

No. 1-09-2538

**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).

SIXTH DIVISION  
JANUARY 28, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 6237
	)	
CHARLES COSSOM,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

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**O R D E R**

*HELD:* Armed habitual criminal conviction affirmed over claim that it violated the *ex post facto* clauses of the Illinois and federal constitutions.

Following a bench trial, defendant Charles Cossom was convicted of being an armed habitual criminal, unlawful use of a weapon by a felon, possession of a defaced firearm, and

possession of a controlled substance. The court merged his weapons convictions into the offense of armed habitual criminal, then sentenced him to 10 years' imprisonment for that offense and a 5-year concurrent term for possessing a controlled substance. On appeal, defendant contends that his conviction for being an armed habitual criminal violates the *ex post facto* clauses of the Illinois and federal constitutions.

The evidence adduced at trial showed that on March 10, 2008, Chicago police officers executed a search warrant at the Chicago Housing Authority apartment where defendant and his girlfriend were living at 2930 West Harrison Street in Chicago. The officers recovered a clear plastic bag containing twelve smaller ziploc bags which held an off-white, rock-like substance the officers believed to be crack cocaine from the pocket of a man's coat hanging in the closet. They also discovered a .45 caliber, blue steel, High Point semi-automatic pistol, which was concealed in a red laundry bag in the closet. The gun contained eight live rounds, and the serial number had been defaced.

The parties stipulated to the scientific analysis of the contents of the ziploc bags which revealed that eight of the items weighed 1.2 grams and tested positive for cocaine. The State also entered into evidence, certified copies of defendant's two prior convictions for possession of a controlled substance and three prior convictions for possession of a controlled substance with intent to deliver, the most recent of which

occurred in 2004 and 2007. The trial court entered judgments of conviction on the offense of armed habitual criminal and the lesser-included offense of possession of a controlled substance.

On appeal, defendant solely contends that his conviction for being an armed habitual criminal violates the *ex post facto* clauses of the Illinois and federal constitutions. Although defendant did not raise and preserve this issue in the circuit court, a challenge to the constitutionality of a statute may be raised at any time (*People v. Bryant*, 128 Ill. 2d 448, 454 (1989)), and we review such a challenge *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008).

A person is guilty of being an armed habitual criminal if he is found guilty of possessing a firearm after having previously been convicted of two or more violations of the Illinois Controlled Substances Act that were punishable as Class 3 felonies or higher. 720 ILCS 5/24-1.7(a)(3) (West 2008).

Defendant maintains that his armed habitual criminal conviction violates the proscription against *ex post facto* legislation because it is predicated, in part, on his 2004 conviction for possession of a controlled substance with intent to deliver, which occurred prior to the enactment of the armed habitual criminal statute in Public Act 94-398 (eff. Aug. 2, 2005).

This same argument was made and rejected in *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009), whose reasoning was

found compelling and adopted by this court in *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009) and *People v. Adams*, No. 1-08-0455, slip op. at 12 (Ill. App. Sept. 17, 2010). In these cases, we held, to the contrary, that the armed habitual criminal statute does not violate the constitutional prohibitions against *ex post facto* laws because it does not punish prior offenses, but rather, punishes the new, separate act of possessing a firearm. *Bailey*, 396 Ill. App. 3d at 464; *Leonard*, 391 Ill. App. 3d at 931. In essence, under the statute, defendant's prior convictions serve as elements of the offense, while the punishment results from a new act which occurred after the effective date of the statute. *Leonard*, 391 Ill. App. 3d at 932.

Defendant, nonetheless, takes issue with these holdings, arguing that they are suspect in light of *People v. Levin*, 157 Ill. 2d 138, 149 (1993) and *People v. Dunigan*, 165 Ill. 2d 235, 242 (1995), where the supreme court stated expressly that prior convictions were not elements of the charged offense. He claims that the supreme court was thereby implying that the use of prior convictions as elements of an offense violates the constitutional prohibition against *ex post facto* laws.

We continue to find no merit to this argument and defendant's reliance on *Levin* and *Dunigan* misplaced. *Bailey*, 396 Ill. App. 3d at 464, citing *Leonard*, 391 Ill. App. 3d at 932. *Levin* and *Dunigan* involved a habitual criminal statute that was a sentencing-enhancement, whereas the armed habitual criminal

statute creates a substantive offense that punishes defendant for the new offense and not for his earlier convictions. *Bailey*, 396 Ill. App. 3d at 464, citing *Leonard*, 391 Ill. App. 3d at 932.

Accordingly, we have determined that the *Levin* and *Dunigan* courts did not state that habitual criminal legislation cannot include prior convictions as elements of an offense (*Bailey*, 396 Ill. App. 3d at 464), but rather, were merely indicating that the statute in question involved a sentencing-enhancement, not a substantive offense (*Leonard*, 391 Ill. App. 3d at 932). In the case of a substantive offense, prior convictions can serve as elements of an offense punishing a new and separate act that occurred after the effective date of the statute. *People v. McCrimmon*, 150 Ill. App. 3d 112, 117 (1986).

Here, defendant was punished for the new offense while already having been convicted of two prior enumerated felonies, of which he had fair and ample warning. *Bailey*, 396 Ill. App. 3d at 464. Accordingly, we find that the armed habitual criminal statute, as applied, did not violate the *ex post facto* clauses of the Illinois and United States constitutions.

We therefore affirm the judgment of the circuit court of Cook County.

Affirmed.