2017 IL App (1st) 152591-U

FIRST DIVISION
December 18, 2017

No. 1-15-2591

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 10262
	)	
LAMONT ARMSTRONG,	)	Honorable
	)	Vincent Michael Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: We affirm defendant's conviction for being an armed habitual criminal. We reject his argument that the statute is facially unconstitutional. We also modify defendant's fines, fees, and costs order.

¶ 2 Following a jury trial, defendant Lamont Armstrong was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (2014)) and sentenced to seven years' imprisonment. On appeal, Mr. Armstrong contends that the armed habitual criminal statute is facially unconstitutional. He also contends that his fines, fees, and costs order should be corrected. We affirm Mr. Armstrong's conviction and correct the fines, fees, and costs order.

¶ 3 BACKGROUND

¶ 4 Mr. Armstrong was charged with one count of being an armed habitual criminal (AHC), four counts of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. Prior to trial, the State moved to *nolle prosequi* all counts except the AHC count. Because Mr. Armstrong does not challenge the sufficiency of the evidence to sustain his conviction we recount the facts only to the extent necessary to resolve the issues raised on appeal.

¶ 5 The State's evidence at trial showed that, on May 26, 2014, Chicago police officer Suthar was on duty with his partners, Officers Cannata and Manjarrez, in the area of Lockwood Avenue and Adams Street. The officers were in a vehicle travelling southbound on Lockwood Avenue and observed a group of people walking northbound on the east side of Lockwood Avenue. A few feet behind the group, walking in the same direction, was Mr. Armstrong. Officer Suthar testified that as Mr. Armstrong walked, his left hand would swing about, but his right hand remained at his waist area as though he were "holding an object." When Mr. Armstrong saw the officers' vehicle, he quickly left the sidewalk and entered the yard of a nearby residence. The officers passed Mr. Armstrong, but turned their vehicle around to investigate his behavior. The officers briefly lost sight of Mr. Armstrong, but he eventually emerged from the yard and continued walking northbound on Lockwood Avenue. The officers, now travelling northbound on Lockwood Avenue, pulled up alongside Mr. Armstrong. Officers Suthar and Manjarrez exited the vehicle and announced that they were police. At the sight of the officers, Mr. Armstrong ran southbound on Lockwood Avenue, turned left onto Adams Street, and then ran through a gangway between two apartment buildings.

¶ 6 The officers gave chase with Officer Suthar running ahead of Officer Manjarrez. Officer

Suthar used his flashlight to illuminate a dark gangway that Mr. Armstrong had entered. Officer Suthar saw Mr. Armstrong climbing a gate in the gangway. As he was climbing the gate, Mr. Armstrong removed a dark, L-shaped object from his right waistband and threw it over the gate. Officer Suthar heard the sound of metal hitting cement on the other side. Officer Suthar grabbed Mr. Armstrong, pulled him down from the gate, and placed him into custody. Officer Manjarrez entered the gangway as Officer Suthar was pulling Mr. Armstrong down from the gate. Officer Suthar told Officer Manjarrez that he had seen Mr. Armstrong drop an object on the other side of the gate. Officer Manjarrez searched the area and saw a weapon on the ground. He eventually gained entry into the area and recovered a semi-automatic gun. Mr. Armstrong was placed inside the officers' vehicle and transported back to the 15th District police station.

¶ 7 On the way to the station, Mr. Armstrong told the officers that he was "broke" and intended to sell the gun. At the station, Officer Cannata read Mr. Armstrong his *Miranda* rights. Mr. Armstrong agreed to speak with the officers and told them that he saw someone hide the gun. He also told the officers that, because he needed money, he took the gun with the intention of selling it. In addition to the semi-automatic weapon, the only other item recovered from Mr. Armstrong was a cellular phone.

¶ 8 On cross-examination, Officers Suthar and Manjarrez acknowledged that the arrest reports did not include the fact that a group of people were walking ahead of Mr. Armstrong when he first came to their attention. The officers also acknowledged that Officer Suthar's report did not indicate that the officers announced their office to Mr. Armstrong or that Officer Suthar had used his flashlight in the gangway.

¶ 9 The parties stipulated that Mr. Armstrong had two qualifying felony convictions in case numbers 08 CR 14389-01 and 10 CR 13550-01. The first conviction was for delivery of a

controlled substance and the second was for unlawful use of a weapon by a felon. The State then rested.

¶ 10 After argument, the jury found Mr. Armstrong guilty of being an AHC. The trial court denied Mr. Armstrong's motion for a new trial. After hearing evidence in aggravation and mitigation, the court sentenced Mr. Armstrong to seven years' imprisonment. Mr. Armstrong was also assessed $404 in fines, fees, and costs. The court subsequently denied Mr. Armstrong's motion to reconsider sentence.

¶ 11 JURISDICTION

¶ 12 Mr. Armstrong was sentenced on July 24, 2015, and timely filed his notice of appeal on August 11, 2015. 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 Constitutionality of the AHC Statute

¶ 15 On appeal, Mr. Armstrong first contends 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 Owner's Identification (FOID) card. Mr. Armstrong 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.

¶ 16 The constitutionality of a statute is reviewed *de novo*. *People v. Patterson*, 2014 IL 115102, ¶ 90. 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. *Id.* Furthermore, 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 the defendant must establish that no set of circumstances exists under which the AHC statute would be valid. See *People v. Greco,* 204 Ill. 2d 400, 407 (2003).

¶ 17 In Illinois, the FOID Card Act (Act) restricts firearm ownership to those who possess a FOID card. 430 ILCS 65/2(a)(1) (West 2014). Under the Act, a person who is convicted of a felony may have their FOID card revoked and seized or their application for a FOID card denied. 430 ILCS 65/8(c) (West 2014). Section 10 of the 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 2014). 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"; (3) a grant of relief is not contrary to the public interest; and (4) a grant of relief is not contrary to federal law. Pub. Act 97–1131, § 15 (eff.Jan.1, 2013) (amending 430 ILCS 65/10(c) (West 2012)). Mr. Armstrong argues that, under these provisions, it is possible for a twice-convicted felon to obtain a FOID card and legally possess a firearm.

¶ 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 2014). And no provision exempts those awarded FOID cards from punishment. But, as Mr. Armstrong

acknowledges, this court has rejected facial challenges to the AHC statute identical to the one he poses here. 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 observed:

> "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.

¶ 19 Mr. Armstrong argues that our prior decisions were wrongly decided. This argument rests in part on our supreme court's decision in *Coram v. State,* 2013 IL 113867. According to Mr. Armstrong, our supreme court in *Coram* both "confirmed that the Illinois Constitution guarantees every citizen the right to individualized consideration of whether they may legally own a firearm" and established "that under both the FOID Card Act itself and the Illinois Constitution, the possession of a firearm by a person twice convicted of felony offenses set forth in the [AHC] statute is not, in all cases, unlawful." Mr. Armstrong argues that our prior decisions

finding the AHC statute constitutional are problematic because they "ignore[ ] *Coram*'s requirement that there be '*individualized* consideration of a person's rights to keep and bear arms.' *Coram*, 2013 IL 113867, ¶ 58." (Emphasis in original.)

¶ 20 With respect to *Coram*, we note that case does not address the AHC statute, but addresses only the FOID Card Act, and is therefore not controlling authority here. We have repeatedly recognized that, under *Coram*, a convicted felon must have an opportunity to obtain relief under the FOID Card Act from the prohibition on owning a gun. We have acknowledged that it is possible that a twice-convicted felon might obtain such relief and then, subsequently, have the AHC statute applied to him. *Fulton*, 2016 IL App (1st) 141765, ¶ 23; *Johnson*, 2015 IL App (1st) 133633, ¶ 27. Such a remote possibility, even if it would support an "as applied" challenge to the AHC statute, does not render the AHC statute facially unconstitutional. Mr. Armstrong also makes no argument that he had or could even be eligible for a FOID card.

¶ 21 Mr. Armstrong also argues that we should depart from our prior rulings and find that the AHC statute is facially unconstitutional because the statute potentially subjects wholly innocent conduct to criminal penalties. Mr. Armstrong cites five cases in support of this argument. These include *People v. Madrigal*, 241 Ill. 2d 463 (2011) (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); and *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).

¶ 22 In *Fulton,* this court distinguished the statutes at issue in *Madrigal* and *Carpenter* from the AHC statute. There, we stated:

> "[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 in original). 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.

¶ 23 For the same reasons that *Madrigal* and *Carpenter* were distinguished in *Fulton,* the analysis in *Wright*, *Zaremba*, and *Wick* is not applicable to the AHC statute. In contrast to the five cases Mr. Armstrong cites, where the statutes at issue criminalized such broad categories of innocent conduct that they no longer had a rational connection to the purpose of the legislation, the AHC statute has a rational relationship to the conduct the legislators sought to regulate. The unlikely chance that the AHC statute will criminalize possession of a gun by a FOID card owner is simply insufficient to render its purpose irrational. As such, we decline to depart from the reasoning in our prior decisions and find that the AHC statute is facially constitutional.

¶ 24 Fines and Fees

¶ 25 Mr. Armstrong next argues that the assessed fines, fees, and costs should be reduced from $404 to $80. He contends that the trial court erroneously assessed him with charges for which his offense does not qualify. Mr. Armstrong also insists that several of his assessments are labeled as "fees," but are actually fines, which should be offset by his presentence custody credit.

¶ 26 Initially, we note that Mr. Armstrong did not raise these challenges at trial and they are, therefore, arguably forfeited. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). We need not address this potential forfeiture, however, because the rules of forfeiture also apply to the State, and where, as here, the State fails to argue that Mr. Armstrong has forfeited the issue, it forfeits the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. We review *de novo* the propriety of a court-ordered fine or fee. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 27 First, the parties agree, and we concur, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) and the $5 court system fee (55 ILCS 5/5-1101(a) (2014)) must be vacated as those fees do not apply to Mr. Armstrong's felony offense of being an armed habitual criminal. 705 ILCS 105/27.3e (West 2014) (fee imposed in any traffic, misdemeanor, municipal ordinance, or conservation cases); 55 ILCS 5/5-1101(a) (2014) (fee imposed for violation of the Illinois Vehicle Code). Accordingly, we vacate the erroneous charges for both the $5 electronic citation fee and the $5 court system fee.

¶ 28 Mr. Armstrong next asserts that eight of the fees imposed against him are actually fines subject to be offset by his presentence incarceration credit. See *People v. Jones*, 223 Ill. 2d 569, 599 (2006) ("the credit for presentence incarceration can only reduce fines, not fees"). "Broadly speaking, a 'fine' is a part of the punishment for a conviction, whereas a 'fee' or 'cost' seeks to recoup expenses incurred by the State." *Id.* at 582. The most important factor, therefore, is

whether the charge seeks to compensate the State for any costs incurred as a result of prosecuting the defendant. See *People v. Graves*, 235 Ill. 2d 244, 250 (2009); see also *Jones*, 223 Ill. 2d at 600 ("A charge is a fee if and only if it is intended to reimburse the State for some cost incurred in defendant's prosecution.").

¶ 29 The parties agree that two of the fees assessed to Mr. Armstrong, the $50 court system fee (55 ILCS 5/5-1101(c) (West 2014)) and the $15 state police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)), are actually fines and should be offset by Mr. Armstrong's presentence credit. We concur. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 (holding "that the $50 Court System fee imposed in this case pursuant to section 5–1101(c) is a fine for which defendant can receive credit for the *** days he spent in presentence custody"); see also *People v. Maxey*, 2016 IL App (1st) 130698, ¶¶ 140-41 ("Since the state operations charge under section 27.3a(1.5) is a fine, defendant is entitled to presentence credit toward it.").

¶ 30 The parties only dispute whether the six remaining challenged charges are fines rather than fees. Mr. Armstrong argues that the following six charges are, in fact, fines subject to offset by his presentence incarceration credit: the $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)); the $15 clerk automation fee (705 ILCS 105/27.3a(1) (West 2014)); the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)); the $25 court services fee (55 ILCS 5/5–1103 (West 2014)); the $2 State's Attorney records automation fee (55 ILCS 5/42002.1(c) (West 2014)); and the $2 public defender records automation fee (55 ILCS 5/3–4012 (West 2014)).

¶ 31 This court has considered challenges to these assessments and repeatedly determined that they are fees and, therefore, not subject to presentence incarceration credit. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) ("We find that all of these charges are compensatory and

a collateral consequence of defendant's conviction and, as such, are considered 'fees' rather than 'fines.' "); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the $190 felony complaint assessment to be a fee); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81 (finding the clerk automation fee and the document storage fee are fees not subject to offset by presentence incarceration credit); *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (relying on *Tolliver* and finding the $25 court services charge is a fee not subject to offset by presentence incarceration credit); *Brown*, 2017 IL App (1st) 142877, ¶¶ 73, 75 (finding the State's Attorney records automation fee and public defender records automation fee to be fees); *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (same); *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65 (finding the State's Attorney records automation assessment and the public defender records automation assessment are both fees because they are meant to reimburse the State for expenses related to automated record-keeping systems). We decline Mr. Armstrong's invitation to revisit these rulings. Accordingly, we hold that these charges are fees not subject to offset by presentence incarceration credit.

¶ 32 We acknowledge that, in *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56, a panel of this court found that the State's Attorney and public defender records automation fees were, in fact, fines that should be offset by the presentence credit. However, we follow the decisions in *Brown*, *Reed*, and *Bowen* and determine that the State's Attorney records automation charge and the public defender records automation charge are fees, and, therefore, not subject to offset by presentence custody credit.

¶ 33 CONCLUSION

¶ 34 For these reasons, we affirm Mr. Armstrong's conviction for being an armed habitual criminal. We vacate the erroneously assessed $5 electronic citation fee and the $5 court system

fee; we also find that the $50 court system fee and the $15 state police operations charge are fines subject to presentence incarceration credit. However, the $190 felony complaint fee, the $15 clerk automation fee, the $15 document storage fee, the $25 court services fee, the $2 State's Attorney records automation charge, and the $2 public defender records automation charge are fees not subject to presentence incarceration credit. The fines, fees, and costs order should reflect a new total due of $329. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we direct the clerk of the circuit court to modify the fines, fees, and costs order accordingly.

¶ 35 Affirmed; fines, fees, and costs order corrected.