

No. 1-12-0661

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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. 11CR99
)	
DWAYNE WILLIAMS,)	The Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse concurred in the judgment.
Justice Lavin dissented.

MODIFIED ORDER UPON DENIAL OF REHEARING

¶ 1 *Held:* Where it is unclear from the record before us whether defendant's predicate convictions were made pursuant to a now-unconstitutional statutory section, cause is remanded to the trial court for a limited hearing.

¶ 2 Following a jury trial, defendant Dwayne Williams was found guilty of armed habitual criminal and two counts of unlawful use of a weapon (UUW) by a felon. Defendant was sentenced to eight years' imprisonment for armed habitual criminal and seven years'

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imprisonment for each count of UUW by a felon, the UUW by a felon sentences to merge. On appeal, defendant contends he was denied the effective assistance of trial counsel where his trial attorney failed to file pretrial motions: (1) to prevent the venire from hearing details about defendant's two prior convictions for gun offenses; and (2) to quash his arrest and suppress his statement. For the first time in his reply brief, defendant also argues that the State failed to prove him guilty of both armed habitual criminal and UUW by a felon where the State relied on defendant's prior convictions for aggravated unlawful use of a weapon to satisfy an element of the charged offenses, which convictions are invalid, he argues, because they were entered under a statute that has been found unconstitutional in *People v. Aguilar*, 2013 IL 112116. For the following reasons, we remand this cause to the trial court for a limited hearing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with armed habitual criminal, aggravated unlawful use of a weapon, and UUW by a felon. The State proceeded to trial on the armed habitual criminal charge and two counts of UUW by a felon. The indictments read, in pertinent part:

"[COUNT 1] Dwayne Williams committed the offense of armed habitual criminal in that he knowingly or intentionally possessed a firearm after being convicted of aggravated unlawful use of a weapon under case number 08CR1359001 and aggravated unlawful use of a weapon under case number 07CR1654001"

and:

"[COUNT 2] Dwayne Williams committed the offense of

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unlawful use or possession of a weapon by a felon in that he, knowingly possessed on or about his person any firearm, to wit: 9mm handgun, after having been previously convicted of the felony offense of aggravated unlawful use of a weapon, under case number 08CR1359001 * * * and the State shall seek to sentence him as a Class 2 offender, in that he has been previously convicted of violation 24-1.1 under case number 08CR1359001"

and:

"[COUNT 3] Dwayne Williams committed the offense of unlawful use or possession of a weapon by a felon in that he, knowingly possessed on or about his person any firearm, to wit: 9mm Kel-Tec handgun, after having been previously convicted of the felony offense of aggravated unlawful use of a weapon, under case number 08CR1359001, under the laws of the State of Illinois * * * and the State shall seek to sentence him as a Class 2 offender, in that he has been previously convicted of violation 24-1.1 under case number 08CR1359001[.]"

¶ 5 Evidence at trial showed that, on December 9, 2010, police officers found two guns in a garbage can near where defendant had been standing. Chicago police officer Joseph White testified that he interviewed defendant on the night of his arrest, and defendant claimed ownership of the guns, stating he had found the weapons two years previous, had been storing the

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weapons in an abandoned building, and that, on December 9, 2010, he had them in his possession for his protection.

¶ 6 The parties stipulated that defendant had a prior felony conviction in 08 CR 13590 from November 23, 2008. The parties further stipulated that defendant had two prior felony convictions in 08 CR 13590 from November 23, 2008, and 07 CR 16540 from September 20, 2007, which convictions served as qualifying offense for armed habitual criminal. The nature of these previous felony convictions was not introduced at trial. The specific stipulations were as follows:

"[ASSISTANT STATE'S ATTORNEY FIALKOWSKI]: It is hereby stipulated between the People of the State of Illinois by their attorney, Anita Alvarez, the State's Attorney of Cook County, through her assistant state's attorneys, Antara Rivera and Melanie Fialkowski, and the defendant, Dwayne Williams, through his attorney, Wham Cary, that the defendant has a prior felony conviction in case 08-CR-13590 from November 23, 2008."

And:

"[ASSISTANT STATE'S ATTORNEY FIALKOWSKI]: It is hereby stipulated between the People of the State of Illinois by their attorney, Anita Alvarez, the State's Attorney of Cook County, through her assistant state's attorneys, Antara Rivera and Melanie Fialkowski, and the defendant, Dwayne Williams, through his

attorney, Wham Cary, that the defendant has two prior felony convictions in case 08-CR-13590 from November 23, 2008, and case 07-CR-16540 from September 20, 2007. These two prior felony convictions are qualifying offenses under the Armed Habitual Criminal."

¶ 7 The State rested. Defendant did not present evidence on his own behalf. Following closing arguments and jury instructions, the jury found defendant guilty of armed habitual criminal and two counts of unlawful use of a weapon by a felon based on the two different recovered weapons.

¶ 8 Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 a. The Predicate AUUW Offenses

¶ 11 In this appeal, we first address defendant's contention that the State failed to prove him guilty of either UUW by a felon or armed habitual criminal where the underlying convictions relied upon by the State were defendant's two prior convictions for aggravated unlawful use of a weapon (AUUW). According to defendant, after *People v. Aguilar*, 2013 IL 112116, these underlying convictions are void *ab initio* and can therefore no longer serve as predicate felonies to his current charges. On the specific facts before us in this case, we disagree.

¶ 12 Defendant essentially challenges the sufficiency of the evidence supporting his convictions for armed habitual criminal and UUW by a felon. See, e.g., *People v. McFadden*,

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2014 IL App (1st) 102939, ¶ 36 (where the defendant argued that, under *Aguilar*, his conviction for UUW by a felon must be vacated because the underlying predicate felony of AUUW was void, his "argument amount[ed] to a challenge to the sufficiency of the evidence supporting his UUW by a felon conviction."). When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). We will not substitute our judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259. A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

¶ 13 To prove unlawful use of a weapon by a felon, the State must prove that the defendant knowingly possessed a weapon or ammunition and that the defendant had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). A person may be convicted of being an armed habitual criminal if he possesses any firearm after being convicted twice of, *inter alia*, unlawful use of a weapon by a felon or aggravated unlawful use of a weapon. 720 ILCS 5/24-1.7(a)(2) (West 2010). The statute "demonstrates an unmistakable purpose to criminalize recidivist offenders who subsequently receive, possess, sell, or transfer firearms. [Citation.] Moreover, the statute evinces a clear intent that the crime apply to those offenders whose prior offenses were of a particular serious class or nature." *People v. Adams*, 404 Ill. App. 3d 405, 411

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(2010). Both the prior convictions and the present conduct must be proved beyond a reasonable doubt. *Adams*, 404 Ill. App. 3d at 412.

¶ 14 Recently, our supreme court filed its modified decision in *Aguilar*, in which it found the Class 4 version of the aggravated unlawful use of a weapon (AUUW) statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2008)) to be an unconstitutional violation of the second amendment right to bear arms. *Aguilar*, 2013 IL 112116, ¶ 22. That section provided as follows:

"(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(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, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]

* * *

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]" 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008).

In *Aguilar*, our supreme court determined:

"[I]n the form presently before us, the Class 4 form of section 24-

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1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an 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." *Aguilar*, 2013 IL 112116, ¶ 21.

"When a statute is declared unconstitutional, it is void *ab initio*, meaning that it is as if the law never existed." *Aguilar*, 2013 IL 112116, ¶ 9 (citing *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999)). "A trial court is without jurisdiction to enter a conviction against a defendant based on actions that do not constitute a criminal offense." *People v. Dunmore*, 2013 IL App (1st) 121170, ¶ 9. A Class 4 AUUW conviction, which offense has been found unconstitutional by our supreme court in *Aguilar*, cannot stand as a predicate offense for any charge. *People v. Fields*, 2014 IL App (1st) 110311, ¶ 44; *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 43.

¶ 15 While we recognize the above case law interpreting *Aguilar*, the case at bar differs factually from these cases and, therefore, has a different outcome. In the case at bar, it is unclear from the record whether defendant was previously convicted under the now unconstitutional section of the AUUW statute. From our review of the record, we have no doubt that defendant was convicted of aggravated unlawful use of a weapon, but we are unable to discern whether he was convicted of the now-unconstitutional Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d).

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The indictments included in the record specify defendant had previously been "convicted of aggravated unlawful use of a weapon under case number 07CR1654001" and previously been "convicted of the felony offense of aggravated unlawful use of a weapon, under case number 08CR1359001." At trial, the parties stipulated that defendant had two prior felony convictions, specifying that the convictions were "qualifying offenses under the Armed Habitual Criminal." The nature of the previous felony convictions was not introduced at trial. In the end, the jury, as the trier of fact, was presented with the fact of two prior felony convictions, which were stipulated to be "qualifying offenses" for the crimes at issue. At the time of defendant's trial, this practice was sufficient. Post-*Aguilar*, however, we now know the better practice may have been to specify the precise conviction for the record. Because we are unable to discern from the record before us whether defendant was convicted of the Class 4 form of the statute ruled unconstitutional in *Aguilar* (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), we are unable to determine whether *Aguilar* applies here.

¶ 16 In *People v. Greene*, 2014 IL App (4th) 120454, the Fourth District of this court addressed, in part, whether a defendant who had pled guilty to armed habitual criminal should have his conviction vacated because it was void where one of the underlying offenses –AUUW– used to satisfy the armed habitual criminal statute was found unconstitutional in *Aguilar*. *Greene*, 2014 IL App (4th) 120454, ¶ 11. The court affirmed defendant's conviction because, in part, it was unclear from the record whether defendant was previously convicted under the now-unconstitutional section of AUUW. *Greene*, 2014 IL App (4th) 120454, ¶ 13.

¶ 17 Similarly, defendant in the case at bar fails to show that his predicate convictions were

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under the now-unconstitutional section of the AUUW statute. While a Class 4 AUUW conviction, which offense has been found unconstitutional by our supreme court in *Aguilar*, cannot stand as a predicate offense for any charge (*People v. Fields*, 2014 IL App (1st) 110311, ¶ 44; *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 43), this court will not overturn a conviction based on an underlying predicate felony conviction about which we have insufficient information.

¶ 18 In its petition for rehearing, the State Appellate Defender argues again that defendant's predicate offenses were of the type found unconstitutional in *Aguilar*, that is, the convictions were pursuant to the now-unconstitutional Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d). In support of this argument, the State Appellate Defender attached several documents, including an unstamped printout dated March 21, 2014 (after the Rule 23 in this case was filed), purporting to show that defendant's underlying felonies were, in fact, under the now-unconstitutional Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d). A court of review is prohibited from considering matters outside the record on appeal. *Carrol v. Faust*, 311 Ill. App. 3d 679, 683 (2000) ("attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record"). The documents provided for the first time in the petition for rehearing are not properly before this court and, accordingly, we will not rely on them in our disposition.

¶ 19 Nonetheless, upon reconsideration of the issues before us, where we are unable to discern defendant's predicate convictions from the record before us, we have determined it appropriate to remand this cause to the trial court for a hearing to determine whether defendant's predicate

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convictions were pursuant to the now-unconstitutional Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d). Until such time as we have that piece of information, we are unable to determine whether defendant's contested convictions of AHC and UUW by a felon should be vacated.

¶ 20 Due to our disposition here, we no longer need to address defendant's further contentions regarding the alleged ineffective assistance of trial counsel.

¶ 21 III. CONCLUSION

¶ 22 On these facts, where *Aguilar* was decided after defendant's trial, and the record before us is insufficient to determine whether defendant's underlying, predicate offenses were of the subsection ruled unconstitutional in *Aguilar*, the equitable solution is to remand this cause to the trial court for a limited hearing to determine precisely what defendant's predicate convictions are. Accordingly, for the foregoing reasons, we remand this cause to the circuit court of Cook County for a limited hearing to determine with precision defendant's predicate convictions, that is, under what subsection of the UUW statute defendant was previously convicted. Supreme Court Rule 366(a)(5).

¶ 23 Remanded with directions for further proceedings.

¶ 24 JUSTICE LAVIN, dissenting:

¶ 25 I agree that the record could be clearer as to the precise nature of defendant's predicate prior convictions. I would clarify, however, that following the trial court's determination on that issue, it appears that the majority intends for this court, rather than the trial court, to decide whether (1) that determination requires defendant's armed habitual criminal conviction to remain

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intact; (2) requires that only defendant's UUWF convictions stand; or (3) requires defendant to be acquitted of all counts. Because a determination that acquittal is required would render all issues moot, the more efficient approach would be to permit the trial court to decide in the first instance whether the judgment must be modified.