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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. 10 CR 05679 (01)
)	
DARRYL AUSTIN,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for unlawful use of a weapon by a felon violates the one-act, one-crime rule, and must be vacated. We find that the armed habitual criminal statute does not violate the second amendment's right to bear arms, as we have in several prior cases. We order the mittimus corrected to reflect only one drug conviction.
- ¶ 2 After a bench trial, defendant Darryl Austin was convicted and sentenced on three counts: (1) being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)); (2) possession with intent to deliver within 1,000 feet of a church (720 ILCS 570/407(b)(1) (West 2008)); and (3) unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). On January 26,

2011, after hearing factors in aggravation and mitigation, the trial court sentenced defendant to three concurrent 15-year terms in the Illinois Department of Corrections.

¶ 3 On this direct appeal, defendant raises three issues for review. First, he claims that his convictions for armed habitual criminal and for unlawful use of a weapon by a felon based on the possession of a handgun in his home must be vacated because the statutes violate his constitutional right to bear arms for self-defense. We have rejected this same constitutional claim several times before in other cases, and we see no reason to depart from our well-established precedent. *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011) (armed habitual criminal statute constitutional); *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011) (armed habitual criminal statute constitutional); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011) (armed habitual criminal statute constitutional). Second, defendant claims that his conviction for unlawful use of a weapon by a felon must be vacated under the one-act, one-crime rule because it was predicated on the same act of possessing a single handgun, which formed the basis of his armed habitual criminal conviction. The State agrees, and so do we. Third, defendant claims that his mittimus should be corrected to reflect two convictions for possession of a controlled substance with intent to deliver within 1,000 feet of a church. The State agrees that the mittimus should be corrected. However, we find that the trial court sentenced defendant to only one drug offense, and order the mittimus corrected to reflect the trial court's oral imposition of sentence.

¶ 4 In sum and for the reasons discussed below, we vacate defendant's conviction for unlawful use of a weapon by a felon as violating the one-act, one-crime rule; we reject defendant's constitutional claims that the armed habitual criminal statute violates the second amendment's right to bear arms; and we correct the mittimus to reflect only one drug conviction.

¶ 5

BACKGROUND

¶ 6

I. Bench Trial

¶ 7 At trial, there was no dispute that Oak Park police officers executed a search warrant for apartment 2B at 143 North Mason Avenue in Chicago and that the search revealed a gun, drugs, drug paraphernalia, such as scales and knotted plastic baggies, which are commonly used for drug distribution. There was also no dispute that this apartment was located less than 1,000 feet from a church or that defendant had two prior felony convictions. At trial, defendant disputed only the State's claim that he resided in apartment 2B. Defendant claimed that he resided in apartment 2D.

¶ 8

A. The State's Case

¶ 9 The State presented the testimony of five witnesses at trial: Greg¹ Sorg, the property manager of defendant's apartment building, and Oak Park police officers Michael O'Conner, Victor Barrientos, Kevin Collins and Michael Rallidis, who searched the apartment and arrested defendant.

¶ 10 Greg Sorg testified that, when he took over the management of the apartment building in January of 2009, defendant and Carrie Lash, defendant's girlfriend, were living in apartment 2D. Sorg testified that, at some point, defendant contacted him about moving into apartment 2B, which was a larger one-bedroom apartment. In February 2010, defendant relinquished his keys to apartment 2D and Sorg gave him the keys for the new apartment.

¶ 11 On February 18, 2010, Sorg visited apartment 2B to address complaints from a downstairs neighbor regarding excessive foot traffic and visitors. Carrie Lash answered the door and Sorg told her to tell defendant about the noise complaint. Sorg testified that he did not know the exact date on which defendant later vacated apartment 2B, but it was the result of an eviction

¹ The record states Greg instead of Gregory.

proceeding brought against defendant in August 2010 for unpaid rent while defendant was awaiting trial in this case. Sorg had telephone conversations with defendant prior to filing the eviction suit regarding the nonpayment of rent.

¶ 12 Officer Michael O'Conner testified that, on February 19, 2010, he obtained a search warrant for apartment 2B. The two targets for the search warrant were defendant and Carrie Lash. The search warrant was signed at 5:12 p.m. and Officer O'Conner drove to the Mason Avenue address arriving at approximately 5:45 p.m. Defendant and Lash were already in custody, and the officers on the scene had obtained a key to the apartment from defendant. Inside the apartment, the police officers observed a blender with a white powdery residue on it and drug paraphernalia found in the apartment. Other items recovered included two digital scales, a sifter with a spoon and toothbrush, a metal grinder, baggies, twist ties, and Dormin, which the officer testified is an over-the-counter medication that is mixed into the drugs to make the drugs appear to be greater in weight and density. Officer O'Conner testified that, based on his experience, these items are commonly used in preparing drugs for distribution. Officer O'Conner has worked for the Oak Park police department for 10 years with over 50 drug arrests. An extensive search of the apartment was done after the canine team arrived on the scene.

¶ 13 Officer O'Conner testified that he searched the bedroom and in the closet he found male clothing and shoes. Female clothing was found in the dresser drawers of the same bedroom. Officer O'Conner testified that he recovered a Frontier .22-caliber handgun loaded with two rounds and drugs inside a pair of white shoes. The drugs recovered in the pair of white shoes were in a Tylenol bottle and an unmarked pill bottle. Inside the Tylenol bottle, Officer O'Conner found a knotted plastic bag containing a chunky white substance. The unmarked pill bottle contained a large clear plastic bag and 12 individual smaller knotted baggies. Over \$900 was

recovered from defendant's person following his arrest and \$74 of that was in prerecorded funds. The prerecorded funds had been used in undercover buys from defendant by a confidential informant.

¶ 14 The parties stipulated that the substance from the 12 smaller baggies tested positive for 1.1 grams of cocaine. The substance from the large clear plastic bag inside of the unmarked pill bottle tested positive for 4.1 grams of heroin. The substance from the Tylenol bottle tested positive for 4.9 grams of heroin.

¶ 15 Next, Officer Victor Barrientos testified that he was on duty on February 19, 2010, when a search warrant was executed at 5 p.m. that evening. Officer Barrientos observed defendant and Carrie Lash drive up in a vehicle and observed Officers Collins and Donaire execute a stop of the vehicle. Officer Barrientos then proceeded to apartment 2B and assisted Officers O'Conner, Leidl and Jones² in executing the search warrant. The officers checked apartment 2B to make sure other people were not inside, and then conducted a physical search. In the bathroom, Officer Barrientos recovered a Q-tip box containing three to four syringes and other items used to prepare drugs for distribution.

¶ 16 At the Oak Park Police Department, while apartment 2B, was being physically searched, Officer Barrientos read defendant his Miranda rights and defendant signed an "Oak Park Police Department Advisory of Rights" form. During the ensuing interview, defendant told Officer Barrientos that he lived at 145 North Mason Avenue, apartment 2B with his girlfriend. Defendant also told Officer Barrientos that there was a handgun and drugs in his apartment. Specifically, located in his bedroom, in a closet, and stuffed in an open-style shoe, there were two pill bottle containers. Officer Barrientos contacted Officer O'Conner and related the information obtained from defendant about the handgun and the drugs. Defendant told Officer

² The record does not indicate the first names of Officers Leidl and Jones.

Barrientos that the gun in his apartment belonged to his cousin, Andrea Austin, who lived in Wisconsin. Defendant's statements to Officer Barrientos were not taped or videorecorded, or put in writing. The officer did later include the substance of his interview in his police report.

¶ 17 Next, Officer Michael Rallidis, an evidence technician, testified that he was directed to photograph the evidence that was collected on February 19, 2010, at 145 North Mason Avenue, apartment 2B. He also took measurements of the distance from the Light of Liberty Church of God located at 2 West Washington in Oak Park to the location of defendant's apartment. By using a calibrated roller measuring instrument, he determined that the distance from the front door of defendant's apartment to the front door of the church was 739 feet.

¶ 18 Next, Officer Michael Collins testified that on February 19, 2010, at approximately 5 p.m. he conducted pre-warrant surveillance at 145 South Mason Avenue. Officer Collins observed defendant in a vehicle driving westbound on West End Avenue. Defendant was driving and Carrie Lash was in the passenger seat. Officer Collins stopped them on West End Avenue, just east of Mason Avenue, and informed them of the search warrant, served the warrant on defendant, and placed defendant under arrest. Officer Collins asked defendant where he lived and defendant stated 145 South Mason Avenue, apartment 2B. Officer Collins asked defendant whether he had keys to the apartment, so the police would not have to force the door open and defendant gave the officer his keys from a key ring. Officer Collins entered defendant's apartment to make sure that there was no one in the apartment. Officer Collins testified that, later that evening, defendant told officers that he had purchased the drugs with his girlfriend Carrie Lash, that he had cut the heroin with Dormin, and that the crack had come prepackaged.

¶ 19 The State then entered into evidence certified copies of defendant's two prior felony convictions which were received without objection. The State rested and defendant moved for a

directed finding of not guilty. The trial court granted the motion in part, dismissing count II (delivery of cocaine within 1,000 feet from a church), count IV (delivery of heroin within 1,000 feet of a church), and count VI (delivery of less than 15 grams of cocaine). The trial court denied the motion as to the other counts.

¶ 20

B. The Defense Case

¶ 21 The defense called Parrish Archer as its only witness. He testified that he is an employee of Pioneer Properties and that his direct supervisor is Greg Sorg. Archer's duties include cleaning up around the buildings, maintenance, and collecting rent. Archer first met defendant a little less than a year ago. Archer testified that defendant lived directly above him at 143 North Mason Avenue. He denied that defendant lived in apartment 2B. Archer testified that he collected rent from defendant for apartment 2D. According to Archer, a man named Charles Peoples lived in apartment 2B.

¶ 22 On cross-examination, Archer admitted that he had previous felony convictions for home invasion, armed robbery, and residential burglary. Archer also admitted that he is not in charge of the apartment leases, that he is unaware of the actual lessee, and that he only collects the rent.

¶ 23

II. Conviction and Sentencing

¶ 24 On September 29, 2010, the trial court found defendant guilty on the following seven counts: I (armed habitual criminal); III (possession with intent to deliver cocaine within 1,000 feet of a church); V (possession with intent to deliver heroin within 1,000 feet of a church); VII (possession with intent to deliver less than 1 gram of heroin); VIII (unlawful use of a weapon by a felon); X (possession of less than 15 grams of cocaine); and XI (possession of less than 15 grams of cocaine). Defendant was found not guilty on counts: II (delivery of cocaine within

1,000 feet of a church), IV (delivery of heroin within 1,000 feet of a church), VI (delivery of cocaine), and IX (unlawful use of a weapon by a felon for two live rounds).

¶ 25 At the sentencing on September 29, 2010, the trial court merged the drug offenses into one count of possession with intent to deliver cocaine within 1,000 feet of a church. Specifically, the trial court merged counts V, VII, X, and XI into count III. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to three concurrent 15-year terms on each of the following three counts: I (armed habitual criminal); III (possession with intent to deliver within 1,000 feet of a church); and VIII (unlawful use of a weapon by a felon).

¶ 26 Since there were originally eleven different counts, and since there appears to be confusion among the parties about which counts were merged, we have summarized the trial court’s findings in the chart below:

¶ 27

<u>Sentences</u>	<u>Count</u>	<u>Charges</u>	<u>Finding</u>
15 years	I	Armed Habitual Criminal	Guilty
	II	Delivery of cocaine within 1,000 feet of a church	Not guilty
15 years	III	Possession with intent to deliver cocaine within 1,000 feet of a church	Guilty
	IV	Delivery of heroin within 1,000 feet of a church	Not guilty
Merged with count 3	V	Possession with intent to deliver heroin within 1,000 feet of a church	Guilty
	VI	Delivery of cocaine	Not guilty
Merged with count 3	VII	Possession with intent to deliver less than 1 gram of heroin	Guilty
15 years	VIII	Unlawful use of a weapon by a felon	Guilty
	IX	Unlawful use of a weapon by a felon for two live rounds	Not guilty
Merged with count 3	X	Possession of less than 15 grams of cocaine	Guilty
Merged with count 3	XI	Possession of less than 15 grams of cocaine	Guilty

¶ 28 The State and defendant agree that the mittimus should be corrected to reflect two counts of possession with intent to deliver within 1,000 feet of a church: count III (possession of cocaine with intent to deliver within 1,000 feet of a church); and count V (possession of heroin with intent to deliver within 1,000 feet of a church). However, this is not what the trial court ordered at sentencing.

¶ 29 The trial court stated: “All right. Count I is 15 years.”

¶ 30 Then the trial court stated: “A Class X. That would be also 15 years on Count III.” Then the trial court stated: “So it’s 15 years on Count I, III, V, and VII merge. There’s a finding, a separate finding on Count VIII, and the 15 years is Count VIII. X and XI are merged with the other possession with intent charges.”

¶ 31 After imposing sentence, the trial court next explained defendant’s appeal rights. Then, almost as an afterthought, the trial court explained that defendant’s sentences were “75 percent sentences”:

¶ 32 “Okay. Mr. Austin, I just wanted to tell you something. I explained your sentence was 15 years, but I also wanted you to know that two of the charges, the possession of cocaine with intent to deliver within 1,000 feet of a church or a school, and possession of heroin with intent to deliver also within 1,000 feet of a school or a church, both of those are 75 percent sentences.”

¶ 33 The parties assume that, in the above paragraph, the trial court imposed an additional sentence. However, the trial court did not state that it was imposing an additional sentence nor did it state that it was correcting or changing its prior and complete imposition of sentence, where it stated the result on every count. In the above-quoted paragraph, after imposing sentence

and informing defendant of his appeal rights, the trial court merely informed defendant that his sentence would be served at 75 percent.

¶ 34 The mittimus, entered January 26, 2011, mistakenly reflected a total of five drug convictions and sentences. Defendant's posttrial motion to reduce sentence was denied, and defendant filed a notice of appeal on February 24, 2011. This appeal followed.

¶ 35 ANALYSIS

¶ 36 On this direct appeal, defendant claims, first, that his convictions for armed habitual criminal and for unlawful use of a weapon by a felon should be vacated because the statutes violate his constitutional right to bear arms. Second, defendant claims that his conviction and sentence for unlawful use of a weapon by a felon must also be vacated under the one-act, one-crime rule because it was predicated on the same act of possessing a single handgun, which formed the basis of his armed habitual criminal conviction; and the State agrees. Third, defendant claims that his mittimus should be corrected to reflect two convictions and sentences for possession of a controlled substance with intent to deliver within 1,000 feet of a church; and the State agrees. For the following reasons, we vacate defendant's conviction for unlawful use of a weapon as violating the one-act, one-crime rule; we reject defendant's constitutional claims that the armed habitual criminal statute violates the second amendment's right to bear arms; and we correct the mittimus to reflect one drug conviction.

¶ 37 I. Armed Habitual Criminal

¶ 38 Defendant claims that the armed habitual criminal statute violates the second amendment. We do not find this argument persuasive, for the reason explained below.

¶ 39 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*, *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.

¶ 40

A. Right to Bear Arms

¶ 41 We have previously considered this same question of whether, in light of the United States Supreme Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), whether the offense of being an armed habitual criminal violates the second amendment’s right to bear arms.

¶ 42 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.

¶ 43 In both of 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 U.S. at 625 (“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.

¶ 44 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.

¶ 45 As noted, every Illinois appellate panel, which has considered second amendment challenges to felon possession laws after *Heller*, has upheld these laws. *Davis*, 408 Ill. App. 3d at 750 (1st District, 3d 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).

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

¶ 47 II. Defendant's Claim Under the One-Act, One-Crime Rule

¶ 48 The State and defendant agree that defendant's conviction and sentence for unlawful use of a weapon by a felon must be vacated under the one-act, one-crime rule because it was predicated on the same act of possessing a single handgun, which formed the basis of his armed habitual criminal conviction. The trial court found defendant guilty on count I (armed habitual criminal) and count VIII (unlawful use of a weapon by a felon).

¶ 49 The evidence at trial showed that the police officers recovered a .22-caliber handgun from defendant's apartment. Defendant claims that his conviction for unlawful use of a weapon was predicated on the same act of possession of a firearm as his armed habitual criminal

conviction. The State agrees in its appellate brief that, “based on the one-act, one-crime rule defendant’s conviction and concurrent sentence for unlawful use of a weapon by a felon should be vacated.”

¶ 50 Although both parties have agreed that the one act, one crime rule applies and have asked us to vacate a conviction based on it, we are still compelled to determine the parameters of the rule and which convictions must be vacated. *Cf. People v. Givens*, 237 Ill. 2d 311, 328 (2010) (observing that an appellate court “was compelled in the interest of justice to sua sponte address the trial court’s ‘obvious error’ in convicting defendant of four separate counts of first degree murder involving a single murder) (citing *People v. Rodriguez*, 336 Ill. App. 3d 1, 12 (2002)). The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). Thus, for example, “[w]here but one person has been murdered, there can be but one conviction of murder.” *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). Similarly, when the State presented evidence of defendant’s possession of only one loaded firearm at only one point in time, we held that there can be only one conviction based on it. *People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005) (multiple convictions “based on the same act, specifically, defendant’s possession of the firearm *** cannot stand under the one-act, one-crime doctrine”). Thus, we affirm count I (armed habitual criminal) and vacate count VIII (unlawful use of a weapon by a felon). Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999) (providing the appellate court with the power to “reverse, affirm, or modify the judgment or order from which the appeal is taken”).

¶ 51 Accordingly, we agree that the possession of a single loaded firearm cannot serve as the basis for multiple convictions, and therefore vacate defendant's conviction on count VIII for unlawful use of a weapon by a felon.

¶ 52 III. Mittimus Corrected

¶ 53 The State and defendant also agree that defendant's mittimus should be corrected. We also note a discrepancy between the mittimus and the trial court's oral sentencing in open court. Defendant's mittimus must be amended to reflect that the trial court imposed one 15-year sentence on count I (armed habitual criminal), one 15-year sentence on count III (possession with intent to deliver within 1,000 feet of a church), and one 15-year sentence on count VIII (unlawful use of a weapon by a felon).

¶ 54 When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls. *People v. DeWeese*, 298 Ill. App. 3d 4 (1998); *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). The oral pronouncement of the judge is the judgment of the court, and the written order of commitment is merely evidence of that judgment. *Smith*, 242 Ill. App. 3d at 402. Following our established precedent, we find that the oral pronouncement of the trial court must prevail over defendant's mittimus.

¶ 55 Remand is unnecessary because, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we may "reverse, affirm, or modify the judgment or order from which the appeal is taken." Thus, we order the clerk of the circuit court to make the necessary corrections to defendant's sentencing order. *People v. McCray*, 274 Ill. App. 3d 396, 403 (1995).

¶ 56 Accordingly, we order the mittimus to be corrected to reflect the one drug sentence for count III (possession with intent to deliver cocaine within 1,000 feet of a church), as well as the sentences for counts I and VIII. As orally pronounced, all the other drug counts merged into

count III. The trial court also ordered all three sentences to be served concurrently. *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992) (correcting the mittimus without remanding case under Supreme Court Rule 615); Ill. S. Ct. R. 615 (eff. Aug. 27, 1999).

¶ 57

CONCLUSION

¶ 58 For the foregoing reasons, we find that defendant's conviction for unlawful use of a weapon by a felon violates the one-act, one-crime rule, and is, therefore vacated. We reject defendant's constitutional claims that the armed habitual criminal statute violates the second amendment's right to bear arms, and we order the mittimus to be corrected to reflect only convictions and sentences on counts I, III, and VIII.

¶ 59 Affirmed in part, vacated in part and mittimus corrected.