2016 IL App (4th) 141042-U

NO. 4-14-1042

FILED
September 19, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
REGINALD D. WOODS,	)	No. 07CF176
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The offense of armed violence predicated on unlawful restraint (720 ILCS 5/33A-2(a) (West 2006)) carries a heavier statutory penalty than the offense of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)), but because the two offenses do not share all the same elements, a proportionality challenge based on the identical-elements test fails.

¶ 2 Defendant, Reginald D. Woods, who is serving concurrent terms of 50 years' imprisonment for armed robbery (720 ILCS 5/18-2(a) (West 2006)) and armed violence predicated on unlawful restraint (720 ILCS 5/33A-2(a) (West 2006)) and 10 years' imprisonment for aggravated battery with a deadly weapon (720 ILCS 5/12-4(b)(1) (West 2006)), appeals the summary dismissal of his petition for postconviction relief.

¶ 3 On appeal, defendant argues two claims, neither of which he raised in his petition for postconviction relief. But see *People v. Wagener*, 196 Ill. 2d 269, 279 (2001) ("[A] party may challenge the constitutionality of a statute at any time."). First, he argues that when, in

accordance with the identical-elements test, the offense of armed violence predicated on unlawful restraint (720 ILCS 5/33A-2(a) (West 2006)) is compared to the more lightly penalized offense of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)), the statutory penalty for the former offense is disproportionate to the seriousness of that offense (see Ill. Const. 1970, art I. § 11). Second, he argues that his appellate counsel on direct appeal rendered ineffective assistance by failing to make this proportionality challenge.

¶ 4 We disagree that the two offenses share all the same elements. Therefore, we find no disproportionality, and we affirm the trial court's judgment.

¶ 5 To explain how we arrived at this decision, we begin with the constitutional provision that defendant invokes. Article I, section 11, of the Illinois Constitution is entitled "Limitation of Penalties after Conviction," and the first sentence of that section provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art I. § 11. The language "All penalties shall be determined *** according to the seriousness of the offense" is known as "the proportionate-penalties clause." *People v. Clemons*, 2012 IL 107821, ¶ 30; *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 57.

¶ 6 When making a proportionality challenge, the defendant "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Specifically, this challenge can take two forms: (1) "the penalty for a particular offense is too severe," that is, the penalty is "cruel or degrading"; or (2) the penalty "is harsher than the penalty for a different offense that contains identical elements." (Internal quotation marks omitted.) *Id.* at 521.

¶ 7 The second form of proportionality challenge—the form that defendant pursues in the present case—is directed at "the sentencing scheme itself" and calls for the identical-elements test. *Clemons*, 2012 IL 107821, ¶ 30. The identical-elements test compares two different offenses having the same elements but carrying different penalties. "If the legislature determines that the exact same elements merit two different penalties," logic compels the conclusion that "one of these penalties has not been set in accordance with the seriousness of the offense." *Sharpe*, 216 Ill. 2d at 522. From a logical point of view, the greater penalty could be too severe, or, alternatively, the lesser penalty could be too light. But we resolve the ambiguity so as to favor the defendant. Whenever the legislature makes "two different judgments about the seriousness of one offense," we conclude that the greater of the two penalties is disproportionate to the seriousness of the offense. *Id.* We decide *de novo* whether the legislature has fallen into such a self-contradiction. *People v. Taylor*, 2015 IL 117267, ¶ 11.

¶ 8 Defendant argues the legislature contradicted itself in the different penalties it prescribed for two offenses which, according to him, have identical elements: armed violence predicated on unlawful restraint while armed with a knife, a Category II weapon (720 ILCS 5/33A-1(c)(2), 33A-2(a) (West 2006)), which is one of the offenses of which he was convicted in the present case; and aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)). The former offense is a Class X felony punishable by "a minimum term of imprisonment of 10 years" (720 ILCS 5/33A-3(a-5) (West 2006)), whereas the latter offense is a Class 3 felony (720 ILCS 5/10-3.1(b) (West 2006)), for which "the sentence shall be not less than 2 years and not more than 5 years" (730 ILCS 5/5-8-1(a)(6) (West 2006)).

¶ 9 Clearly, the penalty for the offense of which defendant was convicted is greater than the penalty for the other offense. Let us, then, compare the elements of these two offenses to see if the elements are indeed identical.

¶ 10 Defendant committed the offense of armed violence on January 29, 2007, and therefore, we look at the version of the statute in effect on that date. The armed violence statute (720 ILCS 5/33A-2 (West 2006)) had several subsections, and the one pertaining to defendant provided as follows:

> "(a) A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law, except first degree murder, attempted first degree murder, intentional homicide of an unborn child, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnaping, aggravated battery of a child, home invasion, armed robbery, or aggravated vehicular hijacking." 720 ILCS 5/33A-2(a) (West 2006).

¶ 11 Section 33A-1 specially defined the phrase "armed with a dangerous weapon," breaking down the term "dangerous weapon" into Category I, Category II, and Category III weapons:

> "(c) Definitions.
>
> (1) 'Armed with a dangerous weapon.' A person is considered armed with a dangerous weapon for purposes of this Article, when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon.

(2) A Category I weapon is a handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semiautomatic firearm, or machine gun. A Category II weapon is any other rifle, shotgun, spring gun, other firearm, stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code [(720 ILCS 5/24-1(a) (West 2006))], knife with a blade of at least [three] inches in length, dagger, dirk, switchblade knife, stiletto, axe, hatchet, or other deadly or dangerous weapon or instrument of like character. As used in this subsection (b) 'semiautomatic firearm' means a repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge.

(3) A Category III weapon is a bludgeon, black-jack, slingshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1(c) (West 2006).

The supreme court has interpreted the catchall language in subsection (c)(2), "other deadly or dangerous weapon or instrument of like character," as meaning any "blade-type weapons," or "weapons or instruments that are sharp and have the ability to cut or stab." *People v. Davis*, 199 Ill. 2d 130, 139 (2002).

¶ 12 Count II of the information, the count charging defendant with armed violence, alleged that he "knowingly while armed with a dangerous weapon, a knife, (a Category II weapon) *** committed the offense of *** unlawful restraint." Thus, the charged offense had two elements, both of which required the mental state of knowledge: (1) defendant committed

the offense of unlawful restraint; and (2) while doing so, he was armed with a dangerous weapon, a knife. 720 ILCS 5/33A-1(c), 33A-2(a) (West 2006).

¶ 13 Now let us compare the elements of aggravated unlawful restraint. The legislature defined that offense as follows:

> "(a) A person commits the offense of aggravated unlawful restraint when he knowingly without legal authority detains another while using a deadly weapon." 720 ILCS 5/10-3.1(a) (West 2006).

¶ 14 Because the offense of unlawful restraint is "knowingly without legal authority detain[ing] another" (720 ILCS 5/10-3(a) (West 2006)), the elements of aggravated unlawful restraint are (1) committing the offense of unlawful restraint and (2) knowingly using a deadly weapon while doing so (720 ILCS 5/10-3.1(a) (West 2006)).

¶ 15 Thus, it is true that in addition to sharing the same mental state of knowledge, the offense of armed violence predicated on unlawful restraint (720 ILCS 5/33A-2(a) (West 2006)) and the offense of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)) have an element in common: the commission of unlawful restraint. But that is not the only element in the two offenses. Armed violence predicated on unlawful restraint requires that the defendant be "armed with a dangerous weapon" while committing unlawful restraint. 720 ILCS 5/33A-2(a) (West 2006). Aggravated unlawful restraint, by contrast, requires that the defendant "us[e] a deadly weapon while" committing unlawful restraint. 720 ILCS 5/10-3.1(a) (West 2006). Those elements are different. When proving armed violence, the State need not prove that the "dangerous weapon" necessarily was deadly (720 ILCS 5/33A-2(a) (West 2006)), but when proving aggravated unlawful restraint, the State must prove defendant's use of a "deadly weapon" (720 ILCS 5/10-3.1(a) (West 2006)). Also, when proving armed violence, the State

need not prove that the defendant used the weapon but only that the defendant was "armed" with the weapon (the knife or pistol, for example, could have remained holstered and hidden at all times) (720 ILCS 5/33A-2(a) (West 2006)), whereas when proving aggravated unlawful restraint, the State must prove that the defendant somehow "used" the weapon (720 ILCS 5/10-3.1(a) (West 2006)). Because the elements of the two offenses are not truly identical, defendant's proportionality challenge fails.

¶ 16 Ironically, though, from the standpoint of "common sense and sound logic," the differences between these remaining elements only bolster defendant's claim that the penalty for armed violence predicated on unlawful restraint is disproportionate to the seriousness of the offense. (Internal quotation marks omitted.) *Sharpe,* 216 Ill. 2d at 504. A sensible person would have to ask how it is possible, in a system of justice in which penalties are proportionate to the seriousness of offenses, that merely being *armed* with a *dangerous* weapon while committing unlawful restraint carries a heavier penalty than actually *using* a *deadly* weapon while committing unlawful restraint. This is, as we say, a natural question, but the supreme court's abandonment of the cross-comparison test puts this question out of bounds. See *id.* at 520. (We note, incidentally, that, in Public Act 95-688, § 4 (eff. Oct. 23, 2007), the legislature fixed this problem by amending section 33A-2 so as to exclude, as a predicate offense for purposes of armed violence, "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." Of course, this later version of the statute is inapplicable to defendant's conduct on January 29, 2007.)

¶ 17 In short, then, because the two offenses, armed violence predicated on unlawful restraint and aggravated unlawful restraint, have differing elements and therefore fail the

identical-elements test, we find no disproportionality, and we affirm the trial court's judgment. We award the State $50 in costs.

¶ 18 Affirmed.