

FIFTH DIVISION
December 18, 2015

No. 1-13-3190

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. 12 CR 9596 |
| |) | |
| EUGENE SAUNDERS, |) | Honorable |
| |) | Thomas M. Davy, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 **Held:** The Firearm Owner's Identification Card provisions of the aggravated unlawful use of a weapon statute and the Firearm Owner's Identification Card Act do not violate the proportionate penalties clause of the Illinois Constitution. The unlawful possession or use of a firearm by a felon statute is constitutional under the second amendment of the United States Constitution and the Illinois Constitution.

¶ 2 Following a jury trial, defendant Eugene Saunders was found guilty of the Class 2 offense of aggravated unlawful use of a weapon (AUUW), and unlawful possession of a weapon by a felon. He was sentenced to three and one half years in prison for the AUUW conviction. On appeal, he contends that his sentence for the Class 2 offense of AUUW violates the proportionate penalties clause of the Illinois Constitution because the "identical" conduct is punished as a Class 3 felony under the Firearm Owner's Identification (FOID) Card Act. He further argues that his conviction for unlawful possession of a weapon by a felon must be vacated because it violates the right to bear arms conferred by the second amendment of the United States Constitution and the Illinois Constitution. We affirm.

¶ 3 At trial, Officer Matt Alvarado testified that on February 19, 2012, he and his partner responded to a call of shots fired in the area of 121st Street and Lafayette in Chicago. Upon arrival at the location, Alvarado observed three individuals entering a Jeep. The Jeep was subsequently curbed for a traffic violation and the occupants, including defendant, were asked to exit the vehicle. Alvarado's partner then asked if anyone had anything illegal and defendant stated that he had a handgun. Alvarado recovered the weapon, which contained six "live" rounds, and took defendant into custody. During a subsequent conversation, defendant stated that he purchased the firearm from a man at a gas station for protection.

¶ 4 The State entered into evidence, without objection, a certified copy of a document from the Illinois State Police indicating that defendant had never been issued a FOID card. The parties also stipulated that defendant had previously been convicted of the felony offense of possession of cannabis in case number 97 CR 14232.

¶ 5 Ultimately, the jury found defendant guilty of AUUW and unlawful possession of a weapon by a felon. The trial court sentenced defendant to three and one half years in prison for the AUUW conviction.

¶ 6 Defendant was convicted of AUUW in that he carried on about his person, a handgun, at a time when he was not on his own land or in his abode, legal dwelling, or fixed place of business or on the land or in the legal dwelling of another as an invitee with that person's permission, and had not been issued a currently valid FOID card. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012). On appeal, defendant contends that in light of our supreme court's holding in *People v. Aguilar*, 2013 IL 112116, the elements constituting a violation of section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute are now "substantively identical" to the elements of a violation of the FOID Card Act, which prohibits a person from "acquir[ing] or possess[ing]" any firearm "without having in his or her possession a Firearm Owner's Identification Card." See 430 ILCS 65/2(a)(1) (West 2012). Defendant further argues that because the possession of a firearm and the lack of a valid FOID card now comprise a violation of either the AUUW statute or the FOID Card Act but are punished differently, these statutes violate the proportionate penalties clause of the Illinois Constitution. The State responds that this court rejected a similar argument in *People v. Grant*, 2014 IL App (1st) 100174-B.

¶ 7 When reviewing the merits of a constitutional challenge, this court recognizes that "statutes carry a strong presumption of constitutionality." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). In order to overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution. *Id.* A reviewing court "has a duty to construe a statute in

a manner that upholds its validity and constitutionality if it reasonably can be done." *People v. Graves*, 207 Ill. 2d 478, 482 (2003). Whether a statute is constitutional is a question of law that we review *de novo*. *Id.*

¶ 8 The proportionate penalties clause of the Illinois Constitution "requires the legislature to set penalties 'according to the seriousness of the offense.' " *Sharpe*, 216 Ill. 2d at 522, quoting Ill. Const. 1970, art. I, § 11. The proportionate penalties clause is violated when offenses with identical elements receive different sentences. *Graves*, 207 Ill. 2d at 482. In other words, applying different penalties for identical elements violates the proportionate penalties clause because when "the legislature determines that the exact same elements merit two different penalties, *** one of these penalties has not been set in accordance with the seriousness of the offense." *Sharpe*, 216 Ill. 2d at 522.

¶ 9 A defendant violates section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute when he carries on about his person, a handgun, at a time when he was not on his own land or in his abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another as an invitee with that person's permission, and has not been issued a currently valid FOID card. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012). Pursuant to the FOID Card Act, no one "may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provision of this Act." 430 ILCS 65/2(a)(1) (West 2012).

¶ 10 We find *People v. Grant*, 2014 IL App (1st) 100174-B, is controlling. In that case, the defendant argued that the proportionate penalties clause was violated because the FOID-related

sections of the AUUW statute were identical to those supporting a violation of the FOID Card Act, *i.e.*, a violation of either required proof of the possession of a firearm and the lack of a currently valid FOID Card, but each statute imposed a different penalty for that conduct.

¶ 11 On appeal, this court characterized the defendant's argument as "an overly simplistic view of the elements of each offense." *Id.* ¶ 43. Based upon our review of the statutory language, we determined that the statutes did not contain identical "possession of a firearm" elements. *Id.* The FOID Card Act is violated when a person acquires or possesses a firearm (see 430 ILCS 65/2(a)(1) (West 2012)), but the statutory language does not explain "the manner of acquisition or possession that is required for an individual to be subject to liability." *Id.* ¶ 43. Therefore, the statute's applicability was not limited to those individuals carrying a firearm on the person as opposed to other possible forms of "possessing" a firearm. *Id.* In other words, the "disjunctive phrase 'acquire or possess' " indicated that the requirement to carry a FOID card applies whenever a person acquires a firearm, such as through purchase from a vendor, even if he has not taken physical possession of the weapon. *Id.*, quoting 430 ILCS 65/2(a)(1) (West 2012).

¶ 12 The AUUW statute, on the other hand, requires "more specific factual findings" as to the manner in which a person possesses a firearm. *Id.* ¶ 44. Specifically, a violation of section 24-1.6(a)(1), (a)(3)(C) occurs when a person, "who has not been issued a valid FOID card 'carries' a firearm 'on or about his or her person or in any vehicle or concealed on or about his or her person,' " *i.e.*, the State must establish that the firearm was carried or concealed on the person of the defendant or in a vehicle. *Id.*, quoting 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2008). A FOID Card Act violation, however, does not require that the firearm at issue was ever carried by

the defendant or placed in a specific location. *Id.* ¶ 44. Additionally, section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute does not apply to an individual who is on his own land or in his abode or fixed place of business, but there is no such limitation under the FOID Card Act. *Id.*, citing 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2008). Finally, the statutes differ as to whether an individual must have "physical possession" of his FOID Card. *Id.* ¶ 46, fnt. 3 Although the FOID card act is violated whenever a person possesses a firearm " 'without having [a FOID card] in his or her possession' " (*Id.*, quoting 430 ILCS 65/2(a)(1) (West 2012)), a violation of the FOID-related sections of the AUUW statute occurs when " 'the person possessing the firearm has not been issued a currently valid FOID card' " (*Id.*, quoting 720 ILCS 5/24-1.6(a)(3)(C) (West 2008)).

¶ 13 Ultimately, we concluded that because the AUUW statute required the State to prove additional elements regarding the manner and location of firearm possession that were not required to establish a violation of the FOID Card Act, the FOID-related sections of the AUUW statute and the FOID Card Act did not require "identical elements" to establish a defendant's criminal liability. *Id.* ¶ 46. Therefore, these statutes do not violate the proportionate penalties clause of the Illinois Constitution. *Id.*

¶ 14 Defendant acknowledges the holding of *Grant*, but argues *Grant* is flawed because it "dramatically understates" *Aguilar's* impact on the AUUW statute. However, our supreme court, in an exercise of its supervisory authority, directed this court to vacate its judgment (see *People v. Grant*, 2013 IL App (1st) 100174-U), and to reconsider the matter in light of *Aguilar* in order determine if another outcome was warranted. See *People v. Grant*, No. 116216 (Jan. 29, 2014).

Thus, our holding in *Grant* specifically considered the implications of *Aguilar*. See *Grant*, 2014 IL App (1st) 100174-B, ¶ 18 (stating that this court had reconsidered the defendant's appeal in light of *Aguilar* and the parties' supplemental briefing). We recognize that the issue of whether the FOID-related provisions of the AUUW statute and the FOID Card Act do violate the proportionate penalties clause is pending before our supreme court. See *People v Williams*, No. 117470.¹ However, until our supreme court instructs us otherwise, we find no reason to depart from our holding in *Grant*.

¶ 15 Ultimately, as in *Grant*, we reject defendant's argument that the FOID-related sections of the AUUW statute and the FOID Card Act contain identical "possession of a firearm" elements. See *Id.* ¶ 43. Therefore, defendant's proportionate penalties challenge must fail.

¶ 16 Defendant next contends that the unlawful use or possession of a firearm by a felon statute (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)), is unconstitutional because it "comprehensively bans all convicted felons from possessing firearms without regard to the nature of their criminal record or the time that has passed since their most recent convictions." Defendant argues that although he has never been convicted of a violent felony and has not been convicted of any crime since 1997, he is "forever barred" from legally possessing a firearm for self-defense.

¶ 17 Although defendant did not raise this issue before the trial court, a constitutional challenge to a criminal statute can be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61 (2003). As stated above, statutes carry a strong presumption of constitutionality (*Sharpe*, 216 Ill. 2d at 487),

¹ Oral argument was held on September 15, 2015.

and in order to overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution (*People v. Rush*, 2014 IL App (1st) 123462, ¶ 10). This court reviews the constitutionality of a statute *de novo*. *Graves*, 207 Ill. 2d at 482.

¶ 18 In *District of Columbia v. Heller*, 554 U.S. 570, 592, 599-600, 635 (2008), the Supreme Court held that the second amendment guarantees an individual the right to keep and bear arms, that the central component of that right is the right of armed self-defense in one's home, and that a ban on the possession of a gun in the home violates the second amendment. The Court specifically stated that this conclusion did not cast doubt on longstanding prohibitions regarding the possession of firearms by felons because, *inter alia*, the right to bear arms was not the right to keep and carry any weapon whatsoever in any manner whatsoever. *Heller*, 554 U.S. at 626; see also *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 786 (2010).

¶ 19 Similarly, in *People v. Aguilar*, 2013 IL 112116, ¶¶ 26-27, our supreme court relied on the principles articulated in *Heller* to indicate its approval of some limitations on firearm possession including, bans on firearm possession by felons, the mentally ill and minors. See also *People v. Garvin*, 2013 IL App (1st) 113095, ¶¶ 28-33 (rejecting the defendant's constitutional challenges to the UUWF statute); *People v. Campbell*, 2014 IL App (1st) 112926, ¶¶ 59-60 (noting that *Heller* and *McDonald* state that the regulation of the use and possession of firearms is not categorically prohibited and that laws may prohibit felons from possessing firearms and holding that felon-based firearm bans, like the UUWF statute, do not impose a burden on conduct falling within the scope of the second amendment). Accordingly, we adhere to the

reasoning stated in these decisions, and reject defendant's argument that the UUWF statute violates the second amendment of the United States Constitution or the Illinois Constitution.

¶ 20 We decline defendant's invitation to depart from this well-reasoned precedent in favor of federal court cases discussing the intent behind the enactment of 18 U.S.C. § 922(g)(1), the federal analogue to the Illinois UUWF statute. We have also considered, and rejected, defendant's argument that the *Garvin* court erroneously relied upon *dicta* from *Heller*. See *Heller*, 554 U.S. at 626 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"). Our supreme court has held that judicial *dicta* should carry dispositive weight in inferior courts. *People v. Williams*, 204 Ill. 2d 191, 206 (2003). We also note, and defendant admits, that in *McDonald* the Supreme Court reiterated its approval of its prior statements in *Heller*. See *McDonald*, 561 U.S. at 786 ("[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures" prohibiting the possession of firearms by felons).

¶ 21 We also reject defendant's contention that the UUWF statute is unconstitutional as applied to him because his prior felonies were nonviolent. The statute does not provide any exceptions for persons convicted of nonviolent felonies (see 720 ILCS 5/24-1.1(a) (West 2012)), and no such exception was recognized by the Supreme Court in *Heller* and *McDonald* (see *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 32). Therefore, defendant's constitutional challenge to the UUWF statute must fail.

¶ 22 For the reasons above, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.