

No. 1-11-0025

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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 6530
	)	
JOSE MACIAS,	)	Honorable Thomas M. Davy,
	)	Judge Presiding.
Defendant-Appellant.	)	

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JUSTICE SIMON delivered the judgment of the court.  
Justices Hyman and Pierce concurred in the judgment.

**ORDER**

¶ 1 *HELD*: Where the Illinois Supreme Court has declared the Class 4 form of the Aggravated Unlawful Use of a Weapon statute (720 ILCS 5/24-1.6(a)(3)(A) (West 2006)) (AUUW) void *ab initio*, defendant's convictions for that form of AUUW must be reversed. Defendant's remaining convictions pursuant to sections (a)(3)(C) and (a)(3)(I) of the AUUW statute are affirmed and the cause is remanded with directions.

¶ 2 Defendant, Jose Macias, was charged with 12 counts of aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (a)(3)(C), and (a)(3)(I) (West 2008) (AUUW).

Following a bench trial, defendant was convicted of nine counts of AUUW, three each under the Class 4 form of section 24-1.6(a)(1), (a)(3)(A); failure to have a valid firearm owners

identification card (FOID) in section 24-1.6(a)(1), (a)(3)(C), and for being under 21 years of age at the time under section 24-1.6(a)(1), (a)(3)(I). The convictions were merged into the first count for the Class 4 form of AUUW and defendant was sentenced to 30 months probation and 80 hours of community service.

¶ 3 Defendant appealed, 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. We rejected defendant's argument and affirmed the holding of the trial court. Defendant sought review of that decision before our supreme court.

¶ 4 Our supreme court entered a supervisory order directing this court to vacate our prior holding and reconsider the judgment to determine if another outcome is warranted in light of the decision in *People v. Aguilar*, 2013 IL 112116. Our prior judgment was vacated. For the following reasons, in light of the decision in *Aguilar*, we reverse defendant's convictions for the Class 4 form of AUUW and remand the matter to the trial court to determine which conviction should be reflected on defendant's sentencing order.

¶ 5 The parties have not filed supplemental briefs in this case. On direct appeal, there was no dispute between the parties concerning the facts underlying defendant's conviction. Defendant was arrested by Chicago police officers on March 23, 2009, and charged with 12 counts of AUUW. The case proceeded to a bench trial.

¶ 6 At trial, Officer Mills of the Chicago police department testified that he and his partner were patrolling the area of 3245 West 77th Street in a marked squad car on March 23, 2009. At around 8:30 p.m. that evening, the officers responded to a flash message concerning a shooting in the area. The shooter was described as a male Hispanic wearing a white T-shirt named Jose

Macias.

¶ 7 While driving westbound on West 77th Street, Mills observed a Nissan Altima exiting an alley with its lights off. The vehicle turned onto West 77th Street, heading the opposite direction. The officers put their spotlight on the vehicle and saw three occupants, with the front seat passenger matching the description of the shooter.

¶ 8 The officers turned around and pulled the vehicle over. Mills testified that he approached the vehicle, with the spotlight remaining pointed toward the vehicle, from behind on the passenger side. As he approached, Mills saw defendant with a chrome handgun in his hand. He saw defendant turn around and toss the handgun into the back seat area, hearing a "thud" sound as it hit the floor.

¶ 9 Mills testified that the occupants were ordered out of the vehicle. After they exited the vehicle, Mills observed a chrome revolver on the floor in the backseat area on the driver's side. Mills testified that he did not touch the handgun, but called an evidence technician who indicated the handgun was uncased and loaded with five live rounds and one spent round. Defendant was taken to the police station where Mills asked him if he had a current firearm owner's identification card. Defendant indicated that he did not have one.

¶ 10 The evidence technician, Officer Aguirre, testified that he was called to the scene. Aguirre arrived and spoke with officers on the scene before photographing the vehicle. Aguirre removed a chrome revolver from the floor of the back seat of the car. Aguirre testified that the weapon was uncased and loaded.

¶ 11 Edgar Pena, the driver of the vehicle, testified on behalf of defendant. Pena testified that he was driving defendant home from a friend's house when they were pulled over by the police officers. Pena testified that he was unable to see anything going on because of the spotlight, but

he did see the officers draw their weapons when they approached. Pena testified that the occupants of the vehicle were removed one by one by the officers and thrown to the ground. Pena testified that he did not see defendant with a weapon in the vehicle that night and he denied speaking to the officers.

¶ 12 Defendant testified that he did not have a gun on his person the night he was arrested. He testified that the officers asked "who's Jose Macias?" when they approached the vehicle and had their flashlights and weapons in their hands. Defendant testified that the officers removed him from the vehicle and threw him to the ground before he could respond.

¶ 13 The State called Officer Hauser, Officer Mills' partner, to the stand. Hauser testified consistently with Mills. He testified that Pena told him that he saw the gun and that the person the officers sought in connection with the shooting was in the front passenger seat. Following closing arguments, defendant was found guilty of nine counts of AAUW. The counts were merged and defendant, who had no criminal background, was sentenced to 30 months probation and 80 hours of community service.

¶ 14 Defendant appealed his convictions, arguing that the decisions in *Heller* and *McDonald* required reversal of his convictions as they violated his second amendment rights. We affirmed his convictions based on case law interpreting *Heller* and *McDonald* at that time. However, as noted above, our supreme court subsequently entered its opinion in *People v. Aguilar*, 2013 IL 112116, and entered a supervisory order directing this court to vacate our prior holding and reconsider the judgment to determine if another outcome is warranted in light of the decision.

¶ 15 In *Aguilar*, our supreme court declared the Class 4 form of AUUW facially unconstitutional as it violated the second amendment, as recently construed by our United States Supreme Court. *Id.* at ¶¶ 18-20, 22, citing *Heller* and *McDonald*. In contravention of the right to

keep and bear arms, which was found to extend outside of the home, the Class 4 form of AUUW was found to be a comprehensive ban that categorically prohibited possession and use of a firearm for self-defense outside of the home. *Id.* Therefore, the *Aguilar* court reversed the defendant's conviction for AUUW and remanded the matter for sentencing on a separate conviction. *Id.* at ¶ 30.

¶ 16 In the instant matter, defendant was convicted of nine counts of AUUW, which were merged for sentencing. When a statute is declared unconstitutional, it is rendered void *ab initio*, or as if the law had never been passed. *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Accordingly, because the *Aguilar* court declared the Class 4 form of the AUUW statute under which defendant was found guilty, defendant's convictions for that section of the AUUW cannot stand and must be reversed.

¶ 17 However, defendant's convictions under sections (a)(3)(C) and (a)(3)(I) for failing to possess a FOID card and being under 21 years of age at the time are affirmed. As noted by this court in *People v. Burns*, 2013 IL App (1st) 120929, in the majority opinion in *Heller*, Justice Scalia confirmed that the right to keep and bear arms was subject to meaningful regulation and longstanding prohibitions on the possession of firearms, such as by felons and other enumerated examples. *Id.* at ¶¶ 24-27. Following this line of reasoning, the *Aguilar* court upheld the defendant's other conviction for unlawful possession of a firearm, based on the defendant's age, 17-years-old, at the time of the conviction and the longstanding prohibition against the juvenile possession of firearms. *Id.* at ¶ 26. Likewise, in *Burns*, the court upheld the conviction for Class 2 AUUW as it prohibits possession of firearms by felons, conduct that falls outside of the protections of the second amendment. *Id.* at ¶ 27.

¶ 18 This court has also considered the constitutionality of both of the challenged FOID and age restriction sections of the AUUW statute under this lens. *People v. Henderson*, 2013 IL App (1st) 113294. The *Henderson* court reviewed cases from several jurisdictions where the purchase and possession of handguns by persons less than 21 years-of-age in finding that such a prohibition is historically rooted and not core conduct subject to second amendment protection. *Id.* at ¶ 30. The court also found that the FOID card requirement was a constitutional restriction on the possession of firearms. *Id.* at ¶¶ 31-36.

¶ 19 We have not been presented any reason to upset this precedent and our research also supports upholding these restrictions. Accordingly, defendant's convictions for failure to have a valid FOID card (720 ILCS 5/24.16(a)(1), (a)(3)(C) (West 2008)) and for being under 21 years-of-age at the time under section (720 ILCS 5/24-1.6(a)(1), (a)(3)(I) (West 2008)) are affirmed. Defendant's sentencing order therefore must be corrected. This issue must be corrected by the trial court because as the standing convictions share the same mental state, sentencing classification, and punishment, we cannot determine which offense is more serious and the trial court must make that determination. *People v. Artis*, 232 Ill. 2d 156, 177 (2009).

¶ 20 Affirmed in part, reversed in part; remanded with directions.