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2016 IL App (3d) 120778-UB

Order filed March 1, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0778
v.	)	Circuit No. 05-CF-175
	)	
MICHAEL T. JOHNSON,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant's aggravated unlawful use of a weapon conviction violated the second amendment. (2) The court did not err when it summarily dismissed defendant's postconviction petition.
- ¶ 2 Defendant, Michael T. Johnson, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)), aggravated discharge of a firearm (720 ILCS 5/23-1.2(a)(3) (West 2004)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)), and aggravated assault (720 ILCS 5/12-2(a)(6) (West 2004)). On appeal, defendant's conviction for

aggravated discharge of a weapon was remanded for resentencing. *People v. Johnson*, No. 3-07-0825 (2009) (unpublished order under Illinois Supreme Court Rule 23). Upon remand defendant was resentenced. The new sentence was affirmed on appeal. *People v. Johnson*, No. 3-10-0262 (2011) (unpublished order under Illinois Supreme Court Rule 23). Thereafter, defendant filed a *pro se* postconviction petition which was summarily dismissed by the trial court. Defendant appeals, arguing that: (1) his conviction for aggravated unlawful use of a weapon should be vacated; and (2) the court erred when it dismissed his postconviction petition at the first stage. We vacate defendant's conviction for aggravated unlawful use of a weapon as unconstitutional, but affirm the trial court's dismissal of defendant's postconviction petition.

¶ 3

FACTS

¶ 4

The State charged defendant with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)), aggravated assault (720 ILCS 5/12-2(a)(6) (West 2004)), and two counts each of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2004)) and aggravated discharge of a firearm (720 ILCS 5/23-1.2(a)(3) (West 2004)). The information listed aggravated unlawful use of a weapon as a Class 2 felony due to defendant's previous felony conviction. The cause proceeded to a jury trial.

¶ 5

At trial, Tina Ferguson testified that she was at her mother's house on Easter Sunday when a vehicle pulled up near the residence. The driver of the vehicle exited and approached the victim, Dwayne Cooks, and engaged in a verbal exchange. At the conclusion of the exchange, Cooks began to walk away, and the driver returned to his car. Once there, the driver produced a black rifle-like weapon from his side and pointed it toward Cooks. A passenger in the car also emerged and produced a small handgun. Both men began to fire toward Cooks. After a number

of shots were fired, the men got back into the car and drove away. Ferguson saw Cooks lying face down on the steps. Based on Cooks' location, Ferguson believed Cooks was attempting to ascend the steps when he was shot. Prior to those shots being fired, Ferguson did not hear any shots fired.

¶ 6 Police officer Eddie Perez testified that he was on patrol on Easter Sunday when he heard gunshots. As he approached the area where he had heard the shots, he saw two subjects in the middle of the street firing toward a residence. One subject was holding an assault rifle, and the other was holding a handgun. Perez identified defendant as the individual who was shooting the assault rifle. After the two men stopped shooting, they got back into their vehicle and fled the scene. Perez pursued the vehicle. Eventually, the vehicle entered a ditch and blew out its tires. Perez had not lost sight of the vehicle during the pursuit. Defendant and two other individuals were arrested, and guns were found in the vehicle.

¶ 7 Marshall Billips testified that he was Cooks' cousin and was present the day of the shooting. Before the shooting, Billips saw a blue car drive by the residence and park. Defendant emerged from the vehicle and approached Cooks. At this point, defendant had a rifle in his hand. Billips testified that Cooks also had a handgun. Billips grabbed his child and ran towards the house. He noted that Cooks also began to run toward the house. With his back turned, Billips heard gunshots. After securing his child in the residence, Billips went back outside and saw that Cooks had been shot. Defendant and another individual were still firing in Cooks' direction. Billips grabbed Cooks' gun and started firing toward defendant and the other individual. Eventually the shooting stopped, and defendant and his accomplices drove away.

¶ 8 Billips admitted during trial that he had initially denied firing a gun. He also admitted that he had hid the gun from the police after the incident. Billips stated that he had lied because

he did not want the police to think Cooks was a violent person. Further, the State elicited testimony from Billips that it had quashed certain warrants that had been issued for his arrest in exchange for his testimony. When asked what the warrants were for, Billips responded, "Uh, traffic, and, uh—I think they both was traffic." Neither the State nor defendant introduced evidence of a bench warrant on a domestic case that was also quashed prior to Billips' testimony in defendant's accomplice's trial. Both parties also failed to mention a petition to revoke in one of Billips' traffic cases that had been withdrawn before his testimony. Information about the bench warrant and the petition to revoke had been disclosed to defendant during discovery.

¶ 9 At the conclusion of the trial, the jury found defendant guilty of first degree murder, aggravated discharge of a firearm, aggravated unlawful use of a weapon, and aggravated assault. The trial court sentenced defendant to a term of imprisonment of 85 years for first degree murder to be served consecutively with sentences of 15 years for aggravated discharge of a firearm and 7 years for aggravated unlawful use of a weapon. Defendant appealed, and this court remanded for resentencing on the aggravated discharge of a weapon conviction. *Johnson*, No. 3-07-0825 (2009) (unpublished order under Illinois Supreme Court Rule 23). On remand, defendant was sentenced to 12 years' imprisonment. That sentence was affirmed on appeal. *Johnson*, No. 3-10-0262.

¶ 10 Thereafter, defendant filed a *pro se* postconviction petition arguing, *inter alia*, that trial counsel was ineffective for failing to object to the State's use of perjured testimony. Specifically, defendant alleged that counsel had failed to note that, contrary to Billips' testimony, the State had quashed a bench warrant in a domestic case and had withdrawn a petition to revoke filed against Billips before he testified. The trial court summarily dismissed the petition at the first stage. Defendant appeals.

¶ 11

ANALYSIS

¶ 12

I. Constitutionality of Defendant's Aggravated Unlawful Use of a Weapon Conviction

¶ 13

Defendant first contends that his conviction for aggravated unlawful use of a weapon should be vacated because the statute under which he was charged has been found unconstitutional. Generally, where a statute has been declared unconstitutional by the supreme court, the statute is null and void as of the date of its enactment. *People v. Zeisler*, 125 Ill. 2d 42 (1988). Such unconstitutional laws are void *ab initio* and can be raised at any time. *Id.*

¶ 14

On the date of the offense in question, the section of the aggravated unlawful use of a weapon statute under which defendant was charged read as follows:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; [and]

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; ***

* * *

(d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or

another jurisdiction is a Class 2 felony." 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2004).

In *People v. Aguilar*, 2013 IL 112116, our supreme court originally held that sections 24-1.6(a)(1), (a)(3)(A) of the aggravated unlawful use of a weapon statute was unconstitutional. *Id.* ¶¶ 32-38 (Garman, J., dissenting upon denial of rehearing); *id.* ¶¶ 39-48 (Theis, J., dissenting upon denial of rehearing). Upon the State's motion for rehearing, however, the court modified its opinion to explicitly clarify that the decision applied only to what it termed the "Class 4 form" of the offense. See *id.* ¶ 18; see also *id.* ¶ 47 (Theis, J., dissenting upon denial of rehearing) ("[G]iven this new approach, the implication of the court's holding is that the so-called 'Class 2 form of the offense,' which enhances the penalty for felons, could potentially remain enforceable.").

¶ 15 In the interim between the original *Aguilar* decision and its modification, the State in the present case conceded that defendant's conviction for aggravated unlawful use of a weapon was unconstitutional. The modification of *Aguilar* was issued, however, before this court ruled on defendant's appeal. Defendant, having been previously convicted of a felony, was eligible for Class 2 sentencing under the statute. Citing *Aguilar*, we rejected the State's concession and held that defendant's conviction for aggravated unlawful use of a weapon was constitutional. *People v. Johnson*, 2014 IL App (3d) 120778-U, ¶¶ 14-15.

¶ 16 More recently, in *People v. Burns*, 2015 IL 117387, our supreme court abolished the distinction between the so-called "Class 2 form" and "Class 4 form" of aggravated unlawful use of a weapon. *Id.* ¶ 22. The court recognized that the fact of a prior felony conviction was merely a sentencing factor, and that sections 24-1.6(a)(1), (a)(3)(A) was unconstitutional even where an offender was eligible for Class 2 sentencing. *Id.* ¶ 20. Thus, the supreme court repudiated its

modification of *Aguilar*. *Id.* ¶ 22 ("[W]e now acknowledge that our reference in *Aguilar* to a 'Class 4 form' of the offense was inappropriate."). Following the *Burns* decision, the supreme court issued a supervisory order directing us to reconsider our decision in the present case.

People v. Johnson, No. 117449 (Jan. 20, 2016).

¶ 17 In light of our supreme court's decision in *Burns*, we now accept the State's original concession in this case. Subsection (a)(1), (a)(3)(A) of the aggravated unlawful use of a weapon statute is unconstitutional on its face, and the fact of a defendant's prior felony conviction does not render that subsection constitutional. See *Burns*, 2015 IL 117387, ¶ 30. Accordingly, we vacate defendant's conviction and sentence for aggravated unlawful use of a weapon. See *Zeisler*, 125 Ill. 2d at 48 ("[T]he doctrine of void *ab initio* declares a statute unconstitutional, null and void, which results in the court's vacating a conviction based upon such statute.").

¶ 18 II. Defendant's Postconviction Petition

¶ 19 Defendant next contends that his postconviction petition stated the gist of a constitutional claim, and therefore should not have been dismissed.¹ A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2012). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). A petition is frivolous or patently without merit if its

¹We note that defendant did not raise in his postconviction petition the issue of the constitutionality of his conviction for aggravated unlawful use of a weapon. Accordingly, our decision in section I, *supra*, does not impact our analysis concerning defendant's postconviction petition.

allegations, when taken as true, fail to present the gist of a constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). A trial court's dismissal of a postconviction petition as frivolous or patently without merit is reviewed *de novo*. *Morris*, 236 Ill. 2d 345.

¶ 20 Here, defendant argues that his postconviction allegation that trial counsel was ineffective for failing to raise an issue regarding Billips' alleged perjured testimony stated the gist of a constitutional claim. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). Defendant must satisfy both prongs in order to prevail on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *Id.*

¶ 21 Defendant contends that the outcome of the trial might have been different had the jury heard evidence that the State dismissed a bench warrant and a petition to revoke issued against Billips in exchange for his testimony. After our review of the record, we conclude that defendant's argument is without merit because it is not arguable that defendant was prejudiced. See *People v. Hodges*, 234 Ill. 2d 1 (2009) (a first-stage postconviction petition may be summarily dismissed if it is not arguable that defendant was prejudiced).

¶ 22 Our conclusion is based on the fact that the jury was informed that Billips had benefited from his testimony and because other evidence established that defendant had committed the crime and was not acting in self-defense. First, while it is true that Billips did not testify that the State had quashed the bench warrant or withdrawn the petition to revoke, he did testify that the State quashed traffic warrants for him in exchange for his testimony. Therefore, the jury already

knew of the benefits Billips received. Second, other evidence established that defendant was guilty of the crime and that Cooks did not fire at defendant, thereby causing defendant to shoot Cooks in self-defense. Thus, even if Billips' testimony would have been discredited by the fact that he had received another benefit, the remaining evidence would have been sufficient to convict defendant and defeat any self-defense claim.

¶ 23 We note that defendant also argues that appellate counsel was ineffective for not raising the ineffectiveness of trial counsel on appeal. However, because we have concluded that defendant's argument regarding the ineffectiveness of trial counsel is without merit, we do not find that appellate counsel was ineffective. See *People v. Moore*, 177 Ill. 2d 421 (1997) (appellate counsel is only ineffective if counsel fails to raise a meritorious issue on appeal).

¶ 24 Having found that there was no merit to defendant's claims of ineffective assistance of counsel, we conclude that the trial court did not err when it summarily dismissed defendant's postconviction petition.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Kankakee County is vacated in part and affirmed in part.

¶ 27 Affirmed in part and vacated in part.