

No. 1-10-1376

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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 Cook County, Illinois.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CR 23027
	)	
JUHWUN FOSTER,	)	Honorable John A. Wasilewski,
	)	Judge Presiding.
Defendant-Appellant.	)	

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JUSTICE SIMON delivered the judgment of the court.  
Justices Pierce and Hyman concurred in the judgment.

**ORDER**

¶ 1 *HELD*: We affirm defendant's armed habitual criminal conviction where the State proved every element of the offense beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant, Juhwun Foster, was convicted of one count of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2006)), four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (West 2006)) (AUUW) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)) (UUWF). The convictions were merged into the count of armed habitual criminal, and defendant, who had two prior convictions,

for aggravated unlawful use of a weapon in 2002 and armed robbery in 2004, was sentenced to nine years in prison. Defendant appealed arguing that the armed habitual criminal statute was unconstitutional. We rejected defendant's argument and affirmed defendant's conviction and sentence. *People v. Foster*, 2012 IL App (1st) 101376-U. Defendant sought review of that decision before our supreme court.

¶ 3 Our supreme court entered a supervisory order directing this court to vacate our prior holding and reconsider the judgment to determine if another outcome is warranted in light of the decision in *People v. Aguilar*, 2013 IL 112116. Our judgment was vacated and we reversed defendant's armed habitual criminal conviction and remanded the matter for resentencing on defendant's conviction for UUWF. See *People v. Foster*, 2014 IL App (1st) 101376-U. Pursuant to our supreme court's second supervisory order, our decision in *People v. Foster*, 2014 IL App (1st) 101376-U, was vacated and we now proceed to address the merits of defendant's appeal in light of *People v. McFadden*, 2016 IL 117424.

¶ 4 There is no dispute between the parties concerning the facts underlying defendant's conviction. At trial, Officer Edward Dougherty of the Chicago police department testified that on October 21, 2007, he and his partner were near a parking lot at 4430 South Laporte Avenue in Chicago, Illinois. Dougherty observed defendant walking towards the officers and then turn and walk briskly away after seeing the officers. Dougherty exited the squad car, announced his office and sought a field interview. From about ten feet away, Dougherty saw defendant remove a loaded handgun from his waistband and drop it in a bush. Dougherty discovered two loaded firearms in the bush and defendant was arrested. At trial, the State presented certified copies showing defendant's 2002 AUUW conviction and his 2004 armed robbery conviction.

¶ 5 Defendant testified on his own behalf and also presented the testimony of Paris McGee and Lashica Dover. They testified that McGee was with defendant when the police stopped

them, but that McGee was released while defendant was arrested. Further, they testified that defendant never possessed a handgun and there was no bush in the vicinity of the arrest. The trial court found defendant guilty on all counts, merging the counts into the conviction for armed habitual criminal and sentenced defendant to nine years in prison.

¶ 6 Defendant argues that his armed habitual criminal conviction must be reversed in the wake of *Aguilar* because it was predicated on a prior conviction for the Class 4 form of AUUW that the *Aguilar* court found unconstitutional. Defendant asserts that the Class 4 form of AUUW is void *ab initio*; therefore, defendant argues, his predicate offense for AUUW is void, his armed habitual criminal conviction must be reversed, and the matter must be remanded for resentencing on his remaining conviction for UUWF.

¶ 7 To sustain a conviction for armed habitual criminal, the State was required to prove that defendant possessed a firearm after having been convicted of at least two qualifying predicate offenses. See 720 ILCS 5/24–1.7(a) (West 2012). In the present case, the two predicate offenses were armed robbery in case number 03 CR 10476 and the Class 4 version of AUUW in case number 02 CR 9312.

¶ 8 In *Aguilar*, our supreme court found the Class 4 version of the AUUW to be facially unconstitutional in violation of the second amendment right to bear arms. *Aguilar*, 2013 IL 112116, ¶ 1. When a statute is declared unconstitutional, it is void *ab initio*. *Id.* ¶ 12. Defendant's 2002 conviction for AUUW was for the Class 4 form of the offense. Thus, the holding in *Aguilar* renders defendant's 2002 AUUW conviction void *ab initio*.

¶ 9 Our supreme court in *People v. McFadden*, 2016 IL 117424, addressed the same issue defendant raises here and controls our disposition in this case. In *McFadden*, the defendant was convicted of UUWF based on his possession of a firearm after having been convicted of AUUW. *Id.* ¶ 1. On appeal, the defendant argued that his UUWF conviction must be vacated because it

was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar* and, thus, the State failed to prove all the elements of the UUWF offense. *Id.* ¶ 8.

¶ 10 Our supreme court examined the language of the UUWF statute, which prohibits a person's knowing possession of a firearm after having been convicted of a felony. *Id.* ¶ 27 (citing 720 ILCS 5/24–1.1(a) (West 2008)). The court noted that the proscription under section 24–1.1(a) of the UUWF statute is expressed in the past tense, applying to any person who “has been convicted” of a felony (*id.* (citing 720 ILCS 5/24–1.1(a) (West 2008))), and that “[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur.” *Id.*

¶ 11 The court further found that “the language of section 24–1.1(a) is ‘consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.’ ” *Id.* ¶ 29 (citing *Lewis v. United States*, 445 U.S. 55, 61 n. 5 (1980)). Additionally, the purpose of the UUWF statute is to “protect the public from persons who are potentially irresponsible and dangerous.” *Id.* Thus, it is immaterial whether the predicate conviction ultimately turns out invalid. *Id.* The UUWF statute is not concerned with enforcing the predicate conviction, but rather is concerned with the role of that conviction as a disqualifying condition for the purpose of obtaining firearms. *Id.* Therefore, the court found that the UUWF statute was a “status offense,” and that the legislature intended that the defendant clear his felon status through the judicial process by having his prior conviction vacated or expunged prior to obtaining firearms. *Id.*

¶ 12 The court further stated:

“It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any

conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [UUWF] offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms.” *Id.* ¶ 31.

¶ 13 The court found that, although the defendant could seek to vacate his prior AUUW conviction as being void *ab initio* under *Aguilar*, that remedy would not alter the requirement under the UUWF statute that he clear his felon status prior to obtaining a firearm. *Id.* ¶ 37. Accordingly, the court concluded that the defendant's prior AUUW conviction properly served as proof of the predicate felony conviction for UUWF. *Id.*

¶ 14 The reasoning in *McFadden* applies equally to the offense of armed habitual criminal, where, “the State need only prove the fact of the prior convictions of enumerated offenses [citations], just as the State need only prove the fact of a prior felony conviction to support a UUWF conviction.” *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 7.

¶ 15 Here, as in *McFadden*, defendant's prior AUUW conviction in the case number 02 CR 9312 was not vacated at the time defendant committed the instant offense in 2007. Defendant's failure to vacate his prior AUUW conviction on grounds that it was unconstitutional prior to committing the instant offense is fatal to his challenge to his armed habitual criminal conviction. Pursuant to *McFadden*, we hold that defendant's prior AUUW conviction in the case number 02 CR 9312 could serve as one of the predicate offenses for defendant's armed habitual criminal conviction. Therefore, because the State proved beyond a reasonable doubt that defendant possessed a firearm and was convicted of two prior felonies properly serving as the predicate

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offenses, AUUW and armed robbery, we affirm the judgment of the trial court finding defendant guilty of being an armed habitual criminal. See *Perkins*, 2016 IL App (1st) 150889, ¶ 7.

¶ 16

CONCLUSION

¶ 17 Based on the foregoing, we affirm.

¶ 18 Affirmed.