

No. 1-12-3283

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 6542
	)	
BENNIE ELLISON,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Pierce and Liu concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's failure to file a Rule 604(d) motion to withdraw his negotiated plea of guilty to a violation of the armed habitual criminal statute before he filed a notice of appeal required dismissal of his appeal on the merits; certain assessments in the court's fines, fees and costs order were affirmed in part and vacated in part.

¶ 2 Defendant Bennie Ellison, appearing *pro se*, entered a negotiated guilty plea for a violation of the armed habitual criminal statute and was sentenced to six years in prison and a

mandatory supervised release (MSR) term of two years. Defendant did not file a postplea motion to withdraw his plea but did file a notice of appeal. On appeal, defendant challenges the constitutionality of the armed habitual criminal statute. Defendant also challenges certain fines and fees assessed against him. We affirm in part and vacate in part the challenged fines and fees, and we dismiss defendant's appeal on the merits of his challenge to the armed habitual criminal statute.

¶ 3 Pursuant to a negotiated plea agreement, defendant entered a plea of guilty to one count of being an armed habitual criminal. During the change-of-plea hearing, the circuit court advised defendant, *inter alia*, that if he wished to appeal from his guilty plea, he must first file a motion within 30 days asking to withdraw his plea. Defendant failed to file a postplea motion pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) to withdraw his plea; however, he filed a notice of appeal within 30 days of entry of the judgment.

¶ 4 On appeal, defendant contends that the statute creating the offense of armed habitual criminal, which forbids individuals with certain felony criminal records from possessing firearms, violates the individual right to bear arms protected by the second amendment to the federal constitution. U.S. Const., amend. II. The State responds that defendant's failure to file a timely postplea motion pursuant to Rule 604(d) deprives this court of jurisdiction over this appeal and requires that his appeal be dismissed, both as to the constitutionality of the statute and as to defendant's challenge to the fines and fees portion of his sentence. Alternatively, the State contends that the armed habitual criminal statute is not constitutionally invalid and agrees that most of the challenged fines and fees be vacated. Defendant replies that Rule 604(d) does not create a jurisdictional bar.

¶ 5 The filing of a Rule 604(d) motion is a condition precedent to an appeal from a judgment

on a plea of guilty. *People v. Jamison*, 181 Ill. 2d 24, 28 (1998), citing *People v. Wilk*, 124 Ill. 2d 93, 105 (1988). However, a defendant's failure to file a timely Rule 604(d) motion in the circuit court does not deprive the appellate court of jurisdiction over a subsequent appeal. *In re William M.*, 206 Ill. 2d 595, 601 (2003). Nevertheless, as a general rule, the failure to file a timely Rule 604(d) motion precludes the appellate court from considering the appeal on the merits and requires that the appeal be dismissed. *People v. Flowers*, 208 Ill. 2d 291, 301 (2003); *People v. Carroll*, 375 Ill. App. 3d 162, 164 -65 (2007).

¶ 6 An exception to the jurisdictional bar is that a defendant may attack a void judgment at any time, and his claim that his judgment is void is not subject to waiver. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). (But see *People v. Merriweather*, 2013 IL App (1<sup>st</sup>) 113789, ¶ 35, holding that the defendant's failure to file a Rule 604(d) postplea motion relieved that court of the responsibility of addressing his contention that the aggravated unlawful use of a weapon statute was unconstitutional as violating the second amendment's right to bear arms.) Here, defendant posits that we have jurisdiction to reach the merits of his challenge to the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2008)), because that statute is unconstitutional and, therefore, his conviction under that statute was void *ab initio*. We conclude, however, that the armed habitual criminal statute is constitutional and is not void.

¶ 7 The constitutionality of a statute is a question of law and, therefore, the proper standard of review is *de novo*. *People Aguilar*, 2013 IL 112116, ¶ 16. A statute is presumed constitutional and, consequently, the party challenging its constitutionality bears a burden of clearly establishing that the statute violates the constitution. *People v. Melongo*, 2014 IL 114852, ¶ 20. A court must construe a statute in a manner that upholds its validity and constitutionality if it can do so reasonably. *Id.* The fundamental rule of statutory interpretation

is to determine the intent of the legislature and to give effect to that intent. *People v. Jones*, 223 Ill. 2d 569, 580 (2006).

¶ 8 Defendant contends that the second amendment of the Constitution, made applicable to the states through the fourteenth amendment, protects the right of individuals like defendant to bear arms for the purpose of self-defense, and that the statute violates his second-amendment inherent natural right to keep firearms for self-defense. U.S. Const, amend. II. Defendant's contention relies heavily on the opinion of the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court concluded that a District of Columbia law completely banning the possession of handguns in the home violated the second amendment. *Id.* at 635. However, the Supreme Court noted in *Heller* that "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. In *McDonald v. City of Chicago*, 561 U.S. 742, \_\_\_, 130 S. Ct. 3020, 3047 (2010), the Supreme Court repeated its assurance in *Heller* that its holding did not cast doubt on preserving the prohibition on the possession of firearms by felons.

¶ 9 Defendant asserts that the Supreme Court's "seeming approval" in *Heller* and *McDonald* of prohibitions on firearms possession by felons is mere *dicta* which was not meant to apply to the Illinois armed habitual criminal statute. Nevertheless, our own supreme court has recognized that "[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).

¶ 10 Additionally, constitutional challenges to the armed habitual criminal statute have been rejected specifically by this court on a number of occasions. See *People v. Black*, 2012 IL App (1<sup>st</sup>) 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 *Ross*, 407 Ill. App. 3d at 9424, this court concluded that "the armed habitual criminal statute is a constitutionally permissible restriction of the right to bear arms, as a valid exercise of government's right to protect the health, safety, and general welfare of its citizens. The restriction serves a substantial governmental interest and is proportional to the interest served."

¶ 11 We conclude that the armed habitual criminal statute is not unconstitutional as violating the second amendment's right to bear arms. It follows that the judgment from which defendant appeals was not void. Consequently, we must dismiss defendant's appeal for failing to comply with the mandates of Rule 604(d).

¶ 12 We next address defendant's claim that certain fines and fees assessed by the circuit court clerk must be vacated because they were not authorized and, consequently, void. Contrary to the State's position, "[t]here is no jurisdictional impediment to the granting of relief from the void portion of the circuit court's sentencing order." *Thompson*, 209 Ill. 2d at 28.

¶ 13 Defendant contends that the circuit court improperly denied him a \$5 *per diem* presentence incarceration credit for a \$10 fine under the County Jail Medical Costs Fund assessment found in section 17 of the County Jail Act (Act) (730 ILCS 125/17 (West 2012)). Section 17 of the Act explicitly provides that "[t]he fee shall not be considered a part of the fine for purposes of any reduction in the fine." Consequently, we agree with the State that defendant is not entitled to pretrial custody credit against that \$10 assessment. *People v. Unander*, 404 Ill.

App. 3d 884, 890 (2010); see *People v. Elcock*, 396 Ill. App. 3d 524, 540 n.2 (2009).

¶ 14 We also concur with the State that defendant was properly assessed the \$25 Court Services charge pursuant to section 5-1103 of the Counties Code (55 ILCS 5/5-1103) (West 2012)). By its plain language, this is a fee applicable to all judgments of conviction, not a fine, and cannot be offset by the custody credit earned by defendant. *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010).

¶ 15 The State does agree that defendant is entitled to \$5 *per diem* presentence incarceration credit toward the \$50 Court System charge (55 ILCS 5/5-1101(c) (West 2012)) because that assessment is a fine and not a fee. Defendant was credited with 1,285 days in presentence custody and, consequently, the \$50 Court System fine must be offset by defendant's presentencing credit. The State agrees that a \$5 Electronic Citation fee (705 ILCS 105/27.3(e) (West 2012)) should be vacated, as defendant was not convicted of any traffic, misdemeanor, municipal ordinance, or conservation case. The parties agree that a \$20 Probable Cause Hearing fee must be vacated where defendant was charged by indictment and no probable cause hearing was held. See *People v. Smith*, 236 Ill. 2d 162, 170 (2010). The parties also agree that the \$15 State Police Operations fee (705 ILCS 105/27.3a(1.5) (West 2010)) must be vacated as violating the *ex post facto* laws where it became effective after defendant's 2009 offense.

¶ 16 For the foregoing reasons, defendant's failure to file a Rule 604(d) motion before filing a notice of appeal requires that we dismiss this appeal on the merits. We order the clerk of the circuit court to modify the fines, fees and costs order as follows: defendant's \$50 fine should be offset by defendant's presentence credit for time served; we affirm the assessment of the \$10 County Jail Medical Costs Fund fee and the \$25 Court Services fee; we further order that the clerk of the circuit court vacate the \$5 electronic citation charge, the \$20 probable cause hearing

No. 1-12-3283

charge, and the \$15 State Police Operations charge.

¶ 17 Appeal dismissed; fines and fees order modified.