2012 IL App (1st) 110592-U

FIRST DIVISION
DECEMBER 3, 2012

1-11-0592

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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. 09 CR 21635
	)	
CLEVELAND WILLIAMS,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The armed habitual criminal statute neither violates the Second Amendment of the United States Constitution, nor violates the federal or state prohibitions against *ex post facto* laws.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Cleveland Williams was convicted under the armed habitual criminal statute (720 ILCS 5/24-1.7(a) (West 2009)), and sentenced to 10 years of imprisonment. On appeal, he argues that: (1) the armed habitual criminal statute violates his constitutional right to bear arms; and (2) the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois Constitutions. For the following

reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On October 8, 2009, Chicago police officers arrested the defendant at a gas station located at 7114 South Vincennes Avenue in Chicago, Illinois. On November 30, 2009, the defendant was charged with several gun-related offenses, including the offense of being an armed habitual criminal.

¶ 5 On December 8, 2010, a jury trial commenced during which the State presented the testimony of police officers Dennis Oboikovitz (Officer Oboikovitz), Jack Meseck (Officer Meseck) and Cedric Taylor (Officer Taylor). The evidence adduced at trial is as follows: On October 8, 2009, at approximately 10:10 p.m., Officers Oboikovitz, Meseck and Taylor were on patrol in an unmarked police vehicle when they pulled into a gasoline station near the intersection of South Vincennes Avenue and 71st Street in Chicago. The police officers noticed two individuals inside a silver-colored car that was parked at one of the gasoline pumps. As Officer Oboikovitz drove the unmarked police vehicle through the station, he observed the defendant exit the silver-colored car. When the defendant shut the car door, a flap of his coat "swung open" to reveal about 3 to 5 inches of the handle of a gun which was tucked into the defendant's waistband. At that point, Officer Oboikovitz alerted his partners about the gun, parked the police vehicle, and detained the defendant. Following a pat-down search, Officer Oboikovitz recovered a 40-caliber semiautomatic handgun from the defendant's waistband, placed it on the hood of the car, advised the defendant of his rights, and placed him under arrest. Officer Meseck then removed the magazine of the gun, which had a total of 10 bullets, and secured the weapon in the glove compartment of the police vehicle. Following his arrest, the defendant informed Officers Oboikovitz and Taylor that he was in

possession of the gun because he feared retaliation for the shooting of his cousin, which had occurred the day before this incident. Subsequently, Officer Taylor performed a pat-down search of Lavelle Hardy (Hardy), the second man who was sitting in the silver-colored car, but did not find any weapons or contraband. Hardy was released by the police officers after a check of his identity did not reveal any outstanding arrest warrants.

¶ 6 The parties then stipulated that the defendant had previously been convicted of two "qualifying felonies"–possession of a controlled substance with the intent to deliver– to support the charge of armed habitual criminal.

¶ 7 The defendant testified on his own behalf that he was pumping gasoline into his car when the police approached, questioned him, and frisked him. He denied possessing the gun, but stated that Officer Oboikovitz had falsely produced the gun and had falsely accused him. The defendant further denied informing the police officers that he carried the gun for his own protection.

¶ 8 Following closing arguments, the jury found the defendant guilty of the offense of armed habitual criminal. On February 8, 2011, the trial court denied the defendant's motion for a new trial, sentenced the defendant to 10 years of imprisonment, and denied the defendant's motion to reconsider the sentence. On that same day, February 8, 2011, a timely notice of appeal was filed before this court.

¶ 9 ANALYSIS

¶ 10 We determine the following issues: (1) whether the armed habitual criminal statute violates the defendant's constitutional right to bear arms; and (2) whether the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois Constitutions.

¶ 11 We first determine whether the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2009)) violates the defendant's constitutional right to bear arms.

¶ 12 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 Illinois Criminal Code (the Code) was unconstitutional because it violates the Second Amendment of the United States Constitution, which was incorporated against the states through the Fourteenth Amendment, and thus, his conviction must be vacated. The defendant contends that, under the United States 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*, 561 U.S. ___, 130 S. Ct. 3020 (2010), the criminalization of the possession of firearms by a felon is an unconstitutional infringement on his 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, that the statute at issue unconstitutionally punishes felons who carry firearms for the purpose of self-defense outside of the home, and that he should not be categorically excluded from the protections of the Second Amendment by virtue of his status as a felon.

¶ 13 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 United States 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, his conviction as an armed habitual offender was constitutionally valid. Specifically, the State argues that no fundamental right was at issue here because the defendant had been removed from the protections of the Second Amendment by virtue of his undisputed status as a recidivist felon.

¶ 14 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 the trial court to create an adequate record with which to address the defendant's constitutional claims, 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.

¶ 15 We find the facts of the State's cited cases–*In re Parentage of John M.* and *Lebron*–to be distinguishable from 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 a semiautomatic handgun in the defendant's possession at a gasoline station. Under section 24-1.7 of the Code, the purpose for which the defendant possessed the firearm did not matter. As was established at trial, what mattered was that the defendant possessed a firearm as a prior convicted felon within the meaning of the statute. See 720 ILCS 5/24-1.7 (West 2009). Nor do we accept the State's contention that the defendant's as-applied challenge to the statute at issue was forfeited because he failed to raise the issue in the trial court. In fact, the constitutionality of a statute may be challenged at any time. See *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 12. 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.

¶ 16 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 United States Constitution. See *id*; see also U.S. Const., amend. II.

¶ 17 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).

¶ 18 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.*

¶ 19 The Second Amendment of the United States 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.

¶ 20 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." 720 ILCS 5/24-1.7 (West 2009).

¶ 21 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 firearms 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.

¶22 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*, 561 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 of 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.

¶ 23 We find that this court has already 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*, 408 Ill. App. 3d 747, 947 N.E.2d 813 (2011) (holding that the armed habitual criminal statute was not facially unconstitutional). Although the *Heller* court did not 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 *id.* at 749, 947 N.E.2d at 816; accord *People v. Ross*, 407 Ill. App. 3d 931, 939, 947 N.E.2d 776, 784 (2011) (applying the intermediate scrutiny standard in determining whether the armed habitual criminal statute violated the Second

Amendment); *People v. Coleman*, 409 Ill. App. 3d 869, 879, 948 N.E.2d 795, 805 (2011) (adopting the reasoning and holding in *Ross*); 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).

¶ 24 While the State wholeheartedly agrees with the ultimate holdings in *Davis*, *Ross*, and *Coleman* in upholding the constitutionality of the armed habitual criminal statute, the State argues that the defendant's challenges to the statute should be rejected outright where no fundamental right is triggered here because the defendant's status as a felon removed him from the protections of the Second Amendment. Thus, the State contends, no constitutional scrutiny under any level is necessary. The State further argues that even if the armed habitual criminal statute is subjected to constitutional scrutiny, this court should apply a lower "rational basis" standard.

¶ 25 We find that this court had already considered and rejected the State's identical argument in *Davis*, which held that a defendant is not categorically excluded from the protections of the Second Amendment by virtue of his status as a felon, and applied intermediate scrutiny to determine whether the armed habitual criminal statute was unconstitutional. See *Davis*, 408 Ill. App. 3d at 749, 947 N.E.2d at 816 ("[a]lthough a felon, [defendant] still counts as one of the people whose rights the Constitutional protects"); see also *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 69 ("the second amendment guarantee of the individual right to bear arms is a fundamental right incorporated to the states and is not subject to rational basis review"). We see no reason to disturb this court's holding in *Davis*. Thus, we find that intermediate scrutiny is the appropriate standard in the present case.

¶ 26 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*, 408 Ill. App. 3d at 749, 947 N.E.2d at 816, 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. *Id.*

¶ 27 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*, 408 Ill. App. 3d at 750, 947 N.E.2d at 817; see *Ross*, 407 Ill. App. 3d at 942, 947 N.E.2d at 787 (finding the armed habitual criminal statute constitutional where its restriction on the right to bear arms serves a substantial government interest and is proportional to the interest served); *Coleman*, 409 Ill. App. 3d at 879, 948 N.E.2d at 805 (same). Thus, we find that the restrictions on the defendant's rights under the Second Amendment of the United States Constitution fit proportionally with the interest that the statute serves.

¶ 28 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.

¶ 29 "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 tailored 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 at 322, 495 N.E.2d at 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 firearms. See 720 ILCS 5/24-1.7 (West 2009). Further, the defendant has not shown that no set of circumstances exist under which the statute at issue would be valid, and we decline the defendant's invitation to this court to reexamine the sound holdings in *Davis* and *Ross*. See *Hill*, 202 Ill. 2d at 157, 781 N.E.2d at 1069; *Davis*, 408 Ill. App. 3d 747, 947 N.E.2d 813; *Ross*, 407 Ill. App. 3d 931, 947 N.E.2d 776. Therefore, the defendant's facial challenge to section 24-1.7 of the Code must fail.

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

¶ 31 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.

¶ 32 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 United States Constitution. See U.S. Const., amend. II. The supreme court in *Heller* and *McDonald* clearly and explicitly held that laws prohibiting felons 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 this 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 protections of the Second Amendment. We decline to do so.

¶ 33 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, carried on his person a loaded handgun in a public place. The defendant was not, as the police officers approached the parked vehicle from which the defendant had exited, using the handgun for any self-defense purposes. Rather, the record suggests that the defendant exited the vehicle at the gasoline

station, at which point the police officers spotted the handle of the defendant's handgun in his waistband, detained him, and performed a pat-down search of the defendant. 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*, 408 Ill. App. 3d at 750, 947 N.E.2d at 817; see 720 ILCS 5/24-1.7 (West 2009). Thus, we find that section 24-1.7 of the Code was not unconstitutional as applied to the defendant.

¶ 34 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 does not apply to felons keeping arms for the purpose of self-defense. He further contends that this *dicta* is inapplicable to the statute at issue because the supreme court in *Heller* and *McDonald* never specifically identified the armed habitual criminal statute as a permissible regulatory measure for the purpose of prohibiting felons from possessing firearms. He also maintains that the armed habitual criminal statute is more than a mere "regulatory measure" concerning who may possess a firearm, but rather, criminalizes the possession of firearms for *any* purpose–including self-defense.

¶ 35 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–impliedly including the statute at issue–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*, 408 Ill. App. 3d. at 750, 947 N.E.2d at 817 ("judicial *dicta* should usually carry dispositive weight in an inferior court").

¶ 36 The defendant also appears to argue 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*, 561 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.

¶ 37 We next determine whether the armed habitual criminal statute under section 24-1.7 of the Code violates the *ex post facto* clauses of the United States and Illinois Constitutions, which we review *de novo*. See *Davis*, 408 Ill. App. 3d at 751, 947 N.E.2d at 817.

¶ 38 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 United States and Illinois Constitutions 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.

¶ 39 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 United States and Illinois Constitutions, because it criminalizes conduct which occurred after the enactment of the statute. The State cites to *Davis*, 408 Ill. App. 3d 747, 947 N.E.2d 813; *Ross*, 407 Ill. App. 3d 931, 947 N.E.2d 776; *Coleman*, 409 Ill. App. 3d 869, 948 N.E.2d 805; *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.

¶ 40 Both the United States 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.*

¶ 41 We note that this court in *Leonard*, *Bailey*, *Adams*, *Davis*, *Ross*, and *Coleman* had already considered and rejected the identical *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 (following the holdings in

Leonard and *Bailey* and finding no merit in the defendant's claim that the armed habitual criminal statute was an *ex post facto* law); *Davis*, 408 Ill. App. 3d at 752, 947 N.E.2d at 818 (same); *Ross*, 407 Ill. App. 3d at 945, 947 N.E.2d at 788 (same); *Coleman*, 409 Ill. App. 3d at 880, 948 N.E.2d at 806 (same).

¶ 42 Applying the principles of these cases to the instant case, we find that the defendant's prior drug convictions, to which the parties stipulated at trial to support 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 2, 2005. Rather, the defendant was being punished for the new and separate offense of possessing a firearm at the time of his October 8, 2009 arrest, and he, like the defendants in the enumerated cases above, had fair warning that he was committing the offense of armed habitual criminal.

¶ 43 In rebuttal, the defendant specifically argues that *Leonard*, *Bailey*, *Adams*, *Coleman* and *Davis* 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).

¶ 44 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 the prior crimes; *** it is not an ingredient of the main offense charged").

¶ 45 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 for drug possession 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.

¶ 46 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 *Bailey*, 396 Ill. App. 3d at 464, 919 N.E.2d at 464 (upholding this reasoning in *Leonard*); accord *Davis*, 408 Ill. App. 3d at 752, 947 N.E.2d at 818 (same); *Coleman*, 409 Ill. App. 3d at 880, 948 N.E.2d at 806 (same).

¶ 47 Thus, we find that the State's cited cases were not wrongly decided and we decline to depart from the sound 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 United States and Illinois constitutional prohibitions against *ex post facto* legislation.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 49 Affirmed.