2017 IL App (1st) 150407-U

No. 1-15-0407

Order filed November 6, 2017

First 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,	)	
	)	No. 14 CR 12615
v.	)	
	)	Honorable James B. Linn,
ANTHONY RUFFIN,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence affirmed over his contention that the trial court considered improper sentencing factors. Defendant's conviction for armed habitual criminal affirmed over his contentions that he was subjected to an impermissible double enhancement and the armed habitual criminal statute is facially unconstitutional for criminalizing wholly innocent conduct.

¶ 2 Following a bench trial, defendant Anthony Ruffin was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)), and sentenced to eight years' imprisonment. On appeal, defendant contends that (1) the trial court erred by considering improper sentencing factors, (2) he was subjected to an impermissible double enhancement

where the trial court used a single prior felony conviction as both a predicate offense and an element of the second predicate offense in adjudicating him an AHC, and (3) the AHC statute is facially unconstitutional because it potentially criminalizes wholly innocent conduct. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, we recite only those facts necessary to our disposition. The evidence at trial established that, on July 9, 2014, two Chicago police officers pulled over a vehicle for running a stop sign. Defendant was in the passenger seat. The officers observed in plain sight an open container of alcohol and a bag of suspected cannabis in the vehicle, so they ordered the occupants out of the car. Upon a further search of the vehicle, they recovered a loaded handgun from the glove box located in front of where defendant had been sitting. Without prompting, defendant stated that he knew about the gun because the vehicle belonged to his girlfriend. After being arrested and *Mirandized*, defendant told police that he found the gun that night and acknowledged he was not supposed to be in possession of a gun because of his prior convictions.

¶ 4 The State introduced into evidence a document showing that defendant did not have a valid firearm owner's identification (FOID) card, as well as two certified copies of defendant's prior convictions for a 2012 unlawful possession of a weapon by a felon (UUWF) and a 2010 robbery.

¶ 5 The court found defendant guilty of being an AHC. At sentencing, the court referenced defendant's presentence investigation report (PSI) prior to hearing arguments. The State argued in aggravation that defendant had a prior UUWF conviction, and a prior robbery conviction. The State further argued that defendant was previously sentenced to probation for the robbery

conviction, which he violated and was then sentenced to five years' imprisonment. The court noted that defendant's offense was possessory, and that he did not shoot anyone with the weapon.

¶ 6 In mitigation, defense counsel argued that defendant was 22 years old, and his parents were present in court. Counsel stated that defendant had a good relationship with his parents and that "[h]e's really hurt his parents with these actions, actually devastated them." Further, counsel noted that defendant grew up in a drug and gang-infested neighborhood, was in a committed relationship, and attempted to correct his past mistakes by obtaining a high school diploma after a previous incarceration. Finally, counsel emphasized that defendant did not hurt or threaten anyone with the weapon.

¶ 7 Following the arguments in aggravation and mitigation, the following colloquy ensued.

> "THE COURT: Mother or father, anything you want to say about your child before he's sentenced today? You don't have to. What's your name?
>
> [DEFENDANT'S FATHER]: *** I want him to know we love him, and we just don't understand why he makes the choices he makes. He has to be accountable for what he's done, and he needs to take this as a new learning experience, and I hope he accomplishes something while he's returning back into the DOC system. He needs to re-evaluate himself, which is something only he can do at this age. You know, he's not a young baby anymore. He needs to learn for himself firsthand what the real responsibility of being a man is about.
>
> [THE COURT]: Anything you want to say before I sentence you?

> [DEFENDANT]: Yes, your Honor. Thank you for checking up on my case. Also, my father is right for the decisions I have made, and I apologize to him. I'm willing to come home and be a better man.
>
> [THE COURT]: I hope you're right. You know, most of the young fellows that come up here in a situation like yours, they don't have anybody standing behind them. You've got two really good people and you are breaking their hearts. Your lawyer is correct, they're horrified seeing you in jail clothes. You're now a three-time convicted felon; second time you've been convicted of having a gun with a felony record."

¶ 8 The court thereafter sentenced defendant to eight years' imprisonment, and stated it was "mindful it's an 85 percent sentence under the law." Defense counsel filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 9 On appeal, defendant first contends that the trial court relied on improper sentencing factors. Specifically, defendant alleges that the trial court improperly relied on a factor inherent in the offense of AHC. He further argues that the court improperly called defendant's father as a witness at sentencing and then relied on his testimony in imposing sentence. Defendant acknowledges that he failed to preserve the sentencing errors for review and asks that we review them for plain error because he argues he was denied a fair sentencing hearing.

¶ 10 Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine

in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. Before we consider application of the plain error doctrine, defendant must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545.

¶ 11 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30 (citing *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000)). In general, "we will not disturb sentences that fall within the statutory guidelines unless they are 'greatly disproportionate' to the nature of the offenses of which the defendant has been convicted." *People v. Bailey*, 409 Ill. App. 3d 574, 591 (2011) (quoting *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004)).

¶ 12 Here, the court sentenced defendant to eight years' imprisonment, which is within the statutory range and just two years above the minimum term. 720 ILCS 5/24-1.7(d) (West 2014) (AHC is a Class X felony); 730 ILCS 5/5-4.5-25(a) (West 2014) (Class X sentencing range is 6 to 30 years' imprisonment). Because his sentence is within the applicable range, we presume it is proper. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36. Thus, the burden is on defendant to establish that the alleged improper sentencing considerations led to a greater sentence. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 13 In determining the propriety of a sentence, the reviewing court must consider the record as a whole and should not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). The court's statements at sentencing may not be considered in isolation. *People v. Csaszar*, 375

Ill. App. 3d 929, 952 (2007). Where the trial court mentions an improper factor, but gives insignificant weight to that factor which does not result in a greater sentence, the case need not be remanded for resentencing. *Walker*, 2012 IL App (1st) 083655, ¶ 30. Whether the trial court considered an improper factor at sentencing is reviewed *de novo*. *Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 14 Defendant first contends that the trial court improperly relied on a factor inherent in the offense. To support his claim, defendant relies on the trial court's statement, "You're now a three-time convicted felon; second time you've been convicted of having a gun with a felony record."

¶ 15 The trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id.* at 11-12. The court, however, may consider the nature of the offense when imposing a sentence, including the circumstances and extent of each element as committed. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009).

¶ 16 Here, when read in context, the record reveals that the trial court did not rely on a factor implicit in the offense when sentencing defendant. Rather, the court's comment was a reference to defendant's criminal history, which now comprised two gun-related offenses and three total convictions, made in response to defense counsel's statement that defendant's parents were devastated by defendant's actions. Thus, the court's comment was not improper and no clear or obvious error occurred.

¶ 17 Defendant additionally claims that the trial court abandoned its role as a neutral arbiter when it *sua sponte* called defendant's father as a witness and then improperly relied on his testimony in imposing a sentence above the statutory minimum.

¶ 18 We disagree with defendant's contention that the trial court abandoned its role as a neutral arbiter in asking defendant's parents if they wished to speak at sentencing. Defense counsel referenced defendant's parents in his mitigation argument, and the father's statement was not aggravating, but rather was mitigating evidence of defendant's strong family support. That the court imposed a sentence greater than the minimum does not, standing alone, show that it improperly relied on defendant's father's statement. To the contrary, the record shows that the court, in addition to hearing defendant's father's statement, noted the PSI and heard evidence in aggravation and mitigation, as well as defendant's allocutory statement. The court is not obligated to recite and assign a value to every factor that it considers (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)) and, given defendant's criminal history, we do not find it improper that the court imposed a sentence two years above the statutory minimum (see, *e.g.*, *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (a defendant's criminal history alone may warrant a sentence substantially above the minimum)).

¶ 19 In sum, we conclude that the record, when considered as a whole, shows that the trial court did not consider any improper factors in imposing sentence and, therefore, committed no error. Instead, the court properly exercised its discretion when it sentenced defendant to eight years' imprisonment, which is within the statutory range and just two years above the minimum term. 730 ILCS 5/5-4.5-25(a) (West 2014). Accordingly, we honor defendant's forfeiture of this issue.

¶ 20 Defendant alternatively contends that his trial counsel was ineffective for failing to properly preserve this issue by failing to object to the trial court's alleged reliance on improper sentencing factors and include this issue in a postsentencing motion. In order to prove ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency substantially prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the sentencing challenge is without merit, defendant was not prejudiced by counsel's failure to preserve the issue and, thus, counsel did not render ineffective assistance. See *People v. Coleman*, 158 Ill. 2d 319, 349 (1994) (defendant was not denied effective assistance of counsel where the issues counsel failed to preserve for appeal were without merit and did not prejudice defendant).

¶ 21 Defendant next contends that he was subjected to an impermissible double enhancement because his 2010 robbery conviction was used twice to support his AHC conviction: once as its own predicate felony and once as an element of the second predicate felony, a 2012 UUWF conviction.

¶ 22 An improper double enhancement occurs when either (1) a single factor is used as an element of an offense and serves as a basis for a harsher sentence, or (2) " 'when the same factor is used twice to elevate the severity of the offense itself.' " *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 9 (quoting *Phelps*, 211 Ill. 2d at 12-13). Whether a defendant has been subject to an impermissible double enhancement is a question of statutory construction which we review *de novo*. *Fulton*, 2016 IL App (1st) 141765, ¶ 9.

¶ 23 In relevant part, section 24-1.7 of the Criminal Code of 2012 (Code) provides,

"(a) A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted of a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; ***

* * *

(b) Sentence. Being an armed habitual criminal is a Class X felony." 720 ILCS 5/24-1.7 (West 2014).

¶ 24 Defendant acknowledges that this court addressed this issue in *People v. Johnson*, 2015 IL App (1st) 133663, and *People v. Fulton*, 2016 IL App (1st) 141765. In both *Johnson* and *Fulton*, the defendants had AHC convictions based on two prior qualifying convictions: UUWF and an additional qualifying felony. *Johnson*, 2015 IL App (1st) 133663, ¶ 18 (convicted of AHC based on prior convictions for residential burglary and UUWF); *Fulton*, 2016 IL App (1st) 141765, ¶ 12 (convicted of AHC based on prior convictions for delivery of a controlled substance and UUWF). In each case, the defendant's additional qualifying felony (residential burglary and delivery of a controlled substance, respectively) supported his subsequent UUWF conviction. *Johnson*, 2015 IL App (1st) 133663, ¶ 18; *Fulton*, 2016 IL App (1st) 141765, ¶ 12. On appeal, each defendant asserted that he had been subjected to an improper double enhancement because the additional qualifying felony was used both as a predicate felony for AHC and as an element of the second predicate felony, the UUWF conviction. We found that the fact that the earlier convictions supported the UUWF convictions did not " 'negate the validity of

the two offenses as the predicate offenses' " for the armed habitual criminal convictions. *Fulton*, 2016 IL App (1st) 141765, ¶ 12 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 16)).

¶ 25 In reaching this conclusion, this court in *Johnson* noted,

> "Finding that a UUWF conviction could not be predicated on the same conviction (here, residential burglary) as that used for one of the predicate offenses required for an armed habitual criminal conviction, would render the armed habitual criminal statute illogical. If defendant's construction of the armed habitual criminal statute were to be accepted, any defendant whose armed habitual criminal conviction consisted of the offense of UUWF would then have to have a third conviction – one that did not serve as a predicate offense to his UUWF conviction. Defendant's conclusion reads into the armed habitual criminal statute an element that is not there: that a court can only use the predicate felony of UUWF if that UUWF conviction is based on a felony other than the one used as the second predicate felony for the armed habitual criminal conviction. In other words, when using UUWF as a predicate felony for an armed habitual criminal conviction, the offender would have to have at least three prior felony convictions instead of two. There is no such language in the armed habitual criminal statute, and we refuse to read it into the statute. [Citation.] Accordingly, we find that there was no improper double enhancement in this case." *Id.* ¶ 18.

¶ 26 In this case, defendant's AHC conviction was predicated on a 2010 robbery conviction and a 2012 UUWF conviction. As in *Johnson* and *Fulton*, defendant's earlier conviction, here, robbery, supported his subsequent conviction for UUWF. UUWF is a qualifying predicate felony under the AHC statute. 720 ILCS 5/24-1.7(a)(2) (West 2014). Robbery is a forcible felony

pursuant to section 2-8 of the Code (720 ILCS 5/2-8 (West 2014)), and therefore also constitutes a qualifying felony under the AHC statute. 720 ILCS 5/24-1.7(a)(1) (West 2014). Defendant's robbery conviction was not used both as an element of the offense and a factor to enhance his sentence; nor was it used twice to elevate the severity of the offense. As noted above, that defendant's 2010 robbery supported his 2012 UUWF conviction does not negate the validity of the two offenses as predicates for his AHC conviction. As we found in *Johnson* and *Fulton*, "requiring a third predicate felony offense would add a new element to the statute, rendering [it] 'illogical.' " *Johnson*, 2015 IL App (1st) 133663, ¶ 18; *Fulton*, 2016 IL App (1st) 141765, ¶ 12. Accordingly, we conclude that defendant was not subject to an impermissible double enhancement as a result of his AHC conviction based on his 2010 and 2012 convictions.

¶ 27 In reaching this conclusion, we are unpersuaded by defendant's reliance on *People v. Del Percio*, 105 Ill. 2d 372 (1985), and *People v. Haron*, 85 Ill. 2d 261 (1981), in which our supreme court found impermissible double enhancements. We distinguished both cases in *Fulton*. In both *Del Percio* and *Haron*, the defendants were convicted of armed violence, an offense which, at that time, occurred when a person, " 'while armed with a dangerous weapon, *** commits any felony defined by Illinois law.' " *Del Percio*, 105 Ill. 2d at 376 (quoting Ill. Rev. Stat. 1979, ch. 38, ¶ 33A-2)); *Haron*, 85 Ill. 2d at 265. In each case, due to the defendants' possession of firearms during the commission of the respective offenses, the resulting charges were enhanced, and the enhanced charges were used as predicate offenses to charge each defendant with armed violence. *Haron*, 85 Ill. 2d at 277 (defendant's original charge of battery enhanced to aggravated battery, which was then used as a predicate offense for armed violence); *Del Percio*, 105 Ill. 2d at 378 (defendant's original charge of attempted robbery enhanced to attempted armed robbery,

which was then used as a predicate offense for armed violence). The supreme court found impermissible double enhancements in each case. In *Haron*, the court held that the legislature "did not intend that the presence of a weapon serve to enhance an offense from misdemeanor to felony and also to serve as the basis for a charge of armed violence." *Haron*, 85 Ill. 2d at 278. In *Del Percio*, it held that "*Haron* applies whenever a predicate felony is doubly enhanced because of the presence of a weapon." *Del Percio*, 105 Ill. 2d at 377.

¶ 28 As we noted in *Fulton*, in *Del Percio* and *Haron*, "a single factor – the presence of a dangerous weapon – was used both to enhance the predicate offense to a more serious offense, and as an element of the more serious charge of armed violence. The resulting judgments fall squarely within the definition of an improper double enhancement." *Fulton*, 2016 IL App (1st) 141765, ¶ 15. By contrast, in *Fulton*, as here, there was no enhancement to defendant's charges. *Id.* As in *Fulton*, defendant was charged with AHC, a Class X offense, and each predicate offense was used once as an element of the AHC offense. Defendant was then convicted of AHC, a Class X offense. Thus, there was no harsher sentence imposed and the severity of the offense was not elevated. See *id.* We therefore decline defendant's invitation to depart from our previous holdings in *Johnson* and *Fulton*.

¶ 29 Finally, defendant contends that the AHC statute is facially unconstitutional because it violates due process by criminalizing both lawful and unlawful possession of a firearm. Defendant argues that the statute criminalizes the possession of a firearm by a twice-convicted felon, but the Firearm Owners Identification Act (FOID Card Act) permits a twice-convicted felon in limited circumstances to qualify for a FOID card. See 430 ILCS 65/8, 10 (West 2014). Thus, citing *Coram v. State*, 2013 IL 113867, defendant argues that the statute potentially

criminalizes innocent conduct for those twice-convicted felons with valid FOID cards and is, therefore, invalid on its face because it does not require a culpable mental state.

¶ 30 The AHC statute provides that a person commits the offense of being an armed habitual criminal if he "receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination [of several enumerated felonies]." 720 ILCS 5/24-1.7 (West 2014). Under section 8 of the FOID Card Act, a person who is convicted of a felony may have his FOID card seized or revoked, or his application denied. 430 ILCS 65/8(c) (West 2014). However, section 10(c) of the FOID Card Act provides that a circuit court may grant relief to a FOID card applicant prohibited from obtaining a card under section 8(c) where he establishes certain requirements to the court's satisfaction. 430 ILCS 65/10(c) (West 2014). Specifically, the applicant must establish, *inter alia*, that his criminal history shows he will not be likely to act in a manner dangerous to public safety and granting relief would not be contrary to the public interest and to federal law. 420 ILCS 65/10(c) (West 2014). Thus, as defendant points out, it is possible that a felon might acquire a FOID card, *i.e.*, be legally authorized to possess a firearm.

¶ 31 We note that the evidence at trial established that defendant did not have a FOID card at the time of the offense. Defendant's claim, therefore, is not an "as applied" challenge to the AHC statute, but rather a facial challenge, arguing that the statute violates due process because it is unenforceable against anyone. "A facial attack on a statute is the most difficult challenge to mount." *People v. Davis*, 2014 IL 115595, ¶ 25. "A statute is not facially invalid merely because it *could* be unconstitutional in some circumstances." (Emphasis in original.) *People v. West*, 2017 IL App (1st) 143632, ¶ 21. Accordingly, a facial challenge fails if any circumstance exists

where the statute could be validly applied. *Id*. The constitutionality of a statute is a question of law we review *de novo*. *Id.*

¶ 32 Defendant acknowledges that panels of this court have repeatedly rejected a facial unconstitutionality challenge to the AHC statute on grounds identical to those raised by defendant. See *Johnson*, 2015 IL App (1st) 133663; *Fulton*, 2016 IL App (1st) 141765; *People v. West*, 2017 IL App (1st) 143632; and *People v. Brown*, 2017 IL App (1st) 150146. In *Fulton*, 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 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." [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.' " *Fulton*, 2016 IL App (1st) 141765, ¶ 23 (quoting *Johnson*, 2015 IL App (1st) 133663, ¶ 27).

¶ 33 We also explicitly rejected the contention that the statute encompasses wholly innocent conduct, finding:

> "[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).

¶ 34 Defendant nevertheless urges this court not to follow *Johnson* and *Fulton* because those cases did not address the required individualized consideration of a person's right to possess a firearm outlined in *Coram v. State of Illinois*, 2013 IL 113867, ¶ 58. However, both *Johnson* and *Fulton* found *Coram* inapposite because it analyzed an older version of the FOID Card Act, enacted prior to the 2013 amendments, in upholding the individualized consideration of a person's right to possess a firearm. *Johnson*, 2015 IL App (1st) 133663, ¶ 29; *Fulton*, 2016 IL App (1st) 141765, ¶ 24. Additionally, *Fulton* distinguished *Coram* because the court in that case did not address the constitutionality of the AHC statute. *Fulton*, 2016 IL App (1st) 141765, ¶ 24. In light of the substantial authority on this precise issue, we decline to reconsider the constitutionality of the AHC statute. We adopt the reasoning in *Fulton* and *Johnson*, and therefore conclude that the AHC statute is not facially unconstitutional.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.