SECOND DIVISION
JUNE 28, 2011

1-09-2912

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 15509
	)	
TREVELL BRANCH,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: The armed habitual criminal statute was not unconstitutional under the Second Amendment of the U.S. Constitution, nor did it violate the federal and state prohibitions against *ex post facto* laws. The mittimus should be amended to reflect a Class 4 felony conviction for possession of a controlled substance, but the trial court properly awarded the defendant with 445 days of pre-sentencing credit.

Following a jury trial, the defendant, Trevell Branch, was convicted of the offenses of armed habitual criminal and possession of a controlled substance. Subsequently, he was sentenced to concurrent terms of 11 years of imprisonment for the offense of armed habitual criminal and 3 years

of imprisonment for the offense of possession of a controlled substance. On appeal, the defendant argues that: (1) the armed habitual criminal statute under section 24-1.7 of the Illinois Criminal Code (Code) violates the Second Amendment of the U.S. Constitution; (2) the armed habitual criminal statute under section 24-1.7 of the Code violates the *ex post facto* clauses of the U.S. Constitution and the Illinois Constitution; and (3) the sentencing mittimus should be amended to reflect the defendant's conviction of possession of a controlled substance as a Class 4 felony and to correct the number of days of credit for time spent in pre-sentencing custody. For the following reasons, we affirm the judgment of the circuit court of Cook County, but correct the mittimus to reflect that the defendant was convicted of a Class 4 felony for possession of a controlled substance.

BACKGROUND

We set forth the facts of the instant case only to the extent necessary for resolution of the issues on appeal. On July 25, 2008, the Chicago police department arrested the defendant in an alley near 821 N. Lawler Avenue in Chicago, Illinois. Upon his arrest, the police recovered five small bags of heroin and a semi-automatic handgun in the defendant's possession.

On August 18, 2008, the defendant was charged with the offense of armed habitual criminal (count 1), possession of a controlled substance with the intent to deliver (count 2), unlawful use of weapon by a felon (counts 3 and 4), and defacing identification marks of a firearm (count 5).

On May 21, 2009, the defendant filed a motion *in limine*, requesting that the trial court bar the State from introducing as evidence the defendant's prior robbery and armed robbery convictions in support of the armed habitual criminal charge (count 1) against the defendant. Specifically, the defendant argues that these two prior convictions "should be viewed as a sentencing enhancement,

not as an element of the charge, and should not be produced as evidence before the jury." Further, the defendant asserted that if the trial court were to deny the motion *in limine*, that, in the alternative, the trial court permit him to "stipulate to the qualifying nature and number of the felonies, without disclosing to the jury the exact type of felonies."

Prior to the start of the July 15, 2009 jury trial, the State chose to proceed solely on the offense of armed habitual criminal and the offense of simple possession of a controlled substance (1 to 15 grams of heroin), without the "intent to deliver" element, and *nolle prosequied* all other counts against the defendant. On that same day, July 15, 2009, the trial court allowed defense counsel to stipulate to the existence of the defendant's "two prior qualifying felonies" at trial, rather than disclosing to the jury the exact types of prior felonies for which the defendant had been convicted.[1]

On that same day, July 15, 2009, a two-day jury trial commenced during which the State presented testimony from police officers regarding the circumstances surrounding the defendant's July 25, 2008 arrest. After the State rested, the parties stipulated before the jury that "the defendant had previously been convicted of two qualifying felonies," and that "[t]hese two felonies go towards the charge of armed habitual criminal." The defendant then testified on behalf of the defense.

Subsequently, the jury found the defendant guilty of the offenses of armed habitual criminal

[1]We note that the trial court did not explicitly state that it was denying the defendant's motion *in limine*. However, by virtue of the trial court's ruling to permit defense counsel to stipulate to the existence of the defendant's two prior qualifying felonies at trial, as the defendant argued in the alternative in its motion *in limine*, we must conclude that the trial court had in fact denied the motion *in limine*.

and possession of a controlled substance.

On August 5, 2009, the defendant filed a motion for a new trial. On October 13, 2009, the defendant filed a supplemental motion for a new trial. On that same day, October 13, 2009, the trial court denied the motion for a new trial. After hearing arguments in aggravation and mitigation, the trial court sentenced the defendant to concurrent terms of 11 years of imprisonment for the offense of armed habitual criminal and 3 years of imprisonment for the offense of possession of a controlled substance. The trial court also gave the defendant 445 days of credit for time served in pre-sentencing custody.

On October 13, 2009, the defendant filed a notice of appeal before this court.

ANALYSIS

We determine the following issues: (1) whether the armed habitual criminal statute under section 24-1.7 of Code violates the Second Amendment of the U.S. Constitution; (2) whether the armed habitual criminal statute under section 24-1.7 of the Code violates the *ex post facto* clauses of the U.S. Constitution and the Illinois Constitution; and (3) whether the sentencing mittimus should be amended.

We first determine whether the armed habitual criminal statute under section 24-1.7 of the Code (720 ILCS 5/24-1.7 (West 2008)) violates the Second Amendment of the U.S. Constitution.

The defendant does not challenge the sufficiency of the evidence showing that he possessed a firearm and that he had prior felony convictions. Instead, he argues that the armed habitual criminal statute under section 24-1.7 of the Code was unconstitutional because it violates the Second Amendment of the U.S. Constitution, which was incorporated against the states through the

fourteenth amendment, and thus, his conviction must be vacated. The defendant contends that, under the U.S. Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 278 (2008), and *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020 (2010), the criminalization of possession of firearms by a felon is an unconstitutional infringement of the right to bear arms. Specifically, he maintains that his possession of a handgun at the time of his arrest was "conduct protected at the very core of the Second Amendment," that there was no evidence to suggest that he possessed the handgun for an unlawful purpose, and that he was punished for simply exercising his rights under the Second Amendment. Further, the defendant argues that the protections afforded by the Second Amendment extend beyond the home, and that the statute at issue unconstitutionally punished felons who carry a firearm for the purpose of self-defense outside of the home.

The State counters that the armed habitual criminal statute under section 24-1.7 of the Code does not violate the Second Amendment of the U.S. Constitution. The State points out that the defendant's arguments amounted to both a facial and an as-applied challenge against the armed habitual criminal statute, and that the as-applied challenge to the statute by the defendant is unreviewable on appeal because the defendant failed to raise this issue before the trial court. The State argues that even if the defendant's claims were reviewable, the defendant's conviction for the offense of armed habitual criminal was constitutionally valid. Specifically, the State argues that no fundamental right was at issue here because the defendant "had been removed from the protection of the Second Amendment by virtue of his undisputed status as a recidivist felon," and that he "was found to be in possession of [a] [firearm] outside of his home."

As an initial matter, we address the State's contention that the defendant's as-applied

challenge to the statute at issue is unreviewable because he failed to raise the issue before the trial court. The State specifically argues that no evidentiary hearing was ever held in order for the trial court to make applicable factual findings regarding the nature of the firearm and to determine "whether [the] defendant possessed the firearm for the lawful purpose of self-defense in the home or for some illegitimate use that is unprotected by the Second Amendment," and cites to *In re Parentage of John M.*, 212 Ill. 2d 253, 817 N.E.2d 500 (2004) and *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 930 N.E.2d 895 (2010), for support. We disagree.

We find the facts of the State's cited cases–*In re Parentage of John M.* and *Lebron*–to be distinguishable to the instant case. In those cited cases, our supreme court ruled that the trial court's "as-applied" determination of unconstitutionality of a challenged statute, made during the pre-trial stage of the proceedings, was premature when no evidentiary hearing was ever held, nor had any findings of facts been established in the trial court. See *Lebron*, 237 Ill. 2d at 228, 930 N.E.2d at 902 ("when there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial"); *In re Parentage of John M.*, 212 Ill. 2d at 268, 871 N.E.2d at 508-09 (the trial court could not have found the Illinois Parentage Act unconstitutional as applied to the parties at issue because it never held an evidentiary hearing and made no findings of fact). On the contrary, the instant case was fully adjudicated in a jury trial, during which testimony was presented to establish the circumstances surrounding the defendant's arrest–essentially, that police officers recovered heroin and a semi-automatic handgun in the defendant's possession after he fled from the police on foot on a public street. Under section 24-1.7 of the Code, it did not matter what the purpose was for which the defendant possessed the firearm; rather, it only mattered that, as was established at trial,

that the defendant possessed a firearm as a prior conviction felon within the meaning of the statute. See 720 ILCS 5/24-1.7 (West 2008). Nor do we accept the State's contention that the defendants' as-applied challenge to the statute at issue was forfeited simply because he failed to raise the issue in the trial court, and find that the constitutionality challenge to a statute may be raised at any time. See *People v. Bryant*, 128 Ill. 2d 448, 454, 539 N.E.2d 1221, 1224 (1989). Thus, we hold that the defendant's claims, including his as-applied challenge to section 24-1.7 of the Code, are reviewable on appeal.

Turning to the merits of the case, we review *de novo* whether the armed habitual criminal statute under section 24-1.7 of the Code, facially and as applied to the defendant, was unconstitutional under the Second Amendment of the U.S. Constitution. See *Lebron*, 237 Ill. 2d at 227, 930 N.E.2d at 902 ("[w]hether a statute is unconstitutional is a question of law subject to *de novo* review"); see also U.S. Const., amend II.

Statutes carry a strong presumption of constitutionality. *People v. Sharpe*, 216 Ill. 2d, 481, 487, 839 N.E.2d, 492, 497 (2005). "To overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution." *Id.* A reviewing court has "a duty to construe a statute in a manner that upholds its validity and constitutionality if it reasonably can be done." *People v. Graves*, 207 Ill. 2d 478, 482, 800 N.E.2d 790, 792 (2003).

A facial challenge to a statute is difficult to mount successfully. *Hill v. Cowan*, 202 Ill. 2d 151, 157, 781 N.E.2d 1065, 1068-69 (2002). A statute is facially unconstitutional only if no set of circumstances exists under which the statute would be valid. *Id.* at 157, 781 N.E.2d at 1069. "The fact that a statute may operate invalidly under some circumstances is insufficient to establish facial

invalidity." *Id.* "Thus, so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail." *Id.*

The Second Amendment of the U.S. Constitution provides 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.

Section 24-1.7 of the Code states the following:

> "(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> (1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm; or
>
> (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.
>
> (b) Sentence. Being an armed habitual criminal is a Class X felony."

In *Heller*, the issue before the Supreme Court was whether a District of Columbia (D.C.) prohibition on the possession of usable handguns in the home violated the Second Amendment of the Constitution. *Heller*, 554 U.S. at 573, 128 S. Ct. at 2787-88. Under a city code, D.C. generally prohibited the possession of handguns, by making it a crime "to carry an unregistered firearm" and prohibiting the registration of handguns. *Id.* at 574-75, 128 S. Ct. at 2788. The D.C. law also required residents "to keep their lawfully owned firearms, such as registered long guns, 'unloaded and disassembled or bound by a trigger lock or similar device' unless they are located in a place of business or are being used for lawful recreation activities." *Id.* at 575, 128 S. Ct. at 2788. A D.C. special police officer, Dick Heller (Heller), who was authorized to carry a handgun while on duty, applied for, and was refused by D.C., a registration certificate for a handgun he wished to keep at home. *Id.* Subsequently, Heller filed a lawsuit against D.C. seeking, on Second Amendment grounds, to "enjoin the city from enforcing the bar on the registration of handguns, the licensing requirements insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirements insofar as it prohibits the use of 'functional firearms' within the home." *Id.* at 576, 128 S. Ct. at 2788. The federal district court dismissed the complaint, but the court of appeals reversed, holding that D.C.'s total ban on handguns and its requirement that firearms in the home be kept "nonfunctional" even when necessary for self-defense, violated the individual right to possess firearm under the Second Amendment. *Id.* On appeal, the supreme court affirmed, holding that D.C.'s "ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635, 128 S. Ct. at 2821-22. The *Heller* court stated that, "[a]ssuming

that Heller is not disqualified from the exercise of Second Amendment rights, [D.C.] must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* at 635, 128 S. Ct. at 2822. Moreover, the supreme court in *Heller* stated that, under the Second Amendment, "law-abiding, responsible citizens" had the right to "use arms in defense of hearth and home." *Id.* at 635, 128 S. Ct. at 2821. The *Heller* court then gave the following cautionary language:

> "[a]lthough 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* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (Emphasis added.) *Id.* at 626-27, 128 S. Ct. at 2816-17.

Two years after the supreme court's decision in *Heller*, the supreme court, in *McDonald,* held that the Second Amendment right to keep and bear arms for the purpose of self-defense was fully applicable to the States by virtue of the Fourteenth Amendment. *McDonald*, ___ U.S. at ___, 130 S. Ct. at 3020. In *McDonald*, the supreme court struck down a Chicago law and an ordinance in Oak Park, Illinois, which "effectively [banned] handgun possession by almost all private citizens." *Id.* at ___, 130 S. Ct. at 3021. The *McDonald* court reiterated the principles in *Heller*, stating that individual self-defense was a "central component" of the Second Amendment rights, that the defense for self, family and property was the "most acute in the home," and that citizens must be permitted

to use handguns for the core lawful purpose of self-defense." *Id.* at ___, 130 S. Ct. at 3036. The supreme court also reinforced its holding in *Heller*, stating:

> "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by *felons* and the mentally ill,' [and] 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings[.]' *** We repeat those assurances here." (Emphasis added.) *Id.* at ___, 130 S. Ct. at 3047, citing *Heller*, 554 U.S. at 626-27, 128 S. Ct. at 2816-17.

We find that this court has recently considered and rejected the same facial challenge to the armed habitual criminal statute under section 24-1.7 of the Code as that advanced by the defendant in this case. See *People v. Davis*, ___ Ill. App. 3d ___, ___, ___ N.E.2d ___, ____ (2011) (holding that the armed habitual criminal statute was not facially unconstitutional). Although the *Heller* court failed to set forth a specific level of scrutiny in examining the constitutionality of statutes prohibiting the possession of firearms within the home, this court in *Davis* has stated that intermediate scrutiny was the proper standard by which to review the statute at issue. See *Davis*, ___ Ill. App. 3d at ___, ___ N.E.2d at ___; accord *People v. Ross*, 407 Ill. App. 3d 931, ___, ___ N.E.2d ___, ___ (2011) (applying the intermediate scrutiny standard in determining whether the armed habitual criminal statute violated the Second Amendment); and see generally *Wilson v. Cook County*, 407 Ill. App. 3d 759, 943 N.E.2d 768 (2011) (applying the intermediate scrutiny in determining whether an ordinance banning assault weapons was unconstitutional). Thus, we find that intermediate scrutiny is the

appropriate standard in the present case.

Under the intermediate scrutiny standard of review, " 'the State must assert a substantial interest to be achieved by restrictions' on the constitutional right, and 'the regulatory technique must be in proportion to that interest.' " *Davis*, ___ Ill. App. 3d at ___, ___ N.E.2d at ___, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 2350 (1980). However, the regulatory measure used in achieving the substantial interest need not be perfect, but only reasonable. *Davis*, Ill. App. 3d at ___, ___ N.E.2d at ___.

We find that the State has a legitimate interest in protecting the public from dangers posed by convicted felons in possession of firearms. See *People v. Crawford*, 145 Ill. App. 3d 318, 322, 495 N.E.2d 1025, 1028 (1986) (a "legitimate legislative determination" exists that convicted felons pose a danger to the public). As the *Davis* court correctly held, the armed habitual criminal statute under section 24-1.7 of the Code forbids possession of firearms "only by persons proven to have committed felonies," and that before imposing the punishment established in the armed habitual criminal statute, the State "must prove that the defendant twice committed the specific kinds of felonies peculiarly related to the use of firearms." *Davis*, Ill. App. 3d at ___, ___ N.E.2d at ___. Thus, we find that the restrictions on the defendant's rights under the Second Amendment fit proportionally with the interest that the statute serves.

Even if a higher level of scrutiny were required to examine the statute at issue, we find that section 24-1.7 is not facially unconstitutional under the Second Amendment.

"In order to survive strict scrutiny, the measure employed by the government body must be necessary to serve a compelling state interest, and must be narrowly tailed thereto, *i.e.*, the

government must use the least restrictive means consistent with the attainment of its goal." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307, 891 N.E.2d 839, 846 (2008). Here, it cannot be disputed that convicted felons pose a certain level of danger to society and that it is within the government's compelling interest to keep firearms out of the hands of repeat felons. See *Crawford*, 145 Ill. App. 3d 322, 495 N.E.2d 1028. We find that the armed habitual criminal statute under section 24-1.7 of the Code is narrowly tailored to serve that compelling interest by punishing *convicted* felons who have committed at least two or more *defined* felonies, and who have engaged in the *specific* acts of receiving, selling, possessing or transferring a specific type of weapons–firearms. See 720 ILCS 5/24-1.7 (West 2008). Further, the defendant has not shown that no set of circumstances exist under which the statute at issue would be valid. See *Hill*, 202 Ill. 2d at 157, 781 N.E.2d at 1069. Therefore, the defendant's facial challenge to section 24-1.7 under the Second Amendment must fail.

The defendant also makes an as-applied challenge to the armed habitual criminal statute under section 24-1.7 of the Code.

In an as-applied challenge to a statute, "the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional." *People v. Brady*, 369 Ill. App. 3d 836, 847, 861 N.E.2d 687, 697 (2007). "An 'as-applied' challenge requires a party to show that the statute violates the constitution as the statute applies to him." *Id.* "If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional." *Id.* at 847-48, 861 N.E.2d at 697.

Applying the holdings and principles in *Heller* and *McDonald*, we find that section 24-1.7

of the Code, as applied to the defendant, was not unconstitutional under the Second Amendment of the U.S. Constitution. See U.S. Const., amend II. The supreme court in *Heller* and *McDonald* clearly and explicitly held that laws prohibiting felonies from possessing firearms were constitutional under the Second Amendment. In the instant case, it is undisputed that the defendant was a convicted felon who committed "two prior qualifying felonies" within the meaning of section 24-1.7 of the Code. Thus, unlike the law-abiding citizens in *Heller* and *McDonald*, whose right to bear arms for the core lawful purpose of self-defense was protected by the Second Amendment, the defendant in the instant case, as a convicted felon, did not have unfettered freedom to exercise that right. We reject the defendant's contention that restrictions on the possession of firearms by a felon do not apply to felons, like the defendant, who have fully served their sentences for the prior convictions. Essentially, the defendant asks his court to lend credence to the notion that a convicted felon should no longer have the status of a "convicted felon" simply by serving his sentence, and thereby regaining full rights under the protection of the Second Amendment. We decline to do so.

Nothing in the record supports the defendant's contention that section 24-1.7 of the Code was unconstitutional as applied to him. At the time of his arrest, the defendant, a convicted felon, had fled from the police on foot and was engaged in the unlawful activity of possessing heroin while armed with a semi-automatic handgun. It is unfathomable that a convicted felon, like the defendant, would be allowed to carry a concealed loaded handgun during the commission of another crime–namely, the possession of heroin–for the sake of "self-defense." The defendant was not, at the time police officers approached the parked vehicle in which the defendant was sitting as a passenger, using the handgun for any self-defense purposes. Rather, the record suggests that the

defendant exited the vehicle and fled on foot, at which point the police officers chased the defendant and arrested him in a nearby alley. We further note that section 24-1.7 does not require "a showing of any improper purpose for the felon's possession of the firearms." *Davis*, ___ Ill. App. 3d at ___, ___ N.E.2d at ___; see 720 ILCS 5/24-1.7 (West 2008). Thus, we find that section 24-1.7 of the Code was not unconstitutional as applied to the defendant.

Nevertheless, the defendant argues that the language in *Heller* and *McDonald*, which reaffirmed the supreme court's approval of laws prohibiting *felons* from possessing firearms, was merely *dicta* that should not be given any weight and did not apply to felons keeping arms for the purpose of self-defense. We find this argument to be unpersuasive and find that the language in *Heller* and *McDonald* clearly set forth the supreme court's unequivocal holding that laws may be enacted to prohibit the possession of firearms by felons. See *People v. Williams*, 405 Ill. App. 3d 958, 963, 940 N.E.2d 95, 99 (2010) (applying the principles of *Heller* and *McDonald* and holding that the Illinois statute of aggravated unlawful use of a weapon (AUUW) by a felon was not unconstitutional under the Second Amendment). Even if the language at issue in *Heller* and *McDonald* were *dicta*, we find that the language carries dispositive weight in this court. See *Cates v. Cates*, 156 Ill. 2d 76, 80, 619 N.E.2d 715, 717 (1993) (judicial *dicta* is entitled to much weight and should be followed unless found to be erroneous); accord *People v. Williams*, 204 Ill. 2d 191, 206-07, 788 N.E.2d 1126, 1136 (2003) and *Davis*, ___ Ill. App. 3d. at ___, ___, N.E.2d at ___ ("judicial *dicta* should usually carry dispositive weight in an inferior court").

The defendant further makes arguments that the rights and protections afforded by the Second Amendment extend beyond the home. We fail to see how these arguments advance the defendant's

contention that his possession of a handgun in a public place should be protected behavior under the Second Amendment. As discussed, the defendant was a convicted felon subject to restraints on the complete free exercise of rights under the Second Amendment. See *Heller*, 554 U.S. at 626-27, 128 S. Ct. at 2816-17; *McDonald*, ___ U.S. at ___, 130 S. Ct. at 3047. It did not matter whether the defendant possessed a firearm at home or, as in this instant case, in a public setting. What matters is that the statute prohibiting a felon from possessing a firearm is not disproportionately prohibitive. Section 24-1.7, as discussed, is proportionate to the government's objective of keeping firearms out of the hands of repeat felons. Therefore, we hold that section 24-1.7 of the Code, as applied to the defendant, was not unconstitutional.

We next determine whether the armed habitual criminal statute under section 24-1.7 of the Code violates the *ex post factor* clauses of the U.S. Constitution and the Illinois Constitution, which we review *de novo*. See *Davis*, ___ Ill. App. 3d at ___, ___ N.E.2d at ___.

The defendant argues that the armed habitual criminal statute under section 24-1.7 of the Code violates the *ex post facto* clauses of the U.S. Constitution and the Illinois Constitution because both of his prior felonies, upon which the State relied to establish the essential elements of the offense, occurred prior to the effective date of the statute–August 2, 2005. He contends that section 24-1.7 of the Code was a new criminal offense which unconstitutionally punished him for conduct that occurred before August 2, 2005, and cites to *People v. Dunigan*, 165 Ill. 2d 235, 650 N.E.2d 1026 (1995), for support. Thus, he maintains, this court should vacate his conviction for the offense of armed habitual criminal.

The State counters that the armed habitual criminal statute under section 24-1.7 of the Code

was constitutional and did not implicate the *ex post facto* clauses of the U.S. Constitution and Illinois Constitution. The State cites to *People v. Leonard*, 391 Ill. App. 3d 926, 911 N.E.2d 403 (2009); *People v. Bailey*, 396 Ill. App. 3d 459, 919 N.E.2d 460 (2009); and *People v. Adams*, 404 Ill. App. 3d 405, 936 N.E.2d 693 (2010), for support.

Both the U.S. Constitution and the Illinois Constitution proscribe any *ex post facto* laws from being passed. See U.S. Const., art. I, §9; Ill. Const. 1970, art I, §16. "An *ex post facto* law is one that (1) makes criminal and punishable an act innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the law; or (4) alters the rules of evidence to require less or different evidence than required when the crime was committed." *Leonard*, 391 Ill. App. 3d at 931, 911 N.E.2d at 408. "The prohibition against *ex post facto* laws is founded on the basis of a person's right to have fair warning of conduct giving rise to criminal penalties and punishment." *Id.*

We note that this court in *Leonard*, *Bailey* and *Adams* had already considered and rejected the same *ex post facto* argument which the defendant now makes on appeal in the instant case. In *Leonard*, this court upheld the constitutionality of the armed habitual criminal statute under section 24-1.7 of the Code, holding that it did not violate the federal and state constitutional prohibitions against *ex post facto* laws. *Leonard*, 391 Ill. App. 3d at 931, 911 N.E.2d at 409. The *Leonard* court stated that the statute did not punish the defendant for prior convictions which occurred before the enactment of the statute in August 2005. *Id.* "Rather, he was convicted for the separate offense of possessing a firearm after having been convicted of three of the statute's enumerated offenses." *Id.*

The *Leonard* court further stated that at the time the defendant possessed the firearm in April 2006, "he had fair warning that, in combination with his prior convictions, he was committing the offense of armed habitual criminal." *Id.* at 931-32, 911 N.E.2d at 409. The court then held that the defendant's prior convictions were only "an element of the offense [of armed habitual criminal]" and that he was not being punished for acts committed prior to the statute's effective date, but for the "new act of possessing a firearm." *Id.* at 932, 911 N.E.2d at 409. Likewise in *Bailey*, this court, following the holding in *Leonard*, held that the armed habitual criminal statute was not violative of the federal and state prohibitions against *ex post facto* laws because it did not punish the *Bailey* defendant for "the drug offenses he committed in 1997 before the statute's new effective date but, rather, properly punishe[d] him for *** the new and separate crime he committed in 2006 of possessing firearms while having already been convicted of two prior enumerated felonies, an offense of which he had fair and ample warning." *Bailey*, 396 Ill. App. 3d at 464, 919 N.E.2d at 464; accord *Adams*, 404 Ill. App. 3d at 413, 935 N.E.2d at 701 (finding no merit in the defendant's claim that the armed habitual criminal statute was an *ex post facto* law).

Applying the principles of *Leonard*, *Bailey*, and *Adams* to the instant case, we find that the defendant's prior robbery and armed robbery convictions, to which the parties stipulated at trial to establish the charge of armed habitual criminal against the defendant, were only an element of the offense of armed habitual criminal, and that he was not being punished for acts committed prior to the statute's effective date of August 2005. Rather, the defendant was being punished for the new and separate offense of possessing a firearm at the time of his July 25, 2008 arrest, and he, like the *Leonard* and *Bailey* defendants, had fair warning that he was committing the offense of armed

habitual criminal.

In rebuttal, the defendant argues that *Leonard*, *Bailey* and *Adams* were wrongly decided because their holdings conflicted with our supreme court's holdings in *Dunigan*, 165 Ill. 2d at 235, 650 N.E.2d at1026 and *People v. Levin*, 157 Ill. 2d 138, 623 N.E.2d 317 (1993).

In *Dunigan*, the defendant raised an *ex post facto* challenge against a 1980 habitual criminal act which, he argued, punished him in part for a 1972 rape offense that he committed prior to the effective date of the statute because it was used in declaring his status as a habitual criminal and, as a result, a mandatory life sentence was imposed upon him under the statute. *Dunigan*, 165 Ill. 2d at 240-41, 650 N.E.2d at 1028. The *Dunigan* court rejected the defendant's argument, holding that the habitual criminal act was constitutional because "[t]he punishment imposed under the [statute] is for the most recent offense only," that the penalty was "made heavier because the person convicted is a habitual criminal," and that the statute "[did] not punish a defendant again for his prior felony convictions, *nor* [*were*] *those convictions elements of the most recent felony offense*." (Emphasis added.) *Id.* at 242, 650 N.E.2d at 1029; see also *Levin*, 157 Ill. 2d at 149, 623 N.E.2d at 323 ("[i]t is settled that habitual-offender legislation neither creates a separate offense nor directly involves; *** it is not an ingredient of the main offense charged").

The defendant in the case at bar seizes on the language in *Dunigan* that the *Dunigan* defendant's prior convictions were not "elements of the most recent felony offense," in an attempt to show that the armed habitual criminal statute under section 24-1.7 of the Code violated *ex post facto* prohibitions. He argues that his prior convictions of robbery and armed robbery were used as "elements of the most recent felony offense"–possession of a firearm by a convicted felon–as

prohibited by *Dunigan*, and thus, his conviction for armed habitual criminal must be reversed.

We find the defendant's argument to be without merit, and note that the *Leonard* court had specifically addressed and rejected this exact point, by stating that:

> "The *Levin* and *Dunigan* courts did not express that habitual criminal legislation cannot include prior convictions as elements of an offense; they merely indicated that the statute in question in those cases was a sentencing enhancement, not a substantive offense. *** In contrast, the armed habitual criminal statute [under section 24-1.7 of the Code] *** creates a substantive offense which punishes a defendant, not for his or her earlier convictions, but for the new offense." *Leonard*, 391 Ill. App. 3d at 932, 911 N.E.2d at 409-10; see also *Davis*, ___ Ill. App. 3d at ___, ___ N.E.2d at ___ (same).

Thus, we find that *Leonard*, *Bailey* and *Adams* were not wrongly decided and we decline to depart from the principles and holdings in those cases. Therefore, we hold that the armed habitual criminal statute under section 24-1.7 of the Code does not violate the *ex post facto* clauses of the U.S. Constitution and Illinois Constitution.

We next determine whether the sentencing mittimus should be amended.

The defendant argues that the sentencing mittimus must be amended to correct two errors. First, the defendant contends that the mittimus incorrectly shows that he was convicted of a Class 1 possession of a controlled substance with intent to deliver, rather than a Class 4 possession of a controlled substance–heroin. Secondly, the defendant maintains that he was entitled to one

additional day of pre-sentencing credit, for a total of 446 days, to include the day of his October 13, 2009 sentencing.

The State concedes, and we agree, that the mittimus must be corrected to reflect that the defendant was convicted of a Class 4 felony for possession of a controlled substance. However, the State argues that the defendant is not entitled to one additional day of pre-sentencing credit because the trial court properly awarded 445 days of credit for time served in pre-sentence custody.

A defendant shall be given credit "for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7 (West 2006). "The credit requirement of section 5-8-7(b) is meant to account for all time served in confinement for a particular offense." *People v. Latona*, 184 Ill. 2d 260, 270, 703 N.E.2d 901, 906 (1998). This includes time spent in custody prior to sentencing from the time of the defendant's arrest. See *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A reviewing court may correct the mittimus without remanding the cause to the trial court. *People v. Hill*, 402 Ill. App. 3d 920, 929, 932 N.E.2d 173, 182 (2010).

Our supreme court has recently held, in *People v. Williams*, that the day on which a defendant is sentenced and committed to the Department of Corrections "is to be counted as a day of sentence and not as a day of pre[-]sentence credit." *People v. Williams*, 239 Ill. 2d 503, 510, 942 N.E.2d 1257, 1262 (2011).

According to the record in the case at bar, the defendant was arrested on July 25, 2008 and sentenced on October 13, 2009. Applying the principles of *Williams*, October 13, 2009 is counted as a day of sentence and not as a day of pre-sentencing credit. Thus, we find that the defendant was

only entitled to pre-sentencing credit for time served in custody from July 25, 2008 until October 12, 2009, for a total of 445 days of credit. Therefore, the trial court did not err in granting him 445 days of pre-sentencing credit, rather than 446 days.

Nevertheless, the defendant acknowledges the holding in *Williams*, but asks this court to take judicial notice of information contained on the Department of Correction (DOC) website, which stated that the defendant did not come under DOC's custody until October 16, 2009. Thus, he maintains that he is neither receiving pre-sentencing nor DOC custodial credit for the day of the trial court's October 13, 2009 sentencing. Because he was not in DOC custody on October 13, 2009, he argues, he is entitled to one additional day of pre-sentencing credit for time served. We disagree.

We take judicial notice of the information pertaining to the defendant on the DOC website. See *People v. Petersen*, 372 Ill. App. 3d 1010, 1019, 868 N.E.2d 329, 336 (2007) ("this court may take judicial notice of DOC's records because they are public documents"). Based on the DOC public records, we note that, as the defendant points out, the "admission date" for the defendant was listed as October 16, 2009. However, we find that this information is not dispositive to our analysis of this issue on appeal because it is undisputed that the defendant was sentenced and the mittimus issued on October 13, 2009 and, as discussed, he could not receive "pre-sentencing" credit for that day. Further, we note that the record on appeal before this court shows that at the sentencing hearing on October 13, 2009, the trial court denied the defendant's request for "an eight-day stay here," but instead, stated that the defendant "should begin serving [his sentence]." Moreover, we note that some of the information contained on the DOC website is inaccurate because it contains errors–such as listing the "custody date" for the defendant's current offenses as July 18, 2008, although it is

undisputed by the parties that the defendant was not arrested until July 25, 2008. The defendant's recourse may be to take these matters up with DOC. Therefore, we hold that the defendant is not entitled to an additional day of pre-sentencing credit for time served.

Accordingly, for the foregoing reasons, we: (1) affirm the defendant's conviction and sentence; and (2) order the mittimus corrected to reflect that the defendant was convicted of a Class 4 felony for possession of a controlled substance.

Affirmed; mittimus corrected.