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SIXTH DIVISION
November 2, 2012

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. 10 CR 5802
)	
MARCELLUS FRENCH,)	The Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Robert E. Gordon concurred in the judgment.

ORDER

¶ 1 HELD: The aggravated unlawful use of a weapon (AUUW) statute did not violate defendant's right to bear arms under the second amendment, either on its face or as applied to defendant, where recent United States Supreme Court cases restricted the right to possession of a loaded handgun for purposes of self-defense to within a home.

¶ 2 Defendant, Marcellus French, argues that the aggravated unlawful use of a weapon (AUUW) statute that he was convicted under is unconstitutional, on its face and as applied to him, as an improper infringement on an individual's second amendment right to bear arms in

1-11-1570

light of the United States Supreme Court's ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and in *McDonald v. City of Chicago*, 561 U.S. ___, (2010). Based on the following, we hold that the provisions of the AUUW statute at issue here do not violate the constitutional protection of the right to bear arms.

¶ 3

FACTS

¶ 4 On March 11, 2010, defendant was charged with three counts of AUUW after police officers recovered a handgun from an apartment at 41 East Garfield Boulevard, in Chicago, Illinois. Count I charged defendant with knowingly carrying on or about his person a firearm, when he was not on his own land, abode or fixed place of business, and that firearm was uncased, loaded and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). Count II charged defendant with knowingly carrying on or about his person a firearm, when he was not on his own land, abode or fixed place of business, where he had not been issued a currently valid firearm owner's identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)). The State nolleed count III, which charged defendant with carrying a firearm on or about his person when not on his own land, abode, or fixed place of business while previously having been adjudicated a delinquent for possession of a controlled substance. On January 5, 2011, defendant waived his right to a jury trial and proceeded to a bench trial.

¶ 5 The following facts were elicited at trial. On March 11, 2010, Chicago police officer Robert Stegmiller and Sergeant Jose Lopez were part of a team of officers investigating gang-

1-11-1570

related shootings and homicides in the area of 41 East Garfield on the south side of Chicago.

The building contained a total of eight units, two on each floor.

¶ 6 Officer Stegmiller testified that, at around 9:10 p.m. on the date in question, he surveilled the apartment building at 41 East Garfield. Officer Stegmiller testified that he observed defendant walking back and forth in front of the building on the sidewalk. Because the street lights and the lights from inside of the building illuminated the area, Officer Stegmiller observed defendant clearly without obstruction. While he watched defendant pacing in front of the building, Officer Stegmiller observed a magazine extending from the grip of a gun sticking out of the right side of the waistband of defendant's pants. Officer Stegmiller described the magazine as 12 inches long with 6 of those inches extending beyond the gun's grip. Officer Stegmiller used his radio to transmit the information to the other officers on his team.

¶ 7 Officer Stegmiller further testified that he then re-located and was picked up by an unmarked police car driven by Sergeant Lopez, who was accompanied by another officer. The sergeant drove "around the corner" to the 5500 block of South Wabash, which was about 30-40 feet east of the front doorway to the building at 41 East Garfield. A second unmarked car containing four other members of the team pulled up behind Sergeant Lopez's vehicle. The police officers alighted from their cars and approached the front entrance to the building at 41 East Garfield. Officer Stegmiller observed defendant enter the hallway of 41 East Garfield and run up the steps. The officers followed defendant inside the building.

¶ 8 Officer Stegmiller testified that he did not see defendant when he entered the building, but he heard someone running up the stairs. Officer Stegmiller said he then ran up the stairs to

1-11-1570

the fourth floor. Upon hearing a door slam from apartment 4-W, Officer Stegmiller and four other officers entered that apartment and found three men inside the living room area. Officer Stegmiller recognized the three men as individuals he had observed on the second and fourth floors, before the officers entered the building. While the officers remained in the apartment, defendant came out of the bathroom into the hallway where he was subsequently detained.

¶ 9 Officer Stegmiller testified that he searched the bathroom defendant had exited and recovered a 9 m.m. handgun with an extended magazine containing 30 live rounds. The weapon was uncased and loaded. Officer Stegmiller testified that the recovered weapon appeared to be the same one that was in defendant's waistband moments earlier. Defendant could not provide a firearm owner's identification card and informed Officer Stegmiller that he lived at 10727 South Prairie in Chicago.

¶ 10 Sergeant Lopez testified that, after initially arriving on the scene, he parked his vehicle and walked up to 41 East Garfield. As Sergeant Lopez approached the building, he observed defendant "grab a semi-automatic pistol in his waistband which had an extended magazine." According to Sergeant Lopez, the "artificial lighting conditions in front of the building were good" so that the sergeant also noticed that defendant's gun was two-toned and that the magazine was "extended" by 5 or 6 inches. At that point, defendant looked over at Sergeant Lopez. Sergeant Lopez said he announced his office and pulled out his gun. In response, defendant ran inside the building. Sergeant Lopez entered the building first, holding the door open for his partners.

1-11-1570

¶ 11 Sergeant Lopez further testified that the gun with the extended magazine recovered by Officer Stegmiller was the same two-toned gun with an extended magazine he saw in defendant's waistband moments earlier.

¶ 12 The trial court found the officers to be "very credible" and stressed that it was significant that the officers were able to clearly see "a gun that's certainly not run of the mill. It's been described by the sergeant as a two-tone gun with an extended clip [] protruding at least five or six inches out of the gun. So a very different kind of a gun that was described."

¶ 13 Defendant was found guilty under counts I and II. The trial court merged the convictions and sentenced defendant to one year of imprisonment. Defendant was sentenced on May 11, 2011. Defendant's notice of appeal was timely filed on May 11, 2011.

¶ 14

DECISION

¶ 15 Defendant contends the AUUW statute that he was convicted under is unconstitutional as an improper infringement on his second amendment right to bear arms in light of the United States Supreme Court's rulings in *Heller*, 554 U.S. 570, and *McDonald*, 561 U.S. ____.

¶ 16 Whether a statute is constitutional is a question of law to be reviewed de novo. *People v. Morgan*, 203 Ill. 2d 470, 486, 786 N.E.2d 994 (2003). All statutes are presumed to be constitutional and the burden of clearly establishing a statute's constitutionality is on the party challenging the validity of the statute. *People v. Montyce H.*, 2011 IL App (1st) 101788, ¶12, 959 N.E.2d 221 (2011). Further, a reviewing court should attempt to construe the statute in a manner which upholds its constitutionality, if such a construction is reasonably possible. *Id.*

1-11-1570

¶ 17 The State asserts and defendant concedes that defendant has raised his contention for the first time on appeal. Defendant correctly asserts, however, that he has not forfeited the issue because “a constitutional challenge to a criminal statute can be raised at any time.” *Id.* See *In re J.W.*, 204 Ill. 2d 50, 61, 787 N.E.2d 747 (2003). Accordingly, we will address defendant’s second amendment challenge even though he raised the challenge for the first time in the appellate court.

¶ 18 Prior to considering defendant’s “as applied” and facial challenges, we first address the State’s contention that defendant’s second amendment challenge fails because defendant was not in possession of a “lawful firearm” protected under the second amendment, but rather an “assault weapon” that does not fall into the class of arms “typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625.

¶ 19 The second amendment to the United States Constitution provides: “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. In addressing second amendment claims, we must first consider whether the challenged law imposes a burden on conduct falling within the scope of the second amendment’s guarantee. *People v. Mimes*, 2011 IL App (1st) 082747, ¶66, 953 N.E.2d 55 (2011); *Wilson v. Cook County*, 407 Ill. App. 3d 759, 768, 943 N.E.3d 768 (2011). If the challenged law does not burden protected conduct, then the law is valid. *Mimes*, at ¶66.

¶ 20 Section 54-211 of the Cook County Code defines semi-automatic weapons as unlawful assault weapons if they have “the capacity to accept a large capacity magazine” and an additional

1-11-1570

prohibited feature, such as a “folding, telescoping, or thumbhole stock.” (Emphasis added.)

Wilson, 407 Ill. App. 3d at 648 (citing Cook County Code § 54-211).

¶ 21 At the time of his arrest, defendant was carrying a 9 m.m. semi-automatic pistol with an extended magazine that contained 30 rounds of ammunition. The trial court noted that the gun at issue was “a gun that’s certainly not run of the mill.” However, the record does not reveal, and the State does not assert, that the gun possessed by defendant had any additional prohibited features other than the extended magazine. Therefore, the gun cannot be categorized as an unlawful assault weapon and defendant has met his initial burden to show that the challenged provisions of the AUUW statute burden conduct falling within the scope of the second amendment’s protection.

¶ 22 I. Constitutionality of Sections 24-1.6(a)(1) and (a)(3)(A) of the AUUW Statute

¶ 23 Defendant first claims that sections 24-1.6(a)(1) and (a)(3)(A) of the AUUW statute are unconstitutional as applied to him under the second amendment.

¶ 24 Section 24-1.6 of the Criminal Code of 1961 (Criminal Code) provides, in pertinent part, as follows:

“(a) A person commits the offense of [AUUW] when he or she knowingly:

(1) Carries on or about his or her person *** except when on his or her land or in his or her abode, legal dwelling, or fixed place of business *** any pistol, revolver, *** or other firearm;
***; and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense.” 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010).

¶ 25 A court is not capable of making an “as applied” determination of unconstitutionality where there has been no evidentiary hearing and no findings of fact in the lower court. *Reno v. Flores*, 507 U.S. 292, 300-01 (1993) (when there are no factual findings or evidentiary record, the constitutional challenge must be facial). In an “as applied” challenge, the challenging party contests only how the statute was applied against him or her within a particular context, and, as a result, the facts of his or her particular case become relevant. *Montyce H.*, at ¶16. Without an evidentiary record that provides ample foundation for the reviewing court to intelligently address the particular challenge, any finding that a statute is unconstitutional “as applied” is premature. *In re Parentage of John M.*, 212 Ill. 2d 253, 268, 817 N.E.2d 500 (2004). Nor would it be appropriate for this court, *sua sponte*, to consider whether the statute has been constitutionally applied since we, as a reviewing court, are not arbiters of the facts. *Id.*

¶ 26 Defendant claims that he has a right to possession of a gun for the purposes of self-defense outside the boundaries of his home. However, there are no facts of record to support the notion that defendant “had specific fears or a need for self-defense or that he was anywhere near or en route to his home at the moment of his offense.” *Montyce H.*, at ¶19. Therefore, we find defendant’s assertion of an “as applied” challenge unpersuasive, and we will proceed by analyzing only his facial challenge.

1-11-1570

¶ 27 Defendant also contends that sections (a)(1) and (a)(3)(A) of the AUUW statute are facially unconstitutional because the need for self-defense is not restricted to the confines of the home and, therefore, the right to bear arms for self-defense must also exist outside the home.

¶ 28 In support of his argument, defendant cites to *Heller* and *McDonald*. In *Heller*, the Supreme Court struck down a District of Columbia statute imposing a total ban on the possession of operable handguns in the home, reasoning that the “inherent right of self-defense” lies at the core of the second amendment and the home in particular was where the need for such defense was “the most acute.” *Heller*, 554 U.S. 570 at 628. In *McDonald*, a plurality of the Supreme Court struck down similar Chicago municipal ordinances that restricted the possession of loaded handguns for self-defense in the home, holding that the second amendment applied to states through the due process clause of the fourteenth amendment. *McDonald*, 561 U.S. ____.

¶ 29 We initially consider the level of constitutional scrutiny that should be applied to the AUUW statute challenged in this case. Statutes limiting a fundamental right are typically subject to strict scrutiny and, therefore, are presumed to be unlawful. *People v. Aguilar*, 408 Ill. App. 3d 136, 144 (1st Dist. 2011) (appeal allowed, ___ Ill. 2d ___, 949 N.E.2d 1099 (2011)). Defendant, however, concedes that a great number of recent cases have held that intermediate scrutiny is the appropriate standard to review his second amendment challenge. See, e.g., *Aguilar*, 408 Ill. App. 3d at 146 (“we find intermediate scrutiny to be the appropriate standard in the present case” for the aggravated unlawful use of a weapon statute); *Mimes*, at ¶74 (“[w]e find that intermediate scrutiny is the appropriate level of scrutiny to apply to the second amendment challenge at issue here,” the aggravated unlawful use of a weapon statute); *People v. Ross*, 407 Ill. App. 3d 931,

1-11-1570

939, 947 N.E.2d 776 (“[r]ecently, this district in Aguilar [citation] applied the intermediate scrutiny standard in upholding the constitutionality of the aggravated unlawful use of a weapon statute and we also find it to be the appropriate standard in the present case” involving the armed habitual criminal statutes.); *People v. Davis*, 408 Ill. App. 3d 747, 749, 947 N.E.2d 813 (2011) (applying intermediate scrutiny to the unlawful use of a weapon by a felon and the armed habitual criminal statutes); *Wilson*, 407 Ill. App. 3d at 768 (applying intermediate scrutiny to uphold a statute banning assault weapons). In *Mimes*, the court explained that “the conduct at issue here – carrying an uncased, loaded and immediately accessible handgun on a public street – is not the type of core conduct like self-defense of hearth and home that is central to the second amendment guarantee.” *Mimes* at ¶74. Thus, we find that intermediate scrutiny is the appropriate standard to apply to the second amendment challenge at issue in the present case.

¶ 30 Intermediate scrutiny asks whether the challenged law serves a substantial or important government interest and whether there is a reasonable fit between the challenged law and the asserted objective. *Id.*

¶ 31 Addressing the government’s interest in the statute, we look to the purpose of the AUUW statute as previously noted in *Aguilar*, which “is to allow the State to seek a harsher penalty for any person in the State of Illinois who does not fall under a specific exemption from carrying a loaded weapon on or about his person or in any vehicle because of the inherent dangers to police officers and the general public, even if the person carrying the weapon has no criminal objective.” *Aguilar*, 408 Ill. App. 3d at 146. See *People v. Marin*, 342 Ill. App. 3d 716, 723-24, 795 N.E.2d 953 (2003). In *Mimes*, the court further noted that “promoting and ensuring the

1-11-1570

safety of both the general public and police officers by limiting the accessibility of loaded firearms in public places and on public streets constitutes a substantial or important interest.”

Mimes, at ¶76. We similarly conclude that the challenged AUUW provisions serve a substantial and important interest of protecting the police and the general public from individuals carrying uncased, loaded, and immediately accessible firearms in public.

¶ 32 Next, we consider the fit between the challenged AUUW provisions and their substantial and important goals. The fit between the challenged statute and the governmental interest must be reasonable, not perfect. *Wilson*, 407 Ill. App. 3d at 767. A reasonable fit “represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’ ” *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

¶ 33 Defendant argues that while the State has a legitimate interest in protecting the public from the dangers of gun violence, the AUUW, which broadly bans the carrying of loaded, accessible firearms outside of one’s home and fixed place of business, defeats the core right of using firearms for self-defense. As noted in *Mimes*, however, “the prohibition at issue here does not criminalize the carrying of firearms everywhere outside the individual’s home, land, or fixed place of business. Rather, the prohibition impacts the individual’s right to self-defense based upon factors concerning both where the firearm is carried and the manner in which it is carried.” *Mimes*, at ¶78. We continue to adhere to the holding in *Mimes*, which found that the fit between the challenged provisions of the AUUW statute and the statute’s substantial and important goal was reasonable. *Id.* at ¶82. Furthermore, contrary to defendant’s argument that an individual’s

1-11-1570

right to carry arms for the purpose of self-defense extends beyond the home, the Supreme Court in *Heller* and *McDonald* constrained its ruling to the issue of the second amendment's protection of the right to possess a handgun in the home for self-defense purposes, not the right to possess handguns outside of the home. Specifically, the Court in *Heller* held that "the District's ban on handgun possession in the home violates the Second Amendment." (Emphasis added.) *Heller*, 554 U.S. 570 at 635. In *McDonald*, the Supreme Court also constrained its holding by refusing to expand *Heller*. *McDonald*, 561 U.S. at ____.

¶ 34 Accordingly, as this court has repeatedly done in recent history, we conclude that the AUUW statute is constitutionally permissible because it is substantially related to an important governmental interest in protecting the health, safety and general welfare of its citizens and the fit between the statute and the government objective was reasonable. See, e.g., *Montyce H.*, at ¶23; *Mimes*, at ¶82; *Aguilar*, 408 Ill. App. 3d at 146.

¶ 35 II. Constitutionality of Sections 24-1.6(a)(1) and (a)(3)(C) of the AUUW Statute

¶ 36 Defendant also claims that sections 24-1.6(a)(1) and (a)(3)(C) of the AUUW statute are unconstitutional, both "as applied" and on its face, as the provisions create an impermissible classification based on age. The relevant sections of the AUUW statute provide that a person commits the offense of AUUW when he or she knowingly carries on or about his person a firearm, when he was not on his own land, abode or fixed place of business, where he had not been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1) and (a)(3)(C) (West 2010). The pertinent section of the FOID statute requires that an applicant under the age of 21 may be eligible for a FOID card only if he or she submits a written consent from a parent or legal

1-11-1570

guardian, provided, however, that the parent or legal guardian is not an individual prohibited from obtaining a FOID card. 430 ILCS 65/4(a)(2)(i) (West 2010). Defendant argues that persons between the ages of 18 and 20 are also adults with the same constitutional protections that apply to all other Illinois adults over the age of 21 and, therefore, an absolute ban on firearm ownership by 18, 19, and 20 year olds without parental permission is a violation of their second amendment rights.

¶ 37 As noted above, an “as applied” challenge requires an evidentiary record that provides ample foundation for the reviewing court to intelligently address the particular challenge. *John M.*, 212 Ill. 2d at 268. Although defendant was 20 years of age when he was arrested for possession of a loaded handgun, defendant provides no facts to demonstrate that he was unable to obtain a FOID card with parental permission. “Where no facts demonstrate an unconstitutional application of a statute or law to defendant, defendant may not challenge the statute on the ground that it might conceivably be applied unconstitutionally in some hypothetical case.” *People v. Becker*, 315 Ill. App. 3d 980, 1000, 734 N.E.2d 987 (2000). We, therefore, cannot consider defendant’s “as applied” challenge.

¶ 38 Furthermore, defendant’s facial challenge is necessarily premised upon a finding that, under the second amendment, adults over the age of 21 have a constitutional right to possess loaded handguns outside of their homes. However, we previously determined that the State may constitutionally ban the possession of loaded handguns by adults outside their homes. Moreover, we are not persuaded by defendant’s contention that sections 24-1.6(a)(1) and (a)(3)(C) of the AUUW statute do not pass heightened constitutional scrutiny because the provisions are not

1-11-1570

narrowly-tailored or substantially related to an important government interest. This court, in *People v. Alvarado*, 2011 IL App (1st) 82957, ¶72, previously held that preventing those under the age of 21 from carrying handguns in public was a reasonable fit to the substantial and important governmental goal of preserving the safety of the public and police officers. Therefore, defendant's facial challenge must also fail.

¶ 39 III. Illinois Constitution

¶ 40 Defendant further contends that the AUUW statute also violates the Illinois Constitution and, thus, the holding in the case of *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 470 N.E.2d 266 (1984), should be reexamined in light of *Heller* and *McDonald*.

¶ 41 Section 22 of article I of the Illinois Constitution provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. 1970, art. I, § 22.

¶ 42 In *Kalodimos*, our supreme court applied a rational basis test to hold that a city ordinance prohibiting the possession of operable handguns was a correct exercise of police power and was not in violation of the Illinois Constitution. *Kalodimos*, 103 Ill. 2d at 511. In *Mimes*, the court noted that the analysis and holding in *Kalodimos* had been "impliedly overruled by *Heller* and *McDonald*." *Mimes*, at ¶69. Nevertheless, Illinois is not bound to interpret the provisions of the Illinois Constitution in lockstep with the Supreme Court's interpretation of the federal constitution. *People v. Mitchell*, 165 Ill. 2d 211, 217, 650 N.E.2d 1014 (1995). While states are free to provide more protection than the U.S. Constitution requires, they may not provide less. *Mimes*, at ¶82. We have already found that the second amendment does not afford defendant

1-11-1570

protection from the AUUW statute and defendant has not cited any authority to persuade us that the “right to bear arms under the Illinois Constitution is greater than that afforded under the second amendment.” *Id.* Furthermore, as the court explained in *Aguilar*, even if the ruling in *Kalodimos* should be reexamined in light of *Heller* and *McDonald*, “only our supreme court may change its holding.” *Aguilar*, 408 Ill. App. 3d at 150. Thus, we find defendant's state constitutional argument unpersuasive.

¶ 43

CONCLUSION

¶ 44 For the reasons previously stated, we hold that the aggravated unlawful use of a weapon statute does not violate the federal or state constitutional right to bear arms. We, therefore, affirm defendant’s conviction and sentence.

¶ 45 Affirmed.