# Illinois Official Reports

## Appellate Court




***Baumgartner v. Greene County State's Attorney's Office,***
**2016 IL App (4th) 150035**

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| Appellate Court Caption | KYLE R. BAUMGARTNER, Plaintiff-Appellant, v. GREENE COUNTY STATE'S ATTORNEY'S OFFICE, Defendant-Appellee, and THE ILLINOIS STATE POLICE, Intervenor-Appellee. |
| District & No. | Fourth District<br>Docket No. 4-15-0035 |
| Filed | March 31, 2016 |
| Decision Under Review | Appeal from the Circuit Court of Greene County, No. 14-MR-4; the Hon. James W. Day, Judge, presiding. |
| Judgment | Affirmed. |
| Counsel on Appeal | Elliott Turpin (argued), of Carrollton, for appellant.<br><br>Caleb Briscoe, State's Attorney, of Carrollton, for appellee Greene County State's Attorney's Office.<br><br>Lisa Madigan, Attorney General, of Chicago (Carolyn E. Shapiro, Solicitor General, and Linda Boachie-Ansah (argued), Assistant Attorney General, of counsel), for appellee Illinois State Police.<br><br>Lindsey Powell, of United States Department of Justice, of Madison, Wisconsin, *amicus curiae*. |

Panel JUSTICE HARRIS delivered the judgment of the court, with opinion. Justices Steigmann and Appleton concurred in the judgment and opinion.

## OPINION

¶ 1 Plaintiff, Kyle R. Baumgartner, applied to the Illinois State Police (ISP) for a firearm owners identification (FOID) card but was denied based on his criminal history, which included a misdemeanor conviction for domestic battery. Pursuant to section 10 of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/10 (West 2014)), he petitioned the circuit court for relief from ISP's decision. Initially, the court granted plaintiff relief, finding him eligible for a FOID card. However, ISP was allowed to intervene in the underlying proceedings and filed a motion to vacate the court's order. Ultimately, the court granted ISP's motion and denied plaintiff's petition.

¶ 2 Plaintiff appeals, arguing (1) the circuit court erred in finding statutory review pursuant to section 10 of the FOID Act could not remove a federal firearms disability; (2) federal law does not prohibit him from possessing a firearm because his civil rights were restored following his domestic battery conviction; and (3) if state and federal law are read together to prohibit him from obtaining a FOID card, the relevant statutory provisions unreasonably restrict his second amendment right to bear arms and are unconstitutional as applied to him. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2007, the State charged plaintiff in Greene County case No. 07-CF-69 with possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2006)) (count I), unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2006)) (count II), criminal damage to state supported property (720 ILCS 5/21-4(1)(a) (West 2006)) (count III), unlawful possession with the intent to deliver cannabis (720 ILCS 550/5(c) (West 2006)) (count IV), endangering the life or health of a child (720 ILCS 5/12-21.6(a) (West 2006)) (count V), domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2006)) (count VI), battery (720 ILCS 5/12-3(a)(1) (West 2006)) (count VII), and unlawful possession of drug paraphernalia (720 ILCS 600/3.5 (West 2006)) (count VIII). In October 2007, plaintiff pleaded guilty to unlawful possession with the intent to deliver cannabis (count IV)–a Class 4 felony–and domestic battery (count VI)–a Class A misdemeanor. The remaining counts against him were dismissed. With respect to plaintiff's sentence, the trial court's docket entry states as follows:

> "[Plaintiff] sentenced on Count IV [(unlawful possession with the intent to deliver cannabis)] to one year in [the Illinois Department of Corrections (DOC)], with credit for 65 days, with one year mandatory supervised release. On Count VI [(domestic battery),] [plaintiff] is sentenced to 65 days and to pay costs of prosecution."

¶ 5 In January 2014, plaintiff filed an application for a FOID card with ISP. On his application, plaintiff denied that he had ever been convicted of a felony or a domestic battery offense. In February 2014, ISP denied plaintiff's application, finding him ineligible to possess a firearm

due to his October 2007 domestic battery conviction. The same month, plaintiff filed a petition in the circuit court, seeking relief from ISP's decision pursuant to section 10(c) of the FOID Act (430 ILCS 65/10(c) (West 2014)) and naming the Greene County State's Attorney's office as the respondent in the matter.

¶ 6 Section 10(c) permits a circuit court to grant relief from ISP's denial of a FOID card request based on a previous domestic battery conviction when an applicant establishes the following:

> "(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a [FOID card], or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
>
> (2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
>
> (3) granting relief would not be contrary to the public interest; and
>
> (4) granting relief would not be contrary to federal law." 430 ILCS 65/10(c) (West 2014).

In his petition with the circuit court, plaintiff alleged all of the section 10(c) requirements were met. He asked the court to enter an order directing ISP to issue him a FOID card.

¶ 7 In April 2014, the circuit court conducted a hearing in the matter. Plaintiff presented the testimony of Byron Berry, a pharmacist, who testified he had known plaintiff for 10 to 15 years. Berry stated plaintiff had "done work for [him] in the past" and that he knew plaintiff "fairly well." He described plaintiff as personable and helpful and denied ever seeing him mad. Berry testified his personal experience with plaintiff gave him no indication that plaintiff would pose a danger to the public if he were to obtain a FOID card and possess a firearm, and he did not believe such circumstances would be against the public interest. Additionally, Berry asserted he would not have a problem with plaintiff obtaining a FOID card and possessing a firearm.

¶ 8 Kendra Baumgartner testified she was married to plaintiff and the couple had two children. Plaintiff also had a child from a previous relationship. Kendra stated she had been married to plaintiff for almost 4 years but had known him for approximately 10 years. In 2007, before the couple was married but while they were in a relationship and living together, an incident occurred between her and plaintiff that resulted in plaintiff's domestic battery conviction. Kendra testified plaintiff had been drinking and became angry with her for going somewhere with one of the couple's children and a friend. When she returned home, plaintiff "raged," "grabbed [her] by the throat through the car," and "took [her] into the house." Kendra denied having any serious injuries as a result of the incident. She also denied that there were ever any similar incidents between her and plaintiff either before or after the 2007 incident.

¶ 9 Kendra testified that, following the incident, she moved out of the home she shared with plaintiff and "stay[ed] away" for approximately one year. Ultimately, she got back together with plaintiff and the two were married because plaintiff was the father of her child and she loved him. When asked whether she had any concerns for her own safety after reconciling with plaintiff, Kendra testified she "was leery but it's been fine."

¶ 10 Kendra further testified plaintiff had improved himself as a person since the 2007 domestic battery incident. She stated plaintiff had become a wonderful father to the couple's children, was a very hard worker, and went to school for welding. Kendra did not believe plaintiff had any violent tendencies. She stated that although he drank alcohol occasionally, he did not drink to the point of being drunk. Kendra testified she was "fine" and had no concerns with plaintiff obtaining a FOID card and did not feel that he was any kind of danger to her, their family, or society. She stated plaintiff wanted to obtain a FOID card and possess a firearm so that he could hunt, which was something he previously enjoyed.

¶ 11 Plaintiff testified on his own behalf and acknowledged that, in 2007, he had been convicted of domestic battery and unlawful possession of cannabis with the intent to deliver. He stated he did not really remember the domestic battery incident and had been "very intoxicated." However, plaintiff did recall that he "found out [Kendra] was with one of [his] buddies who was known to be a ladies' man and *** was just very outraged." As far as he knew, Kendra's testimony regarding the incident was accurate. Plaintiff denied that any similar incidents had occurred between the couple either before the 2007 incident or after.

¶ 12 Plaintiff testified he worked for a lumber company and had been there for four years. He stated he had never been disciplined at work, had never had a customer lodge a complaint against him, and got along well with his coworkers. Plaintiff testified he was also taking community college classes and majoring in welding technology.

¶ 13 Plaintiff stated that, prior to the 2007 domestic battery incident, he had a valid FOID card and possessed firearms for hunting purposes. If he was able to obtain a FOID card again, he would use it to possess firearms for hunting and personal protection in his home. Further, plaintiff denied that a firearm was involved in the 2007 domestic battery incident, that he had ever used a firearm against anyone, that he had ever been convicted of a forcible felony, or that he had ever been committed to a mental institution. He testified he would not be a danger to society if he was permitted to obtain a FOID card, stating he "wouldn't really have [his] gun out in public." Plaintiff testified he was not the type of person who got into trouble for fighting or threatening others.

¶ 14 The record further indicates plaintiff presented a letter from his employer, Jason Schnettgoecke. Schnettgoecke asserted plaintiff had been "a model employee" since he began working for the lumber company in 2010. He described plaintiff as reliable and trustworthy, and he stated he was "very personable with customers and always polite."

¶ 15 At the conclusion of plaintiff's evidence, the Greene County State's Attorney's office made no objection to plaintiff's petition and the circuit court took the matter under advisement. On April 14, 2014, the court entered an order, finding plaintiff had met the requirements of section 10(c) of the FOID Act and granting his petition for relief from ISP's denial of his FOID card application. The court ordered ISP to issue a FOID card to plaintiff.

¶ 16 In October 2014, ISP filed a motion to intervene as of right in the underlying proceedings and a petition to vacate the circuit court's April 2014 order granting plaintiff's section 10(c) petition. In connection with its filings, ISP argued federal law, in particular section 922(g)(9) of the Gun Control Act (18 U.S.C. § 922(g)(9) (2006)), prohibited plaintiff from possessing a firearm based on his 2007 domestic battery conviction. Further, it maintained that, because federal law prohibited plaintiff from possessing a firearm, he was not entitled to relief under section 10(c) of the FOID Act, which it asserted precluded relief where contrary to federal law. Ultimately, the court permitted ISP to intervene in the matter over plaintiff's objection.

¶ 17 In January 2015, the circuit court conducted a hearing on ISP's petition to vacate the court's April 2014 order. ISP reiterated its position that federal law prohibited plaintiff–a person convicted "of a misdemeanor crime of domestic violence" (18 U.S.C. § 922(g)(9) (2006))–from possessing a firearm and, as a result, he could not obtain relief under section 10 of the FOID Act. The parties disputed the meaning and significance of the supreme court's decision in *Coram v. State*, 2013 IL 113867, 996 N.E.2d 1057, particularly whether that case held that the version of section 10 of the FOID Act applicable to plaintiff permitted removal of a federal firearm disability.

¶ 18 Before the circuit court, plaintiff argued in the alternative that he was not under a federal firearm disability because, as a result of his domestic battery conviction and sentence, his civil rights were lost and then restored. Plaintiff maintained section 921(a)(33)(B)(ii) of the Gun Control Act (18 U.S.C. § 921(a)(33)(B)(ii) (2006)) provides that a person is not considered to have been convicted of a misdemeanor domestic violence offense under the Gun Control Act where his conviction results in a loss of civil rights and where those civil rights are then later restored. He argued that the civil rights at issue are the right to vote, the right to hold office, and the right to serve on a jury. Plaintiff asserted that, pursuant to Illinois state law, he lost his right to vote when sentenced to 65 days in jail for domestic battery and then had his civil rights restored by operation of law upon completion of that sentence.

¶ 19 At the hearing, neither the circuit court nor ISP specifically addressed plaintiff's alternative contention that he was not under a federal firearms disability. Ultimately, however, the court concluded it had "to go with the argument of [ISP]" and granted ISP's motion to vacate its previous order. The same day as the hearing, the court entered a written order, granting ISP's motion to vacate the court's April 2014 order and denying plaintiff's petition for relief from ISP's denial of his FOID card application.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. The FOID Act

¶ 23 On appeal, plaintiff argues the circuit court erred by denying his petition for relief from ISP's denial of his FOID card application. Initially, he asserts the court incorrectly found he was not entitled to relief under section 10 of the FOID Act where such relief would be contrary to federal law. Plaintiff contends that in so finding, the court erroneously interpreted section 10 of the FOID Act and the supreme court's decision in *Coram*. He interprets both section 10 and *Coram* as providing authority for circuit courts to remove a federal firearm disability and order ISP to issue a FOID card.

¶ 24 ISP responds that the circuit court correctly vacated its prior order and denied plaintiff relief. It maintains that under the version of the FOID Act applicable to plaintiff, the court lacked authority to grant plaintiff relief from ISP's denial of his FOID card application because federal law prohibited plaintiff from possessing a firearm. ISP contends the *Coram* case does not require a different result under the current version of section 10 of the FOID Act and subsequent appellate court cases support its position. Additionally, on review, this court granted leave to the United States to file an *amicus curiae* brief in support of neither party. As to this initial issue presented for appellate review, the United States agrees with ISP's position.

¶ 25 Whether plaintiff is entitled to relief under section 10 of the FOID Act presents an issue of statutory construction. See *Walton v. Illinois State Police*, 2015 IL App (4th) 141055, 39 N.E.3d 1095. "The fundamental rule of statutory construction is to ascertain and effectuate the legislature's intent." *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16, 25 N.E.3d 570. "The most reliable indicator of the legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning." *Hayashi*, 2014 IL 116023, ¶ 16, 25 N.E.3d 570. "Where the language is clear and unambiguous, a court may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi*, 2014 IL 116023, ¶ 16, 25 N.E.3d 570. The construction of a statute presents a question of law and is subject to *de novo* review. *In re Commitment of Fields*, 2014 IL 115542, ¶ 32, 10 N.E.3d 832.

¶ 26 Under the FOID Act, ISP may deny an application for a FOID card if the applicant has been convicted of domestic battery or is a person prohibited from acquiring or possessing firearms or firearm ammunition by state statute or federal law. 430 ILCS 65/8(*l*), (n) (West 2014). Pursuant to section 10 of the FOID Act, a person whose application is denied based on a domestic battery conviction may petition the circuit court for a hearing. 430 ILCS 65/10(a) (West 2014). Section 10(b) of the FOID Act (430 ILCS 65/10(b) (West 2014)) sets forth requirements for such proceedings in the circuit court, stating as follows:

> "At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. *However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law*." (Emphasis added.)

¶ 27 Further, section 10(c) of the FOID Act (430 ILCS 65/10(c) (West 2014)) provides that a circuit court may grant a FOID card applicant relief where he establishes the following requirements to the court's satisfaction:

> "(0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
>
> (1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a [FOID card], or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
>
> (2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
>
> (3) granting relief would not be contrary to the public interest; and
>
> (4) *granting relief would not be contrary to federal law*." (Emphasis added.)

¶ 28 The language in the aforementioned sections of the FOID Act, which bars the circuit court from ordering ISP to issue a FOID card when an applicant is prohibited from possessing a

firearm under federal law (430 ILCS 65/10(b) (West 2014)) or granting relief where contrary to federal law (430 ILCS 65/10(c) (West 2014)), was added to the FOID Act by amendments that took effect on January 1, 2013. See Pub. Act 97-1131, § 15 (eff. Jan. 1, 2013) (amending 430 ILCS 65/10 (West 2012)). This amended version of section 10 is applicable to plaintiff. Additionally, under the Gun Control Act, it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9) (2006).

¶ 29 Recently, in *Walton*, 2015 IL App (4th) 141055, 39 N.E.3d 1095, this court addressed the precise issue presented on appeal. In that case, we held that the plain language of the current versions of sections 10(b) and 10(c) of the FOID Act prohibited a circuit court from granting relief from ISP's revocation of a FOID card "when such revocation is based on the petitioner being barred from obtaining, possessing, or using a firearm under federal law." *Walton*, 2015 IL App (4th) 141055, ¶ 23, 39 N.E.3d 1095. Additionally, we noted other appellate decisions which had reached the same conclusion with respect to the 2013 amendments. See *People v. Frederick*, 2015 IL App (2d) 140540, ¶ 28, 40 N.E.3d 63 ("[A]s amended in 2013, the FOID Act forbids courts from ordering the issuance of a FOID card if the person seeking the card is prohibited from obtaining or possessing a gun under federal law."); *O'Neill v. Director of the Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶ 31, 28 N.E.3d 1020 ("The [FOID] Act prohibits the [circuit] court from granting relief where doing so would be contrary to federal law."); see also *Odle v. Department of State Police*, 2015 IL App (5th) 140274, ¶ 33, 43 N.E.3d 1223 ("As amended, section 10 [of the FOID Act] requires [circuit] courts to find that granting relief would not be contrary to federal law [citation], and it expressly prohibits courts from ordering the State Police to issue a FOID card if doing so would be contrary to federal law [citation].").

¶ 30 We adhere to our holding in *Walton*. Specifically, given its plain and ordinary meaning, the language used by the legislature in section 10 is clear and unambiguous. In particular, both sections 10(b) and 10(c)(4) definitely bar relief where the petitioning party is prohibited by federal law from possessing a firearm.

¶ 31 Additionally, we note that, both before the circuit court and on appeal, the parties dispute the significance of the supreme court's decision in *Coram* to the issue presented. In *Coram*, 2013 IL 113867, ¶ 74, 996 N.E.2d 1057, the supreme court's lead plurality opinion addressed a version of the FOID Act predating the 2013 amendments and found statutory review under section 10(c) of the FOID Act could remove a federal firearm disability and entitle a petitioner under that section to a FOID card. The lead opinion noted the 2013 amendments "in passing" and found the amendments would not change its result–that "[r]elief granted pursuant to statutory review *removes* the federal firearm disability." (Emphasis in original.) *Coram*, 2013 IL 113867, ¶ 75, 996 N.E.2d 1057. However, both the two-justice special concurrence and the two-justice dissent disagreed with the lead opinion's statements regarding the effect of the 2013 amendments. See *Coram*, 2013 IL 113867, ¶ 101, 996 N.E.2d 1057 (Burke, J., specially concurring, joined by Freeman, J.) ("The amendments make clear that a circuit court no longer has the authority to make findings or grant relief under section 10 if the court concludes that the applicant would be in violation of federal law if he or she were to possess a firearm."); *Coram*, 2013 IL 113867, ¶ 124, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.) ("[U]nder the amended statute, the relief procedures under section 10 cannot remove a federal firearms disability.").

¶ 32 In *Walton*, 2015 IL App (4th) 141055, ¶ 24, 39 N.E.3d 1095, we addressed *Coram* and found the holding of the lead opinion inapplicable to the amended version of section 10. Specifically, we stated as follows:

> "As to the *Coram* case, cited by petitioner, we note that case addressed the prior version of the FOID Act. [Citation.] Moreover, while the lead opinion in *Coram* addressed the 2013 amendments [citation], those comments were *dicta* and a majority of the court did not agree with that *dicta*. [Citations.] Accordingly, we do not find the *Coram* decision controls this case." *Walton*, 2015 IL App (4th) 141055, ¶ 24, 39 N.E.3d 1095.

¶ 33 Again, we agree with the rationale set forth in *Walton*. Contrary to plaintiff's position on appeal, the lead opinion in *Coram* does not control the result in this case. The plain language of the current version of section 10 of the FOID Act clearly bars relief where an individual is subject to a federal firearms disability. *Coram* addressed a previous version of the statute that is inapplicable to plaintiff and that decision does not warrant a different result in this case. Thus, the circuit court committed no error in finding it could not grant plaintiff relief under section 10 of the FOID Act so long as federal law prohibits him from possessing a firearm.

¶ 34 B. Civil Rights Restored

¶ 35 On appeal, plaintiff alternatively argues that he has no federal firearm disability. As a result, he maintains the circuit court was not barred from granting him relief from ISP's denial of his FOID card application under section 10 of the FOID Act. This issue also involves questions of law and statutory construction and is subject to *de novo* review. *Fields*, 2014 IL 115542, ¶ 32, 10 N.E.3d 832.

¶ 36 As stated, the federal Gun Control Act provides that it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9) (2006). However, the Gun Control Act also provides as follows:

> "*A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence]* for purposes of this chapter *if the conviction* has been expunged or set aside, or *is an offense for which the person* has been pardoned or *has had civil rights restored* (*if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense*) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." (Emphases added.) 18 U.S.C. § 921(a)(33)(B)(ii) (2006).

¶ 37 In *Logan v. United States*, 552 U.S. 23, 26 (2007) the Supreme Court construed similar "civil rights restored" language used elsewhere in the Gun Control Act. See 18 U.S.C. § 921(a)(20) (2006) (providing that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored"). The Court noted that although the term "civil rights" was not defined in the Gun Control Act, "courts have held *** that the civil rights relevant under the *** provision are the rights to vote, hold office, and serve on a jury." *Logan*, 552 U.S. at 28.

¶ 38 In Illinois, a " '[m]isdemeanor' means any offense for which a sentence to a term of imprisonment in other than a penitentiary for less than one year may be imposed." 730 ILCS

5/5-1-14 (West 2014). Illinois law further provides that "[a] person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence." Ill. Const. 1970, art. III, § 2; see also 730 ILCS 5/5-5-5(c) (West 2014) ("A person sentenced to imprisonment shall lose his right to vote until released from imprisonment.").

¶ 39 Plaintiff contends his domestic battery conviction is not a conviction for purposes of the Gun Control Act because, pursuant to Illinois law, he lost one of his civil rights and then had that right restored. Specifically, he argues he lost his right to vote when sentenced to 65 days in jail as a result of his domestic battery conviction and then had that right restored by operation of law once his sentence was completed. In its *amicus curiae* brief, the United States takes the same position as plaintiff.

¶ 40 In response, ISP does not dispute plaintiff's basic position–that an individual with a domestic battery conviction who served time in jail as a result of that conviction and has been released has had his "civil rights restored" under Illinois law and, therefore, is not subject to a federal firearms disability under the Gun Control Act based on that domestic battery conviction. However, ISP does dispute that plaintiff in this case actually served jail time following his domestic battery conviction. Instead, it contends plaintiff was essentially sentenced to "time served" due to time he spent in custody prior to his conviction and sentence. Thus, it maintains plaintiff lost no civil right as a result of his domestic battery conviction and, consequently, could not have had any "civil rights restored" as contemplated by section 921(a)(33)(B)(ii) of the Gun Control Act.

¶ 41 Initially, plaintiff argues ISP has forfeited this particular argument for failing to raise it with the circuit court. However, "an appellee may argue in support of the judgment on any basis which appears in the record." *Hayes v. Board of Fire & Police Commissioners*, 230 Ill. App. 3d 707, 710, 595 N.E.2d 683, 685 (1992); see also *Shaw v. Lorenz*, 42 Ill. 2d 246, 248, 246 N.E.2d 285, 287 (1969) (stating "the appellee may urge any point in support of the judgment on appeal, even though not directly ruled on by the trial court, so long as the factual basis for such point was before the trial court"). Additionally, on review, "we may affirm the trial court for any reason supported by the record, regardless of the particular basis relied upon by the trial court." *In re Marriage of Benson*, 2015 IL App (4th) 140682, ¶ 22, 33 N.E.3d 268.

¶ 42 Here, plaintiff raised his "civil rights restored" argument with the circuit court. Although ISP did not respond to plaintiff's specific claim, at all times before the circuit court, it took the position that plaintiff remained under a federal firearms disability. Further, for the reasons that follow, we find the record contains a sufficient factual basis for the position ISP now takes on appeal in its appellee's brief. Thus, a finding of forfeiture is not warranted by the circumstances presented.

¶ 43 To support its position on appeal that plaintiff did not have any civil rights restored following his domestic battery conviction, ISP relies, in part, on an ISP printout detailing plaintiff's criminal history, which it attached as an exhibit to its filings before the circuit court. The printout reflects that with respect to his 2007 domestic battery conviction, plaintiff was sentenced to "COST[S] ONLY." Plaintiff argues the printout "should not be considered as evidence" because it conflicts with the record in his criminal case (case No. 07-CF-69), "was not introduced as evidence," and was not considered by the circuit court. Additionally, to support his contention that ISP's printout should not be considered, he cites case authority which provides that a party's pleading controls over a conflicting exhibit " '[w]hen the exhibit

is not an instrument upon which the claim or defense is founded but, rather, is merely evidence supporting the pleader's allegations.' " *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 432, 804 N.E.2d 519, 531-32 (2004) (quoting *Garrison v. Choh*, 308 Ill. App. 3d 48, 53-54, 719 N.E.2d 237, 241 (1999)).

¶ 44 We disagree with plaintiff's arguments. First, plaintiff claims that the appellate record, which includes the record in case No. 07-CF-69, refutes ISP's position. He does not argue that ISP's pleading and its exhibit conflict with each other. Thus, the case authority he cites is irrelevant to his claim. Second, ISP's printout was attached to its pleadings and properly before the circuit court for consideration. See 735 ILCS 5/2-606 (West 2014) ("In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit" and "the exhibit constitutes a part of the pleading for all purposes.").

¶ 45 Third, we find ISP's position that plaintiff did not serve jail time following his domestic battery conviction is supported by the record in case No. 07-CF-69 and not in conflict with ISP's printout, as plaintiff claims. The record shows plaintiff was arrested in connection with his various criminal charges in case No. 07-CF-69 and served 65 days in custody prior to being convicted of and sentenced for unlawful possession with intent to deliver cannabis and domestic battery. Under Illinois law, an "offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014). Thus, plaintiff was entitled to 65 days' credit on his 65-day domestic battery sentence.

¶ 46 Finally, even disregarding ISP's printout, we find its contention persuasive. In the circuit court, plaintiff had the burden of proving his entitlement to relief under section 10 of the FOID Act, including that "relief would not be contrary to federal law." 430 ILCS 65/10(c)(4) (West 2014). Plaintiff failed to meet that burden with respect to his "civil rights restored" argument as, by operation of statute (730 ILCS 5/5-4.5-100(b) (West 2014)), he was entitled to 65 days' sentence credit on his 65-day domestic battery sentence and he otherwise failed to establish that he actually served 65 days in jail following his domestic battery conviction. Additionally, we note that, even when challenging ISP's contentions on appeal, plaintiff does not argue that the time he spent in jail in connection with his domestic battery conviction actually occurred following his conviction.

¶ 47 Under the circumstances presented, we find the record sufficient to support ISP's claim that plaintiff did not serve time in jail following his conviction and sentence for domestic battery. Rather, the record reflects that, although plaintiff received a 65-day sentence for domestic battery, he also was granted credit for the 65 days he served in jail prior to his conviction. Thus, the record indicates plaintiff served no jail time following his conviction for domestic battery.

¶ 48 As stated, ISP maintains that, because plaintiff's jail time occurred prior to his conviction and sentence for domestic battery, he never lost and had any "civil rights restored" as contemplated by section 921(a)(33)(B)(ii) of the Gun Control Act. Conversely, plaintiff argues that even if the only jail time he served was prior to his conviction and sentence, such jail time was nevertheless a part of his sentence. Therefore, he contends that, because he lost the right to vote as part of his sentence and had that right restored upon his release from jail, he had "civil rights restored" and was not under a federal firearm disability.

¶ 49 Again, section 921(a)(33)(B)(ii) of the Gun Control Act (18 U.S.C. § 921(a)(33)(B)(ii) (2006)) provides that a person is not considered to have been convicted of a misdemeanor crime of domestic violence "if the conviction *** is an offense for which the person *** has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." In construing the "civil rights restored" language in *Logan*, 552 U.S. at 26, the Supreme Court rejected the argument that the retention of civil rights equated with the restoration of civil rights, holding that the civil rights restored "exemption provision does not cover the case of an offender who retained civil rights at all times, and *whose legal status, postconviction, remained in all respects unaltered* by any state dispensation." (Emphasis added.) Stated another way, the Court held "that the words 'civil rights restored' do not cover the case of an offender who lost no civil rights." *Logan*, 552 U.S. at 37; see also *Connour v. Grau*, 2015 IL App (4th) 130746, ¶ 25, 35 N.E.3d 244 (holding that "because [the] plaintiff did not lose his core civil rights when he was convicted of domestic battery, he never had his core civil rights restored within the meaning of the Gun Control Act").

¶ 50 Here, relying on both the Gun Control Act and *Logan*, we find that the appropriate time frame in which to determine whether plaintiff had "civil rights restored" within the meaning of section 921(a)(33)(B)(ii) was postconviction. Pursuant to section 921(a)(33)(B)(ii), Illinois law must "provide[ ] for the loss of civil rights under" a misdemeanor domestic violence offense before civil rights can be restored. 18 U.S.C. § 921(a)(33)(B)(ii) (2006). Illinois law provides that individuals "under sentence in a *** jail, shall lose the right to vote" (Ill. Const. 1970, art. III, § 2). See also 730 ILCS 5/5-5-5(c) (West 2014) ("A person sentenced to imprisonment shall lose his right to vote until released from imprisonment."). A person held in custody prior to trial is not someone who is "under sentence" while in such custody and, thus, subject to a loss of civil rights. See *United States v. Kirchoff*, 387 F.3d 748, 752 (8th Cir. 2004) (noting Missouri law provided for a loss of civil rights only when a person was "confined under a sentence of imprisonment" and finding that the appellant was not so confined while a pretrial detainee "and thus did not lose his civil rights").

¶ 51 Additionally, upon being convicted of domestic battery, plaintiff did not physically serve any jail time. Thus, he retained his civil rights. Having lost no civil rights, he could have no civil rights restored and his "legal status, postconviction, remained in all respects unaltered by any state dispensation." *Logan*, 552 U.S. at 26.

¶ 52 We find plaintiff falls within the same class of persons whose convictions for a misdemeanor offense of domestic violence caused them to lose no civil rights. As a result, he cannot take advantage of the section 921(a)(33)(B)(ii) "civil rights restored" exemption and, therefore, remains under a federal firearm disability.

¶ 53 C. As-Applied Constitutional Challenge

¶ 54 On appeal, plaintiff's final contention is that the FOID Act and the Gun Control Act are unconstitutional as applied to him. He maintains that, because he established himself before the circuit court as a law-abiding individual, interpret2ing section 10 of the FOID Act and section 922(g)(9) of the Gun Control Act as prohibiting him from possessing a firearm violates his second amendment rights to keep and bear arms (U.S. Const., amend. II).

¶ 55 ISP responds that plaintiff forfeited his constitutional challenge on appeal by failing to raise the issue in the circuit court. Alternatively, it maintains plaintiff's claim is without merit

because there is no certain lifetime ban preventing him from possessing a firearm. In its *amicus curiae* brief, the United States takes the same position as ISP.

¶ 56 "Whether a statute is unconstitutional is a question of law subject to *de novo* review." *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 227, 930 N.E.2d 895, 902 (2010). However, when an appellant has failed to raise his constitutional claim before the circuit court, "he has forfeited consideration of the issue on appeal." *Odle*, 2015 IL App (5th) 140274, ¶ 35, 43 N.E.3d 1223 (finding the appellant forfeited his constitutional claim that the interplay between the FOID Act and the federal Gun Control Act violated his rights to keep and bear arms under the second amendment). Additionally, "[a] court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact." *In re Parentage of John M.*, 212 Ill. 2d 253, 268, 817 N.E.2d 500, 508 (2004); see also *Lebron*, 237 Ill. 2d at 228, 930 N.E.2d at 902 (holding that "when there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial"). "By definition, an as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant or petitioner" and, "[t]herefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *People v. Thompson*, 2015 IL 118151, ¶ 37, 43 N.E.3d 984.

¶ 57 Although plaintiff acknowledges that he failed to raise an as-applied constitutional challenge in the circuit court, he asks this court to excuse his forfeiture on the basis the circuit court heard and considered evidence in connection with his petition under section 10 of the FOID Act and because "the State certainly could have presented evidence [during the hearing on his section 10 petition] but chose not to."

¶ 58 Here, we decline to excuse plaintiff's forfeiture. As stated, the hearing before the circuit court concerned plaintiff's request for relief under section 10 of the FOID Act. At no time during the underlying proceedings did the court consider or make factual findings relative to an as-applied constitutional challenge to the FOID Act or the federal Gun Control Act. Moreover, the hearing at issue occurred prior to ISP's intervention in the underlying proceedings. ISP was ultimately allowed to intervene, in part, based on claims that the State's Attorney's office–the original respondent in the matter–was not sufficiently representing ISP's interests. Thus, although the State's Attorney's office was present at the hearing and could have presented contrary evidence to that presented by plaintiff, ISP did not have the same opportunity.

¶ 59 Finally, even if we were inclined to excuse plaintiff's forfeiture, we question the appropriateness of reaching the merits of his as-applied constitutional claim under the circumstances presented by this case. In *Coram*, 2013 IL 113867, ¶ 1, 996 N.E.2d 1057, the circuit court held section 922(g)(9) of the federal Gun Control Act was unconstitutional as applied to the appellee, an individual denied 2a FOID card by ISP, and ISP appealed. On review before the supreme court, the dissent noted the constitutional question presented by the appeal but found it to be premature. *Coram*, 2013 IL 113867, ¶ 134, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.). We find the dissent's reasoning instructive.

¶ 60 The dissent noted that under section 921(a)(33)(B)(ii) of the Gun Control Act (18 U.S.C. § 921(a)(33)(B)(ii) (2006)), "an individual convicted of misdemeanor domestic violence potentially has three avenues of relief from the federal [firearms] ban," *i.e.*, having their conviction expunged, being pardoned, or having their civil rights restored. *Coram*, 2013 IL 113867, ¶ 130, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.). The dissent further stated that, "[i]n Illinois, the constitution gives the Governor the unfettered authority to

'grant *** pardons, after conviction, for all offenses on such terms as he thinks proper' " and noted "[t]he pardon power is extremely broad." *Coram*, 2013 IL 113867, ¶ 133, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.) (quoting Ill. Const. 1970, art. V, § 12). It then determined as follows:

> "Where [the appellee] has not availed himself of a potential state remedy available to him under the statute, we need not and should not determine whether the statute is an unconstitutional perpetual ban which violates his second amendment rights. A remedy does not become unavailable merely because it is discretionary or resort to it may fail. It is not futile without ever being tried. Thus, where it is yet unknown whether [the appellee] can satisfy section 921(a)(33)(B)(ii), the question of '[w]hether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy [section] 921(a)(33)(B)(ii), is a question not presented today.' [Citation.]" *Coram*, 2013 IL 113867, ¶ 134, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).

¶ 61 Like in *Coram*, plaintiff in this case has a potential state remedy available to him, which could result in the removal of his federal firearm disability. Nothing in the record indicates he has attempted to avail himself of that potential remedy. As a result, his constitutional claim is premature.

¶ 62 D. Plaintiff's Felony Conviction

¶ 63 On appeal, ISP argues plaintiff's felony conviction for unlawful possession with the intent to deliver cannabis also renders him ineligible for possession of a FOID card. However, given our resolution of the other issues presented for review in this case, we find it unnecessary to address this alternative claim.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, we affirm the circuit court's judgment.

¶ 66 Affirmed.