2017 IL App (1st) 123281-UB

Nos. 1-12-3281 and 1-12-3523 (Consolidated)

April 6, 2017

FOURTH DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

	)	Appeal from the Circuit Court
	)	of Cook County.
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Nos. 07 CR 13523
v.	)	07 CR 22263
	)	07 CR 4615
JERRY SMITH, a/k/a Jarvis Alexander,	)	08 CR 13010
	)	08 CR 9418
Defendant-Appellant.	)	
	)	Honorable
	)	Neera Lall Walsh,
	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.[*]
Justices McBride and Reyes concurred in the judgment.

O R D E R

Held: We affirm the trial court's order dismissing defendant's postconviction petition. *People v. White*, 2011 IL 109689, does not apply retroactively and defendant's sentence for the offense of attempt first degree murder fell within applicable statutory guidelines. We also affirm defendant's Class 2 UUWF conviction as his prior AUUW conviction had not been vacated at the time he possessed a firearm, and the prior AUUW conviction was used only as an element of the offense and not as an enhancement.

[*] Justice Palmer delivered the original judgment in this case, which has been adopted in significant part in this decision. Following Justice Palmer's retirement from the court, Justice Burke has been substituted as the authoring judge.

¶ 1 Defendant, Jerry Smith, a/k/a Jarvis Alexander, appeals from an order of the circuit court of Cook County granting in part and dismissing in part his postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2010)) (Case No. 12-3523) and an order denying his motion to reconsider the dismissal of his petition (Case No. 12-3281).[1] On appeal, defendant asserts the sentence he received as a result of his negotiated guilty plea to attempt first degree murder is void because it did not include the mandatory statutory firearm enhancement, and he should therefore be allowed to withdraw his plea and either plea anew or proceed to trial. Additionally, defendant contends that pursuant to *People v. Aguilar*, 2013 IL 112116, his guilty-plea conviction for unlawful use of a weapon by a felon (UUWF) should be vacated because the underlying predicate felony of aggravated unlawful use of a weapon (AUUW) was void.

¶ 2 On June 26, 2015, we issued a Rule 23 order affirming defendant's sentence for the offense of attempt first degree murder and reversing defendant's UUWF conviction based on our conclusion that the underlying AUUW conviction was void *ab initio* under *Aguilar*. *People v. Smith*, 2015 IL App (1st) 123281-U.

¶ 3 The State filed a petition for leave to appeal with the Illinois Supreme Court on July 31, 2015. In the interim, our supreme court released *People v. McFadden*, 2016 IL 117424, *pet. for certiorari pending*, No. 16–7346 (U.S. Dec. 22, 2016). The supreme court subsequently denied the State's petition for leave to appeal in the present case, but entered a supervisory order on

[1] This court granted defendant's motion to file a late notice of appeal from the circuit court's order granting in part and dismissing in part his petition. Defendant filed a separate notice of appeal following the denial of his motion to reconsider. This court granted his motion to consolidate the two cases on appeal. We note that this court previously entered a summary order on June 20, 2014, in case number 1-13-1635, in which it affirmed the dismissal of a successive postconviction petition filed by defendant on January 31, 2013, while the current consolidated cases were pending. *People v. Alexander*, summary order filed June 20, 2014 (Case No. 1-13-1635).

September 28, 2016, directing us to vacate our judgment and reconsider in light of *McFadden* to determine if a different result is warranted.

¶ 4 In accordance with the supreme court's directive, we vacated our earlier judgment. After reconsidering this case in light of *McFadden*, we find that a different result is warranted. Accordingly, we now affirm both defendant's sentence for attempt first degree murder and his UUWF conviction.

¶ 5 I. BACKGROUND

¶ 6 The record reflects that defendant was charged with numerous offenses, but he ultimately pleaded guilty to several charges pursuant to a negotiated plea agreement on September 11, 2008. Defendant entered a plea of guilty to one charge of UUWF (case no. 07 CR 04615), one charge of attempt first degree murder (case no. 07 CR 13523), and three charges of possession of contraband in a penal institution (case nos. 08 CR 9418, 08 CR 13010, 07 CR 22263). In exchange, the remaining charges were dismissed, including a charge of first degree murder. The trial court sentenced him to concurrent terms of 3 years' imprisonment for the UUWF conviction and 10 years' imprisonment for the attempt first degree murder conviction. He received a sentence of 5 years' imprisonment for each of the possession of contraband convictions, to be served consecutively to the attempt murder and UUWF sentences.

¶ 7 As support for the factual basis for the pleas, the State presented the following evidence concerning the UUWF conviction. On February 9, 2007, while investigating a domestic disturbance, an officer saw defendant in the middle of the street and approached him. Defendant ran away while grabbing his waistband; the police gave chase and observed defendant remove a handgun and throw it in a garbage can during the pursuit. The weapon was a fully loaded 9-

millimeter handgun. Defendant stipulated to having a prior felony conviction for aggravated unlawful use of a weapon (AUUW) (case no. 05 CR 09975).[2]

¶ 8 With regard to attempt first degree murder, the plea hearing evidence showed that on January 7, 2006, defendant and his co-offenders approached a parked vehicle with three occupants. Defendant and another co-offender were armed with handguns. Defendant pointed his gun at the car and pulled the trigger, but the gun did not fire because the safety was on. The co-offender fired his handgun and struck all three occupants, one of whom was killed. Defendant later provided a statement to the police admitting to these facts.

¶ 9 The three convictions of possession of contraband in a penal institution were supported by evidence that on three different occasions, defendant was found to be in possession of a sharpened wood object and/or a sharpened metal object while in a penal institution.

¶ 10 Defendant subsequently moved to withdraw his guilty pleas. The trial court denied the motion following a hearing. Defendant did not appeal.

¶ 11 On November 16, 2010, defendant filed a *pro se* postconviction petition in which he asserted ineffective assistance of plea counsel and failure of the trial court to properly admonish him regarding the fact that his sentence would entail an additional three years due to mandatory supervised release (MSR). Defendant also requested that all his sentences run concurrently.

¶ 12 The trial court advanced defendant's petition to the second stage and counsel was appointed. His counsel did not amend the petition. The State moved to dismiss the *pro se* postconviction petition on May 21, 2012.

[2] Defendant attaches to his brief on appeal a copy of the conviction in case number 05 CR 09975 from May 16, 2005, which indicates that he was convicted of the Class 4 felony of "AGG UNLAWFUL USE OF WEAPON/VEH," and it sets forth the statutory cite "720-5/24-1.6(a)(1)." He also attaches a copy of an indictment in case number 05 CR 09975 which recites that he was charged pursuant to "720 ACT 5 SECTION 24-1.6(a)(1)/(3)(A)." Although a copy of the sentence or indictment from this underlying conviction was not included in the lower court record, we note that the State has not disputed that the predicate felony underlying defendant's UUWF conviction was a Class 4 AUUW.

¶ 13 On July 30, 2012, the trial court denied in part and granted in part defendant's postconviction petition. The trial court found that the record demonstrated that his plea counsel properly advised him of the sentences he would receive and that he was properly admonished of his appellate rights. However, the trial court found that defendant was not advised of the three-year MSR term for the attempt murder conviction, even though he was advised that he would be required to serve a two-year MSR term for his remaining convictions. Therefore, the court reduced defendant's sentence for the attempt first degree murder conviction by one year, to nine years' imprisonment. The court dismissed his remaining claims, finding that defendant failed to make a substantial showing that his constitutional rights were violated. The court also denied defendant's request that all his sentences run concurrently.

¶ 14 Defendant filed a late notice of appeal from this order. Defendant also filed a *pro se* motion for reconsideration, which the trial court denied on October 11, 2012. Defendant filed a notice of appeal from that order as well.

¶ 15 II. ANALYSIS

¶ 16 A. Post-Conviction Hearing Act

¶ 17 Pursuant to the Act, a criminal defendant may pursue a three-stage process to collaterally attack his convictions based on substantial violations of his constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99–100 (2002). If a defendant’s initial *pro se* petition withstands the first stage by making out the gist of a constitutional claim, the petition advances to the second stage of review, where the defendant receives the benefit of representation by counsel, who has the opportunity to amend the petition, and the State may respond to the petition or file a motion to dismiss. *Id.* at 100. "[A] motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *People v. Domagala*, 2013 IL 113688, ¶ 35 (quoting

People v. Coleman, 183 Ill. 2d 366, 385 (1998). "[T]he dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Coleman*, 183 Ill. 2d at 382. A defendant must support the allegations in the petition with either the record or accompanying affidavits. *Id.* at 381. The court takes as true all well-pled factual allegations which are not positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). However, the court does not resolve evidentiary questions, engage in fact-finding, or make credibility determinations at this stage. *Domagala*, 2013 IL 113688, ¶ 35 (quoting *Coleman*, 183 Ill. 2d at 385). Where the petition and any accompanying exhibits make out a substantial showing of a constitutional violation, the defendant is entitled to a third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 381-82. Generally, we review the circuit court's second-stage dismissal of a postconviction petition *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 18 B. Defendant's Attempt First Degree Murder Conviction

¶ 19 On appeal, defendant argues that because the indictment and factual basis for his guilty plea to attempt first degree murder demonstrated that he was armed with a firearm during the offense, the mandatory statutory enhancement of 15 years should have been added to the minimum 6-year sentence range for attempt first degree murder. Defendant asserts that pursuant to *People v. White*, 2011 IL 109689, a trial court is required to impose a statutory firearm enhancement where the indictment and factual basis support it. As a result, defendant argues that his 9-year sentence is void and must be vacated because it is less than the 21-year minimum compelled by statute. According to defendant, his plea should be withdrawn and the cause should be remanded to allow him to either plea anew or proceed to trial. He contends that *White* did not

announce a new rule of law exempt from retroactive application because a court is never authorized to impose a sentence that does not comply with statutory guidelines.

¶ 20 The State maintains that *White* announced a new rule of law that does not apply retroactively. The State further contends that defendant should be estopped from raising a belated challenge to his plea agreement because the error was to his benefit as he received a lower sentence and the State would be prejudiced in prosecuting the 2006 case anew at this time.

¶ 21 Defendant did not raise this issue in his postconviction petition. Generally, claims cannot be raised for the first time on appeal from postconviction proceedings. *People v. Jones*, 213 Ill. 2d 498, 505-08 (2004). Defendant urges that a void judgment may be attacked at any time. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). See *People v. Arna*, 168 Ill. 2d 107, 113 (1995) ("A sentence which does not conform to a statutory requirement is void" and the appellate court may correct a void sentence at anytime.)

¶ 22 We note that after we issued our initial Rule 23 order in this case, our supreme court issued *People v. Castleberry*, 2015 IL 116916, ¶ 19, on November 19, 2015, in which it abolished the void sentence rule established in *Arna*. The *Castleberry* court held that a sentence is not void, but merely voidable, where it does not conform to a statutory requirement and was entered by a court with jurisdiction. *Id.* Thus, whether defendant here forfeited this issue depends on whether *Castleberry* applies to him.

¶ 23 More recently, our supreme court issued *People v. Price*, 2016 IL 118613, ¶ 27. In *Price*, the defendant's 2-1401 petition challenging his conviction as void was pending in the appellate court when *Castleberry* was decided. *Id.* ¶ 27. The *Price* court explained that *Castleberry* established that a sentence which does not conform to statute is merely voidable, not void, and therefore subject to procedural rules and restraints such as forfeiture. *Id.* ¶ 17. The court stated

that "a defendant may no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity." *Id.* The court found that, as to the question of retroactive application, "*Castleberry* applies not only to the parties in that case but also prospectively." *Id.* ¶ 27. The court held that as the defendant's 2-1401 petition was pending in the appellate court when *Castleberry* was announced, the general rule of retroactivity applied, *i.e.*, the court's "decisions apply to 'all cases that are pending when the decision is announced, unless this court directs otherwise.'" *Id.* (quoting *People v. Granados*, 172 Ill. 2d 358, 365 (1996)). As the court did not limit the reach of *Castleberry* and the defendant offered no reason to not apply it, the court held that the void sentence rule did not apply to overcome the untimely filing of the defendant's petition in *Price*. *Id.* ¶ 35. See also *People v. Williams*, 2017 IL App (1st) 123357-B (holding that the trial court's order improperly dismissing the defendant's post-conviction petition outside the statutory 90-day window was merely voidable, not void, and therefore not subject to collateral attack pursuant to *Castleberry* and *Price*, where the case was pending before our supreme court when *Castleberry* was decided).

¶ 24 Accordingly, based on *Castleberry* and *Price*, defendant forfeited his argument that his sentence is void for failure to comply with statutory law because he failed to raise it below. Nevertheless, even if we were to address this claim, we would conclude, as we previously held in our initial Rule 23 order, that *White* does not apply retroactively to defendant's sentence and the trial court's sentence was proper.

¶ 25 Attempt first degree murder is a Class X felony with a sentence of not less than 6 years but not more than 30 years' imprisonment. 720 ILCS 5/8-4(c)(1) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006). However, if a defendant is armed with a firearm while committing the offense, then the offense becomes "a Class X felony for which 15 years shall be added to the

term of imprisonment imposed by the court[.]" 720 ILCS 5/8-4(c)(1) (West 2006). The parties do not dispute that this mandatory 15-year statutory enhancement was triggered by the indictment and the factual basis for the plea, which indicated that defendant was in possession of a firearm and attempted to discharge it at the victims. As a result, defendant potentially faced a minimum sentence of 21 years' imprisonment for attempt first degree murder. Because the actual sentence imposed of 10 years (and, after the postconviction amendment, 9 years) fell outside of this range, defendant contends that his sentence is void.

¶ 26 In *White*, 2011 IL 109689, ¶¶ 23, 26, our supreme court held that a sentence entered as a result of a plea agreement to first degree murder was void because it failed to include the mandatory statutory 15-year firearm enhancement where such enhancement was supported by the factual basis for the plea. The State and trial court did not have discretion to fashion a sentence that did not include the mandatory enhancement as such a sentence would not be authorized by law. *Id.* Here, the parties dispute whether the 2011 decision in *White* should apply retroactively to defendant's case, as *White* was decided after defendant's convictions became final in 2008.

¶ 27 Our supreme court's decision in *People v. Smith*, 2015 IL 116572, which was issued after the parties filed their briefs in the present case, controls the outcome here. In *Smith*, our supreme court determined that *White* did not apply retroactively to convictions which were final at the time *White* was decided. *Smith*, 2015 IL 116572, ¶¶ 1, 34. The *Smith* court reasoned that the decision in *White* constituted the pronouncement of a "new rule" pursuant to the United States Supreme Court's guidance in *Teague v. Lane*, 489 U.S. 288 (1989), under which a judicial decision that establishes a new rule is applicable to all pending criminal cases that are on direct review, but "will not apply retroactively to convictions that are already final at the time the new

rule is announced." *Smith,* 2015 IL 116572, ¶ 24 (citing *Teague,* 489 U.S. 288). As the court in *Smith* observed, a decision establishes a new rule where "it breaks new ground or imposes a new obligation on the states or federal government." *Id.* ¶ 25. In deciding that *White* pronounced a new rule, the *Smith* court concluded that "for the first time in *White,* we held that a circuit court may not disregard a fact that requires the imposition of a statutory sentencing enhancement if that fact is included in the factual basis accepted by the court." *Id.* ¶ 27. Our supreme court in *Smith* further determined that neither of the two *Teague* exceptions to the bar against retroactive application of a new rule to final convictions applied to *White*. That is, the rule announced in *White* did not legalize primary, private individual conduct and it did not present a "watershed" rule of criminal procedure. *Smith,* 2015 IL 116572, ¶ 32.

¶ 28 Pursuant to *Smith,* the decision in *White* is inapplicable to defendant's case as his conviction was final at the time *White* was decided. Thus, the new rule announced in *White* does not apply retroactively to his case. Accordingly, the trial court properly sentenced defendant pursuant to the plea agreement to 10 years' imprisonment (and subsequently, 9 years), which fell within the 6- to 30-year sentence range for attempt first degree murder. 720 ILCS 5/8-4(c) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006).

¶ 29 B. Defendant's Unlawful Use of a Weapon by a Felon Conviction

¶ 30 In defendant's opening brief on appeal, he argues that his UUWF conviction should be vacated in light of *Aguilar*, 2013 IL 112116, because it was predicated on his prior conviction of AUUW under 720 ILCS 5/24-1.6(a)(1) (West 2006), a provision which was found facially unconstitutional in *Aguilar*. The State argues in its initial brief on appeal that because defendant failed to raise this issue in his postconviction petition, it was forfeited.

¶ 31 Although defendant did not raise this challenge on direct appeal or in his postconviction petition in the lower court, we do not find that defendant's failure to raise this issue until his appeal from the dismissal of his postconviction petition precludes our review. Defendant filed his *pro se* postconviction petition in 2010 and his appeal from the dismissal of his postconviction petition in 2012, which was before our supreme court decided *Aguilar* (initially filed on September 12, 2013, and modified on December 19, 2013). "[A] a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio*" may be raised at any time and is exempt from forfeiture. *People v. Thompson*, 2015 IL 118151, ¶ 32. Moreover, forfeiture is a limitation on the parties, and not this court's ability to consider an issue. *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

¶ 32 Turning to the issue at hand, defendant here was charged with two counts of UUWF by indictment, which alleged that he was previously convicted of AUUW (720 ILCS 5/24-1.6(a)(1) (West 2006)) in case number 05 CR 09975. Defendant pleaded guilty to one count of Class 2 UUWF. Subsection 24-1.1(a) provides that it is "unlawful for a person to knowingly possess on or about his person *** [a firearm] if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2006). Subsection 24-1.1(e) specifies that a "[v]iolation of this Section by a person not confined in a penal institution shall be a Class 3 felony ***. Violation of this Section by a person not confined in a penal institution who has been convicted of *** a felony violation of Article 24 of this Code[] *** is a Class 2 felony." 720 ILCS 5/24-1.1(e) (West 2006).

¶ 33 As stated, the Illinois Supreme Court held in *Aguilar*, that the Class 4 form of the AUUW offense (720 ILCS 5/24–1.6(a)(1), (a)(3)(A), (d) (West 2008)) was facially unconstitutional because it violated the second amendment. *Aguilar*, 2013 IL 112116, ¶¶ 18–20, 22. In *People v.*

Burns, 2015 IL 117387, ¶¶ 24-25, our supreme court further clarified that "section 24-1.6(a)(1), (a)(3)(A) of the [AUUW] statute is facially unconstitutional, without limitation," as there is no distinction between the Class 4 or Class 2 forms of AUUW.

¶ 34 Subsequently, in *McFadden*, 2016 IL 117424, ¶¶ 1, 8, the defendant directly appealed his UUWF conviction, asserting that it must be vacated because the underlying predicate conviction of AUUW was based on a now-unconstitutional statutory provision per *Aguilar*. Our supreme court concluded that UUWF is a status offense and the defendant's felon status was unaffected by *Aguilar*. *Id.* ¶ 31. "Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the UUW by a felon offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *Id.* ¶ 31. In so holding, the court relied on the language of section 24-1.1(a) and the United States Supreme Court case *Lewis v. United States*, 445 U.S. 55 (1980), which involved a similar federal statute. *Id.* ¶¶ 22, 29. In *Lewis*, the Court recognized that the defendant's prior underlying felony conviction was unconstitutional as he was unrepresented by counsel, but it found that the federal felon-in-possession statute, which criminalized possession of a firearm by "any person who has been convicted *** of a felony," nevertheless imposed liability based on the fact of having a felony conviction, regardless of whether the conviction was subject to collateral attack. *Lewis*, 445 U.S. at 60-61. Adopting this reasoning, the *McFadden* court held that as the UUWF statute requires the State to prove a defendant's status as a felon, "the fact of a felony conviction without any intervening vacatur or other affirmative action to nullify the conviction triggers the firearms disability." *McFadden*, 2016 IL 117424, ¶ 24.

¶ 35 Following our supreme court's supervisory order to reconsider the present case in light of *McFadden*, 2016 IL 117424, the parties submitted supplemental briefing. In his supplemental brief, defendant argues that this court need not follow *McFadden* because our supreme court in *McFadden* failed to consider *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718 (2016), and *Ex Parte Siebold*, 100 U.S. 371 (1880).

¶ 36 In *Montgomery*, the United States Supreme Court held that the prohibition against mandatory life sentences without parole for juvenile offenders (pronounced in *Miller v. Alabama*, 567 U.S. 460 (2012)) was a new substantive constitutional rule that applied retroactively on state collateral review. *Montgomery*, 136 S.Ct. at 736. The Court held that substantive rules were "categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Id.* 729-30. As such, "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id.* at 731 (citing *Siebold*, 100 U.S. at 376).

¶ 37 Defendant argues that *Aguilar* should be given similar retroactive effective because the State's use of his unconstitutional prior AUUW conviction violates *Montgomery*'s mandate that "[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery*, 136 S.Ct. at 731.

¶ 38 However, *McFadden* is dispositive in resolving the issue before us. Moreover, contrary to defendant's contention, and as the State points out, the Illinois Supreme Court was aware of *Montgomery* and *Siebold* when it handed down its decision in *McFadden* because it allowed the defendant to cite *Montgomery* as additional authority prior to oral arguments and the defendant also cited it in his petition for rehearing, which the supreme court denied. We are bound by our

supreme court's decisions and must adhere to the holding in *McFadden. People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23.

¶ 39 In addition, another panel of this court recently rejected arguments similar to those defendant raises here in *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9, *appeal denied*, No. 121407 (Nov. 23, 2016). In *Perkins*, the defendant's armed habitual criminal (AHC) conviction was based on prior convictions for UUWF and AUUW. The *Perkins* court held that the prior convictions could serve as predicates for the defendant's AHC conviction because they had not been vacated at the time the defendant possessed a firearm in the AHC case. *Id.* ¶ 10. Our court found that *Montgomery* posed no constitutional impediment because the defendant "was not seeking to vacate his prior conviction ***, but instead was challenging his status as a convicted felon at the time of his trial." *Id.* ¶ 9. Rather, the court concluded that *Lewis*, 445 U.S. at 60-62, controlled the analysis in such circumstances. *Id.* (citing *Lewis*, 445 U.S. at 60-62). See also *People v. Smith*, 2017 IL App (1st) 122370-B, ¶¶ 28-29 (rejecting the defendant's argument to disregard *McFadden* because it failed to address *Montgomery*, finding that the *McFadden* court did not fail to consider *Montgomery*, and concluding that *Montgomery* was inapplicable as the State was not attempting to enforce an invalid felony conviction, but rather, the issue was whether the defendant's prior AUUW conviction based on a statute subsequently found facially unconstitutional could serve as proof of the predicate felony conviction for his UUWF offense); *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 30 (citing *Perkins* and rejecting the defendant's arguments that *McFadden* runs afoul of *Montgomery* and *Siebold* and that his prior AUUW conviction could not be used as a predicate offense for his current AHC conviction).

¶ 40 Accordingly, in the present case, we conclude that the predicate conviction under the unconstitutional AUUW statute rendered defendant a felon when he possessed a firearm on

February 9, 2007, for purposes of the instant UUWF conviction. At the time defendant possessed a firearm, his prior conviction for AUUW was still valid, and this prior conviction has never been vacated, expunged, or collaterally attacked. Thus, because no court had vacated the prior AUUW conviction, his UUWF conviction must stand.

¶ 41 Alternatively, defendant argues that this court must reduce his UUWF conviction from a Class 2 felony to a Class 3 felony because his prior AUUW conviction was used to prove not only his felon status, but also to raise the offense to a Class 2. He asserts this was not permissible under *Lewis*, *Burgett v. Texas*, 389 U.S. 109 (1967), and *United States v. Tucker*, 404 U.S. 443 (1972), which forbid the use of an invalid prior conviction to prove an element of an offense or for enhancement of punishment.

¶ 42 A panel of this court recently addressed and rejected a similar argument in *Smith*, 2017 IL App (1st) 122370-B. There, the defendant argued that his UUWF conviction should be reduced from a Class 2 to a Class 3 felony because his prior AUUW conviction (based the statute found unconstitutional in *Aguilar*) was used to prove that his UUWF offense was a subsequent violation and this constituted improper enhancement of his sentence. *Id.* ¶ 30. The defendant in *Smith*, like defendant here, relied on *Burgett* and *Tucker* and *Lewis*'s discussion of those cases. *Id.* The *Smith* court cited with approval *Lewis*'s nuanced distinction of *Burgett* and *Tucker*, that is, the latter cases found a subsequent conviction or sentence unconstitutional where they depended on the reliability of a past uncounseled conviction, but the federal gun law prohibiting firearms possession by a felon which was at issue in *Lewis* did not focus on the reliability of the prior conviction, " 'but on the mere fact of conviction *** in order to keep firearms away from potentially dangerous persons. *** Enforcement of that essentially civil disability through a

criminal sanction does not 'support guilt or enhance punishment.' " *Smith*, 2017 IL App (1st) 122370-B, ¶ 31 (quoting *Lewis*, 445 U.S. at 67).

¶ 43 The *Smith* court also found *People v. Easley*, 2014 IL 115581, instructive, as we do here. *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. In *Easley*, the defendant asserted that improper double enhancement occurred when his prior UUWF conviction was used to prove an element of his current UUWF offense and to elevate it to a Class 2 offense, and he was thus entitled to notification pursuant to section 111-3(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c) (West 2008). *Easley*, 2014 IL 115581, ¶ 13. The supreme court held that "section 111-3(c) *** applies only when the prior conviction that would enhance the sentence is not already an element of the offense." *Id.* ¶ 19. Pursuant to section 24-1.1(a), it is unlawful for a person to possess a firearm if they have previously been "convicted of a felony under the laws of this State or any other jurisdiction," and under section 24-1.1(e), "any second or subsequent violation shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years." (Emphasis omitted.) *Id.* ¶¶ 20-21 (quoting 720 ILCS 5/24-1.1(a), (e) (West 2008)). Based on these provisions, the court held that the notice provision did not apply because the State was not seeking to enhance the sentence with his prior conviction. *Id.* ¶ 22. Rather, the Class 2 sentence was "the only statutorily allowed sentence under" section 24-1.1(e) and the defendant could not have been given a Class 3 sentence. *Id.*

¶ 44 In *Smith*, the defendant stipulated to his felon status at the time of his UUWF conviction, and his prior AUUW conviction had never been vacated. *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. The court held that pursuant to *Easley*, the defendant's prior AUUW conviction was an element of his UUWF offense and only one class of felony was possible under section 24-1.1(e).

Id. Thus, the State did not impermissibly use the defendant's prior AUUW conviction to enhance his offense to a Class 2 felony. *Id.*

¶ 45 Based on *Easley* and *Smith*, we decline to reduce defendant's Class 2 UUWF conviction to a Class 3 offense. His prior AUUW conviction was not used to prove both his felon status and enhance his punishment. Rather, like the defendant in *Smith*, pursuant to section 24-1.1(e), defendant had "been convicted of *** a felony violation of Article 24 of this Code," *i.e.*, his prior AUUW conviction (720 ILCS 5/24-1.6(a)(1) (West 2006)), and therefore his UUWF offense constituted "a Class 2 felony." 720 ILCS 5/24-1.1(e) (West 2006). As such, the Class 2 UUWF offense was the only statutorily authorized offense.

¶ 46 III. CONCLUSION

¶ 47 For the reasons discussed, we affirm the dismissal of defendant's postconviction petition and affirm his convictions and sentences of attempt murder and UUWF.

¶ 48 Affirmed.