

No. 1-11-1517

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 re Stephan P., a Minor

(The People of the State of Illinois,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee)	Cook County
)	
v.)	No. 09 JD 3489
)	
Stephan P.,)	Honorable
)	Patricia Mendoza,
Respondent-Appellant).)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Respondent's finding of delinquency is vacated pursuant to *People v. Aguilar*, 2013 IL 112116.
- ¶ 2 Respondent, Stephan P., was adjudicated delinquent for the offense of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2010)) by the circuit court of Cook County and sentenced to an indeterminate term of custody in the Juvenile Department of Corrections. Stephan appealed, arguing: (1) the AUUW statute violates the right

to bear arms protected by the United States and Illinois Constitutions (U.S. Const., amends. II, XIV; Ill. Const. 1970, art. I, § 22); (2) the circuit court erred in ruling it lacked discretion to credit time Stephan spent on electronic home monitoring. We affirmed defendant's conviction but remanded the case to the circuit court for a determination of how much credit, if any, Stephan may be entitled to receive for time he spent on electronic home monitoring in *In re Stephan P., a Minor*, 2012 IL App (1st) 111517-U on August 29, 2012. Pursuant to a January 29, 2014, supervisory order from our supreme court, we previously vacated our August 29, 2012 order. Pursuant to the supervisory order, we reconsider the issues raised in light of *People v. Aguilar*, 2013 IL 112116, and determine the finding of delinquency is vacated for the reasons that follow.

¶ 3

BACKGROUND

¶ 4 The record on appeal discloses the following facts. On August 27, 2009, the State filed a delinquency petition charging Stephan with three counts of AUUW, one count of unlawful possession of a firearm, and one count of resisting a police officer. The AUUW allegations were that Stephan knowingly carried a handgun when he was not on his own land or in his own abode and the gun was uncased, loaded and immediately accessible. Later that day, at a preliminary hearing, the State proffered that on August 26, 2009, Chicago police officer Celani saw 16-year-old Stephan holding a handgun while standing on the sidewalk in front of his home at 7234 South Bell Avenue. When the police approached, Stephan went into his house. The police pursued Stephan through the house and apprehended him in the backyard as he flailed his arms and legs. The police seized the .22 caliber loaded handgun Stephan discarded in his kitchen. Stephan told the police he bought the gun the prior month to protect his family after his home

was burglarized. Although defense counsel disagreed with the State's assertion that the police saw Stephan in custody of the weapon outside his home, the circuit court found probable cause that Stephan was delinquent.

¶ 5 On September 3, 2009, the circuit court placed Stephan on electronic home monitoring.

¶ 6 On October 8, 2009, Stephan pleaded guilty to one count of AUUW. At the conclusion of the hearing, the circuit court released Stephan from electronic home monitoring. On November 19, 2009, the circuit court imposed an 18-month term of probation.

¶ 7 On April 20, 2010, the State filed a violation of probation (VOP) petition, alleging Stephan failed to attend school. On May 10, 2010, the State filed a VOP petition for supplemental relief, charging Stephan with possession of not more than 2.5 grams of cannabis. On June 24, 2010, Stephan admitted to violating his probation by possessing cannabis; the circuit court recommitted Stephan to an 18-month term of probation and ordered inpatient drug rehabilitation.

¶ 8 On September 9, 2010, the State filed a VOP petition alleging that Stephan failed to enroll in and attend the drug treatment program. The petition also alleged Stephan failed to meet with his probation officer. On March 15, 2011, following a contested VOP hearing, the circuit court found Stephan had violated the terms of his probation and placed him in custody. At a March 22, 2011, dispositional hearing, the parties disputed whether Stephan was entitled to predisposition credit while subject to electronic home monitoring; the case was continued to resolve the issue.

¶ 9 On March 25, 2011, the circuit court determined that it lacked discretion to credit time Stephan spent on electronic home monitoring because the provision of the Unified Code of

Corrections (Code) at issue (730 ILCS 5/5-4.5-100 (West 2010)) did not allow such credit for persons convicted of AUUW. The circuit court imposed an indeterminate term in the department of juvenile justice and granted Stephan 38 days of credit for time spent in predisposition custody. Stephan filed a timely notice of appeal to this court.

¶ 10

DISCUSSION

¶ 11 In his original brief filed in this court, Stephan argued that the Class 4 form of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2010), under which he was convicted violates the right to bear arms protected by the United States Constitution (U.S. Const., amends. II, XIV) and the Illinois Constitution (Ill. Const. 1970, art. I, § 22). Stephan also argued the circuit court erred in ruling that it lacked discretion to credit time Stephan spent on electronic home monitoring. As we previously remanded this case back to the trial court for the court to determine how much credit, if any, Stephan was entitled to receive for the time he spent on electronic home monitoring, we need only address Stephan's constitutional challenge to the AUUW statute.

¶ 12 Stephan argues that the AUUW statute, insofar as it criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violates the constitutional right to bear arms, both facially and as applied to him. We begin by noting that a constitutional challenge to a criminal statute can be raised at any time. *In re J.W.*, 204 Ill. 2d 50 (2003); see also *People v. Meyerowitz*, 61 Ill. 2d 200, 211 (1975) (defendant who pleads guilty may challenge conviction under unconstitutional statute in motion to terminate probation).

¶ 13 In this case defendant was convicted of violating the AUUW statute which makes it unlawful to carry or possess a loaded firearm in public. 720 ILCS 5/24-1.6(a)(1),(a) (3)(A)(d)

(West 2008). However, recently in *Aguilar*, 2013 IL 112116 ¶ 22, our supreme court found the Class 4 form of felony of the AUUW statute, the exact section defendant was convicted of violating in this case (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2010)), to be unconstitutional in violation of the second amendment right to bear arms. The *Aguilar* court noted that the United States Supreme Court has stated that a central component of the second amendment right to bear arms is the " 'the inherent right of self-defense.'" *Id.* ¶ 16, citing *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). The court found this constitutional principle to be at odds with subsection (a)(1),(a)(3)(A)(d), which "categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Aguilar*, 2013 IL 112116, ¶ 21. Consequently, the *Aguilar* court held that subsection (a)(1),(a)(3)(A)(d) violated the right to keep and bear arms as guaranteed by the second amendment, and reversed *Aguilar*'s conviction under that subsection. *Id.* ¶ 22.

¶ 14 When a statute is declared unconstitutional, it is void *ab initio*, or as though the law had never been passed. See *People v. McFadden*, 2014 IL App (1st) 102939 ¶ 43; *People v. Fields*, 2014 IL App (1st) 110311 ¶ 38; *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Pursuant to the court's holding in *Aguilar*, we must vacate Stephan's finding of delinquency under section 5/24-1.6(a)(1), (a)(3)(A)(d). 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2010).

¶ 15 **CONCLUSION**

¶ 16 Based on the foregoing, we vacate Stephan's finding of delinquency under section 5/24-1.6(a)(1), (a)(3)(A)(d) of the AUUW statute.

¶ 17 Reversed.