

2013 IL App (2d) 111236-U
No. 2-11-1236
Order filed July 30, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of DeKalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-302
)	
Michael King,)	Honorable
)	Robin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

- ¶ 1 *Held:* As held by the supreme court in *People v. Blair* (2013 IL 1114122), Public Act 95-688, § 4 (eff. October 23, 2007) revived the sentencing enhancement for armed robbery. Therefore, the trial court properly applied the sentencing enhancement. Affirmed.
- ¶ 2 Following a June 2011 bench trial, defendant, Michael King, was convicted of: (1) armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and (2) armed violence (720 ILCS 5/33A-2(a) (West 2010)). The court sentenced him to a 23-year term of incarceration on each conviction, to run

concurrently, and ordered him to pay \$5,000 in restitution. The 23-year term for armed robbery included a 15-year firearm enhancement. 720 ILCS 5/18-2(b) (West 2010).

¶ 3 Defendant appeals, arguing that the trial court erred in applying the firearm enhancement, because the supreme court in *People v. Hauschild*, 226 Ill. 2d 63 (2007), held that provision unconstitutional and the legislature has not since expressly revived it. For the reasons that follow, we disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 The evidence presented at trial showed that defendant, an African-American, and co-defendant, Eric Bernard, entered Associated Bank on November 11, 2009, at about 11:30 a.m. Daniel Okoniewski, a manager, testified that the men were dressed in dark hoodies, dark sunglasses, and appeared to be concealing something. Defendant, who was armed with a lead-colored gun, entered Okoniewski's office, pointed a gun at him and stated, "Out."¹ Simultaneously, Bernard, who was armed with an Uzi-like gun and had dreadlocks, pointed the gun at Lisa Rainey, a teller, and a customer she was helping, approached them, threw a bag at Rainey and stated, "Give me all your money and don't give me any of that dye pack shit."² Rainey placed the money in the bag and placed

¹ The court notes that neither Okoniewski nor Rainey was able to identify which individual was defendant or Eric Bernard when recounting the robbery. However, from the record, the trial court was able to deduce that King, who was the shorter of the two defendants, entered Okoniewski's office. Moreover, we note that defendant only appeals his sentence, not his conviction.

² Rainey testified that she was approached by a man with dreadlocks. Given the DNA results on the wig, which had dreadlocks, detailed below, the trial court could have deduced that Bernard approached Rainey.

the bag on the counter. The two offenders ran out through the back door. Okoniewski instructed Rainey to hit the panic alarm and call 911.

¶ 6 Just before noon on that same day, a nearby resident, Wallace Myers, testified that, while he was working in his garage, he saw a plastic bag lying in the middle of the street. Myers stated that he thought the bag was garbage; therefore, he picked it up to dispose of it. Upon retrieving the bag, Myers noticed a black t-shirt lying next to the bag and picked up the t-shirt as well. Myers noticed the bag was heavy, so he started to pull out items, including a wig, which had dreadlocks, a black hooded sweatshirt, and a gun. The gun discharged as Myers removed the contents. Myers called the police, and they came to retrieve the bag and its contents.

¶ 7 Both the wig and the black t-shirt were tested by Nichol Smith, a forensic scientist. Smith testified that the DNA profile on the wig matched to Bernard. Additionally, the black t-shirt had a mixture of DNA from two people. Defendant could not be excluded as a contributor to one of the profiles, which was consistent with 1 in 9 African-Americans.

¶ 8 Jasmen Cunningham, who testified pursuant to a grant of immunity, acknowledged telling police that defendant and Bernard came to her house in November and asked her to drive them around to “scope out” something. On the same day, in the evening, Bernard and defendant discussed the “situation” in Cunningham’s presence and, while no details of the crime were given, Cunningham testified that defendant stated he was “scared.” Cunningham was able to identify defendant in a photograph presented by a DeKalb sergeant.

¶ 9 The trial judge, after reviewing the evidence, found defendant guilty of armed robbery and armed violence. The court sentenced defendant as stated above and denied his motion to reconsider the sentence. This appeal followed.

¶ 10

II. ANALYSIS

¶ 11 Defendant contends that the trial court erred by applying the 15-year firearm enhancement to his sentence. He notes that, in *Hauschild*, the supreme court held that the armed robbery statute's enhancement provision is unconstitutional because, when compared to the offense of armed violence, it created a disproportionate penalty. *Hauschild*, 226 Ill. 2d at 88-89. Defendant further notes that Public Act 95-688 revised the armed violence statute to correct the disproportionality, but it did not address the armed robbery statute. Pub. Act 95-688, § 4 (eff. Oct. 23, 2007). He argues that, therefore, Public Act 95-688 did not revive the sentencing enhancement.

¶ 12 Whether Public Act 95-688 revived the sentencing enhancement for armed robbery through amendment of the comparison statute presents a constitutional question that may be raised at any time. *People v. Christy*, 139 Ill. 2d 172, 176 (1990). Therefore, we may address this issue now, even though defendant did not raise it at trial. *Id.* A constitutional issue raises a question of law and, therefore, is reviewed *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005). Statutes enjoy a strong presumption of constitutionality; whenever possible courts must construe statutes to uphold their constitutionality. *People v. Masterson*, 207 Ill. 2d 305, 318 (2003).

¶ 13 In *Hauschild*, the supreme court held that the 15-year enhancement provision for armed robbery (while armed with a firearm) violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. art. 1, § 11) because it contained identical elements as armed violence predicated on robbery with a category I or category II weapon, but carried different penalties (sentencing ranges of 21 to 45 years' imprisonment, which included the 15-year sentence enhancement, and 15 to 30 years' imprisonment, respectively). *Hauschild*, 226 Ill. 2d at 86-87. The *Hauschild* court noted that the proportionate penalties clause bars unequal penalties for two offenses

with identical elements. *Id.* Thus, the court held that the 15-year sentencing enhancement was unconstitutional because the punishment for armed robbery while armed with a firearm was more severe than that for armed violence predicated on robbery with a category I or category II weapon. *Id.*

¶ 14 Subsequently, the legislature enacted Public Act 95-688 (Pub. Act 95-688, § 4 (eff. Oct. 23, 2007); 720 ILCS 5/33A-2(a) (West 2008)) to amend the armed violence statute, eliminating robbery as a predicate offense for armed violence. *People v. Brown*, 2012 IL App (5th) 100452, ¶ 9. This amendment corrected the disproportionality *vis-a-vis* the offense of armed robbery while armed with a firearm.

¶ 15 Defendant argues that the 15-year sentencing enhancement for armed robbery while armed with a firearm, ruled unconstitutional in *Hauschild*, cannot be revived by an amendment to only the comparison statute. To support his argument, defendant compares his case to *People v. Manuel*, 94 Ill. 2d 242, 243 (1983), where the court affirmed the dismissal of charges alleging delivery of a look-alike substance. Section 404 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1979 ch. 56 1/2, ¶ 1404) had previously been held unconstitutional in *People v. Wagner*, 89 Ill. 2d 308 (1982), as it created a disparity by punishing delivery of a look-alike substance more severely than delivery of the actual substance under section 401. *Id.* at 243-44. The court held that, even though the disparity was corrected by an amendment to sections 401 and 402, section 404 was not revived. *Id.* Because section 404 was not amended, it was still unconstitutional, rendering the statute void *ab initio*. *Id.* at 244-45. Defendant argues the situation in *Manuel* is analogous because, here, even though an amendment was made to the armed violence statute, the firearm enhancement of the armed robbery statute was never re-enacted after being invalidated by *Hauschild*.

¶ 16 At the time defendant filed this appeal, various districts of the appellate court were split on whether, following the legislature's enactment of Public Act 95-688, the enhanced sentence for armed robbery could be applied to a defendant's sentence. Compare *People v. Malone*, 2012 IL App (1st) 110517, ¶ 90 (Public Act 95-688 did revive the 15-year enhancement provision by fixing the proportionate penalties violation) and *People v. Brown*, 2012 IL App (5th) 100452, ¶ 16 (Public Act 95-688 did revive the 15-year enhancement provision by fixing the proportionate penalties violation), with *People v. Gillespie*, 2012 IL App (4th) 110151, ¶ 54 (Public Act 95-688 did not revive the 15-year enhancement provision).

¶ 17 After defendant submitted his brief, but before the State filed a reply brief, the supreme court settled the district split. *People v. Blair*, 2013 IL114122. The *Blair* court held that Public Act 95-688 did revive the 15-year sentencing enhancement in the armed robbery statute when it amended the armed violence statute. *Id.* at ¶ 35. It noted that, unlike other constitutional violations, a proportionality violation is rooted in the relationship between two statutes. *Id.* at ¶¶ 25, 32 (“although only the statute with the greater penalty will be found to violate the proportionate penalties clause[,], that violation is entirely dependent upon the existence of the comparison statute”). Therefore, the legislature can remedy the constitutional violation either by amending the challenged statute or, as the General Assembly did in Public Act 95-688, by amending the comparison statute. *Id.* It explained that the legislature's intent in Public Act 95-688 to revive the sentencing enhancement was evident, given that Public Act 95-688 was enacted within a few months of *Hauschild* and directly tracks the court's analysis made in that case. *Id.* at ¶ 37. Moreover, the court noted that the legislative history specifically acknowledged the proportionate penalties clause

violation and that the bill underlying Public Act 95-688 “corrects that.” *Id.*, ¶ 38 (citing 95th Ill. Gen. Assem., Senate Proceedings, July 26, 2007, at 8).

¶ 18 The defendant in *Blair* presented arguments similar to defendant’s arguments here. Specifically, *inter alia*, the defendant in *Blair* attempted to analogize the case to *Manuel* and argued that the void *ab initio* doctrine barred the 15-year enhancement provision’s revival. The *Blair* court rejected each of these arguments. *Blair*, 2013 IL 114122 at ¶ 33. Specifically, the *Blair* court distinguished the amendments at issue in *Manuel* from Public Act 95-688, reasoning that the dispositive factor in *Manuel* was that the amendments at issue were made prior to the court holding the challenged statute unconstitutional. *Id.* The legislature could not have intended to revive the statute where it had not yet been declared unconstitutional. *Id.*

¶ 19 The *Blair* court also rejected the defendant’s argument that, once *Hauschild* declared the armed robbery sentencing enhancement unconstitutional, the statute was void *ab initio* and, therefore, inoperative as if it never existed. *Id.* at ¶¶ 26, 28-30. In the defendant’s view, a statute that “never existed” could not be revived. The court noted that the defendant misconstrued the void *ab initio* doctrine to mean the statute literally never existed. Such an argument goes against void *ab initio* doctrine, which sets forth that the existence of a statute is an “operative fact” that cannot be ignored. *Id.* at ¶ 29 (citing *Perlstein v. Wolk*, 218 Ill. 2d 448, 455 (2006)).

¶ 20 This court is bound to follow a holding of the supreme court. *People v. Muhammad*, 398 Ill. App. 3d 1013, 1017 (2010). Thus, we hold that Public Act 95-688 did revive the 15-year firearm enhancement provision of the armed robbery statute. As such, defendant’s challenge to his sentence fails, and we affirm.

¶ 21

III. CONCLUSION

¶ 22 For the aforementioned reasons, we affirm the trial court's sentence.

¶ 23 Affirmed.