2018 IL App (1st) 163000-U

No. 1-16-3000

Order filed December 20, 2018

Fourth 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. 06 CR 19074
	)	
FRANCISCO CASARRUBIAS,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the trial court's dismissal of defendant's section 2-1401 petition for relief from judgment where a subsequent version of the offense of which defendant was convicted was declared facially unconstitutional, and vacate the void judgment.

¶ 2 Defendant Francisco Casarrubias appeals the dismissal of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). He contends that the trial court erroneously dismissed his section 2-1401

petition because his 2006 conviction for unlawful use or possession of a weapon (UUW) on a public street within 1,000 feet of a park pursuant to section 5/24-1(a)(10), (c)(1.5) of the Criminal Code of 1961 (720 ILCS 5/24-1(a)(10), (c)(1.5) (West 2006)) is void because the statute has been declared unconstitutional. For the following reasons, we reverse the trial court's dismissal of defendant's petition and vacate his conviction for UUW.

¶ 3 Defendant was charged with two counts of UUW and three counts of aggravated unlawful use of a weapon (AUUW). On October 11, 2006, defendant pled guilty to UUW on a public street within 1,000 feet of a park and was sentenced to six months' imprisonment in Cook County jail and two years' gang probation. The State nol-prossed the other charges. Defendant did not file a direct appeal. His probation terminated on October 14, 2008.

¶ 4 On May 10, 2016, with the assistance of counsel, defendant filed a section 2-1401 petition seeking to have his UUW conviction vacated based on our supreme court's opinion in *People v. Aguilar*, 2013 IL 112116, which held certain sections of the 2008 version of the AUUW statute unconstitutional. The State moved to dismiss defendant's petition, arguing that the *Aguilar* decision was limited to the 2008 AUUW statute and did not extend to the statute under which defendant was convicted. The court granted the State's motion to dismiss defendant's section 2-1401 petition. This appeal followed.

¶ 5 On appeal, defendant contends that the trial court erred by dismissing his petition for relief from judgment. Relying on *People v. Chairez*, 2018 IL 121417, and *People v. Green*, 2018 IL App (1st) 143874, defendant argues that the statute underlying the offense to which he pled guilty has since been deemed unconstitutional and, consequently, his conviction for UUW is

void. The State concedes that, in light of our supreme court's decision in *Chairez*, defendant's conviction is void, and agrees with defendant that this court should vacate the conviction.

¶ 6 Section 2-1401 of the Code allows a litigant to file a petition presenting to the court facts outside the record that, if known at the time the judgment was entered, would have prevented the entry of judgment. *In re Detention of Morris*, 362 Ill. App. 3d 321, 322 (2005). It also allows litigants a means to attack a void judgment. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). While generally a section 2-1401 petition must be filed within two years after the entry of the order or judgment (735 ILCS 5/2-1401(c) (West 2016)), void judgments may be attacked at any time (*People v. Price*, 2016 IL 118613, ¶ 30). Although petitions pursuant to this section are typically labeled a civil remedy, section 2-1401 petitions may also be used in criminal cases. *Morris*, 362 Ill. App. 3d at 323, 298. Where, as here, a section 2-1401 petition is disposed of in a manner other than after an evidentiary hearing, we review that disposition *de novo*. *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30.

¶ 7 Defendant pled guilty in 2006 to UUW on a public street within 1,000 feet of a public park under section 24-1(a)(10), (c)(1.5). While his appeal from the trial court's order dismissing his section 2-1401 petition was pending, our supreme court decided *Chairez*, 2018 IL 121417. In *Chairez*, the court found the penalty enhancement in section 24-1(c)(1.5) of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(4), (c)(1.5) (West 2012)) prohibiting possession of a firearm within 1,000 feet of a public park unconstitutional. *Chairez*, 2018 IL 121417, ¶ 56. Although there are multiple "location factors" used as penalty enhancements in section 24-1(c)(1.5), the court expressly limited its analysis and holding to the firearm restriction to which the defendant pled

guilty—possession of a firearm *within 1000 feet of a public park* (*Id.* at ¶¶ 13, 17, 56)—the same location provision under which defendant here was convicted.

¶ 8 In *Green*, this court applied our supreme court's analysis from *Chairez* to section 24-1(a)(10), (c)(1.5) of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(10), (c)(1.5) (West 2012)), to find the portion prohibiting possession of a firearm within 1,000 feet of a school unconstitutional. This court found the ban on firearms within 1,000 feet of a school, like the ban on firearms within 1,000 feet of a public park in *Chairez*, facially unconstitutional because it "effectively operates as a total ban on the carriage of weapons for self-defense outside the home in Chicago," and therefore "runs afoul of *Aguilar*, in which the supreme court held that the right to carry firearms is particularly important when traveling outside the home." *Id.* at ¶¶ 23-24 (citing *Chairez*, 2018 IL 121417, ¶ 55, and *Aguilar*, 2013 IL 112116, ¶¶ 19-20).

¶ 9 "[A] judgment based on a statute that is facially unconstitutional is void." *In re N.G.*, 2018 IL 121939, ¶ 43. A conviction and sentence "based on a facially unconstitutional statute have no legal force or effect," but their nullification is not self-executing and therefore requires judicial action. *Id.* at ¶ 52. In Illinois, void judgments may be impeached in any proceeding at any time, regardless of whether the time for appeal has expired. *Id.* at ¶ 43 (citing *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986) (a void judgment may be attacked, either directly or collaterally, at any time or in any court)).

¶ 10 The parties agree that the 2012 version of section 24-1(a)(10), (c)(1.5) prohibiting possession of a firearm within 1,000 feet of a public park has been declared facially unconstitutional (see *Chairez*, 2018 IL 121417, ¶ 56, and *Green*, 2018 IL App (1st) 143874, ¶ 24) and that same offense in the 2006 version of the statute under which defendant was convicted

is likewise unconstitutional. Although *Chairez* analyzed the "within 1,000 feet of a public park" element of the 2012 version of the statute, and defendant was convicted under the 2006 version, the clause at issue is identical in each version. Compare 720 ILCS 5/24-1(a)(10), (c)(1.5) (West 2012) with 720 ILCS 5/24-1(a)(10), (c)(1.5) (West 2006). We therefore conclude that defendant's conviction for possession of a firearm within 1,000 feet of a public park pursuant to section 24-1(a)(10), (c)(1.5) of the 2006 UUW statute is void because the specific location offense (possession of a firearm within 1,000 feet of a public park) has been determined to be unconstitutional. See *Chairez*, 2018 IL 121417, ¶ 56.

¶ 11 Defendant essentially pled guilty to something that was never a crime. See *People v. Shinaul*, 2017 IL 120162, ¶ 14 (in the context of the defendant's guilty plea to an offense declared unconstitutional in *Aguilar*). Accordingly, we reverse the trial court's dismissal of defendant's section 2-1401 petition and vacate his conviction. See *In re N.G.*, 2018 IL 121939, ¶ 57 ("[I]f the constitutional infirmity is put in issue during a proceeding that is pending before a court, the court has an independent duty to vacate the void judgment and may do so *sua sponte*.")

¶ 12 When a court vacates a judgment, even on a guilty plea, "the prior judgment is eliminated, and the case thereby returns to its status before the judgment was made." *Shinaul*, 2017 IL 120162, ¶ 14. Although the State may generally request reinstatement of any nol-prossed charges, here the three-year criminal statute of limitations (720 ILCS 5/3-5 (West 2006)) is a complete bar against such reinstatement. See *Shinaul*, 2017 IL 120162, ¶¶ 14-15.

¶ 13 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and vacate defendant's conviction for UUW.

¶ 14 Reversed and vacated.