2015 IL App (1st) 123563-U
No. 1-12-3563

THIRD DIVISION
JUNE 3, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD SPIVEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 13096 The Honorable Neil J. Linehan, Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's UUWF convictions under counts two and three, and the sentence imposed on count two, are vacated because his prior Class 4 AUUW conviction, which was based on a statutory provision subsequently found to be unconstitutional in *Aguilar*, could not satisfy the prior felony conviction element of UUWF. Defendant's AUUW convictions under counts four and six are further vacated.

¶ 2 Following a bench trial, defendant Donald Spivey was found guilty of two counts of unlawful use of a weapon by a felon (UUWF) and two counts of aggravated unlawful use of a weapon (AUUW). The trial court merged the convictions and sentenced defendant to four years' imprisonment, followed by two years of mandatory supervised release (MSR), for his conviction

on count two for UUWF. On appeal, defendant contends that his UUWF conviction and sentence should be reversed because his prior Class 4 AUUW conviction, which was used to satisfy an element of his UUWF conviction on count two, was rendered void *ab initio* by *People v. Aguilar*, 2013 IL 112116.

¶ 3 BACKGROUND

¶ 4 The record shows that defendant was charged by information, under case number 10CR13096, with one count of armed habitual criminal (count one), two counts of UUWF (counts two and three), and four counts of AUUW (counts four, five, six, and seven). The State nol-prossed[1] counts one, five, and seven, then entered into evidence a certified statement of defendant's prior conviction for AUUW in case number 04 CR 18579, and the matter proceeded to trial on the remaining four counts.

¶ 5 Specifically, count two charged defendant with committing the offense of UUWF in that he knowingly possessed "on or about his person any weapon prohibited by section 24-1 of this Code" to wit: a firearm after having been previously convicted of AUUW under case number 04 CR 18579 (720 ILCS 5/24-1.1(a) (West 2010)); count three charged defendant with committing the offense of UUWF in that he knowingly possessed firearm ammunition after having been previously convicted of AUUW under case number 04 CR 18579 (720 ILCS 5/24-1.1(a) (West 2010)); count four charged defendant with committing the offense of AUUW in that he knowingly carried an uncased, loaded and immediately accessible firearm on his person and outside his home (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2010)); and count six charged defendant with committing the offense of AUUW in that he knowingly carried or possessed an uncased, loaded and immediately accessible firearm on his person, upon a public way (720 ILCS

[1] The State has not requested that this cause be remanded to the trial court for reinstatement of the nol-prossed charges.

5/24-1.6(a)(2), (3)(A) (West 2010)). Additionally, counts four and six indicated, "The State shall seek to sentence [defendant] as a class two offender in that he has been previously convicted of the offense of [AUUW] under case number 04CR18579." We take judicial notice of the charging instrument and the circuit court clerk's docket in case number 04 CR 18579 that defendant included in his appendix to the brief (Ill. S. Ct. R. 342 (eff. Jan. 1, 2005)), which reflect that he was convicted of the Class 4 version of AUUW under count one[2], alleging that he knowingly carried an uncased, loaded and immediately accessible firearm on his person and outside his home (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2010)). See *People v. Williams*, 404 Ill. App. 3d 621, 634 (2010) (reviewing court may take judicial notice of public records and other judicial proceedings).

¶ 6 At trial, Chicago police officer Jason Perez testified that at 4:55 a.m., on July 3, 2010, he and his partner, Officer Antonio De Carlo, were on routine patrol in the area of 6836 South May Street, where he observed defendant standing on the sidewalk about 20 feet away, with a black object resembling the handle of a revolver tucked into his waistband. Officer Perez made eye contact with defendant, who then walked away with his arms around his waist. Officer Perez exited his squad car, announced his office, and pursued defendant through a nearby gangway, into the backyard of the abandoned house at 6836 South May Street. There, defendant threw an object that made a metallic sound when it struck the chain-link fence at the north side of the backyard. The pursuit continued through an alley, across Racine Avenue, and ended with defendant's arrest in a vacant lot.

[2] The circuit court clerk's docket in case number 04 CR 18579 reflects that defendant pleaded guilty to count one (AUUW), and the criminal history reports attached to the presentence investigation report in the common law record in this appeal, reflect that the State nol-prossed the remaining three AUUW counts in case number 04 CR 18579, of which count two was based on defendant's possession of a firearm without a valid FOID card and counts three and four were based on his possession of a firearm on a public way.

¶ 7 Chicago police officer Andres Zepeda testified that he and other responding officers arrived on the scene and helped place defendant into custody. He was then directed by Officer Perez to search along the chain-link fence in the backyard of the abandoned house at 6836 South May Street. There, he recovered a loaded .357-caliber revolver along the north side of the chain-link fence. Officer Perez arrived in the backyard and identified the firearm as the same black revolver that he observed defendant holding minutes ago.

¶ 8 Defendant presented the testimony of Artamese Prewitt and Kathy Johnson, both of whom testified that defendant did not have a gun. Additionally, defendant testified that he was living with his cousin at 6838 South May Street when the incident at bar occurred. He testified that he was drinking alcohol on his front yard when police officers pulled up in a squad car, exited and approached him. He explained that he ran when the officers called him because he had an open container of alcohol and a warrant from Wisconsin for unpaid child support. Defendant maintained that he threw his bottle of alcohol at the chain-link fence in the backyard, and he denied having a weapon.

¶ 9 In finding defendant guilty, the trial court stated, "So as to count 2, there will be a finding of guilty. Counts 3, 4, and 6 will merge with *** count 2 in the charging document," and sentenced defendant to four years' imprisonment for his UUWF conviction on count two. Defendant timely appealed.

¶ 10 In this court, defendant contends that the State failed to prove him guilty of UUWF because the alleged predicate offense, AUUW, was found to be unconstitutional and void *ab initio* by the Illinois Supreme Court in *People v. Aguilar,* 2013 IL 112116.

¶ 11 ANALYSIS

¶ 12 When defendant challenges the sufficiency of the evidence to sustain his UUWF conviction (*People v. McFadden*, 2014 IL App (1st) 102939, ¶ 36), the relevant question on review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt (*Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009)). We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 13 We have an independent duty to vacate void orders and may *sua sponte* declare an order void. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). A statute that is held facially unconstitutional is void *ab initio*, or as if the law never existed. *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Correspondingly, a trial court is without jurisdiction to enter a conviction against a defendant based on conduct that does not constitute a criminal offense. *People v. Dunmore*, 2013 IL App (1st) 121170, ¶ 9.

¶ 14 To sustain a conviction for UUWF, the State must prove that defendant knowingly possessed a weapon or ammunition, and that he had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). "Illinois law has long held that, in prosecutions for the offense of UUW by a felon, the prior felony conviction is an element of the offense which must be proven beyond a reasonable doubt by the State in its case in chief." *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 42 (citing *People v. Walker*, 211 Ill. 2d 317 (2004)).

¶ 15 In *Aguilar*, 2013 IL 112116, ¶ 22, our supreme court held the Class 4 version of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), to be facially unconstitutional in violation of the second amendment right to bear arms. Here, before trial the

State entered into evidence a certified statement of defendant's prior AUUW conviction in case number 04 CR 18579, and after trial, the court found defendant guilty, then merged counts three and four into count two, and sentenced defendant to four years' imprisonment for his conviction on count two, as charged by information and which alleged that he committed the offense of UUWF after having been previously convicted of AUUW in case number 04 CR 18579.

¶ 16 Defendant argues that because his prior conviction for AUUW is void *ab initio* under *Aguilar*, the State could not rely on it in satisfaction of the subject prior felony conviction element of UUWF. As support for his argument, defendant cites the recent opinions of this court in *People v. Dunmore*, 2013 IL App (1st) 121170, *People v. McFadden*, 2014 IL App (1st) 102939, *pet. for leave to appeal allowed*, No. 117424 (May 28, 2014), and *People v. Fields*, 2014 IL App (1st) 110311, and *People v. Claxton*, 2014 IL App (1st) 132681.

¶ 17 In *Dunmore*, the defendant pled guilty to one count of AUUW and was sentenced to 18 months' probation. *Dunmore*, 2013 IL App (1st) 121170, ¶ 3. When the defendant violated the terms of his probation, the trial court revoked his probation and sentenced him to two years' imprisonment on the underlying AUUW conviction. *Dunmore*, 2013 IL App (1st) 121170, ¶ 5. Noting that judicial decisions declaring a statute unconstitutional apply to cases pending on direct appeal and our independent duty to vacate void orders, we observed that once the defendant's appeal of his probation revocation came before us, we were bound to apply *Aguilar* and vacate the defendant's AUUW conviction as void. *Dunmore*, 2013 IL App (1st) 121170, ¶ 10. The State acknowledged the same and requested that the cause be remanded for reinstatement of the charges that were nol-prossed, asserting that whichever charges it reinstated would likely pass constitutional muster. *Dunmore*, 2013 IL App (1st) 121170, ¶ 11. We declined the State's invitation to render what would essentially be an advisory opinion on the

constitutionality of charges yet to be reinstated. *Dunmore*, 2013 IL App (1st) 121170, ¶ 12. Rather, in light of *Aguilar*, we vacated the defendant's AUUW conviction, the probation order based on that conviction, and the two-year prison sentence imposed upon the revocation of probation as void. *Dunmore*, 2013 IL App (1st) 121170, ¶ 9.

¶ 18 In *McFadden*, the Second Division of this court vacated the defendant's UUWF conviction, finding that the evidence was insufficient to sustain the conviction where his prior Class 4 AUUW conviction, in case number 02 CR 30903, was used to satisfy the prior felony element of the offense. *McFadden*, 2014 IL App (1st) 102939, ¶¶ 41-44. In so finding, the reviewing court added that it found *Dunmore* to be instructive, notwithstanding differences in procedural posture, *i.e.*, unlike Dunmore's AUUW conviction, McFadden's conviction for AUUW in case number 02 CR 30903 was not at issue. *McFadden*, 2014 IL App (1st) 102939, ¶ 41. The reviewing court reasoned, "because defendant's case is pending on direct appeal in this court, similar to the court in *Dunmore* we cannot ignore *Aguilar*'s effects on his conviction for UUW by a felon." *McFadden*, 2014 IL App (1st) 102939, ¶ 41 (citing *Dunmore*, 2013 IL App (1st) 121170, ¶ 10; *People v. Gersch*, 135 Ill. 2d 384, 397 (1990) (judicial decisions that declare a statute unconstitutional apply to cases pending on direct review)).

¶ 19 In *Fields*, the Second Division of this court vacated the defendant's armed habitual criminal conviction in light of *Aguilar* "because the State could not prove an element of the offense of armed habitual criminal through the use of a predicate felony conviction [AUUW] that is void *ab initio*." *Fields*, 2014 IL App (1st) 110311, ¶44. Again, the reviewing court found *Dunmore* to be instructive, notwithstanding the differences in procedural posture. *Fields*, 2014 IL App (1st) 110311, ¶¶ 40, 42. The reviewing court reasoned, "because defendant's case is pending on direct appeal in this court, similar to the court in *Dunmore* we cannot ignore

Aguilar's effects on his conviction for armed habitual criminal." *Fields*, 2014 IL App (1st) 110311, ¶ 42 (citing *Dunmore*, 2013 IL App (1st) 121170, ¶ 10; *Gersch*, 135 Ill. 2d at 397).

¶ 20 In *Claxton*, the Fifth Division of this court vacated the defendant's UUWF conviction, finding that the evidence was insufficient to sustain the conviction where his prior AUUW conviction in case number 11 CR 16293, was used to satisfy an essential element of the defendant's UUWF conviction. *Claxton*, 2014 IL App (1st) 132681, ¶ 20. In so finding, the reviewing court added that it agreed with *Fields* and *McFadden* that a prior conviction for AUUW could not form the predicate of a subsequent offense, and further stated, "A statute declared unconstitutional on its face is void *ab initio*, that is 'was constitutionally infirm from the moment of its enactment and, therefore, is unenforceable.' " *Claxton*, 2014 IL App (1st) 132681, ¶ 16 (quoting *People v. Davis*, 2014 IL 115595, ¶ 25). Further, the reviewing court did not find the State's federal authority persuasive because, unlike Illinois courts, it did not recognize the distinction between void and voidable judgments. *Claxton*, 2014 IL App (1st) 132681, ¶ 19.

¶ 21 As in *Dunmore*, *McFadden*, *Fields*, and *Claxton*, we cannot allow defendant's prior Class 4 AUUW conviction, which is based on a statute that was found to be unconstitutional and void *ab initio* in *Aguilar*, to stand as the predicate offense for his UUWF conviction. Because defendant's appeal, filed on November 2, 2012, was pending when *Aguilar* was announced on September 12, 2013, and modified on December 19, 2013, we are bound to apply *Aguilar* and vacate defendant's UUWF conviction under count two, because "the State did not prove an essential element of the offense where it alleged in the charging instrument and proved at trial a predicate offense that has been declared unconstitutional and void *ab initio*." *McFadden*, 2014 IL App (1st) 102939, ¶ 43.

¶ 22 The State acknowledges that in 2010, defendant was charged with committing the offense of UUWF predicated on his prior Class 4 AUUW conviction. However, the State argues that defendant was properly charged and convicted of UUWF based on that prior AUUW conviction, "regardless of the statute underlying that prior conviction being found to be unconstitutional years later," citing the United States Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 60-62 (1980), which interpreted a federal UUWF statute and held that the status of the prior felony conviction at the time the accused possesses the firearm controls, regardless of whether that prior conviction might later be invalidated or found to be unconstitutional, and several subsequent federal circuit court decisions that held the same.

¶ 23 Defendant replies that he has provided this court with recent Illinois cases analyzing the effect of *Aguilar* on an UUWF conviction predicated on a prior Class 4 AUUW conviction (*Fields*, 2014 IL App (1st) 110311; *McFadden*, 2014 IL App (1st) 102939; and *Claxton*, 2014 IL App (1st) 132681), and cited Illinois cases instructive on the application of the void *ab initio* doctrine (*Gersch*, 135 Ill. 2d 384), whereas the State has made no discernible attempt to explain why federal interpretations of a federal law are relevant in this case. We find defendant's position well taken and observe that "[a] federal court's construction of a federal statute is not binding on Illinois courts in construing a similar state statute." *People v. Gutman*, 2011 IL 110338, ¶ 17.

¶ 24 The State also asserts that the opinion of this court in *Dunmore* is inapplicable because that case was a direct appeal from the defendant's Class 4 AUUW conviction. However, as discussed, it is *Aguilar* that we are bound to apply here, and *Dunmore*, notwithstanding its procedural posture, continues to be instructive. *McFadden*, 2014 IL App (1st) 102939, ¶ 41. The State then concedes that the decisions in *Fields* and *McFadden* are on point with the facts

here, but submits that they were wrongly decided. While we acknowledge the State's footnote citation that it filed petitions for leave to appeal in *Fields* and *McFadden*, we are bound to honor our supreme court's decision in *Aguilar* unless, and until, it is revisited by our supreme court or overruled by the United States Supreme Court. *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23.

¶ 25 Applying *Aguilar*, we conclude that the State failed to prove the prior felony element of UUWF, and we thus vacate defendant's UUWF conviction under count two and the sentence imposed thereon. *McFadden*, 2014 IL App (1st) 102939, ¶¶ 42-43.

¶ 26 However, our inquiry does not end here, as the trial court also found defendant guilty on count three of UUWF based on his knowing possession of firearm ammunition, and counts four and six of AUUW based, respectively, on his possession of an uncased, loaded and readily accessible firearm outside his home (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2010)) and upon a public way (720 ILCS 5/24-1.6(a)(2), (3)(A) (West 2010)). Because the trial court merged these convictions into defendant's UUWF conviction under count two, which we are now vacating in light of *Aguilar*, and to the extent that defendant has challenged the validity of his UUWF conviction on count three and the constitutionality of his AUUW convictions on counts four and six in a footnote without elaboration (see *People v. Chaban*, 2013 IL App (1st) 112588, ¶53 ("in any event" considering the merits of the defendant's argument set forth in a footnote of his main brief)), we further vacate defendant's convictions on counts three, four, and six. *McFadden*, 2014 IL App (1st) 102939, ¶¶ 42-43; *Dunmore*, 2013 IL App (1st) 121170, ¶ 14; see *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 11 (extending the reasoning in *Aguilar* to vacate the defendant's AUUW conviction for possession of a firearm on the public way); and *Claxton*, 2014 IL App (1st) 132681, ¶ 20.

¶ 27 CONCLUSION

¶ 28 For the reasons stated, we vacate defendant's UUWF convictions under counts two and three, the sentence imposed on count two, and the AUUW convictions imposed on counts four and six.

¶ 29 Judgment vacated.