

2012 IL App (1st) 110019-U

THIRD DIVISION
November 30, 2012

No. 1-11-0019

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. 08 CR 12860
)	
VIRGIL ANDERSON,)	Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Salone and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's denial of defendant's motion to withdraw his guilty plea and vacate judgment affirmed over his claims that the armed habitual criminal statute violates the second amendment right to bear arms, and that post-plea counsel failed to comply with Rule 604(d).

¶ 2 Defendant Virgil Anderson appeals from an order of the circuit court of Cook County denying his motion to withdraw his guilty plea and vacate the judgment entered thereon pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). On appeal, defendant contends that his plea should be vacated because the armed habitual criminal statute on which it was predicated

violates the second amendment right to bear arms. He also contends that the cause should be remanded because post-plea counsel failed to comply with the requirements of Rule 604(d).

¶ 3 The record shows, in relevant part, that defendant was charged by indictment with armed habitual criminal, nine counts of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. Prior to trial, the parties participated in a Supreme Court Rule 402 conference which led to an offer of six years' imprisonment in exchange for a plea of guilty to armed habitual criminal. On June 1, 2009, defendant accepted the offer, entered a plea of guilty, and received the agreed upon sentence. The State *nolle prosequed* the remainder of the charges.

¶ 4 As the factual basis for defendant's plea, the parties agreed that Chicago police officer Allen would testify that about 8:45 p.m. on June 25, 2008, he made a traffic stop of a vehicle in which defendant was a passenger in the area of 8100 South Yates Boulevard, in Chicago. As he was approaching defendant, he observed him secrete an object in the front of his pants and asked him to exit the vehicle. While defendant walked to the rear of the car, a silver .25 caliber pistol containing four live rounds dropped from his right pants leg to the ground. The parties also agreed that defendant had previously been convicted of home invasion and delivery of a controlled substance.

¶ 5 On July 1, 2009,¹ defendant mailed a *pro se* motion to withdraw guilty plea and vacate sentence on the grounds of "inadequate representation of counsel where counsel failed to investigate, procure Chicago police surveillance tape, and to interview specific witnesses," and also "to prove the chronological order of defendants [*sic*] prior convictions to the State." On

¹ Although the record does not contain a certificate of mailing, at a hearing on August 12, 2009, the trial court noted that defendant's motion "is dated – the post-mark is dated July 1 from the penitentiary. So, I will accept it as being timely."

August 10, 2009, he filed a motion requesting leave to amend his motion to withdraw guilty plea with additional allegations of ineffective assistance of counsel.

¶ 6 The public defender was appointed to represent defendant,² and on October 25, 2010, post-plea counsel filed a certificate of compliance pursuant to Rule 604(d) stating that she had consulted with defendant in person to ascertain his contentions of error, examined the trial court file and the report of his guilty plea proceedings, and "filed a written motion on defendant's behalf requesting he be allowed to withdraw his guilty plea and that the judgment be vacated." That motion, filed the same day, incorporated and clarified claims made in defendant's original motion, added new claims, and was accompanied by supporting affidavits. On December 2, 2010, the trial court conducted a hearing, then denied defendant's motion to withdraw his guilty plea. This appeal follows.

¶ 7 Defendant first contends that the armed habitual criminal statute is facially unconstitutional in that it violates the second amendment right to bear arms. Although defendant did not preserve this issue in the trial court, a challenge to the constitutionality of a statute may be raised at any time (*People v. Bryant*, 128 Ill. 2d 448, 454 (1989)), and we review such a challenge *de novo* (*People v. Carpenter*, 228 Ill. 2d 250, 267 (2008)).

¶ 8 Defendant claims that the armed habitual criminal statute criminalizes the right to bear arms as recognized by the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020 (2010). In *Heller*, 554 U.S. at 635, the Supreme Court held that the second amendment precluded the District of Columbia from banning the possession of handguns in the home and from prohibiting individuals from rendering those firearms operable for the purpose of self-defense. In *McDonald*, ___ U.S. ___, 130 S. Ct. at 3050, the Supreme Court held that the right to keep

² Defendant was represented by private counsel during his guilty plea proceedings.

handguns inside the home for self-defense was incorporated in the due process clause of the fourteenth amendment.

¶ 9 The State responds that the armed habitual criminal statute is facially constitutional under *Heller* and *McDonald* because the Supreme Court explicitly approved of statutory prohibitions on the possession of firearms by felons.

¶ 10 This court has repeatedly rejected the same challenge to the armed habitual criminal statute raised by defendant here. *People v. Black*, 2012 IL App (1st) 110055, ¶ 13, *pet. for leave to appeal pending*, No. 114857 (filed Sept. 4, 2012); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011); *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011); *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011). In doing so, this court has noted that prohibitions on the possession of firearms by felons were found to be lawful regulatory measures in *Heller* and *McDonald*. *Black*, 2012 IL App (1st) 110055, ¶ 13 (citing *Ross*, 407 Ill. App. 3d at 942). This court has also reviewed the statute under intermediate scrutiny and found that it serves a substantial governmental interest in preventing the danger associated with repeat felons having firearms, and is proportional to that interest. *Black*, 2012 IL App (1st) 110055, ¶ 13 (and cases cited therein). We see no reason to depart from these prior decisions, and continue to find that the armed habitual criminal statute is constitutionally sound. As a result, defendant's guilty plea to the offense proscribed therein is not void, and his claim to the contrary provides no basis for the relief requested.

¶ 11 In reaching this conclusion, we find defendant's reliance on *De Jonge v. Oregon*, 299 U.S. 353 (1937) and *Texas v. Johnson*, 491 U.S. 397 (1989), is misplaced. In *De Jonge*, 299 U.S. at 362, 364-65, defendant was criminally charged with participating in a Communist Party meeting in violation of the fundamental right to peaceable assembly. In *Johnson*, 491 U.S. at 399, 420, defendant was convicted of desecrating a flag in violation of the right to free speech. Unlike

De Jonge and *Johnson*, convicted felons are a class of people that the Supreme Court has recognized may be lawfully and constitutionally prohibited from possessing a firearm (*Heller*, 554 U.S. at 626; see also *McDonald*, ___ U.S. ___, 130 S. Ct. at 3047), and we find that this crucial fact clearly distinguishes the instant case from those cited by defendant.

¶ 12 Defendant next contends that post-plea counsel failed to comply with the requirements of Rule 604(d) where she failed to state in her certificate that she made necessary amendments to his motion. Accordingly, he requests this court to remand the matter to the trial court for such compliance. The State responds that counsel complied with Rule 604(d) despite her "semantically imperfect certificate," and that the certificate comported with the rule "for all intents and purposes."

¶ 13 Under Rule 604(d), post-plea counsel is required to file a certificate stating that she has consulted with defendant either by mail or in person to ascertain his contentions of error, examined the trial court file and report of the plea proceedings, and made any amendments to the motion necessary for adequate presentation of any defects in those proceedings. Ill. S. Ct. R. 604(d). Strict compliance with Rule 604(d) is required and reviewed by this court *de novo*. *People v. Dismuke*, 355 Ill. App. 3d 606, 608 (2005).

¶ 14 Here, the record shows that counsel filed a Rule 604(d) certificate stating that she had consulted with defendant to ascertain his contentions of error, examined the trial court file and the report of his guilty plea proceedings, and "filed a written motion on defendant's behalf requesting he be allowed to withdraw his guilty plea and that the judgment be vacated." The record also shows that counsel did, in fact, file a written motion to withdraw defendant's guilty plea and vacate judgment, adding more claims and providing supporting affidavits.

¶ 15 Nonetheless, defendant claims that counsel did not strictly comply with Rule 604(d) because she did not state in her certificate that she made any amendments to the motion

necessary for an adequate presentation of any defects in the plea proceedings. In making this argument, defendant overlooks the fact that counsel's certificate need not recite the language of the rule verbatim, but rather, must give some indication that counsel performed the duties required under Rule 604(d). *Dismuke*, 355 Ill. App. 3d at 609. Since a new motion to withdraw guilty plea is, at its very essence, an amendment of the original motion, we find that no serious argument can be made that counsel's certification was inadequate to indicate that she made the necessary amendments to defendant's *pro se* motion in accordance with Rule 604(d). To do so would elevate form over substance.

¶ 16 We also find *Dismuke*, cited by defendant, factually distinguishable from the case at bar. In *Dismuke*, defense counsel entirely failed to certify whether any necessary changes whatsoever had been made to defendant's motion, and also failed to attach the documents containing the facts upon which the motion was based, leading the reviewing court to question whether counsel considered all of the relevant bases for defendant's motion to withdraw. *Dismuke*, 355 Ill. App. 3d at 607-09. Here, on the other hand, counsel certified that she filed a new motion to withdraw guilty plea, which on its face is an amendment to the original motion, and in which she added more claims and supporting affidavits. Under these circumstances, we find *Dismuke* readily distinguishable and defendant's reliance thereon misplaced.

¶ 17 For the reasons stated, we affirm the order of the circuit court of Cook County denying defendant's motion to withdraw his guilty plea and vacate judgment.

¶ 18 Affirmed.