SECOND DIVISION
Rule 23 Order filed May 17, 2016
Modified upon denial of rehearing May 31, 2016

No. 1-13-0383

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 7769
	)	
CALVIN JACKSON,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's jury waiver was valid. Defendant's convictions for aggravated unlawful use of a weapon based on his possession of a loaded firearm in a vehicle and on a public street (Count One and Count Two) are vacated pursuant to *People v. Burns*, 2015 IL 117387. Defendant's convictions for aggravated unlawful use of a weapon based on his possession of a loaded firearm without a firearm owner's identification card (Count Seven and Count Eight) and UUWF (Count Ten) are affirmed. Five-year sentence is not excessive. Clerk of the circuit court ordered to correct the mittimus.

¶ 2 Following a bench trial, defendant Calvin Jackson was convicted of two counts of

aggravated unlawful use of a weapon (AUUW) for possessing a loaded firearm in a vehicle and on a public street, two counts of AUUW for possessing a loaded firearm without a firearm owner's identification (FOID) card, and unlawful use of a weapon by a felon (UUWF). Defendants' convictions were merged into a single Class 2 felony count of AUUW and he was sentenced to five years' imprisonment. We previously affirmed the trial court's judgment. *People v. Jackson*, 2015 IL App (1st) 130383-U. Pursuant to a supervisory order from the Illinois Supreme Court (45 N.E.3d 687 (Mem) (2016)) we vacated[1] our previous order and now consider this appeal in light of *People v. Burns*, 2015 IL 117387.

¶ 3 On appeal, defendant contends that his jury waiver was invalid, that the offense of AUUW is unconstitutional, and that his sentence is excessive.

¶ 4 Defendant was charged with various counts of AUUW and one count of UUWF for, on or about December 23, 2011, carrying an uncased, loaded, and accessible firearm in a vehicle on a public street (163rd Street and Park Avenue, in Markham) outside of his own land, abode or place of business while under 21 years old and not having a valid firearm owner's identification card (FOID). The UUWF count and every AUUW count alleged that defendant was previously convicted of aggravated robbery in case 08CR8031. Defendant was also charged with aggravated fleeing or attempt to elude a peace officer allegedly committed on the same date.

¶ 5 On the day of trial, defendant filed a signed jury waiver, stating that he did "hereby waive jury trial and submit the above entitled cause to the Court for hearing." Just before trial, the court told defendant "you are entitled to a jury trial. You know what a jury trial is?" but (according to

[1] On April 29, 2016, the Executive Chair, First District Appellate Court, assigned this appeal to the Second Division, First Appellate District, due to the untimely passing of Justice Liu on April 15, 2016.

the transcript) immediately asked "State, do you wish to make an opening statement?" with no indication of a reply by defendant in between. The State waived an opening statement, as did defense counsel.

¶ 6 The evidence at trial was that, at about 4 a.m. on the night in question, Markham police officers were responding to a report of a man with a gun at a night club on 163rd Street when a car fled the night club parking lot. The car drove on at high speed – covering several blocks in about 25 seconds – and did not stop despite being followed by a marked police car with active emergency lights and siren and despite encountering intersections with a red signal and a stop sign respectively. The latter intersection was a "T" crossing where 163rd Street terminates at Park Avenue, but the car was going too fast to turn and crashed. Defendant was the sole occupant of the car, and he dropped a hard object (judging by sound) to the ground before running away; an officer found a loaded gun four feet from the car. Defendant was arrested nearby and identified as the man who fled the car. The parties stipulated to defendant's 2009 aggravated robbery conviction in 08CR8031 and that he did not have a FOID card on the day in question. Defendant waived his right to testify and, after closing arguments, was found guilty of AUUW and UUWF.

¶ 7 Defendant first contends that his jury waiver was invalid.

¶ 8 Defendant acknowledges that he did not raise this issue in the trial court but argues that we can consider the claim as a matter of plain error. The plain error doctrine allows this court to consider an otherwise-forfeited claim where there is a clear or obvious error and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Eppinger*, 2013 IL 114121, ¶ 18;

People v. Bannister, 232 Ill. 2d 52, 65 (2008). The State correctly notes that the first step in plain error analysis is determining whether an error occurred at all. *Eppinger*, 2013 IL 114121, ¶ 19; *Bannister*, 232 Ill. 2d at 65. As stated below, we find no error.

¶ 9 A criminal defendant has the constitutional right to a trial by jury but may waive that right knowingly and voluntarily. *Bannister*, 232 Ill. 2d at 65. While the trial court must ensure that a defendant is waiving this right expressly and understandingly, the court need not give any specific admonition or advice for a jury waiver to be valid. *Bannister*, 232 Ill. 2d at 66. Thus, it is preferable but not required that the court apprise a defendant that he has a right to a jury trial. *People v. Rincon*, 387 Ill. App. 3d 708, 718 (2008). Waiver need not be made by defendant personally and affirmatively; an oral waiver by defense counsel in open court is valid if made in the defendant's presence without his objection, and something in the discussion indicates that the defendant's right to a jury trial is being waived. *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 16, citing *People v. Murrell*, 60 Ill. 2d 287, 290 (1975); *Rincon*, 387 Ill. App. 3d at 718. A written jury waiver memorializes a defendant's decision and allows this court to review the record to ascertain whether a jury waiver was made understandingly, but is not requisite for a valid waiver nor by itself shows a valid waiver. *Bannister*, 232 Ill. 2d at 66; *Rincon*, 387 Ill. App. 3d at 718. The pivotal knowledge that a defendant must understand, along with the consequences thereof, is that the facts of his case will be determined by a judge and not a jury. *Bannister*, 232 Ill. 2d at 69. Determination of a jury waiver's validity rests not on any precise formula but on the facts and circumstances of the particular case. *Bannister*, 232 Ill. 2d at 66. Such circumstances include that the defendant has prior experience with the criminal justice system and so is familiar with his right to a jury trial and knows that he would receive a bench trial if he waives that right.

Bannister, 232 Ill. 2d at 71. A defendant challenging his jury waiver bears the burden of establishing that the waiver was invalid. *People v. Gibson*, 304 Ill. App. 3d 923, 930 (1999).

¶ 10 Here, the court told defendant just before trial that he had a right to a jury trial, and defendant signed and filed on the day of trial a jury waiver. After the clear statement that he had a right to a jury trial, defendant did not object (either personally or through counsel) to the case proceeding directly to a bench trial. The admonishment shows that he was made aware of his right to a jury trial and the written waiver shows the key knowledge that his case would be heard by the court and not a jury. His knowledge of the right to a jury trial is also shown by his previous felony conviction by guilty plea, when presumably he was admonished upon and waived his right to jury trial. Under the circumstances, we find that defendant has not shown that his jury waiver was invalid, and thus find no error and certainly no plain error.

¶ 11 Defendant also contends that the offense of AUUW, section 24-1.6 of the Criminal Code (720 ILCS 5/24-1.6 (West 2012)), is unconstitutional. Again, defendant was convicted of two possessory counts of AUUW pursuant to section 24-1.6(a)(1), (a)(3)(A) and section 24-1.6(a)(2), (a)(3)(A) and two counts of AUUW for possession of a firearm without having been issued a valid firearms owners identification (FOID) card pursuant to section 24-1.6(a)(1), (a)(3)(C) and section 24-1.6(a)(2), (a)(3)(C).

¶ 12 AUUW is generally a Class 4 felony, however it is a Class 2 felony where the defendant "has been previously convicted of a felony in this State or another jurisdiction." 720 ILCS 5/24-1.6(d)(1), (3) (West 2012). In *People v. Aguilar*, 2013 IL 112116, our supreme court found that "the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution" while it made "no

finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute." *Id.*, ¶ 22, n.3. The *Aguilar* court noted the United States Supreme Court's statement that " 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' " *Id.*, ¶ 26, quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In our April 2015 order, we followed the distinction made by the supreme court in *Aguilar* between the "Class 4 form" of section 24-1.6(a)(1), (a)(3)(A) (which it held was unconstitutional) and the "Class 2 form" (the constitutionality of which it declined to rule on), and in keeping with our prior precedent, affirmed the defendant's conviction of the "Class 2 form" of AUUW. 2015 IL 130383-U, ¶¶ 13-14 (citing *Aguilar*, 2013 IL 112116, ¶ 22, n. 3).

¶ 13 In *People v. Burns*, 2015 IL 117387, our supreme court clarified its ruling in *Aguilar*, stating that the sentencing provision for the offense of AUUW, set forth in section 24-1.6 (d) "does not create separate and distinct offenses of aggravated unlawful use of a weapon," thus abandoning the distinction between Class 4 and Class 2 "forms" of AUUW. *Id*. ¶ 24. The court further held that section 24-1.6(a)(1), (a)(3)(A) impermissibly infringed on rights granted by the second amendment to the United States Constitution, was "facially unconstitutional, without limitation," and was "not enforceable against anyone," including individuals like defendant who were subject to an elevated penalty under subsection (d)(3) of the statute due to their commission of a prior felony. 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). Accordingly, we vacate defendant's conviction pursuant to subsection (a)(1), (a)(3)(A) of the AUUW statute for possessing a loaded firearm in a vehicle.

¶ 14 Subsequently, our supreme court in *People v. Mosley*, 2015 IL 115872, ¶ 25, held that *Aguilar* applies equally to convictions under 720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2012)) of the AUUW statute. Pursuant to *Mosley*, we likewise vacate defendant's conviction for possessing a loaded weapon on a public street.

¶ 15 We next consider defendant's convictions for possessing a loaded weapon without a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (while in a vehicle) and 24-1.6(a)(2), (a)(3)(C) (while on a public street)). In *Mosley*, 2015 IL 115872, ¶ 31, our supreme court held that subsection (a)(3)(C) is severable from that portion of the statute found unconstitutional in *Burns*. Although the court did not pass on the constitutionality of this section beyond its application to individuals under the age of 21, the court noted that the requirements of the provision were "consistent with th[e] court's recognition that the second amendment right to possess firearms is still subject to meaningful regulation." (Internal quotation marks omitted.) *Mosley*, 2015 IL 115872, ¶ 36. Bearing in mind that "[s]tatutes are presumed to be constitutional," and that "we have a duty to construe [a] statute in a manner that upholds [its] validity and constitutionality, if it can be reasonably done" (*People v. Taylor*, 2013 IL App (1st) 110166, ¶ 29), we see no reason to depart from this court's decision in *Taylor*, affirmatively holding that section 24-1.6(a)(1), (a)(3)(C) "does not violate the right to bear arms guaranteed under the second amendment" (*id.* ¶ 32). Pursuant Supreme Court Rule 366(a)(5) we have the authority to enter any judgment and grant any relief that ought to have been entered as the case requires. We therefore affirm defendant's AUUW convictions for possessing a loaded weapon without a FOID card (Count 7

and Count 8).

¶ 16 Lastly, we will not disturb defendant's conviction for UUWF, which is not challenged on appeal.

¶ 17 In our order filed on May 17, 2016, we declined to address defendant's contention that his five-year prison sentence is excessive. We found that because defendant's convictions were merged into a single (now-vacated) count for AUUW and he was sentenced only on that count, the issue of whether his sentence was excessive was no longer before us because no sentence was imposed on the other charges where a finding of guilty was entered. Because our ruling had resulted in four felony convictions being affirmed without a sentence being imposed, we remanded to the circuit court for imposition of sentence. See *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982) (holding appellate court was authorized, upon reversing sentenced convictions, to remand for imposition of a sentence on remaining convictions).

¶ 18 However, in defendant's petition for rehearing filed on May 18, 2016, he requested that, in the interest of judicial economy and because he had already served his five-year sentence, we should exercise our power under Illinois Supreme Court Rule 615(b) and order the clerk of the circuit court to correct the mittimus. Defendant stated that "there is no meaningful difference between Counts 7 and 8 and Count 1 (the count on which Jackson was originally sentenced" and asked this court to order the clerk of the circuit court to correct his mittimus to reflect convictions on Counts 7, 8, and 10, merge Counts 8 and 10 into 7, and impose the five-year sentence on Count 7 instead of Count 1. We agree.

¶ 19 For the reasons stated, we vacate defendant's AUUW convictions for possession of a loaded firearm in a vehicle and on a public street (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) and 24-

1.6(a)(1), (a)(3)(A) (West 2010)) (Count One and Count Two), affirm the finding of guilty on Count 7, Count 8 and Count 10. Using the authority granted to us by Illinois Supreme Court Rule 615(b)(1), we order the clerk of the circuit court to correct defendant's mittimus to reflect convictions on Counts 7, 8, and 10, merger of Counts 8 and 10 into Count 7 and a sentence of five-years in the Illinois Department of Corrections imposed on Count 7. In doing so, we note that the five-year sentence that defendant served in this case was not excessive. His sentence fell within the statutory range and is therefore presumptively proper. *People v. Hauschild*, 226 Ill.2d 63, 90 (2007); 720 ILCS 5/24-1.6 (West 2012).

¶ 20 Affirmed in part; reversed in part; clerk of the circuit court to correct the mittimus.