

No. 1-10-2029

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 19950
)	
TIRON WASHINGTON,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for the offense of armed habitual criminal did not violate the *ex post facto* clauses of the United States and Illinois constitutions or the constitutional right to bear arms. Where the trial court found defendant guilty of unlawful use of a weapon by a felon and possession of a defaced firearm, but did not impose sentence on those counts, no final, appealable judgment exists and the appeal as to those counts is dismissed.
- ¶ 2 Following a bench trial, defendant Tiron Washington was found guilty of one count each of armed habitual criminal, unlawful use of a weapon (UW) by a felon, and possession of a defaced firearm. The trial court merged the counts and sentenced defendant to seven years'

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imprisonment on the armed habitual criminal count. On appeal, defendant contends that his conviction for the offense of armed habitual criminal violates the *ex post facto* clauses of the federal and Illinois constitutions, as well as the constitutional right to bear arms. Defendant also challenges his guilty findings on the charges of UUC by a felon and possession of a defaced firearm. He contends that the UUC by a felon statute violates his right to bear arms; that the State failed to prove he knew the serial number on the revolver found in his home had been defaced; and that if such knowledge is not required for conviction, the statute creating the offense of possessing a defaced firearm is unconstitutional.

¶ 3 For the reasons that follow, we affirm.

¶ 4 The underlying facts in the instant case are not in dispute and will be set forth here only as necessary. Defendant's conviction arose from the execution of a search warrant at his Chicago home on September 30, 2009. At trial, Chicago police officer Thomas Lieber testified that in the course of executing the search, he found a revolver with a defaced serial number under a couch cushion in the living room. Officer Reginald Ward later interviewed defendant. After being informed of his *Miranda* rights, defendant told Officer Ward that "he was going to take the weight, the guns were his." Special Agent Salvador Gonzalez, of the U.S. Department of Agriculture, was also present for the interview. He testified that defendant said "those were his guns" and "he was going to take the weight." Defendant presented the testimony of his cousin, Terry Smith, who lived across the street. Smith testified that about four days prior to the search, he put his gun under the couch in defendant's living room. Finally, the State introduced into evidence a certified copy of conviction for defendant for aggravated unlawful use of a weapon, as well as a class 3 felony conviction for manufacture and delivery of cannabis.

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¶ 5 The trial court found defendant guilty of one count each of armed habitual criminal, UUC by a felon, and possession of a defaced firearm. The trial court merged the counts and imposed a sentence of seven years' imprisonment on the armed habitual criminal count.

¶ 6 On appeal, defendant raises issues relating to each of the offenses of which he was found guilty. We begin by addressing his two-pronged challenge to his conviction for the offense of armed habitual criminal.

¶ 7 Defendant contends that his conviction for armed habitual criminal violates the *ex post facto* clauses of the United States and Illinois constitutions, as his predicate prior convictions each occurred before the effective date of the legislation creating the offense. Defendant acknowledges that this court has consistently held that the armed habitual criminal statute does not violate *ex post facto* principles. See, e.g., *People v. Ross*, 407 Ill. App. 3d 931, 944-45 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010); *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 931-32 (3d Dist. 2009). Nevertheless, he argues that in this line of cases, this court has overlooked our supreme court's decisions in *People v. Dunigan*, 165 Ill. 2d 235 (1995), and *People v. Levin*, 157 Ill. 2d 138 (1993), which held that a substantive criminal offense that punishes previous conduct is unconstitutional *ex post facto* legislation.

¶ 8 Defendant's precise argument was addressed and rejected in *People v. Tolentino*, 409 Ill. App. 3d 598, 608-09 (2011). In *Tolentino*, as here, the defendant argued that the cases upholding the armed habitual criminal statute against *ex post facto* challenges should be disregarded as cases decided in contravention of *Dunigan* and *Levin*. *Tolentino*, 409 Ill. App. 3d at 608. The *Tolentino* court was not persuaded by the argument. Noting that the legislation at issue in *Dunigan* and *Levin* dealt only with sentencing, the *Tolentino* court concluded that *Dunigan* and

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Levin did not prohibit the use of prior convictions as an element of a habitual criminal offense. *Tolentino*, 409 Ill. App. 3d at 609.

¶ 9 We agree with the reasoning of *Tolentino* and see no reason to depart from the long line of cases holding that the armed habitual criminal statute does not violate *ex post facto* principles. Defendant's contention fails.

¶ 10 The second prong of defendant's challenge to his conviction for armed habitual criminal is a contention that the statute creating the offense violates the second amendment. Defendant did not raise this issue in the trial court. However, a constitutional challenge to a statute may be raised at any time. *People v. Ross*, 407 Ill. App. 3d 931, 938 (2011). Our review of the constitutionality of a statute is *de novo*. *Ross*, 407 Ill. App. 3d at 938.

¶ 11 Defendant argues that the criminalization of possession of a firearm by a felon is an unconstitutional infringement on the right to bear arms. In making his arguments, defendant relies on *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010). In *Heller*, the Supreme Court held that the second amendment protects the right to possess a handgun in the home for self-defense, and struck down a District of Columbia ordinance that completely banned handgun possession in the home and required any lawful firearm in the home to always be disassembled or bound by a trigger lock. *Heller*, 554 U.S. at 628, 635. In *McDonald*, the Supreme Court held that the due process clause of the fourteenth amendment incorporated the second amendment right recognized in *Heller*. *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3050.

¶ 12 Based on *Heller* and *McDonald*, defendant asserts that his mere possession of a handgun is conduct protected at the very core of the second amendment. Therefore, he argues, his conviction is unconstitutional, as no evidence was adduced to suggest that he possessed a

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handgun for an unlawful purpose. According to defendant's argument, he was convicted and sentenced not for abusing an enumerated right, but simply for exercising it.

¶ 13 This court has previously considered and rejected similar constitutional challenges to the armed habitual criminal statute based on *Heller* and *McDonald*. For example, in *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011), this court held that "the armed habitual criminal statute is a constitutionally permissible restriction of the second amendment right to bear arms, as a valid exercise of government's right to protect the health, safety, and general welfare of its citizens. The restriction serves a substantial governmental interest and is proportional to the interest served." In *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011), this court found the analysis in *Ross* to be thoughtful and well-reasoned, and adopted its conclusion upholding the constitutionality of the armed habitual criminal statute.

¶ 14 We see no basis to depart from *Ross* and *Coleman*. The Supreme Court did not hold in *Heller* or *McDonald* that a felon may possess a firearm. Indeed, the *Heller* court stated in *dicta* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626. The Supreme Court repeated this language from *Heller* in *McDonald*, emphasizing that its decisions did not "imperil every law regulating firearms." *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3047.

¶ 15 Defendant acknowledges the above statements in *Heller* and *McDonald*, but argues that they are *dicta* and do not apply here. We are not persuaded by defendant's argument that the Supreme Court's failure to specifically identify a law prohibiting a felon from keeping arms for the core lawful purpose of self-defense makes *Heller* and *McDonald* inapplicable. Moreover, judicial *dicta*, such as the statements in *Heller* and *McDonald*, should usually carry dispositive weight in an inferior court. *People v. Robinson*, 2011 IL App (1st) 1100078, ¶ 25.

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¶ 16 We are also not persuaded by defendant's argument that he was wrongfully convicted and sentenced simply for exercising an enumerated right. In making this argument, defendant relies upon *De Jonge v. Oregon*, 299 U.S. 353 (1937). In *De Jonge*, the defendant was charged with and convicted of assisting in a Communist Party meeting. *De Jonge*, 299 U.S. at 362. The Supreme Court held that the fundamental right of peaceable assembly is cognate to the rights of free speech and free press and determined that the criminal syndicalism statute under which the defendant had been convicted was unconstitutional as applied, as the defendant was entitled to take part in a peaceable assembly having a lawful purpose. *De Jonge*, 299 U.S. at 364-65. In contrast to *De Jonge*, the Supreme Court has not recognized a fundamental right to carry firearms extending to felons. Therefore, *De Jonge* is distinguishable from the instant case. Defendant's argument fails.

¶ 17 Defendant next challenges the trial court's finding that he was guilty of UUW by a felon. He contends that the statute creating the offense violates the right to bear arms protected by the second amendment. As with his challenge to the armed habitual criminal statute, defendant relies upon *Heller* and *McDonald* in making his arguments.

¶ 18 The final, appealable judgment in a criminal case is the sentence and generally, in the absence of imposition of a sentence, an appeal cannot be entertained. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984); *People v. Johnson*, 392 Ill. App. 3d 127, 132 (2009). Here, the trial court found defendant guilty of UUW by a felon, but did not impose a sentence on that count. Accordingly, defendant's appeal from the finding of guilty of UUW by a felon must be dismissed. *Caballero*, 102 Ill. 2d at 51.

¶ 19 Even if we were to find one of the exceptions to *Caballero* applied and reach defendant's argument, it would not succeed. In *People v. Robinson*, 2011 IL App (1st) 1100078, ¶ 26, this court determined that the UUW by a felon statute constitutes a valid exercise of the government's

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right to protect the health, safety and general welfare of its citizens, and found that the statute is a constitutionally permissible restriction of the second amendment right to bear arms. The *Robinson* court found that nothing in *Heller* or *McDonald* stood against its findings. *Robinson*, 2011 IL App (1st) 1100078, ¶ 26. Moreover, the *Robinson* court specifically rejected the argument that the Supreme Court's *dicta* in *Heller* and *McDonald* did not apply. *Robinson*, 2011 IL App (1st) 1100078, ¶ 25. In light of *Robinson*, defendant's argument that the UUW by a felon statute violates the second amendment fails.

¶ 20 Finally, defendant challenges the trial court's finding that he was guilty of possessing a defaced firearm. He contends that the guilty finding must be reversed because there was insufficient evidence to prove he knew the serial number on the revolver found in his home had been defaced. In the alternative, defendant contends that if the statute creating the offense is found not to require knowledge, it is unconstitutional because it penalizes innocent conduct without requiring a culpable mental state.

¶ 21 As with the guilty finding for UUW by a felon, we find that we cannot review defendant's guilty finding for possessing a defaced firearm because the trial court did not impose sentence on that count. *Caballero*, 102 Ill. 2d at 51; *Johnson*, 392 Ill. App. 3d at 132. The appeal from this guilty finding must be dismissed. *Caballero*, 102 Ill. 2d at 51.

¶ 22 Moreover, were we to reach defendant's arguments, they would fail on their merits. The resolution of the issues raised by defendant would be dictated by this court's decision in *People v. Stanley*, 397 Ill. App. 3d 598 (2009). In *Stanley*, as here, the defendant contended that he had not been proved guilty of possessing a defaced firearm where there was no proof of his knowledge that the marks had been scratched off the gun he possessed. *Stanley*, 397 Ill. App. 3d at 603. The defendant alternatively posited that if such knowledge was not required, the statute was unconstitutional as tending to criminalize innocent conduct without a showing of a culpable

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mental state. *Stanley*, 397 Ill. App. 3d at 603. Noting that constitutional questions should be avoided when a case could be decided on other grounds, the *Stanley* court first turned to the defendant's challenge to the sufficiency of the evidence. *Stanley*, 397 Ill. App. 3d at 603.

¶ 23 The *Stanley* court began by examining the statute creating the offense, section 24-5(b) of the Criminal Code of 1961 (Code), which provides as follows:

"A person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." 720 ILCS 5/24-5(b) (West 2008).

The court noted that the statute, as written, did not provide a mental state. *Stanley*, 397 Ill. App. 3d at 605. Following a thorough analysis, the court determined that the applicable *mens rea* for the offense is knowledge and that "the knowledge required applies only to the possessory component of the offense." *Stanley*, 397 Ill. App. 3d at 608.

¶ 24 The *Stanley* court held that to prove the offense defined in section 24-5(b), the State is required to show knowing possession of the defaced firearm by the defendant. *Stanley*, 397 Ill. App. 3d at 609. However, the State is not required to establish knowledge of the character of the firearm, as defacement is not an element of the offense. *Stanley*, 397 Ill. App. 3d at 609.

¶ 25 In the instant case, Officer Lieber testified that he recovered a defaced revolver from under the cushions of the couch in defendant's living room. Officer Ward and Special Agent Gonzalez conducted an interview with defendant, during which he admitted the gun belonged to him. Thus, the State provided evidence of knowing possession of a defaced firearm by defendant. Viewed in the light most favorable to the prosecution, the evidence established the essential elements of the crime. The evidence was not "so unsatisfactory, improbable or

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implausible" so as to raise a reasonable doubt as to defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Thus, defendant's challenge to the sufficiency of the evidence fails.

¶ 26 Following *Stanley*, defendant's alternative argument regarding constitutionality also fails. Defendant's argument is that if the statute criminalizing possession of a defaced firearm is found not to require a mental state, then the statute is unconstitutional. However, in *Stanley*, this court held that the statute did indeed require proof of a mental state, *i.e.*, knowing possession of the defaced firearm. *Stanley*, 397 Ill. App. 3d at 608-09. The *Stanley* court determined that in light of its conclusion as to the construction of the statute, the constitutional challenge in that case was without merit and did not warrant further discussion. *Stanley*, 397 Ill. App. 3d at 610. The same reasoning applies here and we reject defendant's argument.

¶ 27 For the reasons explained above, we affirm defendant's conviction for the offense of armed habitual criminal and dismiss the appeal with regard to the guilty findings for UUW by a felon and possession of a defaced firearm.

¶ 28 Affirmed in part; appeal dismissed in part.