2017 IL App (1st) 143832-U

No. 1-14-3832

Order filed June 28, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 14587
	)	
MICHAEL PALMER,	)	Honorable
	)	Joan Margaret O'Brien,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order granting the State's motion to dismiss defendant's section 2-1401 petition for relief from judgment is affirmed because the armed habitual criminal statute is not facially unconstitutional.

¶ 2 Following a negotiated guilty plea, defendant Michael Palmer was sentenced to seven years' imprisonment for being an armed habitual criminal (AHC). Defendant appeals from the circuit court's denial of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant contends

that the AHC statute is facially unconstitutional. Defendant also contends that the trial court's order imposing fines, fees, and costs should be corrected to reflect his presentence custody credit. For the reasons that follow, we affirm and correct the fines, fees, and costs order.

¶ 3 On July 26, 2012, defendant was arrested and subsequently charged with being an AHC, aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, and defacing identification marks of firearms. On July 31, 2013, defendant entered a negotiated plea of guilty to being an AHC in exchange for a seven-year sentence, and the State nol-prossed the remaining charges. The factual basis for defendant's plea reflects that he was stopped after he ran across the street with an open bottle of wine in his hand and he was found to be in possession of a loaded revolver with a defaced serial number. Defendant had felony convictions for delivery of a controlled substance in 1998 and attempted armed robbery in 1999. The court sentenced defendant to seven years' imprisonment with three years of mandatory supervised release, assessed fines and fees, and awarded defendant 371 days of presentence custody credit. Defendant did not attempt to perfect a direct appeal.

¶ 4 On June 5, 2015, defendant, *pro se*, filed the instant petition for relief under section 2-1401, alleging that he was convicted of four counts of unlawful use of a weapon and that these counts were unconstitutional under *People v. Aguilar*, 2013 IL 112116. The circuit court appointed counsel and the State filed a motion to dismiss.

¶ 5 In its motion, the State pointed out that defendant pled guilty to count 1 of his indictment, which charged that he was an AHC. The State argued that defendant's petition was factually and legally incorrect and that it did not allege a cognizable section 2-1401 claim.

¶ 6 On November 7, 2014, following a hearing, the court granted the State's motion to dismiss. In doing so, the court noted that defendant pled guilty to the offense of being an AHC

and found that his two qualifying underlying felonies were not affected by the holding in *Aguilar*. Defendant appeals.

¶ 7 In this court, defendant contends that the trial court erred in granting the State's motion and that his conviction should be reversed because the AHC statute (720 ILCS 5/24-1.7 (West 2012)) is facially unconstitutional.

¶ 8 When an appeal from the dismissal of a section 2-1401 petition raises a purely legal challenge to a final order, the standard of review is *de novo*. *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 47 (citing *People v. Vincent*, 226 Ill. 2d 1, 7, 18 (2007)). Generally, a section 2-1401 petition is used to bring facts to the attention of the trial court which would have precluded the entry of the final judgment if known to the court at that time. *Walters*, 2015 IL 117783, ¶ 31. However, our supreme court has held that section 2-1401 may be used to raise a challenge to a judgment for legal reasons. *People v. Lawton*, 212 Ill. 2d 285, 297 (2004); see also *People v. Thompson*, 2015 IL 118151 (recognizing that a facial constitutional challenge may be raised in a section 2-1401 petition). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8.

¶ 9 As relevant here, a defendant commits the offense of being an AHC if he possesses any firearm after having been twice convicted of a qualifying underlying felony, including a forcible felony and a Class 3 or greater violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7(a)(1), (3) (West 2012); see also *People v. Brown*, 2017 IL App (1st) 150146, ¶ 22 ("the offense of attempted armed robbery qualifies as an inherently forcible felony for purposes of the armed habitual criminal statute").

¶ 10 According to defendant, all Illinois citizens, including felons with two qualifying convictions under the AHC statute, are eligible to obtain a Firearm Owner's Identification (FOID) card pursuant to the FOID Card Act (430 ILCS 65/0.01 *et seq.* (West 2012)) and the Illinois Constitution (Ill. Const. 1970, art. I, § 22). *Coram v. State*, 2013 IL 113867. As such, defendant maintains that, because the AHC statute criminalizes a felon's possession of a firearm regardless of whether the felon has a valid FOID card, the AHC statute potentially criminalizes innocent conduct and is therefore facially unconstitutional.

¶ 11 This court has previously considered and rejected this exact constitutional challenge to the AHC statute. In *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 23, and *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 27, we explained:

> " '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 protect the public from the threat of violence that arises when repeat offenders possess firearms. *** 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.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 23 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

¶ 12 Moreover, in *Fulton* and *Johnson*, we upheld the AHC statute over the defendant's contention that the statute was overly broad and criminalized wholly innocent conduct. In doing so, we reasoned that:

> "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. The statute's criminalization of a twice-convicted felon's possession of a weapon is, therefore, rationally related to the purpose of 'protect[ing] the public from the threat of violence that arises when repeat offenders possess firearms.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 31 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

We see no reason here to depart from our reasoning and holding in *Fulton* and *Johnson*, and find them dispositive of the case at bar. Accordingly, we reject defendant's claim that the AHC statue is facially unconstitutional.

¶ 13 In reaching this conclusion, we find unpersuasive the cases cited by defendant in support of his contention that the AHC statute criminalizes conduct that is not necessarily criminal. See *People v. Madrigal*, 241 Ill. 2d 463, 472, 479 (2011) (invalidating an identity theft statute that would prohibit using a neighbor's identification information for the benign purpose of checking his performance in a marathon); *People v. Carpenter*, 228 Ill. 2d 250, 269, 273 (2008) (overturning a statute that penalized possession of vehicles containing compartments for concealing items from law enforcement, as the intent to conceal is not necessarily unlawful); *People v. Zaremba*, 158 Ill. 2d 36, 38–39 (1994) (antifencing statute rendered evidence technicians culpable for accepting stolen goods recovered by police officers); *People v. Wright*, 194 Ill. 2d 1, 28 (2000) (statute prohibiting knowing failure to maintain vehicle records criminalized innocent lapses); *People v. Wick*, 107 Ill. 2d 62, 66 (1985) (aggravated arson statute punished lawful and unlawful conduct by not requiring an unlawful purpose for setting fire). In addition, a culpable mental state is not required when a statute proscribes an act (in this case, the

possession of a firearm after having been convicted of two qualifying felonies) that is criminal in nature. *People v. Williams*, 235 Ill. 2d 178, 210 (2009).

¶ 14 Defendant nevertheless contends that *Johnson* and *Fulton* failed to adequately account for *Coram v. State*, 2013 IL 113867, which established a constitutional guarantee for "individualized consideration" of a person's legal right to possess a firearm. In *Coram*, the Illinois State Police denied the applicant's FOID card application because federal law barred him from possessing a firearm due to a prior misdemeanor domestic battery conviction. *Coram*, 2013 IL 113867, ¶ 8. Our supreme court determined that, under the version of the FOID Card Act in effect when the applicant applied for his FOID card, nothing prevented the trial court from granting relief from the federal firearm disability. *Id.* ¶¶ 8-9. Consistent with the guarantee of the Illinois constitution to "the right of the individual citizen to keep and bear arms" (Ill. Const. 1970, art. 1, § 22), the *Coram* court found that the FOID Card Act mandated "individual assessment of a person's application and circumstances by the *Department of State Police* in the first instance, and individualized *judicial* consideration of the basis for denial of a FOID card." (Emphasis in original.) *Coram*, 2013 IL 113867, ¶ 58.

¶ 15 In *People v. West*, 2017 IL App (1st) 143632 ¶¶ 17, 22, we rejected the defendant's contention that *Coram* casted doubt on *Fulton* and *Johnson*, and noted that *Coram* did not address the constitutionality of the AHC statute. *Id.* ¶ 22. Furthermore, *Coram* considered individualized review in the context of a federal firearm prohibition and did not consider whether Illinois law permits circuit courts to act contrarily to a state-imposed firearm prohibition against felons. As in *West*, we find defendant's *Coram*-based argument unpersuasive and continue to follow *Johnson* and *Fulton*.

¶ 16 Defendant next maintains that he is entitled to a statutorily mandated $5-per-day credit for the 371 days he spent in custody prior to sentencing, for a total credit of $1,855. See 725 ILCS 5/110-14(a) (West 2012). The parties agree that, although defendant served 371 days in custody, the order imposing fines, fees, and costs does not reflect the $5-per-day presentence credit to which defendant is entitled. Defendant acknowledges that he did not raise this issue in the court below, but argues that this court has the authority to modify the fines and fees order pursuant to Illinois Supreme Court Rule 615(b) (eff. Aug. 17, 1999).

¶ 17 The State responds that our authority to grant defendant relief is limited to the judgment from which the appeal is taken and because defendant did not raise this issue in his section 2-1401 petition, it is not properly before this court. The State recognizes an exception for "void" orders, which may be reviewed at any time, but argues that under *People v. Castleberry*, 2015 IL 116916, ¶ 19, which abolished the "void sentence rule," the exception does not apply here. Thus, the State maintains, the fines and fees order, which does not reflect defendant's statutorily mandated $5-per-day credit, is not "void" and our reviewing authority is limited to the denial of the section 2-1401 petition. The State also argues that, in this appeal, Rule 615 does not authorize this court to grant defendant relief from forfeiture. According to the State, although Rule 615(b)(1) provides that this court may modify the judgment from which the appeal is taken, a section 2-1401 proceeding is a collateral attack on a final judgment and not a continuation of the original action. As such, the State contends, our authority under Rule 615 does not extend to the fines and fees order in the original judgment.

¶ 18 We find *People v. Caballero*, 228 Ill. 2d 79 (2008) instructive. In *Caballero*, our supreme court addressed a claim for presentence custody credit raised for the first time on appeal from the dismissal of a postconviction petition. *Caballero*, 228 Ill. 2d at 83. After finding that a claim for

the *per diem* monetary credit conferred by section 110-14 is a purely statutory right that is not cognizable under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), the *Caballero* court explained that the defendant's request was merely an application for a different type of statutory relief. *Id.* at 87-88. The court noted that section 110-14 lacked a specified time frame or procedural stage for a defendant to make such an application and that the grant of such credit was a "simple ministerial act" that would promote judicial economy by precluding further proceedings on that matter. *Id.* (quoting *People v. Woodard*, 175 Ill. 2d 435, 444, 456-57 (1997)). The *Caballero* court then held that "if, as in this case, the basis for granting the application of the defendant is clear and available from the record, the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Id.* at 88.

¶ 19 Although this is an appeal from a collateral proceeding under section 2-1401, and not a postconviction petition as in *Caballero*, the omission of defendant's statutorily mandated $5-per-day credit from the fines and fees order is clear and available from the record. Accordingly, we direct the clerk of the circuit court to correct the order imposing fines, fees, and costs to reflect a presentence credit of $1,855 and to apply this credit to offset any qualifying fines assessed by the trial court.

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Cook County and correct the order imposing fines, fees, and costs.

¶ 21 Affirmed; fines, fees, and costs order corrected.