SECOND DIVISION
May 17, 2016

No. 1-12-3568

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 3568
	)	
JOE BANKS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concur in the judgment.

O R D E R

¶ 1 *HELD*: Judgment on defendant's aggravated unlawful use of a weapon conviction pursuant to 720 ILCS 5/24-1.6(a)(1)/(3)(A) reversed in accordance with *People v. Aguilar*, 2013 IL 112116; conviction reinstated where general verdict was entered finding defendant guilty under separate count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(3)(C)); cause remanded to the trial court for resentencing under the applicable provision of 720 ILCS 5/24-1.6(d).

¶ 2 Defendant Joe Banks was charged with multiple offenses, including two counts of aggravated unlawful use of a weapon (AUUW), one under subsection (a)(1), (a)(3)(A) and one

under subsection (a)(1), (a)(3)(C) of section 24-1.6 of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1)/(3)(A), (a)(1)/(3)(C) (West 2010))[1]. A jury found defendant guilty of AUUW generally, and the trial court merged the two AUUW counts, sentencing defendant to two years' imprisonment, with 445 days of credit for time actually served.[2] On appeal, defendant argues that his conviction is unconstitutional under *People v. Aguilar*, 2013 IL 112116. In the alternative, he contends that the State failed to prove he was in possession of a "loaded" weapon, as required by subsection (3)(A), and that his counsel was ineffective by failing to file a motion to suppress.

¶ 3 This court initially ruled on defendant's appeal in an order dated September 30, 2014, where we reversed defendant's AUUW conviction under subsection (3)(A), reinstated his AUUW conviction under subsection (3)(C), and remanded the cause to the trial court for resentencing. *People v. Banks*, 2014 IL App (1st) 123568-U. We subsequently vacated that judgment pursuant to a January 20, 2016 supervisory order entered by the Illinois Supreme Court directing us to reconsider the merits of defendant's appeal in light of the court's decisions in *People v. Mosley*, 2015 IL 115872 and *In re Jordan G.*, 2015 IL 116834. See *People v. Banks*, 2016 IL 118588. The supreme court further directed us to address the merits of defendant's challenge to subsection (d)(2) of the AUUW statute (720 ILCS 5/24-1.6(d)(2) (West 2010)), an issue we did not initially reach because we found it was moot.[3] Upon reconsideration, we again reverse defendant's AUUW conviction under subsection (3)(A) and reinstate his AUUW

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[1] For simplicity, we will refer to these sections of the AUUW statute as simply "subsection (a)(1)" and "subsection (a)(3)" for the remainder of the order.

[2] At the time of his appeal, defendant had completed his sentence and supervised release.

[3] We note that neither party filed a supplementary brief in this appeal subsequent to our supreme court's supervisory order.

conviction under subsection (3)(C). We further vacate his sentence under subsection (d)(2), and remand the cause to the trial court for resentencing.

¶ 4 BACKGROUND

¶ 5 As a result of an incident that took place in July 2011, defendant was charged with aggravated assault (720 ILCS 5/12-2(C)(6) (West 2010)), unlawful use of a weapon (720 ILCS 5/24-1(a)(10) (West 2010)), and two counts of AUUW, one under subsection (3)(A) and one under subsection (3)(C).

¶ 6 We limit our discussion of the trial testimony to the evidence relevant to defendant's appeal. Based on that evidence, at around 8:00 p.m. on July 25, 2011, two groups of Chicago police officers were on patrol near the intersection of Kedzie Avenue and Franklin Boulevard. Chicago Police Captain Roger Bay and Officer Nenad Dragojlovich testified for the State that they were on bike patrol with two other officers, riding north on Kedzie Avenue and approaching Franklin Boulevard. Two other officers, Richard Caceres and Hector Santana, were in a vehicle patrolling the area which Officer Caceres described as a "public violent zone," where "numerous incidents had been reported for violent crime."

¶ 7 According to Officer Caceres, he observed defendant walking alone, wearing a black T-shirt and tan shorts. Officer Caceres left his vehicle to conduct a field interview, but after defendant made eye contact with Officer Caceres, he immediately fled northbound on Kedzie Avenue. Officer Caceres got back into the police car and activated the emergency lights and sirens, while Officer Santana exited the car and began chasing defendant on foot. The officers on bike patrol also began pursuing defendant, with Captain Bay in the lead in front of the other bike patrol officers.

¶ 8 Captain Bay testified that during their pursuit, he yelled "police," "stop," and "you can't

outrun the bikes." Officer Dragojlovich confirmed that, on "[m]ultiple" occasions during the chase, defendant was "ordered to stop," but he disregarded those commands.

¶ 9 While defendant was running, Captain Bay saw defendant reach for an unidentified object in his waistband. Officer Dragojlovich similarly stated that defendant was holding the front right side of his waistband as he ran from the officers. Eventually, when Captain Bay was approximately 25 to 30 feet away from defendant, he observed defendant pull his right hand up from his waist and point a handgun at Captain Bay. Captain Bay testified that he yelled at defendant to "drop the gun," but rather than complying, defendant continued to run and then pointed the gun a second time at Captain Bay.

¶ 10 Officers Dragojlovich and Caceres also testified that they saw defendant pointing a black handgun with his right hand. Officer Caceres stated that defendant had "turned back with his right hand and pointed it towards [C]aptain [Bay]."

¶ 11 Both Captain Bay and Officer Dragojlovich testified that at this point they believed they might get shot. Captain Bay then "discharged [his] firearm three times," striking defendant twice in the back.

¶ 12 According to Officer Dragojlovich, as defendant fell to the ground, the gun dropped from his hand, struck a plate on the ground, and "explode[d] into pieces." Officer Caceres similarly observed that the firearm fell to the ground and hit a large metal construction plate, causing the bottom magazine piece to break and the rounds to come out of it. Upon approaching defendant, Officer Bay saw on the ground next to defendant the black semiautomatic handgun that defendant previously had been holding.

¶ 13 At the close of its case in chief, the State entered into evidence the Illinois State Police certification showing that defendant did not have a valid FOID card.

¶ 14 After the State rested, Eunice Hunt, who had known defendant since he was a child, testified as a witness for the defense. Hunt stated that at the time of the incident she saw defendant riding a bike and then observed another individual race past defendant. According to Hunt, she then saw officers behind defendant and heard defendant yell out. As she was running to the corner to see what happened, she saw defendant fall off of his bike and heard him say "why you shoot me?" When she reached the corner, she asked the officers why they shot defendant. Hunt testified that she did not see a gun on the ground near where defendant was shot. The next day she went to the Chicago Police Department to make a statement.

¶ 15 Defendant also testified in his defense. He stated that at the time of the incident he was riding his bike and listening to his iPod. Defendant recalled seeing a black male run past him. He then felt a sharp pain in his left buttock and upper back, where he was shot, and fell off of his bike. He testified that he never heard anyone shout, "stop police," nor did he see an officer before he fell. Defendant denied having a gun on him or pointing a gun at the officers.

¶ 16 Defendant stated that while he was being treated at the hospital he met with some detectives and an Assistant State's Attorney (ASA), but he denied that anyone read him his *Miranda* rights. He further denied ever telling them that (1) he ran from officers despite being told to stop; (2) he had a .380 caliber handgun in his pocket which he had purchased for protection; or (3) he did not know how many bullets were in the handgun.

¶ 17 In rebuttal, Detective Carlos Cortez testified for the State. On July 25, 2011, Detective Cortez, along with his partner and ASA Hanus, visited defendant in the hospital. The ASA read defendant his *Miranda* rights, and defendant confirmed that he understood his rights and proceeded to speak with them. In explaining the events leading up to the shooting, defendant told them that he had exited the bus at the train station on Kedzie Avenue and Lake Street and was

walking northbound on Kedzie Avenue when the officers approached him. Defendant admitted that he fled from the officers "because *** he believed that he had an outstanding warrant from DeKalb County." Detective Cortez further testified that defendant told them that he had a .380 caliber handgun on him, which he purchased in Indiana for protection. According to Detective Cortez, defendant never stated that he had been riding a bicycle or that he saw another individual running down the street.

¶ 18 After the close of evidence, the court instructed the jury. With respect to the AUUW counts, the court gave the jury a combined AUUW instruction, which included all of the elements of both subsections (3)(A) and (3)(C). Specifically, the instruction stated that to find defendant guilty of AUUW, the State was required to prove that defendant possessed a firearm that was uncased, loaded, and immediately accessible (as required by subsection (3)(A)), *and* that he possessed the firearm without having a currently valid Firearm Owner's Identification (FOID) card (as required by subsection (3)(C)). On September 24, 2012, the jury found defendant not guilty on the aggravated assault charge, but returned a general verdict of guilty on the AUUW charge. The trial court merged the two AUUW counts, sentencing defendant to two years' imprisonment with 445 days of credit for time actually served. The mittimus reflects that defendant was convicted and sentenced pursuant to subsection (3)(A).

¶ 19 ANALYSIS

¶ 20 A. AUUW Charges under Subsections (3)(A) and (3)(C)

¶ 21 On appeal, Banks first contends that his conviction for AUUW should be reversed as unconstitutional pursuant to *People v. Aguilar*, 2013 IL 112116. In the alternative, defendant maintains that, even if not unconstitutional, his AUUW conviction must be reversed because the State failed to prove that he possessed a "loaded" firearm as required by subsection (3)(A). In

response, the State concedes that defendant's conviction under subsection (3)(A) must be reversed but contends that the AUUW conviction pursuant to subsection (3)(C) nevertheless can be affirmed. Further, the State contends that because the AUUW conviction under subsection (3)(C) is valid, defendant's alternative argument that the State failed to prove that the gun was "loaded"—an element only required under subsection (3)(A)—is moot. In our September 30, 2014 order, this court agreed with the State. Having now reconsidered these issues in light of our supreme court's directive, we reach the same conclusion.

¶ 22 Section 24-1.6(a) of the Criminal Code of 1961 provides:

> "(a) person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> > (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]
> >
> > ***
> >
> > (3) One of the following factors is present:
> >
> > > (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense; or
> >
> > ***

(C) the person possessing the firearm has not been issued a currently valid [FOID] [c]ard[.]" 720 ILCS 5/24-1.6(a)(1)/(3)(A), (3)(C) (West 2010).

¶ 23 As the State concedes, defendant's conviction under subsection (3)(A) must be reversed in light of *Aguilar*. There, our supreme court adopted the reasoning of the U.S. Court of Appeals for the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and held that subsection (3)(A) violated the second amendment of the U.S. Constitution because it prohibited the "right to possess and use a firearm for self-defense outside of the home." *Aguilar*, 2013 IL 112116, ¶ 21. The *Aguilar* ruling was subsequently clarified in *People v. Burns*, 2015 IL 117387, in which the supreme court declared that subsection (3)(A) was "facially unconstitutional, without limitation," and "not enforceable against anyone." *Burns*, 2015 IL 117387, ¶¶ 25, 32. When a statute is held facially unconstitutional, it is void *ab initio*, as if the law never existed. See *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Therefore, defendant's conviction under subsection (3)(A) must be reversed.

¶ 24 Although subsection (3)(A) does not support defendant's conviction, defendant's AUUW conviction pursuant to subsection (3)(C) can still be upheld if that subsection remains valid post-*Aguilar* and if the jury's verdict supports a conviction under that subsection. As explained below, we answer both questions in the affirmative.

¶ 25 This court has previously concluded that *Aguilar* did not invalidate the entire AUUW statute and that convictions under subsection (3)(C) remain valid post-*Aguilar*. See *People v. Henderson*, 2013 IL App (1st) 113294; *People v. Taylor*, 2013 IL App (1st) 110166; *People v. Atkins*, 2014 IL App (1st) 093418-B. The validity of subsection (3)(C) has also been addressed by our supreme court. In *Mosley*, the court held that section 24-1.6(a)(1), (a)(3)(C) was severable

from the portion of the statute found unconstitutional in *Aguilar*. *Mosley*, 2015 IL 115872, ¶ 31. Although its holding was limited to the application of subsection (3)(C) to individuals under the age of 21, the court noted that the provision's requirements were "consistent with this court's recognition that the second amendment right to possess firearms is still subject to meaningful regulation." (Internal quotation marks omitted.) *Id.* ¶ 36. This reasoning was echoed in the simultaneously-issued opinion *In re Jordan G.*, 2015 IL 116834, where the supreme court found that subsection (3)(C) "stand[s] independently" from the provision invalidated by *Aguilar*, and rejected the defendant's second amendment challenge to the subsection. *In re Jordan G.*, 2015 IL 116834, ¶¶ 19, 25. We are persuaded by the reasoning in those decisions and see no reason why this case warrants a different result. Accordingly, we reject defendant's arguments to the contrary.

¶ 26 In addition, the jury's general verdict in this case supports a conviction under subsection (3)(C). According to defendant, we should not impose a conviction under that provision because his conviction under subsection (3)(A) was the only conviction of record. Because the State opted for a single jury instruction on the AUUW charge incorporating all of the required elements of proof for both subsections (3)(A) and (3)(C), defendant maintains that it would be unfair to enter a conviction under subsection (3)(C). We disagree.

¶ 27 Defendant was charged with two counts of AUUW, one under subsection (3)(A) and one under subsection (3)(C), and there is no indication that the State ever abandoned the charge pursuant to subsection (3)(C). Under subsection (3)(A), the State was required to prove that defendant possessed a loaded, uncased, and immediately accessible firearm (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010)), while under subsection (3)(C), the State was required to prove that defendant possessed a firearm while not having a currently valid FOID card (720 ILCS 5/24-

1.6(a)(1)/(3)(C) (West 2010)). The court's combined AUUW instruction included all of the elements under both subsections, and the jury returned a general verdict of guilty on the AUUW charge. Thus, the guilty verdict demonstrates that the jury concluded the State met its burden of proof on all of the elements of both subsection (3)(A) and subsection (3)(C).

¶ 28 "[F]or well over a century," Illinois has recognized the "one good count rule," whereby " 'if one count in an indictment [is] good, although all the others are defective, it will be sufficient to support a general verdict of guilty.' " *People v. Smith*, 233 Ill. 2d 1, 19 (2009) (quoting *Curtis v. People*, 1 Ill. 256, 260 (1828)). It is similarly well established that "where an indictment contains several counts arising out of a single transaction and a general verdict is returned, the effect is that the defendant is guilty as charged in each count to which the proof is applicable." *People v. Holmes*, 241 Ill. 2d 509, 519 (2011). Here, based on the instruction to the jury, the jury's guilty verdict on the AUUW charge necessarily included a finding that defendant possessed the firearm without having a currently valid FOID card. Consequently, we agree with the State that, notwithstanding the invalidity of subsection (3)(A), the jury's verdict supports a conviction under subsection (3)(C), and defendant's conviction should be reinstated under that subsection. See *Holmes*, 241 Ill. 2d at 519*;* see also *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982) (holding, where appeal was properly before the court with regard to defendant's sentenced convictions, appellate court was authorized, upon reversing those convictions, to remand for resentencing on remaining convictions).

¶ 29 Defendant cites *People v. Barnett*, 2011 IL App (3d) 090721 for the proposition that the State cannot take an "all-or-nothing approach" by pursuing one offense and then asking the court to enter a judgment on the theory it disavowed. However, that case is not applicable. In *Barnett*, the defendant was charged with armed robbery, and both parties opposed providing an

instruction to the jury for the lesser included offense of robbery. *Barnett*, 2011 IL App (3d) 090721, ¶¶ 10-11. On appeal, the court considered reducing the conviction to robbery, but concluded that "[b]ased on these circumstances, we elect not to exercise our discretion" and reduce the conviction to the lesser offense. *Id.* ¶¶ 40-42. The holding in *Barnett* is limited to the facts of that case and does not require a different result here.

¶ 30 Defendant next contends that his AUUW conviction should be reversed because he was sentenced under subsection (d)(2) of the AUUW statute (720 ILCS 5/24-1.6(d)(2) (West 2010)), a provision defendant contends is also invalid under *Aguilar*. Under the AUUW sentencing provisions in subsection (d)(2), if the underlying offense involves the factors in both subsections (3)(A) and (3)(C), the offense is a Class 4 felony "for which the person shall be sentenced to a term of imprisonment of not less than one year and not more than 3 years." According to defendant, this provision is also invalid post-*Aguilar* because it is "inextricably bound up" with subsection (3)(A).

¶ 31 This court initially rejected defendant's argument. Addressing subsection (d)(2) as a sentencing provision (as opposed to a separate offense), and noting that defendant already completed his sentence and supervised release, we found that "defendant's arguments related to his now-completed sentence are moot." *Banks*, 2014 IL App (1st) 123568-U, ¶¶ 28-29. However, "a sentence that violates the constitution is void from its inception" and "may be attacked at any time and in any court." *People v. Davis*, 2014 IL 115595, ¶ 26. Having been directed by our supreme court to address defendant's challenge to subsection (d)(2) on the merits, we agree with defendant that this provision is invalid under *Aguilar*.

¶ 32 At all times relevant to this case, section 24-1.6(d)(2) read as follows:

> "(2) Except as otherwise provided in paragraphs (3) and (4) of this subsection (d), a first offense of aggravated unlawful use of a weapon committed with a firearm by a person 18 years of age or older where the factors listed in both items (A) and (C) of paragraph (3) of subsection (a) are present is a Class 4 felony, for which the person shall be sentenced to a term of imprisonment of not less than one year and not more than 3 years." 720 ILCS 5/24-1.6(d)(2) (West 2012).[4]

The constitutionality of this provision was addressed in *Mosley*, 2015 IL 115872. There, the supreme court recognized that "the plain language of the sentencing provision in subsection (d)(2) directly references the AUUW offense stated in subsection (a)(3)(A)." *Id.* ¶ 54. The court then reasoned that "because subsection (a)(3)(A) has been found unconstitutional, the requirements for sentencing under subsection (d)(2) cannot be met, as a statutory section cannot be 'present' if it is void *ab initio*." *Id.* ¶ 55. Therefore, because subsection (d)(2) is "based upon an unconstitutional and unenforceable statutory section," it is invalid. *Id.* Further, the court found that subsection (d)(2) is severable from the remainder of the AUUW statute, which means that the remainder of the AUUW statute remains in force despite the invalidity of subsection (d)(2). *Id.* ¶ 57.

¶ 33 As noted by the State, the record is unclear as to whether the trial court sentenced defendant pursuant to subsection (d)(1) or (d)(2); the judge never explicitly referred to any particular sentencing provision during the sentencing hearing, and the mittimus reflects only that defendant was sentenced to 2 years' imprisonment for a class 4 felony, which could apply to either provision. However, subsection (d)(2) states that an individual who commits "a first offense of [AUUW] *** where the factors listed in both items (A) and (C) of paragraph (3) of

[4] In *Mosley*, our supreme court noted that this version of the AUUW statute was replaced by Pub. Act 98-63 § 155 (eff. July 9, 2013), but here just as in that case, "there is no change in the language of subsection (d)(2) which would affect our decision under the facts of this case." *Mosley*, 2015 IL 115872, ¶ 53 n.8.

subsection (a) are present is a Class 4 felony, for which the person *shall* be sentenced to a term of imprisonment of not less than one year and not more than 3 years." (Emphasis added.) 720 ILCS 5/24-1.6(d)(2) (West 2012). Under the rules of statutory construction, the word "shall" is generally "regarded as indicative of a mandatory intent." *People v. Singleton*, 103 Ill. 2d 339, 341 (1984). Given that defendant, at the time, received a general verdict of guilty on the AUUW charge pursuant to the jury instruction which included all of the elements of *both* subsections (3)(A) and (3)(C), this court presumes that the trial court followed the plain language of the statute and sentenced defendant pursuant to subsection (d)(2). See *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009) ("[A] trial court is presumed to know the law and apply it properly.").

¶ 34 Regardless of which provision defendant was sentenced under initially, he may not be sentenced on remand pursuant to subsection (d)(2) because that provision is invalid. Moreover, even if the provision were still valid, it would no longer apply to defendant where he now stands convicted only of subsection (3)(C). Accordingly, and because subsection (d)(2) is severable from the remainder of the AUUW statute, defendant may properly be sentenced under the applicable provision of section (d) of the statute.

¶ 35 We also note that because *Mosley* clarifies that subsection (d)(2) is a sentencing provision and does not define a separate form of AUUW (*Mosley*, 2015 IL 115872, ¶ 52), we will disregard the parties' alternative arguments under the premise that subsection (d)(2) creates its own offense.

¶ 36 In sum, because *Aguilar* did not invalidate subsection (3)(C) and the jury's general verdict supports defendant's conviction under that subsection, we agree with the State that defendant's AUUW conviction should be reinstated under subsection (3)(C). We do not reach defendant's alternative argument that the State failed to prove that the recovered handgun was

"loaded," as that is a required element of subsection (3)(A) but not of subsection (3)(C). Subsection (d)(2) having been found invalid, defendant is to be resentenced under the applicable provision of section (d) of the statute.

¶ 37 B. Ineffective Assistance of Counsel Claim

¶ 38 Defendant additionally argues that he is entitled to a new trial because his counsel was ineffective for failing to move to suppress evidence of the recovered handgun and his confession in the hospital. According to defendant, this evidence was obtained as a result of an unreasonable seizure, *i.e.*, Officer Bay's use of force in shooting defendant when, according to defendant, he did not pose a threat to the officers' safety.[5] Specifically, defendant relies on the jury's acquittal on the aggravated assault count, arguing that the jury necessarily rejected the officers' testimony that defendant had pointed a gun at Captain Bay. As a result, Officer Bay acted unreasonably in shooting him, and a motion to suppress was reasonably likely to have been granted. Our analysis of this issue is unaffected by the supreme court's directive to reconsider defendant's appeal, and we disagree with defendant's argument.

¶ 39 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Namely, defendant must establish (1) "that counsel's performance was deficient;" and (2) that this "deficient performance prejudiced the defense." *Id.* at 687. In performing this inquiry, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Indeed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In other words, "the defendant must overcome the presumption that, under the

[5] For purposes of defendant's appeal, we accept his proposition that the unreasonable use of force in seizing a suspect, by itself, can be the basis for a suppression motion because the State has not disputed that position here. We note, however, that this position may be unsound. See *United States v. Collins*, 714 F.3d 540 (7th Cir. 2013) (discussing case law holding that use of excessive force collateral to an otherwise lawful search or seizure is not a basis for excluding evidence).

circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Id.* Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 690.

¶ 40 "[T]he decision whether to file a motion to suppress is generally 'a matter of trial strategy, which is entitled to great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (quoting *People v. White*, 221 Ill. 2d 1, 21 (2006)). Even if counsel's performance was deficient, to establish that counsel's decision to not file such a motion was prejudicial, " 'defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.' " *Id.* at 128-29 (quoting *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)).

¶ 41 In this case, we do not find that counsel's performance was deficient. While the State bore the burden of proving defendant guilty of aggravated assault beyond a reasonable doubt, on a motion to suppress evidence, the "defendant bears the burden of proof" and "must make a *prima facie* case that the evidence was obtained by an illegal *** seizure." *People v. Gipson*, 203 Ill. 2d 298, 306 (2003). An officer's use of deadly force in seizing a suspect does not violate the fourth amendment if "the suspect threaten[ed] the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

¶ 42 Here, had defendant's counsel filed a motion to suppress, Captain Bay and Officers Dragojlovich and Caceres would have provided testimony supporting the reasonableness of the use of force in this case. Based on their testimony at trial, those officers would have stated that

they observed defendant pointing the handgun, and both Captain Bay and Officer Dragojlovich would have further testified that they believed they might be shot. In light of this evidence, defendant's counsel was not objectively unreasonable in declining to file a motion to suppress.

¶ 43 Contrary to defendant's position, simply because the jury did not find defendant guilty on the aggravated assault charge does not mean that the officers' testimony at a suppression hearing would not have established that defendant's conduct towards them was threatening. In any event, we cannot rely on the hindsight provided by the jury's verdict to second guess counsel's strategic decision. *People v. Manning*, 241 Ill. 2d 319, 334 (2011) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (quoting *Strickland*, 466 U.S. at 689)). Defendant, therefore, has not overcome the presumption that his counsel's decision against filing a motion to suppress was reasonable trial strategy. Nor can he show that any failure to file such a motion was prejudicial because, based on the officers' testimony, we disagree with defendant that such a motion had a reasonable probability of success.

¶ 44 *Gentry v. Sevier*, 597 F.3d 838 (7th Cir. 2010), *People v. Little*, 322 Ill. App. 3d 607 (2001), and *People v. Steels*, 277 Ill. App. 3d 123 (1995), cited by defendant, are distinguishable. In those ineffective assistance of counsel cases, even on the State's version of events, the defendant had a reasonable argument that his fourth amendment rights were violated and that suppression was appropriate. In *Gentry*, for example, the court found that on the "undisputed record" the defendant "did not give the officers a reason to suspect that he had been engaged in any wrongdoing," demonstrating that the *Terry* stop was unlawful. *Gentry*, 597 F.3d at 846. Similarly, in *Little*, the court emphasized that the State "seemingly concede[d] that the arresting

officers lacked probable cause to search and arrest defendant" in concluding that "a motion to quash and suppress would have had a reasonable probability of success at trial." *Little*, 322 Ill. App. 3d at 613. Here, in contrast, the State could have presented testimony from several officers attesting to the reasonableness of Captain Bay's actions. For the above reasons, defendant has failed to establish that his counsel was ineffective.

¶ 45 In conclusion, we reverse defendant's AUUW conviction under subsection (3)(A), reinstate his AUUW conviction under subsection (3)(C), vacate his sentence under subsection (d)(2), and remand to the circuit court for resentencing. We acknowledge that defendant has completed his sentence and that the trial court cannot impose a greater sentence on remand. 730 ILCS 5/5-5-4 (West 2016). It is nevertheless procedurally necessary for a sentence to be imposed on the AUUW conviction under subsection (3)(C) so that judgment can be entered. 730 ILCS 5/5-1-12 (West 2016) (" 'Judgment' means an adjudication by the court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court."); *People v. Becker*, 414 Ill. 291, 295 (1953) ("The final judgment in a criminal case is the sentence.").

¶ 46 Reversed and remanded for resentencing, with instructions.