

No. 1-12-0589

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 59
)	
ANTHONY MCDANIELS,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment on defendant's conviction of armed habitual criminal affirmed over defendant's contentions regarding insufficient chain of custody of firearm, and *ex post facto* violation posed by application of armed habitual criminal statute; fines and fees order corrected.
- ¶ 2 Following a bench trial, defendant Anthony McDaniels was found guilty of armed habitual criminal, then sentenced as a Class X offender to 12 years' imprisonment. On appeal, defendant contends that the trial court erred in admitting the gun presented at trial into evidence because the State failed to lay an adequate foundation for its introduction. He thus requests that

we reverse his conviction and remand his cause for a new trial. In the alternative, defendant requests that we vacate the judgment entered on his armed habitual criminal conviction because it violates the *ex post facto* clauses of the United States and Illinois constitutions. Defendant also contends that he was improperly assessed certain fines, costs and fees, and requests that we vacate them and correct the fines and fees order accordingly.

¶ 3 The incident leading to the charges filed in this case took place in the early afternoon of November 21, 2008. When defendant's trial was scheduled to commence on February 8, 2011, the State informed the court that it had just discovered that the gun related to defendant's case had been fingerprinted by the ATF without its knowledge, and requested additional time in order to obtain the fingerprint report. Defendant filed a motion to dismiss in relation to these developments, and a hearing was held on that motion. The State informed the court that the fingerprint report revealed no suitable impressions, and that it did not find out about the ATF's actions until it obtained the gun for trial and saw that "pink or purple-like powder" was on the gun, bullets, and magazine. The trial court denied defendant's motion to dismiss and the case proceeded to trial, where the following evidence, as pertinent to this appeal, was presented.

¶ 4 Chicago police officer Manuel Leano testified that about 1:58 p.m. on November 21, 2008, he and his partner, Officer Nichols, were conducting a narcotics surveillance near 56th and South Prairie Streets in Chicago, when he saw defendant leave the residence at 5613 South Prairie Street. Defendant held his waistband and yelled "go, go, go," as he jumped into the front passenger seat of a gold Ford Taurus that was parked nearby. Officer Leano and Officer Nichols, who was driving their unmarked vehicle, followed the Taurus. At approximately 56th Street and King Drive, the driver of the Taurus failed to stop at a stop sign, so Officer Nichols activated his emergency lights in an unsuccessful attempt to effectuate a stop.

¶ 5 Officer Leano further testified that, as the Taurus proceeded down the alley near 5814 South King Drive, he saw defendant jump out of it. Officer Leano exited his car and chased defendant, who was holding the right side of his waist as he ran. Shortly thereafter, Officer Leano saw defendant fall down and a blue steel gun drop from the right side of his waistband to the sidewalk. Officer Leano immediately recovered the gun and placed it in his pocket, while defendant got up and continued running away. Officer Leano radioed defendant's location to Officer Nichols, who apprehended defendant shortly thereafter.

¶ 6 Officer Leano further testified that upon arriving at the police station, and in the presence of Officer Nichols, he inspected the gun and found that it was a Glock 9 millimeter, model 19, loaded with seven live rounds in the magazine and one in the chamber. Officer Leano identified State's Group Exhibit 10 as the gun, magazine and eight live rounds that he recovered from defendant, and testified that they were all in substantially the same condition as on the day of the incident, "minus the dust and purple stuff." The trial court admitted that exhibit into evidence over defendant's objection to a lack of proper identification. Officer Leano further testified that he advised defendant of his rights in Officer Nichols' presence at the police station, that defendant stated that he understood those rights and waived them, then stated that he bought the gun on the street for protection and wanted to get the gun out of his car.

¶ 7 On cross-examination, Officer Leano acknowledged that he wrote the incorrect initial direction of travel for the Taurus in the arrest report. He further testified that he is familiar with Glock pistols in general, and although he is unfamiliar with model 19, that information was written on the gun itself. He also testified that neither he, nor Officer Nichols, put any identifying marks on the gun or bullets, and that the gun had a serial number on it. On re-direct, Officer Leano testified that Officer Nichols properly inventoried the gun, magazine and live rounds in his presence, and placed them inside an envelope. He then identified Group Exhibit 10

as the contents of that envelope. On re-cross, Officer Leano testified that he did not submit the gun for fingerprinting.

¶ 8 Officer Nichols corroborated Officer Leano's testimony regarding their observation, pursuit and apprehension of defendant on the day of the incident, as well as defendant's statement. Officer Nichols added that Officer Leano showed him the recovered gun while they were on the scene right before they took defendant into custody. Officer Nichols further testified that he inventoried the gun, magazine and eight live rounds at the police station, and, in doing so, assigned those items a unique inventory number, then put them in a properly sealed envelope, which he then placed in a safe. Officer Nichols identified State's Group Exhibit 10 as the gun, magazine and eight live rounds that he inventoried in relation to this case and testified that, aside from white dusting and a purplish tint, the contents of the exhibit were in substantially the same condition as when he saw them on the day of the incident. On cross-examination, Officer Nichols testified that he did not assign any individual markings to the gun or bullets, and that the gun contained a serial number.

¶ 9 The parties stipulated that defendant was convicted of armed robbery in Case No. 01 CR 1077 and second degree murder in case No. 90 CR 7287. Defendant then moved for a directed finding as to all counts. The trial court granted the motion solely on Count 6, defacing identification marks of a firearm.

¶ 10 Antonio Riles testified for the defense that he towed the Taurus on the day of the incident from 5613 South Prairie Street to 103rd and Doty Streets, and acknowledged that he signed a vehicle tow sheet reflecting that the Taurus was towed to 5101 South Wentworth Avenue. Chicago police officer Kallatt Muhammed testified in rebuttal that on the day of the incident, he and Officer Elsworth Smith recovered the Taurus from an alley near 57th Street and King Drive and drove it to the police station at 5101 South Wentworth Avenue.

¶ 11 The trial court found defendant guilty of, *inter alia*, armed habitual criminal, and, in doing so, stated that it had gauged the credibility of the testifying witnesses, determined that Officers Leano and Nichols had testified clearly and convincingly, and that it believed defendant admitted to police that he had the gun and had bought it for protection. The trial court denied defendant's subsequently-filed motion for a new trial, and once again noted that the testifying officers were "very credible." The court further stated that it believed that those officers were able to distinguish the gun that was presented in court "from any other gun or any other bit of evidence." The court then sentenced defendant to 12 years' imprisonment on his conviction for armed habitual criminal, and assessed him certain fines and fees.

¶ 12 In this appeal from that judgment, defendant first contends that his conviction should be reversed because the trial court erred in admitting the gun into evidence where the State failed to establish a proper chain of custody for it, and thereby failed to lay the proper foundation for its introduction into evidence. We disagree.

¶ 13 An adequate foundation for evidence can be established through identification by a witness where the item sought to be admitted has unique and readily identifiable characteristics and its composition is not easily subject to change. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). The evidence at issue here is a gun, which, unlike controlled substances, is not easily subject to change in terms of its composition. See *Woods*, 214 Ill. 2d at 466-67. Although defendant contends that the gun was not unique or readily identifiable, Officer Leano testified that the gun was a blue Glock 9 millimeter, model number 19, as indicated on the gun itself, that both he and Officer Nichols observed this gun at the scene, and that the gun was then placed in an envelope at the police station and inventoried. The fact that the gun was covered in purple dust at the time of trial was not evidence of tampering or substitution in that the dust did not change the gun's

constitution, brand, model or serial numbers, and the presence of the dust was explained by the fact that the ATF had taken it for fingerprinting.

¶ 14 Defendant, nevertheless, points out that some of the complaints which were signed by Officer Leano state that the serial number of the recovered gun had been defaced, and that the trial court directed a verdict in his favor on the charge of defacing the identification marks of a firearm. However, Officer Leano specifically testified at trial that the gun he recovered had a serial number, and defendant did not attempt to impeach him at that time with the contents of the complaints he signed. Further, the State presented no argument against a directed verdict on the charge of defacing a firearm, and, as such, did not contend that the serial number on the gun at issue had been defaced.

¶ 15 Accordingly, we find the testimony of Officers Leano and Nichols that the gun presented at trial was the same gun that was recovered on the day of the incident, provided an adequate foundation for the admission of the gun into evidence. *Woods*, 214 Ill. 2d at 466; *People v. Underwood*, 263 Ill. App. 3d 780, 786 (1994). Moreover, even assuming that the trial court erred in admitting the gun into evidence, for the reasons to follow, we find that such error was harmless.

¶ 16 According to defendant, if the State had been prohibited from introducing the gun into evidence, its case would have been severely undermined, and, taken in conjunction with questions regarding the testifying officers' credibility, "could have led a rational trier of fact to find reasonable doubt." We find, however, that even without the gun, sufficient evidence was presented to prove defendant guilty of armed habitual criminal beyond a reasonable doubt.

¶ 17 To sustain defendant's conviction of armed habitual criminal, the State was required to prove beyond a reasonable doubt that he possessed "a firearm" after having been previously convicted of two or more offenses identified by the statute. 720 ILCS 5/24-1.7(a) (West 2008).

Defendant acknowledges that due to the stipulation regarding his two prior qualifying convictions, "the only issue in dispute" was his possession of a firearm. On review, a finding regarding possession, a factual issue, will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of defendant's guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007).

¶ 18 We observe that the testimony of a single witness, including that of a law enforcement officer, if positive and credible, is sufficient to convict, even if it is contradicted by defendant. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992). In addition, that testimony need not be corroborated by physical evidence or other witnesses. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23); see also *People v. Ash*, 346 Ill. App. 3d 809, 818 (2004).

¶ 19 Here, Officer Leano testified that on the day of the incident he saw defendant jump out of the Taurus while it was still in motion, and run from police while holding his waist on the right side; the same area from which Officer Leano saw a gun drop after defendant fell down, and which gun he immediately recovered. Officer Leano's observations and recovery effort, which the trial court specifically found credible, established that defendant was in possession of a loaded firearm, and we have no basis for substituting our judgment for that of the trial court in this matter. *People v. Campbell*, 146 Ill. 2d 363, 389 (1992).

¶ 20 Further, Officer Nichols, who the trial court also specifically found to be a credible witness, provided testimony that corroborated Officer Leano's description of the incident leading to defendant's attempt to flee from police. Although Officer Nichols did not observe the gun fall from defendant's waistband, he did corroborate Officer Leano's testimony that a gun was recovered during defendant's attempt to flee, and was shown this gun while they were still on the scene. In addition, Officers Leano and Nichols both testified that, after having been advised of, and knowingly waiving his rights, defendant stated that he had purchased the gun on the street

for protection and had wanted to get the gun out of his car. In announcing its ruling, the trial court stated that it believed defendant admitted to possessing the gun. Given the credible testimony of officers Leano and Nichols, which included the details of defendant's admission to possession of the gun, we find that the evidence against defendant was overwhelming, and thus, any error in admitting the gun was harmless.

¶ 21 Defendant, nevertheless, maintains that the officers' credibility was called into question because their testimony regarding the direction the Taurus was traveling contradicted what was written in the police report, and because they both testified that another officer transported the Taurus from an alley to the police impound, which was contradicted by Riles' testimony. However, none of this testimony relates to, or contradicts, Officer Leano's testimony regarding defendant's possession of the gun, which was the subject of the prosecution. Further, these arguments regarding weaknesses in the evidence were all presented to, and rejected by, the trier of fact, and are unpersuasive. *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005).

¶ 22 In sum, we find that the testimony of Officer Leano regarding his observations of defendant in possession of a gun and defendant's admission to possessing a gun, and stipulation to his prior felony convictions, when viewed in the light most favorable to the State (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009)), was sufficient to allow the trial court to find that defendant was in possession of a gun after having been twice convicted of felonies, and was thus proved guilty of the offense of armed habitual criminal beyond a reasonable doubt.

¶ 23 Defendant next contends that his armed habitual criminal conviction violated the *ex post facto* clauses of the United States and Illinois constitutions because both of his qualifying convictions occurred prior to the effective date of the statute. Although defendant did not raise this issue in his motion for a new trial, a constitutional challenge to a statute can be raised at any

time. *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). We review such a constitutional challenge *de novo*. *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005).

¶ 24 There is no question that both the Illinois and United States constitutions prohibit *ex post facto* laws. *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011). In this case, the armed habitual criminal statute, under which defendant was convicted, became effective August 2, 2005 (*People v. Black*, 2012 IL App (1st) 110055, ¶ 19), and includes, as an element, that defendant has been previously convicted of two qualifying offenses (720 ILCS 5/24-1.7(a) (West 2008)). Defendant maintains that this statute violates the Illinois and United States *ex post facto* clauses because it does not require that the two qualifying convictions take place after the effective date of the statute.

¶ 25 Defendant acknowledges that this court has repeatedly addressed and rejected similar *ex post facto* challenges to the armed habitual criminal statute. See *Black*, 2012 IL App (1st) 110055, ¶ 19, *Coleman*, 409 Ill. App. 3d at 879-80; *People v. Thomas*, 407 Ill. App. 3d 136, 141-42 (2011); *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010); *People v. Davis*, 405 Ill. App. 3d 585, 596 (2010); *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 932 (2009). However, he argues that we should not follow these decisions because they conflict with the *ex post facto* principles as set forth in decisions from the Illinois and United States Supreme Courts. In doing so, he relies heavily on *People v. Dunigan*, 165 Ill. 2d 235 (1995), where the supreme court held that the Illinois Habitual Criminal Act (IHCA) was not an *ex post facto* law, but in doing so, relied on the fact that the prior convictions at issue were used only as sentencing factors, and did not constitute elements of a new substantive offense, as in the case at bar.

¶ 26 Defendant's reliance on *Dunigan* is misplaced. This court has repeatedly addressed *Dunigan* and found that it does not hold that habitual criminal legislation cannot include prior

convictions as elements of an offense. See *e.g. Black*, 2012 IL App (1st) 110055, ¶¶ 21-22; *Coleman*, 409 Ill. App. 3d at 880; *Leonard*, 391 Ill. App. 3d at 932, *Bailey*, 396 Ill. App. 3d at 464. We agree with the reasoning reflected in those decisions, and, likewise find that the armed habitual criminal statute does not violate constitutional prohibitions against *ex post facto* legislation.

¶ 27 Defendant finally challenges the imposition of certain fines and fees, as reflected in the order showing a total amount of \$745. Our review is *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 28 Defendant first contends, and the State concedes, that he was improperly assessed the \$20 Serious Traffic Violation fee, the \$35 Traffic Court Supervision fee, and the \$5 Court System fee because he was not convicted of an offense under the Illinois Vehicle Code. See 625 ILCS 5/16-104d (West 2010); 625 ILCS 5/16-104c (West 2010); 55 ILCS 5/5-1101(a) (West 2010). We agree and order that these fines be vacated. See *Price*, 375 Ill. App. 3d at 702.

¶ 29 Defendant next contends, and the State concedes, that he was erroneously assessed a \$20 preliminary hearing fee because no preliminary hearing took place here. 55 ILCS 5/4-2002.1(a) (West 2010). We agree, and order that this fee be vacated. *People v. Smith*, 236 Ill. 2d 162, 174 (2010).

¶ 30 Defendant next contends, and the State concedes, that he was erroneously assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), because his DNA profile was entered into the Illinois State DNA database in April 2005 for a prior conviction. We agree, and order this fee vacated. *People v. Marshall*, 242 Ill. 2d 285, 301-03 (2011).

¶ 31 Defendant further contends that he is entitled to a \$5 credit for each of the 853 days he spent in presentence custody. The State responds, and we agree, that defendant is not entitled to a claim of presentence credit for the day he was sentenced (*People v. Williams*, 239 Ill. 2d 503,

510 (2011)), and thus is entitled to a \$5 credit for 852 days spent in presentence custody.

However, there are four fines against which defendant may apply this credit, the \$30 Child Advocacy Center assessment (*People v. Jones*, 397 Ill. App. 3d 651, 660, 664 (2009)), the \$10 Mental Health Court and the \$5 Youth Diversion/Peer Court charge (*Price*, 375 Ill. App. 3d at 702), and the \$5 Drug Court assessment (*People v. Unander*, 404 Ill. App. 3d 884, 886 (2010)). Defendant's presentence credit offsets these fines, totaling \$50, in full.

¶ 32 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our authority to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we order that the fines and fees order be corrected to reflect (1) the vacation of the \$20 Serious Traffic Violation fee, the \$35 Traffic Court Supervision fee, and the \$5 Court System fee, (2) the vacation of the \$20 preliminary examination fee, (3) the vacation of the \$200 DNA fee, (4) \$4,260 in presentence custody credit, and (5) the offset of the \$30 Child Advocacy Center fee, the \$10 Mental Health Court charge, the \$5 Youth Diversion/Peer Court charge, and the \$5 Drug Court assessment in their entirety, for a corrected total amount of \$415. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 33 Affirmed; fines and fees order corrected.