

No. 1-10-2858

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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 Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 18011
	)	
BERNARD BROWN,	)	Honorable
	)	Victoria A. Stewart,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Karnezis and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* The evidence was sufficient to prove defendant's guilt under the armed habitual criminal statute beyond a reasonable doubt; defendant failed to establish plain error or that he was denied the effective assistance of counsel based on the admission of hearsay evidence; the armed habitual criminal statute is not facially unconstitutional in violation of the second amendment; and the cause is remanded for a proper inquiry as to the defendant's *pro se* post-trial allegation of ineffective assistance of trial counsel.

¶ 2 The defendant, Bernard Brown, was charged in a multicount indictment with several crimes based on his unlawful possession of a firearm. Following a bench trial, the trial court found the defendant guilty of being an armed habitual criminal (720 ILCS 24-1.7 (West 2008)), two counts of

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unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1 (West 2008)), and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2008)). At sentencing, the trial court ordered the defendant to serve the minimum sentence of six years for the Class X offense of being an armed habitual criminal.

¶ 3 On appeal, the defendant asserts that (1) the State failed to prove his guilt beyond a reasonable doubt, (2) he was deprived of his rights to due process, a fair trial, and to confront the witnesses against him based upon the admission of hearsay evidence, (3) he was denied effective assistance of counsel because his attorney failed to object to the hearsay evidence and elicited such evidence on cross-examination, (4) the armed habitual criminal statute is unconstitutional because it infringes on the right to bear arms as guaranteed by the second amendment to the United States Constitution, and (5) the trial court erred in failing to appoint independent counsel and conduct a hearing on his post-trial claim of ineffective assistance of counsel. For the following reasons, we reject the defendant's first four arguments and remand the cause to the trial court with directions to conduct the requisite preliminary inquiry on his post-trial claim of ineffective assistance of counsel.

¶ 4 At trial, the prosecution called as its sole witness Officer Janik, whose testimony established the following facts. At about 11:15 a.m. on July 26, 2009, Officers Janik and Bruno were working in plain clothes and driving an unmarked police vehicle. They were in the vicinity of 6332 South Vernon Avenue in Chicago because the police had received "at least four calls" of a "domestic-related" incident involving a "man with a gun." The calls pertained to a domestic disturbance reported by a woman who was located at 63rd Street and Martin Luther King Drive, which is one block west of Vernon Avenue. Janik and Bruno responded to one of these calls and spoke to the

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complainant at her housing complex. During that conversation, the officers learned that the person involved was the complainant's boyfriend, Bernard Brown, and that he was in possession of her silver-gray car, a Grand Prix or Bonneville.

¶ 5 Shortly thereafter, Officers Janik and Bruno were driving in their unmarked vehicle in the 6300 block of South Vernon Avenue when Janik observed the defendant exiting a gray Pontiac Bonneville and walking across the street. The officers approached the car to detain him for an interview. As they did so, Janik saw a .45-caliber Taurus handgun, which was loaded with 12 live rounds, laying on the front passenger seat of the car. There was no one in the car when Janik approached it, and he did not see anyone else get out of the car along with the defendant. Janik arrested the defendant, recovered the gun, and inventoried it.

¶ 6 During his cross-examination of Janik, defense counsel elicited testimony that the calls regarding the domestic disturbance were placed by the complainant, Tamika Dixon, from her home at 6340 South Martin Luther King Drive, one block away from where the defendant was arrested. Janik also testified that the complainant made several calls indicating that her boyfriend had a gun and was "busting down her door." The prosecutor's objections to these questions were overruled. In response to defense counsel's further queries as to the content of the complainant's calls, the prosecutor raised a "standing objection" to that line of questioning on the ground that it constituted hearsay and should not be admitted as substantive evidence. Defense counsel explained that the testimony was not offered to prove the truth of the matter asserted, but rather to establish "[w]hat the officer responded to." The trial court then allowed the defendant's attorney to proceed on that ground.

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¶ 7 Officer Janik acknowledged that he did not hear any reference to a gun in the complainant's first two calls, which were received at 10:22 and 10:29 a.m., respectively. During her third call at 10:45 a.m., the complainant indicated that the defendant had left the area in a gray Bonneville. The complainant's fourth call was received at 11:13 a.m., and the defendant was arrested approximately two minutes later, a block east of the complainant's residence. Janik acknowledged that he was in the unmarked police car and was about 50 feet away when he saw the defendant getting out of the gray Bonneville and walking across the street. Janik further stated that he and Bruno drove at a normal speed and did not activate the emergency lights on their vehicle or attempt to communicate with the defendant before stopping him.

¶ 8 Janik also acknowledged on cross-examination that the gray car from which the defendant had exited belonged to the complainant and that he had prepared a form to have the car towed, but it had been moved from the scene before the towing company arrived. In addition, Janik admitted that he did not check the car for fingerprints and that he did not recall whether the keys to the vehicle were in the car or in the defendant's possession at the time of his arrest.

¶ 9 The State introduced certified copies of the defendant's two prior convictions for aggravated unlawful use of a weapon in 2004 and 2005.

¶ 10 Upon consideration of the evidence and the arguments of counsel, the trial court found that the testimony of Officer Janik was clear, consistent, and credible. The court determined that Janik had observed "the defendant occupying the driver's seat of the vehicle" and that the gun recovered from the front passenger seat was loaded, uncased, and in plain view after the defendant got out of that car. The court found the defendant guilty of being an armed habitual criminal, based on his two

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prior convictions for aggravated unlawful use of a weapon. The court also found the defendant guilty of two counts of unlawful possession of a weapon by a felon and two counts of aggravated unlawful use of a weapon.

¶ 11 When the parties appeared for sentencing, the defendant's attorney filed and argued a motion for a new trial. The court denied defense counsel's motion and then proceeded to the sentencing hearing, at which the defendant's attorney argued for imposition of the minimum sentence. During the course of these proceedings, the defendant interjected that he wished to file a *pro se* post-trial motion. In response to questioning by the trial court, the defendant stated that he wished to represent himself post-trial. After admonishing the defendant that he had been found guilty of being an armed habitual criminal, a Class X offense, the trial court ruled that defense counsel would not be permitted to withdraw but would remain as "standby counsel." At the trial court's direction, the defendant then filed his *pro se* motion and tendered a file-stamped copy of that motion to the court, the prosecutor, and defense counsel. The defendant's motion asserted several grounds of ineffective assistance of counsel, including that the defendant's privately retained attorney failed to subpoena an eyewitness who would have been exonerating, intimidated the defendant into waiving his right to testify, failed to communicate with the defendant prior to trial regarding his defense strategy, and stated that he had not been paid enough money for representing the defendant, who "got what he paid for."

¶ 12 Both the trial court and the prosecutor reviewed the content of the defendant's *pro se* motion and noted that it alleged ineffective assistance of trial counsel but did not relate to sentencing. Immediately thereafter, the court asked whether the defendant wished to say anything before sentence was imposed. The defendant stated that he did not believe he had received a fair trial, and

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he asked that the court "have mercy" on him. After considering the defendant's background, the trial court sentenced the defendant to serve the minimum term of six years for his conviction of being an armed habitual criminal, a Class X felony. Prior to advising the defendant of his appeal rights, the trial court stated, "I have already denied your motion for new trial." This appeal followed.

¶ 13 On appeal, the defendant claims that, because the State failed to prove that he constructively possessed the gun that was recovered from the passenger seat of the car, his convictions for unlawful use of a weapon, aggravated unlawful use of a weapon, and being an armed habitual criminal must be reversed. In response, the State argues that final judgment was entered only on the conviction for being an armed habitual criminal and that the evidence was sufficient to prove the defendant's guilt of that offense beyond a reasonable doubt. We agree with the State on both grounds.

¶ 14 At the sentencing hearing, the trial judge stated, in relevant part, as follows:

"You are before me charged with armed habitual criminal. It is a Class X felony, punishable by a minimum of six to a maximum of 30 years of incarceration in the Illinois Department of Corrections as charged is not probational.

\* \* \*

\*\*\* I sentence you to the six years in the Illinois Department of Corrections.

\*\*\* That is the minimum sentence, sir."

The plain language of these statements clearly demonstrates that the trial court imposed a single, minimum sentence of six years on the Class X offense of being an armed habitual criminal.

¶ 15 The defendant points out, correctly, that the mittimus indicates that he was sentenced to serve concurrent terms of six years for each of the five offenses of which he had been found guilty. We

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note, however, that where the court's written judgment conflicts with its oral pronouncement, "the oral pronouncement controls." *People v. Lewis*, 379 Ill. App. 3d 829, 837, 884 N.E.2d 823 (2008); see also *People v. Smith*, 242 Ill. App. 3d 399, 402, 609 N.E.2d 1004 (1993). A written order merely serves as evidence of the court's judgment. *Lewis*, 379 Ill. App. 3d at 837. Furthermore, it is a long-standing rule in Illinois, that the mittimus is not part of the common law record. *People v. Quintana*, 332 Ill. App. 3d 96, 110, 772 N.E.2d 833 (2002). Based on the record presented, we find that the defendant was sentenced only under the armed habitual criminal statute. Moreover, in light of the fact that the trial court entered a final judgment with respect to that conviction alone, it is apparent that the defendant's convictions for unlawful use of a weapon and aggravated unlawful use of a weapon merged into that judgment.

¶ 16 We next consider the defendant's assertion that the evidence was insufficient to prove that he possessed the gun that was recovered from the passenger seat of the gray Bonneville. The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). When a defendant challenges the sufficiency of the evidence, the appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see also *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262 (2005). It is not the role of the reviewing court to retry the defendant, and a conviction will not be set aside unless

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the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178 (2006). In reviewing the evidence, we will not substitute our judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242. The determination of the weight to be given the witnesses' testimony, their credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Sutherland*, 223 Ill. 2d at 242.

¶ 17 A person commits the offense of being an armed habitual criminal if he possesses any firearm after having been convicted a total of two or more times of any combination of certain offenses, including aggravated unlawful use of a weapon. 720 ILCS 5/24-1.7(a) (West 2006). When a defendant is not found in actual possession, the State must prove constructive possession. *People v. McCarter*, 339 Ill. App. 3d 876, 879, 791 N.E.2d 1278 (2003). Constructive possession may be proved by showing that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found. *People v. Love*, 404 Ill. App. 3d 784, 788, 937 N.E.2d 752 (2010); *People v. Ingram*, 389 Ill. App. 3d 897, 899-900, 907 N.E.2d 110 (2009).

¶ 18 A defendant's mere presence in a car where contraband is found is not enough to establish the defendant's knowledge of the contraband. *Ingram*, 389 Ill. App. 3d at 900. Yet, knowledge may be shown by circumstantial evidence from which it can be inferred that he knew the contraband existed in the place where it was found. *Love*, 404 Ill. App. 3d at 788; *People v. Beverly*, 278 Ill. App. 3d 794, 798, 663 N.E.2d 1061 (1996). Knowledge may be inferred from several factors, including whether the contraband was visible from the defendant's location within the car, the

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amount of time that the defendant had to observe the contraband, and the size of the contraband. *Love*, 404 Ill. App. 3d at 788 (citing *Ingram*, 389 Ill. App. 3d at 900). Control is established when a person has the "intent and capability to maintain control and dominion" over an item, even if he lacks personal present dominion over it. *People v. Frieberg*, 147 Ill. 2d 326, 361, 589 N.E.2d 508 (1992). "The trier of fact can infer constructive possession of an object from control of an area (like a car) and knowledge of the presence of the object (like a gun) in the area." *People v. Thomas*, 407 Ill. App. 3d 136, 140-41, 943 N.E.2d 179 (2011) (citing *People v. Rangel*, 163 Ill. App. 3d 730, 739, 516 N.E.2d 936 (1987)). In deciding whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt. See *People v. Smith*, 191 Ill. 2d 408, 413, 732 N.E.2d 513 (2000).

¶ 19 In this case, Officer Janik testified that he and his partner responded to several calls indicating that the complainant was involved in a domestic disturbance with her boyfriend, the defendant, who had a gun and had left the area in a gray car, either a Grand Prix or a Bonneville. Janik also testified that, upon seeing the defendant getting out of a gray Pontiac Bonneville and walking across Vernon Avenue, a block from the complainant's home, he detained the defendant and then observed the gun in plain view on the front passenger seat. Janik further stated that he did not see anyone get out of the Bonneville along with the defendant, and there was no one else in the car after the defendant left it. Based on this evidence, it was reasonable for the trial court to infer that the defendant had knowledge and exclusive possession and control of the recovered weapon.

¶ 20 In arguing that the State failed to meet its burden of proof, the defendant relies on the fact

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that there was no evidence regarding the ownership of the gun, nor was there any evidence that he had the keys to the car in his possession or that his fingerprints were found on the car. He also cites the fact that the car was not registered to him and that someone else drove the car from the scene before it could be towed. However, none of these circumstances is sufficient to compel reversal of his conviction. As the State correctly points out, it was not necessary to prove that the defendant owned either the car or the gun in order to establish that he constructively possessed the firearm. See *People v. McKnight*, 39 Ill. 2d 577, 581, 237 N.E.2d 488 (1968); *People v. Rangel*, 163 Ill. App. 3d 730, 739, 516 N.E.2d 936 (1987); *People v. Janis*, 56 Ill. App. 3d 160, 163-64, 371 N.E.2d 1063 (1977). In addition, the fact that another person might have had joint control over the vehicle or the gun does not destroy the inference of the defendant's constructive possession. See *People v. Hill*, 226 Ill. App. 3d 670, 673, 589 N.E.2d 1087 (1992).

¶21 The defendant seeks to dispute the element of control by relying on the fact that Officer Janik did not specify which door the defendant used in exiting the vehicle. Yet, the record reflects that, in describing the defendant's actions, Janik never indicated that the defendant had to walk around the vehicle before crossing the street. The testimony that the defendant was seen exiting the Bonneville and then walking across the street would support a reasonable inference that he had gotten out of the driver's seat, and the trial judge's comments demonstrate that the court did, in fact, draw this inference. The defendant also challenges the finding of control by claiming that, if he did possess the firearm, his possession either was not voluntary or was fleeting or transitory. We find that the evidence does not support such an inference. Contrary to the defendant's assertion, there was no indication that another person had actual possession of the gun but left it on the passenger seat

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and then exited the vehicle before the defendant did so. Also, the comments made by the trial judge demonstrate that she drew the reasonable inference that the defendant had maintained a level of control over both the car and the gun.

¶ 22 We are similarly unpersuaded by the defendant's argument that he had abandoned any possession he might have had merely by leaving the gun on the passenger seat when he got out of the car, where there is no indication in the record that the defendant had relinquished his control of either the car or the gun. Lastly, the defendant asserts that the evidence of his knowledge and control is negated by the fact that he made no attempt to flee from the police. This argument is unavailing where the defendant had no reason to suspect that he was at risk of arrest because Janik and Bruno were working in plain clothes and driving an unmarked police vehicle.

¶ 23 At its core, the defendant's argument essentially challenges the credibility of Officer Janik's testimony and the reasonable inferences that may be drawn from that evidence. We note, however, that the trial court found Officer Janik's testimony was clear, convincing, and credible. Viewing the evidence in the light most favorable to the prosecution, together with all reasonable inferences that may be drawn therefrom, we find that it supports a finding that the defendant constructively possessed the gun found on the front passenger seat moments after he exited the car. Consequently, the evidence was sufficient to prove the defendant's guilt of being an armed habitual criminal beyond a reasonable doubt. See *Jackson*, 443 U.S. at 319; *Collins*, 214 Ill. 2d at 217.

¶ 24 The defendant next argues that he was deprived of his rights to due process, a fair trial, and to confront the witnesses against him based on the admission of hearsay evidence. In particular, the defendant claims that the trial court improperly relied on Officer Janik's direct testimony regarding

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statements made by the complainant during her calls to the police.

¶ 25 The defendant acknowledges that he has forfeited this issue by failing to make a timely objection at trial and raise the issue in his post-trial motion. See *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728 (2007). Yet, he urges us to consider this claim under the plain-error doctrine. See 134 Ill. 2d R. 615(a); *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403 (2007). The initial step of plain-error review is to determine whether any error occurred. *Piatkowski*, 225 Ill. 2d at 565. Absent a reversible error at trial, there can be no plain error. *People v. Johnson*, 208 Ill. 2d 53, 64, 803 N.E.2d 405 (2003).

¶ 26 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Tenney*, 205 Ill. 2d 411, 432-33, 793 N.E.2d 571 (2002); *People v. Peoples*, 377 Ill. App. 3d 978, 983, 880 N.E.2d 598 (2007). Testimony regarding an out-of-court statement that is being offered for a purpose other than to prove the truth of the matter asserted is not hearsay. *People v. Williams*, 181 Ill. 2d 297, 313, 692 N.E.2d 1109 (1998). Illinois courts have recognized an “explanatory exception” to the hearsay rule that allows the admission of statements that explain the progress of a police investigation. *Peoples*, 377 Ill. App. 3d at 984. Such statements may be offered to show the course of a police investigation where such testimony is necessary to fully explain the State’s case to the trier of fact. *Peoples*, 377 Ill. App. 3d at 984; *People v. Jura*, 352 Ill. App. 3d 1080, 1085, 817 N.E.2d 968 (2004).

¶ 27 Here, the record reflects that Janik's testimony regarding the statements made by the complainant during her calls to the police were introduced to explain the officers' conduct in the course of their investigation and, as such, that evidence was admissible as an exception to the

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hearsay rule. In addition, we reject the defendant's assertion that the trial court relied on the complainant's out-of-court statements as substantive evidence. In finding the defendant guilty, the trial court stated that Janik "had a conversation with [the complainant] at her residence. And at that time[,] he was looking for a specific person, that being her boyfriend, a Mr. Bernard Brown, \*\*\* and there was a ['man-with-a-gun'] description given by her at that time, that he did observe the defendant." We do not agree that these comments indicate that the trial court considered the complainant's statements as substantive evidence. Rather, the record indicates that the court was merely recounting the chronology of events leading to the discovery of the gun, as described by Janik. In the absence of a clear indication to the contrary, we presume that the court considered the challenged testimony for the permissible purpose of describing the course of the officers' investigation and not as substantive evidence of the defendant's guilt. See *People v. Gilbert*, 68 Ill. 2d 252, 258-59, 369 N.E.2d 849 (1977) (holding that, on review, it is presumed that the trial court in a bench trial considered only competent evidence in reaching its decision).

¶28 The defendant also contends that he was deprived of the effective assistance of counsel based on the fact that, while cross-examining Janik, his trial attorney elicited additional hearsay evidence of the complainant's statements during Janik's cross-examination. In order to prevail on a claim for ineffective assistance of counsel, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceeding would have been different if counsel had not erred. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *People v. Griffin*, 148 Ill. 2d 45, 57, 592 N.E.2d 930 (1992); *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246 (1984). The

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defendant must overcome a "strong presumption" that his lawyer's conduct falls within a wide range of reasonable professional assistance and that the challenged conduct constitutes sound trial strategy. *Strickland*, 466 U.S. at 689. The failure to satisfy either the deficient performance prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of trial counsel. *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889 (2005).

¶ 29 As set forth above, when the prosecutor objected to Janik's testimony regarding the nature of the complainant's statements on the ground that it constituted hearsay and should not be considered as substantive evidence, defense counsel explained that this testimony was offered only to establish the course of the police investigation. The trial court then allowed the defendant's attorney to proceed on that ground. Consequently, it did not constitute hearsay. See *Peoples*, 377 Ill. App. 3d at 984.

¶ 30 Moreover, the elicitation of this evidence was a valid trial strategy. By using the written logs of the complainant's calls to cross-examine Janik, defense counsel compelled the officer to acknowledge that the complainant did not mention a gun in either the first or second call made to the police, thereby contradicting his earlier statement that she had made "at least four calls" regarding a domestic-related incident involving a "man with a gun." Janik's testimony as to the total number and the timing of the calls placed by the complainant also pointed out that the defendant was arrested a block away from her home just two minutes after the fourth call was received by police, suggesting that Janik's version of events was unlikely and not credible. The cross-examination of Janik also established that the car belonged to the complainant, not the defendant. In addition, the defendant's attorney challenged Janik's credibility by establishing that he did not see the defendant actually

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driving the car, did not test for fingerprints on the car, and could not recall whether the defendant had the car keys in his possession, and that someone else had driven the car from the scene before the tow truck arrived.

¶ 31 The mere fact that defense counsel's trial strategy of challenging Janik's credibility ultimately proved unsuccessful does not mean that his representation was deficient. See *People v. Franklin*, 135 Ill. 2d 78, 119, 552 N.E.2d 743 (1990); *People v. Madej*, 106 Ill. 2d 201, 214, 478 N.E.2d 392 (1985). Because the defendant has not demonstrated that his trial counsel failed to render competent representation, as required by the first prong of *Strickland*, he is not entitled to a new trial on this ground.

¶ 32 We next address the defendant's argument that the statute under which he was convicted is unconstitutional because it infringes on the right to bear arms as guaranteed by the second amendment to the United States Constitution. Though this issue was not presented to the trial court, a constitutional challenge to a statute may be raised at anytime. See *In re J.W.*, 204 Ill. 2d 50, 61–62, 787 N.E.2d 747 (2003); *People v. Williams*, 2011 IL App (1st) 093350, ¶ 49. Whether a statute is constitutional is a question of law to be reviewed *de novo*. *People v. Morgan*, 203 Ill. 2d 470, 486, 786 N.E.2d 994 (2003); *Williams*, 2011 IL App (1st) 093350, ¶ 49.

¶ 33 Relying on the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. —, 130 S. Ct. 3020 (2010), the defendant contends that, because the core of the second amendment is the protection of an individual's right to keep a firearm in his home for self-defense, the armed habitual criminal statute is facially unconstitutional under the second amendment. We disagree.

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¶ 34 In addressing the defendant's argument, we find that the intermediate level of constitutional scrutiny applies. See *People v. Davis*, 408 Ill. App. 3d 747, 749, 947 N.E.2d 813 (2011); *People v. Ross*, 407 Ill. App. 3d 931, 939, 947 N.E.2d 776 (2011). To satisfy the intermediate level of constitutional scrutiny, the challenged statutory provision must serve a significant, substantial or important governmental interest, and the fit between the challenged law and the asserted objective must be reasonable. *Davis*, 408 Ill. App. 3d at 749; *Ross*, 407 Ill. App. 3d at 938-39.

¶ 35 As noted above, a person commits the offense of being an armed habitual criminal if he possesses any firearm after having been convicted a total of two or more times of any combination of certain offenses, including aggravated unlawful use of a weapon. 720 ILCS 5/24-1.7(a) (West 2008). The purpose of this statute is to protect the public from the danger posed by convicted felons possessing firearms. *Davis*, 408 Ill. App. 3d at 750.

¶ 36 The defendant cites *Heller* and *McDonald* in support of his claim that the armed habitual criminal statute violates his second-amendment right because it precludes him from possessing a firearm within his home for the purpose of self defense. However, the Supreme Court 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 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*, 561 U.S. at —, 130 S. Ct. at 3047). In addition, the Court has explicitly stated that its decisions in *Heller* and *McDonald* did not "cast doubt on longstanding prohibitions on the possession of firearms by felons." *McDonald*, 561 U.S. at —, 130 S. Ct. at 3047; *Heller*, 554 U.S.

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at 626.

¶ 37 The defendant contends the Supreme Court's statements in *Heller* and *McDonald* relating to statutes prohibiting the possession of firearms by felons constitute *dicta* and do not govern our resolution of the instant case. However, judicial *dicta* is entitled to much weight and should be followed by an inferior court. See *Cates v. Cates*, 156 Ill. 2d 76, 80, 619 N.E.2d 715 (1993); see also *People v. Williams*, 204 Ill. 2d 191, 206, 788 N.E.2d 1126 (2003); *Davis*, 408 Ill. App. 3d at 750.

¶ 38 We conclude that the armed habitual criminal statute is substantially related to the important governmental objective of protecting the health, safety and general welfare of its citizens, and the fit between the armed habitual criminal statute and that governmental objective is reasonable. See *People v. Coleman*, 409 Ill. App. 3d 869, 878-79, 948 N.E.2d 795 (2011); *Davis*, 408 Ill. App. 3d at 750; *Ross*, 407 Ill. App. 3d at 942. Therefore, the statute does not, on its face, violate the second amendment. See *Davis*, 408 Ill. App. 3d at 750.

¶ 39 Lastly, the defendant argues that the trial court erred in failing to appoint new counsel and conduct a hearing on his post-trial assertion of ineffective assistance, pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). We review this issue *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75, 797 N.E.2d 631 (2003); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25.

¶ 40 Our supreme court has held that when a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court should examine the factual basis of the defendant's claim. *Moore*, 207 Ill. 2d at 77-78. The trial court need not appoint new counsel if it determines that the defendant's claim lacks merit or pertains purely to matters of trial strategy, but should appoint new counsel if the defendant's allegations reveal "possible neglect." *Moore*, 207 Ill. 2d at 78;

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*Krankel*, 102 Ill. 2d at 187-89.

¶ 41 On appeal, the reviewing court is charged with determining whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 78; *People v. Johnson*, 159 Ill. 2d 97, 125, 636 N.E.2d 485 (1994). Some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. *Moore*, 207 Ill. 2d at 78. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations, or a brief discussion between the trial court and the defendant may suffice. *Moore*, 207 Ill. 2d at 78. Alternatively, the trial court can base its evaluation of the defendant's allegations "on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79.

¶ 42 As noted above, the defendant's *pro se* motion alleged, *inter alia*, that the defense counsel failed to subpoena an eyewitness who would have been exonerating, intimidated the defendant into waiving his right to testify, failed to communicate with the defendant prior to trial regarding his defense strategy, and stated that he had not been paid enough money for representing the defendant, who "got what he paid for." When the defendant tendered his motion, the trial judge reviewed its contents, noted that it asserted the ineffectiveness of trial counsel, and then proceeded to sentencing. The trial court made no effort to question either the defendant or his trial attorney as to any of the allegations contained in the *pro se* motion, nor did the court articulate any ruling on the motion prior to imposing sentence. Though the trial judge subsequently stated that she had "already denied

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[defendant's] motion for new trial," the record indicates that this comment refers to the ruling on the motion for a new trial filed by defense counsel, which was denied prior to the commencement of the sentencing proceedings. Thus, it is clear that the trial court failed to conduct any inquiry into the defendant's allegations of ineffective assistance of counsel. In the absence of such inquiry, the trial court could not have made an informed decision as to the possible merit of the allegations that were predicated on private communications between the defendant and his attorney and other matters outside the record. Moreover, contrary to the State's argument, we cannot conclude that the failure to investigate such allegations was harmless beyond a reasonable doubt. *Moore*, 207 Ill. 2d at 80-81; *People v. Vargas*, 409 Ill. App. 3d 790, 803, 949 N.E.2d 238 (2011).

¶ 43 The law mandates the trial court to conduct some type of preliminary inquiry into the underlying factual basis of the defendant's *pro se* post-trial claim of ineffective assistance of counsel. *Moore*, 207 Ill. 2d at 79. Because no such investigation occurred in this case, we must remand the cause to the trial court for that limited purpose. See *Moore*, 207 Ill. 2d at 81.

¶ 44 In reaching this conclusion, we reject the State's argument that the cause need not be remanded because the defendant was represented by private counsel during his trial. In *People v. Pecoraro*, 144 Ill. 2d 1, 578 N.E.2d 942 (1991), our supreme court held that a trial court need not automatically appoint new counsel to argue a defendant's post-trial motion asserting a claim of ineffective assistance of counsel when the defendant was previously represented by private counsel. *Pecoraro*, 144 Ill. 2d at 14-15. The court based its decision on the fact that, in such cases, a defendant is at liberty to manage the attorney-client relationship by dismissing the attorney and hiring a new one of his choice, unlike those who are represented by appointed counsel. *Pecoraro*,

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144 Ill. 2d at 14-15. We note, however, that the determination of whether independent counsel must be appointed is separate and distinct from the conduct of a preliminary inquiry regarding the factual basis for the defendant's allegations. Moreover, it has been recognized that defendants who retain their own lawyers are entitled to the same protections under the sixth amendment as those for whom counsel has been appointed and that the circuit court is not relieved of its obligation to investigate the factual basis of an ineffective assistance claim merely because the defendant was represented by private counsel. See generally *People v. Taylor*, 237 Ill. 2d 68, 78-81 (2010) (Burke, J., specially concurring) (citing *Mickens v. Taylor*, 535 U.S. 162, 168 n. 2, 122 S. Ct. 1237, 1242 n. 2, 152 L. Ed. 2d 291, 302 n. 2 (2002); *Cuylar v. Sullivan*, 446 U.S. 335, 344-45, 100 S. Ct. 1708, 1716, 64 L. Ed. 2d 333, 344 (1980)).

¶ 45 For the foregoing reasons, we remand the cause with directions to the trial court, for the limited purpose of conducting the preliminary *Krankel* inquiry. If the court finds that counsel was ineffective, then the defendant shall be entitled to a new trial on the merits. However, if the court determines that the defendant's *pro se* claims of ineffectiveness are spurious or pertain only to trial strategy, the court may then deny the motion and the judgment of conviction and sentence shall be affirmed. See *Moore*, 207 Ill. 2d at 81-82; *Vargas*, 409 Ill. App. 3d at 803.

¶ 46 Affirmed in part and remanded in part with directions.