2012 IL App (1st) 101376-U

THIRD DIVISION
February 1, 2012

No. 1-10-1376

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUHWUN FOSTER, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County, Illinois. No. 07 CR 23027 Honorable John A. Wasilewski, Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.

Presiding Justice Steele and Justice Salone concurred in the judgment.

ORDER

¶ 1 *HELD*: Where Illinois case law has answered the question of the constitutionality of the Armed Habitual Criminal Act following the United States Supreme Court rulings in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, __ U.S. __, 130 S. Ct. 3020 (2010), defendant's argument that the statute falls outside of longstanding prohibitions approved of by the Supreme Court fails.

¶ 2 Following a bench trial, defendant, Juhwun Foster, was convicted of one count of armed habitual criminal (720 ILCS 5/24-1.7 (West 2006)), four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (West 2006)) (AUUW) and two counts of unlawful use of a

weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)) (UUW). The convictions were merged into the count of armed habitual criminal and defendant, who had two prior convictions for aggravated unlawful use of a weapon in 2002 and armed robbery in 2004, was sentenced to nine years' imprisonment. Defendant now appeals, arguing that following *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, __ U.S. __, 130 S. Ct. 3020 (2010), the armed habitual criminal statute must be stricken as unconstitutional and his conviction must be reversed. For the following reasons, we reject defendant's argument and affirm the holding of the trial court.

¶ 3 There is no dispute between the parties concerning the facts underlying defendant's conviction. At trial, Officer Edward Dougherty of the Chicago police department testified that on October 21, 2007, he and his partner were near a parking lot at 4430 South Laporte Avenue in Chicago, Illinois. Dougherty observed defendant walking towards the officers and then turn and walk briskly away after seeing the officers. Dougherty exited the squad car, announced his office and sought a field interview. From about ten feet away, Dougherty saw defendant remove a loaded handgun from his waistband and drop it in a bush. Dougherty discovered two loaded firearms in the bush and defendant was arrested. The State presented certified copies of defendant's two prior convictions.

¶ 4 Defendant testified on his own behalf and also presented the testimony of Paris McGee and Lashica Dover. They testified that McGee was with defendant when the police stopped them, but that McGee was released while defendant was arrested. Further, they testified that defendant never possessed a handgun and there was no bush in the vicinity of the arrest. The trial court found defendant guilty, merging the counts into the conviction for armed habitual

criminal. Defendant was sentenced to nine years' imprisonment. This appeal followed.

¶ 5 The sole issue presented to this court is defendant's claim that the Armed Habitual Criminal Act (AHCA) is unconstitutional in the wake of the United States Supreme Court's examination of second amendment rights in *Heller* and *McDonald*. Defendant asserts that, following the analysis in support of this contention, the AUUW and UUW statutes also are unconstitutional and his convictions must be reversed. Defendant notes that he did not raise this issue at trial, but asserts that a constitutional challenge to a statute may be reviewed at any time. *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). He notes that the constitutionality of a statute is reviewed *de novo*. *People ex rel. Birkett v. Konetski*, 283 Ill. 2d 185, 200 (2009).

¶ 6 Defendant recognizes that this court recently rejected claims that the AHCA was facially unconstitutional as a violation of the second amendment right to bear arms. *People v. Coleman*, 409 Ill. App. 3d 869 (2011); *People v. Davis*, 408 Ill. App. 3d 747 (2011); *People v. Ross*, 407 Ill. App. 3d 931 (2011). In addition, he notes that this court has also rejected several constitutional challenges to the AUUW statute. *People v. Mimes*, 2011 IL App. (1st) 082747; *People v. Aguilar*, 408 Ill. App. 3d 136 (2011); *People v. Dawson*, 403 Ill. App. 3d 499 (2010); *People v. Williams*, 405 Ill. App. 3d 958 (2010). Defendant respectfully requests this court revisit those decisions as outlier cases that were wrongly decided. Defendant maintains that this court took *dicta* from *Heller* and *McDonald* to support its findings that the AHCA and AUUW statutes were constitutional and approved form of regulation. Defendant argues that a close review of the entirety of the *Heller* and *McDonald* opinions, especially the historical and deep roots of the right to bear arms requires a departure from these cases.

¶ 7 Defendant points to several scholarly writings and case law from the Tenth Circuit to support his argument that the United States Supreme Court failed to justify its *dicta* in *Heller* and

McDonald and that these laws are recent enactments and not long-standing prohibitions mentioned as acceptable. See Nelson Lund, 56 UCLA L. Rev. 1343, 1357-58 (2009); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009). Because this *dicta* is not controlling, defendant contends, the AHCA improperly criminalizes otherwise lawful protected conduct. Defendant analogizes his case to first amendment jurisprudence where the Supreme Court has held that the right to free speech and assembly could be proscribed only to deal with abuse of those rights, otherwise those rights may not be curtailed. *De Jonge v. Oregon*, 299 U.S. 353, 364-66 (1937). Defendant maintains there has been no evidence produced that defendant was abusing his rights for an unlawful purpose and his conviction must be reversed.

¶ 8 Despite defendant's concern that Illinois is such an outlier and the United States Supreme Court's *dicta* cannot support upholding the AHCA or AUUW statutes, there has been widespread acceptance that *Heller* and *McDonald* stand for the proposition that the second amendment right is the " 'right to possess a handgun in the home for purposes of self-defense.' " See, *Dawson*, 403 Ill. App. 3d at 508, quoting *McDonald*, 130 S. Ct. at 3050. As noted, this understanding has not been overturned in Illinois, but repeatedly upheld. These cases address defendant's claim that following *dicta* to support curtailing a constitutional right is improper. See *Davis*, 408 Ill. App. 3d at 750 ("as our supreme court explained in *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993), judicial *dicta* should usually carry dispositive weight in an inferior court."). These courts have undertaken thoughtful and well reasoned analysis under intermediate scrutiny review to conclude the AHCA is constitutional. We see no reason to depart from this thoughtful analysis and for that reason, we adhere to the holdings in *Davis*, *Coleman*, and *Ross* and affirm defendant's conviction.

¶ 9 For the foregoing reasons, we affirm the decision of the trial court.

¶ 10 Affirmed.