

No. 1-12-0314

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. 09 CR 9979
)	
ANDRE BELL,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Certain portions of the aggravated unlawful use of a weapon statute are unconstitutional so that defendant's convictions thereunder are invalid.
- ¶ 2 Following a bench trial, defendant Andre Bell was convicted of aggravated unlawful use of a weapon (AUUW) and sentenced to two years' probation. On appeal, defendant contends that the AUUW statute (720 ILCS 5/24-1.6 (West 2008)), infringes on his constitutional right to keep and bear arms for self-defense. U.S. Const. amend. II. Alternatively, he contends that we should vacate

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two of his three convictions for AUUW as redundant because all three convictions are based on the same physical act of possessing a firearm. For the reasons stated below, we reverse.

¶ 3 Defendant was charged with a controlled substance offense and six counts of AUUW. 720 ILCS 5/24-1.6(a)(1), (2), (3)(A), (C) (West 2008). All six counts alleged that, on or about May 6, 2009, he knowingly possessed or carried a firearm when he was not on his own land or in his own abode or fixed place of business. The counts either alleged that he carried the firearm on or about his person or in a vehicle. The counts variously alleged that the firearm was uncased, loaded, and immediately accessible, that he had not been issued a valid firearm owner's identification card (FOID), and that he possessed the firearm on a specific public street.

¶ 4 At trial, the evidence was that, when police stopped defendant's car for a traffic offense, three officers saw him exit his car and put a gun into his waistband. Defendant fled on foot, and a pursuing officer testified that he saw defendant discard the gun and a "clear object." A loaded gun and a bag containing cannabis and narcotics were later found in the same area. On this evidence, the court found defendant not guilty of the controlled substance charge, granted a directed finding on three counts of AUUW alleging that he did not have a valid FOID, and found him guilty of three counts of AUUW.

¶ 5 The pre-sentencing investigation – accepted by the parties without correction – showed that defendant has a prior felony conviction for a controlled substance offense, for which he received and satisfactorily completed two years' probation. However, the court noted that because of the satisfactory completion of "410 probation *** it would not even be a conviction." *See* 720 ILCS 570/410(f), (g) (West 2010)(satisfactory completion of first-offender probation for minor

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controlled substance offenses dismisses the case so that it "is not a conviction *** for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.") The court stated that it was sentencing defendant on a Class 4 felony. Following arguments in aggravation and mitigation, the court sentenced him to two years of probation. The written orders imposing probation and assessing fines and fees refer to defendant's offense as "Agg. UUW" without further specificity. However, as stated above, the disposition at trial clarifies which counts of AUUW the court convicted defendant. This appeal timely followed.

¶ 6 On appeal, defendant primarily contends that the AUUW statute infringes upon his constitutional right to keep and bear arms.

¶ 7 At the time of defendant's offense, the UUW statute prohibited a person from carrying or concealing on or about his person, or in any vehicle, a firearm except when on his land or in his abode or fixed place of business. 720 ILCS 5/24-1(a)(4) (West 2008). Also at that time, the AUUW statute prohibited the same with any of various additional factors, including that the firearm "was uncased, loaded and immediately accessible," or the person has not been issued a valid FOID. 720 ILCS 5/24-1.6(a)(3)(A), (C) (West 2008). Specifically, section 24-1.6(a)(1) and (2) concerned when a person either:

- "(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business [a] firearm; or
- (2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits

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of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode or fixed place of business [a] firearm." 720 ILCS 5/24-1.6(a)(1), (2) (West 2008).

¶ 8 The United States Court of Appeals for the Seventh Circuit has found the UUW and AUUW statutes unconstitutional. *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012). The United States Supreme Court has found that the Second Amendment creates a personal right, binding upon the States through the Fourteenth Amendment (U.S. Const., amend. XIV, § 1), "to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 3044 (2010), citing *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Seventh Circuit found in *Moore v. Madigan* that the "right to bear arms for self-defense *** is as important outside the home as inside," found that the UUW and AUUW statutes create a "uniquely sweeping ban," and remanded the case to the federal district court for declarations of unconstitutionality and injunctive relief. *Moore v. Madigan*, 702 F. 3d at 942. The Seventh Circuit stayed its mandate "to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public." *Id.* The General Assembly has since amended the UUW and AUUW statutes pursuant to *Moore v. Madigan*. Pub. Act 98-0063 (eff. July 9, 2013).

¶ 9 In *People v. Moore*, 2013 IL App (1st) 110793, ¶¶ 14-19, we noted that a decision of a federal court other than the Supreme Court is not binding on this court but merely persuasive, and found *Moore v. Madigan* unpersuasive in light of the then-existing weight of Illinois case law upholding the AUUW statute. In particular, we disagreed with the Seventh Circuit that the right to self-defense recognized in *Heller* and *McDonald* includes a right to carry a loaded and accessible firearm in public areas. *Id.*, ¶ 18. We therefore affirmed convictions under the pre-amendment AUUW statute. *Id.*, ¶ 21.

¶ 10 However, in *People v. Aguilar*, 2013 IL 112116, our supreme court recently decided to follow *Moore v. Madigan* and held that "on its face, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution." *Aguilar*, 2013 IL 112116, ¶ 22.¹

"Of course, in concluding that the second amendment protects the right to possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation. [Citation.] That said, we cannot escape the reality that, in this case, we are dealing not with a reasonable regulation but with a comprehensive ban. Again, in the form presently before us, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an

¹ We initially followed *People v. Moore* and found the AUUW statute constitutional. However, in denying defendant leave to appeal, the supreme court has ordered us to vacate our order of August 1, 2013, and reconsider in light of *Aguilar*. *People v. Bell*, No. 116569 (Jan. 29, 2014).

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operable firearm for self-defense outside the home. In other words, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) amounts to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court. In no other context would we permit this, and we will not permit it here either." *Id.*, ¶ 21.

The *Aguilar* court also affirmed as constitutional a conviction for possessing a concealable firearm while under 18 years of age (720 ILCS 5/24-3.1(a)(1) (West 2008)), finding that the constitutional right to keep and bear arms does not extend to minors. *Id.*, ¶¶ 24-28.

¶ 11 This court has since distinguished *Aguilar* and found that Class 2 AUUW by a convicted felon, though also pursuant to section 24-1.6(a)(1) and (a)(3)(A), is constitutional because the Supreme Court and our supreme court have affirmed that the right to keep and bear arms is subject to regulation, specifically including presumptively-lawful prohibitions on the possession of firearms by felons. *People v. Burns*, 2013 IL App (1st) 120929, ¶ 25, citing *Aguilar*, 2013 IL 112116, ¶¶ 21, 26, and *Heller*, 554 U.S. at 626-27. We have also distinguished *Aguilar* regarding AUUW based on not having a valid FOID, pursuant to section 24-1.6(a)(3)(C), on the basis that it is not a comprehensive ban on carrying firearms for self-defense outside of the home but affects only a specified class of people, and particularly because *Moore v. Madigan* acknowledged that reasonable restrictions on the right to keep and bear firearms may include a permitting

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requirement. *People v. Taylor*, 2013 IL App (1st) 110166, ¶¶ 27-32, citing *Moore v. Madigan*, 702 F. 3d at 940-41; see also *People v. Akins*, 2014 IL App (1st) 093418-B, ¶¶ 12-15.

¶ 12 Here, defendant was convicted of the Class 4 felony of AUUW under section 24-1.6(a)(1), (2), and (3)(A). As stated above, our supreme court in *Aguilar* found unconstitutional the Class 4 version of AUUW under section 24-1.6(a)(1) and (3)(A). Following *Aguilar*, this court has found the Class 4 version of AUUW under section 24-1.6(a)(2) and (3)(A) to also be unconstitutional.² *Akins*, 2014 IL App (1st) 093418-B, ¶ 11. Therefore, pursuant to *Aguilar* and *Akins*, we find the Class 4 felony form of section 24-1.6(a)(1), (2), and (3)(A) violated defendant's constitutional right to keep and bear arms so that his convictions thereunder cannot stand.

¶ 13 Because we are reversing defendant's convictions, we need not address his contention that two of his three convictions for AUUW should be vacated as redundant.

¶ 14 Accordingly, the judgment of the circuit court is reversed.

¶ 15 Reversed.

² We previously declined to extend *Aguilar* beyond the particular statutory combination struck down therein and therefore issued an order affirming defendant's conviction under section 24-1.6(a)(2) and (3)(A) while reversing his convictions under section 24-1.6(a)(1) and (3)(A). However, upon defendant's petition for rehearing citing *Akins* and the State's answer conceding error based on *Akins*, we have granted rehearing.