2017 IL App (1st) 152010-U

No. 1-15-2010

Order filed September 22, 2017

Fifth 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. 14 CR 12918
	)	
ALONZO McKEITHEN,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for armed habitual criminal over his contention that the armed habitual criminal statute is facially unconstitutional for violating due process.

¶ 2 Following a bench trial, defendant Alonzo McKeithen was convicted of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)), and sentenced to nine years' imprisonment. On appeal, defendant contends that the AHC statute (720 ILCS 5/24-1.7 (West 2014)) is facially unconstitutional because it violates due process by potentially criminalizing

wholly innocent conduct. He asks this court to vacate his AHC conviction. 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 14, 2014, at approximately 7 p.m., two Chicago police officers in an unmarked vehicle observed defendant in a red jacket walking away from a group of people that appeared to be gambling in Chestnut Park. When the officers attempted to ask defendant questions, he fled to a nearby residential area. One officer chased defendant on foot and observed a gun fall out of defendant's jacket as he attempted to pull it off as he ran. The officer recovered the gun, a Stillfield XTM containing nine live nine millimeter rounds. The officers eventually arrested defendant and recovered a red jacket nearby. The State introduced into evidence a certification from the Illinois State Police showing that defendant did not have a valid FOID card, as well as two certified copies of defendant's prior convictions for unlawful possession of a firearm by a felon and residential burglary. The court found defendant guilty of being an armed habitual criminal and sentenced him to nine years' imprisonment with three years of mandatory supervised release. Defendant filed a motion for a new trial and a motion to reconsider sentence, both of which were denied by the court. This appeal followed.

¶ 4 On appeal, defendant challenges the constitutionality of the AHC statute, contending it violates due process because it criminalizes both lawful and unlawful possession of a firearm, thus potentially criminalizing wholly innocent conduct. Specifically, defendant argues that the statute criminalizes the possession of a firearm by a twice-convicted felon, despite the fact that the Firearm Owners Identification Act (FOID Card Act) allows a twice-convicted felon to

qualify for a FOID card in limited circumstances. See 430 ILCS 65/8, 10 (West 2014). (AOB 7) Citing *Coram v. State*, 2013 IL 113867, 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.

¶ 5 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 their 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.

¶ 6 Initially, we note that the evidence at trial established that defendant did not have a FOID card at the time of the offense. Thus, defendant's claim 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.*

¶ 7 This court has previously rejected a facial unconstitutionality challenge to the AHC statute on grounds identical to those raised by defendant, in *People v. Johnson*, 2015 IL App (1st) 133663, *People v. Fulton*, 2016 IL App (1st) 141765, and most recently, *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).

¶ 8 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).

¶ 9 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 defendant's invitation 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.

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

¶ 11 Affirmed.