2013 IL App (1st) 102984-U

FIFTH DIVISION
January 25, 2013

No. 1-10-2984

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. 08 CR 18047
	)	
EVERETT WEST,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Amendment to the armed violence statute corrected unconstitutional disproportionality to armed robbery statute's 15-year firearm enhancement so that the firearm enhancement to defendant's armed robbery sentences was proper. The trial court did not abuse its discretion in considering defendant's post-trial protestation of innocence as one factor among many in sentencing.

¶ 2 Following a jury trial, defendant Everett West was convicted of two counts of armed robbery and sentenced to concurrent prison terms of 29 years, each including a 15-year enhancement for committing the offense while armed with a firearm. On appeal, defendant contends that the trial court erroneously used his protestation of innocence as an aggravating

factor in sentencing. He also contends that the firearm enhancement has been found unconstitutional and that a subsequent statutory amendment to a related statute did not revive the unconstitutional statutory provision, so that his firearm enhancement was void.

¶ 3 Defendant and codefendant Wallace Simmons were charged with three counts of armed robbery, allegedly committed while they were armed with a firearm, against Ghazi Hijazin, Salem Hijazin, and Jamil Zumot on or about August 19, 2008.

¶ 4 The evidence at trial showed that defendant and codefendant entered a store operated by Ghazi and his son Salem, and also occupied at the time by Ghazi's friend Zumot. (Ghazi and Salem testified, but Zumot did not.) Defendant and codefendant initially looked at merchandise, but then defendant produced a gun. Defendant held Ghazi, Salem, and Zumot at gunpoint and repeatedly threatened to kill them, including holding the gun to Salem's head. Defendant had the three men lie face-down on the floor in a back room of the store as codefendant took each man's wallet, and defendant kicked Salem several times as he was on the floor. Defendant forced the three men at gunpoint to the room containing the store's security video system, and he removed the videotape.

¶ 5 A police officer then appeared outside the store, and when both defendant and Salem saw her, Salem grabbed defendant's gun, threw it to the floor, and repeatedly struck defendant in the face. Ghazi picked up the gun and struck defendant in the head with it, and codefendant attacked Ghazi. Zumot joined the struggle and codefendant struck him in the face. Defendant and codefendant fled, with Salem – now holding defendant's gun – and Ghazi pursuing codefendant. Officers separately arrested defendant and codefendant. The property of Ghazi and Salem, but no identifiable property of Zumot, was recovered. Though defense counsel argued to the jury that defendant had been a previous customer who came in to complain about his purchase and was then attacked by Salem, Ghazi, and Zumot when the dispute became heated, Salem denied

having seen defendant before that day, and Ghazi and Salem denied that a gun was kept in the store at that time.

¶ 6 On this evidence, the jury found defendant guilty of the armed robbery of Ghazi and Salem while armed with a firearm but found him not guilty of the armed robbery of Zumot.

¶ 7 The pre-sentencing investigation report (PSI) indicated defendant's prior convictions: one for armed robbery and three for aggravated robbery. It also indicated that he was on parole at the time of the instant offense and had two other pending armed robbery cases. In the PSI, defendant gave his account of the instant incident: he and codefendant went to the store to complain about a previous transaction and, when the argument became acrimonious, a fight broke out; defendant denied both being armed and committing robbery. He stated in the PSI that he was physically abused during childhood. He did not complete high school but later received his GED, and he had not been employed since 2004. He admitted to prior gang membership and to daily alcohol and marijuana use since his early teen years.

¶ 8 At sentencing, the State argued as aggravation the threat of serious harm from defendant brandishing a gun, his criminal history and lengthy prior imprisonment, and the fact that he was on parole at the time of the instant offense. The defense argued in mitigation defendant's youth (26 years), childhood abuse, efforts to take up an occupation in music, the fact that nobody was seriously injured during the instant offense, and that "defendant does not have a physically violent background." Defendant did not personally address the court.

¶ 9 Before passing sentence, the court noted at length defendant's history of offenses using weapons, disputing the defense representation that he did not have a physically violent criminal background. The court also found that "what happened that day lets me know exactly what is in his heart;" that he "apparently needs weapons to prove that he's a tough guy," so that "this case could have very well ended a lot differently *** if that police officer didn't show up." The court

acknowledged defendant's abusive childhood but rejected it as an excuse for robbing people. The court also noted that defendant was, in the PSI, "still telling that story" that had been his defense theory at trial, observed that defendant "would have been better off" refraining from describing the incident in the PSI as many defendants do, and stated that "in his mind, he's got it that now he is the victim." The court sentenced defendant to 29 years' imprisonment (including the 15-year firearm enhancement) for each of the two counts, to be served concurrently. Defendant did not object to the court's findings or file a post-sentencing motion, and this appeal timely followed.

¶ 10 On appeal, defendant contends that the 15-year firearm enhancement in the armed robbery statute has been found unconstitutional as a disproportionate penalty when compared to the armed violence statute, and that a subsequent amendment to the armed violence statute did not revive the unconstitutional portion of the armed robbery statute, so that the firearm enhancement to his sentences was void.

¶ 11 In *People v. Hauschild*, 226 Ill. 2d 63 (2007), our supreme court held the 15-year enhancement for being armed with a firearm during an armed robbery (720 ILCS 5/18-2(a)(2), (b) (West 2006)) to be unconstitutionally disproportionate when compared to the armed violence statute (720 ILCS 5/33A-2(a) (West 2000)) with robbery as the predicate offense.

¶ 12 Since *Hauschild*, the armed violence statute has been amended to eliminate robbery as a predicate offense. Pub. Act 95–688, § 4 (eff. Oct. 23, 2007).

¶ 13 This court has repeatedly considered the effect of P.A. 95-688 on the firearm enhancement to the armed robbery statute. In *People v. Brown*, 2012 IL App (5th) 100452, where the armed robbery offense occurred after the 2007 effective date of P.A. 95-688, the Fifth District rejected the contention that *Hauschild* rendered the enhancement in question void *ab initio* and found that it was the legislature's intent in adopting P.A. 95-688 to revive the enhancement. "The legislature cured this proportionate-penalties violation by removing the

impediment to the sentence enhancement's enforcement, *i.e.*, the offense of armed violence predicated on robbery." *Brown*, ¶ 16. Thus, the enhanced sentence in *Brown* was held proper.

¶ 14 However, defendant argues that we should not follow *Brown* because an unconstitutional statute is void *ab initio* and thus cannot be revived automatically but must be re-adopted by the legislature. Specifically, he argues that amendment of the comparison offense to eliminate an unconstitutional disproportionality without amending or re-adopting the offense at issue does not revive the latter. *People v. Manuel*, 94 Ill. 2d 242 (1983).

¶ 15 The *Manuel* defendants had been charged with delivery in 1981 of a noncontrolled substance represented to be a controlled substance, contrary to section 404 of the Illinois Controlled Substances Act. Ill. Rev. Stat. 1979, ch. 56½, par. 1404. In *People v. Wagner*, 89 Ill. 2d 308 (1982), our supreme court found section 404 unconstitutionally disproportionate, in that it made delivery of a noncontrolled substance a Class 3 felony while, at the time of the *Wagner* defendant's offense in 1978, delivery of an actual controlled substance was a Class 4 felony under section 401(e) and (f) of the same Act. Ill. Rev. Stat. 1977, ch. 56 ½, pars. 1401(e), (f). The legislature amended sections 401(e) and (f) to make delivery of a controlled substance a Class 3 felony (Pub. Act 81-583 (eff. Sept. 14, 1979)), and the State argued in *Manuel* that the defendants could therefore be convicted under section 404 despite *Wagner*. However, because a statute held unconstitutional in its entirety is void *ab initio*,

> "the difficulty with the State's position concerning the nonapplicability of *Wagner* to these prosecutions is that *section 404* was not amended by the legislature. Public Act 81-583, upon which the State relies, specifically amended sections 401 and 402 of the Illinois Controlled Substances Act. *** While we agree that the fortuitous effect of the amendment was to change the

> statutory scheme so as to remedy the unconstitutional classification addressed in *Wagner*, we cannot agree that the amendment to sections 401 and 402 can operate to, in essence, revive a different statute which this court subsequently holds unconstitutional." (Emphasis in original.) *Manuel*, 94 Ill. 2d at 244.

¶ 16 Though the *Brown* court did not address *Manuel*, this court has considered the effect of *Manuel* on the sentencing enhancement at issue. In *People v. Malone*, 2012 IL App (1st) 110517, this court affirmed an armed robbery sentence including the firearm enhancement.

> "In the present case, in contrast to *Manuel*, the legislature enacted Public Act 95–688, amending the armed violence statute, subsequent to the supreme court's decision in *Hauschild* holding that the penalty for committing armed robbery with a firearm was unconstitutionally disproportionate to the penalty for armed violence predicated on robbery with a category I or category II weapon. The legislative history makes clear that in order to remedy the constitutional violation, and restore the penalty provision of the armed robbery statute struck down in *Hauschild*, the legislature enacted Public Act 95–688 to eliminate the offense of armed violence predicated on robbery with a category I or category II weapon." *Malone*, ¶ 89.

As to whether the amendment of one statute could revive another statute by eliminating their relative disproportionality, the *Malone* court noted that the "*Hauschild* court held that Public Act 91–404 ' "revived" the offense of armed violence predicated on robbery when it amended the sentence for certain armed robberies to add the 15/20/25–to–life provisions.' " [Emphasis added

by *Malone*.] *Malone*, ¶ 90, citing *Hauschild*, 226 Ill. 2d at 84, and Pub. Act 91–404, §5 (eff. Jan. 1, 2000)(creating the 15-year firearm enhancement to armed robbery).

¶ 17 Conversely, in *People v. Gillespie*, 2012 IL App (4th) 110151, the Fourth District held that the proportionate-penalties violation recognized in *Hauschild* rendered void *ab initio* the firearm enhancement provision in P.A. 91-404, thus leaving the armed robbery statute as it was before that amendment. *Gillespie*, ¶¶ 53-54. Because P.A. 95-688 did not amend the armed robbery statute but only the armed violence statute, nor was the armed robbery statute subsequently amended, *Gillespie* cited *Manuel* in holding "that the amendment of one statute does not validate a different statute that is void *ab initio* by reason of its unconstitutionality" (*Id.*, ¶ 52) and remanded for a new sentencing hearing without the firearm enhancement. This court followed *Gillespie* in *People v. McFadden*, 2012 IL App (1st) 102939. See also *People v. Blair*, 2012 IL App (3d) 100743–U, *appeal allowed*, No. 114122 (May 30, 2012).

¶ 18 Having considered the aforementioned cases, we conclude that the firearm enhancement to the armed robbery statute was not void *ab initio*. It is axiomatic that our legislature has the authority to establish the sentence for crimes, including enhanced sentences. *People v. Oshana*, 2012 IL App (2d) 101144, ¶ 40; *People v. Jones*, 357 Ill. App. 3d 684, 688-90 (2005). It is only when one or more statutes are adopted or amended to unintentionally create a relative disproportionality in sentencing that one of the statutes is rendered unconstitutional.

¶ 19 In *Manuel*, the legislature could not intend in amending a statute to remedy a disproportionality that did not yet exist. By contrast, in *Malone*, the legislature could and did intend to remedy a disproportionality that already existed and had been recognized by the courts.

> "I believe this chronology is legally significant. In *Manuel*, the supreme court was confronted with a situation factually inapposite to the one with which we are faced today, in that the amendments

> purporting to revive section 404 were enacted before section 404 was held unconstitutional. [Citation.] Here, in contrast, the legislative history of the amendment to the armed violence statute reveals that it was specifically intended to cure the constitutional deficiencies of the armed robbery statute." *McFadden*, ¶ 93 (Justice Sterba, dissenting in part and concurring in part).

Similarly:

> "the supreme court in *Hauschild* made clear that it was Public Act 91–404's amendment to the armed robbery statute that revived certain armed violence offenses. [Citation.] In other words, the court did not rely on the Act's amendment of both statutes in concluding that armed violence predicated on robbery had been revived. As such, I agree with the *Malone* court that *Hauschild* provides authority for holding that an amendment to one section of a statute may operate to revive a separate section previously held unconstitutional. *Id.*, ¶ 95 (Justice Sterba).

We therefore conclude that the firearm enhancement to defendant's sentences was proper.

¶ 20 Defendant also contends that the trial court erroneously used his protestation of innocence in the PSI as an aggravating factor in sentencing.

¶ 21 Defendant did not preserve this claim of error either by objecting during the sentencing hearing or by filing a post-sentencing motion, so that his claim must rise to the level of plain error to survive forfeiture. *People v. Rinehart*, 2012 IL 111719, ¶ 15; *People v. Mays*, 2012 IL App (4th) 090840, ¶ 65. That said, the first step in plain error analysis is determining whether there was an error at all. *Rinehart,* ¶ 15; *Mays*, ¶ 65.

¶ 22 While a trial court should not arbitrarily consider a defendant's insistence on his innocence as an aggravating factor, a continued insistence on innocence and accompanying lack of remorse may legitimately convey to the court that " 'the defendant is an unmitigated liar and at continued war with society,' " thus affecting his prospects for rehabilitation. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011), quoting *People v. Ward*, 113 Ill. 2d 516, 528 (1986). Circumstances that may distinguish the latter from the former include the credibility of the victim and his account of events compared to the defendant's credibility and account of events. *Perkins*, 408 Ill. App. 3d at 763. Conversely, the fact that the trial court used certain language such as "aggravating", or did not use certain other language such as "remorse" or the like, in pronouncing sentence is not dispositive; that is, the determination of whether the trial court punished a defendant for claiming innocence or properly considered his lack of remorse as an aggravating factor should not focus on a few words or statements by the court but consider the record as a whole. *Ward*, 113 Ill. 2d at 526-28. In light of these cases, we conclude that the trial court here did not commit error, much less plain error, in sentencing defendant.

¶ 23 Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.