

No. 1-14-1239

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the    |
|                                      | ) | Circuit Court of   |
| Plaintiff-Appellee,                  | ) | Cook County.       |
|                                      | ) |                    |
| v.                                   | ) | No. 13 CR 07721    |
|                                      | ) |                    |
| SURON ENGRAM,                        | ) | Honorable          |
|                                      | ) | Noreen Love,       |
| Defendant-Appellant.                 | ) | Justice Presiding. |

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Connors and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant-appellant's conviction under Illinois' Armed Habitual Criminal statute is affirmed. The amendment of the predicate offenses stated on the grand jury indictment was a formal amendment. Additionally, defense counsel made reasonable strategic decisions prior to, and during, trial. Accordingly, defendant's claim of ineffective assistance of counsel is without merit.

¶ 2 Following trial, a jury convicted the defendant, Suron Engram (defendant), of violating Illinois' armed habitual criminal (AHC) statute. Defendant now appeals claiming that his conviction should be reversed because (1) the State amended its grand jury indictment before

trial and replaced the original predicate offenses supporting the AHC charge with other qualifying predicate offenses; (2) he was subject to the ineffective assistance of counsel where defense counsel suggested the amendment to the indictment; or (3) he was subject to the ineffective assistance of counsel where defense counsel elicited potentially harmful testimony at trial. For the following reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 3

### BACKGROUND

¶ 4 On April 11, 2013, the State sought a grand jury indictment against defendant on one count of violating the AHC statute, 720 ILCS 5/24-1.7(a) (West 2014), two counts of unlawful use or possession of a weapon by a felon (UUWF) and four counts of aggravated unlawful use of a weapon (AUUW). During the grand jury hearing, the State elicited testimony from Maywood Police Officer Eric Dent (Dent). Dent testified that defendant had previously been convicted of both a Class 2 AUUW offense and the offense of UUWF, two qualifying predicate offenses under the AHC statute. At the conclusion of the hearing, the grand jury returned a true bill and issued an indictment for each of the State's charges.<sup>1</sup> Within the indictment, the AHC charge alleged that defendant was found to be in possession of a firearm after having been convicted of two qualifying predicate offenses, Class 2 AUUW and UUWF.

¶ 5 On March 25, 2014, prior to trial, defendant filed a motion to dismiss the charges under Section 114-1 of the Illinois Code of Criminal Procedure. 725 ILCS 5/114-1 (West 2014). Therein, defendant argued that the AHC charge must be dismissed because the two predicate offenses stated on the indictment, Class 2 AUUW and UUWF, were unconstitutional under our supreme court's decision in *People v. Aguilar*, 2013 IL 112116, and, therefore, void. More specifically, defendant claimed that his 2002 conviction for Class 2 AUUW was now void due to

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<sup>1</sup>The indictment included two counts of UUWF, four counts of AUUW, and one count of violating the AHC statute.

our supreme court's holding in *Aguilar* that the statute defining the Class 4 AUUW offense was facially unconstitutional under the Second Amendment. Therefore, defendant argued, his 2007 UUWF conviction, itself premised on that 2002 Class 2 AUUW conviction, was also void because the unconstitutional AUUW charge could not stand as a predicate offense for the subsequent UUWF conviction. Consequently, defendant concluded that the AHC charge must be dismissed as it was premised on two arguably void convictions.

¶ 6 On March 26, 2014, the circuit court held a hearing on the motion. At the hearing, prior to argument, the State decided to proceed solely on the AHC count and *nolle prosequed* all of the remaining charges. Following this, both the prosecution and the defense presented their arguments to the circuit court.

¶ 7 In support of his argument, defendant pointed to the Fourth District's opinion in *People v. Campbell*, 2013 IL App (4th) 120635, which held that the Class 2 AUUW statute was facially unconstitutional under *Aguilar*. In response to this, the State argued that, in *Aguilar*, our supreme court specifically limited their decision to the AUUW statute's Class 4 offense and did not consider the Class 2 offense for which defendant had previously been convicted. The State acknowledged that the Fourth District, in *Campbell*, had held the Class 2 AUUW offense to also be unconstitutional under *Aguilar*. However, the State pointed to two cases, *People v. Burns*, 2013 IL App (1st) 120929, and *People v. Soto*, 2014 IL App (1st) 121937, in which the First District held the Class 2 AUUW offense to be constitutional and distinct from the Class 4 AUUW offense invalidated under *Aguilar*.

¶ 8 In response to the State and defendant's arguments, the circuit court denied defendant's motion, asserting that it would follow the First District's holdings in *Soto* and *Burns*, both of which held the Class 2 AUUW offense to be constitutional under *Aguilar*. Accordingly, the

circuit court found neither defendant's Class 2 AUUW offense nor his subsequent UUWF offense to be void. The circuit court also noted that *Burns* was pending before our supreme court in order to resolve this split in authority and decide whether the Class 2 AUUW offense was constitutional under *Aguilar*.

¶ 9 Following the court's denial of the motion, the record indicates that defense counsel then suggested that the State amend the grand jury indictment to remove the predicate offenses of Class 2 AUUW and UUWF and replace them with defendant's other qualifying predicate convictions. After this suggestion, the trial court granted defense counsel's request to momentarily go off the record. Following this, once the proceedings were again transcribed, the State moved to amend the grand jury indictment by replacing defendant's predicate AUUW and UUWF convictions with two of the defendant's other qualifying convictions, for residential burglary, under case number 01 CR 003711, and manufacture/delivery of a controlled substance under 98 C4 4086401. The circuit court granted the State's motion with no objection by defense counsel. Shortly thereafter, defense counsel successfully moved to exclude evidence of defendant's AUUW and UUWF convictions for purposes of impeachment at trial.

¶ 10 On March 31, 2014, the parties commenced a jury trial. At trial, Maywood Police Sergeant Fairley (Fairley) testified to the events on the night of defendant's arrest. Fairley asserted that on the night of March 23, 2013, he was dispatched to the apartment of Jeannette Winston (Winston) in response to her report of a domestic disturbance. After speaking with Winston, Fairley left the apartment and canvassed the surrounding area for Winston's boyfriend, defendant, in relation to the domestic disturbance report.

¶ 11 Fairley then testified that shortly after he left Winston's apartment he spotted defendant inside of a nearby convenience store. As Fairley exited the vehicle and approached the

convenience store, defendant began walking out. Fairley then ordered defendant to place his hands on the store's plate glass window and pressed defendant's head against the window in order to hold him there. As Fairley held the defendant against the window, Maywood Police Officer Adeel Afridi (Afridi) arrived on the scene.

¶ 12 Around the time of Afridi's arrival, defendant managed to slip out from his hooded sweatshirt and escape Fairley's control. Fairley asserted that defendant then ran across the street and into a parking lot with he and Afridi in pursuit. While Fairley and Afridi apprehended defendant, Officer Dent arrived outside the convenience store. There, Dent seized defendant's hooded sweatshirt, inside the pocket of which he found a loaded, nine-millimeter semiautomatic handgun. Defendant was then arrested and taken into police custody.

¶ 13 At trial, defendant presented a different version of the events on the night of his arrest. Defendant acknowledged that he and Fairley had known each other for years. Defendant testified further that, in the past, Fairley had apprehended him and coerced him into making an agreement by which the defendant would surrender firearms or report other criminal activity to Fairley in order to avoid prosecution for a number of criminal and traffic offenses. Defendant also testified that he was not in possession of a firearm on the night of March 23, 2013. Instead, defendant asserted that the firearm found within his hooded sweatshirt that night was planted there by Fairley while Fairley held him against the convenience store window, an act which frightened defendant and incited him to flee from Fairley's custody. Defendant alleged that Fairley had likely done this in retaliation for the defendant's failure to comply with the aforementioned deal which the two had previously made.

¶ 14 Also at trial, defendant's girlfriend Winston testified that she had heard gunshots on the night in question but was unaware of where they had taken place or who had fired a weapon.

This account differed significantly from Fairley's, as the sergeant had testified that upon his arrival at Winston's apartment, she had informed him that defendant had fired a gun into the air around the time she called to report the domestic disturbance. Following Fairley's assertion, defense counsel then inquired as to whether any member of the Maywood police force had tested defendant's hands for gunshot residue or performed any other further testing on the recovered firearm. Fairley denied having done such testing but also denied any police misconduct, arrangements between him and defendant, and the planting of the firearm into defendant's hooded sweatshirt.

¶ 15 At the conclusion of the trial, the jury returned a guilty verdict against the defendant on the armed habitual criminal charge. Consequently, defendant was then sentenced to a term of eight years imprisonment. On May 5, 2014, the defendant filed a timely notice of appeal, granting jurisdiction to this court pursuant to Illinois Supreme Court Rule 606(b). Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013).

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues that this court should reverse his conviction for armed habitual criminal because (1) the circuit court and the State committed reversible error by amending the grand jury indictment to substitute the predicate offenses supporting the AHC charge; (2) defendant was subject to the ineffective assistance of counsel where defense counsel suggested that the State amend the grand jury indictment to substitute the predicate offenses; or (3) defendant was subject to the ineffective assistance of counsel where defense counsel elicited testimony that defendant had fired a gun the night of his arrest, contradicting the account of a defense witness and allegedly characterizing the defendant as a dangerous criminal. For the following reasons, we affirm the judgment of the circuit court.

¶ 18 As a threshold matter, we note that the AHC statute criminalizes the receipt, sale, possession, or transfer of a firearm by a person with two or more prior convictions, which fall into certain enumerated categories. 720 ILCS 5/24–1.7 (West 2014).

¶ 19 Defendant's first argument on appeal asserts that it was reversible error for the State to amend the predicate offenses stated on the indictment in support of the AHC charge without returning to the grand jury. For the following reasons, we hold that this was merely a formal amendment and, thus, not error.

¶ 20 At the outset, we note that as this argument presents to us a pure question of law, our standard of review is *de novo*. *People v. Adams*, 404 Ill. App. 3d 405, 414 (2010).

¶ 21 Within Illinois, formal amendments to a charging document may be made by the State or defendant without returning to the grand jury. *People v. Griggs*, 152 Ill. 2d 1, 32 (1992). Conversely, a *substantive* amendment, one which attempts to "broaden the scope of the indictment, alter or change the offense charged, or change a material element of the indictment requires return of the indictment to the grand jury." *Id.*

¶ 22 Section 111-5 of the Illinois Code of Criminal Procedure lists several formal amendments. The section states that formal defects include:

- "(a) Any miswriting, misspelling or grammatical error;
- (b) Any misjoinder of the parties defendant;
- (c) Any misjoinder of the offense charged;
- (d) The presence of any unnecessary allegation;
- (e) The failure to negative any exception, any excuse or proviso contained in the statute defining the offense; or
- (f) The use of alternative or disjunctive allegations as to the acts,

means, intents or results charged." 725 ILCS 5/111-5 (West 2014).

¶ 23 Defendant suggests on appeal that because the State's amendment of the AHC charge's predicate offenses do not fall within one of these enumerated categories, the amendment at issue could not be considered formal. However, this argument relies on a reading of Section 111-5 that is far too narrow. Our caselaw on this issue is clear: Section 111-5's list is not an exhaustive accounting of amendments which we may consider to be "formal." *People v. Benitez*, 169 Ill. 2d 245, 255 (1996); *People v. Milton*, 309 Ill. App. 3d 863 (1999).

¶ 24 The defendant argues further that because the State's amendment altered a necessary element of the AHC offense – the two qualifying predicate convictions – it must be considered substantive. Though we agree that the AHC statute requires proof beyond a reasonable doubt of two prior qualifying convictions, we find defendant's contention, that *any* change to such a necessary element amounts to a substantive amendment, to be a drastic oversimplification.

¶ 25 This court's decision in *People v. Adams* is particularly instructive on this issue. 404 Ill. App. 3d 405 (2010). In *Adams*, the State successfully moved, prior to trial and without objection, to amend an indictment charging the defendant with a violation of the AHC statute. *Id.* at 407. There, the indictment originally stated that the defendant had been convicted of the offense of aggravated discharge of a firearm under case number 92 CR 1901. *Id.* The State then amended the indictment to reflect the defendant's true prior conviction for armed robbery, though the stated case number was originally accurate and thus, not amended. *Id.* On appeal, the appellate court found that this amendment was formal and thus not error. *Id.* at 415.

¶ 26 Defendant cites to *Adams* to contrast the amendment made there with the State's full substitution of predicate offenses in the instant case. Defendant's brief on appeal claims that the *Adams* court found the amendment to be formal because the original indictment listed the correct

case number and the amendment only corrected a "misnamed" prior conviction. Though the amendment in *Adams* was certainly less significant than that which the State made here, defendant's contention ignores the other factors which led the *Adams* court to conclude that the amendment of the AHC charge's predicate offenses was formal rather than substantive.

¶ 27 In *Adams*, this court asserted that:

"Elementally, both the originally listed offense and the actual offense of prior conviction were predicate offenses under the armed habitual criminal statute. Thus, the amendment made no material change to the indictment. \*\*\* Here, the elements of the present offense consist of defendant's possession of a firearm coupled with the fact of a prior conviction for one of certain enumerated offenses. Provided that the prior convictions fall within those categories, the actual offense was essentially surplusage, a matter to which the parties could stipulate, as the parties did in the trial court." 404 Ill. App. 3d at 415.

¶ 28 Additionally, the *Adams* court contrasted the amendment made therein, to the name of a predicate offense, to one which the State had made in another case, *People v. Patterson*, 267 Ill. App. 3d 933 (1994). Prior to the trial in *Patterson*, the State was permitted to amend the quantity of narcotics which the defendant was alleged to have possessed, from 15 to 100 grams initially to 400 to 900 grams. *Id.* at 934. On appeal, this court held that such an amendment "materially changed the indictment" because of the significant role which quantity plays in both defining and setting the punishment for drug offenses. *Id.* at 939. As such, this court found the amendment to be error and vacated the defendant's conviction and sentence for that offense. *Id.*

¶ 29 We can further delineate the line between a formal and substantive amendment by comparing *Patterson* to a case cited therein, *People v. Coleman*, 49 Ill. 2d 565 (1971). There, our supreme court held that an amendment to an indictment for murder that altered the means which the defendant allegedly used to accomplish the decedent's death was a formal amendment. *Id.* at 570. In reaching this conclusion the court stated:

"The gist of the offense with which the defendant was charged in this case was the overt act of intentionally taking the life of his wife. Of this the defendant was adequately informed by the indictment. He could not claim that the allegations of the amendment as to the means of taking her life have taken him by surprise or that he has been unable as a result thereof to adequately prepare his defense to these additional allegations." *Id.*

¶ 30 We find the instant case to be more similar to *Coleman* than *Patterson*. Like *Coleman*, the State's amendment here did not alter the "gist of the offense with which the defendant was charged," his act of possessing a firearm after having been convicted of two qualifying offenses. Nor could the defendant claim to be taken by surprise by such an amendment. Additionally, unlike the amendment in *Patterson*, the State's amendment in the instant case did not alter the definition of the crime alleged or the punishment which defendant was subject to.

¶ 31 Instead, the State made an amendment which left intact the focal point of the AHC charge against defendant: whether he was in possession of a firearm on the night of March 23, 2013. Accordingly, we must hold that the amendment which substituted certain qualifying predicate offenses for two other qualifying predicate offenses was a formal amendment to the grand jury's indictment on the AHC count and thus not error.

¶ 32 Defendant's next two arguments on appeal challenge the performance of his attorney, both before and during the trial. In *Strickland v. Washington*, the Supreme Court established the standard for attorney performance under the Sixth Amendment of the United States Constitution. 466 U.S. 668, 687 (1984). There, the Court held that attorneys must provide "reasonably effective assistance." *Id.* The Court held that reasonably effective assistance is assistance that is not both (1) objectively unreasonable given the circumstances; and (2) prejudicial to the client. *Id.* at 688, 692.

¶ 33 Further, in *Strickland*, the Court advocated for judicial scrutiny that is "highly deferential" to a finding of reasonableness because

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689.

¶ 34 Accordingly, the *Strickland* Court held that when challenging an attorney's performance "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

¶ 35 Here, defendant argues that his counsel's decision to suggest the amendment of the indictment was both unreasonable and prejudicial. However, the record reflects that this decision could easily be construed as reasonable given the circumstances. Defendant's argument boils down to the assertion that counsel, by suggesting the amendment to the indictment, traded away a certain constitutional challenge for seemingly no gain. This characterization of the events, however, both overstates the likelihood of a successful constitutional challenge at the

time of decision and ignores the potential strategic value of such a decision.

¶ 36 At the time of the hearing on defendant's motion to dismiss, this court had held the statute defining the Class 2 AUUW offense to be constitutional in two separate cases, *Soto*, 2014 IL App (1st) 121937, ¶ 24, and *Burns*, 2013 IL App (1st) 120929, ¶ 27, while the Fourth district, in *Campbell*, 2013 IL App (4th) 120635, ¶ 22, had found it to be facially unconstitutional in light of our supreme court's decision in *Aguilar*.

¶ 37 Also at that time, the issue of the Class 2 offense's constitutionality was pending before our supreme court. As such, at the time of the hearing, there was no slam dunk constitutional challenge available to defendant if convicted of an AHC violation with the stated predicate offenses of Class 2 AUUW and UUWF. At best, defendant had the mere possibility of a constitutional challenge only after our supreme court ruled in December of 2015, over a year after defendant's trial, that the Class 2 AUUW offense was unconstitutional. Accordingly, at the time of the hearing, defense counsel traded away not a surefire constitutional challenge but only the chance of one which was itself contingent on a number of favorable variables in the future.

¶ 38 Moreover, the record also reflects that there was likely a significant strategic motivation to have the charging document amended. These strategic motivations are evidenced by the fact that, following the amendment, defense counsel moved to bar the prosecution from referencing defendant's AUUW and UUWF convictions for purposes of impeaching the defendant during the trial. As defense counsel noted, there is "nothing more prejudicial" in the trial of a gun possession charge than "allowing a jury to hear a prior conviction for possessing a firearm."

¶ 39 Though the outcome – lack of a viable constitutional challenge under *Aguilar* and *Burns* - is certainly unfavorable to defendant, the decision which gave rise to this outcome was certainly reasonable and not indicative of the ineffective assistance of counsel. Even though hindsight

shows that defense counsel's strategy did not pay off, we must consider only the context and factors relevant *at the time of the decision itself*. As such, it appears perfectly reasonable for defense counsel to forfeit a possible future constitutional challenge where such a decision helps to remove his client's past gun possession convictions from being discussed at trial. This is especially true where a decision aimed at preserving that constitutional challenge could have jeopardized, or outright surrendered, defendant's chances of acquittal at trial.

¶ 40 Additionally, even if we found that defense counsel's decision was unreasonable, defendant was not prejudiced by the decision. To satisfy the second prong of *Strickland's* test for ineffective assistance of counsel, defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668 at 694. Here, we cannot find any way in which the amendments affected the results of defendant's trial. In fact, as mentioned previously, it is plausible that the amendment improved defendant's odds of obtaining an acquittal relative to his odds had the court admitted his prior gun possession convictions into evidence. Defendant seeks to fulfill this prong by alleging that his inability to pursue a favorable constitutional challenge is itself prejudicial. However, such an argument fails to demonstrate any reasonable likelihood of success at trial had defense counsel not suggested the amendments to the grand jury indictment.

¶ 41 Similarly, the choice which gave rise to the defendant's second claim of ineffective assistance of counsel appears to also be reasonable. Defendant argues that counsel's decision to elicit testimony from Fairley asserting that defendant fired a weapon on the night of the arrest was prejudicial towards his own client for two significant reasons. First, defendant claims that this question, and Fairley's answer in the affirmative, portrayed the defendant as a dangerous menace, which in turn prejudiced the jury against him and decreased the odds of an acquittal.

Second, defendant notes that Fairley's response directly contradicted the testimony of Winston, a defense witness, impeaching her credibility and that of the defense. However, the decision to elicit this testimony from Fairley appears reasonable given the greater context of Fairley's testimony and the other facts which defense counsel sought to prove throughout the trial.

¶ 42 At trial, defense counsel sought to prove not only that Fairley had planted the firearm in defendant's hooded sweatshirt on the night of the arrest but also that the act of framing the defendant for a gun possession arrest was the culmination of years of harassment and police misconduct by which the defendant was coerced into providing firearms or information to the Maywood police department in exchange for favorable treatment. Accordingly, defense counsel sought to impeach Fairley's credibility at trial and to raise issues of impropriety and bias in the department's investigation on the night of the arrest.

¶ 43 Within this context, defense counsel's decision to elicit the relevant testimony appears reasonable as part of the foundation for a line of inquiry that sought to impeach Fairley and present Winston as the more credible witness, instead of the inverse as defendant suggests on appeal. This view is further supported by the line of questioning which counsel began shortly after eliciting the testimony in question. Counsel followed that testimony by asking Fairley whether he had conducted thorough testing of the firearm itself or of defendant. Specifically, defense counsel asked Fairley whether he had tested the firearm for fingerprints or DNA evidence. Counsel then also inquired as to whether he or any other Maywood police officers had tested the defendant's hands for gunshot residue since they allegedly had reason to believe that he had fired the weapon on the night of the arrest.

¶ 44 In this light, the testimony which counsel elicited fits within the framework of a defense seeking to impeach the credibility of the Maywood Police department generally and of Fairley

specifically. We cannot find that counsel's decision was unreasonable solely because the jury did not buy into the defense's version of events.

¶ 45 Moreover, defendant has not demonstrated that counsel's decision to elicit this testimony was prejudicial. More specifically, defendant has not shown that the jury was reasonably likely to acquit him of the State's charges but for this particular line of inquiry. The jury heard evidence asserting that defendant had prior felony convictions for burglary and drug possession, that he was involved in a domestic disturbance on the night of the arrest, and that he was found in possession of a firearm. Defense counsel's decision, made in an attempt to impeach the credibility of Fairley and other arresting officers, cannot be said to have swayed the jury to an extent that would justify a finding of prejudice against defendant.

¶ 46 Accordingly, we determine that defendant's claims of ineffective assistance of counsel are without merit. For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 47 Affirmed.