2018 IL App (1st) 152895-U

No. 1-15-2895

March 14, 2018

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. 14 CR 15458
	)	
TONY MARSHALL,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for being an armed habitual criminal is affirmed over his contentions that the statute is facially unconstitutional and that his sentence of nine years' imprisonment is excessive.

¶ 2 Following a bench trial, defendant Tony Marshall was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced as a Class X offender to nine years' imprisonment. Defendant appeals, arguing that the armed habitual criminal statute is facially unconstitutional. He also contends that his sentence is excessive. We affirm.

¶ 3 Defendant was charged by indictment with one count of being an armed habitual criminal (AHC), one count of unlawful use of a weapon by a felon (UUWF), and one count of aggravated unlawful use of a weapon (AUUW). He waived his right to a jury trial and, on January 21, 2015, the case proceeded to a bench trial.

¶ 4 At trial, Chicago police officer Zinchuk testified that, on July 29, 2014, he helped execute a search warrant for a basement apartment located at 4320 South Michigan Avenue. To access the basement apartment, the officers descended a stairwell leading to an outer door. Officer Zinchuk was the "breach officer" and, therefore, was the first to enter the premises. He knocked on the outer door and announced the police presence. He heard someone behind the door say, "Who is it, what do you want?" Zinchuk knocked again and, after a short time, he forced entry. The door opened into a "breezeway," with a gate at the opposite end. Just before the gate was the door to the basement apartment that was the target of the warrant. The sole occupant of the breezeway was defendant, who fled toward the rear of the breezeway. As defendant did so, Zinchuk saw him toss "what appeared to be a handgun" into a nearby bucket. Zinchuk detained defendant and returned to the bucket. Inside the bucket, he found a revolver. Zinchuk remained with the revolver until the evidence officer recovered it. After the gun was recovered, a juvenile exited the basement apartment, but was not arrested. Zinchuk could not recall the name of the juvenile.

¶ 5 Officer Troutman testified that, on July 29, 2014, he served as the evidence officer for the team that executed the search warrant at 4320 South Michigan Avenue. When Troutman entered the breezeway, Zinchuk had defendant in custody. Zinchuk took Troutman to a bucket where

Troutman recovered a loaded revolver. Troutman maintained custody of the gun until he returned to the police station and inventoried it.

¶ 6 The State introduced into evidence two photographs: one depicting the exterior breezeway door and the other showing the breezeway itself with a bucket in the foreground. Additionally, the State introduced certified copies of defendant's prior felony convictions for armed robbery and arson. Finally, the State introduced a certification from the Illinois State Police showing that, on the date in question, defendant did not possess a Firearm Owner's Identification (FOID) card or a concealed carry permit. The State then rested.

¶ 7 Lezereke Jarmon testified that, on July 29, 2014, he was living in the basement apartment at 4320 South Michigan Avenue. Jarmon and defendant were longtime friends. On the day in question, defendant was visiting Jarmon's apartment. A "young guy" from the neighborhood was also in Jarmon's apartment. This unidentified juvenile told Jarmon that he had found a "pistol" and that he wanted Jarmon to turn it into the police. Jarmon did not see defendant handling the gun that afternoon. When the police entered his apartment, Jarmon was in the bathroom. The officers searched Jarmon and discovered narcotics on his person. Jarmon was arrested for drug possession.

¶ 8 Based on this evidence, the trial court found defendant guilty of being an armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. The court denied defendant's motion for a new trial. The case then proceeded to sentencing.

¶ 9 At the sentencing hearing, the court heard arguments in aggravation and mitigation. In aggravation, the State noted that defendant had two prior felony convictions: one for arson and

another for armed robbery. Defendant's armed robbery conviction was a Class X offense, for which defendant was sentenced to eight-and-a-half years' imprisonment.

¶ 10 In mitigation, defense counsel informed the court that defendant has 11 children and four grandchildren. Following this, the court and defense counsel had this exchange:

> "THE COURT: He has 11 children?
>
> COUNSEL: Yes.
>
> THE COURT: How many mothers are there to the 11 children? How many different women?
>
> COUNSEL: Judge, he indicated five.
>
> THE COURT: Is that supposed to be mitigating in some fashion?
>
> COUNSEL: Your Honor, he indicated that he was –
>
> THE COURT: A guy has 11 kids out of wedlock by five women and none of whom he's supporting because he's been in prison. Are you telling me that's mitigating?"

Defense counsel responded by telling the court that "there is an indication that he was taking care of his children ***." The court then asked defendant if he wished to speak.

¶ 11 In allocution, defendant reiterated that he does take care of his children. He admitted to making mistakes by having children with other women. The court interrupted defendant and said the following:

> "Hold on, I'm not – I'm not holding it against you that you have children. Your lawyer was suggesting that somehow that's something mitigating. I'm not sure I see it as mitigating the way he did, but I'm certainly not holding that against you. I'm not punishing you for that."

Rather, the court told defendant that it was talking about "this case" and defendant's prior criminal history. Defendant acknowledged that he understood and he addressed his criminal history. Defendant explained that he was young when he committed the arson and that, with respect to the armed robbery, he committed the crime with another individual, but defendant was the only one convicted of the crime. Finally, defendant told the court that he did not want to be away from his children or grandchildren for a long time.

¶ 12 In announcing its sentencing decision, the trial court noted that this was a possessory offense with "no other circumstances particularly aggravating." The court reiterated, however, that defendant had two "serious" felonies in his background. The court announced that it would be "moderate" and keep the sentence in the "single digits." The trial court then sentenced defendant to nine years' imprisonment on the AHC count. The court merged the remaining counts into the AHC offense.

¶ 13 After defendant was sentenced, he asked the court if he could give his kids' mother a hug. The court responded, "No. Because sometimes guys come in here with three or four fiancées. If it's your actual mother or real wife, that would be a different story." Defendant insisted that the woman was his wife. The trial court replied, "You've got five other kids' moms. I can't have you guys hug."

¶ 14 On appeal, defendant first contends that the AHC statute is facially unconstitutional because it punishes twice-convicted felons for possessing a firearm regardless of whether they were issued a FOID card. Defendant contends, therefore, that the AHC statute violates due process because it potentially criminalizes the "wholly innocent" possession of a firearm by a

twice-convicted felon who has been authorized to possess a firearm under Illinois law via the issuance of a FOID card.

¶ 15 The constitutionality of a statute is reviewed *de novo*. *People v. Patterson*, 2014 IL 115102, ¶ 90. All statutes are presumed to be constitutional, and the party challenging the statute has the "heavy burden" of overcoming this presumption by clearly establishing a constitutional violation. *Id.* Furthermore, it is our duty to uphold a statute's constitutionality "whenever reasonably possible, resolving any doubts in favor of its validity." *Id.* A facial challenge to a statute, such as the one here, is "the most difficult" because defendant must establish that no set of circumstances exists under which the AHC statute would be valid. See *People v. Greco,* 204 Ill.2d 400, 407 (2003).

¶ 16 "The legislature has wide discretion to establish penalties for criminal offenses, but that discretion is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law." *People v. Carpenter,* 228 Ill.2d 250, 267 (2008). When the challenged statute does not affect "a fundamental constitutional right," we use the highly deferential rational basis test to determine whether the statute comports with substantive due process requirements. *Id.*; see *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). Under the rational-basis test, a statute satisfies due process where: 1) it bears a reasonable relationship to a public interest to be served; and 2) the means adopted are a reasonable method of accomplishing the desired objective. *Madrigal*, 241 Ill. 2d at 466.

¶ 17 In Illinois, the FOID Card Act (Act) restricts firearm ownership to those who possess a FOID card. 430 ILCS 65/2(a)(1) (West 2014). Under the Act, a person who is convicted of a felony may have their FOID card revoked and seized or their application for a FOID card denied.

430 ILCS 65/8(c) (West 2014). Section 10 of the Act, however, allows such a person to "apply to the Director of State Police or petition the circuit court ***, requesting relief from such prohibition." 430 ILCS 65/10(c) (West 2014). Relief may be granted if the following is established: (1) the applicant has not been convicted of a forcible felony within the 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) in light of his criminal history and reputation, an applicant "will not be likely to act in a manner dangerous to public safety"; (3) a grant of relief is not contrary to the public interest; and (4) a grant of relief is not contrary to federal law. Pub. Act 97–1131, § 15 (eff.Jan.1, 2013) (amending 430 ILCS 65/10(c) (West 2012)). Defendant argues that, under these provisions, it is possible for a twice-convicted felon to obtain a FOID card and legally possess a firearm.

¶ 18 The AHC statute, however, makes it a Class X offense for an individual twice-convicted of certain enumerated felonies to possess a firearm. 720 ILCS 5/24-1.7 (West 2014). There is no provision that exempts those awarded FOID cards from punishment. Thus, defendant argues, Illinois law allows for the possibility that a twice-convicted felon could obtain a FOID card to possess a firearm, but, under the AHC statute, possession of a firearm would nevertheless remain criminal. In short, by failing to require an "unlawful purpose," the statute "sweeps to broadly by punishing innocent as well as culpable conduct" and, therefore, fails the rational basis test because it does not represent a reasonable method of preventing the targeted conduct. See *People v. Wick*, 107 Ill. 2d 62, 66 (1985).

¶ 19 As defendant acknowledges, facial challenges to the constitutionality of the AHC statute on grounds identical to those raised here have been previously considered and rejected by three

different panels of this court. See *People v. Johnson*, 2015 IL App (1st) 133663; *People v. Fulton*, 2016 IL App (1st) 141765; *People v. West*, 2017 IL App (1st) 143632. In *Johnson*, we rejected a facial challenge to the AHC statute and reasoned that:

> "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."

Johnson, 2015 IL App (1st) 133663, ¶ 27. We see no reason here to invalidate the substantial authority upholding the constitutionality of the AHC statute. Accordingly, we reject defendant's claim that the AHC statute is facially unconstitutional.

¶ 20 Defendant nevertheless argues that we should ignore our prior rulings and find that the AHC statute is facially unconstitutional because it potentially subjects wholly innocent conduct to criminal penalties. Defendant cites five cases in support of his contention. See *Madrigal*, 241 Ill. 2d at 468 (invalidating statute that would punish as a felony "innocent conduct" such as conducting Google search using someone's name); *Carpenter*, 228 Ill. 2d at 250 (invalidating

statute that criminalized possession of a vehicle with a secret compartment without requiring that contents be contraband); *People v. Wright*, 194 Ill. 2d 1 (2000) (invalidating record-keeping statute that would impose a Class 2 felony for failing to record the color of a single vehicle due to disability, family crisis, or incompetence); *People v. Zaremba*, 158 Ill. 2d 36 (1994) (invalidating statute that criminalized possession of stolen goods even by an evidence technician who keeps them for safekeeping); *Wick*, 107 Ill. 2d at 62 (invalidating an aggravated arson statute that would potentially make it a Class X offense if, when a farmer burns down his barn to clear space for a new one, a fireman standing nearby is injured).

¶ 21 Our ruling in *Fulton*, however, while not addressing all five of the cases cited by defendant, discussed *Madrigal* and *Carpenter* when rejecting the argument that the AHC statute punishes "wholly innocent conduct." In *Fulton*, we explained that:

> "[T]he purpose of the armed habitual criminal statute is 'to help protect the public from the threat of violence that arises when repeat offenders *possess* firearms' [Citation.] (emphasis in original). Unlike the conduct discussed in *Madrigal* and *Carpenter*, 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.' [Citation.] Moreover, '[t]he Supreme Court explicitly noted in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), that nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'[Citation.] (internal

quotation marks omitted) The armed habitual criminal statute does not violate substantive due process and is, therefore, constitutional."

Fulton, 2016 IL App (1st) 141765, ¶ 31. For the same reasons, the "wholly innocent" conduct in *Wright*, *Zaremba*, and *Wick* is distinguishable from defendant's conduct here.

¶ 22 Because we find the AHC statute to be constitutional, we need not address defendant's contention that, on remand, he should be sentenced for his UUWF conviction because the State did not prove an essential element of the AUUW offense.

¶ 23 Defendant next contends that his nine-year sentence was excessive. Defendant argues that the nature of the crime did not justify a sentence above the statutory minimum. Moreover, defendant insists that the court considered his prior felonies in aggravation when those felonies had already been factored into the AHC conviction as an element of the offense. Finally, defendant contends that the court ignored its statutory requirement to consider the hardship that his incarceration would have on his dependents as a mitigating factor, and instead made derogatory comments about his family situation.

¶ 24 The Illinois Constitution requires that a trial court impose a sentence that reflects both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In reaching this balance, a trial court must consider a number of aggravating and mitigating factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). Although the trial court's consideration of mitigating factors is required, it has no obligation to recite each factor and the weight it is given. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. Absent some indication to

the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 25 In reviewing a defendant's sentence, this court will not reweigh the factors and substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20. The trial court is in the superior position to weigh the appropriate factors and so its sentencing decision is entitled to great deference. *Id.* Where that sentence falls within the statutory range, it is presumed proper and will not be disturbed on review absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212-13. An abuse of discretion exists where the sentence imposed is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 26 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the nine-year term. A conviction for being an armed habitual criminal is a Class X felony. 720 ILCS 5/24-1.7(b) (West 2014). A Class X felony has a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). Accordingly, the nine-year sentence imposed by the trial court falls well within the permissible statutory range and, thus, we presume it proper. *Wilson*, 2016 IL App (1st) 141063, ¶ 12; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 27 Defendant does not dispute that his nine-year sentence is within the applicable sentencing range and is therefore presumed proper. Rather, he argues that his sentence does not reflect the nonviolent nature of the crime he committed or appropriate consideration of his criminal and familial background. Specifically, defendant points out that this was a possessory offense where

no harm was caused or threatened. Moreover, defendant contends that the court abused its discretion by using his criminal background, which consists of two prior felonies, to give him more than the statutory minimum sentence where that history was already an element of the AHC offense. Finally, defendant contends that the court's derisive comments about his family demonstrate that the court did not consider the hardship defendant's incarceration would have on his dependents as mitigation.

¶ 28 As mentioned, however, absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. As such, in order to prevail on these arguments, defendant "must make an affirmative showing [that] the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant cannot make such a showing here because the record reflects that the court considered all evidence in mitigation.

¶ 29 We initially note that it is not necessary for a trial court to "detail precisely for the record the exact thought process undertaken to arrive at the ultimate sentencing decision or articulate its consideration of mitigating factors." *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 32; *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). That said, the record at bar shows that the trial court expressly considered the relevant factors in reaching its sentencing decision. At sentencing, the court was presented with evidence that defendant had a large number of dependents. Both defense counsel and defendant informed the court that defendant was supporting his children. The court noted that defendant was previously incarcerated and not in a position to support them.

The court told defendant that, although it was not punishing him for having children, it did not consider his large number of dependents to be a mitigating factor.

¶ 30 Although the trial court is required to consider excessive hardship to defendant's dependents as mitigating, the court is not obligated to provide the statutory minimum sentence merely because defendant has dependents. See *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) ("The trial court was not required to impose a minimum sentence merely because mitigation evidence existed."). Moreover, the hardship must be "excessive" before it must be considered a mitigating factor. See 730 ILCS 5/5-5-3.1(a)(11); see also *People v. Young*, 250 Ill. App. 3d 55, 65 (1993) ("That defendant's imprisonment would entail *excessive* hardship to his dependants is a mitigating factor ***.") (emphasis in original).

¶ 31 Here, there was no evidence that defendant's imprisonment would cause excessive hardship to his dependents such that the court was required to consider this factor in mitigation. See *Young*, 250 Ill. App. 3d at 65 (holding that the trial court's treatment of the excessive hardship factor was permissible despite its acknowledgment that defendant's imprisonment would cause hardship to his dependents, but then saying that "most imprisonment" causes such hardship); see also *People v. Luna*, 234 Ill. App. 3d 544, 551-52 (1992) (holding that the trial court did not abuse its discretion when it made "ill-considered" comments about defendant's sexual irresponsibility because they were in the context of an appropriate discussion about defendant's moral character and tendency to be irresponsible).

¶ 32 Moreover, in imposing sentence, the court specifically noted that this was a possessory offense and that there were no other aggravating circumstances of the offense. See *Quintana*, 332 Ill. App. 3d at 109 ("[T]he statute does not mandate that the absence of aggravating factors

requires the minimum sentence be imposed."); see also *Busse*, 2016 IL App (1st) 142941, ¶ 28 ("In fashioning the appropriate sentence, the most important factor to consider is the seriousness of the crime."). The court pointed out, however, that defendant had two "serious" felonies in his background: one for arson and the second for armed robbery, which was a Class X offense. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may "warrant sentences substantially above the minimum."). The court then stated that it would be "moderate" and "keep [the sentence] in the single digits."

¶ 33 Given that all of the factors defendant raises on appeal were discussed in defendant's presentence investigation report or in arguments in mitigation, defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. As noted above, this we cannot do. See *Busse*, 2016 IL App (1st) 142941, ¶ 20 (a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). As the trial court is presumed to have considered all evidence in mitigation, and the evidence suggests that it did, we find that the trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment, a term three years above the statutory minimum, for defendant's second Class X offense. See *Alexander*, 239 Ill. 2d at 212-14.

¶ 34 In reaching this conclusion, we are not persuaded by defendant's contention that the trial court engaged in impermissible double enhancement by considering his two prior felonies when those infractions were an element of the AHC offense. In *People v. Thomas***,** 171 Ill. 2d 207 (1996), our supreme court concluded that the trial court's consideration of an aggravating factor within the applicable sentencing range "does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence *** within the

available parameters, is a requisite part of every individualized sentencing determination. [Citation.] The judicial exercise of this discretion *** is not properly understood as an 'enhancement.' " *Id.* at 224–25. The court continued, "[T]he legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of [defendant's] criminal history as an aggravating factor." *Id.* at 227. As such, the court did not err in considering defendant's prior felonies in imposing a sentence three years above the statutorily required minimum. Consequently, defendant was never subjected to an impermissible double enhancement.

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

¶ 36 Affirmed.