2024 IL App (1st) 231155

No. 1-23-1155

Opinion filed December 20, 2024

FIFTH DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEANGELO JOHNSON, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 21 CR 9281 Honorable Domenica A. Stephenson, Judge, presiding.

JUSTICE MITCHELL delivered the judgment of the court, with opinion.
Justice Oden Johnson and Justice Navarro concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Deangelo Johnson appeals his conviction for unlawful use of weapons by a felon. 720 ILCS 5/24-1.1 (West 2022). There are three issues on appeal. First, did the circuit court err when it did not hold a *Krankel* hearing based on Johnson's claims that his trial counsel was ineffective? Second, was Johnson's trial counsel ineffective for failing to move to quash his arrest and suppress evidence obtained from that arrest? Third, is the statute prohibiting felons from possessing firearms either facially unconstitutional or unconstitutional as applied to Johnson? We conclude that the circuit court did not err by failing to hold a *Krankel* hearing, the record is not sufficiently developed to determine whether Johnson's trial counsel was ineffective, the felon in

possession of a firearm statute is not facially unconstitutional, and Johnson forfeited the argument that it was unconstitutional as applied to him. Accordingly, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Chicago Police Officers Cruz, Rodriguez, Baciu, and Jackson were patrolling Chicago's 11th Police District at around 10 p.m. when they encountered a vehicle parked on the side of the road with no front or rear license plates. The officers parked in front of the vehicle, exited their squad car and approached. Officers Rodriguez, Baciu, and Jackson went to the driver's side of the vehicle while Officer Cruz headed to the passenger's side. The vehicle had three occupants. Defendant Deangelo Johnson sat in the passenger seat.

¶ 4 Johnson's window was rolled down and he had both hands in the air; one held an unlit cigar and the other held his phone. After one of the officers noticed an open alcohol container in the back seat of the parked vehicle, Officer Cruz instructed Johnson to step out of the car. Rather than get out of the vehicle, Johnson asked whether he could light his cigar. Officer Cruz told him that he could. When Johnson began to light the cigar, Officer Cruz again instructed him to exit the vehicle. Johnson did not immediately comply, so Officer Cruz opened the passenger door. At this point, Officer Cruz noticed the handle of a firearm in Johnson's jacket pocket. He notified the other officers that Johnson had a gun and told Johnson to keep his hands in the air. Officer Cruz then retrieved the firearm and handed it to Officer Rodriguez. Johnson said nothing and had no reaction when Officer Cruz took the gun. The officers then removed Johnson from the parked vehicle and placed him under arrest. Johnson was transported to the 11th District police station where the officers discovered that he had a prior felony conviction. Johnson was subsequently charged with and convicted by a jury of unlawful use of weapons by a felon.

¶ 5 After trial, Johnson sent a letter from prison to the court alleging that his trial counsel was ineffective. The letter was dated June 4, 2023; however, it was file stamped by the court on June 22, 2023. There is no record of any action being taken by the court in the intervening period regarding the letter. Johnson timely appealed his conviction on June 20, 2023. Ill. S. Ct. R. 606(b) (eff. Mar. 12, 2021).

¶ 6 II. ANALYSIS

¶ 7 A. *Krankel* Hearing

¶ 8 Johnson first contends that the circuit court erred by failing to hold a hearing consistent with the Illinois Supreme Court's decision in *People v. Krankel*, 102 Ill. 2d 181 (1984), after he sent a letter to the court claiming that his trial counsel was ineffective. The State responds that the circuit court did not have jurisdiction to hold a *Krankel* hearing and therefore could not have erred by failing to do so. A *Krankel* hearing is a common law procedure that allows "the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* ineffective assistance claims." *People v. Patrick*, 2011 IL 111666, ¶ 39. "The law requires the trial court to conduct some type of inquiry into the underlying factual basis, if any, of a defendant's *pro se* posttrial claim of ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 79 (2003). To be entitled to such an inquiry, "[a] *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention [citations], and thus, a defendant is not required to file a written motion [citation] but may raise the issue orally [citation] or through a letter or note to the court [citation]." (Internal quotation marks omitted.) *People v. Ayres*, 2017 IL 120071, ¶ 11; see *Moore*, 207 Ill. 2d 68, 81 (2003) (holding that the failure to hold a *Krankel* hearing was not harmless where "no record at all was made on defendant's claims of ineffective assistance of counsel.").

¶ 9 The circuit court was divested of jurisdiction in this case on June 20, 2023, when Johnson filed his notice of appeal, and once the circuit court loses jurisdiction of the case, it "may not entertain a *Krankel* motion raising a *pro se* claim of ineffective assistance of counsel." *Patrick*, 2011 IL 111666, ¶ 39; see *People v. Perry*, 2014 IL App (1st) 122584, ¶ 13 ("Upon the proper filing of a notice of appeal, the jurisdiction of the appellate court attaches instanter and the lower court is thereafter deprived of jurisdiction." (Internal quotation marks omitted.)). Therefore, the resolution of this argument depends on when Johnson's letter was brought to the attention of the circuit court. Because this issue is jurisdictional, our review is *de novo*. *People v. Shunick*, 2024 IL 129244, ¶ 18.

¶ 10 Johnson insists that the date of June 4, 2023, at the top of the letter he sent to the court is sufficient to establish that the letter was placed in the mail that day. However, it is contrary to human experience to assume "that all *** documents are mailed on the date that they are typed." (Internal quotation marks omitted.) *Blessing Hospital v. Illinois Health Facilities and Services Review Board*, 2024 IL App (4th) 230282, ¶ 50. Without proof of mailing, "there is nothing in the record to establish the date the document was timely mailed." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 216 (2009). As the appellant, Johnson "carries the burden of presenting a complete record on appeal [citation] and any doubts arising from an incomplete record will be construed against [him]." *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010).

¶ 11 The responsibility of raising the ineffectiveness of trial counsel to the circuit court rests with the defendant. See *Ayres*, 2017 IL 120071, ¶ 11. It follows, then, that Johnson also shoulders the responsibility of providing sufficient proof that the issue was timely raised. This court need not determine, in this case, the exact quantum of proof necessary for a defendant to demonstrate

that he timely brought the matter of ineffective assistance to the circuit court's attention. Here, it is enough to say that the date at the top of a letter is insufficient to prove that the letter was mailed on that date; therefore, Johnson's failure to provide more is fatal to his argument, even if placing the letter in the mail were sufficient to bring the issue to the court's attention, and the filing date controls.

¶ 12 B. Ineffective Assistance of Counsel

¶ 13 Johnson also argues on appeal that the record is sufficiently developed to show that his trial counsel provided ineffective assistance by failing to move to quash his arrest and to suppress the evidence that the State recovered during that arrest. See *People v. Veach*, 2017 IL 120649, ¶ 46 ("[D]efendants are required to raise ineffective assistance of counsel claims on direct review if apparent on the record."). He contends that the officers lacked probable cause to arrest him because they relied solely on the fact that he possessed a firearm. Reasonable trial counsel, Johnson maintains, would have challenged the basis for the arrest, and without the evidence recovered during the arrest, the State could not have convicted Johnson. The State responds that the officers had probable cause to arrest Johnson when considering the totality of the circumstances. In particular, the State points to the conditions that gave rise to the stop, the fact that Johnson did not say anything in defense of his possession of the gun, the fact that there was an open bottle of alcohol in the car, and the fact that Johnson did not exit the car when instructed to by the police.

¶ 14 Both the United States and Illinois Constitutions guarantee criminal defendants the right to the effective assistance of counsel. See, *e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Moore*, 2020 IL 124538, ¶ 28. The standard for what constitutes ineffective assistance is the same under both: "a defendant must show that counsel's performance was objectively

unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). "The ultimate question of whether counsel's actions support a claim for ineffective assistance of counsel is subject to *de novo* review on appeal." *People v. Davis*, 2023 IL App (1st) 220231, ¶ 28. Ordinarily, trial counsel's decision regarding whether to file a motion to suppress is "a matter of trial strategy, which is entitled to great deference." (Internal quotation marks omitted.) *People v. Gayden*, 2020 IL 123505, ¶ 28. Therefore, to argue successfully that counsel was ineffective for failing to file a suppression motion, "the defendant must demonstrate both that the unargued suppression motion was meritorious and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Id.*

¶ 15 The fourth and fourteenth amendments to the United States Constitution guarantee together that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" by state officials. U.S. Const., amend. IV; *People v. Hill*, 2020 IL 124595, ¶ 19 (citing U.S. Const., amend XIV). The "essential purpose" of these protections "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.' " *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)). This standard of reasonableness requires law enforcement officials to have probable cause to support an arrest. *People v. Grant*, 2013 IL 112734, ¶ 11. "[P]robable cause exists when the facts known to the officer at the time are sufficient to lead a reasonably cautious person to believe that the arrestee

has committed a crime, based on the totality of the circumstances." *People v. Gocmen*, 2018 IL 122388, ¶ 19. This standard does not require proof beyond a reasonable doubt or even a preponderance of the evidence; it requires only "the probability of criminal activity." *Id.*

¶ 16 This encounter began as a routine investigative stop (a parked vehicle without license plates). See *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The stop eventually developed into a full-blown arrest based on the officers' observation of open alcohol in the vehicle as well as a firearm on Johnson's person. The officers did not have probable cause to arrest Johnson merely for possessing a firearm; however, the record below is not sufficiently developed to determine whether there was evidence to support a finding that probable cause existed as to some other criminal activity. The fact that Johnson was carrying a firearm is not in itself sufficient to provide officers with probable cause. In *People v. Aguilar*, the Illinois Supreme Court concluded that it was unconstitutional to prohibit the possession of a firearm for self-defense. 2013 IL 112116, ¶ 21. Since *Aguilar*, mere possession of a firearm is no longer illegal. Accordingly, "[s]uspicion and presumption of illegality are no longer the default for officer observation of gun possession." *People v. Wilson*, 2020 IL App (1st) 170443, ¶ 33; see also *People v. Thomas*, 2019 IL App (1st) 170474, ¶ 40 ("[P]olice cannot simply assume a person who possesses a firearm outside the home is involved in criminal activity.").

¶ 17 The probable cause inquiry is not limited to facts related to the crime that Johnson was eventually charged with; the state only needed to show probable cause that Johnson was involved in criminal activity. See *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004). Accordingly, although the State argued only that the police reasonably believed that Johnson illegally possessed a firearm, "this court may affirm a trial court's judgment on any grounds which the record supports." *In re*

Detention of Stanbridge, 2012 IL 112337, ¶ 74. That is, if the facts in the record support an alternative reason for finding probable cause, then Johnson's trial counsel was not ineffective and his conviction must be affirmed. Consequently, it is possible that the open alcohol container in the back seat of the car could have provided the officers in this case with probable cause to arrest Johnson. It is unlawful for a passenger to knowingly "carry, possess or have any alcoholic liquor within any passenger area of any motor vehicle upon a highway in this State except in the original container and with the seal unbroken." 625 ILCS 5/11-502(b) (West 2022); see also *People v. DeVoss*, 150 Ill. App. 3d 38, 40-41 (1986) (ascribing a state of mind requirement to the open container prohibition).

¶ 18 While the record supports the conclusion that there was an open bottle of alcohol in the vehicle with Johnson, the record is not sufficiently developed to determine whether it was reasonable to infer that Johnson knew that the bottle was there. This argument is better raised in a post-conviction petition where the circuit court can hear testimony and receive evidence. *People v. Veach*, 2017 IL 120649, ¶ 46 (holding that ineffective assistance of counsel claims are "better suited to collateral proceedings *** when the record is incomplete or inadequate for resolving the claim").

¶ 19 C. *Bruen* Challenge

¶ 20 Johnson contends, for the first time on appeal, that the section of the Criminal Code that criminalizes the possession of a firearm by a felon is both facially unconstitutional and unconstitutional as applied to him. When a party challenges the constitutionality of a statute, that party "has the burden of clearly establishing a constitutional violation." *People v. Jones*, 223 Ill. 2d 569, 596 (2006). That burden is particularly heavy when the party presents a facial challenge.

Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673, ¶ 33. "[A] facial challenge requires a showing that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts relating to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36. If a statute is facially unconstitutional, it is rendered wholly invalid. *Hope Clinic*, 2013 IL 112673, ¶ 33. On the other hand, a defendant who claims that a statute is unconstitutional as applied to him must show only "that the statute violates the constitution as it applies to the facts and circumstances of [the defendant's case]." *Thompson*, 2015 IL 118151, ¶ 36. "Therefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37. "[A] reviewing court is not capable of making an as-applied finding of unconstitutionality in the 'factual vacuum' created by the absence of an evidentiary hearing and findings of fact by the trial court." *People v. Harris*, 2018 IL 121932, ¶ 41. In either case, this court presumes that a statute is constitutional, and "we have the duty to construe statutes so as to uphold their constitutionality if there is any reasonable way to do so." *Jones*, 223 Ill. at 595-96. We review the constitutionality of a statute *de novo*. *Id.* at 596.

¶ 21 1. Facial Challenge

¶ 22 Johnson argues that, under the analytical framework provided by the United States Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), broadly prohibiting felons from possessing firearms violates the second amendment to the United States Constitution. The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. const., amend. II. This amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

However, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. It is not a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Defining the contours of the right requires a two-step analysis. First, the court must determine whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 17. That is, does the conduct before the court involve the keeping or bearing of arms? See *id.* at 28. If the conduct does involve the keeping or bearing of arms, "the Constitution presumptively protects that conduct" and "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17.

¶ 23 Determining whether a statute fits within "this Nation's historical tradition of firearm regulation" involves "reasoning by analogy." *Id.* at 28. This analysis "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." (Emphasis in original.) *Id.* at 30. Accordingly, the challenged regulation may survive scrutiny if it is "relevantly similar" to a historical analogue. *Id.* at 29. "Why and how the regulation burdens the right are central to this inquiry." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024). "[I]f laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* However, "[e]ven when a law regulates arms-bearing for a permissible reason *** it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Id.*

¶ 24 Illinois law makes it "unlawful for a person to knowingly possess *** any firearm *** if the person has been convicted of a felony." 720 ILCS 5/24-1.1(a). In addressing the constitutionality of this law, this court's decisions since *Bruen* have taken two approaches. The

first concludes that "[t]he *Bruen* Court could not have been more clear that its newly announced test applied only to laws that attempted to regulate the gun possession of 'law-abiding citizens,' and not felons like defendant." *People v. Baker*, 2023 IL App (1st) 220328, ¶ 37. The second determines that felons are part of "the people" to whom the second amendment applies but holds that "there is a history and tradition dating back to the founding era of identifying dangerous individuals and disarming them." *People v. Travis*, 2024 IL App (3d) 230113, ¶ 33. Significantly, regardless of the approach, this court has—repeatedly and without exception—concluded that the second amendment permits Illinois to disarm felons.

¶ 25 Further, the United States Supreme Court's recent decision in *Rahimi* provides additional support for our holdings. There, the court explained that "the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." 144 S. Ct. at 1901. Here, the burden is on Johnson to show that every potential application of the prohibition on firearm possession by felons is unconstitutional. Thus, to overcome the Supreme Court's holding in *Rahimi*, Johnson must show that *no* felon poses a clear threat of violence to another. He cannot. While not *all* felons necessarily pose a threat of violence to others, some felons surely do. Accordingly, the statute is constitutional in at least some applications, and it is not facially invalid.

¶ 26 2. As-Applied Challenge

¶ 27 Johnson further argues that, even if the statute is not facially unconstitutional, it is unconstitutional as applied to him. While he admits that he raises this argument for the first time on appeal, he contends that the argument has not been forfeited because the record is sufficiently developed for this court to adequately address this question. The State agrees that our precedents

excuse Johnson's forfeiture. However, the State's concession does not bind this court; "this court may affirm a trial court's judgment on any grounds which the record supports." *Stanbridge*, 2012 IL 112337, ¶ 74. Because an as-applied challenge is dependent on "the facts and circumstances of [the defendant's case]" and the record has not been sufficiently developed as to those facts, we cannot excuse Johnson's forfeiture here. *Thompson*, 2015 IL 118151, ¶ 36.

¶ 28 Johnson argues that his underlying felony conviction was non-violent and that the second amendment only permits the disarmament of dangerous felons. The precedents of this court have uniformly rejected this contention. See *Travis*, 2024 IL App (3d) 230113, ¶ 37; *Baker*, 2023 IL App (1st) 220328, ¶ 37; *People v. Mobley*, 2023 IL App (1st) 221264, ¶ 28. Regardless, even if Johnson's contention were correct, the record does not clearly demonstrate whether or not his predicate felony could establish that he is dangerous. Johnson's underlying conviction was for delivery of a controlled substance. While not necessarily violent, "[d]rug crimes are associated with dangerous and violent behavior and warrant a higher degree of precaution." *U.S. v. Bullock*, 632 F.3d 1004, 1016 (7th Cir. 2011). This precaution is necessary because, under certain circumstances, drug crimes "pose an extreme risk of harm." *Rosemond v. U.S.*, 572 U.S. 65, 75 (2014). Therefore, the circumstances of Johnson's drug offense are crucial to determining what danger he may pose, and without knowing those circumstances, this court is in no position to rule on Johnson's as-applied challenge.

¶ 29 III. CONCLUSION

¶ 30 For the forgoing reasons, we affirm Johnson's judgment of conviction for unlawful use of weapons by a felon.

¶ 31 Affirmed

***People v. Deangelo Johnson*, 2024 IL App (1st) 231155**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 21-CR-9281; the Hon. Domenica A. Stephenson, Judge, presiding.
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