

NOTICE

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2015 IL App (5th) 140322-U

NO. 5-14-0322

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 90-CF-136
	)	
RICKY D. BROWN,	)	Honorable
	)	Eugene E. Gross,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Welch and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's conviction for unlawful possession of a weapon in a correctional facility is not void because the portion of the statute the defendant was convicted under is severable from the portions of the statute that were deemed unconstitutional. Further, the trial court had jurisdiction to enter the conviction and sentence.

¶ 2 The defendant, Ricky D. Brown, was convicted by a jury of unlawful possession of a weapon by a person in custody of a correctional facility in violation of section 24-1.1 of the Criminal Code of 1961 (Criminal Code) (Ill. Rev. Stat. 1989, ch. 38, ¶ 24-1.1(b)). The defendant was sentenced to 20 years' imprisonment, which was to be served consecutively to the sentence he was already serving. The judgment of the trial court was

affirmed on appeal. The defendant filed a petition to vacate conviction, which was denied. The defendant then filed a motion to reconsider, which was also denied. The defendant filed a notice of appeal. We affirm.

¶ 3

### BACKGROUND

¶ 4 On June 3, 1988, the defendant was convicted of murder and voluntary manslaughter and sentenced to 40 years in prison. On January 22, 1990, while in custody of Menard Correctional Center, the defendant was caught with an 11-inch homemade dagger-like weapon in his sock. On September 24, 1990, the defendant was charged with unlawful possession of a weapon in a correctional facility in violation of section 24-1.1(b) of the Criminal Code (Ill. Rev. Stat. 1989, ch. 38, ¶ 24-1.1(b)). The defendant entered a plea of not guilty on October 2, 1990.

¶ 5 On May 13, 1991, the defendant was found guilty of unlawful possession of a weapon in a correctional facility. On June 17, 1991, the defendant was sentenced to 20 years' imprisonment to be served consecutive to the sentence he was already serving. That same day, he filed a motion in arrest of judgment, which was denied. The defendant filed a notice of appeal. On July 21, 1992, this court entered an order affirming the trial court's order. *People v. Brown*, No. 5-91-0432 (1992) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 17, 2014, the defendant filed a *pro se* petition to vacate a void conviction and sentence pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2012)) arguing that his conviction and sentence for unlawful possession of a weapon in a correctional facility in violation of section 24-

1.1(b) of the Criminal Code (Ill. Rev. Stat. 1989, ch. 38, ¶ 24-1.1(b)) is void because the statute does not list a dagger as a weapon, citing *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The defendant also argued that said statute was void because it had been declared unconstitutional in violation of the second amendment. On March 19, 2014, the State filed a special and limited response to contest jurisdiction of defendant's *pro se* petition to vacate void conviction and sentence, claiming the following: (1) the court's decision in *Moore* does not mention any retroactive applicability; (2) the case cited by the defendant only strikes down the ban on persons carrying concealed firearms in public, not weapons in the Illinois Department of Corrections; (3) the instant case was not subject to direct appeal or collateral proceedings at the time of the *Moore* decision; and, (4) pursuant to section 2-619(a)(1), (a)(4), and/or (a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(1), (a)(4), (a)(5) (West 2012)) this matter should be dismissed. On April 21, 2014, the defendant filed a reply to the State's special and limited response.

¶ 7 On May 5, 2014, the trial court entered an order granting the State's motion to dismiss. On May 28, 2014, the defendant filed a motion to reconsider, which was denied on June 12, 2014. The defendant filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 It is unlawful for any person confined in a penal institution, which is a facility of the Illinois Department of Corrections, to possess any weapon prohibited under section 24-1.1(b) of the Criminal Code. Ill. Rev. Stat. 1990, ch. 38, ¶ 24-1.1(b). The weapons prohibited are defined under section 24-1 of the Criminal Code; section 24-1(a)(2) specifically states that a person commits the offense of unlawful use of weapons when he

knowingly: carries or possesses with intent to use the same unlawfully against another, a dagger, dirk, billy, dangerous knife, razor, stiletto, broken bottle or other piece of glass, stun gun or taser or any other dangerous or deadly weapon or instrument of like character. Ill. Rev. Stat. 1989, ch. 38, ¶ 24-1(a)(2).

¶ 10 The defendant argues that section 24-1 of the Criminal Code—the section defining the prohibited weapons—has been declared void and, therefore, an element of the charge against him does not exist, making his conviction under section 24-1.1 void. The defendant further argues that the judgment is void because the trial court lacked one of the three elements for jurisdiction. More specifically, the defendant argues that the trial court lacked the power to render the judgment or sentence. The defendant's argument fails because the trial court did have the power to render the judgment and the relevant portion of section 24-1 of the Criminal Code has not been declared unconstitutional and is severable from the limited portion found unconstitutional.

¶ 11 In the instant case, the defendant was caught with an 11-inch homemade "dagger" in his sock. More specifically, at trial, Joseph Higgerson, a correctional sergeant who was working as the south cell house keeper at the time of the incident, testified that the defendant was found in possession of a homemade weapon, which he further described as measuring approximately 11 inches long by 1½ inches wide with tape on one end for a handle and a taped sheath.

¶ 12 Under well-settled principles of statutory construction, an undefined term must be given its ordinary and popularly understood meaning, and to determine that meaning, we may look to a dictionary. *People v. Kohl*, 364 Ill. App. 3d 495, 500 (2006). Merriam-

Webster's Dictionary defines dagger as "a sharp pointed knife that is used as a weapon." "dagger." Merriam-Webster Online Dictionary, 2015. <<http://www.merriam-webster.com/dictionary/dagger>>. (30 June 2015). Under this definition, the description given at trial indicates that the weapon found on the defendant was a dagger and a dangerous or deadly weapon.

¶ 13 It should also be noted that the elements giving rise to the offense of possession of a weapon by a person confined in a penal institution do not require the use of the weapon or proof of the inmate's intent, rather the statute only requires that the inmate possess the weapon and disregards the intent for which he possesses it. *People v. Keene*, 296 Ill. App. 3d 183, 188 (1998).

¶ 14 Relying on *Moore*, the defendant argues that section 24-1 has been declared void and, therefore, an element of the charge against him does not exist, making his conviction under section 24-1.1 void. Defendant's argument fails because the relevant portion of section 24-1 has not been declared unconstitutional and is severable from the limited portion found unconstitutional in both *Moore* and *People v. Aguilar*, 2013 IL 112116.

¶ 15 The issue of severability involves a question of statutory construction; essentially, the courts are required to give effect to the intent of the legislature. *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 17. Under the general rule of severability, an invalid portion of a statute may be severed from those portions that remain valid, and the authority to do so may arise either from a specific severability provision of that statute or from the general severability statute. *Id.* ¶ 18. "Severability is determined through a two-part inquiry: first, we determine 'whether the valid and invalid portions of the statute are

essentially and inseparably connected in substance,' and second, we determine whether the legislature would have enacted the valid portions without the invalid portions." *Id.* ¶ 19.

¶ 16 Courts have consistently noted that the fact that the court may have found a portion of a statute unconstitutional does not necessarily mean the entire statute is unconstitutional. See *Aguilar*, 2013 IL 112116, ¶ 22 n.3; *Moore*, 702 F.3d at 940-41; *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *Henderson*, 2013 IL App (1st) 113294, ¶ 22; *People v. Mosley*, 2015 IL 115872, ¶ 57.

¶ 17 In *Moore*, the court examined the constitutionality of sections 24-1(a)(4)(iii), (10)(iii), and 24-1.6(a)(3)(B) (720 ILCS 5/24-1(a)(4)(iii), (10)(iii), 24-1.6(a)(3)(B) (West 2012)) prohibiting carrying an uncased and immediately accessible firearm in public. *Moore*, 702 F.3d at 934. The court held that the right of possession of a firearm for the purpose of self-defense extended beyond the home. *Id.* at 942. The second amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. The court noted that the Supreme Court's interpretation of the second amendment conferred a right to bear arms for self-defense, which the Court believed was as important outside the home as it was inside. *Moore*, 702 F.3d at 942. However, the court noted, as also noted in the *Heller* decision, that although the blanket prohibition on carrying a firearm in public may violate the second amendment, the usual and longstanding prohibitions of firearm ownership by certain groups of people and in sensitive places still stood and should not be questioned. *Id.* at 940-41; *Heller*, 554 U.S. at 626.

¶ 18 In *Aguilar*, the court examined whether the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the aggravated unlawful use of a weapon statute (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2012)) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution. *Aguilar*, 2013 IL 112116, ¶ 11. The defendant argued that the statute itself violated the second amendment and that it could not be enforced against anyone, including himself. *Id.* ¶ 12. In analyzing the defendant's argument, the court noted that statutes are presumed constitutional and the courts have a duty to construe a statute in a manner that upholds the statute's validity and constitutionality if it can be reasonably done. *Id.* ¶ 15. The court, relying on *Moore*, held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) (the part making it illegal to carry an uncased, loaded, immediately accessible firearm) violated the right to keep and bear arms, as guaranteed by the second amendment. *Id.* ¶ 22. However, the court emphasized that the finding of unconstitutionality in *Moore* was specifically limited to the Class 4 form of the AUUW statute, as set forth in section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute; further, the court made no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute. *Id.* ¶ 22 n.3.

¶ 19 In *Mosley*, the defendant claimed that his aggravated unlawful use of weapons convictions under both the "FOID card" subsections (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012) and 720 ILCS 5/24-1.6(a)(2), (a)(3)(C) (West 2012)) and the "under 21" subsections (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2012) and 720 ILCS 5/24-1.6(a)(2), (a)(3)(I) (West 2012)) of the AUUW statute were unconstitutional because they disarm

young adults who are 18 to 20 years old in violation of the second amendment. *Mosley*, 2015 IL 115872, ¶ 33. The defendant argued that the AUUW statute would not have been enacted without the portion struck down in *Aguilar* and therefore the statute was unconstitutional. *Id.* ¶ 28. The court determined that *Aguilar's* finding of the invalidity of one subsection of the statute was not fatal to the balance of the statute and that the remaining factors could stand independently. *Id.* ¶ 31.

¶ 20 The State argued that the "FOID card" and the "under 21" subsections were individually complete and capable of being executed wholly independently. *Id.* ¶ 28. The issue of severability involves a question of statutory construction, which involves both ascertaining and giving effect to the intent of the legislature. *Id.* ¶ 29. In determining severability, the court first must look at the statute's own specific severability provision. *Id.* If there is no severability clause in the statute, the court must look to the Statute on Statute's general severability provision, which states: "[i]f any provision of an Act \*\*\* is held invalid, such invalidity does not affect other provisions \*\*\* of the Act which can be given effect without the invalid \*\*\* provision, and to this end the provisions of each Act \*\*\* are severable, unless otherwise provided by the Act." 5 ILCS 70/1.31 (West 2014).

¶ 21 Because the AUUW statute at issue in *Mosley* (720 ILCS 5/24-1.6 (West 2012)) did not have a specific severability provision, the court had to determine whether the valid and invalid portions of the statute were inseparably connected, such that the legislature would not have passed the valid portions of the statute without the invalid portions. *Mosley*, 2015 IL 115872, ¶ 30. The court relied on the analysis in *Henderson*,



which found that the invalidity of subsection (a)(3)(A) by *Aguilar* was not fatal to the balance of the statute. *Id.* ¶ 31. The *Henderson* court noted that the "'balance of the AUUW statute,' was a continuing reflection of the statute's legislative purpose to protect the police and public from dangerous weapons." *Id.* Therefore, the court concluded that subsections (a)(3)(C) and (a)(3)(I) could stand independently without subsection (a)(3)(A) and that the severability from subsection (a)(3)(A) did not undermine the ability to execute the remaining subsections of section (a)(3). *Id.* ¶ 31.

¶ 22 In the instant case, subsection 24-1(a)(2) is severable from the portions of the statute deemed invalid because they are not so inseparably connected that the legislature would not have passed the valid portions without the invalid portions. The purpose of the statute is to protect the police and public from dangerous weapons. *Mosley*, 2015 IL 115872, ¶ 31. The portions of the statute deemed invalid strike down the ban on persons carrying concealed firearms in public, not weapons in the Illinois Department of Corrections. It is more than reasonable to conclude that the legislature intended the ban against weapons in a penal institution to stand. Lawful persons carrying concealed firearms in public is much different than inmates in the Department of Corrections carrying homemade weapons for obvious reasons; the two are not connected in a way that one could not stand without the other. Allowing weapons in a penal setting would undermine the purpose of the statute, and, therefore, the statute must be severed.

¶ 23 It is apparent from the cases discussed above that each of the courts recognized that the second amendment right to possess and use a firearm for self-defense outside the home is not an unlimited right; this right is undoubtedly still subject to meaningful

regulation. *Aguilar*, 2013 IL 112116, ¶ 11; *Moore*, 702 F.3d at 940-41; *Heller*, 554 U.S. at 626-27; *Mosley*, 2015 IL 115872, ¶ 36. It is important to emphasize that nothing in the above opinions suggests that the scope of protection is extended to inmates in custody of the Department of Corrections. The defendant in the instant case even admits that a person in custody of the Department of Corrections does not have a second amendment right to bear arms.

¶ 24 The defendant was in custody of the Department of Corrections when he possessed the weapon. Courts have held that possession of certain items is more likely to be hazardous in a penal setting and therefore we want to prohibit even the innocent possession of such. See *People v. Ryan*, 117 Ill. 2d 28, 32-33 (1987). In *Ryan*, three defendants, who were inmates of Menard Correctional Center, were charged with possession of a homemade weapon fashioned from a metal rod and sharpened into what was described as a dagger, dirk, or pick. *Id.* at 31. The weapons were found in the defendants' cells during searches conducted by prison authorities. *Id.* The defendants moved to dismiss the charges contending that section 24-1.1 was unconstitutionally vague on its face. *Id.* at 33. The trial court dismissed the charges, and the Illinois Supreme Court reversed and remanded, holding that the statute was not unconstitutionally vague as applied to the inmates. *Id.* at 35.

¶ 25 The court noted that the purpose of the statute is to prohibit even the innocent possession of items that are likely to be hazardous in a penal setting. *Id.* at 32-33. The court further stated that this provision must be understood with its purpose in mind; in light of what has been termed the "central objective of prison administration,

safeguarding institutional security," prison authorities have an obvious interest in preventing prisoners' access to weapons. *Id.* at 35-36.

¶ 26 It is clear that, in the instant case, the defendant is not afforded the second amendment right to bear arms. The homemade weapon the defendant possessed is considered a dagger and dangerous or deadly weapon for the purposes of the statute (Ill. Rev. Stat. 1989, ch. 38, ¶ 24-1(a)(2)). Further, the defendant's conviction under the statute is not void because the portions of the statute held unconstitutional do not apply to the portion of the statute the defendant was convicted under. The unconstitutional portions of the statute are severable from the rest of the statute because they are not so inseparably connected that the legislature would not have enacted the valid portions without the invalid portions. In severing the statute, the court preserves the purpose of the statute as a whole, which is to protect the police and public from dangerous weapons. All prior decisions make clear that the second amendment has its limits, and there is conduct that falls outside the amendment's scope of protection. The fact that the defendant is a convicted felon of a violent crime and the fact that he is in custody of the Department of Corrections make his possession of a weapon dangerous for obvious reasons.

¶ 27 The defendant further argues that the judgment is void because the trial court lacked one of the three elements for jurisdiction. As the Illinois Supreme Court has consistently held, a judgment is void if the court that entered the judgment lacked jurisdiction. *People v. Davis*, 156 Ill. 2d 149, 155 (1993). Pursuant to article VI, section 9, of our constitution, the circuit courts have jurisdiction over all justiciable matters. *Id.*

at 156. There are three elements for jurisdiction: (1) personal jurisdiction, (2) subject matter jurisdiction, and (3) the power to render the particular judgment or sentence. *Id.* Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. *Id.*

¶ 28 In the instant case, the trial court acquired personal jurisdiction over the defendant when he appeared before the court. The trial court acquired subject matter jurisdiction to enforce the criminal code. Lastly, the trial court had the power to render the particular judgment based upon the criminal code. Therefore, the defendant's jurisdictional argument fails.

¶ 29

#### CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Randolph County.

¶ 31 Affirmed.