2014 IL App (1st) 122130-U

SIXTH DIVISION
February 21, 2014
Modified June 13, 2014

No. 1-12-2130

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. 11 CR 16023
	)	
CORNELL ZANDERS,	)	Honorable
	)	Vincent Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's convictions for armed habitual criminal, unlawful use or possession of a weapon by a felon, and resisting a peace officer, where the trial court did not err in denying defendant's motion to quash arrest and suppress evidence, the State proved him guilty beyond a reasonable doubt, and the armed habitual criminal statute did not violate the second amendment.

¶ 2 Following a bench trial, defendant, Cornell Zanders, was convicted of being an armed habitual criminal, unlawful use or possession of a weapon by a felon, and resisting a peace officer. The trial court merged the unlawful use or possession of a weapon by a felon count into the armed

habitual criminal count, and sentenced defendant to six and one-half years' imprisonment for armed habitual criminal to run concurrently with one year of imprisonment for resisting a peace officer. On appeal, defendant contends: (1) the trial court erred in denying his motion to quash arrest and suppress evidence; (2) the State failed to prove him guilty beyond a reasonable doubt; and (3) the armed habitual criminal statute violates the second amendment. We affirm.

¶ 3 The trial court held a simultaneous hearing on defendant's motion to quash arrest and suppress evidence and a bench trial. Officer David Bachler testified that at approximately 2 p.m. on September 17, 2011, he and his partner, Officer Gomez, were on patrol in an unmarked police car near a McDonald's restaurant at 9560 South Halsted Street in Chicago, which was known to be a "high narcotic area." Officer Bachler observed a vehicle backed into a parking space in the southwest corner of the McDonald's restaurant parking lot. The officers decided to approach for a "field interview," so Officer Gomez drove the police car into the McDonald's restaurant parking lot and "pulled up to the driver's side approximately six feet away from the vehicle." There was one person in the vehicle, whom Officer Bachler identified in court as defendant.

¶ 4 Officer Bachler testified he and Officer Gomez exited the police car. They were in plain clothes and each was wearing a bullet-proof vest, a duty belt with weapons, and a visible badge. Officer Bachler approached the rear of defendant's vehicle, while Officer Gomez approached the driver side of the vehicle. Defendant exited his vehicle and walked toward Officer Bachler. Officer Bachler identified himself as a police officer and asked defendant if he had a driver's license and "what his business was at this location." While they were speaking, Officer Bachler looked over at Officer Gomez, who indicated with his hand that there was a weapon in defendant's vehicle. Officer

Bachler then placed one handcuff on defendant's left wrist. Defendant yanked his hand away and fled eastbound in the parking lot. The officers gave chase. Defendant ran for about 15 feet before tripping and falling to the ground. Officer Bachler got on top of defendant to effect the arrest, at which time defendant elbowed Officer Bachler on the bridge of his nose, causing it to swell. After Officer Bachler was struck in the nose, he and Officer Gomez were able to place defendant into custody.

¶ 5 Officer Bachler testified that after defendant was placed in custody, Officer Gomez went back to defendant's vehicle and pulled out a Glock Model 23 .40-caliber handgun, with an extended six-inch clip, from under the front seat. The handgun contained 1 live round in the chamber and 21 live rounds in the magazine.

¶ 6 Officer Bachler testified they transported defendant to the police station and Officer Gomez gave defendant his *Miranda* warnings. Defendant told the officers "he had the weapon because people out here are trying to make him dead."

¶ 7 Officer Gomez testified consistently with Officer Bachler. Specifically, Officer Gomez testified that at approximately 2 p.m. on September 17, 2011, he was on patrol with Officer Bachler in the area of 9560 South Halsted Street. Officer Gomez drove their vehicle into a McDonald's restaurant parking lot at that location in order to conduct a "field interview" with a person who was parked there. Officer Gomez made an in-court identification of that person as defendant.

¶ 8 Officer Gomez testified he parked his vehicle "[a]t an angle in front of [defendant], approximately five, six feet away." Officer Gomez further testified his door "was facing [defendant's] front headlight, at an angle." The trial court questioned Officer Gomez as follows:

"Q. Could [defendant's] car move, once you put your car at an angle in front of his car?

A. Yes."

¶ 9 Officer Gomez testified he and Officer Bachler exited their vehicle. Officer Gomez went to the driver's side of defendant's vehicle, while Officer Bachler went to the rear of defendant's vehicle. Without being requested to do so, defendant exited his vehicle of his own accord, leaving his door open. Defendant approached Officer Bachler and they engaged in a conversation. Meanwhile, Officer Gomez looked through the open door of defendant's vehicle and "observed the extended magazine from the driver side, under the front of the driver side seat." The extended magazine was in plain view. Officer Gomez signaled to Officer Bachler that there was a firearm in the vehicle. At that point, defendant fled. The officers pursued him on foot. Defendant eventually tripped and fell, and Officer Bachler got on top of him. Defendant elbowed Officer Bachler in the nose. The officers were then able to gain control of defendant and place him in custody.

¶ 10 Officer Gomez testified he then returned to defendant's vehicle and recovered a loaded "Glock .40 caliber model 23 firearm" from under the driver's seat. There were 21 live rounds in the extended magazine and 1 live round in the chamber. The magazine was approximately six inches in length.

¶ 11 Officer Gomez testified defendant was transported to the police station, where he was given his *Miranda* warnings and agreed to talk. Officer Gomez asked defendant why he had the weapon in his vehicle. Defendant responded that "people out here want me dead."

¶ 12 Following Officer Gomez's testimony, the trial court admitted into evidence certified copies

of defendant's two prior felony convictions for unlawful use of a weapon by a felon in case number 08 CR 06779-01, and his prior felony conviction for aggravated unlawful use of a weapon in case number 06 CR 16181-01.

¶ 13 After the State rested, defendant called his fiancé, Porscha Jennings. Ms. Jennings testified that at approximately 2 p.m. on September 17, 2011, she was inside the McDonald's restaurant at 9560 South Halsted Street with her three children. She was waiting for defendant to come pick them up. After defendant pulled into the parking lot, he called her, and she walked to the door to leave. She went outside and saw a police car next to defendant's vehicle in the McDonald's restaurant parking lot, "driver to driver." Defendant was speaking with the officers while they were in their respective vehicles. Ms. Jennings then observed an officer exit the passenger side and walk to the back of defendant's vehicle. Defendant remained in his vehicle and continued to speak with the other officer on the driver side. At some point, defendant put his hands out the window. The officer on the driver side exited his vehicle, opened the door of defendant's vehicle, let defendant out of his vehicle, and patted him down. She observed the same officer walk defendant to the rear of defendant's vehicle, where the other officer was standing, then that officer put on latex gloves and searched underneath the driver's seat of defendant's vehicle.

¶ 14 Following all the testimony, the trial court denied the motion to quash arrest and suppress evidence and found defendant guilty of being an armed habitual criminal, unlawful use or possession of a weapon by a felon, and resisting a peace officer. The trial court merged the unlawful use or possession of a weapon by a felon count into the armed habitual criminal count, and sentenced defendant to six and one-half years' imprisonment for armed habitual criminal, to run concurrently

with a one-year term of imprisonment for resisting a peace officer. Defendant appeals.

¶ 15 First, defendant argues the trial court erred in denying his motion to quash arrest and suppress evidence. In reviewing a trial court's ruling on a motion to quash arrest and suppress evidence, "mixed questions of law and fact are presented. Findings of historical fact made by the [trial] court will be upheld on review unless such findings are against the manifest weight of the evidence. This deferential standard is grounded in the reality that the [trial] court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony. However, a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented, and may draw its own conclusions when deciding what relief should be granted. Accordingly, we review *de novo* the ultimate question of whether the evidence should be suppressed." *People v. McDonough*, 239 Ill. 2d 260, 265-66 (2010).

¶ 16 Defendant argues he was unlawfully seized in violation of the fourth amendment when Officers Bachler and Gomez pulled up to his legally parked vehicle, stopped at an angle six feet from his driver side, and simultaneously exited the police car. Both officers had badges displayed prominently on their persons, carried visible duty belts, wore bullet-proof vests, and announced their office as Chicago police. Officer Gomez stood at defendant's driver side, while Officer Bachler stood at the trunk of defendant's vehicle. Defendant contends the officers effectively blocked him from both directions, thereby effectuating a seizure. Defendant further contends once he was seized, Officer Gomez retrieved the weapon from inside defendant's vehicle. Defendant argues that as the gun is a result of an illegal seizure, it must be suppressed. Defendant also argues that without the weapon, probable cause for his arrest is lacking and, therefore, the arrest must be quashed.

¶ 17 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. A seizure occurs when an officer has restrained a citizen's liberty by means of physical force or show of authority. *People v. Luedemann*, 222 Ill. 2d 530, 550 (2006). The appropriate inquiry as to whether a seizure occurred is whether a reasonable innocent person would feel free to decline the officers' requests or otherwise terminate the encounter. *Id*. at 550-51. "Illinois courts will consider the totality of the circumstances in determining whether or not a seizure occurred." *People v. Colquitt*, 2013 IL App (1st) 121138, ¶ 32. Factors indicative of a seizure, as discussed in *United States v. Mendenhall*, 446 U.S. 544 (1980), and adopted by the Illinois Supreme Court, include: "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Luedemann*, 222 Ill. 2d at 553.

¶ 18 Not every encounter between the police and a private citizen results in a seizure. *Id*. at 544. "Courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or '*Terry* stops,' which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *Id*. "Third-tier encounters are also known as consensual encounters." *Id*.

¶ 19 In the present case, the initial encounter between defendant and the police officers prior to the discovery of the firearm was consensual, and, thus, did not implicate fourth amendment interests.

Luedemann is instructive. In *Luedemann*, the defendant, Derek M. Luedemann, was charged with driving under the influence of alcohol, illegal transportation of alcohol, and, in a separate case, he was charged with unlawful possession of a controlled substance. *Id*. at 532. The defendant moved to quash the arrest and suppress evidence in both cases, and he also petitioned to rescind the statutory summary suspension of his driver's license. *Id*. At the rescission hearing, Officer Eric Pate testified he was on patrol, driving west on Julie Street at approximately 2:40 a.m. on August 17, 2002, when he observed the defendant sitting in the driver's seat of a vehicle parked legally in front of 305 Julie Street. *Id*. at 533. Officer Pate decided to question the defendant about what he was doing because within the last week there had been vehicles damaged and three homes burglarized on Julie Street. *Id*. at 534.

¶ 20 Officer Pate drove past the defendant's vehicle and parked in the center of the street. *Id*. Officer Pate exited his vehicle and approached the defendant's vehicle from the rear driver side. *Id*. As Officer Pate approached, the defendant turned off the vehicle's engine. *Id*. When Officer Pate reached the rear quarter panel of the defendant's vehicle, he illuminated it with his flashlight and noticed the neck of an uncapped brown glass bottle on the floor in front of the passenger seat. *Id*. Officer Pate asked the defendant for identification and inquired as to what he was doing there. *Id*. The defendant provided his identification and explained he was waiting for his girlfriend to return home. *Id*.

¶ 21 While Officer Pate was talking to the defendant, he smelled alcohol on the defendant's breath and noticed his speech was slurred and his eyes were glassy and bloodshot. *Id*. at 534-35. Officer Pate radioed for another officer to join him, then pulled his police car directly behind the defendant's

vehicle and activated his vehicle's videotape system. *Id*. at 535. Officer Harris arrived, and the two officers approached the defendant's vehicle, one on each side. *Id*. Officer Harris saw an open beer bottle on the floor of the passenger side of the defendant's vehicle. *Id*. Officer Pate asked the defendant to step out of the vehicle and asked if he could pat the defendant down for weapons; the defendant agreed. *Id*. No weapons were found; Officer Harris removed the bottle from the vehicle and discovered the bottle was one-third full and cool to the touch. *Id*.

¶ 22 The defendant admitted he had been drinking and agreed to perform field sobriety tests, which he failed. *Id*. Officer Pate placed the defendant under arrest. *Id*.

¶ 23 At the conclusion of Officer Pate's testimony, the trial court granted the defendant's petition to rescind the statutory summary suspension. *Id*. The trial court found that Officer Pate had neither probable cause for an arrest, nor justification for a *Terry* stop. *Id*. at 535-36. The State moved for reconsideration, which the trial court denied. *Id*. at 536. Relying on the findings it made in rescinding the statutory summary suspension, the trial court subsequently granted the defendant's motion to quash arrest and suppress evidence. *Id*. The State appealed. *Id*. at 537-38.

¶ 24 The supreme court reversed and remanded. *Id*. at 566. The supreme court first noted that "the police may approach a person seated in a parked vehicle and ask questions of that person without that encounter being labeled a seizure. The encounter becomes a seizure only if the officer, through physical force or a show of authority, restrains the liberty of the vehicle's occupant." *Id*. at 552-53. The supreme court cited the *Mendenhall* factors indicative of a seizure and noted: "If those factors are absent, that means that only one or two officers approached the defendant, they displayed no weapons, they did not touch the defendant, and they did not use any language or tone of voice

indicating that compliance with their requests was compelled." *Id*. at 554. The supreme court stated: "a seizure is much less likely to be found when officers approach a person in such an inoffensive manner." *Id*.

¶ 25 The supreme court cited the following commentary by Professor LaFave:

> " '[T]he mere approach and questioning of [persons seated within parked vehicles] does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to 'freeze' or to get out of the car.'" *Id*. at 557 (quoting 4 W. LaFave, Search & Seizure § 9.4(a) at 433 (4th ed. 2004)).

¶ 26 The supreme court noted:

> "By contrast, factors that courts have found indicative of a seizure of a parked vehicle are 'boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority.' " *Id*. (quoting 4. W. LaFave, Search & Seizure § 9.4(a) at 434-35 (4th ed. 2004)).

¶ 27 The supreme court concluded:

> "In sum, it is clear that Officer Pate did not effectuate a seizure of defendant

> before observing an open bottle and signs of defendant's intoxication. Rather, precedent shows that Officer Pate acted exactly as a well-trained police officer should when he wishes to question a person seated in a parked vehicle without effectuating a seizure. He drove past defendant's vehicle so as not to block it in its space. He did not turn on his overhead flashing lights to signal that defendant's compliance was expected. He did not use coercive language or a coercive tone of voice, he did not touch defendant, and he did not display his weapon. He approached from the rear driver's side, as he was trained to do, and he used a flashlight because it was nighttime. Objectively viewed, nothing Officer Pate did would communicate to a reasonable person, innocent of any wrongdoing, that he was not free to decline to answer Officer Pate's questions or otherwise go about his business." *Id*. at 565.

¶ 28 Similarly, in the present case, the testimony of Officer Bachler and Officer Gomez indicates their initial encounter with defendant prior to the discovery of the firearm did not constitute a seizure. As in *Luedemann*, when the officers first drove toward the defendant's vehicle to conduct the field interview, they did not activate any flashing lights to signal the defendant's compliance was expected, nor did they box the defendant's vehicle in but, rather, parked their police car in such a manner, as to allow the defendant to be able move his vehicle if he desired to do so. Also, as in *Luedemann*, when the two officers exited their police car, with Officer Gomez approaching the side of the vehicle and Officer Bachler approaching the trunk, they did not point any weapons at the defendant, they did not reach inside and touch the defendant, and they did not order him to put his hands on the steering wheel, or use any language or tone of voice indicating that compliance with

their requests was compelled. Thus, as in *Luedemann*, none of the *Mendenhall* factors indicative of a seizure were present. The officers here also never asked defendant to exit the vehicle; he left his vehicle of his own accord to speak with Officer Bachler, at which time Officer Bachler asked him for identification and inquired as to his business in the parking lot. Again, there was no evidence of any touching, display of weapons, or threatening tone of voice which occurred during this conversation between defendant and Officer Bachler. Objectively viewed, nothing the officers did would communicate to a reasonable, innocent person that he was not free to decline to answer Officer Bachler's questions or otherwise go about his business. No seizure occurred during this initial encounter.

¶ 29 Meanwhile, when defendant exited his vehicle to speak with Officer Bachler, he left the door of his vehicle open. Officer Gomez testified he looked through the open door of defendant's vehicle and saw the magazine of a firearm protruding from under the front of the driver's seat. At that point, Officer Gomez could lawfully seize the firearm under the plain view doctrine. See *People v. DeLuna*, 334 Ill. App. 3d 1, 13 (2002) (The plain-view doctrine allows a police officer to seize an object without a warrant if he views the object from a place he is legally entitled to be, and the object is immediately apparent to him to be evidence of a crime, contraband or otherwise subject to seizure.). Defendant does not dispute that the discovery of the weapon gave the officers probable cause to arrest him. See *People v. Zazzetti*, 6 Ill. App. 3d 858, 862 (1972). Accordingly, the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 30 We recognize that defendant's fiancé, Ms. Jennings, testified to a different version of events. Specifically, contrary to the testimony of Officer Bachler and Officer Gomez, Ms. Jennings testified

defendant remained in his vehicle until one of the officers opened defendant's door and let him out. Ms. Jennings also testified, contrary to the officers' testimony, that Officer Gomez put on latex gloves and searched underneath the seat of defendant's vehicle. However, the trial court in this case found the officers to be more credible than Ms. Jennings, and we will not substitute our judgment for the trial court's credibility determination. *People v. Sims*, 358 Ill. App. 3d 627, 634 (2005).

¶ 31 Defendant argues that *People v. Parker*, 284 Ill. App. 3d 860 (1996), compels reversal of the trial court's order denying his motion to quash arrest and suppress evidence. In *Parker*, the defendant, a 16-year-old boy, entered a high school and looked in the direction where students were lined up to go through metal detectors. *Id*. at 861. The defendant then turned around to leave the school. *Id*. At that time, Officer Daren Washington, who was inside the school helping to conduct random metal detector operations, stopped the defendant, identified himself as a police officer, and told the defendant he would have to go through the metal detector. *Id*. The defendant then raised his shirt, showing the handle of a blue steel semiautomatic pistol, and stated: "someone put this gun on me." *Id*. Officer Washington retrieved the weapon and arrested the defendant. *Id*.

¶ 32 The defendant filed a motion to quash arrest and suppress evidence, which the trial court granted. *Id*. On the State's appeal, the appellate court affirmed, holding in pertinent part:

> "In this case, we conclude that defendant's detention constituted an illegal seizure. Defendant, a 16-year-old, was specifically told by a police officer that he had to walk through the metal detectors even though defendant was leaving the building. The only reason the officer had for stopping defendant was because defendant entered the building, looked in the general area of the metal detectors and

> turned around to leave. Nothing in the record suggests that defendant was free to walk away if he had wanted to. Indeed, the officer's testimony suggests that defendant would have been physically restrained if he had refused to go through the metal detector. The detention to which defendant was subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.
>
> * * *
>
> [T]he officer detained the defendant purely as an investigatory expedition 'in the hope that something might turn up.' [Citation.] Clearly, evidence of the gun must be suppressed." *Id*. at 862, 865.

¶ 33 Defendant here argues that, similar to the defendant in *Parker*, the officers illegally seized him as part of an investigatory expedition when they parked next to him at an angle and simultaneously exited their police car, prior to the discovery of the firearm. We disagree. Unlike in *Parker*, where the officer prevented defendant from leaving the high school until he went through the metal detectors, the officers here did not prevent defendant from leaving the parking lot when they pulled up next to him; defendant still had room to move the vehicle out of the parking lot. Also, unlike in *Parker* where the officer ordered defendant to walk through the metal detectors, which suggested to the appellate court that defendant would have been physically restrained had he refused, the officers here testified they gave no orders to defendant when they exited their police car and never told defendant to exit his vehicle; the officers testified defendant left the vehicle of his own accord and walked over to Officer Bachler and spoke with him voluntarily. The officers never

touched defendant, took out their guns, or raised their voices toward defendant, and they only attempted to arrest him after Officer Gomez looked through the open door of defendant's vehicle and saw the magazine of the firearm in plain view. As discussed, the trial court found the officers' testimony to be credible. Accordingly, *Parker* is factually inapposite and does not compel the conclusion that defendant here was seized when the officers first pulled into the parking lot and exited their police car, prior to the discovery of the firearm.

¶ 34 Next, defendant contends the State failed to prove him guilty of being an armed habitual criminal beyond a reasonable doubt. In reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). "It is the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence; we will not substitute our judgment for that of the trier of fact on these matters." *Id*.

¶ 35 Defendant was convicted of violating the armed habitual criminal statute, which provides in pertinent part as follows:

> "(a) A person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> ***
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of

a weapon." 720 ILCS 5/24-1.7 (West Supp. 2011).

¶ 36 "Criminal possession may be actual or constructive. Where the possession is constructive, the State must prove that 'defendant (1) had knowledge of the presence of the weapon, and (2) had immediate and exclusive control over the area where the weapon was found.' [Citations.]" *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010).

¶ 37 At trial, the State entered into evidence certified copies of defendant's two prior convictions for unlawful use of a weapon by a felon in case number 08 CR 06779-01, and his prior conviction for aggravated unlawful use of a weapon in case number 06 CR 16181-01. On appeal, defendant does not challenge the State's evidence with respect to the triggering offense of unlawful use of a weapon by a felon; however, in his reply brief, he does argue that the class 4 form of aggravated unlawful use of a weapon has been held to be void *ab initio* by the supreme court in its modified decision in *People v. Aguilar*, 2013 IL 112116, and, thus, cannot be a triggering offense for armed habitual criminal. We need not address defendant's argument regarding whether the class 4 form of aggravated unlawful use of a weapon can be a triggering offense for armed habitual criminal, because there is no dispute that his two prior convictions of unlawful use of a weapon by a felon in case number 08 CR 06779-01 *are* such triggering offenses and satisfy the armed habitual criminal statute even if defendant's conviction of aggravated unlawful use of a weapon in case number 06 CR 16181-01 was void.

¶ 38 We proceed to address whether the State proved the remaining elements of armed habitual criminal beyond a reasonable doubt. Defendant does not dispute that the possession element was proved, *i.e.*, that he was in constructive possession of the firearm for purposes of the armed habitual

criminal statute. Defendant's only argument is that we should reverse his conviction for armed habitual criminal because the officers' testimony regarding defendant leaving the door of his vehicle open with the magazine of the firearm in plain view was incredible. Defendant contends: "Human experience would suggest an attempt to at least hide the gun upon the realization that two police officers have approached one's vehicle. Even putting the gun completely under the seat, or hiding it in the dashboard would seem more likely than simply allowing the gun to remain in plain view of the officers, risking arrest."

¶ 39 Defendant also argues: "The incredibility of the officers' [testimony] also arises from the fact that both officers allowed [him] to voluntarily exit his car, without being asked to do so, and approach one of the officers. Common sense would seem to dictate that officers who block an individual into a parking space would not permit the individual they have potentially seized to voluntarily exit his car and approach one of the officers without permission." In support, defendant cites treatises on proper police procedure advising that officers should "never allow the violator to get out of the car." See V. Folley, Police Patrol Techniques and Tactics, 95 (1973).

¶ 40 Defendant's contention is without merit. As discussed earlier in this order, the officers testified they decided to conduct a field interview with defendant, who was parked in a McDonald's restaurant parking lot in a "high narcotic area." The officers drove into the parking lot and parked in such a way so as *not* to block defendant from leaving. The officers did not activate their flashing lights, did not issue any orders to defendant, and did not point any weapons at him. The officers exited their police car, with Officer Bachler walking toward the rear of defendant's vehicle, and Officer Gomez walking toward the driver side of defendant's vehicle. Defendant exited his vehicle

of his own accord, leaving the door of his vehicle open, and went to speak with Officer Bachler, who then asked him for identification and inquired as to why he was parked in the McDonald's restaurant parking lot. Officer Gomez testified that with the vehicle door open, he was able to look inside defendant's vehicle and see the magazine of a firearm in plain view underneath the driver's seat. The officers arrested defendant after a chase and recovered the gun from underneath the driver's seat.

¶ 41 In convicting defendant of being an armed habitual criminal, the trial court found that the officers' testimony was credible. As the trier of fact who observed the officers' demeanor and heard their testimony, the trial court was in a better position than the reviewing court to assess the credibility and believability of the officers, and we will not ordinarily substitute our judgment for the trial court's credibility determinations. *People v. Kolb*, 273 Ill. App. 3d 485, 488 (1995). Defendant argues, though, we should not simply "rubber stamp" the trial court's credibility determinations where, as here, the officers' testimony was to a version of events so improbable as to raise a reasonable doubt of his guilt. We disagree with defendant's characterization of the officers' testimony regarding defendant leaving the door of his vehicle open and exiting his vehicle as improbable and unbelievable. Contrary to defendant's argument, there *are* plausible explanations for defendant leaving the door of his vehicle open, namely, that he momentarily forgot the gun was in plain view or was not aware that it was sticking out from under the seat. There is also a plausible explanation for why the officers allowed defendant to leave his vehicle, namely, that he was not yet a suspect in any crime. The point being that the officers' testimony regarding defendant leaving the door of his vehicle open and exiting his vehicle was not so improbable and unbelievable, that we should disregard the credibility determinations made by the trial court, who actually observed the

officers' demeanor and heard their testimony first-hand. Accordingly, we affirm defendant's conviction of armed habitual criminal.

¶ 42 Defendant next contends the armed habitual criminal statute under which he was convicted, which prohibits a felon from possessing a firearm, unconstitutionally violates the second amendment of the United States Constitution. U.S. Const., amend. II ("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.").

¶ 43 "Statutes are presumed constitutional, and the party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional. [Citation.] Moreover, this court has a duty to construe the statute in a manner that upholds the statute's validity and constitutionality, if it can reasonably be done. [Citation.] The constitutionality of a statute is a question of law that we review *de novo*." " *Aguilar*, 2013 IL 112116, ¶ 15.

¶ 44 Defendant was convicted of violating the armed habitual criminal statute which, *inter alia*, criminalizes the possession of firearms by those previously convicted two or more times of certain felonies. See 720 ILCS 5/24-1.7 (West Supp. 2011). Defendant contends, in light of the United States Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020, 3050 (2010), that the armed habitual criminal statute is unconstitutional.

¶ 45 In *Heller*, the United States Supreme Court concluded that a District of Columbia law completely banning the possession of handguns in the home violated the second amendment. *Heller*, 554 U.S. at 635. The Supreme Court subsequently held in *McDonald* that "the second amendment right recognized in *Heller* is applicable to the states through the due process clause of the fourteenth

amendment." *Aguilar*, 2013 IL 112116, ¶ 17 (citing *McDonald*, 561 U.S. ___, 130 S. Ct. 3020, 3050 (2010)). Defendant contends that under the new landscape created by *Heller* and *McDonald*, the criminalization of possession of a firearm by a felon—even one twice-convicted of certain qualifying offenses—is an unconstitutional infringement on the right to bear arms. We disagree.

¶ 46 In *Heller*, the Supreme Court itself noted: "Like most rights, the right secured by the Second Amendment is not unlimited. *** 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* 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.) *Heller*, 554 U.S. at 627. The Supreme Court reiterated this sentiment in *McDonald*. *McDonald*, 561 U.S. ___, 130 S. Ct. at 3047.

¶ 47 More recently, our own supreme court filed its modified decision in *Aguilar*. Therein, the court specifically quoted the above cited language approvingly in concluding that, "the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Aguilar*, 2013 IL 112116, ¶¶ 22, 26-27. Moreover, while the modified opinion in *Aguilar* did specifically find that the "Class 4 form" of our state's aggravated unlawful use of weapons statute (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), is unconstitutional, "the implication of the court's holding is that the so-called 'Class 2 form of the offense,' which enhances the penalty for felons, could potentially remain enforceable." *Aguilar*, 2013 IL 112116, ¶ 47 (Theis, J., dissenting); see also *People v. Burns*, 2013 IL App (1st) 120929, ¶ 27 (concluding that, in light of *Heller* and

Aguilar, "the possession of firearms by felons is conduct that falls outside the scope of the second amendment's protection.").

¶ 48 Defendant acknowledges the decisions in *Heller* and *McDonald*, but notes that in each case the above discussion of restrictions on the second amendment right of felons was at most *dicta*. However, "[j]udicial *dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court." *People v. Williams*, 204 Ill. 2d 191, 206 (2003). Moreover, as noted above, the necessary implication of the *Aguilar* decision is that limitations on the possession of firearms by felons are constitutionally permissible.

¶ 49 Moreover, this court has specifically rejected similar constitutional challenges to the armed habitual criminal statute on a number of prior occasions. See *People v. Black*, 2012 IL App (1st) 110055, ¶ 13; *People v. Davis*, 408 Ill. App. 3d 747, 749-51 (2011); *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011); *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011). In each instance, we generally recognized that the armed habitual criminal statute, applicable only to felons, "is a constitutionally permissible restriction of the second amendment right to bear arms, as a valid exercise of [the] government's right to protect the health, safety, and general welfare of its citizens." *Id*.

¶ 50 In sum, following the statements in *Heller*, *McDonald*, and *Aguilar*, regarding the constitutionally permissible limitations on a felon's right to possess firearms, and in light of our own history of rejecting constitutional challenges similar to the one presented here, we conclude that the

armed habitual criminal statute does not violate defendant's second amendment rights.

¶ 51 In his reply brief, defendant makes a one-sentence argument that his previous convictions for unlawful use of a weapon by a felon in case number 08 CR 06779-01, which are the predicate offenses for his armed habitual criminal conviction here, violated his second amendment rights. Defendant's argument fails for the same reasons that his conviction under the armed habitual criminal statute does not violate his second amendment rights.

¶ 52 For the foregoing reasons, we affirm the circuit court.

¶ 53 Affirmed.

¶ 54 Subsequent to the issuance of our Rule 23 Order which was entered on February 21, 2014, and affirmed defendant's convictions, defendant filed a petition to reconsider in which he contends this court erred in holding that both of his 2008 convictions for unlawful use of a weapon in case number 08 CR 16181-01 are triggering offenses supporting his armed habitual criminal conviction. We entered a briefing schedule, pursuant to which the State filed an answer to defendant's petition, and defendant filed a reply to the State's answer.

¶ 55 Defendant contends our holding that both 2008 convictions are triggering offenses "runs contrary to the text of the information that charged [him] with the crime of armed habitual offender." Defendant argues that only one of those 2008 convictions is alleged in the information to be a triggering offense for armed habitual criminal, and that the other triggering offense alleged in the information is his 2006 conviction of aggravated unlawful use of a weapon in case number 06 CR 16181-01, which is void under *Aguilar*. Defendant argues that since two triggering offenses are needed to sustain his conviction of armed habitual criminal, and only one 2008 triggering offense

remains here, we must reverse his armed habitual criminal conviction.

¶ 56 To the extent defendant is challenging the sufficiency of the information, we find no error.

¶ 57 "Under section 111-3(a) of the Code (725 ILCS 5/111-3(a) (West 2006)), a charging instrument must include: (1) the name of the offense, (2) the statutory provision (3) the nature and elements of the charged offense, (4) the date and county, and (5) the name of the accused." *People v. Klepper*, 234 Ill. 2d 337, 351 (2009). "When the sufficiency of the charging instrument is attacked in a pretrial motion, the standard of review is to determine whether the instrument *strictly* complies with the requirements of section 111-3 of the Code of Criminal Procedure of 1963 [citations]. Contrarily, when, as here, the sufficiency of a charging instrument is attacked for the first time on appeal, the standard of review is more liberal. In such a case, it is sufficient that the [charging instrument] apprised the accused of the precise offense charged with enough specificity to (1) allow preparation of his defense and (2) allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." (Emphasis in the original.) *People v. DiLorenzo*, 169 Ill. 2d 318, 321-22 (1996).

¶ 58 In the instant case, the information stated in pertinent part:

> "The State's Attorney of Cook County now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that on or about September 17, 2011 at and within the County of Cook Cornell Zanders committed the offense of Armed Habitual Criminal in that he, knowingly or intentionally possessed a firearm, after having been convicted of unlawful use of a weapon by a felon under case number 08CR0677901 and aggravated unlawful use of a weapon under case

number 06CR1618101, in violation of Chapter 720 Act 5 Section 24-1.7(a) of the Illinois Compiled Statutes 1992 as amended."

¶ 59 Thus, as required under section 111-3(a), the information provided the name of the offense, the statutory provision, the nature and elements of the charged offense of armed habitual criminal, the date and county, and the name of the accused. In so doing, the information set forth the underlying triggering offenses for the charged offense of armed habitual criminal, specifically, defendant's prior conviction of "unlawful use of a weapon by a felon under case number 08CR0677901 and aggravated unlawful use of a weapon under case number 06CR1618101." Construed liberally, as we must here where the sufficiency of the charging instrument is attacked for the first time on appeal, the information apprised defendant that the charged offense of armed habitual criminal was predicated on the 2008 case in which defendant *admittedly* was convicted of two counts of unlawful use of a weapon by a felon (the first count for possession of a handgun, and the second count for possession of the bullets inside that handgun, after having been previously convicted of possession of a firearm with a defaced serial number under case number 06 CR 22328). The information also apprised defendant that the armed habitual criminal charge was predicated on the 2006 case in which defendant was convicted of aggravated unlawful use of a weapon. The information sufficiently allowed defendant to prepare his defense and plead the resulting conviction of armed habitual criminal as a bar to future prosecution arising out of the same conduct.

¶ 60 Defendant argues that there was a variance between the armed habitual count as alleged in the information and the proof at trial. To invalidate a criminal charge, "a variance between allegations in a complaint and proof at trial must be material and be of such character as may mislead

the accused in making his defense." *People v. Collins*, 214 Ill. 2d 206, 219 (2005) (citations and internal quotation marks omitted). "A variance between the facts alleged and the proof is not fatal if the facts in question are not essential elements of the offense charged." *People v. Meras*, 284 Ill. App. 3d 157, 164 (1996).

¶ 61 There was no variance here. The information charged defendant with committing armed habitual criminal by knowingly or intentionally possessing a firearm after having been convicted of unlawful use of a weapon by a felon under case number 08 CR 06779-01 and aggravated unlawful use of a weapon under case number 06 CR 16181-01. At trial, the State presented evidence supporting each element of the charge. Specifically, the State proved by the officers' testimony that defendant constructively possessed the firearm found in his vehicle and also proved the underlying predicate offenses by introducing into evidence "the certified convictions of defendant under case number 08 CR 06779-01" and the certified conviction of defendant under case number "06 CR 16181-01, where the defendant was convicted of the offense of aggravated unlawful use of a weapon by a felon." Defendant does not dispute that the certified convictions under case number 08 CR 06779-01 and 06 CR 16181-01 were admitted into evidence.

¶ 62 We also note that, even if the 2006 conviction of aggravated unlawful use of a weapon was void under *Aguilar*, the remaining evidence at trial was sufficient to prove defendant guilty of armed habitual criminal predicated on the two 2008 convictions of unlawful use of a weapon by a felon, where the State proved defendant constructively possessed the firearm found in his vehicle and where the trial court admitted into evidence defendant's certified convictions under case number 08 CR 06779-01. Defendant does not contend that his 2008 convictions were void under *Aguilar*.

¶ 63 Defendant contends our order affirming his conviction of armed habitual criminal predicated on the two 2008 convictions of unlawful use of a weapon by a felon "misapprehends the text of the armed habitual criminal statute." The armed habitual criminal statutes states in pertinent part that "[a] person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted a total of 2 or more times of *** unlawful use of a weapon by a felon." 720 ILCS 5/24-1.7 (West Supp. 2011).

¶ 64 Defendant argues that the text of the armed habitual criminal statute, specifically, the language requiring that a defendant be convicted "2 or more times" of the predicate offense of unlawful use of a weapon by a felon, indicates that the predicate offenses must have been committed at different times and must have been brought and tried in separate cases. Defendant contends the armed habitual criminal statute was not designed to prosecute an individual for armed habitual criminal when his predicate convictions were from a single case for acts occurring at the same time, such as here where defendant was twice convicted in the single 2008 case of unlawful use of a weapon by a felon for possessing a gun and for possessing the bullets inside the gun.

¶ 65 "The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and that inquiry appropriately begins with the language of the statute. [Citation.] There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports. Where an enactment is clear and unambiguous, the court is not free to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express [citations], nor is it necessary for the court to search for any subtle or not readily apparent intention of the legislature."

People v. Woodard, 175 Ill. 2d 435, 443 (1997).

¶ 66 Here, the armed habitual criminal statute does not expressly state that the predicate unlawful use of a weapon by a felon offenses must have been brought and tried in separate cases for acts committed at different times; the statute merely states that the defendant must have been previously convicted of unlawful use of a weapon "2 or more times." To the extent that the "2 or more times" language is ambiguous regarding whether the predicate unlawful use of a weapon by a felon convictions must have been brought and tried in separate cases for acts committed at different times, we may look to additional sources to determine the legislature's intent. *Brucker v. Mercola*, 227 Ill. 2d 502, 513-14 (2007). To this end, "[r]eference to another statute by analogy is *** a common method of interpretation and has been relied upon by [the Illinois Supreme Court] on many occasions." *Waste Management of Illinois, Inc. v. Illinois Pollution Control Board*, 145 Ill. 2d 345, 351 (1991). "On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." *Id*. (citation and internal quotation marks omitted).

¶ 67 Against this backdrop, we compare the language of the armed habitual criminal statute at issue here with the language in the sentencing statutes for habitual criminals and Class X offenders, as all three of those statutes similarly classify their respective offenders based on their commission of certain predicate offenses. The habitual criminal sentencing statute states:

> "(1) Every person who has been twice convicted in any state or federal court of an offense that contains the same elements as an offense now (the date of the offense committed after the 2 prior convictions) classified in Illinois as a Class X felony, criminal sexual assault,

aggravated kidnapping, or first degree murder, and who is thereafter convicted of a Class X felony, criminal sexual assault, or first degree murder, committed after the 2 prior convictions, shall be adjudged an habitual criminal.

* * *

(3) *Any convictions that result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purposes of this Section as one conviction*.

(4) This Section does not apply unless each of the following requirements are satisfied:

(A) The third offense was committed after July 3, 1980.

***

(C) The third offense was committed after conviction on the second offense.

(D) The second offense was committed after conviction on the first offense.

(E) Except when the death penalty is imposed, anyone adjudged an habitual criminal shall be sentenced to a term of natural life imprisonment." (Emphasis added.) 730 ILCS 5/5-4.5-95(a)(1), (3), (4) (A), (C), (D), (E) (West Supp. 2011).

¶ 68 The Class X offender sentencing statute states:

"(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony *and those charges are*

separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:

(1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second." (Emphasis added.) 730 ILCS 5/5-4.5-95(b) (1), (2), (3) (West Supp. 2011).

¶ 69 Thus, the habitual criminal sentencing statute expressly provides that the two prior predicate convictions shall be considered as only one conviction for purposes of the statute if they are connected with the same transaction or result from offenses committed at the same time. The habitual criminal sentencing statute also expressly provides that the second predicate offense must have been committed after the conviction on the first offense. The Class X sentencing statute expressly provides that, for purposes of the statute, the charges underlying the two prior predicate felony convictions must have been separately brought and tried and arise out of different series of facts. The Class X sentencing statute also expressly provides that the predicate felonies must not have been committed at the same time, but rather that the second predicate felony must have been committed after conviction on the first. By contrast, the armed habitual criminal statute at issue here contains none of these provisions prescribing a duration between the predicate offenses and/or requiring that they be separately brought and tried, and we will not read them into the statute because, had the legislature intended to include them, it easily could have done so as it did in the habitual criminal and Class X offender sentencing statutes. See *e.g.*, *People v. McSwain*, 2012 IL

App (4th) 100619, ¶¶ 63-64 (noting that various statutory amendments showed that the legislature knows how to authorize multiple convictions for simultaneous violations of a single criminal statute, and in the absence of such language in the statute at issue, the appellate court would not read it in). To hold otherwise would be to read into the statute limitations which the legislature did not express. See *Hines v. Department of Public Aid*, 221 Ill. 2d 222, 230 (2006) (the court "may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express."). In the absence of such limiting language prescribing a duration between the predicate offenses and/or requiring that they be separately brought and tried, we construe the armed habitual criminal statute as allowing for the two predicate offenses to have been committed at the same time and to be brought and tried in one case. Therefore, we affirm defendant's armed habitual criminal conviction predicated on his two 2008 convictions for unlawful use of a weapon by a felon.

¶ 70 Defendant argues, though, that his armed habitual conviction should be reversed because his two predicate 2008 convictions for unlawful use of a weapon by a felon were based on his possession of a single, loaded handgun. Defendant argues that his possession of a single loaded handgun cannot form the basis for two unlawful use of a weapon by a felon convictions but rather supports only one conviction, and therefore that his armed habitual criminal conviction should be reversed because only one of the predicate convictions was valid. We disagree. See *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶¶ 8-17; and *People v. Howard*, 2014 IL App (1st) 122958, ¶¶ 16-18 (holding that the unlawful possession of a weapon by a felon statute, which makes it unlawful for a person who has been convicted of a felony to possess "any firearm or any firearm

ammunition" (720 ILCS 5/24-1.1(a) (West 2008)), and also provides that "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation" (720 ILCS 5/24-1.1(e) (West 2008)), permits multiple convictions based on the simultaneous possession of a firearm, and of the ammunition inside that firearm)[1]. Accordingly, both 2008 convictions of unlawful use of a weapon by a felon were valid under the statute and properly served as the predicate offenses for defendant's conviction of armed habitual criminal.

¶ 71 For the foregoing reasons, we deny defendant's petition for reconsideration and affirm the circuit court.

[1]In an unpublished order, a panel of the appellate court held that the possession of a single loaded firearm cannot serve as the basis for multiple convictions under the unlawful use of a weapon by a felon statute. See *People v. Almond*, 2011 IL App (1st) 093587-U. The supreme court granted the State's petition for leave to appeal in *Almond*. See 3 N.E.3d 796 (2014). Until the supreme court issues its opinion in *Almond* and definitively resolves this issue, we continue to adhere to the reasoning in *Anthony* and *Howard* that the clear language of the unlawful use of a weapon by a felon statute permits multiple convictions based on the simultaneous possession of a firearm and of the ammunition inside that firearm.