No. 127201

In the
Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

VIVIAN CLAUDINE BROWN,

Defendant-Appellee.

Appeal from the Circuit Court of the Second Judicial Circuit,
White County, Illinois
No. 17 CM 60
The Honorable **T. Scott Webb**, Judge Presiding

SUPPLEMENTAL RESPONSE BRIEF OF DEFENDANT-APPELLEE

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INTRODUCTION

Purely on the supplemental issue raised by this Court in its Order of December 21, 2021, Brown agrees with the points made in the State's Supplemental Brief, particularly in its recitation of the history of the case as stated in its *Background* section. Brown responds separately, however, to raise the further additional points.

STATEMENT OF FACTS[1]

1. On April 2, 2020, this Court concluded the lower court's ruling that "section 2(a)(1) of the FOID Card Act is unconstitutional as applied was not necessary to its resolution of this case" and vacated the circuit court's judgment. *People v. Brown*, 2020 IL 124100, ¶ 36. This Court held that the circuit court's holding "that the FOID Card Act did not apply to the act of possessing a firearm in the home as a matter of statutory interpretation and, therefore, could not apply to defendant" was "an alternative, nonconstitutional basis for dismissing defendant's information." Id. at ¶ 31. This Court ordered "that the October 16, 2018, judgment order dismissing defendant's information be vacated and then modified to exclude the ruling that section 2(a)(1) is unconstitutional. The modified order is thereupon to be reentered." *Id.* at ¶ 36.

[1] Brown will cite to materials in the State's Appendix as "A," and materials in the Common Law Record as "C."

2. Justice Karmeier, joined by Justice Theis, dissented. Notably, Justice Karmeier wrote about the "impossibility of compliance" non-constitutional ground discussed by the majority, and how no party had actually raised it:

> It is not surprising that no one made such a claim. The language of the law is clear and unambiguous. There is no exception, here or in any other provision of the Act, for possession of the firearm, stun gun, or taser within one's home. To read the law as inapplicable to possession within the home, thereby avoiding any challenge to the constitutionality of the law as applied in that circumstance, would therefore require the court to depart from the plain language and meaning of the statute and read into it an exception, limitation, or condition the legislature did not express. That is something courts are not at liberty to do. *In re Hernandez*, 2020 IL 124661, ¶ 18.

Brown, 2020 IL 124100 at ¶ 54.

3. On remand, per this Court's mandate, the circuit court entered a modified order dismissing the information against Brown "on [its] statutory analysis of impossibility of compliance." C113.

4. On June 15, 2020, Brown filed a motion to reconsider, arguing that the "trial court's Modified Order herein is legally erroneous, and forces the defendant to take a position not of her own choosing, one that she will lose on appeal and one which will unnecessarily delay (perhaps by years) the ultimate disposition of this case." C142, 146.

5. On June 4, 2020 (as modified on June 15, 2020), the circuit court vacated the modified order, and reinstated the information. C150.

6. On June 19, 2020, Brown renewed her motion alleging that the FOID Card Act is unconstitutional, arguing that:

> The FOID card Act requires individuals to pay a fee and obtain a license to enjoy a right that is protected by the Constitution, even in the individual's own home. Even if the fee is nominal (*i.e.*, $10.00) the entire process suppresses a fundamental right that is recognized to be enjoyed in the most private of areas, such as the home. No other fundamental right as guaranteed by the Bill of Rights requires a fee and/or a license to exercise.

C166, 169.

7. On April 26, 2001, the circuit court declared 430 ILCS 65/2(a)(1) and 430 ILCS 65/5 unconstitutional as applied to Brown. A.7; C.202. Specifically, the court reasoned, the "FOID Card Act is NOT substantially related to an important government interest as applied to the Defendant in this case." *Id.* Moreover, the court held, "*any* fee associated with exercising the core fundamental Constitutional right of armed self-defense within the confines of one's home violates the Second Amendment." C217-18 (emphasis in original).

8. On April 28, 2020, the State timely appealed directly to this Court as per Sup. Ct. Rule 302(a) A4; C219.

9. On December 21, 2021, this Court entered an Order for supplemental briefing based on the below-listed issues:

SUPPLEMENTAL ISSUES PRESENTED

1. Whether the circuit court's June 15, 2020, order vacating its June 4, 2020, modified order, reinstating the information filed by the State on May 5, 2017, and

> allowing defendant to present a motion to declare the FOID Card Act unconstitutional exceeds the scope of this Court's mandate in People v. Brown, 2020 IL 124100; and

2. Whether the circuit court could entertain defendant's motion to vacate the June 4, 2020, modified order.

ARGUMENT

A. The circuit court did not exceed the scope of this Court's mandate in *People v. Brown*.

Generally, "[o]n remand, a circuit court lacks the authority to act beyond the scope of the mandate. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1037, [ ] ([2d Dist.] 2011). If the mandate directs the court to proceed in conformity with the opinion, the entire opinion must be consulted in determining the appropriate course of action. *Id.* If the mandate is general, the court should examine the opinion and determine what further proceedings would be consistent with the opinion. *Id.*" *People v. Lash*, 2020 IL App (1st) 170750-U, ¶ 59.

In this case, the circuit court did not exceed this Court's mandate. Unlike in *Price v. Phillip Morris, Inc.*, 2015 IL 117687, or *Smith v. Duggar*, 318 Ill. 215, 217 (1925), the circuit court here did not vacate a judgment on the merits made by this Court. Rather, this Court dismissed the matter on jurisdictional grounds without rendering a judgment. In fact, this Court specifically held that:

> [W]e emphasize that we express no opinion on the merits of the circuit court's statutory analysis. The entry of a modified judgment order is done only to preserve the State's right to seek review in the appellate court of the

> circuit court's nonconstitutional basis for dismissing defendant's information (Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2017)) and to "permit the normal appellate process to run its course" (*Trent*, 172 Ill. 2d at 426).

State v. Brown, 2020 IL 124100, ¶ 32.

This Court specifically stated it was not expressing an opinion on the merits. 2020 IL 124100, ¶ 32. Thus, the circuit court's modified Order was subject to appellate review, as this Court specifically contemplated. *Id.* It stands to reason that a circuit court order subject to appellate review would also be subject to circuit court reconsideration, assuming the circuit court still had jurisdiction (*i.e.* the 30 day post-dismissal period had not yet expired), which the circuit court had in this case. *See* 735 ILCS 5/2-1301(e) ("The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable").

Given that this Court expressly denied making any findings on the merits, specifically left the "impossibility of compliance" issue open for appellate consideration, and was silent on the issue of reconsideration, the circuit court's actions in vacating the modified Order on reconsideration and entertaining the Motion to Reconsider did not exceed the scope of this Court's mandate in *Brown*, and was also reasonable under 735 ILCS 5/2-1301(e). *See also Czyzewski v. Gleeson*, 49 Ill. App. 3d 655, 659 (1st Dist. 1977) (circuit court's power of reconsideration should "be liberally exercised in order to promote justice").

In fulfilling the mandate in this way, the circuit court did not re-adjudicate anything that this Court had "previously adjudicated." *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627, 632 (2d Dist. 1996). Rather, this Court deliberately did not adjudicate the statutory issue. *See Brown* ¶ 32. Nor did this Court hold that this case could *not* be dismissed on constitutional grounds, which the Court also did not adjudicate. The majority opinion did not purport to dictate how the circuit court needed to go about making any necessary findings. As a result, whether any relevant unresolved facts exist and preclude dismissal—which, as Judge Karmeier showed, they do not, *see Brown* at ¶ 64 (Karmeier, J., dissenting)—remained open for the circuit court to decide and is now properly presented for the Supreme Court to review.

This Court based its remand primarily on *Trent v. Winningham*, 172 Ill. 2d 420 (1996), and *Hearne v. Illinois State Board of Education*, 185 Ill. 2d 443 (1999). *See Brown*, 2020 IL 124200 at ¶ 19. But neither of those opinions contains any indication that the trial court had *sua sponte* based its decision on an alternative non-constitutional ground with which no party agreed. Nor does either opinion say anything about reconsideration on remand. Thus, neither *Trent* nor *Hearne* required the parties here to spend years appealing the non-constitutional issue that the circuit court had inserted, especially as Brown expressly did not advance, and is not now advancing, such an argument. It must also be emphasized that the State agrees the

constitutional issue should be heard. Indeed, as the State noted, it is questionable whether an appellate court would even have had jurisdiction to consider the statutory "impossibility of compliance" issue, since it is not a matter of controversy between the parties. An opinion on the issue would not only be obvious, it would almost certainly be advisory.

Other cases illustrate the proposition that mandates do not foreclose what they do not discuss. In *People v. Lucien*, 128 Ill. App. 3d 706 (2d Dist. 1984), the court stated:

> Before addressing the merits of the defendant's argument, we must first discuss the People's contention that the Second District's opinion bars consideration of the constitutional challenge. The People argue that the opinion is res judicata to all issues that were or could have been raised in the original appeal. It is also claimed that a challenge to the constitutionality of these charges goes beyond the mandate issued by the Second District. We disagree for several reasons. . . . As to the mandate issued by the Second District, the constitutional ramifications of sentencing on these counts were not considered. In fact, a new sentencing hearing was ordered upon rehearing. While this does not necessarily mean that authority to hear constitutional challenges was granted, it does lead to the conclusion that this possibility was not foreclosed by the limited mandate. Accordingly, we turn to the merits of the defendant's argument.

Lucien, 128 Ill. App. 3d at 707–08 (internal citations omitted).

Also, in *Gonzalez*, 407 Ill. App. 3d at 1038, the court held:

> In the body of our order, we noted that the hearing had to address whether, for the purposes of the newly-discovered-evidence claim, 'Lewis's affidavit [was] of such conclusive character that it would probably change the result on retrial.' However, we did not otherwise dictate the scope of the evidentiary hearing. Thus, the trial

> court's action in allowing the defendant to amend his postconviction petition and to present the new claim at the evidentiary hearing did not exceed our mandate." (internal citation omitted).

Although Illinois appellate courts describe their mandates as jurisdictional limitations of their remands, *see*, *e.g.*, *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276–77 (1982), in practice that means that "[a] trial court . . . must obey precise and unambiguous directions on remand." *Fleming v. Moswin*, 2012 IL App (1st) 103475-B, ¶ 28 (internal quotation marks omitted). The circuit court did so here by vacating, modifying, and re-entering its order—exactly as this Court directed it to do. This Court gave no directions for after the entry of the new order, and placed no limits on subsequent motions, whether filed by the State (which also could have moved for reconsideration) or by Brown. Thus, the circuit court did not disobey any instructions by entertaining a reconsideration motion; this Court was not "[a]mbiguous," but silent, about such motions. *Fleming* ¶ 28. This case is unlike *Schreier*, cited above, where the trial court ordered a retrial after the Supreme Court had remanded only for resentencing. Here, the circuit court did not similarly start from scratch. It entered the required ruling, which was just a pared-down version of its own prior ruling, and exercised its "inherent power to reconsider and correct its own rulings" thereafter. *People v. Mink*, 141 Ill. 2d 163, 171 (1990).

Because this Court purposely "express[ed] no opinion on the merits of the circuit court's statutory analysis" and remanded in order "to permit the

normal appellate process to run its course," and as post-judgment motions are common and even required practice following a criminal matter, the circuit court did not exceed the scope of this Court's mandate when it acted upon Brown's Motion to Reconsider.

B. The circuit court was able to consider Brown's motion to reconsider.

The circuit court followed this Court's mandate and entered the modified Order. However, said modified Order was not based on an argument of Brown's. Further, it is an argument that, as Brown pointed out to the circuit court, could not be legally supported, which means she would have no defense to the appeal being thrust upon her.

In fact, Brown specifically disavowed the argument that the FOID card requirement does not apply in the home when she argued the:

> trial court's Modified Order herein is legally erroneous, and forces the defendant to take a position not of her own choosing, one that she will lose on appeal and one which will unnecessarily delay (perhaps by years) the ultimate disposition of this case." C142, 146.

Justice Karmeier described the situation thusly:

> no plausible claim can be made that the conduct with which defendant is charged falls outside the plain language of section 2(a)(1) of the FOID Card Act (430 ILCS 65/2(a)(1) (West 2018)). To order the circuit court to enter such an order would be tantamount to compelling it to make a legal determination that none of the parties requested, that the court itself never meant to make, and that would have no chance of being affirmed on appeal. And when the forced order is ultimately reversed by the appellate court, as the law would require, what will happen? The circuit court will simply enter another order declaring the statute invalid, putting the parties and the

> litigation in precisely the same position they are now. Nothing will have been gained. Time will have been lost. Judicial resources will have been wasted. Defendant will remain in legal limbo.

Brown, 2020 IL 124100, ¶ 59 (Karmeier, J., dissenting).

The "impossibility of compliance in the home" argument was likewise not made by the State, either. In fact, the State's Attorney for White County submitted an Affidavit for Brown's Motion to Reconsider, stating his intent to appeal the "impossibility of compliance" ruling to the Fifth Appellate District. C148. Therefore, the modified Order was truly based on an argument no one was making.

Further, Brown correctly pointed out that there are only certain listed statutory grounds for dismissing a criminal charge at the pre-trial stage. *See* 725 ILCS 5/114-1. Not only is "impossibility of compliance" not among the grounds listed in 725 ILCS 5/114-1, but Brown never filed a motion to dismiss pursuant to that section. C143.

"Impossibility of compliance" is not grounds for a motion to dismiss; it is an affirmative defense. "Where, as here, an offense involves a criminal omission, *i.e.*, a failure to perform an action that one has a legal duty to perform, a criminal defendant may raise an affirmative defense of impossibility if it was impossible for him or her to perform a legal duty." *People v. Costello*, 2014 IL App (3d) 121001, ¶ 14.

Therefore, it is clear not only that the circuit court's modified order not only would have been appealed, but that Brown would have lost, *especially*

since she had no defense. *See Brown*, 2020 IL 124100 at ¶ 54 (Karmeier, J., dissenting) (FOID statute contains "no exception, here or in any other provision of the Act, for possession of the firearm, stun gun, or taser within one's home"). She could not even rely on this Court's mandate, since this Court emphasized that it "express[ed] no opinion on the merits of the circuit court's statutory analysis." *Brown*, 124100 at ¶ 32.

Despite the surface appearance of this Court's mandate of dismissal, unless the circuit court corrected what it saw as an injustice, Brown would have remained in legal limbo and jeopardy for an unfairly-prolonged period of time, prolonged at least by the lengthy period until the Fifth District's reversal and reinstatement of the charge against Brown compelled the circuit court to once again consider the real issue of the FOID statute's constitutionality. At that point, potentially years down the road, which would then be the third time Brown raises the constitutionality issue before the circuit court, it is of course unknown how the circuit court would then treat the issue. The State is correct that Brown has an interest in the finality of the proceedings. *See People v. Inman*, 2014 IL App (5th) 120097, ¶ 37; *see also People v. Pendleton*, 75 Ill. App. 3d 580, 594 (1st Dist. 1979).

It is true as a general rule that "a party cannot complain of an error that does not prejudicially affect that party." *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36. In this case, Brown was prejudiced, as the promised extended appellate litigation, with the outcome all but pre-determined

against her, would keep her in legal jeopardy for years. Substantial justice required that the circuit court act to avoid this unnecessary situation. *See Green v. Myers*, 106 Ill. App. 3d 541, 543 (1st Dist. 1982) ("The overriding consideration under this section is whether or not substantial justice is being done between the litigants and whether it is reasonable under the circumstances to compel the parties to go to trial on the merits"). While this case is currently about the prospect of an unneeded appeal about an unwanted legal issue advanced by no party – as opposed to a trial – the principle is the same. When substantial justice is not being done, the circuit court can act accordingly, especially since the circuit court had first made sure to comply with this Court's mandate.

Knowing this, and knowing this Court's ruling specifically contemplated appellate review ("The entry of a modified judgment order is done only to preserve the State's right to seek review in the appellate court of the circuit court's nonconstitutional basis for dismissing defendant's information (Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2017)) and to "permit the normal appellate process to run its course"), *Brown*, 2020 IL 124100 at ¶ 32, logic and justice require that the circuit court was able to review its own order as well (*See Lash*, 2020 IL App (1st) 170750-U, ¶ 59, n.1.

Further, given the waste of judicial resources that would have resulted at the Appellate level from such a manufactured appeal, the result of which would not be in doubt and to which no one is claiming an interest in the

argument (beyond slogging through it so that the parties can get to the real issue of the case), it was appropriate and economical for the circuit court to address the issue when the matter was squarely before it. *See* 735 ILCS 5/2-1301(e); *see also Chi. Police Sergeants' Ass'n v. Pallohusky*, 2017 IL App (1st) 162822, ¶ 32.

The principle of giving the circuit court the opportunity to correct errors and not waste appellate court resources is behind the requirement that a party file a post-trial motion following unfavorable jury verdicts, lest they waive the requested relief. "The law is well established that the failure to specify an issue in a post-trial motion constitutes a waiver of that issue and precludes a defendant from assigning that matter on appeal as grounds for reversal." *People v. Miller*, 47 Ill. App. 3d 412, 414 (5th Dist, 1977). *See also People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). This is also the purpose of the motion to reconsider, such as the circuit court considered in this case. In a very real sense, the circuit court was fulfilling this court's mandate – preventing a legally erroneous ruling (as "impossibility of compliance" is not a legal basis for dismissal) which would have resulted in a lengthy and useless (and unasked-for) appeal, while furthering justice and conserving judicial resources. Not only was the circuit court able to entertain Brown's motion to reconsider, it arguably had a duty to do so.

CONCLUSION

In light of the above, the Defendant-Appellee, VIVIAN CLAUDINE BROWN, respectfully asserts that the circuit court (1.) did not exceed the scope of this Court's mandate when it considered and ruled upon Brown's Motion to Reconsider, vacating the modified Order and allowing Brown to move the circuit court to find the FOID Card Act unconstitutional as applied to her, and (2,) correctly entertained Brown's Motion, given the legal prejudice to Brown that would have resulted had the modified order been allowed to stand.

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Dated: February 1, 2022

Respectfully submitted,

/s David G. Sigale
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ILLINOIS SUPREME COURT RULE 341(c) CERTIFICATION OF COMPLIANCE

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I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 3511 words.

/s/ David G. Sigale
David G. Sigale
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Signed and sworn under penalty of perjury
pursuant to 735 ILCS 5/1-109 this 1st day of February, 2022.

/s/ David G. Sigale
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NOTICE OF FILING OF SUPPLEMENTAL RESPONSE BRIEF OF DEFENDANT-APPELLEE

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You are hereby notified that this 1st day of February, 2022, the Defendant-Appellee has filed and served electronically, with the Clerk's Office of the Supreme Court of Illinois, her *Supplemental Response Brief of Defendant-Appellee*, a copy of which accompanies this document.

/s/ David G. Sigale
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PROOF OF SERVICE

I, David G. Sigale, an attorney, state under oath and under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure that the statements set forth are true and correct: that I delivered Defendant-Appellee's *Supplemental Response Brief of Defendant-Appellee* and *Notice of Filing of Supplemental Response Brief of Defendant-Appellee* to their intended recipients *via* electronic filing and e-mail from Wheaton, Illinois, on the 1st day of February, 2022.

/s/ David G. Sigale
LAW FIRM OF DAVID G. SIGALE, P.C.

Subscribed and sworn pursuant to 735 ILCS 5/1-109 that
the statements set forth herein are true and correct
this 1st day of February, 2022.

/s/ David G. Sigale
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