THIRD DIVISION
June 19, 2019

No. 1-16-1066

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 1719
	)	
BRANDEN STEELE,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Armed habitual criminal statute does not violate substantive due process and is not facially unconstitutional.

¶ 2 Defendant Branden Steele pleaded guilty to one count of armed habitual criminal (AHC). The factual basis for the plea was as follows: On November 30, 2014, just before midnight, the police found defendant sitting in a car that was illegally parked and had a false registration. Defendant did not have a valid license and was arrested for operating a car without one. An inventory search of the car revealed a handgun in a backpack. Defendant had two qualifying prior convictions for purposes of the AHC statute. The trial court accepted defendant's plea and sentenced him to 8 years in prison.

¶ 3 Defendant timely filed a post-conviction petition, raising various claims that are not at issue here. The circuit court denied the petition, finding that defendant had failed to file a timely motion to withdraw his plea, and that his claims were otherwise frivolous and patently without merit.

¶ 4 Defendant raises one issue on appeal. He argues that the AHC statute violates substantive due process and is facially unconstitutional. A facial challenge to a statute may be raised at any time, including on appeal from the denial of a post-conviction petition. *People v. Thompson*, 2015 IL 118151, ¶ 32. We review defendant's constitutional challenge *de novo*. *People v. Patterson*, 2014 IL 115102, ¶ 90.

¶ 5 Defendant argues that the AHC statute criminalizes potentially innocent conduct, because someone with two previous, AHC-qualifying convictions could still be issued a Firearm Owner's Identification (FOID) Card under limited circumstances, yet that person would still be subject to liability under the AHC statute if convicted of a third offense involving a gun, because having a valid FOID card is not a defense to the AHC statute. In that scenario, says defendant, someone who legitimately possesses the gun (by virtue of the FOID card) could be convicted as an armed habitual criminal despite his "innocent" conduct of legally possessing a firearm.

¶ 6 This court has rejected that precise argument in at least four published opinions. See *People v. Johnson,* 2015 IL App (1st) 133663, ¶ 27 (potential application to "innocent conduct" alleged here does not render AHC statute facially unconstitutional); *People v. Fulton,* 2016 IL App (1st) 141765, ¶ 31 (same); *People v. West*, 2017 IL App (1st) 143632, ¶ 22; *People v. Brown*, 2017 IL App (1st) 150146, ¶¶ 29-31. Though we agree with the holdings of those cases and much of their reasoning, we do take issue with a small portion of their analyses and thus explain our own reasoning below.

¶ 7 The constitutional guarantee of substantive due process limits the legislature's otherwise broad discretion to criminalize conduct. *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011); see U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2. Unless a fundamental constitutional right is implicated, Illinois courts use the rational-basis test to determine whether a statute violates substantive due process. *Madrigal*, 241 Ill. 2d at 468. Defendant does not claim that a fundamental constitutional right is implicated, and he argues for this rational-basis standard accordingly.

¶ 8 A statute fails the rational-basis test if it does not bear a reasonable relationship to a legitimate public interest, or, in other words, if it is not a reasonable method of preventing the guilty conduct it was meant to target. *Id.* Under this rubric, our supreme court has held various statutes facially unconstitutional because they swept too broadly, punishing "innocent conduct" along with the guilty conduct they legitimately targeted. See *id.* at 467-68; *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008); *People v. Wright*, 194 Ill. 2d 1, 28 (2000); *People v. Zaremba*, 158 Ill. 2d 36, 42 (1994); *People v. Wick*, 107 Ill. 2d 62, 66 (1985).

¶ 9 In *Madrigal*, 241 Ill. 2d at 470, for instance, the court struck down a subsection of the identity theft law that made it illegal to use someone else's personal identification information or document to gain access to any records of that person's activities or transactions, or any communications made or received by that person, without that person's express prior permission. See 720 ILCS 5/16G-15(a) (West 2008). Because this subsection did not require a "culpable mental state"—*i.e.*, "criminal intent, criminal knowledge, or a criminal purpose"—it applied to the conduct specified in the statute regardless of the defendant's purpose in undertaking those actions. *Madrigal*, 241 Ill. 2d at 470-71, 473. As a result, it "potentially punishe[d] a significant amount of wholly innocent conduct not related to the statute's purpose" of preventing identity

theft, including "doing a computer search through Google *** or though a social networking site" by entering someone's name; "using the internet to look up how their neighbor did in the Chicago Marathon;" "call[ing] an employer of a friend to see if the friend is working or on vacation;" or "call[ing] a hotel to see if [one's] husband has registered, checked in yet, or made a reservation." *Id*. at 471-72.

¶ 10 Other statutes struck down in the *Madrigal-Wick* line of cases exemplify the same pattern of overreach: the statute at issue lacked the mental-state elements necessary to limit its application to genuinely criminal—as opposed to everyday, innocuous—instances of the prohibited conduct.

¶ 11 In *Carpenter*, 228 Ill. 2d at 269, the statute criminalized false or secret compartments in vehicles, whether used to conceal contraband or legal items. The court noted that, due to the lack of a mental state of criminal purpose, the law prohibited the transportation of lawfully-obtained items such as "cash, jewelry, a risqué magazine, a confidential file, or a BB gun." *Id*. at 270.

¶ 12 In *Zaremba*, 158 Ill. 2d at 42-43, the statute criminalized exercising control over property in the custody of a law enforcement agency that one knows to be stolen property; but because the statute required no criminal purpose in doing so, the law equally outlawed an evidence technician merely doing his or her job. See also *Wright*, 194 Ill. 2d at 28 (statute criminalized failure to maintain sales records, making no distinction between doing so as part of criminal scheme to sell stolen vehicles and parts, or as result of mere incompetence or inability to do so without criminal purpose); *Wick*, 107 Ill. 2d at 66 (aggravated arson statute applied to fires set for perfectly lawful purpose, as long as firefighter or police officer was injured, and thus reached too broadly).

¶ 13 Ordinarily, a defendant challenging the facial validity of a statute would have to demonstrate that no set of circumstances exists under which the statute could be valid; that is, the defendant would have to show that the statute is incapable of constitutional application in any context. But while that principle of law is true in most facial challenges, it is not true in a facial challenge on substantive-due-process grounds alleging substantial overbreadth, like the ones we have discussed above.

¶ 14 In those decisions, the challenged statutes were not invalid because they were incapable of legitimate application. They most certainly *were* capable of valid application in many instances. The identity theft statute in *Madrigal* certainly covered the conduct of people actually engaging in identity theft. The law criminalizing secret compartments in *Carpenter* unquestionably covered criminals who used secret compartments to hide contraband. The stolen-goods statute in *Zaremba* clearly covered the conduct of people who were actually fencing stolen goods.

¶ 15 The problem with those statutes was not that they failed to cover legitimately criminal activity. It was that they *also* criminalized "innocent" conduct—"innocent" in the sense that it was conduct entirely unrelated to the intended purpose of those laws. A person looking up an old classmate on Facebook without intending any criminal harm; a person searching a name on Google to find out her time in the Chicago Marathon, not to steal her identity; an individual placing her wallet in a secret compartment in a car; an evidence technician inventorying stolen goods as part of her routine job duties—all of those people could be prosecuted for felonies under laws that were never intended, in the court's view, to outlaw their conduct.

¶ 16 In fact, it is precisely *because* a statute can be legitimately applied in many circumstances that, before striking it down facially on substantive due process grounds, the criminal statute

must *substantially* overshoot its legitimate target. *Madrigal*, 241 Ill. 2d at 478 ("[c]riminal statutes * * that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid *even if they also have legitimate application*") (emphasis added) (quoting *City of Houston, Texas v. Hill*, 482 U.S. 451, 459 (1987)). In relying on *Hill*, a first-amendment case, our supreme court underscored that, in this respect too, facial substantive-due-process challenges function like overbreadth challenges, which require "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

¶ 17 In *Madrigal*, 241 Ill. 2d at 471, 473, 476-77, for example, the court repeatedly found that the identity theft law punished a "wide array" or "significant amount" of conduct that had nothing to do with identity theft, like the Google or Facebook user who had no intention of stealing someone's identity. The stolen-goods statute in *Zaremba*, 158 Ill. 2d at 42-43, substantially overreached in that it would have criminalized the job duties of police evidence technician throughout Illinois in routinely taking custody of property they knew to be stolen. 158 Ill. 2d at 42-43. The secret-compartment prohibition in *Carpenter*, 228 Ill. 2d at 269-70, would have created felons out of a large swath of well-meaning people throughout our state who just wanted to hide their valuables in their cars from potential thieves.

¶ 18 So the question is not whether the AHC statute is capable of some valid, constitutional application. It unquestionably is; defendant does not argue otherwise. To the extent the courts in in *Johnson*, 2015 IL App (1st) 133663, ¶¶ 25, 27 and *Fulton*, 2016 IL App (1st) 141765, ¶ 20, wrote that the existence of some valid application of the statute defeats this kind of a facial challenge, we respectfully disagree with those statements in those opinions. We otherwise agree with their reasoning and holdings in full.

¶ 19 Rather, the relevant question is whether the AHC statute also criminalizes a *substantial* amount of "innocent" behavior—whether it *substantially* overshoots its admittedly legitimate purpose. Thus, we begin with the purpose of the AHC statute. That law "was enacted to protect the public from the threat of violence that arises when repeat offenders possess firearms." *Johnson*, 2015 IL App (1st) 133663, ¶ 27; see also *Fulton*, 2016 IL App (1st) 141765, ¶ 23. Generally speaking, the statute hews quite closely to that purpose. Defendant does not say otherwise, as a general proposition. Instead, defendant points to one specific instance in which, he says, he could be prosecuted as an armed habitual criminal despite having received a FOID card in the interim between his second and third offense.

¶ 20 Defendant is correct, theoretically. An individual could obtain a FOID card despite having two AHC-qualifying convictions. Section 10 of the FOID Card Act (430 ILCS 65/1 *et seq* (West 2016)) provides that an applicant who has been rendered ineligible for a FOID card because of prior felony convictions may petition the circuit court for relief from that disability. *Id.* § 65/10(a), (c). The court may order the Department of State Police to issue a FOID card upon finding that:

> (1) the applicant has not been convicted of a forcible felony within twenty years of the application, or at least twenty years have passed since the applicant was last incarcerated for a forcible felony; (2) the applicant would not be likely to act in a manner dangerous to public safety; (3) granting relief would not be contrary to the public interest; and (4) "granting relief would not be contrary to federal law." *Id.* § 65/10(c)(1)-(4).

¶ 21 Thus, defendant concludes, it is possible for someone to receive a FOID card but still be subject to prosecution as an armed habitual criminal while *legally* possessing a firearm, because

the AHC statute makes no provision for someone who possesses the weapon legally via a FOID card.

¶ 22 While we might depart from *Johnson* in some respects, as noted above, we fully agree with *Johnson*'s conclusion that the hypothetical presented here by defendant (the same one presented in *Johnson*) involves "one very unlikely set of circumstances." *Johnson*, 2015 IL App (1st) 133663, ¶ 27. As we just noted above in our block quote, the hypothetical applicant for a FOID card, who already has two felony convictions, must demonstrate that he or she has been free of felony convictions or imprisonment for at least twenty years, that granting the FOID license will not be contrary to public safety or the public interest, and that federal law does not prohibit the issuance of the FOID card. 430 ILCS 65/10(c)(1)-(4) (West 2016). That single, narrow example does not strike us presenting an instance where the AHC statute has *substantially* overreached to protect "innocent," law-abiding conduct, such as in the cases we have discussed above.

¶ 23 We could stop there, finding no substantial overreach. But we would go a step beyond *Johnson* to note that, as things currently stand, not only is the hypothetical given by defendant "very unlikely"—it could not happen, because current federal law would prohibit anyone with two prior felonies from obtaining a handgun; thus, granting a FOID card to such a person would be "contrary to federal law" under the FOID law. 430 ILCS 65/10(c)(4) (West 2016).

¶ 24 The current federal felon-in-possession statute makes it a crime for "any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess "any firearm or ammunition[.]" 18 U.S.C. § 922(g)(1). Thus, anyone who has two AHC-qualifying convictions would necessarily violate federal law by possessing a firearm. See 720 ILCS 5/24-1.7(a)(4). Unless that federal firearms disability is

removed, the applicant is not eligible for a FOID card, because federal law prohibits it. 430 ILCS 65/10(c)(4) (West 2016).

¶ 25 And for all practical purposes, there is currently no way for an applicant to remove a federal firearms disability imposed by section 922(g)(1). Theoretically, an individual may apply to the Attorney General "for relief from the disabilities imposed by Federal laws with respect to the * * * possession of firearms." 18 U.S.C. § 925(c). Applications made under section 925(c) are to be reviewed, in the first instance, by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), pursuant to a grant of delegated authority. *United States v. Bean*, 537 U.S. 71, 74 (2002); *Tyler v. Hillsdale County Sheriffs Dep't.*, 837 F.3d 678, 682 (6th Cir. 2016). If an application is denied, the statute provides for judicial review in federal district court. 18 U.S.C. § 925(c).

¶ 26 The remedial procedure contemplated by section 925(c) "has been rendered inoperative, however, for Congress has repeatedly barred the Attorney General from using appropriated funds 'to investigate or act upon [relief] applications.' " *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (quoting *Bean*, 537 U.S. at 74-75) (brackets in original); see also *Tyler*, 837 F.3d at 682 ("Section 925(c), however, is currently a nullity."). In 1992, Congress defunded the relief-from-disabilities program, noting that reviewing relief applications was a "very difficult and subjective task which could have devastating consequences for innocent civilians if the wrong decision is made." S. Rep. No. 102-353, at 19 (1992). Congress has reaffirmed this prohibition every year since 1992; it remains in force, in the current federal budget's appropriations provisions for ATF. See Consolidated Appropriations Act, 2019, P.L. 116-6, 131 Stat. 13, 107 (Feb. 13, 2019) ("*Provided*, That none of the funds appropriated herein shall be available to investigate or act

upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code[.]").

¶ 27 The long and short of it is that currently, ATF is prohibited from reviewing relief applications, and the Supreme Court has held that this prohibition on initial agency review stripped the federal courts of jurisdiction to review claims arising under section 925(c). *Bean*, 537 U.S. at 78. So as things stand today, there is no way an applicant for a FOID card can remove the federal firearms disability that necessarily arises from his or her AHC-qualifying convictions. Which means that the hypothetical applicant that defendant places before this court—this "very unlikely" applicant (*Johnson*, 2015 IL App (1st) 133663, ¶ 27)—in fact is a hypothetical applicant that could not, as a matter of law, exist under current law. See *Johnson*, 2015 IL App (1st) 133663, ¶ 29 (noting that current federal law would prohibit State from issuing FOID card to convicted felon).

¶ 28 Clearly, then, defendant cannot demonstrate that the AHC statute *substantially* overreaches its intended purpose, if it overreaches at all.

¶ 29 That could change, of course, and one day an applicant with AHC-qualifying convictions might get relief from the federal disability, prevail in his bid to obtain a FOID card, and later be charged under the AHC statute. Nothing would stop such a person from raising an as-applied challenge to the AHC law, or maybe even a facial challenge under new circumstances. At this time, however, there is no basis for sustaining a facial challenge to the AHC statute based on substantive due process. We reject defendant's constitutional challenge.

¶ 30 We affirm the judgment of the circuit court.

¶ 31 Affirmed.