

2015 IL App (1st) 130398-U  
January 20, 2015  
Modified Upon Rehearing June 2, 2015

SECOND DIVISION

No. 1-13-0398

**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 C6 60685     |
|                                      | ) |                     |
| DARIUS HARPER,                       | ) | Honorable           |
|                                      | ) | Michele M. Simmons, |
| Defendant-Appellant.                 | ) | Judge Presiding.    |

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Pierce and Liu concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Defendant's conviction for possessing an uncased and loaded firearm in a vehicle is vacated because it violates his second amendment right to keep and bear arms. However, defendant's conviction for possessing the weapon without a valid FOID card is affirmed, and the provision requiring parental permission for individuals under 21 to obtain a FOID card is not facially unconstitutional.
- ¶ 2 Following a jury trial in 2012, Darius Harper, the defendant, was convicted of one count of aggravated unlawful use of a weapon (AUUW) for possessing a weapon inside of a vehicle and a second count of AUUW for carrying the firearm without possessing a valid Firearm

Owner's Identification Card (FOID card). For the reasons that follow, we grant the Petition for Rehearing, vacate the AUUW conviction on the first count, and affirm the AUUW conviction on the second count.

¶ 3 Defendant was charged by information with six counts of aggravated UUW. Count I charged defendant with carrying an uncased, loaded and immediately accessible weapon in a vehicle, in violation of subsection (a)(1), (a)(3)(A) of the AUUW statute. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010). Count II charged defendant with carrying a firearm in a vehicle without possessing a valid FOID card, in violation of subsection (a)(1), (a)(3)(C) of the statute. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). The remaining counts were *nolle-prossed*, and the case proceeded to trial on the first two counts.

¶ 4 The trial evidence established that Country Club Hills police officer Walter Giergielewicz initiated a traffic stop of a vehicle driven by Lee Hinton because no front license plate was displayed at about 5:40 p.m. on June 10, 2011. Hinton was arrested after Giergielewicz learned he had an outstanding arrest warrant, lacked a valid driver's license and had no insurance for the vehicle.

¶ 5 Defendant was a passenger in the vehicle. A consensual search of the vehicle revealed a gun in defendant's backpack. A certified record of the Illinois State Police indicated that on June 10, 2011, defendant did not possess a valid FOID card.

¶ 6 The jury found defendant guilty of counts I and II. The trial court merged count II into count I and sentenced defendant to 18 months in prison on count I.

¶ 7 On appeal, defendant first contends and the State agrees that his conviction on count I for carrying an uncased, loaded and immediately accessible weapon in a vehicle in violation of

subsection (a)(3)(A) of the AUUW statute must be vacated because the Illinois Supreme Court held that portion of the statute was facially unconstitutional as a comprehensive ban on the right to keep and bear a firearm for self-defense outside the home under the second amendment. See *People v. Aguilar*, 2013 IL 112116, ¶ 21. In light of *Aguilar*, we vacate defendant's conviction on count I.

¶ 8 Next, the State contends that defendant's remaining conviction for possessing a weapon without a valid FOID card in violation of subsection (a)(3)(C) of the statute, should be affirmed because that portion of the statute remains effective as a reasonable restriction on the right to keep and bear arms. The State observes this court has distinguished the offense of possessing a firearm found unconstitutional in *Aguilar* from the act of carrying a firearm without a valid FOID card.

¶ 9 Defendant responds that the FOID requirement cannot be severed from the remainder of the statute found invalid in *Aguilar*. He argues the legislature could not have intended that the aggravated forms of unlawful use of a weapon that are included in the statute should survive absent the validity of the underlying offense.

¶ 10 Defendant acknowledges this court has rejected this severability argument in *People v. Henderson*, 2013 IL App (1st) 113294. In *Henderson*, this court held the invalidity of subsection (a)(3)(A) "is not fatal to the balance of the statute, particularly the FOID card requirement" because the remaining subsections can be executed in the absence of the invalid portion. *Henderson*, 2013 IL App (1st) 113294, ¶ 22. The *Henderson* court took note of the supreme court's statement in *Aguilar* that the right to keep and bear arms was not unlimited and was

subject to "meaningful regulation." *Henderson*, 2013 IL App (1st) 113294, ¶ 24, quoting *Aguilar*, 2013 IL 112116, ¶ 21.

¶ 11 Although defendant contends that *Henderson* was wrongly decided and should not be followed, we find no basis to adopt his position. None of the cases addressing the severability of the FOID provision of the statute has departed from the analysis in *Henderson*. See *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 22 (expressly following *Henderson*); *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 13 ("Defendant has not provided any compelling reason for us to depart from the reasoning in *Henderson* on this issue"); *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 82 (citing *Henderson* in upholding juvenile respondent's guilt of AUUW for failing to possess a FOID card, as supported by *Aguilar*); *People v. Ware*, 2014 IL App (1st) 120485, ¶ 34. See also *People v. Taylor*, 2013 IL App (1st) 110166, ¶ 34 (opinion filed one day after *Henderson* similarly declined to apply *Aguilar* to the FOID provision of the statute). Given that consistent line of precedent, we see no basis to depart from the analysis in *Henderson*.

¶ 12 Therefore, defendant's conviction under subsection (a)(3)(C) for violating the FOID provision of the statute is affirmed.

¶ 13 Defendant's remaining assertion on appeal is that subsection (a)(3)(C) of the AUUW statute is facially unconstitutional because it does not allow adults between the ages of 18 and 21 to obtain an FOID card without parental permission. He asserts that restriction thereby infringes upon the second amendment rights of those individuals to carry a firearm outside the home for the purpose of self-defense if they cannot meet the requirement of parental permission requirements.

¶ 14 Defendant states in his brief that he was 22 years old at the time of the events that led to his conviction. To have standing to contest the constitutionality of a statutory provision, the party bringing the challenge must show that he falls within the class of persons aggrieved by the alleged unconstitutionality. *Aguilar*, 2013 IL 112116, ¶ 11. *Aguilar* held, however, that the defendant in that case could raise a challenge to the facial validity of the AUUW statute by asserting those laws could not be enforced against anyone, including the defendant. *Id.* ¶¶ 11-12. For that reason, defendant in the instant case can assert the FOID card restrictions pertaining to those between the ages of 18 and 21 are facially unconstitutional.

¶ 15 As with defendant's previous contentions, this same argument was addressed and rejected in *Henderson*, which pointed to the supreme court's agreement in *Aguilar* with prior decisions restricting the access to handguns by individuals under the age of 21. *Henderson*, 2013 IL App (1st) 113294, ¶ 30, citing *Aguilar*, 2013 IL 112116, ¶¶ 26-27. *Aguilar* observed the second amendment's protections of the right to keep and bear arms are not unlimited, and the supreme court explicitly agreed with a 150-year-old history of case law prohibiting the firearms possession by those under the age of 21, holding that the "possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Aguilar*, 2013 IL 112116, ¶ 27. In line with *Aguilar* and *Henderson*, we reject defendant's assertion that the second amendment should protect the rights of those under age 21 to carry handguns in public. See also *Akins*, 2014 IL App (1st) 093418-B, ¶ 13.

¶ 16 In our initial order in this case, we affirmed the conviction on count II, for carrying a weapon in a vehicle without possessing a valid FOID card, and remanded to the trial court for sentencing because the trial court had not entered a sentence on that count. Defendant filed a

petition for rehearing, arguing that resentencing would waste judicial resources because he already served his full sentence. The State concurred. Both parties cited *People v. Grant*, 2014 IL App (1st) 100174, in support of their request. The *Grant* court said:

"Although we would otherwise remand for resentencing, this is a rare case where the State and the defendant have \*\*\* requested that we enter judgment \*\*\* instead of remanding to the trial court. The parties have indicated to this court their agreement that remanding for resentencing could not have any practical effect in this case and thus would not be an effective use of judicial resources. Resentencing at this point would not actually benefit the defendant, as he has already completed the term of probation originally imposed by the trial court after its general guilty verdict on all four counts. That is, even if we were to remand for resentencing in light of our order vacating the convictions on counts I and III, any new, lesser sentence imposed by the trial court would be moot in light of the probation already served. In this situation, we agree with the State and the defendant that remanding for resentencing is unnecessary and would not be an effective use of the time and resources of the parties or the court. Accordingly, for the reasons discussed we enter judgment and sentence on the count IV conviction only. The sentence imposed by the trial court shall stand."

¶ 17 We grant the Petition for Rehearing and adopt the reasoning of *Grant*. Defendant's conviction on count I, for carrying an uncased, loaded and immediately accessible weapon in a vehicle is vacated because that portion of the statute was found unconstitutional in *Aguilar*. Defendant's conviction on count II, for carrying a weapon in a vehicle without possessing a valid

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FOID card, is affirmed. We enter a judgment and sentence on count II only. The trial court's sentence of 18 months shall stand as the sentence on count II.

¶ 18 Affirmed in part and vacated in part.