2017 IL App (1st) 151529-U
No. 1-15-1529
Order filed November 7, 2017

Second Division

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.14 CR 9150
	)	
DURRELL ROBERTSON,	)	Honorable
	)	Erica L. Riddick,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for the offense of armed habitual criminal must be reduced to the lesser-included offense of unlawful use of a weapon by a felon when defendant's previous conviction for aggravated battery of a peace officer is not a qualifying predicate offense.

¶ 2 Following a jury trial, defendant Durrell Robertson was found guilty of the offense of armed habitual criminal (AHC), and resisting or obstructing a police officer. He received a sentence of six years in prison for the AHC conviction and a concurrent one-year term for resisting or obstructing a police officer. On appeal, Robertson contends that his conviction for

AHC must be reduced to the lesser-included offense of unlawful use of a weapon by a felon (UUWF), and this cause remanded for resentencing because the State failed to establish that he had previously been convicted of two qualifying predicate offenses. According to Robertson, his previous conviction for aggravated battery of a peace officer is not a forcible felony that can serve as one of the two required predicate offenses.

¶ 3 We agree with Robertson. An aggravated battery is not a "forcible felony" unless it was based on great bodily harm or permanent disability or disfigurement. As Robertson's previous conviction for aggravated battery of a peace officer was not based on great bodily harm or permanent disability or disfigurement and was not an "other felony" under the Criminal Code, it does not satisfy the definition of forcible felony nor can it serve as a predicate offense to support a conviction for AHC. We affirm as modified and remand for resentencing.

¶ 4 Background

¶ 5 Robertson was charged with AHC, UUWF, aggravated unlawful use of a weapon, and resisting or obstructing a peace officer. The charging instrument cited two previous felonies as the predicate offenses for the AHC charge: a conviction for delivery of a controlled substance in case number 06 CR 19284 and a conviction for the aggravated battery of a peace officer in case number 08 CR 19096. Before trial, the State *nolle prossed* the UUWF and the aggravated unlawful use of a weapon charges and proceeded to trial on the AHC and resisting or obstructing a peace officer charges. The parties entered into a stipulation that Robertson had "two prior qualifying convictions to sustain the charge of armed habitual criminal." A jury convicted Robertson of AHC and resisting or obstructing a police officer. He was sentenced to six years in

prison for the AHC conviction and to a concurrent one-year sentence for resisting or obstructing a police officer.

¶ 6 Analysis

¶ 7 Robertson contends that the State failed to prove an element of the offense of AHC. He argues that his previous conviction for aggravated battery of a peace officer cannot serve as a predicate felony for the offense of AHC as it was not a forcible felony, that is, it was not based on great bodily harm or permanent disability or disfigurement. Robertson has supplemented the record with the indictment and mittimus entered in his previous case, which confirms that he was charged with, found guilty of, and sentenced for aggravated battery causing bodily harm to a peace officer, a Class 2 felony. See 720 ILCS 5/12-4(b)(18), (e)(2) (West 2008) (aggravated battery to peace officer occurs when defendant commits battery and knows the individual harmed to be officer engaged in performance of duties); 720 ILCS 5/12-3 (West 2008) (defendant commits battery if he or she, in relevant part, caused bodily harm to individual or makes physical contact of insulting or provoking nature).

¶ 8 A defendant commits the offense of AHC when he or she possesses a firearm after having been convicted of two or more of the following offenses:

> "(1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child * * *; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm * * *; or

(3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2014).

¶ 9 Aggravated battery of a peace officer is not among the offenses listed under subsection (a) (2) or (a) (3) of section 1.7. This court has held that a conviction for aggravated battery of a police officer does not "qualify as a 'forcible felony as defined in Section 2-8.' " See *People v. Crosby*, 2017 IL App (1st) 121645, ¶ 13 (quoting *People v. Smith*, 2016 IL App (1st) 140496, ¶ 11).

¶ 10 We note that there is a split among Illinois appellate courts as to whether an aggravated battery may constitute a forcible felony under the residual clause of section 2-8 of the Criminal Code of 2012 (720 ILCS 5/2-8 (West 2014)). See *People v. Jones*, 226 Ill. App. 3d 1054, 1056 (1992) (finding aggravated battery involving use or threat of physical force, but not resulting in great bodily harm or permanent disability or disfigurement, is forcible felony, and noting plain language of forcible felony statute "includes, along with a number of other crimes, *any* felony involving the use of physical force or violence against any individual") (Emphasis in original.)). See also *People v. Hall*, 291 Ill. App. 3d 411, 418 (1997).

¶ 11 Section 2-8 of the Code (720 ILCS 5/2-8 (West 2014)), defines a "forcible felony" as:

"treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2014).

¶ 12 Instructive is *People v. Schmidt*, 392 Ill. App. 3d 689 (2009). There, this court found that the legislature intended the residual category of the forcible felony statute to refer only to felonies not specifically included in the list of felonies contained within section 2-8. *Id.* at 695-96 ("While the State argues that section 2-8 defines 'forcible felony' as '*any* felony involving the threat or use of physical force or violence against any individual,' this argument ignores the phrase 'any *other* felony.' ") (Emphases in original.)

¶ 13 We further noted that the 1990 amendment to the forcible felony definition, "which added the phrase 'resulting in great bodily harm or permanent disability or disfigurement' after 'aggravated battery,' " was an expression of the legislature's "intent to limit the number and types of aggravated batteries that would qualify as forcible felonies." *Id*. at 696 (citing Pub. Act. 86-291 (eff. Jan. 1, 1990)). Hence, because section 2-8 of the Code "specifically enumerated aggravated battery resulting in great bodily harm or permanent disability or disfigurement, 'other felony' must refer to felonies other than aggravated battery." *Id.* at 695. See also *In re Angelique E.*, 389 Ill. App. 3d 430, 433 (2009) (finding definition of forcible felony in section 2-8 "excludes an aggravated battery that involves only bodily harm, not great bodily harm"); *In re Rodney S.*, 402 Ill. App. 3d 272, 286-87 (2010) (recognizing split in authority on this issue and following *Schmidt*).

¶ 14 We find *Schmidt*, *Crosby* and *Smith* well reasoned and follow them. Accordingly, an aggravated battery is not a "forcible felony" unless it was based on great bodily harm or permanent disability or disfigurement. Because Robertson's previous conviction for aggravated battery of a peace officer was not based on great bodily harm or permanent disability or disfigurement and was not an "other felony," it does not satisfy the definition of forcible felony

(*Crosby*, 2017 IL App (1st) 121645, ¶ 13), and, therefore, cannot serve as one of the predicate offenses to support a conviction for AHC (see 720 ILCS 5/24-1.7 (West 2014)).

¶ 15 While Robertson, through counsel, stipulated that his conviction for aggravated battery of a peace officer was a qualifying offense for the AHC charge, the State concedes that his conviction for AHC should be reduced to the lesser-included offense of UUWF, as absent the stipulation, it could not have proved Robertson guilty of the offense of AHC. We accept the State's concession.

¶ 16 We reduce Robertson's conviction for AHC to the lesser-included offense of UUWF, vacate the sentence imposed the AHC conviction, and remand for resentencing. We affirm the circuit court of Cook County in all other aspects.

¶ 17 Affirmed as modified and remanded with directions.