2016 IL App (1st) 143801-U

No. 1-14-3801

Fourth Division
June 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BERNARD BANKS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 12 CR 18435 Honorable Neil J. Linehan, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's admonishments were sufficient to ensure defendant's jury waiver was voluntary, knowing and intelligent; the armed habitual criminal statute was not facially unconstitutional for failing to contain an element exempting criminal conviction for felons who possess a valid Firearm Owner's Identification card.

¶ 2 Following a bench trial, defendant Bernard Banks was found guilty of aggravated unlawful use of a weapon (AUUW) and being an armed habitual criminal (AHC). For purposes of sentencing, the trial court merged defendant's convictions and sentenced him to seven years' imprisonment on the AHC offense. On appeal, defendant asserts the trial court

failed to ensure his jury waiver was knowing and voluntary and that the AHC statute is facially unconstitutional because it criminalizes potentially lawful conduct for those who possess a valid Firearm Owner's Identification (FOID) card. We affirm.

¶ 3 BACKGROUND

¶ 4 Prior to trial, defendant executed a jury waiver indicating his wish to proceed to a bench trial. Before accepting the waiver, the trial court admonished defendant as follows:

"THE COURT: Mr. Banks, is this your signature on the jury waiver?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that by signing that jury waiver and handing it to me, you are telling me you wish that I hear the evidence, rather than a jury? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Do you understand what a jury trial is and what it does?

DEFENDANT: Yes.

THE COURT: Do you understand by signing and handing it to me, you are telling me you wish I hear the evidence rather than a jury. Is that what you wish to happen?

DEFENDANT: Yes, sir.

THE COURT: The jury waiver would be accepted and made a part of the record." The matter then proceeded to a bench trial.

¶ 5 The evidence at trial established that on September 20, 2012, Chicago police officers curbed defendant's vehicle after witnessing him commit a traffic violation. Upon curbing the vehicle, an officer saw defendant make a movement with his right arm. When officers asked defendant for his driver's license, he drove away and was subsequently involved in a

collision. Defendant abandoned his vehicle and fled on foot, but was eventually apprehended by officers in a nearby backyard. A search of defendant's abandoned vehicle yielded a loaded firearm in the same location officers observed defendant move his arm. Certified copies of defendant's prior convictions were entered into evidence. The court found defendant guilty of one count of AHC and four counts of AUUW. For purposes of sentencing, the trial court merged defendant's AUUW convictions into his Class X AHC conviction and sentenced him to seven years' imprisonment. See 720 ILCS 5/24-1.7 (West 2010). Defendant appeals.

¶ 6 ANALYSIS

¶ 7 A. Jury Waiver

¶ 8 Defendant contends that the trial court failed to ensure his jury waiver was voluntary, knowing and intelligent as it failed to "probe to what level, if at all, [defendant] understood the ramifications of waiving his right to a jury trial" and argues his conviction should be reversed and his cause remanded for retrial. He acknowledges that his claim is subject to forfeiture as he failed to object at trial or raise this issue in a posttrial motion to preserve the issue for review (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues it is reviewable under the "substantial rights" prong of the plain error doctrine because the right to a jury trial is a fundamental right. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). The State concedes that the matter is reviewable as plain error, but contends that defendant has not demonstrated that an error occurred. See *People v. Herron*, 215 Ill. 2d 167, 184 (2005) (there can be no plain error if no error has occurred). It argues that the trial court's admonishments were sufficient to ensure defendant's waiver was knowing, intelligent and voluntary given the specific facts of this case as no specific admonishments are required.

¶ 9 The right to a trial by jury in criminal cases is "fundamental to the American scheme of justice" and is guaranteed by both the United States and Illinois Constitutions. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); U.S. Const. amends. VI, XVI; Ill. Const. 1970, art. 1, §§ 8, 13. Section 103-6 of the Code of Criminal Procedure provides that every person accused of a crime has a right to a trial by jury unless the accused understandingly waives such right in open court. 725 ILCS 5/103-6 (West 2010). To be valid, a defendant must make the waiver knowingly and voluntarily. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The determination of whether a jury waiver was made turns on the facts and circumstances of each particular case. *People v. Tye*, 141 Ill. 2d 1, 24 (1990); *People v. Duncan*, 297 Ill. App. 3d 446, 450 (1998). While a circuit court must ensure that a defendant's waiver is understandingly made, no set admonition or advice is required before an effective waiver may be made. *People v. Smith*, 106 Ill. 2d 327, 334 (1985). A signed jury waiver alone is not sufficient to demonstrate an understanding jury waiver. *People v. Sebag*, 110 Ill. App. 3d 821, 828 (1982). However, a signed waiver, viewed in light of other circumstances, can "lessen[ ] the probability that the waiver was not made knowingly." *People v. Stokes*, 281 Ill. App. 3d 972, 978 (1996).

¶ 10 Defendant, citing *People v. Tooles*, 177 Ill. 2d 462, 469-70 (1997), argues that the trial court "did not make [the] requisite inquiries" because it did not explain the difference between a jury and a bench trial, ensure the waiver was not made due to promises or threats, and determine that defendant conferred with his attorney prior to accepting the waiver. As previously stated, no set admonishments are necessary and the effectiveness of the waiver turns on the specific set of facts or circumstances in each case. *Duncan*, 297 Ill. App. 3d at 450-51 ("*Tooles* does not require specific admonishments or advice to a defendant").

However, in *People v. Chitwood*, 67 Ill. 2d 443, 448-49 (1977), our supreme court provided guidance regarding the required admonishments to effectuate a valid jury waiver when it stated, in dicta:

> "It takes but a few moments of a trial judge's time to directly elicit from a defendant a response indicating that he understands that he is entitled to a jury trial, that he understands what a jury trial is, and whether or not he wishes to be tried by a jury or by the court without a jury. This simple procedure incorporated in the record will reduce the countless contentions raised in the reviewing courts about jury waivers."

¶ 11 Here, defense counsel informed the court that defendant was executing a jury waiver and defendant did not object. The trial court confirmed that defendant understood "what a jury trial is and what it does," that defendant "wish[ed]" that the court should hear the evidence as opposed to a jury and that it was defendant's signature on the written jury waiver. Although the trial court did not specifically inform defendant that he was entitled to a jury trial, this is merely preferable but not required. See *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008). Further, defendant was represented by counsel and had extensive experience with the criminal justice system such that we can infer he understood his right to a jury trial. See *Bannister*, 232 Ill. 2d at 71. Thus, given the trial court's admonishments, the presence of a signed jury waiver, defendant's representation by counsel and his extensive experience with the criminal justice system, we find the jury waiver was made knowingly, intelligently, and voluntarily.

¶ 12 We also find defendant's reliance on *Sebag*, 110 Ill. App. 3d 821, misplaced. In *Sebag*, this court determined the trial court's admonishments were insufficient to effectuate a valid

jury waiver despite the presence of a signed jury waiver form when the court admonished the defendant as follows:

"THE COURT: The charge is offense of battery. How do you plead?

DEFENDANT SEBAG: Not guilty.

THE COURT: You are entitled to have your case tried before a jury or judge.

DEFENDANT SEBAG: Judge.

THE COURT: Jury waiver. Do you understand that by waiving a jury at this time you cannot reinstate it; do you understand that?

DEFENDANT SEBAG: Yes." *Id.* at 828-29.

The court concluded the defendant's jury waiver was inadequate and reasoned that he was without counsel, was not advised of the meaning of a trial by jury, nor did it appear that he was familiar with criminal proceedings. *Id.* In addition, the court reasoned that he was not arraigned as to the public indecency charge against him and the court's discussion related only to the battery offense and therefore, in light of the circumstances, the jury waiver was invalid. *Id.* Here, as previously stated, defendant was represented by counsel, had extensive experience with the criminal justice system, was asked if he understood the difference between a jury and a bench trial, and was also informed that by signing the jury waiver the court would hear the evidence. Further, defendant does not allege, nor is there evidence, that he was improperly arraigned. Accordingly, we find *Sebag* inapposite and conclude that based upon the facts and circumstances of the instant case, the trial court's admonishments were sufficient to invoke a valid jury waiver.

¶ 13 B. Constitutionality

¶ 14 Defendant next contends that the AHC statute is facially unconstitutional and violates due process because it does not exempt felons who possess a valid FOID card. According to defendant, it is possible for a felon twice-convicted of the enumerated predicate felonies in the AHC statute to also possess a FOID card under the Firearm Owner's Identification Card Act (FOID Card Act). See 430 ILCS 65/5, 8, 10 (West 2010); Ill. Const. 1970, art. I, § 22. He argues that because the statute "potentially criminalizes innocent conduct" for individuals with valid FOID cards, it is therefore invalid on its face because it does not require a culpable mental state. See *People v. Carpenter, 2*28 Ill. 2d 250, 268 (2008).

¶ 15 The State initially responds that defendant cannot prove the AHC statute is facially unconstitutional on these grounds because the statute is constitutional as applied to him. See *In re C.E.*, 161 Ill. 2d 200, 210-11 (1994) (a defendant's facial challenge must fail if the statute is constitutional as applied to him). It argues that it is undisputed that defendant was ineligible for a FOID card when he committed the offense and thus, defendant did not suffer harm under the AHC statute. The State also argues that the statute meets the rational basis test and its constitutionality should be upheld.

¶ 16 Statutes are presumed to be constitutional and the party challenging the constitutionality of the statute carries the burden of proving the statute is unconstitutional. *People v. Hollins*, 2012 IL 112754, ¶ 13. This court has a duty to construe a statute in a manner that upholds its constitutionality "whenever reasonably possible, resolving any doubts in favor of its validity." *People v. Patterson,* 2014 IL 115102, ¶ 90. A facial challenge requires a defendant to demonstrate that the statute is incapable of constitutional application under any set of circumstances. *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 16. Our review of the constitutionality of a statute is *de novo*. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 54.

¶ 17 "The legislature has wide discretion to establish penalties for criminal offenses, but that discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law." *Carpenter,* 228 Ill. 2d at 267. When the challenged statute does not affect "a fundamental constitutional right," the rational basis test is used to determine whether the statute comports with substantive due process requirements.[1] *Id.* A statute will be upheld under the rational basis test when it bears a reasonable relationship to the public interest it seeks to serve and the means adopted are a reasonable method of accomplishing such objective. *Id.* at 267-68.

¶ 18 The armed habitual criminal statute creates a Class X felony when an individual is in possession of a firearm having twice been convicted of certain enumerated offenses. 720 ILCS 5/24-1.7 (West 2010). Under section 8 of the FOID Card Act, a person who is convicted of a felony may have their FOID card seized or revoked or their application denied. 430 ILCS 65/8(c) (West 2010). Section 10 of the Act, however, provides an avenue for individual review of any prohibition under section 8 by allowing the aggrieved party to appeal a prohibition to the circuit court. 430 ILCS 65/10(c) (West 2010). According to the FOID Card Act, a circuit court may reinstate an applicant's right to possess a firearm if it determines that (1) more than 20 years have passed since the applicant's last conviction for a forcible felony or the end of any term of imprisonment for that conviction, (2) the applicant's criminal history and reputation are such that he or she will not be likely to act in a manner

[1] There has been dispute among our courts whether rational basis or intermediate scrutiny applies to constitutional challenges regarding a felon's right to bear arms. See *People v. Ross*, 407 Ill. App. 3d 931, 939 (2011) (applying intermediate scrutiny standard to constitutional challenge under the AHC statute). The parties here apply a rational basis standard. We agree with this application. See *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 21.

dangerous to public safety, and (3) granting relief would not be contrary to the public interest.[2] 430 ILCS 65/10(c)(1) – (c)(3) (West 2010).

¶ 19 Defendant assumes that, under section 10 of the FOID Card Act, it is possible for a person convicted under the AHC statute to lawfully possess a FOID card under the aforementioned "individual review" provision. He argues, therefore, that the AHC statute criminalizes potentially innocent conduct and does not bear a rational relationship to the purpose it intended to serve. We disagree.

¶ 20 Although neither party addresses section 13 of the FOID Card Act, it specifically provides that "[n]othing in this Act shall make lawful the acquisition or possession of firearms or firearm ammunition which is otherwise prohibited by law." 430 ILCS 65/13 (West 2010). Further, the legislature clearly established certain requirements an applicant must meet before individual review may be considered or granted. See 430 ILCS 65/10(c)(1) – (c)(3); *Supra* ¶ 18. The FOID Card Act's plain language demonstrates the legislature did not intend for the circuit court to possess an unlimited "power of final review" to reinstate an applicant's right to possess a firearm in every circumstance – including when the legislature had otherwise deemed it illegal to do so, such as in the AHC statute. If we accepted defendant's construction of section 10 of the FOID Card Act, section 13 would be rendered superfluous because the circuit court could potentially lift a firearm prohibition even if such possession was contrary to law. See *People v. Marshall*, 242 Ill. 2d 285, 292 (statute should be construed as to avoid rendering any part of it meaningless or superfluous). Defendant's argument likewise creates an absurd construction under section 10 as it potentially gives the circuit court an unabridged power to ultimately override the legislature's determination of

[2] The FOID Card Act was amended in 2013 to prohibit a circuit court from granting a FOID card to anyone prohibited from possessing a firearm under federal law. See 430 ILCS 65/10(c)(4) (West 2014). This amendment is irrelevant, however, as it was not in effect at the time of the commission of the instant offense.

what is "contrary to the public interest" when it has already dictated otherwise. See *Marshall*, 242 Ill. 2d at 292 (statutes construed so as not to lead to absurd results); *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 364 (1985) ("It is clear that the legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest."). Thus, based upon the plain language of the Act, we do not find a felon subject to the provisions of the AHC statute could obtain a FOID card under the individual review guidelines set forth in section 10.

¶ 21 We also find support for this conclusion in the language of the offense of unlawful possession of a weapon by a felon (UUWF), which is part of the same article in the criminal code creating the offense of AHC. 730 ILCS 5/24-1.1 (West 2012); 730 ILCS 5/24-1.7. Pursuant to the criminal code, the legislature expressly excludes prosecution under the UUWF statute for felons who have been granted relief under section 10 of the FOID Card Act. 730 ILCS 5/24-1.1(a) (West 2012) ("This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Card Act."). No such exemption exists in the AHC statute. See 720 ILCS 5/24-1.7. We presume that if the legislature intended to allow circuit courts to lift the firearm disability for felons whose prior convictions subjected them to prosecution under the AHC statute, it would have included similar exempting language as in the UUWF statute. See *People v. Ellis*, 199 Ill. 2d 28, 39 (2002) (we will not depart from a statute's plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature); see also *People v. Maya*, 105 Ill. 2d 281, 286 (1985) (statutes relating to the same subject are governed by one spirit and a single policy). Because this language is

conspicuously absent, however, it appears the legislature did not intend to create an exception that allowed circuit courts to reinstate the right to possess firearms to individuals subject to prosecution under the AHC statute.

¶ 22 Even assuming, however, that section 13 of the FOID Card Act does not limit the circuit court's ability to reinstate an individual's right to bear firearms under the AHC statute, we have previously considered and rejected defendant's contention that eligibility for a FOID Card under section 10 of the FOID Card Act renders the AHC statute facially unconstitutional. See *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 23 (quoting *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 27 ("the invalidity of a statute in one particular set of circumstances is insufficient to prove that a statute is facially unconstitutional.")).

¶ 23 We have likewise previously examined and rejected defendant's argument that the AHC statute cannot survive the rational basis test because it fails to require a culpable mental state by criminalizing "wholly innocent conduct." See *Fulton*, 2016 IL App (1st) 141765, ¶¶ 26-31. As explained in *Fulton*, the AHC statute was enacted to help "protect the public from the threat of violence that arises when repeat offenders *possess* firearms." (Emphasis in original.) *Id.* ¶ 31 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27). As the State points out, our courts have held that "[c]onvicted felons present special dangers when they possess firearms, even if they hold those firearms only temporarily for other owners." *Davis*, 408 Ill. App. 3d at 750-51 (citing *United States v. Johnson*, 459 F. 3d 990, 998 (9th Cir. 2006)). Thus, "the statute's criminalization of a twice-convicted felon's possession of a firearm is not 'wholly innocent' and is, in fact, exactly what the legislature was seeking to prevent in passing the armed habitual criminal statute" and thus, is rationally related to the purpose it serves. *Fulton*, 2016 IL App (1st) 141765, ¶ 31.

¶ 24 Defendant nonetheless contends that the Illinois Constitution "guarantees every citizen the right to individualized consideration of whether they can legally own a firearm." See *Coram v. State of Illinois*, 2013 IL 113867, ¶ 58. He argues that "both the FOID Card Act itself and the Illinois Constitution as detailed in *Coram* establish that the possession of a firearm by a person twice-convicted of the offenses set forth in the AHC statute is not, by itself, a criminal act unless it can also be shown that the person did not have a FOID card at the time of the offense." Based upon the facts of the specific case, we find *Coram* distinguishable.

¶ 25 *Coram* considered individualized review in the context of federally imposed firearm prohibitions against a misdemeanant-defendant and reasoned that Congress intended to provide a means for state law to neutralize the prohibition of a *federal* firearm disability when based upon a prior state misdemeanor conviction. *Id.* ¶ 62. *Coram* did not interpret or address our state legislature's intent to allow circuit courts to countermand a state-imposed firearm prohibition against felons, nor did it address the constitutionality of such prohibition under the AHC statute. See *id.* ¶ 63. We thus find *Coram* inapposite and conclude the AHC statute is constitutional and does not violate substantive due process.

¶ 26 Conclusion

¶ 27 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 28 Affirmed.