

No. 1-11-0436

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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 14161
)	
RASHAD TAITTS,)	The Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* The armed habitual criminal statute does not violate the second amendment to the United States Constitution because prohibitions on the possession of firearms by felons are a permissible restriction on the constitutional right to bear arms. The defendant's conviction is affirmed.

¶ 2 The trial court found the defendant guilty of violating the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2008)) in a bench trial. The defendant, with two prior qualifying

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felonies, was arrested carrying a shotgun. The court sentenced the defendant to 10 years' imprisonment for the Class X felony. We affirm. Punishing felons for possessing firearms does not violate the second amendment's right to bear arms.

¶ 3 BACKGROUND

¶ 4 Defendant Rashad Taitts had two prior felony convictions before being convicted in this case. He was convicted of attempted murder on October 28, 1997, and unlawful use of a weapon by a felon on November 28, 2006.

¶ 5 On May 31, 2009, the defendant was arrested by Maywood police officer Larry Verpil. The defendant elected to proceed to a bench trial. Officer Verpil testified that on the date in question, he was on patrol at approximately 2:50 a.m. when he responded to a dispatch of a male on the street possibly armed with a rifle. The dispatch described the male as black, wearing dark clothes with white gloves. Officer Verpil arrived at 801 S. 15th Avenue in response to the dispatch. He observed the defendant on the porch at the location. Officer Verpil testified the defendant was the only person on the porch and appeared to be holding something in his hands. From earlier interactions, Officer Verpil knew the defendant lived in an apartment next door.

¶ 6 Officer Verpil exited his vehicle and as he approached, he observed the defendant holding either a short-barreled rifle or a shotgun. As the dispatch described, the defendant was wearing all black clothing with white gloves. Officer Verpil instructed the defendant to drop his weapon and walk in the officer's direction; the defendant complied. As he walked toward Officer Verpil, the defendant took off his gloves and dropped them to the ground. Officer Verpil placed the defendant in custody; he then retrieved the weapon from the porch where Officer

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Verpil first observed the defendant. The recovered weapon was a Marlin .12 gauge, pump-action shotgun with a sawed-off butt stock and a sawed-off barrel.

¶ 7 The defendant testified that he had been drinking before his arrest, but he was not drunk. Nor had he used any illicit drugs on the night of his arrest. The defendant explained his actions leading to his arrest. He was walking home, "by the lawn between [his] residence and the corner house [at 801 S. 15th Avenue]," when a marked squad car approached. An officer exited the squad car and ordered him to stop. The defendant complied and was immediately arrested. The defendant was wearing a blue shirt, blue jeans, and a blue summer jacket. Immediately before his arrest, he was not on the porch at 801 S. 15th Avenue; he did not have any weapons; nor was he wearing gloves or black clothing. He did not drop any object to the ground as he walked toward the officer. To corroborate the color of his clothing, the defense introduced into evidence an inventory slip showing the defendant wore blue trousers and a blue shirt when he was brought to the Cook County jail following his arrest.

¶ 8 The judge found the defendant guilty of armed habitual criminal (Count 1) and unlawful use or possession of a weapon by a felon (Count 2). The trial court merged the two counts and sentenced the defendant to ten years' imprisonment with three years of mandatory supervised release. On February 10, 2011, the court denied the defendant's motion to reconsider sentence; the defendant timely appealed.

¶ 9

ANALYSIS

¶ 10 The defendant argues the armed habitual criminal statute violates on its face the second amendment to the United States Constitution because it infringes on his right to bear arms. He cites the United States Supreme Court cases of *District of Columbia v. Heller*, 554 U.S. 570

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(2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), as authority for his right to possess a firearm. The State counters that Illinois properly excludes felons from exercising the right to bear arms.

¶ 11 The constitutional challenge to the armed habitual criminal statute is first raised before this court. Such a challenge may be raised at any time. *People v. Zeisler*, 125 Ill. 2d 42, 46 (1988). Our review is *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008). Our duty in addressing a challenge to the constitutionality of a statute is clear. "Our duty is to construe a statute in a manner that upholds its validity and constitutionality if it can reasonably be done." *People v. McGee*, 341 Ill. App. 3d 1029, 1032 (2003) (citing *People v. Malchow*, 193 Ill. 2d 413, 418 (2000)). "Because we assume that a statute is constitutional, defendant bears the burden of showing the constitutional violation." *People v. Aguilar*, 408 Ill. App. 3d 136, 142 (2011).

¶ 12 The second amendment to the United States Constitution protects the right of citizens to keep and bear arms. U.S. Const. amend. II. The armed habitual criminal statute prohibits any person who has been previously convicted of two or more specified felonies from possessing a firearm. 720 ILCS 5/24-1.7 (West 2008). The issue before us is whether the armed habitual criminal statute impermissibly infringes on the federal constitutional right to keep and bear arms.

¶ 13 In *Heller*, the United States Supreme Court examined the District of Columbia's ban of possession of handguns. *Heller*, 554 U.S. at 573. The issue concerning the federal district's handgun proscription was narrow: whether a "prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution." The Court ruled that the prohibition violated the federal constitutional right to bear arms. *Id.*

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¶ 14 In *McDonald*, the Supreme Court held the second amendment fully applicable to the States. *McDonald*, 130 S. Ct. at 3026. The Court invalidated a Chicago ordinance that effectively banned possession of handguns by nearly all ordinary citizens within city limits. *Id.* However, the Court cautioned that "incorporation [into the Fourteenth Amendment, which renders the Second Amendment applicable to the States] does not imperil every law regulating firearms." *Id.* at 3047.

¶ 15 In both *Heller* and *McDonald*, the Court made clear that certain laws regulating firearms may pass constitutional muster. "[T]he right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. The *Heller* Court expressly noted that criminal laws regulating firearms possessed by felons are exempt from constitutional challenges. "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* *McDonald* reiterated this point: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'" *McDonald*, __ U.S. at __, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626).

¶ 16 Notwithstanding the United States Supreme Court's clear pronouncement that neither *Heller* nor *McDonald* should be read as casting doubt on prohibitions against felons possessing firearms, our appellate courts have been confronted with numerous challenges to the constitutionality of the armed habitual criminal statute, not one of which has succeeded. We briefly highlight three such cases.

¶ 17 In *Ross*, a convicted felon was arrested after police recovered a gun from the car he was driving. *People v. Ross*, 407 Ill. App. 3d 931, 933-34 (2011). Following his conviction for

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violating the armed habitual criminal statute, the felon appealed, arguing that the statute was unconstitutional on its face in light of *Heller* and *McDonald*. *Id.* at 934, 937. We rejected the contention: "Our United States Supreme Court has never indicated that a felon can possess a firearm in a home or outside of a home." *Id.* at 939.

¶ 18 In *Davis*, a police officer discovered four guns in the trunk of a car operated by a felon. *People v. Davis*, 408 Ill. App. 3d 747, 748 (2011). The driver was convicted of violating both the armed habitual criminal statute and the statute banning unlawful use of a weapon by a felon (UUWF). *Id.* The felon appealed, arguing that both statutes violated the second amendment. *Id.* at 749. The court rejected this argument: "*Dicta* in [*Heller*] supports our finding that the UUWF statute and the armed habitual criminal statute comport with the second amendment." *Id.* at 750.

¶ 19 In *Coleman*, a police officer testified that he recovered a gun from a convicted felon on the street. *People v. Coleman*, 409 Ill. App. 3d 869, 870 (2011). Coleman was convicted of violating the armed habitual criminal statute. *Id.* at 873. On appeal, Coleman argued that the statute violated the second amendment by banning " 'mere possession' " and asserted that possession was conduct that the amendment " 'elevates above all other interests.' " *Id.* at 877–78 (quoting *Heller*, 554 U.S. at 635). The court rejected the argument: " [T]he 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.' " *Id.* at 879 (quoting *Ross*, 407 Ill. App. 3d at 942).

¶ 20 The prohibition against felons possessing firearms has been universally upheld against claims that the firearm prohibitions in the armed habitual criminal statute violate the right to bear arms of the second amendment. While relying on *Heller* and *McDonald* as authority to

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challenge the constitutionality of the statute, the defendant asserts we should ignore as *dicta* the statements that exclude laws prohibiting possession of firearms by felons from the holding in each case. While the defendant may be right on his assertion that statements concerning felons in *Heller* and *McDonald* are *dicta*, they are persuasive *dicta*. See *People v. Williams*, 204 Ill.2d 191, 206-07 (2003) ("Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court.").

¶ 21 Nor does the defendant advance a persuasive argument that it is unconstitutional to prevent felons from carrying weapons for purposes of self-defense. No such exception has been recognized by a published decision. We note that "self-defense" is an affirmative defense, which the defendant must prove at trial. See 720 ILCS 5/7-1 (West 2010). No such claim was raised below. In any event, there is no authority for what we understand the defendant's real claim—that the armed habitual criminal statute is unconstitutional because it does not provide an exception for felons to possess a firearm for purposes of self-defense. The only claim the defendant raises in his brief is that the criminal statute is unconstitutional on its face; there is no claim that its application may be unconstitutional as applied to a valid claim of self-defense.

¶ 22 Finally, the defendant contends his conviction for unlawful possession of a weapon by a felon violates the one act, one crime doctrine in light of his armed habitual criminal conviction. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001) (multiple convictions are prohibited where more than one offense arises from the same physical act). In this case, both offenses arose from a single act of gun possession; the convictions are not subject to merger as greater and lesser offenses, as the trial court appeared to conclude, and as the mittimus reflects. The State agrees

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that unlawful possession of a weapon by a felon is the less serious offense and the defendant's conviction of that offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009).

¶ 23

CONCLUSION

¶ 24 The second amendment right to keep and bear arms does not apply to a felon prohibited from gun possession by the armed habitual criminal statute. The defendant's claim that the statute is unconstitutional on its face is without merit. However, we vacate the defendant's conviction for unlawful possession of a weapon by a felon as the less serious offense, where he was properly convicted of being an armed habitual criminal, because only one act of firearm possession occurred.

¶ 25 Affirmed; conviction vacated.