

FIFTH DIVISION
June 29, 2012

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 07 CR 3645
KENNETH MAYS,)	
)	
Defendant-Appellant.)	Honorable
)	Angela Munari Petrone,
)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and McBride concurred in the judgment.

ORDER

¶ 1 **HELD:** Armed habitual criminal and U UW by a felon statutes do not violate the second amendment or *ex post facto* laws; defendant was not denied his constitutional right to self-representation; defendant's 30-year sentence was not excessive; defendant's U UW by a felon conviction merges into his conviction for armed habitual criminal.

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¶ 2 Following a jury trial, defendant Kenneth Mays was convicted of unlawful use of weapon by a felon and of being an armed habitual criminal and was sentenced to a Class X sentence of 30 years' imprisonment. On appeal, defendant contends that: (1) the offenses of armed habitual criminal and unlawful use of a weapon by a felon violate the second amendment right to bear arms; (2) the offense of armed habitual offender violates the *ex post facto* clause of the United States and Illinois constitutions because predicate prior convictions predate the legislation; (3) denial of defendant's pretrial request to represent himself violated his constitutional right to self-representation; (4) his 30-year maximum sentence was excessive; and (5) his convictions should have been merged under the one-act, one-crime doctrine. For the following reasons, we affirm in part, vacate in part, and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Prior to the commencement of trial, there were several pretrial proceedings. Defendant's motion to suppress evidence and statements was denied. There was also a fitness evaluation and a fitness hearing held at which defendant was found fit for trial. On April 22, 2009, defendant first indicated that he wished to represent himself *pro se*, because he would put more effort into the paperwork and investigation of witnesses than his attorney would and he was not being kept informed about what was going on with his case. After admonishing defendant that his attorney was skilled and that trials were usually a disaster for defendants who proceeded *pro se*, the trial court then asked defendant to think about the decision until the next court date. At the next court date, there was no discussion of defendant's request to waive counsel and the case was subsequently transferred to a different judge.

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¶ 5 On March 2, 2010, defendant told the new judge that he wanted to proceed *pro se*. The trial court told defendant that his attorneys had done a "superb" job so far, that they had experience and training, and that the court would not appoint standby counsel if defendant waived counsel. The court then told defendant to work with his attorney and that they would discuss the matter at the next court date. On March 16, 2010, the trial court again admonished defendant regarding self-representation and told him that he would have two weeks to think about his decision. On March 22, 2010, defendant advised the court that he would stay with his attorney.

¶ 6 On April 26, 2010, defendant again indicated to the trial court that he wished to terminate his attorneys because he had not been shown discovery and there was a conflict of interest. The trial court admonished defendant regarding the possible sentences he could face, his lack of experience compared to that of his attorneys, and arguments he could lose on appeal. The trial court then stated that it would not allow defendant to represent himself, because his attempt to proceed *pro se* was an attempt to stall the proceedings and "thwart the effective administration of justice." The court further addressed defendant's allegations of his attorneys' ineffectiveness and conflict of interest. Defense counsel denied allegations that they would be biased against defendant because of his failed attempts to proceed *pro se*. Defendant identified various discovery items he wished to see, and described a witness from his children's daycare that he wanted to have testify regarding his relationship with the complainant. Defense counsel responded by indicating various visits with defendant and trial preparation, including reviewing discovery with defendant and their attempts to locate the witness. The trial court directed

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defense counsel to review discovery and court transcripts with defendant, and gave the defense an additional day to look into the potential witness.

¶ 7 Briefly stated, the evidence presented at trial established that on January 17, 2007, at approximately 10 a.m., defendant held a gun to the head of his ex-girlfriend, Cequita Hill, and pulled the trigger, but the gun misfired. A few hours later, Hill directed police to defendant's mother's house where a loaded handgun was recovered from under a bathtub. Defendant, who was present, was arrested. The State entered certified copies of two of defendant's prior convictions, case number 99 CR 0397901 for possession of a controlled substance with intent to deliver and case number 04 CR 0124301 for unlawful use of a weapon by a felon. Defendant was subsequently acquitted of attempted murder but convicted of unlawful use of a weapon by a felon and of being an armed habitual criminal. Following the denial of his motion for new trial, defendant was sentenced to a 30-year term of imprisonment. Defendant's motion to reconsider was denied on June 21, 2010, and this timely appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant does not challenge the sufficiency of the evidence showing that he possessed firearms and that he had prior felony convictions. He does, however, raise the following issues for our consideration: (1) whether the offenses of armed habitual criminal and unlawful use of a weapon by a felon violate his second amendment right to bear arms; (2) whether the offense of armed habitual criminal violates the *ex post facto* clause of the United States and Illinois constitutions because predicate prior convictions predate the legislation; (3) whether the denial of defendant's pretrial request to represent himself violated his constitutional

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right to self-representation; (4) whether his 30-year maximum sentence was excessive and (5) whether his convictions should merge under the one-act, one-crime doctrine.

¶ 10 The Right to Bear Arms

¶ 11 Defendant first contends that the armed habitual criminal statute and the unlawful use of a weapon by a felon statute violate his constitutional right to bear arms. He argues that the two statutes criminalize a substantial amount of protected conduct, namely the right to bear handguns in case of confrontation.

¶ 12 A statute is presumed constitutional, and the party challenging it bears the burden of proving the statute unconstitutional. *People v. Tolentino*, 409 Ill. App. 3d 598, 507 (2011). We review the constitutionality of a statute *de novo*. *People v. Davis*, 408 Ill. App. 3d 747, 749 (2011). Further, we apply intermediate scrutiny to determine whether the statutes at issue violate the second amendment. *Davis*, 408 Ill. App. 3d at 749. Under this standard of review, "[t]he State must assert a substantial interest to be achieved by restrictions" on the constitutional right, and "the regulatory technique must be in proportion to that interest." *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 564 (1980). Supreme Court decisions "require * * * a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989), (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

¶ 13 The unlawful use of a weapon (UUWF) statute prohibits the possession of firearms by any person previously convicted of any felony. 720 ILCS 5/24-1.1(a) (West 2006). The armed

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habitual criminal statute establishes harsher penalties for possession of a firearm if the possessor has two or more convictions for any of the felonies listed in the statute, including aggravated discharge of a firearm and delivery of a controlled substance, if the controlled substance offense is a Class 3 or higher level offense. 720 ILCS 5/24-1.7(a) (West 2006). Both statutes clearly apply to defendant in this case.

¶ 14 The UUWF statute serves to protect the public from the danger posed when convicted felons possess firearms. *Davis*, 408 Ill. App. 3d at 750. The legislature similarly intended the armed habitual criminal statute to help protect the public from the threat of violence that arises when repeat offenders possess firearms. *Davis*, 408 Ill. App. 3d at 750. Both statutes forbid possession of firearms only by persons proven to have committed felonies. *Davis*, 408 Ill. App. 3d at 750. The United States Supreme Court has indicated in *dicta* that the right to bear arms does not cast doubt on longstanding prohibitions on the possession of firearms by felons. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Because judicial *dicta* carries dispositive weight in an inferior court (*People v. Williams*, 204 Ill. 2d 191, 206 (2003)), we hold that the armed habitual criminal statute and the UUWF statute do not, facially, violate the second amendment.

¶ 15 Defendant also challenges the statutes as applied to him and others similarly situated because they bar him from ever lawfully possessing a handgun because of his two prior convictions. We reject this argument also as the Supreme Court has recognized that certain classes of people may be disqualified from the exercise of second amendment rights (*Heller*, 554 U.S. at 635), and that federal and state legislatures and local governments have police powers to

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pass laws that promote the health, safety and general welfare of their citizens, and that the police power includes the power to regulate certain aspects of gun possession and ownership (*McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020, 3047 (2010)). See also *People v. Spencer*, 2012 IL App (1st) 102094.

¶ 16 We conclude that the statutes at issue are substantially related to the important governmental objective of protecting the health, safety and general welfare of its citizens, and the fit between the UUWF and armed habitual criminal statutes and that governmental objective is reasonable. *Spencer*, 2012 Ill App (1st) 102094, ¶31. Accordingly, the statutes are constitutional.

¶ 17 The Armed Habitual Criminal Statute and the *Ex Post Facto* Clause

¶ 18 Next, defendant contends that the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois constitutions because predicate prior convictions predate the legislation.

¶ 19 We review this constitutional issue *de novo*. *Davis*, 408 Ill. App. 3d at 751.

¶ 20 The armed habitual criminal statute became effective on August 2, 2005, and created the offense of an armed habitual criminal. *Ross*, 407 Ill. App. 3d at 943. The elements of the offense are as follows: (1) possession of a firearm and (2) at least two prior convictions for certain enumerated offenses. *Ross*, 407 Ill. App. 3d at 943. The statute does not require that the prior offenses occurred after the effective date of the statute. *Ross*, 407 Ill. App. 3d at 943.

¶ 21 Illinois is prohibited from passing an *ex post facto* law by its own constitution and the Constitution of the United States. U.S. Const., art. , §§ 9 and 10; Ill. Const. 1970, art. I, §16. An

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ex post facto law is one which punishes prior acts that were not criminal when they were accomplished; aggravates a crime, or makes it greater than it was when committed, increases the punishment for a crime and applies the increases to crimes committed before the enactment of the law; or alters the rules of evidence to require less or different evidence than required when the crime was committed. *Tolentino*, 409 Ill. App. 3d at 607.

¶ 22 The evidence presented at trial established that defendant possessed a firearm on January 17, 2007. The State also introduced certified copies of defendant's convictions for a Class 2 possession of a controlled substance under case number 99 CR 0397901, and aggravated unlawful use of a weapon under case number 04 CR 0124301. Defendant argues that application of the armed habitual criminal statute to him violates the prohibition against *ex post facto* laws since one of his prior convictions, which occurred before the enactment of the statute, was an element of the armed habitual criminal offense.

¶ 23 Similar arguments challenging the armed habitual criminal statute have been rejected by this court several times. See *Tolentino*, 409 Ill. App. 3d at 609; *People v. Coleman*, 409 Ill. App. 869, 879 (2011); *Ross*, 407 Ill. App. 3d at 945; *Davis*, 408 Ill. App. 3d at 752; *People v. Adams*, 404 Ill. App. 3d 405 (2009); *People v. Bailey*, 396 Ill. App. 3d 459 (2009); *People v. Leonard*, 391 Ill. App. 3d 926 (2009). Despite this, defendant contends that this court should not follow these prior decisions because they conflict with *ex post facto* principles as set forth in decisions from the United States Supreme Court and the Illinois Supreme Court.

¶ 24 We are unpersuaded by defendant's argument. This court has repeatedly noted that challenges to recidivist statutes have consistently withstood challenges because they punish

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defendant for a new and separate crime, not for the offenses committed before the statute was enacted. *Davis*, 408 Ill. App. 3d at 751. In such statutes, as here, defendant's prior convictions are only an element of the new crime. *Davis*, 408 Ill. App. 3d at 751. A defendant's prior convictions count as elements of a violation of the armed habitual criminal statute, as the prior offenses establish that the defendant fits in the class of persons who must not possess firearms. *Davis*, 408 Ill. App. 3d at 751-52. The defendant's act that violates the statute, possession of a firearm by a twice-convicted felon, must take place entirely after the enactment of the armed habitual criminal statute. *Davis*, 408 Ill. App. 3d at 752. Accordingly we too hold that the armed habitual criminal statute does not violate the United States or Illinois constitutional prohibitions against *ex post facto* laws.

¶ 25 Defendant's Right to Self-Representation

¶ 26 Defendant further contends that his constitutional right to self-representation was violated when the trial court denied his unequivocal pretrial requests to represent himself. We disagree.

¶ 27 A defendant has a constitutional right to represent himself. *People v. Span*, 2011 IL App. (1st) 083037, ¶ 59. The determination of whether a defendant's constitutional rights have been violated is subject to *de novo* review. *People v. Leeper*, 317 Ill. App. 3d 475, 480 (2000). A defendant wishing to represent himself must relinquish his right to counsel knowingly and intelligently, and his waiver of counsel must be clear and unequivocal, not ambiguous. *Span*, 2011 IL App (1st) 083037, ¶ 59. The purpose of requiring that a criminal defendant make an unequivocal request to waive counsel is to: (1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the

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defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*. *People v. Mayo*, 198 Ill. 2d 530, 538 (2002). Before being permitted to represent themselves, defendants must knowingly and intelligently relinquish their right to counsel. *Leeper*, 317 Ill. App. 3d at 480. The determination as to whether the defendant made an intelligent waiver of his right to counsel and invoked his right of self-representation is reviewed for an abuse of discretion. *Span*, 2011 IL App (1st) 083037, ¶ 55.

¶ 28 The timing of a request to proceed *pro se* has great significance. *Leeper*, 317 Ill. App. 3d at 481. Courts have held that such a " 'request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun.' " *Leeper*, 317 Ill. App. 3d at 481, (quoting *People v. Burton*, 184 Ill. 2d 1, 24 (1998)). After that time, a court has the discretion to deny a defendant's request to proceed *pro se*. *Leeper*, 317 Ill. App. 3d at 481. Such discretion is necessary so that a defendant cannot use this right to frustrate the effective prosecution of his case. *Leeper*, 317 Ill. App. 3d at 481.

¶ 29 Here, the record reflects that defendant had previously made and withdrew two requests to represent himself before he made his last request to represent himself on the day before the trial was scheduled to begin. The record reveals that this request was two weeks after defendant requested to go to the hospital because he was stressed out due to his pending situation. After being admonished by the court, defendant identified various discovery items he wished to see and described a potential witness he wanted located. After defense counsel responded to defendant's statements, the trial court directed counsel to review discovery and court transcripts with defendant, and gave the defense an additional day to look into the potential witness. Most

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significantly, defendant never renewed his request to proceed *pro se* at any time. We find that the record does not support the conclusion that defendant's waiver of counsel was unequivocal. At best, defendant expressed his frustration with his trial counsel in responding to his requests to review discovery and transcripts, failure to locate a potential witness, as well as their purported conflict of interest because he had previously asked to represent himself. Once defendant reviewed discovery and transcripts and counsel received an additional day to attempt to locate the witness, he never asked to represent himself again, and did not object to representation by his appointed attorneys again. Thus, contrary to defendant's contention, the trial court did not deny his constitutional right to self-representation. See *People v. Foster*, 391 Ill. App. 3d 487, 492-93 (2009).

¶ 30 Excessive Sentence

¶ 31 Defendant further contends that his 30-year sentence was excessive because the two prior felonies presented as evidence by the State were the only qualifying felonies in his criminal background. He argues that prior to the instant case, he had never been sentenced to more than three years imprisonment; the sentence does not reflect defendant's rehabilitative potential; and the 30-year sentence is disproportionate to the seriousness of the offense. Defendant requests that this court reduce his sentence or remand for resentencing.

¶ 32 Defendant was sentenced to a Class X term of imprisonment based on his conviction for being an armed habitual criminal. 720 ILS 5/24-1.7 (West 2010). The sentencing range for a Class X felony is not less than 6 nor more than 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2010).

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¶ 33 It is well settled that the trial court has broad discretionary powers in imposing a sentence and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court is granted such deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. *Stacey*, 193 Ill. 2d at 209. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Stacey*, 193 Ill. 2d at 209. Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Stacey*, 193 Ill. 2d at 209.

¶ 34 Although the trial court is vested with wide discretion in sentencing, it is not limitless. *Stacey*, 193 Ill. 2d at 209. A sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 35 In the case at bar, in sentencing defendant, the trial court noted defendant's lengthy criminal history, including juvenile convictions of aggravated assault, possession of a controlled substance, battery, aggravated battery, and two convictions for delivery of a controlled substance. Defendant's adult criminal history included two misdemeanor convictions and one felony conviction for criminal damage to property, domestic battery, possession of cannabis, possession of a controlled substance and unlawful use of a weapon by a felon. The trial court further noted that any time defendant had been sentenced to probation or conditional discharge, it was always

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terminated unsatisfactorily. Moreover, defendant was on parole for another felony when he committed the instant offense. Additionally, while the instant case was pending, defendant was charged with six additional felonies while incarcerated, five criminal damage to government property and one aggravated battery of a peace officer. Defendant pleaded guilty to the aggravated battery case prior to sentencing on the instant case, the others were taken into consideration for purposes of sentencing on this case in lieu of proceeding independently on them. Testimony on two of those cases was presented during the sentencing hearing and detailed how on one occasion, defendant started a fire in his jail cell, and on another, defendant broke a sprinkler head located in the jail cell and jumped from his tier to a tier below.

¶ 36 The trial court stated that even though the jury rejected the attempted murder charge, it was not going to find that Hill was dishonest in her testimony that defendant put a gun to her head in front of her children and pulled the trigger. The trial court further stated that it did not believe that defendant had accepted any responsibility for his actions that had gotten him there, and that his use of aliases reflected an inability to be truthful. The trial court found that defendant's conduct of placing a loaded gun in his mother's apartment around children harmed others, that defendant was becoming increasingly violent in his commission of offenses, and that a lengthy sentence was necessary to deter others from committing the same crime. The trial court further found that no statutory mitigation factors were present. However, the trial court took into account defendant's difficult childhood, his relationship with his mother, father and grandmother; jobs that defendant held before being arrested, as well as a job that defendant held for one month prior to incarceration on this case; and defendant's alcohol dependency, drug use and gang

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affiliation. The court found that defendant's conduct caused harm to others; defendant did not act under any provocation; there were no grounds under which to excuse or justify his conduct; his conduct was not induced or facilitated by another person; defendant had not compensated the victim; defendant had a substantial criminal history; defendant's conduct was the result of circumstances very likely to recur given defendant's past abuse of Hill; imprisonment of defendant would present no excessive hardship to defendant's dependents because he was not financially supporting them; imprisonment would not endanger defendant's health; and there was a need to protect Hill and society from defendant's repeated violent behavior.

¶ 37 We agree with the State that considering the discretion vested in the trial court, the factors presented in aggravation and mitigation and that the sentence imposed falls within the statutory guidelines, the sentence is not excessive. The court considered the mitigating evidence presented by defendant, noting however, that none of the statutory mitigation factors were present.

Additionally, defendant had a lengthy criminal history, both juvenile and adult, was on parole when the current offense was committed and committed six felonies while incarcerated during the pendency of the instant case. The facts disclose that defendant put a gun to Hill's head and pulled the trigger in front of her children and there is a lengthy history of abuse between Hill and defendant. We conclude that the trial court did not abuse its discretion in imposing a 30-year sentence.

¶ 38 One-Act, One-Crime Doctrine

¶ 39 Finally, defendant contends that his convictions for unlawful use of a weapon by a felon should merge into a single conviction for armed habitual criminal because there was only one

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handgun. The State concedes that under the one-act, one-crime doctrine, defendant's conviction for unlawful use of a weapon by a felon must be merged into his conviction for armed habitual criminal and that the corresponding sentence should be vacated.

¶ 40 Here, defendant was convicted of both unlawful use of a weapon by a felon and armed habitual criminal for conduct arising from a single act. Accordingly, defendant should have only been convicted of being an armed habitual criminal, and the conviction for unlawful use of a weapon by a felon should have merged into the greater offense. See *People v. James*, 362 Ill. App. 3d 250, 255-56 (2005). Additionally, under the one-act, one-crime doctrine, sentence should be imposed on the most serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). As such, the five-year sentence for unlawful use of weapon must be vacated. As this court has the authority to correct defendant's mittimus without the need for remand (*People v. Magee*, 374 Ill. App. 3d 1024, 1035-36 (2007)), we order the mittimus corrected to reflect that defendant's conviction for unlawful use of a weapon by a felon merges into his conviction for armed habitual criminal and that the corresponding sentence be vacated.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part, defendant's conviction for unlawful use of a weapon by a felon is merged into his conviction for armed habitual criminal, and the mittimus is corrected in accordance with this order.

¶ 43 Affirmed in part; vacated in part; mittimus corrected.