

No. 1-10-1376

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 23027
)	
JUHWUN FOSTER,)	Honorable John A. Wasilewski,
)	Judge Presiding.
Defendant-Appellant.)	

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) (West 2006)) (AUUW), that statute is void *ab initio* and defendant's conviction for armed habitual criminal must be reversed because one of the elements of that crime was supported by the predicate offense of AUUW, which was rendered void and could no longer support the conviction. Defendant's conviction for unlawful use of a weapon by a felon is affirmed and the matter is remanded for resentencing.

¶ 2 Following a bench trial, defendant, Juhwun Foster, was convicted of one count of armed habitual criminal (720 ILCS 5/24-1.7 (West 2006)), four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (West 2006)) (AUUW) and two counts of unlawful use of a

weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)) (UUW). The convictions were merged into the count of armed habitual criminal and defendant, who had two prior convictions, for aggravated unlawful use of a weapon in 2002 and armed robbery in 2004, was sentenced to nine years' imprisonment. 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 and defendant sought review of that decision before our supreme court.

¶ 3 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 and both parties provided supplemental briefs. For the following reasons, we reverse defendant's conviction for armed habitual criminal and remand the matter for re-sentencing on defendant's conviction for UUW by a felon.

¶ 4 There is no dispute between the parties concerning the facts underlying defendant's conviction. At trial, Officer Edward Dougherty of the Chicago police department testified that on October 21, 2007, he and his partner were near a parking lot at 4430 South Laporte Avenue in Chicago, Illinois. Dougherty observed defendant walking towards the officers and then turn and walk briskly away after seeing the officers. Dougherty exited the squad car, announced his office and sought a field interview. From about ten feet away, Dougherty saw defendant remove a loaded handgun from his waistband and drop it in a bush. Dougherty discovered two loaded firearms in the bush and defendant was arrested. The State presented certified copies of defendant's two prior convictions.

¶ 5 Defendant testified on his own behalf and also presented the testimony of Paris McGee and Lashica Dover. They testified that McGee was with defendant when the police stopped them, but that McGee was released while defendant was arrested. Further, they testified that defendant never possessed a handgun and there was no bush in the vicinity of the arrest. The trial court found defendant guilty on all counts, merging the counts into the conviction for armed habitual criminal. Defendant was sentenced to nine years' imprisonment.

¶ 6 Defendant does not challenge his conviction for UUW by a felon. The sole issue presented to this court is defendant's claim that his conviction for armed habitual criminal must be reversed in the wake of *Aguilar* because it was predicated on a prior conviction for the Class 4 form of AUUW that the *Aguilar* court found unconstitutional. Defendant asserts that the Class 4 form of AUUW is void *ab initio*; therefore, defendant argues, his predicate offense for AUUW is void, his conviction for armed habitual criminal must be reversed, and the matter must be remanded for resentencing on his remaining conviction for UUW by a felon. We agree.

¶ 7 As section 24-1.7 states, in pertinent part, a defendant's prior convictions are elements of the offense:

“(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:

* * *

(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 [.]” 720 ILCS 5/24-1.7 (West 2010).

In this case, one of defendant's predicate convictions was his prior conviction under the Class 4 form of AUUW.

¶ 8 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.* Accordingly, the *Aguilar* court reversed the defendant's conviction for AUUW and remanded the matter for sentencing on a separate conviction. *Id.* at ¶ 30.

¶ 9 Following *Aguilar*, this court has addressed the very issue before us now. *People v. Fields*, 2014 IL App (1st) 110311; *People v. McFadden*, 2014 IL App (1st) 102939. Although the convictions for AUUW were not at issue before the courts, they noted that judicial decisions that declare a statute constitutional apply to pending cases on direct review. *People v. Gersch*, 135 Ill. 2d 384, 397 (1990). More importantly, they cited to authority stating that 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).

¶ 10 In *Fields*, the defendant was convicted of being an armed habitual criminal; however, the defendant's prior Class 4 AUUW conviction had been used to satisfy an element of the armed habitual criminal offense. *Fields*, 2014 IL App (1st) 110311 at ¶ 39. The court found that the prior AUUW offense was void under *Aguilar*, it could not serve as the predicate felony for the armed habitual criminal offense, and the evidence was insufficient to sustain the defendant's armed habitual criminal conviction. *Id.* at ¶ 42-44. The *McFadden* court likewise vacated the defendant's conviction, finding that the evidence was insufficient to sustain the defendant's UUW

by a felon conviction where his prior Class 4 AUUW conviction had been used to satisfy the felony element of the offense. *McFadden*, 2014 IL App (1st) 102939 at ¶¶ 41-44.

¶ 11 We find the *Fields* and *McFadden* decisions to be well-reasoned, notwithstanding the State's contrary suggestions. Accordingly, because defendant's conviction for armed habitual criminal was founded on the predicate offense of AUUW, which has been rendered void *ab initio* by *Aguilar*, that conviction must be vacated. Since defendant's convictions were merged into that count and he was sentenced pursuant to that count, we remand the matter for resentencing.

¶ 12 For the foregoing reasons, we affirm defendant's conviction of UUW by a felon, reverse his conviction for armed habitual criminal, and remand the matter to the circuit court for resentencing on defendant's UUW by a felon conviction.

¶ 13 Affirmed in part, reversed in part, remanded for resentencing.