2012 IL App (1st) 101554-U

FIFTH DIVISION
September 28, 2012

No. 1-10-1554

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 09 CR 8187
	)	
ANTHONY SAHARA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Defendant's convictions for possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon are affirmed over defendant's contention that his conviction for unlawful use of a weapon by a felon is unlawful because that statute is unconstitutional as it violates his second amendment right to possess a firearm in defense of hearth and home. Defendant's mittimus is corrected to accurately reflect his conviction of possession of a controlled substance with intent to deliver and a three-year sentence for his conviction of unlawful use of a weapon by a felon.

¶ 2 After a bench trial defendant Anthony Sahara was found guilty of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon. He was sentenced to concurrent terms of 4 ½ and 3 years' imprisonment. On appeal, defendant does not challenge the sufficiency of the evidence to sustain his convictions, but contends that his conviction for unlawful possession of a weapon by a felon is unlawful because the statute criminalizing the possession of a weapon by a felon is unconstitutional as it violates his second amendment right to possess a firearm in defense of hearth and home. Defendant also claims that his mittimus must be corrected to reflect that he was convicted of possession of a controlled substance with intent to deliver rather than manufacture or delivery of a controlled substance. We affirm and correct the mittimus.

¶ 3 At trial, the State presented the testimony of Chicago police officers Jon Mikuzis, Matthew Malloy, Steven Insley and John Spring. The officers each testified that on March 25, 2009, they participated in the execution of a search warrant at an apartment located at 600 West Engelwood Avenue, Apartment 2 West in Chicago. Defendant resided in the apartment with his wife. Defendant was the target of the search warrant.

¶ 4 Officer Mikuzis testified that he searched one of the three bedrooms inside the apartment. Mikuzis said the bedroom contained a bed, a tall headboard, a dresser and a television. Mikuzis found a 9-millimeter caliber handgun on top of the headboard. The gun contained five live rounds of ammunition and the serial number was defaced. Mikuzis said that Chicago police officer Douglas Anderson found an Illinois identification card in the same bedroom. The identification card bore defendant's name and listed the address of the apartment. Officer

Anderson also recovered a parking ticket from the City of Chicago, bearing defendant's name and listing the address of the apartment.

¶ 5 Officer Malloy testified that he searched another bedroom inside the apartment. The bedroom contained two single beds and toys on the floor. From a closet in the bedroom, Malloy recovered a "bundle" of cash, totaling $6,850. Malloy explained that he found the money inside a woman's shoe that was in a shoe box located inside the closet of the bedroom.

¶ 6 Officer Insley testified that he searched the kitchen and "rear" area of the apartment adjacent to the kitchen. Insley said that he recovered a large plastic bag from the freezer above the refrigerator. The bag contained six smaller plastic bags. Four of these smaller bags each contained 10 even smaller "[z]iploc" bags. Insley said that the "[z]iploc" bags contained "suspect heroin." Insley also recovered a separate plastic bag, containing eight smaller "[z]iploc" bags and a bag containing "large chunks of white rock-like substance, suspect heroin."

¶ 7 Officer Spring testified that he was the "evidence officer" during the execution of the search warrant. Spring explained that as the "evidence officer" he received all the items recovered during the search and inventoried those items in accordance with Chicago Police Department procedures. He said that each item was assigned a unique inventory number, heat sealed in a bag and sent to a proper forwarding agency.

¶ 8 The parties then stipulated that 17 of the 49 "[z]iploc" bags recovered from the freezer were analyzed. The 17 bags had a total weight of 5.4 grams and tested positive for the presence of heroin. The parties also stipulated to the chain of custody of the recovered handgun. Finally, the parties stipulated that defendant was convicted of possession of a controlled substance in

1999.

¶ 9 Based on this evidence the court found defendant guilty of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon. Defendant was sentenced to concurrent terms of 4 ½ and 3 years' imprisonment.

¶ 10 On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions. Rather, he contends we should declare the unlawful use of a weapon by a felon statute unconstitutional and vacate his conviction under that statute because the statute violates his second amendment right to "keep and bear arms." He claims that despite his status as a convicted felon, the State was prohibited from criminalizing his act of possessing a handgun inside his home for the core lawful purpose of self-defense. In support of his argument, defendant relies on *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, __ U.S. ___, 130 S. Ct. 3020 (2010).

¶ 11 In *Heller*, the Supreme Court struck down a District of Columbia ordinance that "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Heller*, 554 U.S. at 628.

¶ 12 In *McDonald*, the Supreme Court struck down a Chicago ordinance prohibiting the possession of any handgun within the city, unless the gun had a trigger lock and a load indicator and had been registered by the owner before March 30, 1982. The Supreme Court in *McDonald*, as in *Heller*, recognized the fundamental right to possess a handgun in the home for the purpose of self-defense is protected by the second amendment. The *McDonald* Court went on to hold that

the second amendment right to bear arms is applicable to the states through the due process clause of the fourteenth amendment. *McDonald*, 130 S. Ct. at 3050.

¶ 13 In light of *Heller* and *McDonald*, defendant argues that the unlawful use of a weapon by a felon statute is facially unconstitutional. A statute is presumed constitutional and it is the duty of a reviewing court to construe a statute so as to affirm its constitutionality, if such a construction is reasonably possible. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). The party challenging the statute bears the burden of rebutting this presumption and clearly establishing that the statute violates the constitution. *Cornelius*, 213 Ill. 2d at 189; *People v. Jones*, 223 Ill. 2d 569, 596 (2006). Whether a statute is unconstitutional is a question of law subject to *de novo* review. *People v. Johnson*, 225 Ill. 2d 573, 584 (2007).

¶ 14 In setting forth his argument, defendant recognizes that in *People v. Robinson*, 2011 IL App (1st) 100078, we found the unlawful use of a weapon by a felon statute constitutional in the same context as presented here; *i.e.*, where a defendant is convicted of possession of a weapon recovered from inside his home. Defendant claims that *Robinson* was incorrectly decided because we erred by subjecting the statute to intermediate scrutiny rather than strict scrutiny. However, defendant cites no state or federal cases, and we have found none, in which courts have used the strict scrutiny standard to evaluate the constitutionality of laws implicating the second amendment. *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 53. Accordingly, we see no reason to depart from the reasoning in *Robinson*. We find the unlawful use of a weapon by a felon statute constitutional.

¶ 15 In support of this conclusion, we note that in *Heller* and *McDonald*, the United States

Supreme Court limited the fundamental right to bear arms to a "law-abiding responsible citizen['s]" right to possess and carry firearms in his home for the purpose of self-defense. *Heller*, 554 U.S. at 635. In doing so, the *Heller* court explained its holding by saying that "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 -27. The court went on to say "assuming that [the defendant was] not disqualified from the exercise of Second Amendment rights," he had the right to possess a firearm in his home. *Heller*, 554 U.S. at 635. Similarly, in *McDonald* the Supreme Court quoted *Heller* and reiterated that its holding was not intended to "cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons'[.] " *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626-27).

¶ 16 We are unpersuaded by defendant's argument that this language in *Heller* and *McDonald* is dicta that should not be given weight because it does not apply to felons keeping firearms for self-defense purposes. However, as mentioned, in limiting the right to bear arms to law-abiding citizens' right to possess firearms for the purpose of self-defense, the *Heller* court specifically excluded felons from exercising this right. See *Heller*, 554 U.S. at 634-35. Our supreme court has explained that judicial dicta should carry dispositive weight in inferior courts. See *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93, 100 (2004); *People v. Williams*, 204 Ill. 2d 191, 206 (2003). *Stare decisis* requires us to follow the decisions of higher courts. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011).

¶ 17 We are likewise unpersuaded by defendant's argument that the unlawful use of a weapon by a felon statute is unconstitutional as applied to him because the State adduced no evidence to

suggest that he "ever took the gun outside of his home or that he ever used, or intended to use, the gun for any purpose other than defending his home." Contrary to defendant's argument, the unlawful use of a weapon by a felon statute does not require the State to show any improper purpose for the felon's possession of a firearm. *Robinson*, 2011 IL App (1st) 100078, ¶ 30; 720 ILCS 5/24-1.1(a) (West 2008). In any event, the evidence presented at trial did not suggest that defendant, at the time the police searched his apartment and recovered the handgun from the headboard in his bedroom, was merely using the gun for the self-defense of his home or some other "lawful" purpose. See *Robinson*, 2011 IL App (1st) 100078, ¶ 30. Rather, given the nature of the other items recovered in defendant's apartment, it is just as likely that defendant was using the weapon to further narcotics trafficking.

¶ 18 Defendant next contends, and the State agrees, that defendant's mittimus must be amended to correctly reflect his conviction of possession of a controlled substance with intent to deliver, rather than manufacture or delivery of a controlled substance. The record shows that defendant was convicted of possession of a controlled substance with intent to deliver one gram or more but less that 15 grams of heroin in violation of section 401(c)(1) of the Criminal Code of 1961 (720 ILCS 570/401(c)(1) (West 2008)). Although defendant's mittimus reflects the proper statute in violation of which defendant was convicted, it erroneously lists the offense as manufacture or delivery of heroin. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1), we order that defendant's mittimus be corrected to accurately reflect the name of the offense of which he was convicted: possession of a controlled substance with intent to deliver. See *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007) (where the wrong offense name

is listed, this court may order a corrected mittimus be issued to reflect the actual offense of which the defendant was convicted).

¶ 19 Finally, the State points out that defendant's mittimus erroneously reflects that defendant was sentenced to 4 ½ years' imprisonment for his conviction of unlawful use of a weapon by a felon. The record shows, however, defendant was sentenced to 3 years' imprisonment for that conviction. Defendant's mittimus must be amended to conform with the court's oral pronouncement. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993). Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) we order that defendant's mittimus be corrected to accurately reflect that he was sentenced to 3 years' imprisonment for his conviction of unlawful use of a weapon by a felon.

¶ 20 For the reasons stated, we affirm the judgment of the trial court and correct defendant's mittimus.

¶ 21 Affirmed; mittimus corrected.