

No. 1-12-1882

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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. 11 CR 288
)	
LARRY LESTER,)	The Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Epstein concurred in the judgment.
Justice Fitzgerald Smith dissented in the judgment.

ORDER

¶1 *Held:* The evidence was insufficient to sustain defendant's conviction for being an armed habitual criminal where that offense was predicated on defendant's previous Class 4 conviction for aggravated unlawful use of a weapon, an offense which has since been declared unconstitutional.

¶2 Following a bench trial, defendant Larry Lester was found guilty of being an armed habitual criminal and was sentenced to 12 years in prison. On appeal, defendant asserts the evidence was insufficient to sustain his conviction because his prior conviction for the Class 4 form of aggravated unlawful use of a weapon (AUUW) (01 CR 11627),

which was used to satisfy an element of his armed habitual criminal conviction, is void pursuant to *People v. Aguilar*, 2013 IL 112116. Defendant also challenges his sentence and certain monetary impositions. Because we agree with defendant's former contention, we vacate his armed habitual criminal conviction, and reverse and remand for the trial court to enter a sentence on defendant's previously unsentenced conviction for unlawful use of a weapon by a felon (UUWF).

¶ 3 In the case *sub judice* (11 CR 288), defendant was charged with being an armed habitual criminal in that he knowingly or intentionally possessed a firearm after previously having been convicted of AUUW (01 CR 11627) and aggravated discharge of a firearm (01 CR 18836). He was also charged in the present case with two counts of UUWF and two counts of AUUW based on the same prior aggravated discharge of a firearm conviction (01 CR 18836). The prior AUUW conviction (01 CR 11627), however, forms the basis of the parties' dispute.

¶ 4 The combined trial testimony of Officers Cortes and Kaur revealed that at about 1:15 p.m. on December 15, 2010, the officers pulled over the vehicle in which defendant was a passenger because the driver was talking on a cell phone. When Officer Cortes approached the vehicle, she observed defendant place a gun in the driver's seatback pocket. Defendant was subsequently arrested. The State also presented certified copies of defendant's prior convictions for AUUW (01CR11627) and aggravated discharge of a firearm (01CR118836). Although the certified copies are not included in our record on appeal, the record contains the indictment and the trial court's memorandum of orders (half-sheet) in case 01 CR 11627. Those documents, as well as the presentence investigation report in the instant case, collectively indicate that defendant was charged

with three counts of AUUW in case 01 CR 11627, but was convicted of only one Class 4 count based on carrying an uncased, loaded and immediately accessible firearm while not on his land or in his abode (720 ILCS 5/24-1.6(A)(1)/(3)(A)(d) (West 2000)). Defendant was sentenced to two years' probation. Following the State's case in the present matter, defendant testified on his own behalf, denying that the gun was his or that he touched it. The trial court then found defendant guilty of all counts and sentenced him to 12 years' imprisonment for being an armed habitual criminal.

¶ 5 On appeal, defendant asserts the evidence was insufficient to sustain his conviction for being an armed habitual criminal because his prior conviction for the Class 4 form of AUUW (01 CR 11627), which was used to satisfy an element of his armed habitual criminal conviction, is invalid. In assessing the sufficiency of the evidence, the relevant inquiry is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Branch*, 2014 IL App (1st) 120932,

¶ 10. Section 24-1.7 states, in pertinent part, as follows:

"(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child; intimidation; aggravated

intimidation; gunrunning; home invasion; or aggravated battery with a firearm[.]"
720 ILCS 5/24-1.7 (West 2010).

Thus, a defendant's qualifying prior convictions constitute elements of the armed habitual criminal offense. *People v. Davis*, 405 Ill. App. 3d 585, 491 (2010). Here, defendant's prior AUUW conviction was used to satisfy one of those elements.

¶ 6 In *Aguilar*, our supreme court found that the Class 4 form of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)) was facially unconstitutional, as it violated the second amendment right to keep and bear arms as construed by the United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 320 (2010). *Aguilar*, 2013 IL 112116, ¶¶ 18-20, 22. Specifically, the Illinois Supreme Court found that the right to keep and bear arms extends beyond the home and includes bearing arms for self-defense. *Id.* ¶ 20. In contravention of that right, the Class 4 form of AUUW constituted a comprehensive ban that categorically prohibited the possession and use of an operable firearm for self-defense outside the home. *Id.* ¶ 21. Accordingly, the court reversed the defendant's AUUW conviction and remanded for the trial court to impose a sentence on defendant's previously unsentenced conviction for unlawful possession of a firearm. *Id.* ¶¶ 7, 30. In modifying its decision upon denial of rehearing, the supreme court made clear that its decision was limited to the Class 4 form of AUUW. *Aguilar*, 2013 IL 112116, ¶ 22 n. 3.

¶ 7 Following the supreme court's decision in *Aguilar*, another panel of this court addressed the very issue before us now. *People v. Fields*, 2014 IL App (1st) 110311. In *Fields*, the defendant was convicted of being an armed habitual criminal. *Id.* ¶ 39. The

defendant's prior Class 4 AUUW conviction, however, had been used to satisfy an element of the armed habitual criminal offense. *Id.* The defendant asserted that because his prior AUUW offense was now void under *Aguilar*, the evidence was insufficient to sustain his conviction. *Id.* The reviewing court agreed, finding that although the defendant's prior AUUW conviction was not directly before the court, it could not ignore *Aguilar's* effect on the defendant's armed habitual criminal conviction. *Id.* ¶ 42.

Specifically, the court found that a void conviction for the Class 4 form of AUUW could not serve as the predicate felony for the armed habitual criminal offense. *Id.* ¶ 44.

Because the evidence was insufficient to sustain the defendant's armed habitual criminal conviction, the reviewing court vacated that conviction. *Id.*; see also *People v.*

McFadden, 2014 IL App (1st) 102939, ¶¶ 36-44 (finding the evidence was insufficient to sustain the defendant's UUWF conviction where his prior Class 4 AUUW conviction had been used to satisfy the felony element of the UUWF offense). In doing so, the court was careful to note that it was not vacating the prior AUUW conviction, which was not properly before the court. *Fields*, 2014 IL App (1st) 110311, ¶ 45. We find the *Fields* decision to be well-reasoned, notwithstanding the State's contrary suggestions.

¶ 8 Here, as in *Fields*, the record indicates that defendant's AUUW conviction, used to satisfy an element of the armed habitual criminal offense, was a Class 4 offense. In addition, although the State's brief on appeal was filed prior to the modified *Aguilar* decision, the State did not subsequently move to cite additional authority to assert that defendant's AUUW conviction did not fall within the narrow Class 4 confines of *Aguilar*.¹ *Cf. People v. Green*, 2014 IL App (4th) 120454, ¶ 13 (finding the defendant

¹ We also note that the State did not choose to respond to defendant's motion for leave to cite *McFadden* as additional authority or to our order granting that motion.

did not show he was previously convicted of the now unconstitutional Class 4 subsection of the AUUW statute where the mittimus did not identify the applicable subsection, the mittimus mislabeled the counts for which the defendant was charged and convicted, and the parties had stipulated that the defendant was convicted of Class 2 AUUW).

Accordingly, defendant's Class 4 AUUW conviction became invalid following *Aguilar*.

As a result, the record before us does not contain evidence of the requisite prior convictions necessary to satisfy the elements of the armed habitual criminal offense and his conviction must be vacated. Accordingly, we reverse and remand for the trial court to impose a sentence on defendant's previously unsentenced UUWF conviction, predicated on his prior conviction for aggravated discharge of a firearm (01 CR 18836).

¶ 9 For the foregoing reasons, we vacate defendant's armed habitual criminal conviction, and reverse and remand for the trial court to impose a sentence on defendant's UUWF conviction. In light of our determination, we need not consider defendant's remaining contentions.

¶ 10 Judgment vacated; reversed and remanded with instructions.

¶ 11 JUSTICE FITZGERALD SMITH, dissenting:

¶ 12 I respectfully dissent.

¶ 13 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.

¶ 14 I recognize that, under *Aguilar*, the Class 4 version of the AUUW statute is unconstitutional, and, as the majority states, this court has found that the Class 4 version

of the AUUW statute 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). However, I cannot agree with the majority's position in the case at bar because the instant facts differ in a key respect from *Aguilar*, *Fields*, and *McFadden*. In those cases, the record was clear that the defendants were convicted under the Class 4 version of the AUUW statute. Here, though, the record before this court is unclear under which section of the AUUW statute defendant was convicted. Specifically, the documents contained in the record on which the majority relies are insufficient to ascertain whether the predicate conviction of AUUW is actually under the now-unconstitutional Class 4 version of AUUW, 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d).

¶ 15 The majority relies on four pieces of evidence in the record to infer that the predicate AUUW conviction was the Class 4 version: (1) the fact that the State presented certified copies of defendant's prior conviction for AUUW in case number 01CR11627 (while acknowledging that the certified copies are not included in the record on appeal); (2) the trial court's half-sheet in case 01CR11627 showing defendant's conviction of AUUW; (3) defendant's presentence investigation report; (4) and the information sheet from case 01CR11677. The majority considers these things, none of which conclusively show that defendant's underlying conviction was under the now-unconstitutional Class 4 version of the AUUW statute. Instead, the majority concludes this information "collectively indicates" that defendant's prior conviction was under the Class 4 version of the AUUW statute, 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d). I do not think this court should make such an inference. I believe that, before we vacate a conviction such as the

majority has done here, we must have more before us than information that "collectively indicates" the nature of a defendant's conviction.

¶ 16 In my opinion, defendant in the case at bar fails to show that his predicate conviction was 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), I believe this court should not overturn a conviction based on an underlying predicate felony conviction about which we have insufficient information.

¶ 17 For this reason, I am unable to join in the majority opinion.