

the defendant's 2012 conviction under section 24-1.7 of the Criminal Code of 2012 for being an armed habitual criminal (AHC). See 720 ILCS 5/24-1.7 (West 2012). The trial court concluded that the AHC conviction could not stand because it was based, in part, on a prior conviction for aggravated unlawful use of a weapon (AUUW) pursuant to a statutory provision held unconstitutional by our supreme court in *People v. Aguilar*, 2013 IL 112116.

¶ 3 On August 31, 2015, this court entered an order affirming the trial court, agreeing with the defendant that the prior AUUW conviction was void *ab initio* and thus could not serve as a predicate offense to support the AHC conviction. *People v. Fryer*, 2015 IL App (1st) 141409-U. In November 2016, the supreme court issued a supervisory order directing this court to reconsider that judgment in light of its decision in *People v. McFadden*, 2016 IL 117424. Having done so, we now reverse the trial court's order in this case, as we conclude that, pursuant to *McFadden*, the AUUW conviction could serve as a predicate offense for the defendant's AHC conviction.

¶ 4 **BACKGROUND**

¶ 5 The defendant's 2012 AHC conviction at issue in this appeal was based, in part, on two predicate convictions in 2005 and 2009. In September 2005, in a prior case, the defendant pleaded guilty to AUUW for violating a statutory provision which, at the time, criminalized the possession of an uncased, loaded, accessible firearm outside of one's home. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004). In that case, the defendant received a sentence of 18 months' probation. In a separate case in 2009, the defendant was convicted of unlawful use of a weapon by a felon (UUWF). The factual bases for these prior offenses are not at issue in this appeal.

¶ 6 The AHC charge at issue in the instant case arose from the defendant's arrest by Officer Tovar of the Chicago Police Department in the early morning hours of November 2, 2011.

According to Officer Tovar, at approximately 3:00 a.m., he and his partner were dispatched to the 8500 block of South Damen Avenue in Chicago in response to a call from the defendant's girlfriend regarding a domestic disturbance.

¶ 7 Officer Tovar and his partner spoke with the defendant's girlfriend at the scene, who told them that she had been in a "verbal altercation" with the defendant, after which the defendant had left with her vehicle, a black Ford Explorer. As Officer Tovar was speaking to the defendant's girlfriend, she suddenly yelled out and pointed out a black Ford Explorer traveling on Damen Avenue, and told the officers that it was her vehicle. Officer Tovar testified that he observed the vehicle make a turn without using a turn signal. Officer Tovar and his partner returned to their police car and followed the Ford Explorer, which they observed make a second turn without using a signal.

¶ 8 The officers stopped the Ford Explorer; the defendant was in the driver's seat. Officer Tovar asked the defendant for his driver's license, but the defendant was unable to produce it. At that time, Officer Tovar observed an open container of beer in the Ford Explorer's center console. Officer Tovar asked the defendant to exit the vehicle. After the defendant complied, Officer Tovar observed the handle of a handgun wedged between the driver's seat and the center console. Officer Tovar recovered the handgun and arrested the defendant.

¶ 9 As a result of that arrest, on December 2, 2011, the defendant was charged with a total of nine counts: one count of AHC, two counts of UUWF, and six counts of AUUW. The AHC offense is committed where one "receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times" of certain enumerated offenses. 720 ILCS 5/24-1.7(a) (West 2012). In this case, the State relied on the defendant's 2005 AUUW conviction and his 2009 UUWF conviction as the two predicate convictions to support the AHC charge.

¶ 10 The defendant moved to quash the November 2011 arrest and suppress evidence from that arrest. The court conducted a hearing on that motion on June 5, 2012, at which the defendant and Officer Tovar testified regarding the circumstances of the arrest. The defendant denied getting into an altercation with his girlfriend, but admitted that he was driving a black Ford Explorer when he was pulled over. Contrary to Officer Tovar's subsequent testimony, the defendant testified that he had observed all traffic laws, and he denied that there was an open container of beer in the Ford Explorer.

¶ 11 The defendant's counsel argued that there was no valid basis for stopping the Ford Explorer, claiming that the evidence conflicted as to whether the stop was based on a report of a domestic disturbance or the failure to use a turn signal. The State argued that the stop was justified on both grounds. The trial court concluded that the stop was justified and that the handgun had been in plain view. Thus, the court denied the defendant's motion to suppress.

¶ 12 Following a conference with the court, the State's attorney, and his counsel, the defendant entered a guilty plea to the AHC charge, and the State declined to prosecute the remaining charges. In connection with the plea, the parties stipulated that, had the matter proceeded to trial, the State would have introduced certified copies of conviction reflecting the 2005 conviction for AUUW and the 2009 UUWF conviction. After the defendant entered his plea to the AHC charge, the trial court sentenced him to eight years in the Illinois Department of Corrections, to be followed by three years of mandatory supervised release.

¶ 13 On December 9, 2013, the defendant, acting *pro se*, filed the section 2-1401 petition that is the subject of this appeal. That petition argued that the AHC conviction could not stand because it was predicated, in part, on a 2005 AUUW conviction for violation of a statutory

provision since held unconstitutional by our supreme court in *Aguilar*.¹ The petition sought that the AHC conviction "be expunged *** due to the recent findings in *People v. Aguilar* that finds the constitutionality of the statute of [AUUW] void" and that "[w]ithout the use of the [defendant's] prior conviction of [AUUW], elements do not exist to establish [AHC]."² The trial court subsequently appointed the public defender to represent the defendant.

¶ 14 On February 21, 2014, the defendant's counsel filed a "supplemental motion for relief from judgment" as a supplement to the initial *pro se* petition. That submission argued that the 2005 AUUW conviction was invalid pursuant to *Aguilar* and that "[w]ithout this previous invalid conviction for [AUUW], Mr. Fryer's guilty plea to [AHC] in this case cannot stand." The supplemental motion did not seek to collaterally attack either the 2009 or 2005 convictions, but argued that the AHC conviction must be vacated because "one of the elements in the prosecution of the case *** has been found to be void."

¶ 15 On April 4, 2014, the State moved to dismiss the section 2-1401 petition. In that motion, the State acknowledged that in *Aguilar*, 2013 IL 112116, our supreme court held that the AUUW statutory provision that was the basis of the defendant's 2005 conviction was facially unconstitutional. Nevertheless, the State argued that the defendant's section 2-1401 petition with respect to his 2012 AHC conviction did not give the circuit court jurisdiction to address his AUUW conviction in the prior 2005 case. The State argued that the section 2-1401 petition

¹ The initial *pro se* petition also alleged (incorrectly) that the 2005 AUUW conviction was also the predicate felony offense to support the defendant's 2009 UUWF correction. However, the defendant's counsel subsequently acknowledged to the trial court that the 2009 UUWF conviction was premised on a "drunk driving offense."

² The *pro se* petition's prayer for relief also sought "expunging" of the prior 2005 and 2009 convictions. However, after counsel was appointed, the defendant did not pursue that argument.

should be rejected "as an improper attack on a judgment which is outside this Court's jurisdiction," and that *Aguilar* did not apply "retroactively to cases on collateral review."

¶ 16 Separately, the State urged that the 2012 AHC conviction was valid, notwithstanding the 2013 decision in *Aguilar*, because at the time of the defendant's guilty plea in 2012, "the Class 4 form of AUUW had yet to be declared unconstitutional." The State claimed that "it is the status of the prior felony conviction at the time the defendant possessed the firearm that controls, regardless of whether that prior conviction might later be found to be constitutionally invalid." Because the 2005 predicate AUUW conviction was valid at the time of the 2012 AHC guilty plea, the State asserted that *Aguilar* did not undermine that plea.

¶ 17 The parties argued the merits of the petition at a hearing on April 11, 2014. The defendant's counsel urged that the appropriate relief was to vacate the AHC guilty plea and conduct further proceedings on the remaining charges that were dropped in connection with the plea. Defense counsel cited several post-*Aguilar* appellate court decisions reversing convictions for AHC or UUWF when predicated on AUUW convictions under the statutory provision invalidated by *Aguilar*. Defendant's counsel asserted that his 2005 AUUW conviction was void *ab initio* and thus "can be attacked at any time either directly or collaterally."

¶ 18 The State reiterated its argument that the 2012 AHC conviction was proper because *Aguilar* had not been decided at the time of the defendant's November 2011 arrest. The State again claimed that the court did not have jurisdiction "to go back and look at the '05 conviction."

¶ 19 At a hearing on April 25, 2014, the trial court granted the defendant's section 2-1401 petition. The trial court noted that to support the charge of AHC, "the State's proffer included two predicate offenses, one of which was for [AUUW] under 720 ILCS 5/24-1.6(a)(1)," which had been "declared unconstitutional under *People v. Aguilar*," 2013 IL 112116. The trial court

observed that "this same scenario" was presented in the appellate court decision *People v. Fields*, 2014 IL App (1st) 110311, and that *Fields* had "found that the Class 4 [AUUW], which was void based upon *Aguilar*, could not serve as the predicate felony" for the AHC offense.

¶ 20 The trial court reasoned that in this case, "one of the predicate offenses offered by the [S]tate is the exact form of the statute held to be void *ab initio* in *Aguilar*. This void conviction cannot stand as proof of one of the necessary elements of [AHC]." Thus, the trial court granted the section 2-1401 petition and vacated the defendant's 2012 guilty plea to the AHC offense. The trial court also reinstated all charges against the defendant, including the AHC charge to which he had pleaded guilty.

¶ 21 On May 9, 2014, the State filed a notice of appeal, and the trial court stayed further proceedings pending resolution of the appeal.

¶ 22 On August 31, 2015, we issued a Rule 23 order affirming the trial court's order granting the section 2-1401 petition and vacating the AHC conviction. *People v. Fryer*, 2015 IL App (1st) 141409-U. We noted that decisions of this court had determined that an AUUW conviction arising from the statutory subsection held unconstitutional in *Aguilar* cannot serve as a predicate offense to support a conviction for AHC. *Id.* ¶ 30 (citing *People v. Fields*, 2014 IL App (1st) 110311; *People v. Cowart*, 2015 IL App (1st) 113085.) We agreed with those decisions, holding that the defendant's prior AUUW conviction could not serve as a predicate offense for AHC. Thus, we concluded that the trial court correctly vacated the defendant's plea to the AHC charge.

¶ 23 On November 16, 2016, the supreme court entered a supervisory order, directing us to reconsider our judgment in light of its decision in *People v. McFadden*, 2016 IL 117424. Our August 31, 2015 order was withdrawn in light of that supervisory order. We then allowed the parties to submit supplemental briefing concerning *McFadden* before issuing this order.

¶ 24

ANALYSIS

¶ 25 We now review whether, in light of the supreme court's *McFadden* decision, the defendant's 2005 AUUW conviction could serve as a predicate offense to support the subsequent AHC conviction. As we conclude that *McFadden* permits the use of the prior AUUW conviction to support an AHC conviction, we reverse the trial court's order granting the defendant's section 2-1401 petition.

¶ 26 We first review the *McFadden* decision. *McFadden* concerned a direct appeal from a UUWF conviction, based on the defendant's possession of a firearm when he had previously been convicted of AUUW. As in this case, the *McFadden* defendant's prior AUUW conviction was based on the AUUW statutory provision found to be unconstitutional in *Aguilar*. See *Aguilar*, 2013 IL 112116 (concluding that the Class 4 version of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)) was unconstitutional because it violated the second amendment right to bear arms). Similar to the defendant's argument regarding the AHC offense in this case, the defendant in *McFadden* argued that *Aguilar* prevented use of the prior AUUW conviction to serve as a predicate offense for the UUWF charge.

¶ 27 The appellate court agreed with the *McFadden* defendant and vacated the defendant's UUWF conviction. *People v. McFadden*, 2014 IL App (1st) 102939. However, the supreme court reversed, reasoning that the defendant's felon status was unaffected by *Aguilar*; thus, unless the prior conviction was vacated, the prior conviction precluded the defendant from legally possessing a firearm. *McFadden*, 2016 IL 11724, ¶ 31 ("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 UUW by a

felon offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms.").

¶ 28 The supreme court in *McFadden* relied largely on the United States Supreme Court's holding "that under a federal felon-in-possession-of-a-firearm statute, a constitutionally infirm prior felony conviction could be used by the government as the predicate felony." *Id.* ¶ 22 (citing *Lewis v. United States*, 445 U.S. 55, 65 (1980)). *McFadden* approvingly cited *Lewis*' reasoning in holding that an AUUW conviction subject to vacatur under *Aguilar* may still serve as a predicate for a UUWF conviction.

¶ 29 *Lewis* concerned a federal statute criminalizing firearm possession by "any person who has been convicted *** of a felony." (Internal quotation marks omitted.) 445 U.S. at 60. The defendant in *Lewis* had a prior felony conviction from a case in which he was unrepresented by counsel. *Id.* at 57. The *Lewis* court recognized that a conviction without the benefit of counsel was unconstitutional. *Id.* at 59.

¶ 30 Despite the constitutional infirmity of the prior felony conviction, the United States Supreme Court nonetheless held that it subjected the defendant to liability under the felon-in-possession statute. The *Lewis* court reasoned that "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack]" and that "its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action." (Internal quotation marks omitted). *Id.* at 60-61.

¶ 31 In *McFadden*, the supreme court recognized that "under *Lewis* and its progeny, the fact of a felony conviction without any intervening vacatur or other affirmative action to nullify the conviction triggers the firearms disability." *McFadden*, 2016 IL 117424, ¶ 24. *McFadden*

applied this reasoning to the UUWF statute, which prohibited possession of a firearm by any person who " 'has been convicted of a felony under the laws of this State or any other jurisdiction.' " *Id.* ¶ 27 (quoting 720 ILCS 5/24-1.1(a) (West 2008)). *McFadden* reasoned that the UUWF statute "requires the State to prove only the defendant's felon status" and did not suggest "any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." (Internal quotation marks omitted.) *Id.*

¶ 32 The supreme court in *McFadden* further reasoned that the language of the UUWF statute, like the federal statute at issue in *Lewis*, was " '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 had been vacated.' " *Id.* ¶ 29 (quoting *Lewis*, 445 U.S. at 61 n. 5). Further, *McFadden* agreed that "it is immaterial whether the predicate conviction 'ultimately might turn out to be invalid for any reason.' " *Id.* (quoting *Lewis*, 445 U.S. at 62). *McFadden* concluded that "[t]he UUW by a felon offense is a status offense, and the General Assembly intended that a defendant must clear his felon status before obtaining a firearm." *Id.*

¶ 33 The defendant's supplemental briefing makes two primary arguments attempting to distinguish *McFadden* from his case, which concerns the use of the same prior AUUW felony as a predicate for the AHC offense. Notably, virtually identical arguments were considered and rejected by this court in *People v. Perkins*, 2016 IL App (1st) 150889 and *People v. Faulkner*, 2017 IL App (1st) 132884. Those cases concluded that *McFadden's* logic applies to allow a prior AUUW conviction, premised on the statutory provision held invalid in *Aguilar*, to serve as a predicate for an AHC conviction. We reach the same conclusion in this case.

¶ 34 The defendant's primary argument is that the AHC statute is distinguishable from either the UUWF statute at issue in *McFadden* or the federal statute at issue in *Lewis*, such that

McFadden should not apply to support an AHC conviction based on the form of AUUW invalidated by *Aguilar*. The defendant emphasizes that the UUWF offense merely requires proof "of the defendant's felon *status*," based on *any* prior felony. See 220 ILCS 5/24-1.1(a) (West 2012). He argues that this "generic 'felon status' principle" was the basis for *McFadden's* holding that a "prior unconstitutional AUUW conviction could serve as a predicate offense for UUWF."

¶ 35 In contrast to the "status crime" of UUWF, he urges that the AHC statute punishes "particular conduct" because it "enumerates specific offenses that can serve as the predicate felonies." He urges that the AHC statute "does not present the sort of broad sweeping firearm disability" imposed by the UUWF statute at issue in *McFadden*, or the federal statute at issue in *Lewis*. Thus, he claims that the reasoning in those decisions does not apply here.

¶ 36 As we have before in other recent opinions, we reject the defendant's attempt to argue that *McFadden's* reasoning cannot apply to an AHC conviction. *Faulkner*, 2017 IL App (1st) 132884; *Perkins*, 2016 IL App (1st) 150889. In *Perkins*, the defendant similarly asserted that *McFadden's* reasoning should be limited to UUWF because "UUWF impose[d] a 'status-based disability' that precludes any convicted felon from possessing a firearm" whereas AHC "requires the State to prove that the defendant was convicted of specific enumerated offenses." *Id.* ¶ 6. The *Perkins* defendant argued that UUWF imposed a "status-based disability" whereas AHC "imposes a conduct-based disability" for specific acts. *Id.* The *Perkins* defendant claimed that "because the *conduct* of which he was previously convicted—possession of firearm—was constitutionally protected, it cannot serve as a predicate" for an AHC conviction. (Emphasis in original.) *Id.*

¶ 37 The court in *Perkins* rejected this argument as a "distinction without a difference." *Id.* ¶ 7.

We explained:

"In order to sustain its burden to prove that a defendant is an armed habitual criminal, 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. Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses in order to find that the State has sustained its burden of proof. And because here, as in *McFadden*, Perkins' prior convictions had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." *Id.*

¶ 38 In his supplemental brief, the defendant urges that *Perkins* "engaged in only a superficial comparison of the relevant statutes" and should not be followed. We disagree. The "same reasoning from *Perkins* applies to the defendant's attempt to distinguish the AHC statute in this case" and thus we reject the defendant's first argument raised in opposition to the application of *McFadden*. *Faulkner*, 2017 IL App (1st) 132884, ¶¶ 26-27.

¶ 39 The second argument raised by the defendant opposing the application of *McFadden* has also been repeatedly rejected by this court. Specifically, the defendant asserts that United States Supreme Court precedent, including *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016) and *Ex parte Siebold*, 100 U.S. 371 (1880) precludes the use of a prior conviction, premised on a statute later held unconstitutional, as a predicate for the AHC offense. He argues that this precedent "undercuts *McFadden*, which contains no discussion of *Montgomery* or *Siebold*."

¶ 40 In *Montgomery*, the United States Supreme Court held that the prohibition against mandatory life sentences without parole for juvenile offenders was a substantive rule of constitutional law entitled to retroactive effect. 577 U.S. at ___, 136 S. Ct. at 734. In so holding, the *Montgomery* court recognized: "A conviction for sentence imposed in violation of a substantive rule is *** void. See *Siebold*, 100 U.S. at 376. It follows *** that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.* at 731.

¶ 41 The defendant asserts that *Montgomery* and other United States Supreme Court decisions establish "that States cannot punish citizens, whether directly or collaterally, under a law that is *facially unconstitutional*." He contends that the supreme court's decision in *McFadden*, and this court's decision in *Perkins*, violate this principle by holding that a "facially unconstitutional conviction [for AUUW] may still be used as a predicate for a separate offense" until the prior conviction is vacated. In essence, he argues that his conduct leading to the prior AUUW conviction was "legal behavior" in light of *Aguilar*, such that the AUUW conviction was void and cannot serve as a predicate offense.

¶ 42 As recognized by the defendant, this court rejected this argument in *Perkins*, which upheld an AHC conviction predicated on the same form of AUUW invalidated by *Aguilar*. *Perkins*, 2016 IL App (1st) 150889, ¶¶ 8-9. In *Perkins*, the defendant similarly argued that, pursuant to *Montgomery*, *Aguilar* was entitled to "retroactive effect and that the State's reliance on his prior UUWF and AUUW convictions violates *Montgomery*'s central premise: 'There is no grandfather clause that permits States to enforce punishments the Constitution forbids.'" *Id.* ¶ 8 (quoting *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 731).

¶ 43 However, this court rejected the argument (repeated by the defendant in this case) that the supreme court's decision in *McFadden* had violated *Montgomery*:

"Perkins contends that our supreme court 'ignored' the decision in *Montgomery*. But as the State points out, prior to oral argument in *McFadden*, counsel sought and was granted leave to cite *Montgomery* as additional authority. In that motion, counsel advanced the same arguments presented here. In response, the State argued, as it does here, that *Montgomery* posed no constitutional impediment to affirmance of defendant's UUWF conviction given that defendant was not seeking to vacate his prior conviction ***, but instead was challenging his status as a convicted felon at the time of his trial. The State argued that in this context, *Lewis v. United States* [citation], which held that a defendant's failure to vacate a prior felony conviction on grounds that it was unconstitutional was fatal to a challenge to a felon-in-possession conviction, controlled. We agree with the State.

At the time of Perkins' armed habitual criminal conviction, he had prior UUWF and AUUW convictions. Because those convictions had not been vacated at the time Perkins possessed a firearm ***, they could properly serve as the predicates for his armed habitual criminal conviction." *Id.* ¶¶ 9-10.

¶ 44 In *Faulkner*, which concerned identical arguments, we held that this reasoning from *Perkins* was controlling. *Faulkner*, 2017 IL App (1st) 132884, ¶ 33. We do so again in this

case. It is undisputed that, at the time of the defendant's AHC conviction, he had two prior convictions for qualifying predicate offenses. As those convictions had not been vacated at the time of the defendant's November 2011 arrest, they could properly serve as predicate convictions for his AHC conviction. See *id.* In light of *McFadden* and the other precedent discussed, we conclude that the defendant's AHC conviction could be based, in part, on a prior AUUW conviction stemming from the statutory provision held unconstitutional in *Aguilar*. As the trial court order granting the defendant's section 2-1401 petition was based on the premise that his AUUW conviction could not serve as a predicate for the AHC conviction—which is refuted by *McFadden*—we now reverse the trial court's order, and we remand for proceedings consistent with this order.

¶ 45 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

¶ 46 Reversed and remanded.