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ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 12-95

	Opinion Delivered November 14, 2012
SAMUEL P. MOORE APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIRST DIVISION
V.	[NO. CR-10-707]
STATE OF ARKANSAS APPELLEE	HONORABLE LEON JOHNSON, JUDGE
	AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Samuel Moore was charged with committing aggravated robbery, first-degree battery, theft of property, and possession of a firearm while having a prior conviction for a violent felony, based on events that occurred on January 23, 2010. Appellant was also charged as a habitual offender. The trial court granted appellant's motion to sever the firearm-possession charge, which was tried on September 20, 2010.[1] The jury found appellant guilty and sentenced him to forty years in the Arkansas Department of Correction. Appellant argues that this sentence is illegal because it resulted from the impermissible "stacking" of a specific

[1]Appellant was tried separately and convicted on the other felony charges, which are at issue in a separate appeal.

enhancement statute for felon in possession of a firearm with the general habitual-offender-enhancement statute. We disagree and affirm.

The facts relevant to appellant's firearm-possession charge are as follows. On January 23, 2010, North Little Rock police officers attempted to stop appellant's car and appellant attempted to flee, initiating a chase that ended with him crashing into another vehicle. Immediately following the accident, while he was still stuck inside his vehicle, appellant admitted to police officers on the scene that he was in possession of a .40 caliber handgun. The police retrieved the gun, which was loaded with one live round, and a loaded clip fell from appellant's pants while he was in the emergency room. In a subsequent interview with police, appellant again admitted that he possessed the gun.[2]

At trial, it was established that appellant had previously been convicted of at least ten felonies, including criminal mischief (1986); second-degree forgery (two counts in 1986); theft of property (1986 and 1994); felon in possession of a firearm (1988); and robbery (four counts in two separate cases, 1994).[3] He was released on parole on August 19, 2009, five months before the events giving rise to this appeal occurred.

The jury found appellant guilty of being a felon in possession of a firearm while having a prior violent-felony conviction, a Class B felony. The trial court instructed the jury that the

[2]The detective who questioned appellant testified that he read the *Miranda* rights to appellant, and appellant said he understood his rights. The *Miranda* rights form signed by appellant was admitted into evidence without objection, and appellant does not dispute on appeal that he was in possession of the gun.

[3]Exhibits documenting these ten convictions were entered into evidence and read to the jury, without objection from defense counsel.

range of punishment for a Class B felony where the defendant has four prior felony convictions was a term of imprisonment no less than five years and no more than forty years.[4] The jury fixed appellant's sentence at the maximum sentence of forty years, and the trial court sentenced appellant accordingly. A judgment and commitment order was entered on October 12, 2011, and appellant filed a timely notice of appeal on November 7, 2011.

Arkansas Code Annotated section 5-73-103(c)(1) (Supp. 2011) provides that a felon in possession of a firearm commits a Class B felony if:

> (A) the person has a prior violent felony conviction;
>
> (B) the person's current possession of a firearm involves the commission of another crime; or
>
> (C) the person has been previously convicted under the section or a similar provision from another jurisdiction.

A Class B felony carries a sentence of between five and twenty years' imprisonment.[5] If categories (A), (B), or (C) do not apply, the felon in possession of a firearm has committed a Class D felony,[6] which is punishable by no more than six years' imprisonment.[7] Under Arkansas's habitual-offender statute, the range of punishment for a Class B felony where the

[4]*See* Ark. Code Ann. § 5-4-501(b)(2)(C) (Repl. 2006).

[5]Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006).

[6]Ark. Code Ann. § 5-73-103(c)(2) (Supp. 2011).

[7]Ark. Code Ann. § 5-4-401(a)(5) (Repl. 2006).

defendant has four or more prior felony convictions is a term of imprisonment no less than five years and no more than forty years.[8]

In *Lawson v. State*, our supreme court held that it was impermissible to couple the sentence enhancement for fourth-offense driving while intoxicated (DWI) with the general penalty enhancement for habitual offenders.[9] Appellant argues on appeal that *Lawson* also should be read to prohibit the habitual-offender enhancement from being "stacked" onto section 5-73-103(c)(1)(A), the firearm-possession provision under which he was convicted. However, appellant's reliance on *Lawson* is misplaced.

The issues in *Lawson* were defined by the supreme court very specifically, and distinguish that case from the one presently before us:

> Thus the issue is whether it is proper for a specific subsequent offense penalty enhancement statute to be stacked upon a general habitual criminal statute in sentencing for a single offense? And more narrowly, is it permissible to stack two such statutes when the conduct currently being punished—the offense which triggers application of the habitual criminal statute—is a misdemeanor that has been enhanced to a felony statute only by virtue of its repetition?[10]

The statute at issue in *Lawson* was a specific subsequent-offense penalty enhancement statute providing that a fourth DWI, if committed within three years of the first one, would be elevated from a misdemeanor to a felony and would be punishable by one to six years in prison.[11] In comparison, under the same statute, a second and third DWI occurring within

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[8]Ark. Code Ann. § 5-4-401(b)(2)(C) (Repl. 2006).

[9]295 Ark. 37, 746 S.W.2d 544 (1988).

[10]*Id.* at 39, 747 S.W.2d at 545.

[11]*Id.* (citing Ark. Code Ann. § 5-65-111(b)(3)(A) (1987)).

five years of the first were still misdemeanors, punishable by no more than one year in prison.[12] Under this progressive-enhancement statute, Lawson's fourth DWI was rendered a felony, which the circuit court found made him subject to the habitual-offender statute and allowed his sentence to be doubled.[13] Construing the DWI statute strictly, the supreme court concluded that "the legislature did not intend this specific criminal enhancement statute should be coupled with our general criminal enhancement statute for the resulting purpose of creating a greater sentence than if either statute had been applied singly."[14]

We distinguish *Lawson* from this case on more than one ground. First, the result the supreme court sought to avoid in *Lawson*—a greater sentence than if either statute had been applied singly—is not a factor here. In *Lawson*, if the DWI statute alone had been applied, Lawson's maximum sentence would have been six years.[15] However, the habitual-offender statute could not have been applied by itself: if the DWI statute were not applied to elevate his offense to a felony, Lawson would not have been eligible for the habitual-status enhancement at all. Thus, the highest sentence Lawson could have received by one of the two statutes being applied singly was six years, and his sentence when both enhancements

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[12]Ark. Code Ann. § 5-65-111(b)(1)(A), (2)(A) (1987).

[13]*Lawson*, *supra*. At that time, the statute provided that a defendant convicted of a felony, who had previously been convicted of four or more felonies, could be sentenced to an extended term of imprisonment no less than seven years more than the minimum sentence under the DWI statute and no more than twice the maximum sentence. Ark. Code Ann. § 5-4-501(b) (1987).

[14]*Id.* at 41-42, 746 S.W.2d at 546.

[15]*Id.* (citing Ark. Code Ann. § 5-65-111 (1987)).

were applied was twice as long. In this case, the maximum sentence appellant could have received under one of the statutes was forty years under the habitual-offender statute. That is the sentence he in fact received.

Second, the statutory provision at issue in this case, section 5-73-103(c)(1)(A), does not contain an enhancement for recidivism of the underlying crime (felon in possession of a firearm) and is therefore not the kind of subsequent offense penalty-enhancement statute addressed in *Lawson*. This court discussed this distinction in *Hadley v. State*.[16] Like appellant, the defendant in that case was charged with aggravated robbery, theft of property, and possession of a firearm by a felon, and the firearm charge was severed and tried separately. Hadley was convicted of Class B felony-firearm possession, for possessing a firearm in the commission of another crime, and was sentenced to fifteen years as a habitual offender. This court explained:

> Felon in possession is a proscription against the possession of objects that, to certain classes of people, are effectively contraband. A greater punishment is allowed if the contraband possessed is employed in the commission of another offense because the additional element of committing a separate offense while in possession of a firearm constitutes a greater crime than simple possession.[17]

Our court held that *Lawson* did not apply because section 5-73-103(c)(1)(B) was an independent offense, not an enhancement based on prior possessory offenses. *Lawson* prohibited "stacking" of specific subsequent-offense penalty enhancements like the one in the DWI statute, which operated to convert a misdemeanor to a felony because of multiple

[16]2010 Ark. App. 515.

[17]*Id.* at 3.

recurrences of the same underlying offense within a specified period of time.[18] We decline to expand *Lawson* past that boundary and find that it is inapplicable here. The statutory provision at issue in this case, section 5-73-103(c)(1)(A), denotes that a previous conviction for any violent felony—whether involving a firearm or not—marks a felon's possession of a firearm as an inherently more serious threat[19] and therefore a Class B, as opposed to a Class D, felony.

Appellant argues that he could have received a shorter sentence had his offense been designated Class D possession,[20] which he calls "unenhanced." However, this argument inaccurately defines the higher penalty of a Class B felony[21] as an "enhancement." It is not an enhancement. Felony classes are categories used by the legislature to designate the seriousness of an offense in relation to other offenses.[22] If appellant's argument were accepted,

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[18]*See Lawson*, *supra*; *see also Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003) (holding that statutory sentence enhancement for second-offense domestic battery could not be coupled with the general habitual-offender-enhancement statute); *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003) (holding that a sentencing enhancement for fifth-offense DWI could not be coupled with the general habitual-offender-enhancement statute).

[19]The felon-in-possession-of-a-firearm statute is grouped under subtitle 6, "Offenses Against Public Health, Safety, or Welfare."

[20]Appellant fails to explain how, under the facts of the case and section 5-73-103(c)(1), he could have escaped Class B designation.

[21]Pursuant to Ark. Code Ann. § 5-4-401(a) (Repl. 2006), a Class B felony carries a sentence range of five to thirty years in prison, whereas a Class D felony may not be punished by a sentence greater than six years' imprisonment.

[22]Arkansas felonies are designated as Class Y, A, B, C, or D. Ark. Code Ann. § 5-1-106(b) (Repl. 2006). The sentencing range for a Class Y felony is ten to forty years; Class A, six to thirty years; Class B, five to twenty years; Class C, three to ten years; and Class D, no more than six years.

any felony class above Class D would constitute an "enhancement" that would result in an impermissible stacking when paired with the habitual-offender statute. Stated another way, under appellant's argument, the habitual-offender enhancement could only be applied if all felonies were classed at the same level and had the same sentence range, or, alternatively, the felony classes could be retained but the habitual-offender statute could never be applied to any felony above Class D. We find that either result would be absurd and cannot be seen to reflect the General Assembly's intent when passing the statutes, which was the primary consideration of the supreme court in *Lawson*.[23] The basic rule of statutory interpretation is to give effect to the intent of the legislature,[24] and we will not interpret a statute to yield an absurd result.[25] As in *Hadley*, no impermissible stacking occurred in this case. We hold that appellant's sentence was legal and affirm.

Affirmed.

VAUGHT, C.J., and WYNNE, J., agree.

David Sudduth, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.

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[23]The supreme court applied strict construction to the statutes and looked to other jurisdictions for the purpose of determining legislative intent, noting the rule that courts are not permitted to enlarge the punishment provided by the legislature, either directly or by implication. *Lawson*, *supra*. The court held, "By applying these rules of construction we are satisfied that the legislature did not intend this specific criminal enhancement statute [the DWI statute] should be coupled with our general criminal enhancement statute for the resulting purpose of creating a greater sentence than if either statute had been applied singly." *Id.*

[24]*Montoya v. State*, 2010 Ark. 419.

[25]*State v. Martin*, 2012 Ark. 191 (citing *State v. Owens*, 370 Ark. 421, 260 S.W.3d 288 (2007)).