

THIRD DIVISION  
NOVEMBER 6, 2013

No. 1-11-3363

**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
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10-CR-6959
	)	
JAMES BARBER,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Hyman and Justice Neville concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The defendant's conviction of aggravated unlawful use of a weapon was reversed where the statute has been held facially unconstitutional; the defendant's constitutional attacks on the unlawful use of a weapon and armed habitual criminal statutes failed; and the cause was remanded for resentencing on unlawful use of a weapon by a felon and correction of the mittimus to reflect 351 days of credit.
- ¶ 2 After a bench trial, the defendant, James Barber, was convicted of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), aggravated unlawful use of a weapon (AUUW)

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(720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), two counts of unlawful use of a weapon by a felon (UUW) (720 ILCS 5/24-1.1(a) (West 2010)), and of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)). The two UUW convictions merged into the AUUW conviction, and the defendant was sentenced to eight years' imprisonment each on the armed habitual criminal and aggravated discharge of a firearm offenses and six years' imprisonment on the AUUW, all to be served concurrently. On appeal, the defendant argues that: (1) there was insufficient evidence to sustain his AUUW conviction; (2) the AUUW, UUW and armed habitual criminal statutes are facially unconstitutional in that they violate the second amendment (U.S. Const., amend. II); (3) the armed habitual criminal statute, as applied to him, violates the *ex post facto* clause of the state and federal constitutions (U.S. Const. art. I, § 9; Ill. Const. 1970, art. I, § 16); and (5) he is entitled to four additional days of presentence credit. We affirm in part, reverse in part, and remand the cause for further proceedings.

¶ 3 The following evidence was adduced at the defendant's trial which was held on January 27, 2011. Chicago Police Officer K.A. Fleming testified that, on March 11, 2010, at approximately 12:30 a.m., he was traveling eastbound on Roosevelt Road in the City of Chicago, approaching Pulaski, when he heard gunshots to the north. After turning left on Pulaski, Officer Fleming saw a male limping across Pulaski and two males following him. He then heard screaming coming from down the street and observed two females in the street and a male in a white t-shirt running up the stairs and into the apartment building at 4016 West Grenshaw, which was where the defendant resided in a second-floor unit. The women told Officer Fleming that there had been an argument on the street and that the man who ran inside fired shots in the street. Other officers arrived at the scene

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and eventually forcibly entered the three-story building. Officer Fleming was allowed into the second-floor unit by the defendant's relative and saw another officer arresting the defendant in a bedroom.

¶ 4 Officer Thomas Finegan testified that he located the defendant in the second-floor apartment, hiding underneath a bed. The defendant resisted, and officers Tased him in order to arrest him.

¶ 5 Officer Bryant Peete testified that he retrieved an AK-47 and a .40 caliber Glock semiautomatic pistol from the ground below the front stairwell window of the defendant's apartment building. He also retrieved a magazine from the window's second-floor ledge and spent shell casings of a .40 caliber weapon in the "front of the residence where the shooting had taken place."

¶ 6 Detective John Jurj testified that he interviewed the victim at Mount Sinai Hospital, who signed a refusal to prosecute form. He then interviewed the defendant at the police station. The defendant told him that he had been drinking all night and had a domestic altercation with his girlfriend, Tiffany Frazier. After the altercation, the defendant sat down on the front stairs of his apartment building. While sitting on the front stairs, the defendant began to argue with Tiffany's sister when four males charged him. The defendant stated that he feared for his safety and so he pointed his handgun at the ground in the direction of the men. The four men fled the scene. The defendant then told Detective Jurj that he ran inside the building to the third floor landing, threw the handgun out the window, and ran into his apartment on the second floor. When told that he struck someone, the defendant stated that he was sorry and upset. The defendant admitted that he fired a .40 caliber Glock pistol.

¶ 7 The parties stipulated that the gunshot residue evidence demonstrated that the defendant had

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discharged a firearm, contacted a related item, or had his right hand in the vicinity of a discharged firearm. Additionally, the defendant's two prior convictions for delivery of cannabis and delivery of a controlled substance were entered into evidence.

¶ 8 The trial court found the defendant guilty of all charged crimes and determined that the UUW counts merged into the AUUW count. The court sentenced the defendant to eight years' imprisonment each for the armed habitual criminal and the aggravated discharge of a firearm convictions and six years' imprisonment for the AAUW conviction, all to be served concurrently. The trial court determined that the defendant was entitled to credit for 347 days of time served. On October 17, 2011, the trial court denied the defendant's motion for reconsideration of his sentence. This appeal followed.

¶ 9 The defendant first argues that his AUUW conviction must be reversed because the statute is facially unconstitutional, contending that it violates the second amendment. Though this issue was not raised in the trial court, a constitutional challenge may be raised at any time. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 23. Whether a statute is constitutional is a question of law to be reviewed *de novo*. *Id.* We agree with the defendant that his AUUW conviction must be reversed on constitutional grounds.

¶ 10 Section 24-1.6(a) of the Criminal Code of 1961 (Code) provides:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling,

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or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm;" [and]

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense;" 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010).

¶ 11 The language of the 2010 version of the AUUW statute is unchanged from the 2008 version which our supreme court held was facially unconstitutional in *People v. Aguilar*, 2013 IL 112116, ¶ 22. In *Aguilar*, the supreme court adopted the reasoning in *Moore v. Madigan*, 702 F.3d 933, 941-42 (7th Cir. 2012), which held that the AUUW statute was a flat ban on carrying guns outside the home and that such a ban violated the right to bear arms under the second amendment. *Id.*, ¶ 20. Our supreme court stated that the United States Supreme Court has held that the central component of the right to keep and bear arms is individual self-defense and that restricting that right to the home makes little sense as confrontations are not limited to the home. *Id.* (citing *D.C. v. Heller*, 554 U.S. 570, 599 (2008)). The supreme court stated that, while the second amendment protects the right to possess and use a firearm for self-defense outside the home, it was not concluding that "such a right is unlimited or is not subject to meaningful regulation." *Id.*, ¶ 21. However, the court concluded that the AUUW statute was not a reasonable regulation, but a "wholesale statutory ban on the exercise of a personal right that is specifically" guaranteed by the United States Constitution. *Id.* The supreme court, therefore, reversed the defendant's AUUW conviction as the statute was facially unconstitutional. *Id.* ¶ 22. Likewise, in this case, the defendant was convicted under a facially

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unconstitutional statute, and therefore, we must reverse his AUUW conviction.

¶ 12 Next, the defendant argues that the armed habitual criminal and UUW statutes also violate the second amendment because they criminalize the mere possession of firearms by felons. As we stated earlier, although these issues were not raised in the trial court, a constitutional challenge may be raised at any time, and we review the constitutionality of a statute *de novo*. *Spencer*, 2012 IL App (1st) 102094, ¶ 23. We disagree with the defendant that either statute is facially unconstitutional.

¶ 13 In *Spencer*, we considered the constitutionality of the UUW statute and determined that the statute satisfied intermediate scrutiny. *Id.*, ¶ 26, 31. To satisfy intermediate scrutiny, the challenged statute must serve a significant, substantial or important governmental interest and the fit between the challenged law and the asserted objective must be reasonable. *Id.*, ¶ 23. We stated that the UUW statute is substantially related to the important governmental objective of protecting the public from the danger posed by armed convicted felons and that the fit between the UUW statute and that governmental objective is reasonable. *Id.*, ¶ 31. We, therefore, held that the UUW statute does not, on its face, violate the second amendment. *Id.*

¶ 14 For similar reasons, we have held that the armed habitual criminal statute passes intermediate scrutiny. In *People v. Black*, 2012 IL App (1st) 110055, ¶ 13, we held that the armed habitual criminal statute reflects the legitimate governmental interest in preventing the danger associated with repeat felons having firearms. See also, *People v. Coleman*, 409 Ill. App. 3d 869, 879 (2011); *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011). Accordingly, we held that the armed habitual criminal statute does not violate the second amendment. *Id.*

¶ 15 The recent supreme court decision in *Aguilar* does not change our conclusions in *Spencer*

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or *Black*. In *Aguilar*, the supreme court specifically stated that it was "in no way saying that [the second amendment right to bear arms] is unlimited or is not subject to meaningful regulation." *Aguilar*, 2013 IL 112116, ¶ 21. Unlike the comprehensive ban at issue in *Aguilar*, the UUW and armed habitual criminal statutes are not comprehensive bans, but rather they affect only a certain class of people, namely convicted felons. As we stated in *Spencer* and *Black*, the Supreme Court has recognized that certain classes of people may be disqualified from the exercise of second amendment rights. *Spencer*, ¶ 29 (citing *Heller*, 554 U.S. at 635); *Black*, ¶ 13-14. Accordingly, we find that neither the UUW statute nor the armed habitual criminal statute is facially unconstitutional. We, therefore, affirm the defendant's armed habitual criminal and UUW convictions and remand this cause to the trial court for sentencing on the UUW convictions which had merged in the now-reversed AUUW conviction.

¶ 16 Next, the defendant argues that the armed habitual criminal statute, as applied to him, violates the *ex post facto* clause of the state and federal constitutions because his prior qualifying convictions occurred before the effective date of the armed habitual criminal statute. An identical argument was raised and rejected in *Black* as the statute does not punish the defendant for offenses he committed before the enactment of it, but instead punishes him for the new act of possessing a firearm. *Black*, ¶ 16, 19; see also, *Coleman*, 409 Ill. App. 3d at 880 (2011); *People v. Bailey*, 396 Ill. App. 3d 459, 463 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 932 (2009). For the same reason, we reject the defendant's contention that the armed habitual statute violates the *ex post facto* clause as applied to him.

¶ 17 Finally, the defendant contends that he is entitled to four additional days of presentence

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credit. The State concedes that the defendant is entitled to 351 days of credit, rather than the 347 days currently reflected in his mittimus. We, therefore, order that the mittimus be corrected upon remand to reflect 351 days of credit.

¶ 18 Based on the foregoing reasons, we reverse the defendant's AUUW conviction under section 24-1.6(a)(1), (a)(3)(A) of the Code, affirm the defendant's remaining convictions, and remand the cause to the trial court for sentencing for the UUW convictions under section 24-1.1(a) of the Code and for correction of the mittimus to reflect 351 days of credit.

¶ 19 Affirmed in part, reversed in part, and remanded.