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SIXTH DIVISION
January 6, 2012

No. 1-10-3240

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 18742
)	
TOBIAS MCNEAL,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We hold, as we have held before, that the offense of being an armed habitual criminal does not violate either the second amendment or the *ex post facto* clause. Defendant is entitled to one additional day of credit for time spent in custody.

¶ 2 After a bench trial, defendant Tobias McNeal was convicted on July 30, 2010, of being an armed habitual criminal. On September 17, 2010, the trial court sentenced defendant to 6 years in prison, with a credit of 350 days for time served. On October 15, 2010, defendant filed a notice of appeal.

¶ 3 On this direct appeal, defendant raises two issues. First, he claims that the offense of being an armed habitual criminal violates the second amendment's right to bear arms, as well as the *ex post facto* clause. Illinois courts have rejected these same claims several times before in other cases, and we see no reason to depart from our well-established precedent. Second, defendant claims that he is entitled to an additional day of credit for time served. For the reasons discussed below, we reject defendant's constitutional claims but we find that defendant is entitled to an additional day of presentence credit.

¶ 4 BACKGROUND

¶ 5 Since there is no issue concerning either the facts of the offense or the sufficiency of the evidence, there is no need for a detailed recitation of the facts or the evidence. On this appeal, we are called upon to answer only a strictly legal question.

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¶ 6 The key facts relevant for the purposes of this appeal are not in dispute. First, on October 1, 2009, at approximately 12:45 a.m., police officers seized a loaded handgun from the floor of the vehicle that defendant had been driving. The handgun was in the front part of the vehicle and on the floor of the passenger's side. The gun contained 11 live rounds, with one round in the chamber and ten rounds in the magazine. Second, the parties stipulated at trial that McNeal had previously been found guilty of armed robbery in two prior cases.

¶ 7 At trial, there was a credibility dispute between defendant and the arresting officer. However, this dispute is not at issue on this appeal. Specifically, Officer Raoul Mosqueda, the arresting officer, testified that he and his partner were in uniform and driving a marked police vehicle, when they observed a vehicle without its headlights on; and they attempted to make a traffic stop by turning on their vehicle's blue lights. The officer testified that, instead of immediately stopping, defendant turned his vehicle into an alley, then stopped the vehicle and ran away on foot. The officer testified that, after he stopped defendant on foot, defendant told him there was a weapon in the vehicle.

¶ 8 In contrast, when defendant testified at trial, he denied knowing at first that the vehicle following behind him was a police vehicle. He also denied that

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it activated blue lights or that he told the officers that there was a gun in the vehicle. Defendant corroborated the police officer's testimony, in part, by stating that he did observe a vehicle following him, that he did stop his vehicle in an alley, that he did exit the vehicle in the alley, and that he did run after exiting his vehicle. However, defendant testified that he realized that they were police officers only after he exited his vehicle. Defendant also testified that his cousin gave him the vehicle and that he did not know that it contained a gun.

¶ 9 After the close of the State's case, the trial court granted defendant's motion for a directed finding, with respect to counts 3 and 5 only. Both counts charged that defendant possessed a firearm on or about his person, without "a currently valid firearm owner's identification card." The trial court granted defendant's motion because the State failed to present "any evidence that [defendant] did not have a currently valid FOID card."

¶ 10 At the conclusion of the bench trial, defendant was found guilty of being an armed habitual criminal. Specifically, defendant had been charged by information with one count of being an armed habitual criminal, four counts of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. As already stated, the trial court acquitted defendant of two counts of

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aggravated unlawful use of a weapon at the close of the State's case. At the conclusion of the bench trial, the trial court found defendant guilty of all the remaining counts. The trial court later merged all the guilty counts into the first count, which charged the offense of being an armed habitual criminal.

¶ 11 After announcing the verdict, the trial court set the sentencing hearing for September 9, 2010, and granted defendant an extension of time to file a posttrial motion on that date. On September 9, the trial court continued the proceedings until September 17 "for post-trial motions and sentencing." However, at the sentencing on September 17, 2010, defense counsel informed the trial judge in open court that he "didn't file any posttrial motions."

¶ 12 During the sentencing hearing on September 17, 2010, the trial judge asked defense counsel: "[c]ounsel, how many days does your client have in custody?" Defense counsel replied: "350 days, your Honor." The trial judge repeated "[t]hree, five, zero," and defense counsel stated "[y]es." The trial court then sentenced defendant to six years in the Illinois Department of Corrections, with a credit for 350 days for the time that defendant had been in custody.

Immediately after pronouncing sentence, the trial court informed defendant that, if he wished to challenge the sentence, he "must within 30 days of today's date file a

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written motion to challenge the sentence in this case."

¶ 13 The mittimus, entered September 17, 2010, reflects the six-year sentence for being an armed habitual criminal, and also states that "defendant is entitled to receive credit for time actually served in custody for a total credit of 0350 days as of the date of this order." Another order, also filed on September 17, 2010, but not signed, states that "[d]efendant is credited for the following time served while in pretrial custody in this case: from 10/1/09 thru [sic] 9/17/10 = 350 days."

¶ 14 Defendant chose not to file a post-sentencing motion. However, he did file a notice of appeal on October 15, 2010, and this direct appeal followed.

¶ 15 ANALYSIS

¶ 16 Defendant claims that the offense of being an armed habitual criminal is unconstitutional because, first, it violates the right to bear arms by preventing felons from keeping arms for the purpose of self-defense; and, second, it violates the *ex post facto* clause if the predicate prior convictions occurred before the effective date of the legislation creating the offense. Defendant also claims that the trial court erred by giving him 350 days of presentence credit, instead of 351 days. For the following reasons, we find the offense constitutional, and we order the

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mittimus corrected to reflect 351 days of presentence credit.

¶ 17 I. Armed Habitual Criminal

¶ 18 Defendant puts forth two constitutional provisions that are allegedly violated by the offense of being an armed habitual criminal: (1) the right to bear arms, found in the second amendment; and (2) the *ex post facto* clause. We do not find either of these arguments persuasive, for the reasons explained below.

¶ 19 Although defendant failed to raise these constitutional challenges in the trial court, they are not waived for purposes of this appeal, because "a constitutional challenge to a statute may be raised at any time." *People v. Bryant*, 128 Ill. 2d 448, 454 (1989), *overruled on other grounds by People v. Sharpe*, 216 Ill. 2d 481, 498, 517 (2005). The constitutionality of a statute is purely a matter of law, and accordingly we apply a *de novo* review. *Sharpe*, 216 Ill. 2d at 486-87. All statutes carry a strong presumption of constitutionality. *Sharpe*, 216 Ill. 2d at 487. To overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution. *Sharpe*, 216 Ill. 2d at 487.

¶ 20 A. Right to Bear Arms

¶ 21 We have previously considered this same question of whether, in light of the U.S. Supreme Court's decisions in *District of Columbia*, 554 U.S. 570

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(2008) and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), the offense of being an armed habitual criminal violates the second amendment's right to bear arms. In every case, we have found no violation. See *e.g. People v. Davis*, 408 Ill. App. 3d 747, 750 (1st District, 3rd Division 2011) (armed habitual criminal statute, constitutional); *People v. Ross*, 407 Ill. App. 3d 931, 942 (1st District, 6th Division 2011) (armed habitual criminal statute, constitutional); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (1st District, 6th Division 2011) (different panel) (armed habitual criminal statute, constitutional).

¶ 22 Raising only a facial challenge to the statute, defendant argues that the second amendment right, as recognized in both *Heller* and *McDonald*, protects a felon's right to bear arms for the purpose of self-defense. However, the language of these cases does not support defendant's claim.

¶ 23 In both these recent cases, the United States Supreme Court emphasized that its holdings had no effect on the validity of laws, such as the one in the case at bar, that prohibit the possession of guns by convicted felons. In *Heller*, the United States Supreme Court stated unequivocally 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. See also *Heller*, 554

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U.S. at 626 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes). The *Heller* court held that the second amendment protects only "the rights of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

¶ 24 Similarly, in *McDonald*, a plurality of justices stated: "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibition on the possession of firearms by felons ***. We repeat those assurances here." *McDonald*, 130 S.Ct. at 3047.

¶ 25 In addition, every Illinois appellate panel, which has considered second amendment challenges to felon possession laws after *Heller*, has upheld these laws. See *e.g. Davis*, 408 Ill. App. 3d at 750 (1st District, 3rd Division) (unlawful use of a weapon by a felon, and armed habitual criminal statute); *Ross*, 407 Ill. App. 3d at 942 (1st District, 6th Division) (armed habitual criminal statute); *Coleman*, 409 Ill. App. 3d at 879 (1st District, 6th Division) (different panel) (armed habitual criminal statute).

¶ 26 As we stated above, defendant presents us with no reason to depart from our well-established precedent, and thus we must reject defendant's second-amendment claim.

¶ 27

B. *Ex Post Facto* Claim

¶ 28

Defendant also argues that the armed habitual criminal statute is unconstitutional because it violates the *ex post facto* clause. U.S. Const. art. I, §§9,10; Ill. Const. 1970, art. I, §16. Specifically, defendant argues that the application of the armed habitual criminal statute, as applied to him, violates the prohibition against *ex post facto* laws, since his prior convictions occurred before the enactment of the statute.

¶ 29

The appellate court has rejected this exact same argument at least four times before. *People v. Talentino*, 409 Ill. App. 3d 598, 607-08 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010); *People v. Leonard*, 391 Ill. App. 3d 926, 931-32 (2009); *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009). In *Talentino*, *Adams*, *Leonard* and *Bailey*, the appellate court held that the application of the armed habitual criminal statute did not violate the prohibition against *ex post facto* laws, even where a defendant's prior convictions occurred before the enactment of the statute. *Talentino*, 409 Ill. App. 3d at 607-08; *Leonard*, 391 Ill. App. 3d at 931-32; *Bailey*, 396 Ill. App. 3d at 464.

¶ 30

Defendant acknowledges that the appellate court has rejected his claim several times, but he argues that these cases were wrongly decided.

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However, we can find no reason to depart from these well-reasoned decisions, and thus we must reject defendant's *ex post facto* claim.

¶ 31 II. Additional Day of Credit

¶ 32 Defendant claims that he is entitled to 351 days of credit rather than the 350 days that he received, and he asks us on this appeal to correct the *mittimus* to reflect an additional day of credit. As a preliminary matter, we observe that this error was both invited and procedurally defaulted by defendant. However, since the State did not raise the issues of either invited error or procedural default on this appeal, we will proceed to order the correction of a simple arithmetical error in the *mittimus*.

¶ 33 First, we observe that, if there was an error with respect to the calculation of the presentence credit, it was an invited error. The Illinois Supreme Court has held that, " 'under the doctrine of invited error, ' " a defendant " 'may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *People v. Harvey*, 211 Ill. 2d 368, 385 (2004), quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003). The trial court asked defense counsel how many days of credit defendant should receive, and the trial court entered the number of days that counsel stated. On appeal, defendant makes no

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claim that his counsel was ineffective, nor would we suggest that he was. When the trial court enters the exact number of days requested by defendant, defendant cannot be heard to complain on appeal that the trial court honored his request.

¶ 34 Second, if there was an error, defendant also waived it by failing to file a postsentencing motion in the trial court. Illinois Supreme Court Rule 605(a)(3)(B) provides that "if the defendant seeks to challenge *** any aspect of the sentencing hearing, the defendant must file in the trial court within 30 days of the date on which sentence is imposed a written motion asking to have the trial court *** consider any challenges to the sentencing hearing, setting forth in the motion all issues or claims of error regarding *** the sentencing hearing." Ill. Sup. Ct. R. 605(a)(3)(B) (eff. Oct. 1, 2001). The rule further states that "any issue or claim of error regarding *** any aspect of the sentencing hearing not raised in the written motion shall be deemed waived." Ill. S. Ct. R. 605(a)(3)(C) (eff. Oct. 1, 2001). Failure to file a postsentencing motion means that the issue is waived for review. *People v. Reed*, 177 Ill. 2d 389, 394 (1997). In the case at bar, the trial court informed defendant at sentencing that if he wished to challenge any part of his sentencing, he was required to file a post-sentencing motion, which defendant chose not to do. Thus, the issue was waived for our review.

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¶ 35 Although the error was waived, we will still review it because, first, waiver is a limitation on the parties not on the courts (*People v. Wheeler*, 392 Ill. App. 3d 303, 309 (2009)); and second, the State did not raise the waiver doctrine or the invited error doctrine as an issue on this appeal. *Wheeler*, 392 Ill. App. 3d at 309 (finding that waiver was not a bar to consideration where the opposing party had failed to raise waiver as an issue on appeal), citing *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008).

¶ 36 Our supreme court has held that a defendant is entitled to credit for every day served in custody, and that "the court unquestionably has that responsibility" for crediting the time spent. *People v. Williams*, 239 Ill. 2d 503, 508 (2011). The appellate court also has "the authority to correct the *mittimus* at any time without remanding the matter to the trial court." *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008). Since the calculation of defendant's presentence credit involves statutory interpretation and undisputed facts, our standard of review is *de novo*. *Williams*, 239 Ill. 2d at 506.

¶ 37 The State raises in its brief only one point: that the day of sentencing, September 17, 2010, is not counted. However, defendant acknowledges that fact in both his opening brief and his reply brief, so this is not at issue. *Williams*, 239 Ill.

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2d at 509 ("we hold that the date of the issuance [of the *mittimus*] should therefore not be counted as a day of presentence custody"). Instead, defendant states in his brief that, if you use a day calculator, such as the one found at www.timeanddate.com, and you enter October 1, 2009, as the starting date and enter September 17, 2010, as the end date, with a specific instruction not to include the end date in the count, the count is 351 days. This court has checked the count on several online day counters, and defendant is factually correct.

¶ 38 Thus, we order the *mittimus* corrected to reflect a total of 351 days of presentence credit.

¶ 39 CONCLUSION

¶ 40 In sum, we find that the offense of being an armed habitual criminal does not violate either the second amendment or the *ex post facto* clause; and that defendant is entitled to an additional day of presentence credit.

¶ 41 Affirmed; and *mittimus* corrected.