No. 1-09-1592

FOURTH DIVISION
February 24, 2011

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. 08 CR 22038
	)	
CHINA MILLER,	)	Honorable
	)	Thomas M. Davy
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

ORDER

Held: The unlawful use of a weapon by a felon statute (720 ILCS 5/24-1.1(a) (West 2008)) is not facially unconstitutional under the second amendment to the United States Constitution. U.S. Const., amend. II.

Following a stipulated bench trial, defendant China Miller was found guilty of unlawful use of a weapon by a felon (UUW) (720 ILCS 5/24-1.1(a) (West 2008)) and was sentenced to three years in prison. On appeal, defendant's sole assertion is that the UUW statute is facially unconstitutional because it violates his right to bear arms.

Before trial, defendant filed a motion to quash arrest and suppress evidence, which was denied. The motion is not at issue on appeal; however, the testimony presented at the pretrial hearing on defendant's motion was later stipulated to by the parties at defendant's bench trial on May 4, 2009. The evidence, which is not in dispute on appeal, essentially showed that at about 12:30 a.m. on November 8, 2008, defendant was in the driver's seat of a parked car when a police car passed him. After Officer Ryan Butler and defendant made eye contact, he leaned down toward the passenger seat and the police car backed up. Officer Butler testified that upon approaching defendant, Officer Butler saw a weapons magazine between defendant's feet. Officer Butler ordered defendant out of the car and recovered the magazine, which contained 31 live .45-caliber rounds. The State presented three prior convictions, including the 2002 aggravated unlawful use of a weapon conviction which had been identified in the present UUW charge as defendant's qualifying prior felony conviction. After finding defendant guilty based on the stipulated evidence, the trial court sentenced defendant to three years in prison.

On appeal, defendant asserts that the UUW statute is facially unconstitutional as being violative of his right to bear arms. He relies primarily on the United States Supreme Court's recent decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

In *Heller*, the Court held that the second amendment protects the individual right to bear arms for lawful purposes, most notably, self-defense in one's home. *McDonald v. City of Chicago, Illinois*, _ U.S. _,130 S. Ct. 3020, 3044 (2010) (discussing *Heller*, 554 U.S. 570). The Court found however, that the right was not unlimited. *Heller*, 554 U.S. at 596, 626. "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second

Amendment, 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 595. In addition, the Court found that the standard of scrutiny for assessing an alleged second amendment violation was not the rational basis standard, but declined to specify which standard does apply to a second amendment challenge. *Heller*, 554 U.S. at 628-29 n.27. Instead, the Court held that under any standard of scrutiny, the District of Columbia's statutory scheme prohibiting individuals from keeping handguns in their home would not be constitutional. *Heller*, 554 U.S. at 628-29. In reaching this conclusion, the court found that the need for defense of self, family and property is most acute in the home. *Heller*, 554 U.S. at 628. The Court concluded that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any *lawful* firearm in the home operable for the purpose of immediate self-defense. *Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." (Emphasis added.) *Heller*, 554 U.S. at 635.

Subsequently, the Court revisited the second amendment in *McDonald*, holding that the due process clause of the fourteenth amendment incorporates the second amendment right recognized in *Heller* and that the right fully applies to the States. *McDonald*, _ U.S. at _, _, 130 S. Ct. at 3026, 3050. The Court also repeated that its holding in *Heller* did not place in doubt longstanding regulatory measures such as laws which prohibit felons from possessing firearms. *McDonald*, _ U.S. at _,130 S. Ct. at 3047 (citing *Heller*, 554 U.S. at 626-27).

Defendant contends that the UUW statute is facially unconstitutional after *Heller*. A

facial challenge to legislation is the most difficult challenge to mount successfully because the challenger must show that the legislation would not be valid under any set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 228 (2010); but see *United States v. Stevens*, 559 U.S. _, _, 130 S. Ct. 1577, 1587 (2010) (it is disputed whether a facial attack must either show that the statute is invalid under any circumstances or must show that the statute lacks a "plainly legitimate sweep"). In attempting to demonstrate that a legislative act is wholly invalid, it is insufficient to show that the act might operate unconstitutionally in some conceivable set of circumstances because the "overbreadth" doctrine has not been recognized to apply outside of a first amendment context. See *Salerno*, 481 U.S. at 745.

As stated, the court in *Heller* clarified that its holding was not meant to place doubt on statutes prohibiting felons from having weapons. Even if this was *dicta*, the court reaffirmed this *dicta* in *McDonald*. We disagree with defendant's suggestion that such language has no bearing on our inquiry. With that said, it is not clear following *Heller* whether a felon even has the specific right articulated in that case or any other second amendment right. See *Heller*, 554 U.S. at 635 ("*Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home" (emphasis added)). Assuming, but not deciding, that a felon does have a second amendment right, we find that the UUW statute is not facially unconstitutional.

Following *Heller*, it is clear that rational review scrutiny does not apply, leaving us to determine whether intermediate or strict scrutiny is more appropriate. As this court previously

observed in upholding the UUW statute, courts have found that laws prohibiting felons or repeat sexual offenders from possessing firearms withstand intermediate scrutiny. See *People v. Williams*, No. 1-09-1667, slip op. at 4 (2010) (citing *United States v. Williams*, 616 F.3d 685, 694 (7th Cir. 2010); and *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)). In light of the deferential language found in *Heller* and repeated in *McDonald* regarding laws banning felons from possessing firearms, we find intermediate scrutiny to be the more appropriate standard. See *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307-08 (2008) (a legislative enactment must be substantially related to an important government interest in order to survive intermediate scrutiny, whereas strict scrutiny requires that the legislature narrowly tailor the statute to serve a compelling state interest, *i.e.*, the government must use the least restrictive means to attain its goal). Regardless of which standard applies, we find the UUW statute is constitutional.

Section 24-1.1(a) states as follows:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Card Act."

720 ILCS 5/24-1.1(a) (West 2008).

The plain language of section 24-1.1 shows that the legislature intended to prevent felons

from having dangerous weapons, including but not limited to firearms, in any situation, whether it be in public or in the privacy of the felon's own home. *People v. Kelly*, 347 Ill. App. 3d 163, 167 (2004); *People v. Carmichael*, 343 Ill. App. 3d 855, 864 (2003). Although most felons are nonviolent, a person with a felony conviction is more likely than a nonfelon to participate in illegal and violent firearm use. *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010). Keeping weapons away from those who have demonstrated an inability or unwillingness to follow the law, in order to protect the public from harm, is a compelling interest. We also find the statute is narrowly tailored to serve that interest.

The UUW statute provides a harsher penalty for felons who have previously committed forcible felonies because those felons have a history of using or threatening violence. *People v. Kelly*, 347 Ill. App. 3d 163, 167 (2004) (citing 720 ILCS 5/24-1.1(e) (West 2000)). Thus, the statute takes into account that some felons are more dangerous than others and adjusts the level of deterrence required accordingly. In addition, under the UUW statute, felons who have been granted relief under section 10 of the Firearm Owners Identification Card Act are exempt from the UUW statute's prohibition. Pursuant to section 10(c), a felon may be granted relief from section 24-1.1 where the felon is unlikely to endanger public safety, where granting him relief would not be contrary to the public interest and where the felon has not been convicted of a forcible felony within 20 years or 20 years have passed since the end of any imprisonment imposed for that conviction. 430 ILCS 65/10 (West 2008). Accordingly, the prohibition against possessing firearms is not permanent as to all felons.

Defendant contends that the statute is not narrowly tailored because felons who wish to

defend themselves outside the home are not excluded from the UUW statute's prohibition. If, as defendant suggests, felons were permitted to carry firearms for the alleged purpose of self-defense outside their home, the legislature's goal would be defeated. Any firearm or ammunition that could be used for self-defense outside the home could also be used to threaten the public's safety. There is no meaningful way for the legislature to exclude from the statute's prohibition those felons who wish to defend themselves outside their home and still protect the public. It is not clear from *Heller* what right, if any, the average person has to bear firearms outside his home. Even assuming *Heller* contemplates that virtuous citizens have a second amendment right outside their home, it does not follow that felons must be permitted the same right at the public's expense. See *Yancey*, 621 F. 3d at 684-85 (the second amendment right to bear arms was tied to the idea of virtuous citizenry and as a result, the government could decide to disarm citizens who were not virtuous). We also note that at some point, members of the public, including family members, police officers, firemen and utility workers, will by necessity find themselves at the doorstep of a felon. Thus, to attain its goal, the legislature also needed to prohibit felons from possessing guns in their home.

Defendant further contends that legislation can be constitutionally justified only where it deals with abuse, and that rights themselves cannot be curtailed, relying on *DeJonge v. Oregon*, 299 U.S. 353, 365-66 (1937). We do not believe the Court intended that *DeJonge*, a first amendment freedom of assembly case, would prohibit legislation protecting the public from individuals who pose a higher risk to safety than the average person when in possession of a firearm. In addition, absent a directive from the Court, we will not assume that identical rules

and analysis are warranted under the first and second amendment. Unlike the first amendment, an individual's abuse of second amendment rights can directly cause the death of innocent people, a fact which may require that the amendments be treated differently. In any case, *Heller*'s indication that the right provided by the second amendment can be curtailed defeats defendant's contention.

We find the legislature has narrowly tailored Illinois' statutory scheme to serve a compelling state interest, as required to survive strict scrutiny. It follows that the UUW statute would also pass muster under the intermediate scrutiny standard. See *Williams*, No. 1-09-1667, slip op. at 2-4 (holding that the UUW statute survives a second amendment challenge under any level of scrutiny and also holding that the aggravated unlawful use of a weapon statute (720 ILCS 5/24-1.6 (West 2008)) is constitutional).

Alternatively, defendant contends that article I, section 22 of the Illinois Constitution provides an independent right to possess firearms. That section states that, "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 490 (1984) (quoting Ill. Const. 1970, art. I §22). Section 22 differs from the second amendment to the Federal Constitution because the former is expressly subject to the police power, a power which permits laws prohibiting anything harmful to the public's welfare. *Kalodimos*, 103 Ill. 2d at 490, 496. In addition, although a ban on all firearms would not be permissible under section 22, a ban on certain categories of firearms would be permissible, including a reasonable prohibition of handguns. *Kalodimos*, 103 Ill. 2d at 498. In *Kalodimos*, our supreme court held that a village ordinance which, aside from certain

exceptions, prohibited individuals from possessing operable handguns was a proper exercise of police power and did not violate section 22 of the Illinois constitution. See *Williams*, No. 1-09-1667, slip op. at 2-4, citing *Kalodimos*, 103 Ill. 2d 483.

Defendant is correct in stating that section 22 provides a right to bear arms; however, he has not developed any argument explaining how the UUW statute violates section 22. See Ill. S. Ct. R. 341(h)(7) (eff. September 1, 2006) (an appellant's argument shall contain his contentions and the reasons therefor and any points not argued are waived). Defendant merely argues that because *Kalodimos* made certain statements regarding the federal right to arms which are now incorrect following *Heller*, we should revisit *Kalodimos*. Defendant does not explain how incorrect statements of federal constitutional law would affect a holding based on Illinois constitutional law or why the Illinois constitution would provide him more protection than the federal constitution. In addition, defendant has not otherwise specified how revisiting *Kalodimos* in this instance would assist him in arguing that the unlawful use of a weapon statute violates the Illinois constitution. Whereas here, defendant has not developed an argument delineating how the UUW statute would violate the Illinois constitution if we were to disregard *Kalodimos*, there is no reason to revisit that opinion and we adhere to this court's previous statement that such a task is more appropriately left to our supreme court (see *Williams*, No. 1-09-1667, slip op. at 1).

For the foregoing reasons, we affirm the judgment.

Affirmed.