right to keep and bear arms. *Id.* ¶ 29.

¶ 20 *Coram* addresses the FOID Card Act, not the AHC statute. The result there thus does not dictate the result here. In *Fulton* and *Johnson* and their progeny, we started with the premise that, as our supreme court recognized in *Coram*, a convicted felon may obtain relief from the prohibition on owning a gun under the FOID Card Act.

¶ 21 We have acknowledged that there is some possibility that the AHC statute could be

applied to someone who had a FOID card because they were granted such relief. *Fulton*, 2016 IL App (1st) 141765, ¶ 23; *Johnson*, 2015 IL App (1st) 133633, ¶ 27. But that remote possibility does not render the AHC statute facially unconstitutional or provide a basis for vacating Mr. Weeks's conviction here. It is clear that Mr. Weeks could not have been eligible for a FOID card at the time he was convicted under the AHC statute. Mr. Weeks was convicted of felony robbery in 2008, which is defined as a forcible felony (720 ILCS 5/2-8 (West 2008)) and which therefore rendered him ineligible for relief under the FOID Card Act for 20 years (430 ILCS 65/10(c) (West 2008)).

¶ 22 Mr. Weeks also argues that our prior decisions on this issue are inconsistent with cases in which our supreme court found a statute that punished innocent conduct was not rationally related to the legislative purpose and thus violated the requirement of substantive due process. These cases include *People v. Madrigal*, 241 Ill. 2d 463 (2001) (invalidating a portion of the identity theft statute that would punish "a wide array of wholly innocent conduct" such as conducting a Google search using someone's name); *People v. Carpenter*, 228 Ill. 2d 250 (2008) (invalidating a statute that criminalized possession of a vehicle with a secret compartment); *People v. Wright*, 194 Ill. 2d 1 (2000) (invalidating a record-keeping statute that criminalized the failure to maintain certain records); *People v. Zaremba*, 158 Ill. 2d 36 (1994) (invalidating a portion of a statute that criminalized the possession of stolen goods in the custody of a law enforcement agency); *People v. Wick*, 107 Ill. 2d 62 (1985) (invalidating a portion of an aggravated arson statute that criminalized setting a fire, that would otherwise be legal, if a policeman or fireman was injured by it).

¶ 23 This court's ruling in *Fulton*, while not addressing all five of the cases cited by Mr. Weeks, distinguished the AHC statute from the statutes at issue in *Madrigal* and *Carpenter*. In

Fulton, we explained:

> "[T]he purpose of the armed habitual criminal statute is "to help protect the public from the threat of violence that arises when repeat offenders *possess* firearms" [Citation] (emphasis added). Unlike the conduct discussed in *Madrigal* and *Carpenter,* a twice-convicted felon's possession of a firearm is not "wholly innocent" and is, in fact, exactly what the legislature was seeking to prevent in passing the armed habitual criminal statute. The statute's criminalization of a twice-convicted felon's possession of a weapon is, therefore, rationally related to the purpose of "protect[ing] the public from the threat of violence that arises when repeat offenders possess firearms." [Citation]. *** The armed habitual criminal statute does not violate substantive due process and is, therefore, constitutional." *Fulton*, 2016 IL App (1st) 141765, ¶ 31.

¶ 24 As we recognized in *Fulton*, the remote possibility that the AHC statute could include a defendant who had the legal right to own a gun is a different situation than the scenarios that concerned our supreme court in the five cases cited by Mr. Weeks. In those cases, the criminal statutes swept in such broad swaths of wholly innocent conduct, that they lost any rational connection to the legislative purpose. As with *Madrigal* and *Carpenter,* the inclusion of a broad range of innocent conduct in *Wright*, *Zaremba*, and *Wick* is distinguishable from Mr. Weeks's conduct here. Accordingly, we follow the earlier decisions of this court that have held that the AHC statute is constitutional.

¶ 25 Mr. Weeks also argues that his conviction for UUWF, on top of his AHC conviction, violates the one-act, one-crime rule because it is based on the same physical act as his conviction for being an armed habitual criminal. The State concedes this point, and we agree.

¶ 26 Mr. Weeks acknowledges that he failed to raise this issue in the trial court and thus failed

to preserve the matter for appeal. However, a one-act, one-crime violation is reviewable under the second prong of the plain-error doctrine because it affects the integrity of the judicial process. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010); *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009).

¶ 27 The one-act, one-crime rule prohibits multiple convictions carved from the same physical act. See *People v. Almond*, 2015 IL 113817, ¶ 47; *People v. King*, 66 Ill. 2d 551, 566 (1977). The State concedes that Mr. Weeks's conviction for being an armed habitual criminal is based on his knowing or intentional possession of a revolver, after having been convicted of felony robbery and delivery of cocaine. Likewise, Mr. Weeks's remaining conviction for UUWF was based on him knowingly possessing a firearm after having been previously convicted of felony robbery. Under the one-act, one-crime rule, a sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Mr. Weeks's conviction under the AHC statute is a Class X offense (720 ILCS 5/24-1.7(a) (West 2012)), whereas his conviction for UUWF is a Class 2 offense (720 ILCS 5/24-1.1(a) (West 2012)). Accordingly, we vacate Mr. Weeks's conviction for UUWF.

¶ 28 Finally, Mr. Weeks argues that the trial court engaged in impermissible double enhancement by using his two prior felonies as an aggravating factor to sentence him to a term above the statutory minimum when those infractions were already an element of the AHC offense.

¶ 29 Mr. Weeks again acknowledges that he failed to preserve this issue for appeal by not objecting to the court's oral pronouncements or including these alleged errors in his motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written

postsentencing motion raising the issue are required."). He argues that we may review this issue under the plain-error doctrine. However, we need not decide if there was plain error here because we do not agree that there was double enhancement in Mr. Weeks's sentence. See *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 ("without error, there can be no plain error" (internal quotation marks omitted)).

¶ 30 "There is a general prohibition against the use of a single factor both as an element of a defendant's crime *and* as an aggravating factor justifying the imposition of a harsher sentence than might otherwise have been imposed." (Emphasis in original.) *People v. Gonzalez*, 151 Ill. 2d 79, 83–84 (1992). This is often referred to as double enhancement. *Id.*

¶ 31 In *People v. Thomas***,** 171 Ill. 2d 207 (1996), our supreme court considered and rejected a similar argument to the one Mr. Weeks makes here, concluding that the trial court's consideration of criminal history "does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence *** within the available parameters, is a requisite part of every individualized sentencing determination. [Citation.] The judicial exercise of this discretion *** is not properly understood as an 'enhancement.' " *Id.* at 224–25. The court in *Thomas* reasoned that "the legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of [defendant's] criminal history as an aggravating factor." *Id.* at 227. Our supreme court stressed that "while the fact of a defendant's prior convictions determines his eligibility for a Class X sentence, it is the *nature and circumstances* of these prior convictions which, along with other factors in aggravation and mitigation, determines the exact length of that sentence." (Emphasis in original.) *Id.* at 227-28. At the sentencing hearing in this case, the trial court focused not simply on "the fact" that Mr. Weeks had prior convictions, but on the fact that he

was repeatedly convicted while still on mandatory supervised release for the prior conviction. Thus the court focused on the "circumstances" of those convictions. The court's consideration of Mr. Weeks's prior felonies to sentence him to a term above the statutory minimum was not a double enhancement.

¶ 32 CONCLUSION

¶ 33 In sum, we agree with our prior decisions that have found the AHC statute is constitutional. We find the trial court did not subject Mr. Weeks to an impermissible double enhancement by considering his prior felonies in aggravation. We therefore affirm his conviction for being an armed habitual criminal. We vacate Mr. Weeks's conviction for UUWF because it violates the one-act, one-crime rule.

¶ 34 Affirmed in part and vacated in part.