

No. 1-12-3376

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 21278
)	
ROBERT MARTIN,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and ROCHFORD concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's conviction for aggravated unlawful use of a weapon is vacated because it violates the one-act, one-crime rule.
- ¶ 2 Following a bench trial, defendant Robert Martin was convicted of aggravated battery with a firearm, unlawful use of a weapon by a felon (U UW), and aggravated unlawful use of a weapon (aggravated U UW), then sentenced to concurrent prison terms of 18 years, 5 years and 5 years, respectively. On appeal, the parties agree that one of defendant's convictions, either U UW

by a felon or aggravated UUW, must be vacated under the one-act, one-crime rule, but they disagree as to which conviction must be vacated.

¶ 3 Defendant was tried on four counts of attempted first degree murder, four counts of aggravated UUW, and one count each of aggravated battery with a firearm, aggravated discharge of a firearm, and UUW by a felon. Defendant does not challenge the sufficiency of the evidence sustaining his convictions, and thus, a detailed discussion of the facts of this case is not necessary. The evidence presented at trial established that defendant fired multiple gunshots as he chased a group of four young men, and one of those shots hit a bystander, Donnell Moore, who was standing outside a bar smoking a cigarette. The trial court found defendant not guilty of attempted murder, but guilty of aggravated battery with a firearm, aggravated discharge of a firearm, UUW by a felon, and all four counts of aggravated UUW. The court merged the aggravated discharge conviction into the aggravated battery conviction and sentenced defendant to 18 years' imprisonment for that offense. The court also merged the four aggravated UUW counts into Count 8, and sentenced defendant to concurrent terms of five years' imprisonment for aggravated UUW and UUW by a felon.

¶ 4 On appeal, the parties agree that one of defendant's convictions, either UUW by a felon or aggravated UUW, must be vacated because both cannot stand under the one-act, one-crime rule. Defendant contends that the UUW by a felon conviction must be vacated because it is the less serious of the two offenses. The State responds that that the aggravated UUW conviction must be vacated because that statute was found unconstitutional in *People v. Aguilar*, 2013 IL 112116, rendering that conviction invalid.

¶ 5 In reply, defendant maintains that the UUW by a felon conviction must be vacated as the less serious offense, and claims that it is a Class 3 felony and that the mittimus erroneously indicates that it is a Class 2 felony. Defendant further argues that the holding in *Aguilar* has no effect on this case because that holding was expressly limited to the Class 4 version of aggravated UUW, and here, defendant was convicted of a Class 2 version of the offense.

¶ 6 Application of the one-act, one-crime rule is a question of law which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Pursuant to this rule, defendant cannot be convicted of multiple offenses that are based upon the same single physical act, and where he is convicted of two such offenses, the conviction for the less serious offense must be vacated. *Id.* To determine which of the two offenses is the less serious, we look to the plain language of the relevant statutes to consider the intent of the legislature, which is responsible for determining the seriousness of an offense. *People v. Lee*, 213 Ill. 2d 218, 228 (2004). The statutes must be considered as a whole and in context. *Johnson*, 237 Ill. 3d at 99. Common sense dictates that the legislature will provide a greater sentence for the offense it considers to be more serious. *Lee*, 213 Ill. 2d at 228. Factors our supreme court has found indicative of the legislature's intent include the legislative classification of the offense, the maximum possible sentence, the mental state required for each offense, and the specificity with which each offense is defined in the statute. *Johnson*, 237 Ill. 2d at 98-99.

¶ 7 As a threshold matter, we agree with defendant that the holding of *Aguilar* does not apply to this case. In *Aguilar*, our supreme court held that "the Class 4 form" of the aggravated UUW statute violated the second amendment of the United States Constitution. *Aguilar*, 2013 IL 112116, ¶ 22. The court emphasized that its finding of unconstitutionality was "specifically

limited to the Class 4 form" of aggravated UUW, and that it made no finding regarding the constitutionality of any other form of the statute. *Aguilar*, 2013 IL 112116, ¶ 22, n.3. Here, defendant was convicted of a Class 2 form of aggravated UUW; therefore, the holding in *Aguilar* does not apply.

¶ 8 As relevant to this case, we observe that defendant was charged with committing the offense of UUW by a felon in that he "knowingly possessed on or about his person any firearm, to wit: a handgun, after having been previously convicted of the felony offense of delivery of a controlled substance under case number 07CR-12932," in violation of section 24-1.1(a) of the Criminal Code (Code) (720 ILCS 5/24-1.1(a) (West 2008)). Defendant was also charged with committing aggravated UUW in that he "knowingly carried on or about his person, a firearm, at a time when he was not on his own land or in his own abode or fixed place of business and the firearm possessed was uncased, loaded and immediately accessible at the time of the offense, and he had been previously convicted of a felony, to wit: delivery of a controlled substance under case number 07CR-12932," in violation of section 24-1.6(a)(1)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2008)).

¶ 9 Due to defendant's prior felony conviction, the aggravated UUW charge was a Class 2 felony with a sentencing range of three to seven years' imprisonment. 720 ILCS 5/24-1.6(d) (West 2008). Similarly, due to defendant's prior conviction for delivery of a controlled substance, which was a Class 1 felony, the UUW by a felon charge in this case was a Class 2 felony, as correctly reflected on his mittimus, not a Class 3 felony as he asserts in his reply brief. 720 ILCS 5/24-1.1(e) (West 2008). The statute provides that the Class 2 form of UUW by a felon has a sentencing range of 3 to 14 years' imprisonment. *Id.*

¶ 10 We acknowledge that in *Johnson*, our supreme court found that aggravated UUW was a more serious offense than UUW by a felon. *Johnson*, 237 Ill. 2d at 99. However, under the facts of that case, the aggravated UUW offense was a non-probationable Class 2 felony with a two-year term of mandatory supervised release (MSR), while the UUW by a felon charge was a probationable Class 3 form of the offense with a one-year term of MSR. *Id.* at 98. After considering the felony classifications, probation status, MSR terms and minimum sentences, the court concluded that, under those circumstances, the legislature intended UUW by a felon to be the less serious offense. *Id.* at 99.

¶ 11 Conversely, where UUW by a felon and aggravated UUW were both Class 2 offenses, as they are in this case, the parties and this court agreed that UUW by a felon was the more serious offense as it had a greater sentencing range of 3 to 14 years' imprisonment as compared to 3 to 7 years' imprisonment for aggravated UUW. *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 6.

¶ 12 Here, similar to *Anthony*, defendant was convicted of Class 2 versions of both UUW by a felon and aggravated UUW. Consequently, both offenses have two-year terms of MSR. 730 ILCS 5/5-4.5-35(1) (West 2009). In addition, both offenses are non-probationable and have minimum sentences of three years' imprisonment. 720 ILCS 5/24-1.1(e) (West 2008); 720 ILCS 5/24-1.6(d) (West 2008). The only difference between the two offenses is that UUW by a felon has a maximum sentence of 14 years' imprisonment, while the maximum term for aggravated UUW is 7 years' imprisonment. As charged in this case, we find that UUW by a felon is the more serious offense because it provides for a greater sentence than aggravated UUW.

1-12-3376

¶ 13 Accordingly, we vacate defendant's conviction for aggravated UUV under the one-act, one-crime rule as the less serious offense. We affirm defendant's remaining convictions and sentences in all other respects.

¶ 14 Affirmed in part; vacated in part.