

No. 1-11-3362

**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 6821
	)	
SALVADOR ROJAS,	)	Honorable
	)	Arthur Hill,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice Gordon and Justice McBride concurred in the judgment.

**ORDER**

¶ 1 **Held:** Defendant's conviction for aggravated unlawful use of a weapon is vacated where the statute on which his conviction is based was found facially unconstitutional.

¶ 2 Following a bench trial, defendant Salvador Rojas was convicted of aggravated unlawful use of a weapon (AUUW) pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (the Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). Defendant was sentenced to two years of probation and ordered to pay various fines and fees. On appeal, defendant contends, *inter alia*, that the AUUW statute under which he was convicted violates his right to keep and bear arms pursuant to the second amendment to the United States Constitution (U.S.

Const., amend. II). Because the Illinois Supreme Court has so held in *People v. Aguilar*, 2013 IL 112116, *reh'g denied*, (Dec. 19, 2013), we vacate defendant's conviction.

¶ 3 Defendant was charged with two AUUW counts. Count 1 charged defendant with carrying a firearm on his person while not on his land, abode or place of business (720 ILCS 5/24-1.6(a)(1) (West 2010)) and the firearm was uncased, loaded and immediately accessible (720 ILCS 5/24-1.6(a)(3)(A) (West 2010)). Count 2 charged defendant with carrying a firearm on his person while not on his land, abode or place of business (720 ILCS 5/24-1.6(a)(1) (West 2010)) and he had not been issued a valid firearm owner's identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)). The State nol-prossed Count 2 and proceeded to trial on Count 1.

¶ 4 As the prosecution's sole witness, Chicago police officer Jerry Duskocz testified that at 12:30 a.m. on March 29, 2010, he was working with Chicago police officer Michael Alaniz in a marked car on routine patrol. Duskocz testified they received a radio report and proceeded to 4910 South Honore in Chicago. When the officers arrived at that address, which was a single family home next to the elevated train tracks, Duskocz heard a rumbling sound and moved to the side of the house closest to the noise. Duskocz testified he saw defendant open a window, lean out and throw "a large item consistent in appearance to a rifle" onto the train tracks. Duskocz testified he stood about 35 feet away from the window when he observed defendant. Alaniz retrieved a loaded rifle from the ground near the train tracks.

¶ 5 The officers went inside the house and located defendant. In addition to defendant, another man was in the house, along with a woman and a baby. The State asked Duskocz if any of the people in the residence were "in similar nature" to defendant, and the officer replied no. Defendant was taken to a police car and read his *Miranda* rights, which he verbally waived.

According to Doskocz, defendant said he "had a problem with some bangers earlier and they're not going to come down that alley again." Doskocz said he also learned defendant did not reside at 4910 South Honore but instead lived at 4916 South Marshfield.

¶ 6 On cross-examination, defense counsel asked Doskocz about the lighting in the area where he viewed defendant, and the officer said the light was behind him and he could not remember how far away the light was. Doskocz said he learned the other man in the house was named Ventura, and he was about the same age as defendant.

¶ 7 The defense called Officer Alaniz as its only witness. Alaniz testified he saw defendant extend his body out the window and toss a rifle outside. After recovering the weapon, Alaniz went inside the house with Doskocz and saw a second man in the house along with defendant. The parties stipulated the gun and bullets were tested for fingerprints but none were recovered. Throughout the proceedings, defense counsel asserted that defendant did not live at the residence and it was more likely that someone who lived there threw the weapon from the window and that defendant was not the person seen by police. The court found defendant guilty of AUUW as charged in Count 1.

These events occurred in March 2010. Effective August 25, 2009, section 24-1.6 of the Criminal Code of 1961(the Code) provided, in pertinent part:

"(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, 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[.]" (Emphasis added.) 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010).

¶ 8 We find defendant's contention that the statute under which he was convicted is unconstitutional to be dispositive of this appeal. While this appeal was pending, our supreme court issued its decision in *Aguilar*, in which the defendant was convicted of AUUW under the 2008 version of the statute, which did not include the invitee exception stated in the 2010 version.

¶ 9 The defendant in *Aguilar* was seen dropping a weapon in a yard outside a residence. *Aguilar*, 2013 IL 112116, ¶ 4. Police determined that the defendant did not live at that address, and a defense witness testified it was his home and the defendant was his friend. *Id.* at ¶ 5. The trial court convicted the defendant of AUUW for carrying a firearm on his person while not on his land, abode or place of business (720 ILCS 5/24-1.6(a)(1) (West 2008)) and for carrying a firearm that was uncased, loaded and immediately accessible (720 ILCS 5/24-1.6(a)(3)(A) (West 2008)). *Id.* at ¶ 7. The supreme court reversed the defendant's conviction, finding the 2008 version of the statute to be facially unconstitutional because the statute criminalizes conduct that is protected by the second amendment, namely a person's right to keep and bear arms for self-defense inside or outside the home. *Id.* at ¶ 20. The absence of the invitee language in the 2008 version of the AUUW statute, which applied in *Aguilar*, does not warrant a different result in the case at bar, where the 2010 version applied, because the supreme court concluded that the second amendment protected the right to possess and use a firearm beyond the home (*id.* at ¶¶ 20-21), which necessarily can include the land or dwelling of another person.

¶ 10 In addition to the relevant location being outside the home, the offense of AUUW requires proof of a factor listed in subsection (a)(3). In both *Aguilar* and in the present case, the AUUW conviction applied subsection (a)(3)(A), which is the factor describing the firearm as "uncased, loaded and immediately accessible." 720 ILCS 5/24-1.6(a)(3)(A) (West 2008); 720 ILCS 5/24-1.6(a)(3)(A) (West 2010). This subsection, however, did not withstand scrutiny in *Aguilar*. The *Aguilar* decision explained that the AUUW statute was constitutionally flawed because it was a comprehensive ban on "the possession and use of an *operable* firearm for self-defense outside the home." (Emphasis added). *Aguilar*, 2013 IL 112116, ¶ 21. The *Aguilar* court expressly adopted the analysis in *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012), which noted that the "right to bear arms thus implies a right to carry a *loaded gun* outside the home." (Emphasis added.) *Aguilar*, at ¶¶ 19-20. Accordingly, the AUUW factor stated in subsection (a)(3)(A) was also flawed.

¶ 11 As in *Aguilar*, the State convicted the present defendant for possessing a loaded weapon in a location that was not defendant's land, abode or place of business pursuant to sections (a)(1) and (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). The determination by the supreme court that the statute creating the offense of AUUW under these sections was unconstitutional rendered the offense void *ab initio*; thus, it is as if the law never existed. See *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Accordingly, we must vacate defendant's conviction, including the order imposing fines and fees against defendant. See *People v. Meyerowitz*, 61 Ill. 2d 200, 213-14 (1975) (ordering the refund of fines paid on convictions that were ultimately vacated). Given this disposition, we need not consider defendant's remaining contentions of error.

¶ 12 Vacated.

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