2017 IL App (1st) 151139-U

No. 1-15-1139

Order filed August 16, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 6806
	)	
CESAR PICAZZO,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The possession of a weapon by a felon is not conduct that falls within the second amendment, and thus, the statute prohibiting the unlawful use of a weapon by a felon does not violate the second amendment as applied to defendant.

¶ 2 Following a bench trial in 2015, defendant Cesar Picazzo was convicted of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2014)) after a handgun was recovered from the backyard of his home. Defendant was sentenced to two years in prison. On appeal, defendant contends the UUWF statute is unconstitutional as applied to him because it

infringes on his second amendment right to bear arms for self-defense and, accordingly, his conviction must be vacated.

¶ 3 Defendant was charged with two counts of UUWF for possessing a firearm on or about his person or land while having been previously convicted of a felony, namely possession of a controlled substance. Defendant also was charged with reckless discharge of a firearm.

¶ 4 At trial, Chicago police sergeant Eric Rashan testified that at 2 a.m. on March 18, 2012, he and his partner, Officer Rocco Pruger, responded to a call of shots fired near 9622 South Baltimore Avenue in Chicago. Sergeant Rashan saw defendant speaking with an officer. He had been trained in weapons and detected "a very strong smell" of burnt gun powder immediately upon getting out of his police car.

¶ 5 Sergeant Rashan did not see anyone else in the area where defendant stood. As the sergeant approached defendant, he saw a .44-magnum revolver on the ground about one foot away from defendant. Sergeant Rashan recovered the weapon from the ground because of its proximity to defendant, and he further testified as follows:

> "[W]hen I picked up the gun I had touched the barrel, and the barrel of the weapon was warm. And then when I opened the cylinder of the weapon and injected [*sic*] the rounds, which were six spent .44-magnum shell casings, the shell casings themselves were hot."

¶ 6 Sergeant Rashan identified the weapon and the shell casings in photographs that were entered into evidence. Defendant was arrested and read his *Miranda* rights. Sergeant Rashan and his partner had a conversation in which one of them "asked [defendant] about what he was doing

out there. He said he was just drinking and having fun." When the officers asked defendant to explain, defendant said he "was shooting the gun up in the air" and was not shooting it at anyone.

¶ 7 On cross-examination, Sergeant Rashan stated that when he arrived at the scene, defendant was inside a gate or fence and officers were speaking to defendant through the fence. The scent of gunpowder indicated that a weapon had recently been fired, and the smell of gunpowder from the type of weapon recovered from the yard would be stronger than such a scent from the firing of a smaller weapon such as a .22-caliber gun.

¶ 8 The weapon was near two garbage cans, and Sergeant Rashan saw the "muzzle of the gun sticking out from between those two trash cans." The area was illuminated by artificial light from a nearby alley and the officer's flashlight. Defendant's hands were not tested for gunshot residue, and the officer did not see defendant holding the weapon. The parties stipulated that defendant had a prior felony conviction in 1990 for possession of a controlled substance in case No. 89 CR 16908.

¶ 9 The defense presented the testimony of defendant and his sister, Graciela Wade. Wade testified that she lived on the second floor of 9622 South Baltimore in March 2012. She called defendant on the phone to ask him if the back gate was locked and heard him go outside to check the gate.

¶ 10 Wade saw a squad car arrive and saw "a whole bunch of police officers running in." The officers pushed defendant against the fence and entered the yard. Defendant was placed in the police car, and Wade did not see officers retrieve a weapon or speak to defendant in the yard. Wade testified she heard gunshots outside between 1 and 1:30 p.m. but did not hear any shots immediately before seeing police in the yard.

¶ 11 Defendant testified that at 2 a.m. on the date in question, he was at a friend's house and had a few alcoholic drinks. A friend drove him home at about 2:15 a.m. Defendant had a phone message from his sister asking him to check on the outside gates. As he locked a gate, a police car and the officers spoke to him through the chain link fence and then approached and arrested him. Defendant did not see any weapon on the ground and did not fire a weapon that night, and he denied telling police that he fired the weapon into the air.

¶ 12 In rebuttal, Officer Pruger testified he and other officers arrived at the scene within five minutes of receiving the report that shots were fired. He read *Miranda* warnings to defendant in the presence of Sergeant Rashan, after which defendant said he was just "having some fun" while drinking in his backyard. Officer Pruger smelled a strong odor of gunpowder upon arriving at the scene.

¶ 13 The trial court found defendant guilty of both UUWF counts and not guilty of reckless discharge of a firearm. The court sentenced defendant to two years in prison.

¶ 14 On appeal, defendant contends his UUWF conviction should be vacated because the underlying statute violates his right to keep and bear arms under the second amendment to the United States Constitution (U.S. Const., amend. II). Defendant acknowledges he did not raise these arguments before the trial court. However, a constitutional challenge to a statute may be raised at any time. *People v. McCarty*, 223 Ill. 2d 109, 123 (2006).

¶ 15 Section 1.1(a) of the UUWF statute provides:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a

felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2012)).

¶ 16 Under that statute, defendant was prohibited from possessing a weapon because of his prior felony conviction. He argues the statute is unconstitutional as applied to him. An as-applied challenge arises from a defendant's contention that the statute or law as it is applied to his particular situation is unconstitutional. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 57, citing *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). Facts that surround a defendant's particular circumstances are relevant to an as-applied challenge. *Campbell*, 2014 IL App (1st) 112926, ¶ 57.

¶ 17 Defendant argues the statute impedes his second amendment right to keep a weapon on his own property for purposes of self-defense based solely on his status as a convicted felon, and he points out that the prior felony underlying his UUWF offense occurred more than 25 years ago. He contends the State lacks any interest in barring him from possessing a handgun on his own property, and he argues that convicted felons who have completed their sentence "should have the same right to keep and bear arms in their homes for defensive purposes [that is] held by every other citizen."

¶ 18 Defendant claims his position is supported by *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *Heller*, the United States Supreme Court struck down a District of Columbia statute that banned the possession of a firearm in the home. *Heller*, 554 U.S. at 592. In *McDonald*, the Supreme Court struck down a City of Chicago ordinance that barred citizens from possessing handguns unless they had been registered with the City before 1982 and featured a "lock and load" safety mechanism and also

struck down a similar Oak Park ordinance. *McDonald*, 561 U.S. at 791. In both cases, the Supreme Court recognized the rights of individuals under the second amendment to keep and bear arms.

¶ 19 Defendant's argument that those cases support his position contrasts with the Supreme Court's clear statements in *Heller* and *McDonald* that favor the *prohibition* on the possession of firearms by felons. In *Heller*, the Supreme Court found the second amendment right to bear arms was "not unlimited," stating:

> "[N]othing 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." *Heller*, 554 U.S. at 595, 626-27.

¶ 20 In *McDonald*, the Supreme Court stated that its holding in *Heller* "did not cast doubt on such longstanding regulatory measures" as the categorical regulation of firearm possession by felons and the mentally ill, the prohibition on carrying firearms in certain places such as schools or government buildings, and other regulations. *McDonald*, 561 U.S. at 786.

¶ 21 Defendant describes those passages from *Heller* and *McDonald* as *dicta*, or comments by the court which are unnecessary to the cases' disposition. He maintains those holdings should not apply to felons who keep weapons on their property for self-defense, as he alleges was the case here. Arguing that the dicta in *Heller* and *McDonald* should not be given weight, defendant cites two decisions of this court, *People v. Dawson*, 403 Ill. App. 3d 499 (2010), and *People v. Williams*, 405 Ill. App. 3d 958 (2010).

¶ 22 We do not find that *Dawson* and *Williams* aid defendant's case. In those two decisions, this court held that the aggravated unlawful use of a weapon statute did not violate the defendants' second amendment rights to bear arms for self-defense. *Dawson*, 403 Ill. App. 3d at 510; *Williams*, 405 Ill. App. 3d at 964. The decision in *Dawson* was abrogated by the Illinois Supreme Court's decision in *People v. Aguilar*, 2013 IL 112116, ¶ 26, which noted the finding in *Heller* that the right to bear arms under the second amendment "is not unlimited." The *Williams* court expressly states that the second amendment does not permit, under "any appropriate level of scrutiny," the possession of a handgun by a convicted felon. *Williams*, 405 Ill. App. 3d at 964.

¶ 23 Next, defendant asserts that the numerous decisions of this court that have already rejected his contentions are wrongly decided. Those cases include *People v. Montgomery*, 2016 IL App (1st) 142143, ¶ 14, which followed *Heller* and *McDonald*. *Montgomery* observed that the supreme court in *Aguilar* cited with approval the above-quoted passage in *Heller*. Moreover, our supreme court has stated: "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). We are also bound by the decisions of higher courts. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011).

¶ 24 Several cases cited in *Montgomery* have followed the language of *Heller* and *McDonald*, which is quoted earlier, that favors the restriction of gun possession by felons. *Id*. ¶ 16 (citing, *inter alia*, *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 60, and *People v. Rush*, 2014 IL App (1st) 123462, ¶ 25). One such opinion noted that the defendant offered no support for his claim that a statute prohibiting a felon from possessing a firearm or firearm ammunition is unconstitutional under the second amendment, and the court held that a felon-based firearm ban

such as the UUWF statute does not "impose[] a burden on conduct falling within the scope of the second amendment." *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23. This court went on to state that even if the second amendment was implicated by the defendant's conviction for possessing firearm ammunition, it would nevertheless reject the defendant's facial and as-applied challenges to the UUWF statute. *Id*. ¶ 34. This court found the restriction of firearm possession by felons is a "valid exercise" of Illinois' right to protect its citizens from the "potential danger" posed by such possession and applies "only to those convicted criminals who have proven themselves to be a danger to society." *Id*. ¶ 40. We join those decisions in concluding that the second amendment does not extend to the possession of firearms by felons, and thus, the UUWF statute does not impose a burden on conduct that falls within the second amendment's scope. See, *e.g.*, *Rush*, 2014 IL App (1st) 123462, ¶ 23; *Garvin*, 2013 IL App (1st) 113095, ¶ 23.

¶ 25 Defendant argues that in *People v. Davis*, 408 Ill. App. 3d 747 (2011), this court suggested that the right of felons to possess weapons could be protected under the second amendment. However, defendant fails to acknowledge that even though *Davis* held the defendant was not excluded from second amendment protection due to his felon status, the *Davis* court went on to find that the UUWF and armed habitual criminal statutes were constitutional both on their face and as applied to the defendant, relying on the *dicta* in *Heller* and *McDonald*. *Davis*, 408 Ill. App. 3d at 750-51. Therefore, we agree with *Montgomery*, which rejected the defendant's attempt in that case to seek relief from *Davis*. See *Montgomery*, 2016 IL App (1st) 142143, ¶ 17.

¶ 26 Nevertheless, defendant maintains that those restrictions on the possession of weapons by felons in public places are distinct from prohibiting a felon from having a weapon "for self-

defense on one's own property." We find that in *People v. Burns*, 2015 IL 117387, ¶¶ 28-29, our supreme court foreclosed such an exception. There, the defendant was convicted of aggravated unlawful use of a weapon (AUUW), and the supreme court applied its earlier holding in *Aguilar* to hold that the AUUW statute was facially unconstitutional because it banned the possession and use of a firearm outside the home. *Id*. ¶ 25.

¶ 27 Citing the language from *Heller* that we have discussed earlier, the supreme court in *Burns* went on to address other bans on weapons possession:

> "It would appear, therefore, that the legislature *could* constitutionally prohibit felons from carrying readily accessible guns outside the home. [Citation.] In fact, Illinois already has legislation which prohibits felons from possessing guns at all [citing to UUWF statute]." [Italics in original.] *Burns*, 2015 IL 117387, ¶ 29.

¶ 28 Therefore, in *Burns*, our supreme court interpreted the UUWF statute as barring a felon from possessing a weapon in any circumstance. The UUWF statute does not require proof that a felon possessed the weapon with an improper purpose. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 30. Defendant has offered no legal support for his contention that the UUWF statute permits him to possess a weapon on his own property for purposes of self-defense. Moreover, although defendant emphasizes the predicate felony to his UUWF conviction occurred more than 25 years ago, the UUWF statute does not include any time limit on the element of the prior felony conviction. See 720 ILCS 5/24-1.1(a) (West 2012).

¶ 29 For all of those reasons, we follow the significant number of cases that have previously rejected the arguments that defendant now raises. The UUWF statute does not violate the second amendment as applied to defendant.

¶ 30 Affirmed.