Illinois Official Reports

Appellate Court

People v. Stephens, 2024 IL App (5th) 220828

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSHUA STEPHENS, Defendant-Appellant.
District & No.	Fifth District No. 5-22-0828
Filed	September 30, 2024
Decision Under Review	Appeal from the Circuit Court of Jackson County, No. 22-CF-97; the Hon. Ralph R. Bloodworth III, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and John Koltse, of State Appellate Defender's Office, of Chicago, for appellant. Joseph A. Cervantez, State's Attorney, of Murphysboro (Patrick Delfino, Edward R. Psenicka, and David S. Friedland, of State's Attorneys Appellate Prosecutor's Office, of counsel, and Jenna Seaver, law school graduate), for the People.

Panel JUSTICE McHANEY delivered the judgment of the court, with opinion.
Justices Welch concurred in the judgment and opinion.
Justice Cates specially concurred, with opinion.

OPINION

¶ 1 Following a jury trial, the defendant, Joshua Stephens, was convicted of unlawful use of a weapon by a felon (UUWF) based on a finding that he knowingly possessed a Taser after previously being convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2022). He was sentenced to seven years in the Illinois Department of Corrections, followed by a one-year term of mandatory supervised release. On appeal, he argues that his conviction is void because the statute governing the offense is facially unconstitutional under the United States and Illinois Constitutions following the United States Supreme Court's decision, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Alternatively, the defendant argues that his case should be remanded for a new sentencing hearing where the trial court improperly relied on a personal sentencing policy. For the following reasons, we affirm.

¶ 2 I. Background

¶ 3 We include only those facts necessary for the resolution of the issues on appeal. On March 7, 2022, the defendant was charged by information with two counts: (1) unlawful use of a weapon (Taser) by a felon and (2) unlawful use of a weapon for knowingly possessing a Taser in a place licensed to sell intoxicating beverages. The defendant rejected a plea offer and proceeded to jury trial.

¶ 4 At trial, the State dismissed count II. After opening statements, a stipulation was presented to the jury that at the time of the alleged offense, the defendant previously had been convicted of a qualifying felony. The evidence revealed that in the early morning of March 5, 2022, the defendant was sitting at an outside patio of a bar when another bar patron, Dalton Miller, confronted him for allegedly staring at his group for an extended period of time. A series of conversations escalated into a physical altercation, resulting in Miller tackling the defendant off the patio into the bar's parking lot. According to two witnesses, after the defendant got back up, he threatened Miller and the people around him with a Taser. Miller left the bar after the altercation. One of the witnesses captured the later portion of the fight on her cell phone, and this video was shown to the jury. After four hours of deliberation, the jury found the defendant guilty.

¶ 5 At the sentencing hearing, the State argued that the defendant's case was straightforward: he possessed a Taser, he threatened people with it, and he was not allowed to possess it as a felon. Regarding the seriousness of the offense the State commented, "I realize it is not a gun. I realize that nobody got hurt, but somebody very well could have been hurt, Your Honor." The State recounted the defendant's criminal history, including prior arrests as well as six previous felony convictions for two counts of burglary in 2005, two counts of theft in 2011, possession of methamphetamine manufacturing materials in 2016, and aggravated battery in 2018. The State argued that a prison sentence was necessary for deterrence. Ultimately, the State recommended a five-year sentence, stating:

"People are recommending five years in the Department of Corrections, based—largely based on his criminal activity and his tendency to get agitated and be violent, Judge. That's what I am basing the five years on, Your Honor.

I would note that [the defendant] has been to the Department of Corrections before. The longest period was for five years. I have heard this Court say that sentences go up. They don't go down. I am not asking for a greater sentence than has been handed down to him in the past."

¶ 6 In mitigation, defense counsel asserted that the defendant acted under strong provocation where he only displayed the Taser after being tackled to the ground by Miller, who was an ex-Marine. Defense counsel argued there was some justification for the defendant to display the device, despite insufficient facts to support an affirmative defense of self-defense. Defense counsel noted there was no damage or injury resulting from the defendant's conduct, which was unlikely to occur again. Defense counsel also cited the defendant's mental health issues, as outlined in his presentence investigation report, and argued that the defendant's mental health had been negatively impacted by his incarceration during the COVID-19 pandemic and serious injuries sustained from a methamphetamine explosion. Citing these factors and the length of time that the jury deliberated, defense counsel requested the minimum two-year sentence. During the defendant's statement in allocution, he admitted he should not have had a Taser but stated he was under extreme duress after he was tackled and that the video showed him reacting defensively to someone jumping back at him once he got back on his feet.

¶ 7 Before issuing the sentence, the trial court recounted the arguments made by the State in aggravation and by the defense in mitigation and stated:

"THE COURT: Let the record reflect the Court has considered the presentence investigative report, all of the information contained within it. There has been prior ones done that the Court is aware of as well, and conducted sentencing hearings with [the defendant], some of the information—well, a lot of it is contained therein, as [the defendant] was sentenced to the Department of Corrections, was probably released in January of this year or late last year and then this incident happened in March.

* * *

[THE DEFENDANT]: I'm sorry, Man.

THE COURT: I know. I know you are, and I am too, but we can't have tasers or dangerous weapons, and that's part of it. You know better, and we are here and we have got to deal with it."

¶ 8 The trial court noted it had considered the defense arguments in mitigation that a lesser sentence was warranted based on strong provocation, that there were substantial grounds to excuse or justify the defendant's criminal conduct, and that no compensation was sought. After also stating it considered the defendant's mental health issues and the cost of incarceration, the trial court imposed a sentence of seven years' imprisonment followed by a one-year term of mandatory supervised release. The defendant failed to file a motion to reconsider his sentence and filed a timely appeal.

¶ 9 II. Analysis

¶ 10 The defendant argues for the first time on appeal that section 24-1.1(a) of the UUWF statute violates the second amendment to the United States Constitution (U.S. Const., amend. II) on

its face where there is no founding-era evidence of permanent status-based revocation of the right to keep and bear arms. He also argues for the first time that section 24-1.1(a) of the UUWF statute violates the Illinois Constitution on its face (Ill. Const. 1970, art. I, § 22). He further contends that the trial court failed to provide him with a fair sentencing hearing by improperly relying on a personal sentencing policy that repeat offenders necessarily must receive a sentence longer than the ones previously imposed, which he argues is reviewable also as a claim of ineffective assistance of counsel.

¶ 11 After briefs were filed in this matter, several districts of the Illinois Appellate Court addressed the constitutionality of the UUWF statute as well as the similar armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2022)) in light of *Bruen*. We granted the State's motion to cite additional cases as persuasive authority, specifically *People v. Boyce*, 2023 IL App (4th) 221113-U, *People v. Smith*, 2023 IL App (2d) 220340-U, and *Awkerman v. Illinois State Police*, 2023 IL App (2d) 220434. Although we may consider decisions of our sister districts as instructive, we note that we are not bound by the decisions of other districts. See *O'Casek v. Children*'s *Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). Upon review of the additional authority cited by the State, we do not find the cases instructive or helpful to our analysis and disposition of the issues in this appeal. Neither party cites binding precedent on whether section 24-1.1(a) of the UUWF statute is constitutional under the United States or Illinois Constitutions.

¶ 12 The State argues, and the defendant concedes, that he failed to preserve these issues for appeal. With regard to the defendant's claim of a sentencing error, "both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). "Failure to do so forfeits any review of the error." *People v. Jackson*, 2022 IL 127256, ¶ 15. The plain error rule is a narrow exception to forfeiture principles; however, the rule does not call for the review of all forfeited errors. *Id.* ¶¶ 18-19. Rather, the rule allows review of a claim of error only if the defendant establishes plain error. *Hillier*, 237 Ill. 2d at 545. To obtain relief under the plain error rule, a defendant must first show that a clear or obvious error occurred. *Id.* "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* The defendant has the burden of persuasion under both prongs of the plain error rule. *Id.* In addressing a claim of plain error, a reviewing court must first consider whether error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 13 A criminal defendant has the constitutional right to a fair sentencing hearing. See U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference [citation]." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Because a trial court had the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, a "reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Id.*

¶ 14 "[T]he trial court may not have a personal sentencing policy that fails to conform to the standards of the Unified Code [of Corrections (730 ILCS 5/1-1-1 *et seq.* (West 2016))]." *People v. Musgrave*, 2019 IL App (4th) 170106, ¶ 55. However, "there is a strong presumption that the trial court's sentence was based on proper legal reasoning, and a reviewing court should

consider the record as a whole rather than a few isolated statements." *Id.* The burden is on the defendant to affirmatively establish that his sentence was based on an improper factor. *Id.*

¶ 15 Here, the defendant's claim of trial court error fails where it rests on an isolated statement attributed to the trial court by the State. Considering the record as a whole, there is insufficient evidence that the trial court relied on an impermissible personal policy in fashioning the defendant's sentence.

¶ 16 The defendant next argues that the trial court was obliged to respond to the State's comment or affirmatively disavow it, citing *People v. Jones*, 284 Ill. App. 3d 975 (1996). However, in *Jones*, the trial court responded to allegations made by defense counsel that he had a personal sentencing policy for the simple reason that he was confronted by allegations from the defendant. See *id.* at 979. Contrary to the defendant's claim, *Jones* did not create a duty requiring trial court judges to affirmatively disavow any passing comments made by the State which were purportedly attributable to the trial court. See *id.* at 980-81. Because we find no trial court error, we also find that trial counsel was not ineffective for failing to either object at the sentencing hearing or file a motion to reconsider sentence based on the State's gratuitous comment.

¶ 17 As to the defendant's constitutional challenges, "a voidness challenge may be raised at any time in any court." *People v. Matthews*, 2022 IL App (4th) 210752, ¶ 46. "When a statute is found to be facially unconstitutional in Illinois, it is said to be void *ab initio*; that is, it is as if the law had never been passed." *In re N.G.*, 2018 IL 121939, ¶ 50. A facially unconstitutional law is infirm from the moment of enactment and, thus, is unenforceable. *Id.* Accordingly, we decline to find forfeiture of the defendant's constitutional challenges on appeal.

¶ 18 The State maintains that because the defendant did not raise his facial challenge at the trial court level, the State is without the opportunity to present and develop factual evidence regarding the nation's historical tradition of regulating repeat felons from possessing firearms. Citing a federal district court case, the State argues the defendant's constitutional challenges are forfeited where the record was not sufficiently developed. See *Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023). In *Atkinson*, the defendant challenged the federal felon in possession of a firearm statute.[1] *Id.* at 1019. While the case was pending on appeal, the United States Supreme Court issued its decision in *Bruen*. *Id.* at 1019-20. Because the government's brief did not provide the level of historical analysis required by *Bruen*, the *Atkinson* court remanded the as-applied constitutional challenge back to the district court to conduct a "proper, fulsome analysis of the historical tradition" supporting the federal government's "felon-in-possession statute." *Id.* at 1019, 1022. We find *Atkinson* inapposite. Despite any argument to the contrary, here, the State identified well-established and representative historical analogues as required by *Bruen*, 597 U.S. at 30.

¶ 19 A. Second Amendment Facial Challenge

¶ 20 The defendant argues that section 24-1.1(a) of the UUWF statute violates the second amendment on its face. "The distinction between facial and as-applied constitutional

[1]The federal felon in possession of a firearm statute found in Title 18, section 922(g)(1), of the United States Code provides that it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. 18 U.S.C. § 922(g)(1) (2024).

challenges is critical." *People v. Harris*, 2018 IL 121932, ¶ 38. While a defendant raising a facial constitutional challenge must establish that the statute is unconstitutional under any possible set of facts, "an as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party." *Id.*

¶ 21 The UUWF statute prohibits the possession of a firearm by any person previously convicted of any felony. 720 ILCS 5/24-1.1(a) (West 2022). The Illinois Supreme Court has held that stun guns and Tasers are bearable arms that fall within the scope of the second amendment to the United States Constitution. *People v. Webb*, 2019 IL 122951, ¶ 13. The defendant contends the UUWF statute is unconstitutional because there is no founding-era evidence of permanent status-based revocation of the right to keep and bear arms applicable to convicted felons under the framework articulated in *Bruen*.

¶ 22 The constitutionality of a statute is an issue which this court reviews *de novo*. *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 334 (2006). Statutes are presumed constitutional, and a reviewing court will uphold a statute's validity whenever reasonably possible. *Id.* The formidable burden to clearly establish that a statute is not constitutional is squarely on the party challenging its validity. *Id.*

¶ 23 In *Bruen*, petitioners, who sought unrestricted licenses to carry a handgun in public, brought a second amendment challenge to New York's "proper cause" standard wherein applicants were required to demonstrate a unique need for self-protection distinguishable from that of the general community. *Bruen*, 597 U.S. at 16. 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 *District of Columbia v. Heller*, 554 U.S. 570, 592, 635 (2008), the United States Supreme Court interpreted the second amendment as codifying a preexisting individual right, unconnected with service in the militia, to keep and bear arms for "law-abiding, responsible citizens to use arms in defense of hearth and home." Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court extended the second amendment's individual right to keep and bear arms to the states under the fourteenth amendment (U.S. Const., amend. XIV). In *McDonald*, the Court reiterated that the holding in *Heller* "did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons." (Internal quotation marks omitted.) *McDonald*, 561 U.S. at 786.

¶ 24 Following *Heller* and *McDonald*, courts developed a "two-step" framework for analyzing second amendment challenges to firearms regulations that combined history with means-end scrutiny. *Bruen*, 597 U.S. at 17. The *Bruen* Court rejected the means-end scrutiny in the second amendment context, finding instead that "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. In keeping with *Heller*, the Supreme Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. The State must then justify its regulation of the conduct by demonstrating that the regulation is consistent with this nation's historical tradition of firearm regulation. *Id.* Only then may a court conclude that the individual's conduct falls outside the second amendment's " 'unqualified command.' " *Id.* (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 n.10 (1961)). Applying its newly announced analytical framework for evaluating the constitutionality of firearm regulations, the Supreme Court found

that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 71. It is equally important to note what *Heller*, *McDonald*, and *Bruen* did not decide—the constitutionality of the unlawful possession of a weapon by a felon statute found in section 24-1.1(a).

¶ 25 On appeal, the defendant notes that under *Bruen*, any regulation on bearable firearms that does not have a relevant body of historical analogue is unconstitutional. Thus, he argues, permanent bans on possession of bearable firearms by convicted felons is unconstitutional. We disagree with the defendant's broad interpretation of *Bruen* as it made no such sweeping statement. To the contrary, the Supreme Court in *Bruen* quoted language found in *Heller* recognizing that " '[l]ike most rights, the right secured by the Second Amendment is not unlimited.' " *Id.* at 21 (quoting *Heller*, 554 U.S. at 626). " 'From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' " *Id.* (quoting *Heller*, 554 U.S. at 626).

¶ 26 Turning to the State's argument, we do not agree that language first stated in *Heller* ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" (*Heller*, 554 U.S. at 626)) provides a basis for finding that section 24-1.1 does not implicate the second amendment. That is not a faithful application of the newly announced framework in *Bruen*.

¶ 27 As previously stated, a defendant making a constitutional claim first must show that the plain text of the second amendment covers the regulated conduct, and thus "presumptively protects that conduct." *Bruen*, 597 U.S. at 17. Here, the defendant's conduct was the possession of a firearm, specifically, a Taser. The State submits that in light of *Bruen*, the defendant's conduct is not covered by the plain text because convicted felons are not included in "the People" entitled to the full protection of the second amendment. The State contends that because convicted felons, such as the defendant, are not law-abiding, responsible persons, they fall outside the coverage of the second amendment.

¶ 28 "The second section of the operative clause [of the second amendment], 'Keep and Bear Arms,' defines the substance of the right held by 'the people.' " *United States v. Ware*, 673 F. Supp. 3d 947, 952 (S.D. Ill. 2023). However, the constitution does not define who are included in "the people." *Id.* at 954. As a result, not all courts agree on whether felons are included in "the people." Some Illinois courts have found that the protections afforded by the second amendment apply only to law-abiding citizens. See *People v. Kelley*, 2024 IL App (1st) 230569, ¶ 22; *People v. Mobley*, 2023 IL App (1st) 221264, ¶¶ 27-28 ("*Bruen* strongly suggests the test only applies when a regulation impacts a law-abiding citizen's ability to keep and bear arms"); *People v. Baker*, 2023 IL App (1st) 220328, ¶ 37, *appeal docketed*, No. 130174 (Nov. 3, 2023) (noting that the *Bruen* majority and concurrences repeated the phrase "law-abiding" 18 times); *People v. Burns*, 2015 IL 117387, ¶ 41 (Garman, C.J., specially concurring, joined by Thomas, J.) ("the right secured by the second amendment is held by 'law-abiding, responsible citizens' and is not unlimited" (quoting *Heller*, 554 U.S. at 635)).

¶ 29 However, a different panel of the First District found that the plain language of the second amendment does not exclude felons under *Bruen*'s first prong, finding instead that a defendant's felony conviction should be evaluated under the historical tradition analysis set out in *Bruen*'s second prong. *People v. Brooks*, 2023 IL App (1st) 200435, ¶ 89, *appeal*

docketed, No. 130153 (Oct. 30, 2023); see *People v. Travis*, 2024 IL App (3d) 230113, ¶ 26 (adopting the reasoning set forth in *Brooks*).

¶ 30 Federal courts also are split on whether the phrase "the people" as used in the second amendment categorically excludes felons. See *United States v. Head*, No. 23 CR 00450-1, 2024 WL 2292236, at *6 (N.D. Ill. May 21, 2024). Some courts assume, without deciding, that felons are among "the people" and proceed to the second prong of the *Bruen* analysis. See *United States v. Stringer*, No. 23-CR-20003, 2024 WL 3609058, at *10 (C.D. Ill. July 30, 2024); *United States v. Wigfall*, 677 F. Supp. 3d 791, 796 (N.D. Ind. 2023). Other federal courts have found that felons are not protected under the plain text of the second amendment. See *United States v. McKay*, No. 23 CR 443, 2024 WL 1767605, at *2 (N.D. Ill. Apr. 24, 2024); *United States v. Hall*, No. 22 CR 665, 2023 WL 8004291, at *2 (N.D. Ill. Nov. 17, 2023). Still other federal courts have found that felons are protected under the plain text of the second amendment. *Ware*, 673 F. Supp. 3d at 956; *United States v. Agee*, No. 1:21-CR-00350-1, 2023 WL 6443924, at *4 (N.D. Ill. Oct. 3, 2023).

¶ 31 As the Illinois Supreme Court explained, "if the lower federal courts are uniform on their interpretation of a federal statute, [Illinois courts], in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive." (Emphasis in original.) *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 35. Where the federal courts are not uniform in their interpretation, however, "we may elect to follow those decisions we believe to be better reasoned." *Id.* Accordingly, we find instructive the federal district court decision in *Ware*, 673 F. Supp. 3d 947, a case cited by the State, wherein the court considered the constitutionality of the federal felon-in-possession statute in response to a defendant's facial challenge under *Bruen*.

¶ 32 In *Ware*, the government argued that the felon-in-possession statute was a permissible categorical ban "because this Nation's historical tradition gives the legislature discretion to disarm those not trusted to follow the law and that historic felony punishment implicitly disarmed citizens." *Id.* at 957. The *Ware* court, noting that the Supreme Court in *Heller* in conducting its historical analysis compared the right to keep and bear arms to those rights guaranteed by the first amendment, pointed out that the federal district court had "adopted the approach of looking to other uses of 'the people' in the Bill of Rights to guide its interpretation of the scope of 'the people.' " *Id.* at 953, 955. In *United States v. Meza-Rodriguez*, a pre-*Bruen* case, the court found that "interpreting 'the people' in the Second Amendment consistent with other uses in the Bill of Rights 'has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.' " *Id.* at 955 (quoting *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015)). After analyzing the meaning of "the people" in the first and fourth amendments as applied to felons, the *Ware* court concluded that "felons are not outside of the presumption that 'the people' applies to all Americans, in the context of the First, Second, and Fourth Amendments, and thus are not categorically excluded from the protections afforded therein." *Id.*

¶ 33 The defendant objects to the State's reliance on *Ware*, arguing that *Ware* stands for the proposition that categorical disqualifications of the right to bear arms are constitutional merely because felons may be categorically disqualified from the first amendment right to vote. This is a misreading of *Ware*. The *Ware* court, following the Supreme Court's analysis in *Heller*, examined first amendment jurisprudence to determine whether categorical restrictions on individual rights were permissible. *Id.* at 957. After determining that some categorical

disqualifications were permissible, the *Ware* court went on to examine whether such permissible categorial bans extended to the federal felon-in-possession statute. *Id.* The court concluded that the government met its burden to show historical analogues to the current firearm regulation being challenged. *Id.* at 959. After conducting its historical analysis, the *Ware* court found there was evidence that the categorical ban was permissible and that defendants who had been deemed "dangerous, non-law abiding, or even reasonably likely to breach the peace may have their right to keep and bear arms restricted." *Id.* Despite the defendant's objection, we adopt the well-reasoned approach set out in *Ware* and find that the defendant falls into the category of "the people" protected by the second amendment.

¶ 34 That is not to say that the defendant's status as a felon is irrelevant; rather, it is more properly evaluated under the second prong of the *Bruen* analysis. See *Brooks*, 2023 IL App (1st) 200435, ¶ 89. Having determined that the defendant's possession of a firearm is presumptively constitutional, we examine whether the State has demonstrated that the regulation is consistent with this nation's historical tradition of firearm regulation. *Bruen*, 597 U.S. at 17. The *Bruen* Court, applying the test set forth in *Heller*, clarified that courts must "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 26. The Court then provided examples of when the historical analysis might be fairly straightforward. *Id.*

> "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id.* at 26-27.

¶ 35 In performing the historical analysis, courts are required to use analogical reasoning to determine whether regulations from the nation's history are "relevantly similar" to the modern regulation at issue. *Id.* at 29. As the *Bruen* Court explained, "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." (Emphases in original.) *Id.* at 30. In determining whether a historical regulation is a proper analogue for a modern firearm regulation, the *Bruen* Court pointed to at least two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 28-29.

¶ 36 The State submits that under *Bruen*'s second prong, section 24-1.1 is constitutional because prohibiting the possession of firearms by felons is consistent with a long-standing tradition of similar regulations. The State relies on a number of federal cases, which it cites in a string citation, in support of its argument that historical evidence supports the notion that the government could disarm a category of individuals, such as felons, who were not law-abiding members of the political community. The defendant correctly notes that in the string citation the State cites generally to cases which purportedly found a historical basis to support the statute's ban on the possession of firearms by felons without identifying the underlying historical basis. The defendant argues that the State did not fully examine the historical

analyses laid out in the cases it cited or engage in an analysis to prove their validity. We agree with the defendant that the State could have done more to flesh out the historical basis upon which it relied; nevertheless, we find that the State has sufficiently identified well-established and representative historical analogues.

¶ 37 The State argues that surety statutes are historical analogues to section 24-1.1. Surety statutes required certain individuals to post bond before carrying weapons in public. See *id.* at 55. The State maintains these laws typically targeted only those threatening to do harm. For example, in 1836, Massachusetts enacted a law requiring any person who was reasonably likely to "breach the peace" to post a bond before publicly carrying a firearm. *Id.* at 55-56 (citing Mass. Rev. Stat. 1836, ch. 134, § 16). Between 1838 and 1871, other jurisdictions adopted variants of the Massachusetts law. *Id.* at 56. The *Bruen* Court stated that surety statutes "*presumed* that individuals had a right to public carry that could be burdened only if another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.' " (Emphasis in original.) *Id.* (quoting Mass. Rev. Stat. 1836, ch. 134, § 16). Thus, the defendant maintains that, similar to the surety laws, section 24-1.1 is consistent with the historical practice of disarming categories of people because the section excepts only those from the right to possess firearms who fall into a specific category (*i.e.*, repeat felons) that demonstrate a likelihood to breach the peace. However, the defendant maintains that the State's reliance on surety laws is misplaced because the surety laws did not impose a ban on possession of a firearm. Turning once again to the federal district court's well-reasoned decision in *Ware*, we note that "[a]lthough surety statutes did not disarm citizens, the statutes did burden the right guaranteed by the Second Amendment in a similar fashion." *Ware*, 673 F. Supp. 3d at 959.

¶ 38 In support of its argument that section 24-1.1 is consistent with the nation's historical tradition of firearm regulation (*Bruen*, 597 U.S. at 17), the State cites *United States v. Gates*, No. 1:22-CR-00397-1, 2023 WL 5748362 (N.D. Ill. Sept. 6, 2023). In *Gates*, the court explained:

> "as a matter of historical practice, governments did disarm those persons who were deemed to be 'unvirtuous citizens.' *See United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (*per curiam*) (explaining in pre-*Bruen* decision that 'most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm "unvirtuous citizens." ') (cleaned up). By the time of the Second Amendment's ratification in 1791, there already was a historical tradition of legislatures disarming persons based on the perception (sometimes odious perceptions) that certain groups could not be trusted to abide the law or sovereign." *Id.* at *6.

¶ 39 The defendant argues that the State has not carried its burden to identify historical analogues that are meaningfully similar to section 24-1.1. We disagree. In order to pass constitutional muster, the State is not required to identify a historical twin; rather, it is required to "identify a well-established and representative historical analogue." (Emphasis omitted.) *Bruen*, 597 U.S. at 30. We find the State has met its burden of showing that section 24-1.1(a) is consistent with this nation's historical tradition of firearm regulation. Accordingly, we find that section 24-1.1(a) of the UUWF statue is constitutional on its face under the second amendment.

¶ 40 B. Illinois Constitution Facial Challenge

¶ 41 The defendant next argues that even if section 24-1.1(a) of the UUWF statute passes muster under the second amendment, it violates article I, section 22, of the Illinois Constitution on its face. Article I, section 22, 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 Based on the constitutional text itself and records from the 1970 Constitutional Convention, the parties argue whether the Illinois Constitution's use of the phrase "the individual citizen" was meant to be broader than the phrase "the People" found in the second amendment. The defendant asserts that the Illinois Constitution, by conferring the right to keep and bear arms on "the individual citizen" as opposed to "the People," provides greater protections than the second amendment to individuals with a legal status that might otherwise place them outside the political community; *i.e.*, a convicted felon. In contrast, the State contends that the Illinois Constitution is more restrictive than the United States Constitution and that article I, section 22, does not apply to the defendant because felons are not law-abiding individuals.

¶ 43 Both parties find support of their argument in *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483 (1984). Applying a rational basis test to determine whether a municipality's ordinance banning operable handguns passed constitutional muster, the *Kalodimos* court held that the right to bear arms was not a fundamental right. *Id.* at 508-09. The First District recently recognized that *Kalodimos*'s holding was overruled by *McDonald*, 561 U.S. at 791, where the United States Supreme Court "held that the right to bear arms for self-defense *is* a fundamental right applicable to the states through the fourteenth amendment to the United States Constitution." (Emphasis in original.) *Kelley*, 2024 IL App (1st) 230569, ¶ 26. Although its ultimate holding was overruled, in *Kalodimos*, our state supreme court recognized that article I, section 22, of the Illinois Constitution "does not mirror the second amendment to the Federal Constitution (U.S. Const., amend. II); rather it adds the words '[s]ubject only to the police power,' omits prefatory language concerning the importance of a militia, and substitutes 'the individual citizen' for 'the people.' " *Kalodimos*, 103 Ill. 2d at 491. The *Kalodimos* court explained that the inclusion of the phrase "the individual citizen" was intended to "broaden the scope of the right to arms from a collective one applicable only to weapons traditionally used by a regulated militia [citation] to an individual right covering a wider variety of arms." *Id.* We find both parties' reliance on *Kalodimos* misplaced as the court did not directly address the distinction between the phrase "individual citizen" and "the people." Instead, the *Kalodimos* court examined the interpretation of the phrase "police power" and whether the ordinance at issue was a proper exercise of police power under the Illinois Constitution. *Id.* at 496, 508.

¶ 44 Although the defendant acknowledges that the prefatory language "subject only to the police power" allows for some limitation on the right to keep and bear arms, he nevertheless argues that the Illinois Constitution cannot provide less protection of that right than the second amendment allows. The State does not dispute the defendant's assertion. Rather, the State agrees that Illinois can use its police power to regulate firearms in a manner consistent with the second amendment. Having previously found that prohibiting the possession of firearms by felons is consistent with a long-standing tradition of similar regulations under the second amendment, we similarly find that the Illinois Constitution's prohibition of the possession of firearms by felons is a proper exercise of police power. Thus, we find section 24-1.1(a) of the UUWF is constitutional on its face under the Illinois Constitution.

¶ 45 III. Conclusion

¶ 46 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 47 Affirmed.

¶ 48 JUSTICE CATES, specially concurring:

¶ 49 I agree that section 24-1.1(a) of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2022)), prohibiting a convicted felon from knowingly possessing weapons, is constitutional on its face under the second amendment to the United States Constitution (U.S. Const., amend. II) and article I, section 22, of the Illinois Constitution (Ill. Const. 1970, art. I, § 22) but for different reasons than those discussed by my colleagues. Accordingly, I concur only in the result.