2017 IL App (1st) 151154-U

No. 1-15-1154

Order filed October 20, 2017

Fifth Division

**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 DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 14 CR 9709 |
| | ) | |
| DEON JERNIGAN, | ) | Honorable |
| | ) | Paula M. Daleo, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm defendant's conviction for armed habitual criminal over his contention that the armed habitual criminal statute is facially unconstitutional for criminalizing wholly innocent conduct. We reverse defendant's conviction for resisting a peace officer where the evidence was insufficient to show he knowingly resisted arrest.

¶ 2 Following a bench trial, defendant Deon Jernigan was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)), and resisting a peace officer (720 ILCS 5/31-1(a) (West 2014)), and sentenced to seven years' imprisonment for the AHC

conviction and 93 days, time considered served, for the resisting conviction. On appeal, defendant contends that the AHC statute is facially unconstitutional because it potentially criminalizes wholly innocent conduct, and asks this court to reverse his AHC conviction. He additionally contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of resisting a peace officer. For the following reasons, we affirm in part and reverse in part.

¶ 3 Defendant was charged with AHC, unlawful use of a weapon by a felon (UUWF), and several misdemeanors, including resisting a peace officer and two counts of aggravated assault. At trial, Hillside police officer Johanne Nelson testified that on May 14, 2014, at approximately 5 p.m., he was dispatched to an apartment building on North Wolf Road. He arrived at the address in full uniform with his partner. As Nelson pulled into the parking lot, he observed defendant running across the parking lot holding his waistband and heading up a flight of stairs into an apartment. Once defendant entered the apartment, Nelson walked to the apartment. Nelson spoke with Ashley Garner, who was on the scene. After climbing the stairs, he "attempted to make contact" with defendant, but was unsuccessful. Nelson and other officers then returned down the stairs and surrounded the apartment building.

¶ 4 While maintaining the perimeter of the apartment building, the officers attempted to make contact with defendant, who refused to speak with them. After 45 minutes, defendant opened the door, exited the apartment, and was immediately arrested. Nelson and four to five other officers entered his apartment to check for other individuals. They did not find anyone else inside.

¶ 5 Defendant was thereafter transported to the police station, where he was *Mirandized*. After signing a constitutional rights form, defendant told Nelson that he had been in possession of a weapon, which was in his waistband, but did not pull it out. Defendant additionally stated that when he went to his apartment, he threw the weapon out of a rear window because he knew that he was not supposed to be in possession of a firearm as a convicted felon.

¶ 6 On cross-examination, Nelson acknowledged that when he saw defendant running, defendant was not holding anything in his hands, and Nelson did not discern anything in his waistband or observe defendant remove anything from his waistband. He attempted to look in defendant's window, but the blinds were closed.

¶ 7 Hillside police detective Daniel Pereda testified that on May 14, 2014, at approximately 5 p.m., he was dispatched to an address on North Wolf Road. Upon arrival, Pereda set up perimeter at the rear of the apartment building, approximately 25 to 40 feet away. He was with Detective Sergeant Malazzo and several other officers from neighboring jurisdictions. He was in communication with Officer Nelson throughout the duration of the incident. After approximately 30 minutes, Pereda observed an individual's arm throwing a firearm out of a second story window. He did not immediately recover the weapon because the scene was not yet secure. After receiving a communication that defendant was in custody, Pereda walked with other officers toward the building, while still securing the perimeter. Pereda eventually recovered the firearm. No other civilians could have found the weapon because officers secured the entire perimeter of the building.

¶ 8 Based on information from the officers at the front of the building and seeing curtains move, Pereda and the other officers determined which apartment the gun came from.

Additionally, the screen was cut on the window where the gun was dropped. Pereda photographed the window and the firearm, and identified the photographs in court. The firearm was a loaded silver Colt .357.

¶ 9 On cross-examination, Pereda acknowledged that prior to trial, he did not tell anyone that he saw an arm throw the firearm out of the window. Although he did not write the police report on the incident, he reviewed it prior to testifying and stated it was accurate. However, he acknowledged that the report did not state that he observed an arm throwing the weapon. The report did reflect that Officer Malazzo observed the gun being dropped from the window.

¶ 10 The parties stipulated that defendant was previously convicted of possession of a controlled substance with intent to deliver in case 02 CR 0875802 and delivery of a controlled substance in case 04 CR 0204001.

¶ 11 Defendant did not testify or present evidence on his behalf. Following arguments, the court found defendant guilty of AHC, UUWF, and resisting a peace officer, but not guilty of aggravated assault. With respect to the guilty finding for resisting a peace officer, the court stated defendant, "knowingly obstructed in the performance of Officer Nelson of an authorized act within his official capacity, [defendant], knowing him to be a police officer engaged in the execution of his sufficient duties and that [defendant] fled from Nelson and Pereda by placing himself in the residence and in an attempt to defeat arrest."

¶ 12 Defendant filed a posttrial motion for a new trial. During the hearing on his posttrial motion, defense counsel argued, *inter alia*, that the State failed to show defendant resisted arrest. Counsel argued that the evidence presented showed that defendant ran into his apartment, shut the door, and prevented the police from entering; however, defendant did not have an obligation

to let the police into his apartment without a warrant. Counsel acknowledged that when defendant threw the firearm out of the window, police then had probable cause, but argued that defendant opened his door and submitted to the arrest. Counsel further asserted that resisting arrest must be based on an authorized act, and the police did not have authority to enter defendant's home without a warrant. The State responded that the officer arrived on the scene in full uniform and defendant fled, despite the officer "announc[ing] his office and t[elling] -- g[iving] the defendant numerous directions to stop."

¶ 13 The court denied defendant's posttrial motion. With respect to the resisting a peace officer finding, the court stated,

> "Well, the issue here is that the officers got a call to arrive at that scene for some reason. While the State presented no evidence other than the officer stated he talked I believe to a civilian on the scene, at which time he saw the defendant fleeing across the parking lot into his residence.
>
> The officer attempted to stop him to investigate the crime that he was there to investigate. And we don't know at the time whether he would have been arrested or not due to the reason that they appeared on the -- on the scene.
>
> However, even if I take counsel's arguments that the officers had no right to stop him from going into his apartment, certainly after the gun was thrown from the apartment the officer was informed by the other police officer, Pereda, I think you said, that a gun had been thrown from an apartment on the second floor, the -- Officer Nelson testified that he, again, made numerous attempts to get the defendant to come out of the apartment, which he lawfully had the right to do.

> At that point the defendant -- I think he said he was there for -- I'm not sure, but I'm thinking it was about an hour before the defendant would come out of his apartment.
>
> So I do believe that the elements of resisting a peace officer in the lawful -- in the execution of his official duties has been proven by the State as well."

¶ 14 The court merged the UUWF count into the AHC count and sentenced defendant to seven years' imprisonment. The court also sentenced defendant to 93 days time considered served for the resisting arrest charge. This appeal followed.

¶ 15 On appeal, defendant first contends that the AHC statute is unconstitutional because it violates due process by criminalizing both lawful and unlawful possession of a firearm. Specifically, defendant asserts that the statute criminalizes the possession of a firearm by a twice-convicted felon, despite the fact that the Firearm Owners Identification Act (FOID Card Act) allows a twice-convicted felon to qualify for a FOID card in limited circumstances. See 430 ILCS 65/8, 10 (West 2014). Relying on *Coram v. State*, 2013 IL 113867, defendant argues that the statute potentially criminalizes wholly innocent conduct for those individuals with valid FOID cards and, accordingly, is invalid on its face.

¶ 16 The AHC statute provides that a person commits the offense of being an armed habitual criminal if he "receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination [of several enumerated felonies]." 720 ILCS 5/24-1.7 (West 2014). Under section 8 of the FOID Card Act, a person who is convicted of a felony may have his FOID card seized or revoked, or their application denied. 430 ILCS 65/8(c) (West 2014). However, section 10(c) of the FOID Card Act (430 ILCS 65/10(c) (West 2014)) provides that a circuit court may grant relief to a FOID card applicant prohibited from obtaining a card

under section 8(c) where he establishes certain requirements to the court's satisfaction. 430 ILCS 65/10(c) (West 2014). Specifically, the applicant must establish, *inter alia*, that his criminal history shows he will not be likely to act in a manner dangerous to public safety and granting relief would not be contrary to the public interest and to federal law. 420 ILCS 65/10(c) (West 2014). Thus, as defendant notes, it is possible that a felon might acquire a FOID card, and therefore be legally authorized to possess a firearm.

¶ 17 We first note that defendant does not claim the AHC statute is unconstitutional as applied to him. Instead, defendant asserts that the AHC statute is facially unconstitutional, arguing that the statute violates due process because it is unenforceable against anyone. Facial attacks on statutes are the most difficult challenge to mount (*People v. Davis*, 2014 IL 115595, ¶ 25), because for a statute to be facially invalid, the defendant must show there are no circumstances in which the statute could be validly applied (*People v. West*, 2017 IL App (1st) 143632, ¶ 21). "A statute is not facially invalid merely because it *could* be unconstitutional in some circumstances." *Id*. Accordingly, a facial challenge fails if any circumstance exists where the statute could be validly applied. *Id*. The constitutionality of a statute is a question of law we review *de novo*. *Id.*

¶ 18 Defendant acknowledges that panels of this court have rejected his precise argument on several occasions. See *People v. Johnson*, 2015 IL App (1st) 133663; *People v. Fulton*, 2016 IL App (1st) 141765; *People v. West*, 2017 IL App (1st) 143632; and *People v. Brown*, 2017 IL App (1st) 150146. In addressing the constitutionality of the AHC statute in *Fulton*, we held:

> " '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.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 23 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

¶ 19 We additionally rejected defendant's contention that the statute encompasses wholly innocent conduct, finding:

> "[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.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 31 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

¶ 20 Defendant nevertheless asks this court to depart from our holdings in *Johnson* and *Fulton* because those cases did not address the requisite individualized consideration of a person's right to possess a firearm set forth in *Coram v. State of Illinois*, 2013 IL 113867, ¶ 58. However, we

found *Coram* inapposite in both *Johnson* and *Fulton* because it analyzed an older version of the FOID Card Act (pre-2013 amendments), in upholding the individualized consideration of a person's right to possess a firearm. *Johnson*, 2015 IL App (1st) 133663, ¶ 29; *Fulton*, 2016 IL App (1st) 141765, ¶ 24. *Fulton* additionally distinguished *Coram* because it did not address the constitutionality of the AHC statute. *Fulton*, 2016 IL App (1st) 141765, ¶ 24. We see no reason to depart from our previous holdings on this issue, and, accordingly, we reject defendant's claim that the AHC statute is facially unconstitutional.

¶ 21 Defendant next asserts that the State failed to prove him guilty beyond a reasonable doubt of resisting a peace officer.

¶ 22 As an initial matter, however, we must address the State's contention that we lack jurisdiction to consider this claim. The State asserts that defendant failed to include in his notice of appeal his conviction for misdemeanor resisting a peace officer, and, therefore, we cannot address this issue. Defendant counters that jurisdiction is proper because (1) his notice of appeal was sufficient to provide the State with fair and adequate notice that he was appealing the entire judgment, and (2) reviewing courts liberally construe notices of appeal to include portions of a judgment arising from the same proceeding though not specifically listed on the notice of appeal. We agree with defendant.

¶ 23 It is well established that a notice of appeal should be liberally construed and considered as a whole. *People v. Gutierrez*, 2012 IL 111590, ¶ 9; *People v. Lewis*, 234 Ill. 2d 32, 37 (2009); *People v. Decaluwe*, 405 Ill. App. 3d 256, 263 (2010). "The notice will be 'deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the

appeal.' " *Decaluwe*, 405 Ill. App. 3d at 263 (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991)).

¶ 24 Here, the notice of appeal listed only defendant's conviction for AHC and does not mention his conviction for resisting a peace officer. However, the notice of appeal also listed the trial court's finding of guilt, and the dates of the bench trial and sentencing, which encompassed all of defendant's convictions. We find this sufficient to confer notice on the State that defendant was appealing his entire conviction. See *e.g.*, *Gutierrez*, 2012 IL 111590, ¶ 12 (finding the notice of appeal sufficient to provide the State with adequate notice and confer jurisdiction to review the defendant's entire conviction where it listed the date of final judgment). Accordingly, we conclude that we have jurisdiction to address the merits of defendant's appeal from his conviction for resisting a peace officer.

¶ 25 Defendant argues that the evidence was insufficient to sustain his resisting conviction because there was no evidence presented that showed he was under arrest or given orders by police, and he was within his rights to remain inside the apartment because the police did not have a warrant to arrest him or enter the apartment.

¶ 26 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43), and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-*

*Brito*, 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 27 To sustain the conviction for resisting a peace officer, the State had to prove: (1) defendant knowingly resisted or obstructed a peace officer, (2) the peace officer was performing an authorized act within his or her official capacity, and (3) defendant knew he or she was a peace officer. 720 ILCS 5/31-1(a) (West 2014); see also *People v. Baskerville*, 2012 IL 111056, ¶ 32. Our supreme court has held that an arrest made by a peace officer is an "authorized act" within the meaning of the statute. *City of Champaign v. Torres*, 214 Ill. 2d 234, 242 (2005). A defendant resists a peace officer when he or she commits an act that "impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as going limp, forcefully resisting arrest, or physically helping another party to avoid arrest." *People v. Haynes*, 408 Ill. App. 3d 684, 689-90 (2011). However, a defendant's conduct need not be physical to constitute obstructing or resisting an officer within the meaning of section 31-1(a). *Baskerville*, 2012 IL 111056, ¶ 23.

¶ 28 Here, we find the evidence insufficient to sustain defendant's conviction for resisting a peace officer. The complaint charged defendant with fleeing from Officer Nelson and barricading himself inside the apartment in an attempt to defeat arrest. Nelson's testimony does not support that charge. Nelson did not testify that he instructed defendant to stop running, or that defendant was under arrest. Instead, Nelson testified that he observed defendant running when he pulled into the parking lot. He did not see anything in defendant's hands or waistband, and did not testify that defendant was running in response to seeing the police. Even when

defendant refused to speak with the officers, Nelson did not testify that he informed defendant he was under arrest. Defendant, therefore, could not *knowingly* attempt to flee from the officer to defeat an arrest that, based on the record, was not communicated to him.

¶ 29 Furthermore, contrary to the trial court's finding, there was no testimony establishing that defendant remained in the apartment after throwing the gun from the window. The testimony revealed that defendant remained in the apartment for 45 minutes, and at some point, threw a gun out the window and then voluntarily exited his apartment. The testimony did not establish a timeline from which we can conclude that defendant remained in the apartment after the officers instructed him he was under arrest. In light of this evidence, we cannot say that any rational trier of fact could have found the essential elements of the offense of resisting a peace officer beyond a reasonable doubt. Here, the evidence did not show that defendant possessed the requisite knowledge – an essential element of the offense – that the police officers were effectuating, or attempting to effectuate, an arrest at the time of the incident. Defendant could not be found guilty of knowingly resisting arrest by Officer Nelson where he lacked the knowledge element of the crime. Therefore, we reverse defendant's conviction for resisting a peace officer.

¶ 30 For the foregoing reasons, we affirm in part the judgment of the circuit court of Cook County, and reverse defendant's conviction for resisting a peace officer.

¶ 31 Affirmed in part and reversed in part.