2017 IL App (1st) 150623-U

THIRD DIVISION
June 21, 2017

No. 1-15-0623

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. 12CR23202
	)	
ERWIN WASHINGTON,	)	The Honorable
	)	Diane Shelley,
Defendant-Appellant.	)	Judge Presiding.
	)	

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

ORDER

¶ 1 Held: The armed habitual criminal statute is not facially unconstitutional and does not prohibit wholly innocent conduct. Affirmed.

¶ 2 Following a bench trial, defendant Erwin Washington was convicted of being an armed habitual criminal (AHC) and sentenced to six years' incarceration. On appeal, defendant contends

the AHC statute (720 ILCS 5/24-1.7 (West 2012)) is facially unconstitutional and violates due process because it potentially criminalizes innocent conduct. He asks this court to vacate his AHC conviction. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant does not challenge the sufficiency of the evidence in this appeal. Because the facts of the case are not in dispute, we provide here only a brief background.

¶ 5 Defendant was arrested and charged with AHC and various other weapons charges in connection with the November 2012 shooting death of George Jones in Chicago. He was not charged with shooting Jones. Prior to trial, defense counsel filed a motion to dismiss the AHC count, alleging in pertinent part that defendant's two prior drug convictions did not qualify as the two predicate felonies for AHC. The trial court denied the motion and defendant's case proceeded to trial.

¶ 6 Evidence was presented at trial that defendant was selling narcotics on the street when victim Jones approached him, drew a gun, and demanded money. After defendant gave him money, Jones instructed defendant to get into a vehicle. Defendant then drew a gun and shot the Jones, believing Jones was going to shoot him. After the shooting, defendant gave his gun to a friend for safekeeping. Chicago Police Officer Zimmerman, the arresting officer, testified that defendant told him he would call his friend to bring the gun to the police station. Officer Zimmerman later obtained and inventoried the gun.

¶ 7 Defendant was not charged with shooting Jones, but was charged with armed habitual criminal and other weapons offenses. The parties stipulated to two prior convictions for delivery of a controlled substance within 1,000 feet of a church: Nos. 06-CR-20540 and 06-CR-20546.

¶ 8 At the close of evidence, the court, noting that "the only real question before me is whether or not the defendant, having been a convicted felon, had, in fact, in his possession a handgun," found defendant guilty of AHC. The court merged the other weapons counts into the AHC conviction. After a sentencing hearing, the court sentenced defendant to six years' incarceration.

¶ 9 Defendant appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant contends the armed habitual criminal statute is facially unconstitutional and violates due process because it potentially criminalizes innocent conduct. Specifically, defendant argues it is possible for a felon, though twice convicted of the enumerated predicate felonies in the AHC statute, to also qualify for a FOID card under the Firearm Owner's Identification Act (FOID Card Act). See 430 ILCS 65/5 (West 2012). Citing *Coram v. State*, 2013 IL 113867, and *People v. Carpenter*, 228 Ill. 2d 250, 269 (2008), defendant argues that the statute potentially criminalizes innocent conduct for those individuals with valid FOID cards and is, therefore, invalid on its face because it fails to require a culpable mental state. He says: "The offense does not require a culpable mental state. Rather, it only requires that the defendant have knowledge that he is in possession of a firearm while having two prior convictions for certain offenses—facts that * * * do not necessarily describe a criminal act under Illinois law." Because the AHC statute does not require an unlawful purpose, it " 'sweeps too broadly by punishing innocent as well as culpable conduct.' [*People v.*] *Wick*, 107 Ill. 2d [62, 66 (1985)]."

¶ 12 This court has had several opportunities to consider and reject the precise arguments raised here by defendant. See, *e.g.*, *People v. Johnson*, 2015 IL App (1st) 133663; *People v.*

Fulton, 2016 IL App (1st) 141765; *People v. West*, 2017 IL App (1st) 143632; *People v. Brown*, 2017 IL App (1st) 150146 (slip op. May 17, 2017). Defendant acknowledges *Johnson* and *Fulton*, but argues these cases were wrongly decided.

¶ 13 Statutes are presumed constitutional, and we have the duty to construe statutes so as to uphold their constitutionality if there is any reasonable way to do so. *People v. Inghram*, 118 Ill. 2d 140, 146 (1987); *People v. Patterson*¸ 2014 IL 115102, ¶ 90 (This court has a duty to construe a statute in a manner which upholds its constitutionality "whenever reasonably possible, resolving any doubts in favor of its validity"). The party challenging the validity of a statute has the burden of clearly establishing a constitutional violation. *Madrigal*, 241 Ill. 2d at 466; *People v. Hollins*¸ 2012 IL 112754, ¶ 13.

¶ 14 Here, defendant raises a facial constitutional challenge to the AHC statute, which "requires a showing that the statute is unconstitutional under any set of facts, *i.e.*¸ the specific facts related to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36. A statute's invalidity "in one particular set of circumstances" does not establish that the statute is facially invalid. *In re M.T.*, 221 Ill. 2d 517, 536-37 (2006). Rather, "so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail." *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002). Whether a statute is unconstitutional is a question of law which we review *de novo*. *Madrigal*, 241 Ill. 2d at 466.

¶ 15 When a statute "does not affect a fundamental constitutional right," we determine its constitutionality using the "highly deferential rational basis test." *Madrigal*, 241 Ill. 2d at 466. Under this rational basis 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." *Hollins*, 2012 IL 112754, ¶ 15. "Under the banner of its police power, the legislature has wide discretion to

fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law." *Madrigal*, 241 Ill. 2d at 466. A statute violates due process if it potentially subjects "wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." *Madrigal*, 241 Ill. 2d at 467. In such a case, the statute "fails the rational basis test because it does not represent a reasonable method of preventing the targeted conduct." *Madrigal*, 241 Ill. 2d at 467.

¶ 16 A person commits the offense of being an armed habitual criminal if he "receives, sells, possesses, or transfers any firearm after having been convicted of a total of 2 or more times of any combination [of several enumerated felonies]." 720 ILCS 5/24-1.7 (West 2012). 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 their application denied. 430 ILCS 65/8(c) (West 2012).[1] However, section 10(c) of the FOID Card Act (430 ILCS 65/10(c) (West 2012)) provides that a circuit court may grant a FOID card applicant relief where he establishes certain requirements to the court's satisfaction.

¶ 17 The purpose of the AHC statute is to "help protect the public from the threat of violence based on the State's 'legitimate interest in protecting the public from the dangers posed by felons in possession of firearms.' " *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 17 (quoting *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011)).

¶ 18 While defendant contends that the armed habitual criminal statute under which he was convicted is unconstitutional, the same argument regarding the facial unconstitutionality of the armed habitual criminal statute has been previously made, considered, and rejected by this court

[1] Although the FOID Card Act was amended in 2014 to prohibit a circuit court from granting an FOID card to anyone prohibited from possessing a firearm under federal law, this amendment is inapplicable to the case at bar, as it was not in effect at the time of the crime.

in *Johnson*, 2015 IL App (1st) 133663, *Fulton*, 2016 IL App (1st) 141765, *West*, 2017 IL App (1st) 143632, and *Brown*, 2017 IL App (1st) 150146. We have 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.' *Id*. [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).

¶ 19 Additionally, this court has rejected defendant's contention that the AHC statute lacks a rational basis because it criminalizes wholly innocent conduct. As we explained in *Johnson* and *Fulton*, the AHC statute is not overbroad, but defines precisely the activity it seeks to punish. We held 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).

¶ 20 Defendant's reliance on *Coram v. State*, 2013 IL 113867, to argue that there is a constitutional guarantee for "individualized consideration" of whether a person may legally possess a firearm is unpersuasive. In *Coram*, the Illinois State Police denied the applicant's FOID card application on the basis that, under federal law, a prior misdemeanor domestic battery conviction barred him from possessing a firearm. *Coram*, 2013 IL113867, ¶ 8. *Coram* considered individualized review in the context of federally imposed firearm prohibitions 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. *Coram*, 2013 IL113867, ¶ 62. While the *Coram* court discusses the FOID Card Act, it does so in the context of a domestic violence conviction rather than felony convictions, and not in the context of the armed habitual criminal statute. As the *Coram* court did not address whether the state could prohibit recidivist felons from possessing, receiving, or transferring firearms, and it did not address the constitutionality of the AHC statute, it is not useful to our analysis here.

¶ 21 We continue to adhere to our reasoning in *Johnson, Fulton*, and their progeny, and we reject defendant's argument that the armed habitual criminal statute is facially unconstitutional.

¶ 22 III.CONCLUSION

¶ 23 For all of the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 24 Affirmed.