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2012 IL App (3d) 100743-U

Order filed January 18, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Henry County, Illinois,
)	
v.)	Appeal No. 3-10-0743
)	Circuit No. 09-CF-142
CONNIE S. BLAIR,)	
)	Honorable
Defendant-Appellant.)	Charles H. Stengel,
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred by applying a 15-year enhancement penalty for armed robbery because subsequent legislation curing the constitutional defect did not revive unconstitutional statute. The proper remedy was to remand for resentencing.
- ¶ 2 After a jury trial, the defendant, Connie S. Blair, was convicted of armed robbery, and sentenced to 23 years' imprisonment in the Department of Corrections. 720 ILCS 5/18-2(a)(2) (West 2008). Pursuant to section 18-2(b) of the Criminal Code of 1961 (Code), her sentence included a 15-year enhancement for using a firearm during the commission of the robbery. 720 ILCS 5/18-2(b)

(West 2008). On appeal, the defendant argues that the trial court erred by adding the 15-year enhancement to her sentence.

¶ 3 The defendant's argument is premised on *People v. Hauschild*, 226 Ill. 2d 63 (2007). In that case, our supreme court held that section 18-2(b) was unconstitutional because it violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11. The court found that committing armed robbery under section 18-2(a)(2) carried a penalty of 6 to 30 years' imprisonment plus a mandatory "add on penalty" of 15 years. *Id.* at 75. In contrast, the offense of armed violence predicated on robbery with a category I or category II weapon carried a penalty ranging from 15 to 30 years, even though the two offenses shared identical elements. Consequently, because the penalty for armed robbery was more severe than the penalty for armed violence predicated on robbery, our supreme court held that section 18-2(b) violated the proportionate penalties clause.

¶ 4 On October 23, 2007, approximately four months after the decision in *Hauschild*, the Illinois legislature adopted a new amendment to the armed violence statute excluding as a predicate offense any crime "that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(a) (West 2008). In other words, the amendment to the armed violence statute eliminated robbery or armed robbery as a predicate offense to armed violence, thus presumably remedying the proportionate penalties violation identified in *Hauschild*. To date, the legislature has not amended the armed robbery statute.

¶ 5 The defendant in the instant case committed armed robbery on April 18, 2009, well after the legislature amended the armed violence statute. Accordingly, the issue presented for our review is

whether the legislature's subsequent amendment of the armed violence statute "revived" the 15-year enhancement under section 18-2(b) of the Code. We hold that it does not.

¶ 6 We find instructive the case of *People v. Manuel*, 94 Ill. 2d 242 (1983), which held that an unconstitutional statute was not revived by amending another related statute. *Manuel* concerned section 404 of the Illinois Controlled Substances Act (Act), which penalized delivery of any substance represented to be a controlled substance. Ill. Rev. Stat. 1979, ch. 56½, par. 1404. Prior to *Manuel*, our supreme court held in *People v. Wagner*, 89 Ill. 2d 308 (1982), that section 404 violated due process because it punished delivery of a noncontrolled substance more severely than delivery of a controlled substance under section 401 of the Act. *Manuel*, 94 Ill. 2d 242. Although not applicable to that case, the *Wagner* court noted that in 1979 the legislature had amended sections 401(e) and 401(f) to increase the penalties for delivery of a controlled substance. *Manuel*, 94 Ill. 2d 242.

¶ 7 In *Manuel*, the court agreed that "the fortuitous effect of the amendment [to section 401] was to change the statutory scheme so as to remedy the unconstitutional classification addressed in *Wagner*." *Manuel*, 94 Ill. 2d at 244. However, the court did not agree that the amendment could, in essence, "revive a different statute." *Id.* When a statute is held unconstitutional, it is void *ab initio*. *Manuel*, 94 Ill. 2d 242. Therefore, the problem with prosecuting the defendants in *Manuel* was that, although the constitutional defect was remedied by the 1979 amendment to section 401, section 404 had not been amended by the legislature prior to the defendants' prosecution. *Id.* In fact, section 404 was not amended until 1982, and the defendants had committed their offenses in 1981. *Id.* The court emphasized that "[h]ad the legislature amended section 404, as it now has [citation] we would then have been in a position to examine anew its validity within what would

then be a new statutory scheme." *Id.* at 245.

¶ 8 The State relies upon two sections of *Hauschild* to argue that unconstitutional legislation can be revived without acting upon the legislation itself. The first section involves the court's discussion of *People v. Lewis*, 175 Ill. 2d 412 (1996) (*superseded by* Illinois Pub. Act 91-404 (eff. January 1, 2000)). *Lewis* held that the armed violence statute as it existed in 1996 was unconstitutional. *Id.* In *Hauschild*, the court had to consider whether the armed violence statute "ceased to exist" after the decision in *Lewis*. *Hauschild*, 226 Ill. 2d at 84. After our supreme court decided *Lewis*, the legislature passed Illinois Public Act 91-404, which added sentencing enhancements for certain categories of armed robberies and also amended the armed violence statute. *People v. Harvey*, 366 Ill. App. 3d 119 (2006). The *Hauschild* court declared that Public Act 91-404 "revived" the offense of armed violence. *Hauschild*, 226 Ill. 2d at 84. Specifically, the court stated that "Public Act 91--404 'revived' the offense of armed violence predicated on robbery when it amended the sentence for certain armed robberies to add the 15/20/25-to-life provisions, creating more severe penalties for those offenses than for armed violence predicated on robbery." *Id.*

¶ 9 While *Hauschild* seems to suggest that an amendment to one statute can revive another, the crucial distinction between this case and *Hauschild* is that Public Act 91-404 amended *both* the armed robbery and armed violence statutes.¹ Consequently, because the armed violence statute was

¹Indeed, in reaching the conclusion that the armed violence statute was revived, our supreme court relied heavily on the appellate court's decision in *Harvey*, 366 Ill. App. 3d 119. In *Harvey*, the court specifically referred to the fact that Public Act 91-404 also amended the armed violence statute to add subsections (c) and (b-10). *Id.*; see also 720 ILCS 5/33A-2(c), 33A-3(b-10) (West 2000).

also amended, our supreme court could "examine anew its validity." *Manuel*, 94 Ill. 2d at 245.

¶ 10 The State also relies on *Hauschild* to argue that the 15-year firearm enhancement was revived once the court reversed itself in *People v. Sharpe*, 216 Ill. 2d 481 (2005). In *People v. Walden*, 199 Ill. 2d 392 (2002) (*overruled by Sharpe*, 216 Ill. 2d 481), the court had held that the armed robbery sentencing enhancements were unenforceable because the penalty for armed robbery was disproportionately greater than that for armed violence predicated on aggravated robbery with a firearm. However, *Sharpe* abandoned the analysis utilized in *Walden*, effectively overruling *Walden*. *Sharpe*, 216 Ill. 2d 481. *Hauschild* held that *Sharpe* revived the enhancement because no jurisprudence existed that held the enhancement violated the proportionate penalties clause of the Illinois Constitution. *Hauschild*, 226 Ill. 2d 63.

¶ 11 *Hauschild* is distinguishable from this case. *Hauschild* focused the court's reversing itself, leaving no decision that found the enhancement unconstitutional. If our supreme court should reverse *Hauschild*, the 15-year enhancement would once again be revived.² However, the instant case focuses on the action the legislature must take in order to revive an unconstitutional statute.

¶ 12 We must follow the precedent in *Manuel* that the 15-year enhancement remains unavailable at sentencing until the legislature takes some action on section 18-2(b). When *Hauschild* struck down section 18-2(b), the statute became void *ab initio*. *People v. Coleman*, 399 Ill. App. 3d 1150, 1160 (2010) (stating that "[b]ecause [section 18-2(b)] was void *ab initio* at the time of sentencing, defendant's sentence is void"). Thus, the legal effect is as though the statute was never enacted.

²We note that *Hauschild*'s continued viability is at issue in *People v. Todd Kelly*, No. 107832 (Ill. Dec. 31, 2008) and *People v. Corey D. Clemons*, No. 107821 (Ill. Nov. 24, 2010) presently pending in the Illinois Supreme Court.

People v. Gersch, 135 Ill. 2d 384 (1990).

¶ 13 The defendant further argues that no remand is necessary in the instant case, and that this court should simply vacate the 15-year enhancement, leaving the defendant with a sentence of eight years' imprisonment. However, *Hauschild* speaks directly on this issue. In *Hauschild*, the court held that when a sentencing statute has been found to violate the proportionate penalties clause, "the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment." *Hauschild*, 226 Ill. 2d at 88-89. The purpose of remand is "to allow the trial court to reevaluate defendant's sentence in light of his cumulative sentence and to then resentence him" within the proper range. *Id.* at 89. Therefore, the case should be remanded.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, the judgment of the circuit court of Henry County is reversed, and the cause is remanded for further proceedings.

¶ 16 Reversed and remanded.