2012 IL App (1st) 111794-U

THIRD DIVISION
November 14, 2012

No. 1-11-1794

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 18564
	)	
LARRY MATTHEWS,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

¶ 1 *Held:* The armed habitual criminal statute violates neither the right to bear arms guaranteed by the Second Amendment nor the prohibition against *ex post facto* legislation.

¶ 2 After a bench trial, defendant Larry Matthews was convicted of the offense of armed habitual criminal and sentenced to 10 years in prison. On appeal, defendant contends that the offense of armed habitual criminal, which makes it a crime for a person convicted of specified felonies to possesses a firearm, is a violation of the right to bear arms guaranteed by the Second

Amendment. He further contends that his conviction violates the *ex post facto* clauses of the United States and Illinois constitutions because the qualifying convictions occurred before the statute's effective date. We affirm.

¶ 3 The evidence at defendant's bench trial established that in September 2009, several police officers saw defendant drop a firearm to the ground and that defendant had previously been convicted of attempted murder and robbery. Ultimately, defendant was found guilty of the offense of armed habitual criminal and sentenced to 10 years in prison.

¶ 4 On appeal, defendant first contends that the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2008)), violates the Second Amendment because it criminalizes the possession of a firearm by certain individuals. Defendant argues, relying upon *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *McDonald v. City of Chicago, Illinois,*, 130 S. Ct. 3020 (2010), that the armed habitual criminal statute is unconstitutional on its face. Although defendant admits that he did not raise this issue before the trial court, he argues that a constitutional challenge to a statute may be raised at any time. See *People v. Bryant,* 128 Ill. 2d 448, 454 (1989). This court agrees and will therefore address the merits of defendant's contentions on appeal. See *People v. Bailey,* 396 Ill. App. 3d 459, 462 (2009) (a constitutional challenge involving the validity of a statute may be presented at any time, "regardless of a violation of technical waiver rules").

¶ 5 All statutes are presumed to be constitutional and the party challenging the validity of a statute has the burden to rebut that presumption and to clearly demonstrate a constitutional violation. *People v. Dinelli,* 217 Ill. 2d 387, 397 (2005). Whenever reasonably possible, a court must construe a statute in order to affirm its constitutionality. *Dinelli,* 217 Ill. 2d at 397. This court reviews the constitutionality of a statute *de novo. Dinelli,* 217 Ill. 2d at 397.

¶ 6 Here, defendant argues, relying upon *Heller* and *McDonald,* that the criminalization of the possession of a firearm by a felon, even those twice convicted of certain offenses, is an unconstitutional infringement on the right to bear arms which the Second Amendment "elevates

above all other interests." See *Heller,* 554 U.S. at 635. Although defendant acknowledges that *People v. Ross*, 407 Ill. App. 3d 931 (2011) and *People v. Coleman*, 409 Ill. App. 3d 869 (2011) rejected similar arguments, he contends that these cases were wrongly decided.

¶ 7 The *Ross* court addressed the same issue, whether the armed habitual criminal statute violated the Second Amendment's right to keep and bear arms. There, this court applied intermediate scrutiny analysis and noted that both *Heller* and *McDonald* found prohibitions on the possession of firearms by felons to be lawful regulatory measures used by the government to promote the health, safety, and general welfare of its citizens. *Ross,* 407 Ill. App. 3d at 941-42.

¶ 8 In rejecting the defendant's arguments that such a statute violated the Supreme Court's decisions in *Heller* and *McDonald*, the *Ross* court concluded that those holdings were limited to the question presented in each case, that is, whether the right to possess a handgun in the home for self-defense was protected by the Second Amendment as a fundamental right. *Ross,* 407 Ill. App. 3d at 939-40. The court then highlighted that the Supreme Court has never determined that a felon could possess a firearm at home or outside a home. *Ross,* 407 Ill. App. 3d at 939, quoting *Heller,* 554 U.S. at 626-27 (" 'nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms *by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and governmental buildings, or laws imposing conditions on the commercial sale of arms' " (Emphasis in original.)). See also *McDonald*, 130 S. Ct. at 3047. Ultimately, the *Ross* court concluded that the armed habitual criminal statute served "a substantial governmental interest and [was] proportional to the interest served." *Ross,* 407 Ill. App. 3d at 942. This court declines defendant's invitation to depart from the holding in *Ross*.

¶ 9 This court also rejects defendant's arguments that we may ignore *Heller* and *McDonald*'s statements about lawfully prohibiting felons from possessing firearms because they were *dicta*. This court has previously concluded that judicial *dicta* which involves an issue briefed and

argued by the parties has " 'the force of a determination by a reviewing court and should receive dispositive weight in an inferior court.' " *People v. Black*, 2012 IL App (1st) 110055, ¶ 14, quoting *People v. Williams,* 204 Ill. 2d 191, 206 (2003). As the Supreme Court stated in *Heller* that statutes prohibiting felons from possessing firearms are presumptively lawful, and repeated this statement in *McDonald*, this court cannot agree with defendant's assertion that this statement was an "off-hand reference" that can be disregarded. See *Black*, 2012 IL App (1st) 110055, ¶ 14; see also *People v. Davis,* 408 Ill. App. 3d 747, 750 (2011) (finding support in *dicta* in *Heller* when reviewing a constitutional challenge to the armed habitual criminal statute).

¶ 10 Accordingly, we continue to adhere to this court's decisions in *Ross* and *Black*, and find that the armed habitual criminal statute does not violate defendant's Second Amendment rights. Therefore, defendant's constitutional challenge to the armed habitual criminal statute fails.

¶ 11 Defendant next contends that his conviction for the offense of armed habitual criminal violates the *ex post facto* clauses of the Illinois and United States Constitutions because the offense punished him for conduct that occurred before the effective date of the legislation creating the offense. Defendant acknowledges that similar *ex post facto* challenges were rejected by *People v. Bailey,* 396 Ill. App. 3d 459 (2009), *People v. Leonard,* 391 Ill. App. 3d 926 (2009), and *People v. Adams,* 404 Ill. App. 3d 405 (2010). However, he contends that these cases were wrongly decided.

¶ 12 As stated above, all statutes are presumed constitutional and the burden to rebut this presumption rests upon the party challenging the validity of the statute. *Dinelli*, 217 Ill. 2d at 397. Constitutional challenges to a statute are reviewed *de novo*. *Dinelli*, 217 Ill. 2d at 397.

¶ 13 An *ex post facto* law is one which, *inter alia*, makes criminal and punishable an act innocent when done; aggravates a crime or makes the crime greater than it was at the time it was committed; or increases the punishment for a crime and applies that increase to crimes committed before the enactment of the law. *Leonard*, 391 Ill. App. 3d at 931. The prohibition

against *ex post facto* laws rests upon the belief that a person has the right to a "fair warning" regarding any conduct that gives rise to criminal penalties and punishment. *Leonard,* 391 Ill. App. 3d at 931.

¶ 14 *People v. Leonard*, 391 Ill. App. 3d 926 (2009), a factually similar case, is instructive. There, the defendant was convicted of the offense of armed habitual criminal for possessing a firearm after having previously been convicted of three qualifying offenses committed between 1998 and 2004. On appeal, he contended that the armed habitual criminal statute violated the provision against *ex post facto* laws because his prior convictions were used as elements of the offense even though they were committed before the enactment of the statute.

¶ 15 Initially, the court highlighted that when recidivist statutes have been challenged as a violation of *ex post facto* principles, these statutes have "consistently" been found constitutional because they punish a defendant for a new and separate crime, rather than for the earlier offense committed before the statute was enacted. *Leonard,* 391 Ill. App. 3d at 931. In other words, pursuant to the recidivist statutes, the prior offenses are only an element of the new crime. *Leonard*, 391 Ill. App. 3d at 931. The *Leonard* court then determined that *ex post facto* principles had not been violated in that case, as the armed habitual criminal statute did not punish the defendant for those offenses he had committed before the statute was enacted; rather, he was being punished for "the new act of possessing a firearm." *Leonard,* 391 Ill. App. 3d at 931-32; see also *Bailey,* 396 Ill. App. 3d at 463-64 (citing *Leonard* with approval and holding that contrary to the defendant's argument, the armed habitual criminal statute did not punish him for offenses committed before the statute's effective date but, rather, properly punished him for the "new and separate crime" of possessing firearms while having already been convicted of two prior enumerated felonies).

¶ 16 Defendant, on the other hand, contends that this court should disregard *Leonard* and *Bailey*, as their holdings conflict with *People v. Dunigan,* 165 Ill. 2d 235 (1995), and *People v.*

Levin, 157 Ill. 2d 138 (1993), in which our supreme court upheld the constitutionality of the Habitual Criminal Act (Ill. Rev. Stat. 1989, ch. 38, ¶ 33B-1 (repealed by Pub. Act 95–1052, § 93 (eff. July 1, 2009))), because prior convictions under that statute were used as sentencing factors only and did not constitute elements of a new substantive offense. Defendant further argues that if that statute had considered prior convictions as elements of a new offense, our supreme court would have found an *ex post facto* violation.

¶ 17 However, *People v. Black*, 2012 IL App (1st) 110055, considered, and rejected, a similar argument. There, the court initially noted that unlike the armed habitual criminal statute, the Habitual Criminal Act at issue in *Dunigan* and *Levin* dealt only with sentencing. *Black*, 2012 IL App (1st) 110055, ¶ 21. Thus, in those cases our supreme court responded to the defendants' contentions that the Habitual Criminal Act improperly mandated a life sentence as punishment for all felony offenses, including the ones for which the defendants had already been convicted and, as such, created a new substantive criminal offense. *Black*, 2012 IL App (1st) 110055, ¶ 21, citing *Dunigan,* 165 Ill. 2d at 241-42 and *Levin,* 157 Ill. 2d at 149. However, our supreme court disagreed, determining that the punishment imposed under the Habitual Criminal Act was for the most recent offense only and that a defendant's prior felony convictions simply aggravated or enhanced the penalty imposed for the most recent offense. *Black*, 2012 IL App (1st) 110055, ¶ 21, citing *Dunigan,* 165 Ill. 2d at 242.

¶ 18 The *Black* court then determined that *Dunigan* and *Levin* did not expressly prohibit the use of prior convictions as elements of an offense in all habitual criminal legislation; rather, those cases merely indicated that the statute at issue was a sentencing enhancement and did not create a substantive offense. *Black*, 2012 IL App (1st) 110055, ¶ 22. The armed habitual criminal statute, on the other hand, created a substantive offense which punished a defendant not for his prior convictions, but for a new offense. *Black*, 2012 IL App (1st) 110055, ¶ 21, citing *Leonard,* 391 Ill. App. 3d at 932. Therefore, the court rejected defendant's *ex post facto* argument.

¶ 19 This court sees no reason to depart from our prior decisions. Therefore, we continue to adhere to the holdings of *Leonard, Bailey,* and *Black*. Accordingly, defendant's *ex post facto* challenge to the armed habitual criminal statute must fail.

¶ 20 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.