FIFTH DIVISION
June 19, 2015

No. 1-12-3385

**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. 11 CR 19406 |
| | ) | |
| DARNELLL MOTON, | ) | Honorable |
| | ) | Jorge Luis Alonso, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

**O R D E R**

¶ 1 *HELD*: Defendant's conviction for unlawful use of a weapon by a felon must be vacated when his prior felony conviction for aggravated unlawful use of a weapon was void *ab initio* pursuant to *People v. Aguilar*, 2013 IL 112116, and could therefore not serve as the necessary predicate felony for the instant conviction.

¶ 2 Following a jury trial, defendant Darnell Moton was convicted of unlawful use of a weapon by a felon (UUWF), and sentenced to five years' imprisonment. On appeal, defendant contends that his conviction must be reversed because his only prior felony conviction is for a

version of aggravated unlawful use of a weapon (AUUW) that has been found unconstitutional. For the reasons stated below, we reverse.

¶ 3 Defendant was arrested on November 4, 2011, and charged by information with, *inter alia*, the unlawful use or possession of a weapon by a felon in that he knowingly possessed a handgun after having previously being convicted of AUUW in case number 11 CR 0962501. He was subsequently convicted of UUWF.

¶ 4 On appeal, defendant's sole contention is that his UUWF conviction must be reversed because his only prior felony conviction is for a version of AUUW found facially unconstitutional by our supreme court. Specifically, defendant relies on *People v. Aguilar*, 2013 IL 112116, to argue that his AUUW conviction is void *ab initio* and cannot serve as the predicate felony for his UUWF conviction. Although the State agrees that the instant conviction rests in part upon defendant's prior conviction for the Class 4 offense of AUUW and that *Aguilar* held that this offense was unconstitutional, the State argues that the instant UUWF conviction must stand because the evidence at trial established beyond a reasonable doubt that defendant was a convicted felon at the time that he possessed the firearm at issue on November 4, 2011.

¶ 5 As of 2011, the time of defendant's offense in case number 11 CR 0962501, the AUUW statute prohibited, in pertinent part, a person from carrying a firearm on or about his person or in any vehicle or concealed on or about his person except when on his land or in his abode or fixed place of business. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010). In *Aguilar*, our supreme court concluded that because the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the Criminal Code of 1961 (the Code) categorically prohibited the possession and use of an operable firearm for self-defense outside the home, it violated the right to keep and bear arms as guaranteed by the second amendment of the United Stated Constitution. *Aguilar*, 2013 IL 112116, ¶¶ 20-22.

¶ 6 Here, the record reveals that defendant was convicted of a Class 4 violation of section 24-1.6(a)(1), (a)(3)(A) (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)) in case number 11 CR 0962501. Therefore, the question before this court is whether the instant conviction for UUWF may stand when defendant's predicate felony was for a version of AUUW that is unconstitutional pursuant to *Aguilar*.

¶ 7 *People v. McFadden*, 2014 IL App (1st) 102939, *appeal allowed*, No. 117424 (Ill. May 28, 2014), is instructive. In that case, we vacated a UUWF conviction where the predicate felony was a Class 4 AUUW, agreeing with the defendant that "under *Aguilar*, the State could not rely on this now-void conviction to serve as a predicate offense for UUW by a felon. Therefore, it failed to prove an essential element of the offense." *Id.* ¶¶ 38, 43. Because a prior felony conviction is an element of UUWF that must be proven beyond a reasonable doubt by the State, this court concluded that a void conviction for the Class 4 form of AUUW found unconstitutional in *Aguilar* could not serve as the required predicate offense. *Id.* ¶¶ 42-43. Although we determined that "we cannot ignore *Aguilar's* effects" on the defendant's UUWF conviction because the defendant's case was pending on direct appeal before us, we did not rely on *Aguilar* to vacate the defendant's AUUW conviction itself and did not "address whether formal proceedings for collateral relief may be available to defendant to vacate" that conviction. *Id.* ¶¶ 41, 44. See also *People v. Fields*, 2014 IL App (1st) 110311, ¶¶ 38-39, 44 (vacating the defendant's armed habitual criminal conviction in light of *Aguilar* because his prior conviction for Class 4 AUUW was void under *Aguilar* and the State could not rely on it as a predicate offense such that the State failed to prove an element of the offense of armed habitual criminal).

¶ 8 Here, defendant is directly appealing his UUWF conviction on the grounds that it cannot stand because the predicate felony, his AUUW conviction, is void *ab initio*. Our supreme court has held that a statute which is declared unconstitutional on its face is void *ab initio*, *i.e.*, "the

statute was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable." *People v. Blair*, 2013 IL 114122, ¶ 30.

¶ 9 In the case at bar, we will follow the reasoning of *Fields* and *McFadden*, in that we consider the effect of the predicate conviction on the conviction that is being appealed while taking no action on the prior conviction itself. See *Fields*, 2014 IL App (1st) 110311, ¶ 44 ("A void conviction for the Class 4 form of AUUW found to be unconstitutional in *Aguilar* cannot now, nor can it ever, serve as a predicate offense for any charge."). Here, defendant's prior conviction for a Class 4 violation of section 24-1.6(a)(1), (a)(3)(A) of the Code was based upon a statute determined to be unconstitutional by our supreme court (see *Aguilar*, 2013 IL 112116, ¶¶ 20-22). Therefore, because defendant's prior conviction for AAUW is void *ab initio*, it cannot serve as the required predicate felony for the instant UUWF conviction (see *Blair*, 2013 IL 114122, ¶ 30), and this court must reverse defendant's conviction for UUWF. See *Fields*, 2014 IL App (1st) 110311, ¶ 44; *McFadden*, 2014 IL App (1st) 102939, ¶ 42-43.

¶ 10 The State disagrees, relying on several federal cases, including *Lewis v. United States*, 445 U.S. 55 (1980), for the proposition that defendant's conviction for UUWF is valid because at the time of his conviction his previous AUUW conviction was valid. In other words, because defendant was a felon at the time of his conviction, it is irrelevant that the statute under which he was previously convicted was later determined to be unconstitutional. We recently rejected a similar argument in *People v. Claxton*, 2014 IL App (1st) 132681, ¶ 19, finding, in pertinent part, that federal cases interpreting federal statutes are not binding on this court when we interpret Illinois law, but are merely persuasive authority. The State also argues that *Fields* and *McFadden* were wrongly decided. The Illinois Supreme Court granted a petition for leave to appeal in May 2014 in the *McFadden* case. See *People v. McFadden*, No. 117424 (Ill. May 28, 2014). Thus, a definitive answer will come from our supreme court on the question that we are called upon to

answer today. Unless and until directed otherwise by our supreme court, however, we decline the State's request to conclude that our own recent precedent was wrongly decided.

¶ 11 Ultimately, here, because defendant's prior conviction for AUUW is void *ab initio* (see *Aguilar*, 2013 IL 112116, ¶¶ 20-22), it cannot serve as the predicate felony for his UUWF conviction such that his UUWF conviction must be reversed. See *Fields*, 2014 IL App (1st) 110311, ¶ 44; *McFadden*, 2014 IL App (1st) 102939, ¶ 42-43.

¶ 12 Accordingly, the judgment of the circuit court of Cook County is reversed.

¶ 13 Reversed.