2012 IL App (1st) 111517-U

THIRD DIVISION
August 29, 2012

No. 1-11-1517

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 JUDICIAL DISTRICT

In re STEPHAN P., a Minor	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
(The People of the State of Illinois,	)	COOK COUNTY
Petitioner-Appellee,	)	
	)	
	)	No. 09 JD 3489
v.	)	
	)	
	)	HONORABLE
Stephan P.,	)	PATRICIA MENDOZA,
Respondent-Appellant).	)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: The juvenile respondent was adjudicated delinquent for the offense of aggravated unlawful use of a weapon. The appellate court had jurisdiction to consider the juvenile's claims that his adjudication violated his right to bear arms under the United States and Illinois Constitutions. However, reviewing court found the juvenile's constitutional rights were not violated. The circuit court erred in ruling that it lacked discretion to award predispositional credit for time spent on electronic home monitoring. The judgment of the circuit court is affirmed in part, reversed in part and remanded with directions.

¶ 2 Respondent, Stephan P., was adjudicated delinquent for the offense of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1) (West 2008)) by the circuit court of Cook County and sentenced to an indeterminate term of custody in the Juvenile Department of Corrections. Stephan now appeals, arguing: (1) the AUUW statute violates the right to bear arms protected by the United States and Illinois Constitutions (U.S. Const., amends. II, XIV; Ill. Const. 1970, art. I, § 22); (2) the circuit court erred in ruling it lacked discretion to credit time Stephan spent on electronic home monitoring. For the following reasons, we reject Stephan's constitutional claims, but remand the case to the circuit court for a determination of how much credit, if any, Stephan may be entitled to receive for time he spent on electronic home monitoring.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. On August 27, 2009, the State filed a delinquency petition charging Stephan with three counts of AUUW, one count of unlawful possession of a firearm, and one count of resisting a police officer. The AUUW allegations were that Stephan knowingly carried a handgun when he was not on his own land or in his own abode and the gun was uncased, loaded and immediately accessible. Later that day, at a preliminary hearing, the State proffered that on August 26, 2009, Chicago police officer Celani saw 16-year-old Stephan holding a handgun while standing on the sidewalk in front of his home at 7234 South Bell Avenue. When the police approached, Stephan went into his house. The police pursued Stephan through the house and apprehended him in the backyard as he flailed his arms and legs. The police seized the .22 caliber loaded handgun Stephan discarded in his kitchen.

Stephan told the police he bought the gun the prior month to protect his family after his home was burglarized. Although defense counsel disagreed with the State's assertion that the police saw Stephan in custody of the weapon outside his home, the circuit court found probable cause that Stephan was delinquent.

¶ 5 On September 3, 2009, the circuit court placed Stephan on electronic home monitoring.

¶ 6 On October 8, 2009, Stephan pleaded guilty to one count of AUUW. At the conclusion of the hearing, the circuit court released Stephan from electronic home monitoring. On November 19, 2009, the circuit court imposed an 18-month term of probation.

¶ 7 On April 20, 2010, the State filed a violation of probation (VOP) petition, alleging Stephan failed to attend school. On May 10, 2010, the State filed a VOP petition for supplemental relief, charging Stephan with possession of not more than 2.5 grams of cannabis. On June 24, 2010, Stephan admitted to violating his probation by possessing cannabis; the circuit court recommitted Stephan to an 18-month term of probation and ordered inpatient drug rehabilitation.

¶ 8 On September 9, 2010, the State filed a VOP petition alleging that Stephan failed to enroll in and attend the drug treatment program. The petition also alleged that Stephan failed to meet with his probation officer. On March 15, 2011, following a contested VOP hearing, the circuit court found Stephan had violated the terms of his probation and placed him in custody. At a March 22, 2011, dispositional hearing, the parties disputed whether Stephan was entitled to predisposition credit while subject to electronic home monitoring; the case was continued to resolve the issue.

¶ 9 On March 25, 2011, the circuit court determined that it lacked discretion to credit time Stephan spent on electronic home monitoring because the provision of the Unified Code of Corrections (Code) at issue (730 ILCS 5/5-4.5-100 (West 2010)) did not allow such credit for persons convicted of AUUW. The circuit court imposed an indeterminate term in the department of juvenile justice and granted Stephan 38 days of credit for time spent in predisposition custody. Stephan filed a timely notice of appeal to this court.

¶ 10 DISCUSSION

¶ 11 On appeal, Stephan argues that the AUUW statute violates the right to bear arms protected by the United States Constitution (U.S. Const., amends. II, XIV) and the Illinois Constitution (Ill. Const. 1970, art. I, § 22). Stephan also argues the circuit court erred in ruling that it lacked discretion to credit time Stephan spent on electronic home monitoring. The State argues this court lacks jurisdiction to decide the constitutional issues and concedes the issue of the circuit court's discretion to award credit.

¶ 12 I. Jurisdiction

¶ 13 Initially, the State argues that this court lacks jurisdiction to decide Stephan's constitutional claims. The State relies on our supreme court's decision in *In re J.T.*, 221 Ill. 2d 338 (2006). In *J.T.*, the respondent entered an admission in exchange for a sentence of probation. *Id.* at 342. Nearly one year later, the circuit court revoked the respondent's probation and sentenced him to prison. On appeal, the respondent argued (among other things) that the circuit court did not properly admonish him when it initially sentenced him to probation and that he should be allowed to file a motion to withdraw his admission and receive the necessary

admonishments. *Id*. at 344. The respondent argued that, although he had not filed a motion to withdraw his admission or an appeal from the original sentence, the appellate court should consider his case in the interest of fairness, because, as a juvenile, he could not seek postconviction relief. *Id*.

¶ 14 This court held that the circuit court had not properly admonished the respondent and remanded the case so that he could receive the admonishments and have the opportunity to withdraw his admission. *Id*. at 344-45. However, the supreme court reversed, holding that the appellate court lacked jurisdiction to consider the admonishment issue because J.T. did not file a timely notice of appeal from the order sentencing him to probation, a written motion to either withdraw his plea or reconsider his sentence, or a motion for leave to file a late notice of appeal. *Id.* at 347. Here, the State argues that Stephan similarly failed to file a motion to withdraw his plea as required by Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), let alone a notice of appeal from an order denying said motion.

¶ 15 Stephan responds that this court has jurisdiction because – unlike *J.T.* – he is raising constitutional claims. Stephan correctly cites *In re J.W.*, 204 Ill. 2d 50 (2003), in which a juvenile filed an appeal without moving to withdraw his admissions or to have his sentence reconsidered. In *J.W.*, the State argued that the Illinois Supreme Court lacked jurisdiction over the appeal because the juvenile had not complied with Rule 604(d). *Id*. at 60. The juvenile had admitted two sex-offense charges and was adjudicated delinquent before being placed on probation. *Id*. On appeal, J.W. was not seeking to challenge his admissions or have his term of probation reconsidered but claimed two conditions of his probation – the condition that he

register as a sex offender for the rest of his life and the condition barring him from entering the Village of South Elgin – were void as unconstitutional. *Id*. at 61. The *J.W.* court found that Rule 604(d) did not act as a jurisdictional bar to the appeal because the juvenile was challenging the constitutionality of the two conditions of his probation, not the imposition of probation itself. *Id*.

¶ 16 Like the juvenile in *J.W.*, Stephan is not challenging his admissions or asking this court to reconsider his sentence. Instead, Stephan is contesting the constitutionality of the statute which he admitted violating. A constitutional challenge to a criminal statute can be raised at any time. *Id*.; see also *People v. Meyerowitz*, 61 Ill. 2d 200, 211 (1975) (defendant who pleads guilty may challenge conviction under unconstitutional statute in motion to terminate probation). Accordingly, Stephan's failure to comply with Rule 604(d) does not bar Stephan's constitutional claims on appeal.

¶ 17 II. The Right to Bear Arms

¶ 18 Stephan argues that the AUUW statute, insofar as it criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violates the constitutional right to bear arms, both facially and as applied to him. Stephan acknowledges that this court has repeatedly rejected the same arguments in other cases. *E.g.*, *People v. Alvarado*, 2011 IL App (1st) 082957, ¶ 72; *People v. Williams*, 2011 IL App (1st) 093350, ¶ 57; *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 82; *People v. Montyce H.*, 2011 IL App (1st) 101788, ¶ 34; *People v. Aguilar*, 408 Ill. App. 3d 136, 142-50 (2011), *appeal allowed*, No. 112116, 949 N.E.2d 1099 (May 25, 2011). Indeed, *Alvarado* involved a situation where the defendant ran from the street into his residence. See *Alvarado*, 2011 IL App (1st) 082957, ¶¶ 10-17. In addition, as noted in discussing the

jurisdictional issue, Stephan does not challenge his admission to the factual predicates for the AUUW charge. Although we understand Stephan's desire to preserve the claim for further appeal, his brief relies on the United States Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, — U.S. —, 130 S. Ct. 3020 (2010), and raises no new argument that persuades us to depart from this court's established precedent, which considered the effect of *Heller* and *McDonald* on similar cases at length.[1]

¶ 19 Similarly, we reject Stephan's claim under the Illinois Constitution for the reason stated in *Aguilar, i.e.,* this court lacks the authority to reverse our supreme court's decision rejecting the state constitutional claim in *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 498 (1984). *Aguilar*, 408 Ill. App. 3d at 149-50. Thus, for the reasons previously articulated by this court in the case law cited earlier, Stephan's constitutional claims fail.

¶ 20 III. Credit for Predispositional Electronic Home Monitoring

¶ 21 Lastly, Stephan argues that the circuit court erred in ruling it lacked discretion to award predispositional credit for time Stephan spent on electronic home monitoring under section 5-4.5-100 of the Code (730 ILCS 5/5-4.5-100 (West 2010)). The State concedes that the circuit court has discretion under section 5-4.5-100(b) of the Code to grant such credit where, as here, Stephan was convicted of a Class 4 AUUW violation and sentenced to an indeterminate term of

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[1] Our supreme court will likely clarify the scope and effect of *Heller* and *McDonald* in *Aguilar*, but our supreme court currently appears to generally recognize the intermediate level of scrutiny applied by this court. See *Wilson v. County of Cook*, 2012 IL 112026, ¶ 42.

custody in the Department of Corrections. See *J.T.*, 221 Ill. 2d at 353. Accordingly, we remand the case for the circuit court to determine how much credit, if any, Stephan may be entitled to receive.

¶ 22 CONCLUSION

¶ 23 In short, we conclude that this court possesses jurisdiction over Stephan's constitutional claims, but reject them for the reasons stated repeatedly in our case law. However, we find that the circuit court erred in ruling it lacked discretion to award predispositional credit for time Stephan spent on electronic home monitoring. Accordingly, we remand the case to the circuit court of Cook County for a determination of how much credit, if any, Stephan may be entitled to receive.

¶ 24 Affirmed in part and reversed in part; cause remanded.