

No. 1-13-2208

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. 11 CR 17207
)	
RUBEN PINEDA,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Pursuant to the supreme court's recent opinion in *People v. Burns*, 2015 IL 117387, defendant's conviction for aggravated unlawful use of a weapon based on his possession of an uncased, loaded, and immediately accessible firearm at a time he was not on his own land is vacated and the cause is remanded with directions to impose sentence on the merged convictions.

¶ 2 Following a bench trial, defendant Ruben Pineda was found guilty of aggravated unlawful use of a weapon (AUUW) pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), a Class 2 offense based

upon his prior felony conviction, and was sentenced as a Class X offender to eight years in prison. In an order issued on February 17, 2015, this court affirmed the trial court's judgment. *People v. Pineda*, 2015 IL App (1st) 132208-U. Pursuant to a January 20, 2016 supervisory order entered by the Illinois Supreme Court directing us to reconsider our judgment in light of the supreme court's decision in *People v. Burns*, 2015 IL 117387 and to determine whether another result is warranted, we vacated our February 2015 order. Upon reconsideration, we vacate defendant's AUUW conviction on count 2 under section 24-1.6(a)(1), (a)(3)(A) of the Code and remand with directions to impose judgments on counts 3, 4 and 5 because there were convictions on the aforementioned counts but no sentences.

¶ 3

BACKGROUND

¶ 4 The record shows that on October 5, 2011, defendant was arrested and charged by indictment with five counts, including: count 1, unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1) (West 2010)); count 2, AUUW for possessing on his person an uncased, loaded, and immediately accessible firearm "at a time when he was not on his own land" (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)); count 3, AUUW for possessing on his person a firearm "at a time when he was not on his own land" without a valid FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)); count 4, unlawful use or possession of a weapon by a felon (UUWF) for carrying a firearm as a felon (720 ILCS 5/24-1.1(a) (West 2010)); and count 5, UUWF for carrying ammunition as a felon (720 ILCS 5/24-1.1(a) (West 2010)). Both AUUW counts were charged as Class 2 offenses based on defendant's prior felony conviction for aggravated driving under the influence.

¶ 5 At trial, Chicago police officer Colon testified that he and his partner were on routine patrol on the evening in question, when they noticed defendant standing outside a laundromat

drinking a beer, which he held in his right hand. As they drove their unmarked squad car closer to him, Officer Colon saw a black metallic object in defendant's left hand, which looked like a semi-automatic handgun. As the officers exited their car and approached defendant, he immediately dropped the object into the laundry cart next to him. Officer Colon stated that no one else was present at the scene, and that he and his partner took defendant into custody and recovered a loaded, semi-automatic handgun from the cart.

¶ 6 The State introduced a certified copy of defendant's prior conviction for aggravated driving under the influence and a certification from the Illinois State Police Department indicating that defendant had never been issued a FOID card.

¶ 7 Defendant testified that he was standing outside a laundromat with a friend drinking a beer while waiting for his laundry to finish, when two police officers arrived, exited their vehicle, and searched them. The officers did not find anything on their persons, but found a gun in defendant's laundry cart. Defendant denied ownership or knowledge of the gun, but was arrested and taken to the police station. Defendant testified that he had a cane in his left hand at the time the incident took place.

¶ 8 Following the close of argument, the trial court found defendant not guilty of unlawful possession of a firearm by a street gang member but guilty of count 2, the Class 2 offense of AUUW pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Code. The court then merged the remaining counts—count 3, AUUW for possessing a firearm without a valid FOID card, and counts 4 and 5, the two counts of UUWF—with count 2. Based on his criminal background, the court sentenced defendant as a Class X offender to eight years in prison.

¶ 9

ANALYSIS

¶ 10 On appeal, defendant first claims that his AUUW conviction under count 2, which was based on his possession, on his person, of an uncased, loaded, and immediately accessible firearm outside his own land (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), should be vacated. Defendant relies on *People v. Aguilar*, 2013 IL 112116, where our supreme court held that the Class 4 form of subsection (a)(1), (a)(3)(A), (d)(1) of the AUUW statute facially violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution. *Id.* at ¶ 22. Here, however, defendant's conviction for AUUW was a Class 2 felony, pursuant to subsection (a)(1), (a)(3)(A), (d)(3) of the statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)(3) (West 2010)), based upon his prior felony conviction for aggravated driving under the influence. Nonetheless, defendant maintains that the Class 2 version of subsection (a)(1), (a)(3)(A) cannot be severed from the rest of the statute and that it is unconstitutional on its face.

¶ 11 In our February 2015 order, we disagreed with defendant's contention. We based our determination on this court's decision in *People v. Burns*, 2013 IL App (1st) 120929, *rev'd*, 2015 IL 117387, which found that the Class 2 form of the AUUW offense under subsection (a)(1), (a)(3)(A), (d)(3) "merely regulates the possession of a firearm by a person who has been previously convicted of a felony," and is therefore constitutional. *Burns*, 2013 IL App (1st), ¶ 27.

¶ 12 However, on December 17, 2015, our supreme court issued its opinion in *Burns*, 2015 IL 117387, reversing the appellate court decision, and holding that subsection (d) of the AUUW statute, the sentencing provision, "does not create separate and distinct offenses of aggravated unlawful use of a weapon," and accordingly abandoned any distinction between a Class 2 or Class 4 "form" of the AUUW offense. *Id.* ¶ 24. The court further concluded that subsection (a)(1), (a)(3)(A) was "facially unconstitutional, without limitation," and was "not enforceable

against anyone," including a defendant who was convicted of AUUW as a Class 2 felony due to his commission of a prior felony. *Id.* ¶¶ 25, 32. When a statute is held to be 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, defendant's conviction on count 2, pursuant to subsection (a)(1), (a)(3)(A) of the AUUW statute, cannot stand and is vacated. *Burns*, 2015 IL 1117387, ¶¶ 25, 32.

¶ 13 Defendant also challenges his AUUW conviction for possessing on his person an uncased, loaded, and immediately accessible firearm without a valid FOID card, under subsection (a)(1), (a)(3)(C) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)), contending that the FOID card provision of the AUUW statute is unconstitutional because it cannot be severed from the subsection found unconstitutional in *Aguilar*.

¶ 14 This argument was not addressed in our February 2015 order because the trial court merged defendant's AUUW conviction under subsection (a)(1), (a)(3)(C), charged as count 3, into his AUUW conviction under subsection (a)(1), (a)(3)(A), charged as count 2, and a sentence was only imposed on count 2. In the absence of a sentence, there is no final judgment (730 ILCS 5/5-1-12 (Judgment means an adjudication by the court that a defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court)), so an appeal cannot be entertained by a reviewing court. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984). Finally, following *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982), because the appeal was properly before the court with respect to count 2 on which defendant was convicted and sentenced, we hold that we are authorized, upon vacating defendant's conviction under count 2, to remand for imposition of a judgment on counts 3, 4, and 5, because there were convictions on the aforementioned counts but no sentences.

¶ 15

CONCLUSION

¶ 16 For the above reasons, we vacate defendant's conviction for AUUW under section 24-1.6(a)(1), (a)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), and remand the cause with directions to impose judgments on counts 3, 4, and 5, because there were convictions on the aforementioned counts but no sentences.

¶ 17 Vacated in part; cause remanded for resentencing, with instructions.