2011 IL App (1st) 091879-U

FIFTH DIVISION
August 26, 2011

No. 1-09-1879

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 16687
	)	
MICHAEL PALMER,	)	Honorable
	)	Victoria A. Stewart,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Judgment that defendant violated probation affirmed where probation officer had authority to file petition and due process violation that occurred at hearing was harmless error; defendant's underlying conviction affirmed where statute under which he was convicted is constitutional; certain fines and fees vacated.

¶ 1 Defendant Michael Palmer appeals from the judgment of the circuit court of Cook County revoking the term of probation imposed on his plea conviction of aggravated unlawful use of a weapon (AUUW). He contends that the trial court lacked jurisdiction over the violation of probation petitions filed by his probation officer; that his due process rights were violated at the hearing; and that certain pecuniary penalties were improperly assessed. In a

supplemental brief, defendant claims that his underlying conviction for AUUW should be vacated because it restricts his constitutional right to bear arms.

¶ 2 On July 31, 2007, two Chicago police officers responded to a call of shots fired at 65th and South Laflin Streets, and approached a group of men, including defendant, who were standing on a sidewalk. As they did so, defendant fled from the area and tossed a loaded semiautomatic pistol to the ground. The officers recovered the weapon and defendant admitted that it belonged to him. The trial court accepted defendant's plea to the charge of AUUW and sentenced him to 24 months' probation, ordered him to obtain his GED, and imposed various fines and fees.

¶ 3 On September 23, 2008, defendant's probation officer requested leave from the court to file a petition for violation of probation, alleging that defendant had failed to report to the probation department for two consecutive months, obtain his GED, or pay his fines and fees. The court allowed the petition to be filed and issued an arrest warrant. On December 23, 2008, the probation officer requested leave to file a supplemental petition, alleging that defendant had been arrested on a battery charge and had failed to report in October and November. Thereafter, on April 9, 2009, the probation officer requested leave to file a second supplemental petition, alleging that defendant violated his probation during a March 2009 arrest for criminal trespass.

¶ 4 At the hearing held on that same April day, defendant appeared and was represented by counsel, who told the court that defendant "plead[ed] guilty" to the charges in the initial and first supplemental petitions. Counsel stipulated that defendant had not reported to his probation officer on the four occasions noted in the petitions, failed to obtain his GED, and failed to pay his fines and fees. In response to the charges in the second supplemental petition, counsel indicated that defendant pleaded "not guilty" and stipulated that he had been arrested during his

term of probation for criminal trespass to a residence, but had not been convicted. The court noted that defendant had failed to appear on that matter and it was marked "Bond forfeiture - SOL." The court then stated that "[defendant] violated my probation on three separate occasions. I will sentence him to three years in the Illinois Department of Corrections."

¶ 5 Counsel asked to present mitigation evidence and the court responded "[i]f you want to. Other than the mitigation that was originally presented?" Counsel explained that defendant had been homeless, leading to his having difficulties reporting to his probation officer and dropping out of high school. The following colloquy then occurred.

"DEFENDANT: Excuse me ma'am. I was homeless ma'am. I couldn't do - -

THE COURT: I am going to arrange for you to have housing for a little while, Mr. Defendant. You don't have to worry about it.

DEFENDANT: I'm on my feet now. I can pay the money. I can come in. All that. I can make up for the time I missed.

***

THE COURT: On the third violation, Mr. Defendant, you are out of luck.

DEFENDANT: But look, ma'am, I - -

THE COURT: I think I will give him more than three years; but go on.

DEFENSE COUNSEL: Well, Judge, you know, I understand that he did not comply. The problem is that most of us at 18 if we become homeless, we could have a lot of difficulties surviving. And it's not a crime to be poor.

THE COURT: I am not violating him for not paying the fines and fees. I am violating him for failure to see the probation officer and failing to stay in school.

DEFENDANT: I had no transportation to school or to the - -

THE COURT: I sentence the Defendant to three years in the Illinois Department of Corrections."

¶ 6 This appeal follows, where defendant does not contest the validity of the charges, but contends that the trial court did not have jurisdiction to consider the violation of probation petition filed by a probation officer, rather than an assistant State's Attorney.[1] Thus, he claims, the judgment revoking probation is void.

¶ 7 The Unified Code of Corrections (Code) provides in relevant part that "[t]he conditions of probation *** may by modified by the court on motion of the supervising agency or on its own motion or at the request of the offender after notice and a hearing." 730 ILCS 5/5-6-4(f) (West 2008). The supreme court has determined that the Code contemplates the revocation of an offender's probation only upon the filing of a petition charging a violation of a condition of probation by a proper party. *People v. Dinger*, 136 Ill. 2d 248, 259 (1990). In *People v. Keller*, 399 Ill. App. 3d 654, 656 (2010), this court considered the same issue raised by defendant here, and found, in a detailed analysis of the relevant statute, that a probation officer is such a "proper party."

¶ 8 Defendant, nonetheless, argues that we should follow *People v. Herrin*, 385 Ill. App. 3d 187 (3d Dist. 2008), and *People v. Kellems*, 373 Ill. App. 3d 1129 (4th Dist. 2007),

[1] We note that a case is currently pending before our supreme court that may be dispositive on this issue. *People v. Hammond*, 397 Ill. App. 3d 342 (2009); *People v. Alberty*, No. 1-08-1149 (2010) (unpublished order under Supreme Court Rule 23), *appeal pending*, Nos. 110044, 110705 (cons.).

which held that an agent of the county probation department "cannot file a pleading that charges a probation violation and seeks revocation." Defendant, however, failed to cite section 5-6-4(f) of the Code, as it applies to this case. In any event, we have already distinguished both of the cases relied upon by defendant (*Keller*, 399 Ill. App. 3d 656-60), and find no reason to depart from the reasoning expressed and conclusion reached in that case.

¶ 9 Here, the parties acknowledge that each of defendant's three petitions seeking to revoke probation were prepared and presented in court by an officer of the probation department. The filing of such a petition is not among the enumerated duties proscribed to probation officers in section 12 of the Probation and Probation Officers Act (730 ILCS 110/12 (West 2008)). However, contrary to defendant's assertion, it is similarly not listed in the duties and powers assigned to State's Attorneys in section 3-9005 of the Counties Code (55 ILCS 5/3-9005(a)(1) (West 2008)). *Keller*, 399 Ill. App. 3d at 660.

¶ 10 Section 5-6-4 of the Unified Code (730 ILCS 5/5-6-4 (West 2008)) outlines the procedures to be followed for violation of probation proceedings, and assigns to the judiciary the duties of conducting hearings based on petitions to revoke probation, revoking probation, and imposing sentences. *Keller*, 399 Ill. App. 3d at 660-61. Probation officers are judicial employees (730 ILCS 110/9b(3) (West 2008)); therefore, the action of a probation officer is the action of the judicial branch (*Keller*, 399 Ill. App. 3d at 662, citing *People v. Hammond*, 397 Ill. App. 3d 342, 352 (2009), *appeal pending*, Nos. 110044, 110705 (cons.)). "The probation department, under the auspices of the judiciary, *inter alia*, 'take[s] charge of and watch[es] over all persons placed on probation under such regulations and for such terms as may be prescribed by the court.' " *Keller*, 399 Ill. App. 3d at 662, quoting 730 ILCS 110/12(5) (West 2006). When defendant violated the conditions of his probation, a probation officer was permitted to file a petition informing the court, defendant, and the State's Attorney of that development. *Keller*, 399

Ill. App. 3d at 662. We, therefore, find that the court had jurisdiction over the petitions filed by the probation officer and that defendant's argument to the contrary is without merit.

¶ 11 Defendant next contends that his due process rights were violated in the proceedings when the court refused to consider his ability to comply with the terms of probation, and was not permitted to speak. As part of this contention, defendant argues that the State presented no evidence or witnesses to support certain charges, which we interpret as an indirect challenge to the sufficiency of the evidence, rather than an attack on due process.

¶ 12 To the extent that defendant asserts that he was not afforded due process at his hearing, we note that defendant, as a probationer at a civil hearing for a violation of probation, is not afforded the same due process rights as a defendant in a criminal proceeding. *People v. Lindsey*, 199 Ill. 2d 460, 467, 472 (2002). He is, however, afforded the right to be given notice of the petition, a court hearing on the violation, the right to be heard, the right to confront and cross-examine, and the right to counsel. 730 ILCS 5/5-6-4(b), (c) (West 2008); *Lindsey*, 199 Ill. 2d at 473.

¶ 13 Defendant does not dispute that he was given proper notice, and that he appeared at a hearing represented by counsel, but asserts that he was not given the opportunity to be heard. Although defendant, through counsel, stipulated that he failed to report on four occasions and "plead[ed] guilty" to those violations of probation, he did not "plead guilty" to the violations associated with his subsequent arrests. Our thorough review of the record reveals that defendant sought to be heard by the court, or present a challenge or mitigation evidence related to these charges. The court, in response, disregarded defendant's attempts to speak and cut him off on at least three separate occasions. Although a defendant at a probation revocation hearing is not afforded the same level of due process rights as a criminal defendant, the trial court's disregard for defendant's right to speak or have his challenges to the charged violations be heard

does not comport with the supreme court's guidance to provide him with "a conscientious judicial termination of the charge according to accepted and well recognized procedural methods." *People v. Pier*, 51 Ill. 2d 96, 100 (1972).

¶ 14 Despite the trial court's clear error in this case, it, nonetheless, does not require an automatic reversal of the determination to violate defendant's probation. See *People v. Davis*, 233 Ill. 2d 244, 273 (2009) (finding that a constitutional due process error may be subject to harmless error analysis and not a structural defect that requires automatic reversal). The test for determining whether a constitutional error is harmless is whether it is clear beyond a reasonable doubt that a rational fact-finder would have found defendant guilty absent the error. *People v. Thurow*, 203 Ill. 2d 352, 368-69, (2003), citing *Neder v. United States*, 527 U.S. 1, 18 (1999). Defendant stipulated to the evidence presented at the hearing as it related to his failure to report and "plead[ed] guilty" to the violations contained in two of the petitions. He may not now argue facts to which he has already stipulated (*People v. Cortez*, 402 Ill. App. 3d 468, 472 (2010)), and the failures to report contained therein are alone sufficient to sustain the court's determination that he violated his probation. As such, the record does not support the contention that the trial court's finding is against the manifest weight of the evidence. *People v. Colon*, 225 Ill. 2d 125, 128 (2007). A rational trier of fact could have, absent the error, found that defendant violated his probation, and we find the trial court's error was harmless. *Thurow*, 203 Ill. 2d at 369.

¶ 15 Moreover, defendant, by stipulating, waived his right of confrontation and cross-examination. In the criminal cases of *People v. Clendenin*, 238 Ill. 2d 302, 325-26 (2010), and *People v. Campbell*, 208 Ill. 2d 203, 221 (2003), the supreme court found that counsel may waive defendant's right of confrontation by stipulating to the admissibility of the evidence where defendant does not object or dissent from the decision and it is a matter of trial strategy. We find

that the same result is obtained here, where defendant did not object or dissent from counsel's decision to stipulate to the State's evidence.

¶ 16 Insofar as defendant argues the sufficiency of the evidence presented at the hearing, we note, again, that defendant stipulated to the charges that he failed to report to his probation officer for the four months indicated in the initial and second supplemental petitions. However, we agree with defendant that the evidence in support of the court's finding on the second supplemental petition, which listed defendant's March 2009 arrest as the sole ground for violation, was insufficient.

¶ 17 The State must prove a violation of probation by a preponderance of the evidence. *Colon*, 225 Ill. 2d at 156-57. One condition of probation is that defendant not violate any criminal statute of any jurisdiction. *Colon*, 225 Ill. 2d at 156-57, citing 730 ILCS 5/5-6-3(a)(1) (West 2002). Although proof of a *conviction* is not required to support a finding of a violation (see, *e.g.*, *Colon*, 225 Ill. 2d at 155), there must be some evidence presented that indicates defendant violated a criminal statute (*People v. Dowery*, 62 Ill. 2d 200, 208 (1975)).

¶ 18 Defendant pleaded not guilty to the violation contained in the second supplemental petition and counsel stipulated that defendant had been arrested on March 18, 2009, for criminal trespass to residence. The State did not present evidence related to this violation and the record is devoid of support for finding such a violation. The trial court was presented only with evidence that defendant was arrested and subsequently failed to appear in court on the charges related to that arrest. It is axiomatic that an arrest does not equate to a violation of a criminal statute, and defendant's subsequent failure to appear is a matter more related to contempt proceedings or bond forfeiture; neither of these prove that a criminal statute was violated. Accordingly, we cannot find the evidence sufficient to support the violation of probation under the second supplemental petition.

¶ 19 Notwithstanding this insufficiency, we are unable to provide defendant with an appropriate remedy. As we discussed above, defendant stipulated to his failure to report to his probation officer on four occasions and this is sufficient to sustain the finding. The mittimus issued in this case does not differentiate between the findings as to each petition; there is only a handwritten notation that defendant "PG to VOP" next to the court's imposition of the sentence on his underlying conviction. Therefore, we are unable to vacate the trial court's finding if it was never entered. Defendant notes that he has already completed his sentence, and therefore seeks, as his only remedy, having the finding vacated. It is for this reason that we do not remand the case for resentencing.

¶ 20 As to defendant's remaining assertions related to his sufficiency argument, the record shows that the court explicitly told defendant that it was not considering his ability to pay the fines and fees and the record indicates that defendant made no efforts toward obtaining his GED or attending school. Accordingly, despite the trial court's improper consideration of defendant's arrest, we affirm the court's finding that defendant violated his probation.

¶ 21 Defendant also challenges the imposition of certain pecuniary penalties by the court. Although he failed to raise these claims in the trial court, sentencing issues may affect defendant's substantial rights, and may be reviewed for plain error. *People v. Black*, 394 Ill. App. 3d 935, 939 (2009).

¶ 22 Defendant contends, and the State concedes, that the $100 Trauma Fund charge (730 ILCS 5/5-9-1.10 (West 2008)), and the $5 Court System charge (55 ILCS 5/5-1101(a) (West 2008)), should be vacated. We agree since the trauma fund charge applies only to specified firearms offenses that do not include the AUUW statute, and the court system charge applies only to vehicle offenses. *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009).

¶ 23 Defendant also contends that this court should vacate the $15 Court Services fee (55 ILCS 5/5-1103 (West 2008)) because he was not convicted of one of the offenses enumerated in the statute. We disagree, and note that the plain language of the statute shows that remuneration of court security or sheriff's costs applies in all criminal cases resulting in a judgment of conviction, as here, and is not restricted in the manner defendant proposes. *People v. Anthony*, 408 Ill. App. 3d 799, ___ (2011), citing *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010), and *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010). We therefore affirm the $15 Court Services fee.

¶ 24 In his supplemental brief, defendant seeks the vacatur of his underlying conviction, contending that the AUUW statute is unconstitutional in light of the Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 541 U.S. ___, 130 S. Ct. 3020 (2010). Although defendant did not raise this issue in the trial court, a challenge to the constitutionality of a statute may be raised at any time (*People v. Bryant*, 128 Ill. 2d 448, 454 (1998)), and our review is *de novo* (*People v. Carpenter*, 228 Ill. 2d 250, 267 (2008)).

¶ 25 The AUUW statute prohibits the carrying or possession of a firearm in the presence of certain aggravating conditions, but provides certain enumerated exceptions from criminal liability, including carrying or possessing a firearm on one's own land or in one's own abode. 720 ILCS 5/24-1.6(a)(1)-(3) (West 2008).

¶ 26 Here, defendant pleaded guilty to an offense outlawed by the AUUW statute and the stipulated facts at his plea hearing indicated that defendant was carrying a concealed, uncased, loaded, and immediately accessible firearm on a public sidewalk (720 ILCS 5/24-1.6(a)(1), (3) (West 2008)). Defendant has not claimed that one of the enumerated exceptions under the AUUW statute applies to him. Rather, he maintains that the AUUW statute, which

criminalizes the mere possession of a firearm outside of one's home, is unconstitutional on its face and as applied to him.

¶ 27 Initially, the parties disagree as to the appropriate level of scrutiny to be applied here. Defendant seeks a strict scrutiny review, arguing that a fundamental right is at issue, whereas the State responds that we should review this issue using a rational basis standard. In this case, we follow our previous holding in *People v. Aguilar*, 408 Ill. App. 3d 136, 142 (2011), and apply intermediate scrutiny. In *Aguilar*, we noted that the majority in *Heller* rejected the use of rational basis review, but did not mandate the use of strict scrutiny, and that a number of federal courts have determined that intermediate scrutiny was the appropriate standard of review for second amendment challenges. *Aguilar*, 408 Ill. App. 3d at 145-46.

¶ 28 In *Aguilar*, we found that the AUUW statute survives this intermediate scrutiny, and noted that its purpose is to allow for harsher penalties directed at an individual within Illinois, who is not specifically exempted, from carrying an uncased, loaded weapon on his person or in his vehicle "because of the inherent dangers to police officers and the general public, even if the person carrying the weapon has no criminal objective." *Aguilar*, 408 Ill. App. 3d at 146. We went on to find that the AUUW did not violate defendant's second amendment rights, as applied to him, because it is substantially related to an important government objective, and that the fit between the statute and the governmental objective was reasonable. *Aguilar*, 408 Ill. App. 3d at 146. We adopt that finding herein.

¶ 29 We also note that the AUUW statute specifically excludes from its proscriptions the possession of a firearm within one's abode. *People v. Dawson*, 403 Ill. App. 3d 499, 510 (2010). Thus, the statute does not implicate a person's right to keep a firearm in the home for self defense, as was at issue in *Heller* and *McDonald*, and there is, further, no basis for finding that the AUUW statute is unconstitutional.

¶ 30 Defendant challenges the foundation of our holding in *Dawson*, arguing that we relied on cases decided prior to *Heller*. We find no merit to this challenge. In *Dawson*, 403 Ill. App. 3d at 510, we acknowledged our use of such caselaw and found that the discussion therein of legislative purpose behind the statute and constitutional findings prevail here because *Heller* and *McDonald* did not define the fundamental right to bear arms so as to include activity barred by the AUUW statute.

¶ 31 Defendant also argues that the protections of the second amendment are not limited to carrying firearms within the home, and asserts that the definition of the second amendment provided in *Heller* extends beyond the home. We have rejected such a claim on several prior occasions (*Aguilar*, 408 Ill. App. 3d at 143; *People v. Williams*, 405 Ill. App. 3d 958, 962 (2010); *Dawson*, 403 Ill. App. 3d at 508), and continue to do so here. We reiterate that the issue in *Heller* was limited to firearms in the home for self-defense purposes. This narrow focus defeats defendant's claim that it extends beyond that usage. *Williams*, 405 Ill. App. 3d at 962. Based on the foregoing, we conclude that the AUUW statute does not violate the right to bear arms under the Illinois or U.S. constitutions, and we reject defendant's contrary contention.

¶ 32 For the reasons stated, we vacate the $100 Trauma Fund charge and the $5 Court Systems fee, and affirm the judgment in all other respects.

¶ 33 Affirmed in part, vacated in part.