2018 IL App (1st) 153068-U

No. 1-15-3068

Order filed June 8, 2018

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. 13 CR 11465
	)	
KEITH BROWN,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and 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 Keith Brown was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2012)), and sentenced to six years' imprisonment. On appeal, defendant contends that the AHC statute (720 ILCS 5/24-1.7 (West 2012)) is facially unconstitutional because it violates due process by criminalizing wholly

innocent conduct. He asks this court to reverse his AHC conviction and remand for sentencing on the merged offense of unlawful possession of a weapon by a felon (UPWF). 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. Defendant was charged with armed violence, two counts UPWF, six counts of aggravated UPWF, possession of a controlled substance, and violating the AHC statute.

¶ 4 The evidence at trial established that, at approximately 12:20 p.m. on May 10, 2013, Chicago police officer Adrian Vivanco was in uniform and driving a marked patrol vehicle with his partner, Officer Philip Strazzante. The officers were in the vicinity of the 100 block of North Kostner Avenue. Vivanco observed a van "double standing" in the street. Two men were standing on the street engaged in a conversation with defendant, who was sitting in the driver's seat of the van. When the police car came into view, defendant drove away. He drove through a stop sign at the intersection of Kostner and Maypole Avenue without stopping and failed to use a turn signal while turning onto Maypole.

¶ 5 Vivanco activated his emergency lights and sirens and defendant continued to drive slowly. Vivanco could see defendant "moving his body around the seat," so he drove to the side of defendant's vehicle to get a better view of defendant's movements. He observed defendant "rocking and lift[ing] his body" and noticed a black steel handgun in defendant's right hand. The weapon disappeared below the driver's side window.

¶ 6 After half a block, defendant pulled over. Strazzante was closer to defendant's vehicle so he reached defendant first. When Vivanco approached defendant, the driver's door was open and

Strazzante was handcuffing him. Vivanco observed that the control panel on the driver's door of defendant's vehicle was propped open and cracked. He lifted the panel and observed a .357 Magnum handgun loaded with 6 live rounds. He also observed a black mask and a plastic bag containing 10 ziploc bags of a powder substance that he suspected to be heroin. He recovered the items to be inventoried, and the officers took defendant into custody.

¶ 7 The State introduced into evidence two certified copies of defendant's prior convictions for a Class 1 offense of manufacturing or delivery of cocaine in case number 98 CR 097501, and a Class 2 offense of aggravated UUWF in case number 03 CR 192001. The State also introduced a certified vehicle record for defendant of a 2002 Chrysler van.

¶ 8 The parties stipulated that, on the day in question, defendant had not been issued a valid firearm owner's identification card. The parties further stipulated that, if called, Peter Anzalone, a forensic scientist for the Illinois State Police, would testify as an expert witness in the field of forensic chemistry that he analyzed 7 of 10 inventory items. In Anzalone's expert opinion, the tested items weighed 3.3 grams and tested positive for the presence of heroin.

¶ 9 The trial court found defendant guilty of all counts. At a hearing on defendant's posttrial motion to reconsider, the court granted defendant's motion in part, finding the State failed to prove defendant guilty of armed violence and possession of a controlled substance. The court merged the remaining UPWF and aggravated UPWF counts into the AHC count and sentenced defendant to six years' imprisonment. This appeal followed.

¶ 10 On appeal, defendant asserts that the AHC statute is unconstitutional because it violates due process by criminalizing both lawful and unlawful possession of a firearm. Specifically, defendant contends that the statute criminalizes the possession of a firearm by a twice-convicted

felon, despite the fact that the Firearm Owners Identification Card 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 2012). Relying on *Coram v. State of Illinois*, 2013 IL 113867, defendant argues that the statute potentially criminalizes wholly innocent conduct for those individuals with valid FOID cards and is therefore invalid on its face.

¶ 11 Statutes are presumed constitutional, and we have a duty to construe them so as to uphold their constitutionality if there is a reasonable way to do so. *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 25. In this case, defendant does not claim the AHC statute is unconstitutional as applied to him. Defendant instead asserts that the AHC statute is facially unconstitutional, arguing that the statute violates due process because it is unenforceable against anyone. Facial attacks on statutes are the most difficult challenge to mount. *People v. Davis*, 2014 IL 115595, ¶ 25. This is because for a statute to be facially invalid, the defendant must show there are no circumstances in which the statute could be validly applied. *People v. West*, 2017 IL App (1st) 143632, ¶ 21. "A statute is not facially invalid merely because it *could* be unconstitutional in some circumstances." (Emphasis in original.) *Id*. Thus, a facial challenge fails if any circumstance exists where the statute could be validly applied. *Id*. Whether a statute is constitutional is a question of law we review *de novo*. *Id.*

¶ 12 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 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 his application denied. 430 ILCS 65/8(c) (West

2012). However, section 10(c) of the FOID Card Act (430 ILCS 65/10(c) (West 2012)) 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 2012). In particular, 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 2012). Thus, as defendant correctly points out, a felon *could* acquire a FOID card, and therefore be legally authorized to possess a firearm.

¶ 13 Defendant acknowledges that panels of this court have repeatedly rejected his argument. See *Johnson*, 2015 IL App (1st) 133663; *People v. Fulton*, 2016 IL App (1st) 141765; *West*, 2017 IL App (1st) 143632; and *People v. Brown*, 2017 IL App (1st) 150146. In *Fulton*, while addressing the constitutionality of the AHC statute, 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).

¶ 14 In *Fulton* we also rejected defendant's assertion 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).

¶ 15 Nevertheless, defendant requests that we depart from our holdings in *Johnson* and *Fulton* because those cases did not address the individualized consideration of a person's right to possess a firearm outlined in *Coram v. State of Illinois*, 2013 IL 113867, ¶ 58. However, in both *Johnson* and *Fulton* this court found *Coram* inapplicable because it analyzed an older version of the FOID Card Act 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. In *Fulton*, we further distinguished *Coram* because it did not address the constitutionality of the AHC statute. *Fulton*, 2016 IL App (1st) 141765, ¶ 24. We decline to depart from our previous holdings on this issue, and we therefore reject defendant's claim that the AHC statute is facially unconstitutional.

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

¶ 17 Affirmed.