

No. 1-10-0224

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
April 22, 2011

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. 08 CR 11737
)	
TRAMAIN DRAIN,)	The Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

HELD: Defendant's claim that section 24-1.7 of the Illinois Criminal Code, known as the armed habitual criminal statute, violates federal and State constitutional guarantees of the right to bear arms cannot stand pursuant to *People v. Ross*, 1-09-1463 (Ill. App. March 11, 2011); and defendant conceded issue regarding *voir dire*.

Following a jury trial, defendant Tramain Drain (defendant) was convicted of the offense of armed habitual criminal and was sentenced to 11 years' imprisonment. He appeals, contending

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that the statute under which he was convicted violates federal and State constitutional guarantees of the right to bear arms, and that the trial court committed reversible error by improperly conducting its *voir dire* of the jury. He asks that we vacate his conviction or, alternatively, that we reverse and remand his cause for a new trial. For the following reasons, we affirm.

BACKGROUND

The facts in this cause are not in dispute. Defendant was charged with the offense of armed habitual criminal. During *voir dire*, the trial court advised the venire as a group that defendant was innocent of the offense charged, that this presumption of innocence remained with him throughout every stage of his trial, that the State was required to prove him guilty beyond a reasonable doubt in order to overcome this presumption, and that defendant was not required to prove his innocence or present any evidence on his behalf. Later, as the venire members were questioned, the trial court asked each of them individually if they, first, understood that defendant is presumed innocent, does not have to offer any evidence on his behalf, but does need to be proven guilty beyond a reasonable doubt by the State; and, second, if they would hold defendant's decision not to testify against him. Each of the jurors selected to serve on defendant's jury responded by answering the first question affirmatively and, with respect to the second, that they would not consider defendant's decision not to testify against him.

Defendant's cause then proceeded to trial where only one witness testified. Officer Greg Thomas of the Harvey Police Department testified that, at around midnight on April 25, 2008, he received a dispatch call of shots fired in the area around 155th Street and Turlington in Harvey, Illinois. The dispatch call included a description of the suspects: two men, both African-

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American and both wearing black jackets; additionally, one man was described as wearing black pants, while the other was wearing blue jeans and a red cap. When officer Thomas arrived in the area, he saw two men, matching the descriptions given, near the front steps of an abandoned house at 15531 Turlington. Officer Thomas identified defendant in open court as one of these men, specifically, the man wearing blue jeans and a red cap.

Officer Thomas further testified that, when he called out to defendant and the other man, they began to run. Officer Thomas chased them into an alley. At one point, officer Thomas lost sight of the other man, but was able to continue chasing defendant, who ran until he reached a chain-link fence which enclosed the alley. Officer Thomas averred that defendant attempted to jump over the fence; when he could not, he removed a chrome object from his waistband and tossed it over the fence. Officer Thomas believed the object to be a gun. Officer Thomas began to struggle with defendant, pulled him off the fence and was eventually able to apprehend him. Once defendant was taken into custody, officer Thomas went to the other side of the fence and recovered a .357 chrome Magnum handgun. The gun contained five live rounds of ammunition and one spent cartridge.

The parties stipulated that defendant had been previously convicted to two felonies, which supported the instant charge of armed habitual criminal; however, pursuant to a prior motion by defendant, these felonies were not named before the jury. After the State rested its case-in-chief, defendant, too, rested his case-in-chief. Following the conclusion of trial and deliberation, the jury found defendant guilty.

ANALYSIS

Defendant presents two contentions for our review. We address each separately.

Defendant's first contention is that the armed habitual criminal statute under which he was convicted, namely, section 24-1.7 of the Illinois Criminal Code of 1961, violates his federal and State rights to bear arms. 720 ILCS 5/24-1.7 (West 2008). Citing the United States Supreme Court cases of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020 (2010), he argues that the statute is unconstitutional because it improperly infringes upon the right to possess a firearm for the purpose of self defense either inside or outside the home. We disagree.

The Sixth Division of our court has recently addressed the exact arguments raised by defendant here in *People v. Ross*, No. 1-09-1463 (Ill. App. March 11, 2011). In *Ross*, the defendant, as defendant here, was convicted of the offense of armed habitual criminal. On appeal, he argued, in part, that the armed habitual criminal statute should be declared unconstitutional because it violated his inherent and natural right to keep a firearm for self defense. He too, just as defendant here, relied principally on *Heller* and *McDonald* in support of his argument.

In *Ross*, we conducted a thorough examination of both *Heller* and *McDonald*, as well as other federal and state cases, and concluded that the defendant's arguments could not stand. We noted that *Heller* and *McDonald* were wholly inapplicable because of their limited scope: *Heller* held only that the second amendment protected the right to possess a handgun in the home for self-defense purposes, while *McDonald* overruled a ban on the possession of handguns in the

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home as violative of the second amendment. See *Ross*, No. 1-09-1463, slip op. at 12, 13 (citing *Heller*, 554 U.S. at 598-99, and *McDonald*, ___ U.S. at ___, 130 S. Ct. at 3050). We further explained that *Heller* and *McDonald*'s limited holdings "cannot be overcome" by arguments suggesting that the natural meaning of the phrase "bear arms" includes wearing or carrying a firearm upon one's person, or that it intimates a right to carry a firearm beyond the home. *Ross*, No. 1-09-1463, slip op. at 15. To the contrary, our court has continuously rejected such arguments. See *Ross*, No. 1-09-1463, slip op. at 15 (citing *People v. Dawson*, 403 Ill. App. 3d 499, 508 (2010)).

In addition, we made one concept explicitly, and perfectly, clear in *Ross*: "[o]ur United State Supreme Court has never indicated that a felon can possess a firearm in a home or outside of a home." *Ross*, No. 1-09-1463, slip op. at 12. Rather, not only do *Heller* and *McDonald* specifically recognize that the right to keep and bear arms under the second amendment "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," but their holdings also in no way cast doubt "on longstanding regulatory measures such as [the] prohibition[] on the possession of firearms by felons." (Internal quotation marks omitted.) *Ross*, No. 1-09-1463, slip op. at 14 (quoting *Dawson*, 403 Ill. App. 3d at 509, quoting *McDonald*, ___ U.S. at ___, 130 S. Ct. at 3047, quoting *Heller*, 554 U.S. at 625-26). To the contrary, forbidding felons from possessing firearms is a lawful exercise of the government's inherent power of restraint upon private rights in favor of the public's general welfare; it is, simply, "good sense to have such laws." *Ross*, No. 1-09-1463, slip op. at 13. Ultimately, *Ross* concluded by holding that "the armed habitual criminal statute is a constitutionally permissible

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restriction of the second amendment right to bear arms, as a valid exercise of [the] government's right to protect the health, safety, and general welfare of its citizens." *Ross*, No. 1-09-1463, slip op. at 17.

We find no reason, and defendant here presents us with none, to depart from our timely, clear and well-reasoned holding in *Ross*. Therefore, we reaffirm that the armed habitual criminal statute does not violate federal or State constitutional guarantees of the right to bear arms. See *Ross*, No. 1-09-1463, slip op. at 17, 21; see also *People v. Davis*, No. 1-09-1973, slip op. at 7 (Ill. App. March 31, 2011) (holding that "[t]he armed habitual criminal statute *** comport[s] with the second amendment").

Defendant's second, and final, contention on appeal is that the trial court committed reversible error in its conduct with the venire. Admitting that he did not properly preserve the issue for review, defendant nonetheless claims that, in its questioning of potential jurors during *voir dire*, the court failed to afford each potential juror an opportunity to indicate whether he/she understood and accepted the four *Zehr* principles of a fair trial as embodied in Illinois Supreme Court Rule 431(b), and that it improperly collapsed the first three principles into one compound question in direct violation of *Zehr*. See, e.g., *People v. Zehr*, 103 Ill. 2d 472 (1984); Ill. S. Ct. R. 431(b) (eff. May 1, 2007). In response, the State, citing our state supreme court's recent decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), argues that defendant has forfeited this argument for review due to a failure to preserve it for appeal, that it does not amount to plain error, and that it is not a basis for the reversal of his conviction.

In his reply brief before our court, defendant acknowledges *Thompson* and its holding

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that, because a trial court's failure to strictly comply with Rule 431(b) does not implicate a fundamental right or constitutional protection, such an error is not reviewable under the second prong of a plain error analysis.¹ Defendant then concludes his reply brief by conceding the issue he raised regarding the trial court's conduct in his case, stating he "does not persist in his original argument." With this concession, we too find no error with the trial court's conduct herein of its *sua sponte* duty to question the venire members with respect to the *Zehr* principles as contained in Rule 431(b), and consider the issue moot.

CONCLUSION

Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

¹Defendant makes clear that he filed his opening brief on appeal before *Thompson* was decided.