SECOND DIVISION
September 30, 2014

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 LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *HELD*: Judgment on defendant's aggravated unlawful use of a weapon conviction under 720 ILCS 5/24-1.6(a)(1)/(3)(A) reversed under *People v. Aguilar*, 2013 IL 112116. 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)) conviction reinstated and cause remanded to the trial court for resentencing.

¶ 2 After a jury trial, defendant Joe Banks (defendant) was convicted of aggravated unlawful use of a weapon (AUUW) and was sentenced to two years' imprisonment, with 445 days of

credit for time actually served.[1] On appeal, Banks maintains that his conviction is unconstitutional under *People v. Aguilar*, 2013 IL 112116. In the alternative, Banks contends that the State failed to prove that he was in possession of a "loaded" weapon, as required by section 24-1.6(a)(1)/(3)(A) of the Criminal Code (Code) (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010)) (section (3)(A)). Finally, Bank argues that his counsel was ineffective by failing to file a motion to suppress. As explained below, we reverse defendant's AUUW conviction under section (3)(A), reinstate his AUUW conviction under 720 ILCS 5/24-1.6(a)(1)/(3)(C) (West 2010) (section (3)(C)), and remand the cause to the trial court for resentencing.

¶ 3 BACKGROUND

¶ 4 As a result of an incident on July 25, 2011, involving defendant and several Chicago Police Officers, 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 under both sections (3)(A) and (3)(C).

¶ 5 We limit our discussion of the trial testimony to the evidence relevant to defendant's appeal. Based on the evidence presented during the trial, 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 the intersection of Kedzie Avenue and Franklin Boulevard. A second group of officers, 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."

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

¶ 6 According to Officer Caceres, he observed defendant walking alone, wearing a black T-shirt and tan shorts. Office 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.

¶ 7 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.

¶ 8 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. According to Captain Bay, 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.

¶ 9 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]."

¶ 10 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.

¶ 11 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.

¶ 12 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.

¶ 13 Defendant also testified in his defense. He stated that at the time of the incident he was riding his bike and listening to his I-pod. 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.

¶ 14 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.

¶ 15 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. According to Detective Cortez, 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.

¶ 16 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 section (3)(A) and (3)(B). 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 section (3)(A)), *and* that he possessed the firearm without having a currently valid Firearm Owner's Identification (FOID) card (as required by section (3)(C)). The jury found defendant not guilty on the aggravated assault charge, but it 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 on Count 3 (the section (3)(A) count). Defendant appeals, and we have jurisdiction pursuant to Illinois Supreme Court Rules 603 and 606. Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 3013).

¶ 17 ANALYSIS

¶ 18 A. AUUW Charges under Sections (3)(A) and (3)(C)

¶ 19 On appeal, Banks first contends that his conviction for AUUW should be reversed as unconstitutional under *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 section (3)(A). In response, the State concedes that defendant's conviction under section (3)(A) must be reversed but contends that the AUUW conviction nevertheless can be affirmed under section (3)(C), the additional AUUW count in the indictment. Further, the State contends, because the AUUW conviction under section (3)(C) is valid, defendant's alternative argument that the State failed to prove that the gun was "loaded"—an element only required under section (3)(A)—is moot. We agree with the State.

¶ 20 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).

¶ 21 As the State concedes, defendant's conviction under section (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 section (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.

¶ 22 Nevertheless, although section (3)(A) does not support defendant's conviction, defendant was also charged with AUUW under section (3)(C). Thus, defendant's conviction of AUUW can still be upheld if section (3)(C) remains valid post-*Aguilar* and if the jury's verdict supports a conviction under section. As explained below, we answer both questions in the affirmative.

¶ 23 With respect to the validity of section (3)(C), this court has already addressed that issue multiple times, concluding that *Aguilar* did not invalidate the entire AUUW statute and that convictions under section (3)(C) remained 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. 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.

¶ 24 We also conclude that the jury's general verdict in this case supports a conviction under section (3)(C). According to defendant, we should not impose a conviction under that provision because the section (3)(A) conviction (Count 3) is 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 sections (3)(A) and (3)(C), defendant maintains that it would be "unfair" to enter a conviction under section (3)(C). We disagree.

¶ 25 Defendant was charged with two counts of AUUW under sections (3)(A) and (3)(C), and there is no indication that the State ever abandoned the section (3)(C) charge. Under section (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). Under section (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). The court's combined AUUW instruction included all of the elements under both sections (3)(A) and (3)(C), and the jury returned a general verdict of guilty on the AUUW charge. Thus, the guilty verdict demonstrates that the jury concluded that the State met its burden of proof on all of the elements of both sections (3)(A) and (3)(C).

¶ 26 "[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)). Related to the "one good count rule," it is also 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 section (3)(A), the jury's verdict supports a conviction under section (3)(C). See *Holmes*, 241 Ill. 2d at 519*;* see also *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982) (holding appellate court has authority to remand for sentencing on unsentenced conviction).

¶ 27 *People v. Barnett*, 2011 IL App (3d) 090721, cited by defendant for the proposition that the State cannot "take and all-or-nothing approach" by pursuing one offense and then ask the court to enter a judgment on the theory it disavowed, does not require a different result. That case is limited to its facts and in any event is not binding on this court.

¶ 28 We also reject defendant's argument that his AUUW conviction should be reversed because he was sentenced under 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 section (d)(2), if the underlying offense involves the factors in both sections (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 also is invalid post-*Aguilar* because it is "inextricably bound up" with section (3)(A).

¶ 29 But defendant concedes that if section (d)(2) is a sentencing provision, as opposed to a separate offense, the issue of that provision's validity post-*Aguilar* is moot in this case because defendant has completed his sentence and supervised release. *People v. Roberson*, 212 Ill. 2d 430, 435 (2004). Defendant, however, waited until his reply brief to argue that section (d)(2) is a

separate offense. And this latest position directly contradicts the arguments advanced in his opening brief. As a result, it is waived. Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, for purposes of defendant's appeal, we assume that section (d)(2) is a sentencing provision, and defendant's arguments related to his now-completed sentence are moot.

¶ 30 Illinois courts recognize a limited "public interest exception" to the mootness doctrine, but the exception is "construed narrowly." *Roberson*, 212 Ill. 2d at 436. In determining whether to apply the exception, we consider: "(1) the public nature of the question; (2) the likelihood that the question will recur; and (3) the desirability of an authoritative determination for the purpose of guiding public officers." *Id.* The defendant must make "a clear showing of each criterion" for the exception to apply. *Id.*

¶ 31 Defendant maintains that we should apply the exception here because (1) the question is of a public nature as it addresses how defendants are to be sentenced; (2) it is likely to recur; and (3) future guidance is necessary because court's are currently imposing the penalty. We, however, disagree that the facts in this case warrant this narrow exception.

¶ 32 Although the validity of section (d)(2) is of the public nature, the need for future guidance on this issue is limited as the legislature has already amended the statute to address *Aguilar*. See Pub. Act 98-63 (eff. July 9, 2013). Moreover, defendant's arguments on this issue have evolved throughout this appeal, and we believe it is more prudent to reserve our judgment for a case where the defendant's positions are consistently articulated throughout the briefing and the State has an adequate opportunity to respond.

¶ 33 In sum, because *Aguilar* did not invalidate section (3)(C) and the jury's general verdict supports the conviction under that section, we agree with the State that defendant's AUUW conviction should be reinstated under section (3)(C). Accordingly, we do not reach defendant's alternative argument that the State failed to prove that the recovered handgun was "loaded," which is a required element of section (3)(A) but not section (3)(C).

¶ 34 B. Ineffective Assistance of Counsel Claim

¶ 35 Lastly, defendant 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.[2] 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. We disagree.

¶ 36 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

[2] 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.

¶ 37 "[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)). And 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)).

¶ 38 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).

¶ 39 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. 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.

¶ 40 Contrary to defendant's position, that the jury, confronted with a higher burden of proof at trial, may have reached a different conclusion is not dispositive as to whether defendant threatened the officers. And 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.

¶ 41 *Gentry v. Sevier*, 597 F.3d 838 (7th Cir. 2010); *People v. Little*, 322 Ill. App. 3d 607 (1st Dist. 2001); and *People v. Steels*, 277 Ill. App. 3d 123 (1st Dist. 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. *Id.* 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," (*id.* at 613), in concluding that "a

motion to quash and suppress would have had a reasonable probability of success at trial," (*id.* at 613). Here, in contrast, the State could have presented testimony from several officers attesting to the reasonableness of Captain Bay's actions. For these reasons, defendant has failed to establish that his counsel was ineffective.

¶ 42 In conclusion, we reverse defendant's AUUW conviction under section (3)(A), reinstate the AUUW conviction under section (3)(C), 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 2014). It is nevertheless procedurally necessary that a sentence be imposed on the AUUW conviction under (3)(C) so that judgment can be entered. 730 ILCS 5/5-1-12 (West 2014) (" '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.").

¶ 43 Reversed and remanded with directions.