2018 IL App (1st) 160405-U

No. 1-16-0405

Order filed February 13, 2018

First 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

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 9408
	)	
JOHN WILLIAMS,	)	Honorable
	)	Catherine M. Haberkorn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: We reject defendant's facial challenge to the armed habitual criminal statute raised for the first time on appeal from the dismissal of his petition for relief from judgment.

¶ 2 Defendant John Williams appeals from the dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant contends, for the first time, that the armed habitual criminal

(AHC) statute (720 ILCS 5/24-1.7 (West 2014)), is facially unconstitutional because it criminalizes the lawful possession of firearms by certain felons. We affirm.

¶ 3 Following a 2011 jury trial, defendant was found guilty of the offense of AHC, two counts of unlawful use of a weapon by a felon (UUWF), possession of a controlled substance with intent to deliver, and two counts of possession of a controlled substance. Defendant was eligible for the AHC offense because, in addition to possessing a gun in the instant case, he had been previously convicted of residential burglary in 1990, and UUWF in 1997. Defendant was sentenced to 16 years in prison for the AHC conviction, 10 years for each UUWF conviction, 16 years for possession of a controlled substance with intent to deliver, and 3 years for each possession of a controlled substance conviction. All sentences were to run concurrently.

¶ 4 On appeal, this court rejected defendant's argument that his AHC conviction should be vacated because it violated the constitutional prohibition against *ex post facto* laws. See *People v. Williams*, 2013 IL App (1st) 120650-U, ¶¶ 5-7. This court also vacated defendant's UUWF convictions pursuant to the one-act, one-crime doctrine. *Id.* ¶¶ 8-9.

¶ 5 In 2014, defendant filed a *pro se* petition for relief from judgment alleging that his conviction for AHC was void because it was based in part upon a 1997 conviction for UUWF, which was unconstitutional and void *ab initio* under *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012), and *People v. Aguilar*, 2013 IL 112116.

¶ 6 The trial court appointed the Office of the Public Defender to represent defendant, and counsel subsequently filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The State then filed a motion to dismiss, which the trial court granted after hearing argument. Defendant now appeals.

¶ 7 On appeal, defendant makes no argument regarding the issue raised in his petition for relief from judgment. Rather, he contends that the AHC statute violates substantive due process and is facially unconstitutional. Defendant argues that the AHC statute "potentially criminalizes innocent conduct" because it punishes twice-convicted felons for possessing a firearm regardless of whether they were issued a Firearm Owner's Identification (FOID) card. Specifically, defendant argues that someone with two previous AHC-qualifying convictions could be issued a FOID card under limited circumstances, yet that person would still be subject to liability under the AHC statute if convicted of a third offense involving a gun, because having a valid FOID card is not a defense to the AHC statute.

¶ 8 Section 2-1401 of the Code constitutes a comprehensive statutory procedure authorizing a trial court to vacate or modify a final order or judgment in civil and criminal proceedings. *People v. Thompson*, 2015 IL 118151, ¶ 28. Ordinarily, a petition seeking relief under section 2-1401 must be filed more than 30 days from entry of the final order but not more than 2 years after that entry. 735 ILCS 5/2-1401(a), (c) (West 2014). There is, however, an exception to the ordinary two-year time limit when the petition challenges a void judgment. *Thompson*, 2015 IL 118151, ¶ 28 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). Our supreme court has held that one of the types of voidness challenges that is exempt from forfeiture and may be raised at any time is a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio*. *Id.* ¶ 32.

¶ 9 Here, defendant's section 2-1401 petition was filed approximately three years after his conviction and sentence. However, defendant can raise this claim for the first time on appeal from dismissal of his petition because he is challenging the AHC statute as facially

unconstitutional. See *Id.* (if "a statute is declared facially unconstitutional and void *ab initio*, it means that the statute was constitutionally infirm from the moment of its enactment and, therefore, unenforceable"). Thus, we will address the merits of defendant's contentions on appeal.

¶ 10 All statutes are presumed to be constitutional, and the party challenging a statute bears the "heavy burden" to overcome this presumption by clearly establishing a constitutional violation. *People v. Patterson*, 2014 IL 115102, ¶ 90. "A facial challenge to the constitutionality of a statute is the most difficult challenge to mount." *People v. Davis*, 2014 IL 115595, ¶ 25. "A statute is not facially invalid merely because it *could* be unconstitutional in some circumstances." (Emphasis in original.) *People v. West*, 2017 IL App (1st) 143632, ¶ 21. Accordingly, a facial challenge fails if any circumstance exists where the statute could be validly applied. *Id*. The constitutionality of a statute is reviewed *de novo*. *Patterson*, 2014 IL 115102, ¶ 90.

¶ 11 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 when: (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. 430 ILCS 65/10(c)(1)-(4) (West 2014). The AHC statute, on the other hand, makes it a Class X offense for a person twice-convicted of certain enumerated felonies to possess a firearm. 720 ILCS 5/24-1.7 (West 2014). The AHC statute does not contain a provision exempting those awarded FOID cards from punishment. Thus, as defendant points out, it is possible that a felon might acquire a FOID card, *i.e.*, be legally authorized to possess a firearm, yet still be convicted of the offense of AHC.

¶ 12 As defendant acknowledges, facial challenges to the constitutionality of the AHC statute on grounds identical to those raised in this case have been rejected by this court. See *West*, 2017 IL App (1st) 143632, ¶¶ 17-22; *People v. Fulton*, 2016 IL App (1st) 141765, ¶¶ 23-31; *People v. Johnson*, 2015 IL App (1st) 133663, ¶¶ 26-29; *People v. Brown*, 2017 IL App (1st) 150146, ¶¶ 26-31. In *Johnson*, this court 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.' [Citations.] 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." *Id.* ¶ 27.

¶ 13 Defendant, however, argues that these prior decisions were wrongly decided. Defendant relies on *Coram v. State*, 2013 IL 113867, to argue that our supreme court has "confirmed that the Illinois Constitution guarantees every citizen the right to individualized consideration of whether they may legally own a firearm" and "establish[ed] 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." Defendant argues that this court's previous rejection of similar arguments "ignores *Coram's* requirement that there be '*individualized* consideration of a person's rights to keep and bear arms.' " (Emphasis in original.) Defendant's brief at 13 (quoting *Coram*, 2013 IL 113867, ¶ 58).

¶ 14 In *Coram v. State*, 2013 IL 113867, ¶¶ 74-76 our supreme court held that the Act entitled the defendant to relief from the prohibition on his obtaining a FOID card, based on a 17-year-old misdemeanor conviction. We are unpersuaded by defendant's reliance on *Coram*, as that case analyzed the Act rather than the AHC statute. We have previously recognized that under *Coram* a convicted felon has the opportunity to obtain relief under the Act from the prohibition on owning a gun and that it is possible that a twice-convicted felon might obtain such relief, and, then, have the AHC statute applied to him. 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. See *Johnson*, 2015 IL App (1st) 133663, ¶ 27 ("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 (same).

¶ 15 Defendant 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. Defendant relies on *People v. Madrigal*, 241 Ill. 2d 463, 467-73 (2011) (invalidating a portion of the identity theft statute that would punish "a significant amount of wholly innocent conduct" such as conducting a Google search using someone's name); *People v. Carpenter*, 228 Ill. 2d 250, 269-73 (2008) (invalidating a statute that criminalized possession of a vehicle with a secret compartment); *People v. Wright*, 194 Ill. 2d 1, 25-28 (2000) (invalidating a record keeping statute that criminalized the failure to maintain certain records); *People v. Zaremba*, 158 Ill. 2d 36, 40-43 (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, 66-68 (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).

¶ 16 In *Fulton*, 2016 IL App (1st) 141765, ¶ 31, we distinguished the statutes at issue in *Madrigal* and *Carpenter* from the AHC statute, determining that:

> "the 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." *Id.*

¶ 17 As we recognized in *Fulton*, the remote possibility that the AHC statute could impact 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 relied upon by defendant. In those cases, the criminal statutes encompassed so many kinds of wholly innocent conduct that they lost any rational connection to the legislative purpose. See *Id.* ¶ 31 ("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 AHC statute, on the other hand, has a rational relationship to the conduct the legislators sought to regulate. See *Id.* (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27) (the "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' ").

¶ 18 Accordingly, in light of the substantial authority on this precise issue, we decline to reconsider the constitutionality of the AHC statute, adopt the reasoning of *Fulton* and *Johnson*, and therefore conclude that the AHC statute is not facially unconstitutional.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.