2011 IL App (1st) 091255-U

FIFTH DIVISION
September 2, 2011

No. 1-09-1255

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. 04 CR 4297
	)	
ALVIN PINKARD,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Because the Armed Habitual Criminal statute did not violate the second amendment to the United States Constitution, that statute was not unconstitutional as applied to defendant, nor did it violate *ex post facto* principles. Moreover, the trial court did not abuse its discretion when it sentenced defendant to greater than the minimum sentence allowed.

¶ 2 Defendant Alvin Pinkard, a convicted felon, was found by police with multiple firearms in his home. He was tried and convicted in a bench trial for violating the armed

habitual criminal statute and sentenced to eight years in prison. 720 ILCS 5/24-1.7 (West 2006). Defendant appealed, arguing the statute violated the second amendment, that his conviction violated the *ex post facto* clauses of the United States and Illinois constitutions, and that his sentence should be reduced. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 16, 2006, Chicago police officer Daniel Conway was one of a group of officers sent to defendant's home to execute a search warrant to locate defendant, the target of that warrant. Defendant was not present in the home when police arrived, but subsequently was brought in within minutes by other officers. After being advised of his *Miranda* rights, defendant admitted to having guns in the home and told officers he would show them the location of those guns.

¶ 5 Following defendant's directions, Conway recovered a loaded Derringer handgun from defendant's closet and a shotgun and a rifle, each loaded with live rounds, from behind a dresser. Police also recovered documents indicating defendant was a resident at the apartment.

¶ 6 Defendant was charged in a nine count indictment. The first three counts were for being an armed habitual criminal who knowingly or intentionally possessed a shotgun, a rifle, and a handgun after having been convicted of aggravated discharge of a firearm. The fourth count was for the unlawful possession of a weapon by a felon. Counts five through eight were for the unlawful use of a weapon by a felon, and count nine was for defacing identification marks of a firearm. The State *nolle prossequi'd* all but the three counts of

being an armed habitual criminal.

¶ 7 The weapons and proof of residency were entered into evidence at trial. The State also introduced evidence that defendant had previously been convicted for aggravated discharge of a firearm in 1997 and burglary in 1990. The State then rested and defendant moved for a directed finding, which the trial court denied. The defense then rested without introducing any evidence. Following closing arguments, the trial court found defendant guilty of three counts of being an armed habitual criminal. Defendant then filed a motion for a new trial, which was denied.

¶ 8 At the sentencing hearing, the State presented evidence that defendant was previously convicted of 17 other crimes and had spent a number of years in prison. In mitigation, defendant presented testimony that defendant had recovered from a drug addiction, was in a 12-step program, and was gainfully employed. He also asserted that his prior convictions were for non-violent offenses.

¶ 9 After hearing the factors in aggravation and mitigation, the trial court merged defendant's three convictions into one and sentenced him to eight years' imprisonment. Defendant appealed.

¶ 10 ANALYSIS

¶ 11 Defendant raises three issues on appeal. First, he contends that his conviction should be overturned because the armed habitual criminal statute unconstitutionally violates his second amendment right to keep and bear arms for self-defense. Second, he argues that his conviction violates the *ex post facto* clauses of the United States and Illinois constitutions.

Finally, defendant argues that if his conviction is valid, his 8 year sentence was unwarranted. For the reasons that follow, we affirm.

¶ 12A. Constitutionality of the Armed Habitual Criminal Statute

¶ 13 Defendant's main contention on appeal is that the armed habitual criminal statute is unconstitutional because it violates his "inherent, natural right to keep a firearm in defense of self and home," and therefore his conviction should be overturned under the recent United States Supreme Court cases of *District of Colombia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783; 171 L. Ed. 2d 637 (2008), *McDonald v. Chicago*, 561 U.S. __, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

¶ 14 The armed habitual criminal statute provides:

> "(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 2006).

¶ 15 We begin with the presumption that this statute, like all statutes, is constitutional, and the burden of rebutting that presumption rests upon defendant. *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005), *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). "The legislature has a wide latitude in prescribing criminal penalties under its police power and has an obligation to protect its citizens from known criminals. As a result, the challenging party has the burden of proving that the statute fails to comply with due process requirements." *People v. Ross*, 407 Ill. App. 3d 931, 939 (2011), citing *People v. Jones*, 223 Ill. 2d 569, 596 (2006).

¶ 16 Defendant argues that *Heller* prohibits the state from criminalizing the act of keeping weapons inside his home for the purposes of self-defense. In *Heller*, the United States Supreme Court struck down a District of Colombia ordinance placing a total ban on handgun ownership in the home and requiring any lawful firearms in the home to be disassembled or bound by a trigger lock, finding that the ban violated the second amendment which protected the right to possess a handgun in the home for purposes of self-defense. *Heller*, 554 U.S. at 628, 128 S. Ct. at 2817, 171 L. Ed. 2d at 769. Similarly, in *McDonald*, the United States Supreme Court struck down a Chicago ordinance

prohibiting the possession of an unlocked handgun within the city, finding that the right to possess a handgun in the home for self-defense purposes was a fundamental right protected by the second amendment and applicable to the states via the due process clause of the fourteenth amendment. *McDonald*, 561 U.S. at __, 130 S. Ct. at 3050, 177 L. Ed. 2d at 929. Defendant claims that these cases guarantee him a core right to keep firearms in his home for self-defense purposes. We disagree.

¶ 17 The "United States Supreme Court has *never* indicated that a felon can possess a firearm in a home or outside of a home." *Ross*, 307 Ill. App. 3d at 939 (emphasis added). In fact, in *Heller*, the United States Supreme Court explicitly stated that "nothing in our opinion should be taken to cast doubt on the long-standing 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 governmental buildings, or laws imposing conditions on the commercial sale of arms." *Heller*, 544 U.S. at 626-27, 128 S.Ct. 2815-16, 171 L. Ed. 2d at 661-62. This recognized limitation on the second amendment right to bear arms, as cast in *Heller*, has been reaffirmed by the United States Supreme Court in *McDonald*, which held:

> "We made it clear in *Heller* that our holding did not case doubt on such longstanding regulatory measures as '*prohibitions on the possession of firearms by felons* and the mentally ill.' *** We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law

regulating firearms." *McDonald*, 561 U.S. at ___, 130 S. Ct. at 3047, 177 L. Ed. 2d at 999 (Emphasis added).

¶ 18 Defendant, however, urges us to disregard these statements as "some stray comments *** unsupported by any analysis or citation to precedent" and hold that these cases support his contention that the armed habitual criminal statute is unconstitutional. But, as our Illinois supreme court has explained, statements such as these "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), citing *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993).

¶ 19 This same issue has been raised multiple times on appeal, and each time the courts have upheld the constitutionality of the armed habitual criminal statute. See, *e.g.*, *Ross*, 407 Ill. App. 3d at 942, *People v. Coleman*, 409 Ill. App. 3d 869 (2011)(adopting the holding of *Ross* and finding the armed habitual criminal statute constitutional) and *People v. Davis*, 408 Ill. App. 3d 747 (2011) (holding that "[t]he armed habitual criminal statute *** comport[s] with the second amendment").

¶ 20 In *Ross*, our Sixth Division considered and rejected an identical constitutional challenge to the armed habitual criminal statute. Relying in the aforementioned language in *Heller* and *McDonald*, the *Ross* court noted that the government has the inherent power to place restraints upon private rights when "necessary and appropriate to promote the health, comfort, safety and welfare of society," even if doing so "invade[s] the right or liberty or property of an individual." *Ross*, 407 Ill. App. 3d at 942, quoting *Napelton v. Village of*

Hinsdale, 229 Ill. 2d 296, 310 (2008), quoting *Booth v. People*, 186 Ill. 43, 48-49 (1900). Therefore, the court held that the armed habitual criminal statute was "a constitutionality permissible restriction on the second amendment 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." *Ross*, 407 Ill. App. 3d at 942.

¶ 21 We find no reason, and defendant here presents us with none, to depart from our timely, clear and well-reasoned holding in *Ross*. Accordingly, we adopt its conclusion and reaffirm the constitutionality of the armed habitual criminal statute.

¶ 22B. Ex Post Facto Clause

¶ 23 Defendant next contends that the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois constitutions because his felony convictions occurred before the legislature adopted the statute.

¶ 24 An *ex post facto* law is one which punished prior acts that were not criminal when they were accomplished. *Ross*, 407 Ill. App. 3d at 943. To establish an *ex post facto* violation, a defendant must show that the law in question was applied to events that occurred before its enactment and disadvantaged him by "altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997). Defendant argues that because his prior felony convictions occurred before the armed habitual criminal statute was enacted, his conviction

violated the *ex post facto* clause. We disagree.

¶ 25 This court has repeatedly considered the same issue advanced by defendant and decided it adversely to him. See, *e.g.*, *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), *People v. Adams*, 404 Ill. App. 3d 405 (2010), *People v. Bailey*, 396 Ill. App. 3d 459 (2009), *People v. Leonard*, 391 Ill. App. 3d 926 (2009).

¶ 26 In *Leonard*, the appellate court found that the defendant had ample warning before committing the new offense and he was not being punished for his prior offenses, but instead was being punished for the new crime of possessing a firearm after being convicted of three of the statute's enumerated offenses. The court observed that under the statute, the prior offenses were only an element of the new crime. *Leonard*, 391 Ill. App. 3d at 931-32.

¶ 27 In *Bailey*, the defendant, with two prior felony convictions was convicted of violating the armed habitual criminal statute after police discovered four firearms in his home. Relying on *Leonard*, the court affirmed the defendant's conviction, holding:

> We find no reason to depart from the holding of our sister court [in *Leonard*] on this issue. It is clear to us that, contrary to defendant's contention here, the armed habitual criminal statute does not punish him for the drug offenses he committed in 1997 before the statute's effective date but, rather, properly punishes him for, as he himself points out, 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. Accordingly, we too hold that the armed habitual criminal statute is not violative of the United States and Illinois constitutional prohibitions against *ex post facto* legislation. *Bailey*, 396 Ill. App. 3d at 464.

¶ 28 We see no reason to depart from the holdings of *Leonard*, *Bailey*, and their progeny. Accordingly, defendant's *ex post facto* challenge fails. See, *e.g.*, *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).

¶ 29 C. Length of Sentence

¶ 30 Defendant finally contends that his eight year sentence was unwarranted and should be reduced to the minimum of six years' imprisonment. In support of this contention, defendant relies on the evidence he put forth during mitigation, namely his age, his continued employment, his recovery from drug addiction, and the fact that his conduct was not violent.

¶ 31 Supreme Court Rule 615(b)(4) grants a reviewing court the power to reduce a sentence. 134 Ill. 2d R. 615(b)(4). That power, however, should be exercised " 'cautiously and sparingly.' " *People v. Jones*, 168 Ill. 2d 367, 378 (1995), quoting *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988). A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Hauschild*, 226 Ill. 2d 63 (2007). A

sentence will be deemed an abuse of discretion where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000), citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 32 "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these facts than the reviewing court, which must rely on the 'cold' record." *Fern*, 189 Ill. 2d at 53. "The trial judge has the opportunity to weigh such facts as the defendant's credibilty, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. [Citation.]" *Stacey*, 193 Ill. 2d at 209.

¶ 33 It is clear from the record that the trial court did not rely on improper factors or abuse its discretion when it sentenced defendant to eight years' imprisonment, only two years more than the minimum, and less than the State's requested "double digit sentence." Despite his employment situation and his recovery from his drug addiction, defendant, a repeat felon, had in his possession three weapons, a rifle, a shotgun, and a handgun, two of which were loaded with live ammunition. We will not substitute our own judgment for that of the trial court simply because defendant suggests we should weigh these factors differently.

¶ 34 The record indicates that the trial court properly considered the appropriate factors in

aggravation and mitigation. After hearing those factors, the trial court stated:

> "Mr. Pinkard, I have been impressed with the way your presented yourself in court, impressed with the fact that you had the board up job for five years, did well at it, and made a good living, as I saw the numbers involved there.
>
> I recognize that people do make mistakes, even good people make mistakes at times. Unfortunately, in your situation, you have [a] background that you have to live with. That becomes a problem.
>
> I have taken into consideration the presentation, the fact as heard at trial, the presentence investigation presented to me, and all of the statutory factors required for purposes of sentencing in this case, and I find the appropraite sentence to be eight years in the Illinois Department of Corrections."

¶ 35 We therefore find that the trial court did not abuse its discretion in imposing an eight year sentence on defendant.

¶ 36 CONCLUSION

¶ 37 For the aforementioned reasons, we affirm defendant's conviction and sentence.

¶ 38 AFFIRMED.