2017 IL App (1st) 150083-U
No. 1-15-0083

THIRD DIVISION
March 1, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 4973
	)	
JEFFREY WALKER,	)	
	)	The Honorable
Defendant-Appellant.	)	Dennis J. Porter,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Defendant's armed habitual criminal conviction and six-year sentence affirmed where his constitutional challenge to the Illinois armed habitual criminal statute lacked merit. Circuit court's order imposing fines, fees, and costs modified to eliminate two inapplicable monetary assessments.

¶ 2 Following a bench trial, defendant Jeffrey Walker was convicted of the offense of armed habitual criminal. He was sentenced to 6 years' imprisonment and assessed various fines, fees and costs. On appeal, defendant mounts a facial constitutional challenge to the Illinois armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2012)) and argues that the statute, as written,

does not pass constitutional muster because it potentially criminalizes innocent conduct. He also challenges the propriety of two separate monetary assessments that were imposed upon him. For the reasons set forth herein, we reject defendant's constitutional challenge and affirm his conviction and sentence. We do, however, direct the clerk of the circuit court to modify the fines, fees and costs order to eliminate two inapplicable monetary assessments.

¶ 3 BACKGROUND

¶ 4 On February 25, 2013,[1] Chicago Police officers investigating a burglary at a multi-unit apartment building encountered defendant and observed the handle of a firearm sticking out of his right front pants pocket. Defendant was ultimately arrested and charged with multiple offenses including armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and aggravated unlawful use of a weapon (720 ILCS 5/24.1.6 (a)(1) / (3)(A) (West 2012)). Defendant waived his right to a jury trial and elected to proceed by way of a bench trial.

¶ 5 At trial,[2] two officers provided testimony about their interaction with defendant and their recovery of a .38 caliber revolver from defendant's person. The weapon was loaded and contained three live rounds of ammunition. Defendant did not possess a Firearm Owner's Identification (FOID) card and was not on his own land, abode, or fixed place of business at the time that the officers recovered his weapon.

¶ 6 Certified copies of defendant's two prior felony convictions—aggravated battery with a firearm, and unlawful use of a weapon by a felon—were entered into the record. A certification

[1] Defendant misstates the date of the crime repeatedly in his appellate court briefs. In his opening brief, he identifies the date on which the crime occurred as February 13, 2003. In his reply brief, defendant identifies the date on which the crime occurred as February 13, 2013. The date of the crime identified in the indictment and testified to at trial, however, is February 25, 2013.

[2] Because defendant raises no challenge to the sufficiency of the evidence, we have elected to provide a brief summary of the evidence presented at defendant's bench trial instead of a detailed account of the trial testimony.

completed by the Illinois State Police established that defendant had never been issued a FOID card.

¶ 7 Based upon the aforementioned evidence, the circuit court found defendant guilty of all counts. The counts were then merged into a single armed habitual criminal conviction. At the sentencing hearing that followed, the circuit court, after hearing evidence offered in aggravation and mitigation, sentenced defendant to six years' imprisonment. The court also assessed a number of fees, fines and costs. This appeal followed.

¶ 8 ANALYSIS

¶ 9 Constitutionality of the Illinois Armed Habitual Criminal Statute

¶ 10 On appeal, defendant does not challenge the sufficiency of the evidence; rather, he argues that the Illinois armed habitual criminal statute is "facially unconstitutional because it criminalizes both the lawful and unlawful possession of firearms." Given that the statute criminalizes the possession of a firearm regardless of whether or not a person has a FOID card, defendant argues that the statute violates the tenets of due process because it "potentially criminalizes innocent conduct."

¶ 11 The State responds that defendant's constitutional challenge is without merit because the Illinois "armed habitual criminal statute is facially constitutional and satisfies the due process clause, as it is a reasonable legislative response to the ongoing problems of convicted felons acquiring and possessing firearms."

¶ 12 The constitutionality of a statute is an issue of law that is subject to *de novo* review. *People v. Patterson*, 2014 IL 115102, ¶ 90; *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005); *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 25. Because statues carry a "strong presumption" of constitutionality, it is the burden of the party challenging the constitutionality of

a given statute to "clearly establish" that the statute violates constitutional protections. *Sharpe*, 216 Ill. 2d at 487. A reviewing court has a duty to uphold a statute's constitutionality whenever it is reasonably possible to do so. *Patterson*, 2014 IL 115102, ¶ 90; *Johnson*, 2015 IL App (1st) 133663, ¶ 25. Accordingly, all doubts must be construed in favor of a statute's validity and constitutionality. *Patterson*, 2014 IL 115102, ¶ 90; *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 20. Courts have recognized that succeeding on a facial challenge, as opposed to an "as applied" challenge to a statute's constitutionality, is "extremely difficult, requiring a showing that the statute would be invalid under *any* imaginable set of circumstances. The invalidity of the statute in one particular set of circumstances is insufficient to prove its facial invalidity." *In re M.T.*, 221 Ill. 2d 517, 536-37 (2006). That is, " 'so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail.' " *People v. Huddleston*, 212 Ill. 2d 107, 145 (2004) (quoting *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002)). Where, as here, the statute does not implicate a "fundamental constitutional right," the statute will be reviewed using the "highly deferential rational basis test." *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). In accordance with that test, a statute will be upheld "so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *People v. Hollins*, 2012 IL 112754, ¶ 15. Keeping these standards in mind, we turn to the relevant statute at issue—the Illinois armed habitual criminal statute, which is set forth in section 24-1.7 of the Criminal Code of 2012 (720 ILCS 5/24-1.7 (West 2012)).

¶ 13 The armed habitual criminal statute provides, in pertinent part, that a person commits the offense of armed habitual criminal if he possesses any firearm after having been twice previously convicted of certain specified serious offenses, including unlawful use of a weapon by a felon and aggravated battery with a firearm, the two underlying offenses at issue here. 720 ILCS 5/24-

1.7(a)(2) (West 2012). This provision was enacted to protect the public from the threat of violence that arises when recidivist violent offenders possess firearms. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 17; *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 411 (2010). In order to effectuate this goal, the statute imposes harsher penalties on all felons who have twice previously been convicted of serious offenses and who are subsequently found to be in possession of a firearm. 720 ILCS 5/24-1.7(b) (West 2012) (classifying the offense of armed habitual criminal as a Class X felony).

¶ 14 Defendant does not dispute that the State has a legitimate interest in protecting the public's safety or that keeping guns out of the hands of violent repeat criminal offenders effectuates that legitimate interest. Rather, he contends that the means adopted to accomplish that objective and further the State's legitimate interest is improper because language of the armed habitual criminal statute is too broad and has the potential to criminalize wholly innocent conduct. He argues, in pertinent part, that in certain circumstances, persons with prior felony convictions may lawfully be awarded a FOID card and possess a gun in accordance with provisions of the Illinois Firearm Owners Identification Card Act (FOID ACT) (430 ILCS 65/1 *et seq*. (West 2012)). That is, although a person convicted of a felony may have his FOID card revoked or his application for a FOID card denied (430 ILCS 65/8(c) (West 2012)), defendant observes that in accordance with 10(c) of the FOID Act, an applicant may appeal that decision and be granted relief if the applicant establishes that: (1) he "has not been convicted of a forcible felony within 20 years of the application for a FOID card, or at least 20 years have passed since the end of any sentence related to such a 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." Pub. Act 97-1131 (eff. Jan. 1, 2013) (amending 430 ILCS 65/10(c)(1)-(4) (West 2012)).[3] Because a twice convicted felon could theoretically obtain a FOID card, defendant argues that the mere possession of a firearm by a twice convicted felon is not, by itself, a crime and that the armed habitual criminal statute, as written, is not constitutional because it criminalizes wholly innocent conduct. Instead, defendant argues that the armed habitual criminal statute's prohibition on gun possession should only be applied to twice convicted felons who did not possess a FOID card at the time they were found to be in possession of a firearm.[4]

¶ 15 This court, however, has previously rejected this same constitutional challenge to the armed habitual criminal statute. See *Johnson*, 2015 IL App (1st) 133663; *Fulton*, 2016 IL App (1st) 141765. Specifically, we held:

> " '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

[3] Section 10 of the FOID Act was amended several times in 2013. Public Act 97-1131, which went into effect on January 1, 2013, added the fourth requirement to section 10(c), requiring an applicant seeking a FOID card to establish that "granting relief would not be contrary to federal law." Pub. Act 97-1131 (eff. Jan. 1, 2013). This was the version of the statute in effect at the time of defendant's February 25, 2013, offense. Defendant, without citing a public act number, contends that that requirement did not come into effect until July 9, 2013. Although there was an amendment to the FOID Act that went into effect on that date (Pub. Act. 98-63 (eff. July 9, 2013)), it did not introduce the fourth requirement, as it had already been put into effect via prior amendment.

[4] We note that defendant did not possess a FOID card at the time he was found to be in possession of a firearm on February 25, 2013. However, given that he is raising a facial constitutional challenge, rather than an "as applied" challenge, he nonetheless has standing to make this argument on appeal because he is arguing that the statute, as written, cannot be enforced against *anyone*, including himself, even though he did not have a FOID card. See *Fulton*, 2016 IL App (1st) 141765, ¶ 19.

does not render the statute unconstitutional on its face.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 23 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

¶ 16 In finding the armed habitual criminal statute constitutional, we emphasized that the statute did not overreach or criminalize wholly innocent conduct, reasoning:

"[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).

¶ 17 Although defendant suggests that our decisions in *Johnson* and *Fulton* are "unsound," we decline his invitation to deviate from those decisions and continue to reaffirm the constitutionality of the armed habitual criminal statute.[5]

¶ 18 Fines and Fees

¶ 19 Defendant next argues, and the State agrees, that he was improperly assessed a $35 fee pursuant to section 16-104d of the Illinois Vehicle Code (625 ILCS 5/16-104d (West 2012)) and a $100 Streetgang Fine pursuant to section 5-9-1.19 of the Unified Code of Corrections (730 ILCS 5/5-9-1.19 (West 2012)). We will address the propriety of each of the monetary assessments in turn.

[5] Our decisions in *Johnson* and *Fulton* also thoroughly discuss and distinguish the Illinois supreme court cases that defendant cites in his appellate brief in support of his argument that the armed habitual criminal statute is constitutional: *Coram v. State*, 2013 IL 113867, *People v. Madrigal*, 241 Ill. 2d 463 (2011) and *People v. Carpenter*, 228 Ill. 2d 250 (2008). For the sake of brevity, we need not repeat our analysis here; however, we continue to adhere to our previous analysis and find that the aforementioned cases are distinguishable from the case at bar and do not compel a different result. See *Fulton*, 2016 IL App (1st) 141765, ¶¶ 24-31 (distinguishing *Coram*, *Madrigal* and *Carpenter*); *Johnson*, 2015 IL App (1st) 133663, ¶¶ 28-29 (distinguishing *Coram*).

¶ 20 Section 16-104d of the Illinois Vehicle Code provides, in pertinent part, as follows: "any person who is convicted of, pleads guilty to, or is placed on supervision for *a serious traffic violation*, as defined in Section 1-187.001 of this Code, a violation of Section 11-501 of this Code, or a violation of a similar provision of a local ordinance shall pay an additional fee of $35." (Emphasis added.) 625 ILCS 5/16-104d (West 2012). Based upon the plain language of the statute, the $35 fee may only be imposed on an individual who has committed a serious traffic violation. Defendant, however, was not convicted of violating any provision of the Illinois Vehicle Code; rather, he was found guilty of the offense of armed habitual criminal. Accordingly, we agree with the parties that this $35 fee was improperly assessed and order that the fee be vacated from the circuit court's order assessing fines, fees and costs.

¶ 21 We also agree with the parties that the $100 Streetgang Fine was improperly levied against defendant. That fine, set forth in section 5-9-1.19 of the Unified Code of Corrections provides: "In addition to any other penalty imposed, a fine of $100 shall be imposed upon a person convicted of any violation of the Criminal Code of 1961 or the Criminal Code of 2012 who was, at the time of the commission of the violation a streetgang member, as defined in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act." 730 ILCS 5/5-9-1.19 (West 2012). Because the record contains no evidence that defendant was a streetgang member at the time of the offense, the imposition of the $100 Streetgang Fine was improper. See, *e.g.*, *People v. Smith*, 2015 IL App (1st) 132176, ¶ 34 (finding that the fine was improperly assessed where there was no evidence that the defendant was a member of a gang at the time he committed the offense).

¶ 22 In accordance with Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we instruct the clerk of the circuit court to modify the circuit court's order assessing fines, fees, and costs to vacate the $35 Vehicle Code fee and the $100 Streetgang Fine.

¶ 23 CONCLUSION

¶ 24 Affirmed; fines, fees and costs order modified.