2015 IL App (1st) 140837-U
No. 1-14-0837
December 20, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 4412
	)	
JOHN POWELL,	)	The Honorable
	)	Sharon Sullivan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman concurred in the judgment.
Justice Mason concurred in part and dissented in part.

ORDER

¶ 1 *Held*: A felony conviction for violation of an unconstitutional statute makes the convicted person a felon for purposes of the armed habitual criminal statute until the convicted person obtains from a court a vacatur of the unconstitutional conviction. The armed habitual criminal statute is not facially unconstitutional.

¶ 2 The trial court found John Powell guilty of violating the armed habitual criminal statute. On appeal, Powell contends that the trial court should not have admitted evidence of his prior conviction, because the prior conviction was for the violation of an unconstitutional statute.

Powell also contends that the armed habitual criminal statute is facially unconstitutional, and that the trial court improperly imposed certain fines and fees. Following *People v. McFadden*, 2016 IL 117424, we find that the trial court could consider Powell's prior conviction for violating an unconstitutional statute, because Powell had not had a court formally declare the conviction void before he obtained a firearm. Following *People v. Johnson*, 2015 IL App (1st) 133663, we hold that the armed habitual criminal statute is not facially unconstitutional. We vacate certain fees, and in all other respects we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 Police arrested Powell around 1:30 a.m. on February 8, 2013. Prosecutors charged Powell with unlawful use of a weapon by a felon (UUWF) and violation of the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2012)).

¶ 5 At the bench trial, Officer George Artiga testified that as he rode in a police car, he saw Powell, on the street, fling a dark object. Artiga stopped Powell and brought him back to the area where Powell flung the object. Artiga found a handgun on the ground.

¶ 6 The State presented certified documents showing that Powell had a conviction for aggravated unlawful use of a weapon (AUUW) on December 3, 2003, and for UUWF on July 9, 2008, with the AUUW conviction forming the predicate offense for the UUWF conviction. The trial court found Powell guilty of both UUWF and violating the armed habitual criminal statute, and held that the UUWF charge merged into the armed habitual

criminal charge. The court ordered Powell to pay $859 in fines and fees. Powell now appeals.

¶ 7 ANALYSIS

¶ 8 Unconstitutional Predicate Felonies

¶ 9 In *People v. Aguilar*, 2013 IL 112116, our supreme court declared the AUUW statute unconstitutional, making all convictions for violations of that statute, including Powell's 2003 conviction, void. Powell argues that the conviction for violation of the armed habitual criminal statute also violates his constitutional rights, as the court based the conviction on the prior conviction for violation of an unconstitutional statute.

¶ 10 The armed habitual criminal statute provides that "[a] person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination of *** unlawful use of a weapon by a felon; [or] aggravated unlawful use of a weapon." 720 ILCS 5/24-1.7(a) (West 2012). The State used the unconstitutional AUUW conviction from 2003 and the UUWF conviction from 2008, predicated on the unconstitutional 2003 conviction, as the two predicate convictions for the charged violation of the armed habitual criminal statute.

¶ 11 In *McFadden*, a court in 2002 had found McFadden guilty of AUUW and in 2008 another court found McFadden guilty of UUWF predicated on the 2002 conviction. The State conceded that the 2002 conviction violated McFadden's constitutional right to bear arms, as explained in *Aguilar*. The *McFadden* court found the 2002 conviction void *ab initio* (*McFadden*, 2016 IL 117424, ¶ 17) , but held:

> "[T]he fact of a felony conviction without any intervening vacatur or other affirmative action to nullify the conviction triggers the firearms disability. ***
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> The UUW by a felon statute prohibits the possession of a firearm by any person 'if the person has been convicted of a felony under the laws of this State or any other jurisdiction.' 720 ILCS 5/24-1.1(a) (West 2008). As previously explained, that language of the statute requires the State to prove only 'the defendant's felon status.' [*People v. Walker*, 211 Ill. 2d 317, 337 (2004).] ***
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> *** [T]he UUW by a felon statute is not concerned with prosecuting or enforcing the prior conviction. Rather, the legislation is concerned with 'the role of that conviction as a disqualifying condition for the purpose of obtaining firearms.' [*United States v. Mayfield*, 810 F.2d 943, 946 (10th Cir. 1987)]. Accordingly, based on the plain wording of this particular statutory scheme, the UUW by a felon offense is a status offense, and the General Assembly intended that a defendant must clear his felon status before obtaining a firearm." *McFadden*, 2016 IL 117424, ¶¶ 24-29.

¶ 12 Powell argues that we should not apply *McFadden* here because United States Supreme Court precedent shows that our supreme court erred. Justice Kilbride's dissent in *McFadden* states the argument Powell advances here. We must conclude that the *McFadden* court considered and rejected arguments effectively indistinguishable from the arguments Powell

raises. The predicate conviction, under the unconstitutional AUUW statute, made Powell a felon, for purposes of the armed habitual criminal statute and the UUWF statute, unless Powell had a court declare the unconstitutional convictions void. Thus, because no court had vacated the conviction based on the unconstitutional AUUW statute, the evidence supported the finding that Powell violated the armed habitual criminal statute.

¶ 13 Constitutionality of Armed Habitual Criminal Statute

¶ 14 Next, Powell argues that the armed habitual criminal statute is facially unconstitutional because it subjects innocent conduct to criminal penalties. He points out that the Firearm Owners Identification Card Act (430 ILCS 65/10 (West 2012)) permits persons convicted of multiple felonies, including the felonies listed in the armed habitual criminal statute, to apply for FOID cards, and a court may permit the applicant to obtain the card if "the person will not be likely to act in a manner dangerous to public safety and granting relief would not be contrary to the public interest." 430 ILCS 65/10(f) (West 2012).

¶ 15 We find Powell's argument on this issue indistinguishable from the argument advanced by the defendant in *People v. Johnson*, 2015 IL App (1st) 133663. The *Johnson* court said:

> "While it may be true that an individual could be twice-convicted of the offenses set forth in the armed habitual criminal statute and still receive a FOID card under certain unlikely circumstances, the invalidity of a statute in one particular set of circumstances is insufficient to prove that a statute is facially unconstitutional. [Citation.] The armed habitual criminal statute was enacted to help protect the public from the threat of violence that arises when repeat offenders possess

> firearms. [Citation.] The Supreme Court explicitly noted in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.' *Id.* [Citation.] Accordingly, we find that the potential invalidity of the armed habitual criminal statute in one very unlikely set of circumstances does not render the statute unconstitutional on its face." *Johnson*, 2015 IL App (1st) 133663, ¶ 27.

¶ 16 Following *Johnson*, we find that the armed habitual criminal statute is not unconstitutional on its face, and the trial court did not err by applying it here.

¶ 17 Fees and Fines

¶ 18 The State agrees with Powell that the trial court erred when it charged Powell the $250 DNA analysis fee (see 730 ILCS 5/5-4-3(j) (West 2012)), and when it assessed the $5 court system fee (see 55 ILCS 5/5-1101(a) (West 2012)).

¶ 19 Powell argues that the $2 State's Attorney records automation assessment (55 ILCS 5/4-2002.1(c) (West 2012)), and the $2 public defender records automation assessment (55 ILCS 5/3-4012 (West 2012) count as fines, not fees, and his time in prison discharges the fines. We agree and adopt the holding of *People v. Camacho*, 2016 IL App (1st) 140604, where the court said:

> "The language of both statutes does not demonstrate that the purpose of the assessments is to compensate the state for the costs associated in prosecuting a particular defendant. Rather, both statutes demonstrate a prospective purpose intended to fund the technological advancement of both the State's Attorney's and

> public defender's offices, namely the establishment and maintenance of automated record keeping systems. ***
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> *** [T]he State's Attorney and public defender records automation assessments do not compensate the state for the costs associated in prosecuting a particular defendant. Accordingly, they cannot be considered fees. See [*People v. Jones*, 223 Ill. 2d 569, 600 (2006)] (Assessment 'is a fee *if and only if* it is intended to reimburse the state for some cost incurred in defendant's prosecution.' (Emphasis added.)). As the assessments cannot be fees, they must be fines. Therefore, [the defendant] is entitled to $5 per day of presentence custody credit against these fines. See 725 ILCS 5/110-14(a) (West 2012)." *Camacho*, 2016 IL App (1st) 140604, ¶¶ 50-56.

¶ 20 Finally, the court assessed a $5 "Electronic Citation Fee" under 705 ILCS 105/27.3e (West 2012), which does not apply to felonies. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. We vacate that fee. We reduce the total assessment from $859 to $599, and we hold that Powell can use his 382 days of presentencing custody credit to defray $39 of the total assessed.

¶ 21 CONCLUSION

¶ 22 Following *McFadden* and *Johnson*, we reject both of Powell's constitutional challenges to his conviction. We reduce the assessed fines and fees from $859 to $599, and hold that his

presentencing custody entitles him to credit against $39 of the fines. In all other respects, we affirm the trial court's judgment.

¶ 23 Affirmed as modified.

¶ 24 JUSTICE MASON, concurring in part and dissenting in part.

¶ 25 I concur in the majority's decision to affirm the circuit court's judgment. But I have previously concluded that the $2 Public Defender Records Automation Fee and the $2 States Attorney Record Automation Fee are not fines and I adhere to that determination. *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 29. Therefore, I respectfully dissent from the majority's conclusion that these assessments are fines.