

No. 1-12-2370

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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. 09 CR 18811
)	
JAMAL SMITH,)	The Honorable
)	Diane Cannon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

- ¶ 1 *Held:* This court vacates Smith's convictions for UUWF and AUUW because the predicate felony used to prove an element of the offenses has been rendered void by our supreme court's decision in *Aguilar*.
- ¶ 2 Defendant, Jamal Smith, appeals his convictions for unlawful use of a weapon by a felon (UUWF) and aggravated unlawful use of a weapon by a felon (AUUW), and his sentence of five

years' imprisonment. On appeal, Smith contends (1) the trial court improperly limited defense counsel's cross-examination of Officer Moore; and (2) the supreme court's decision in *People v. Aguilar*, 2013 IL 112116 rendered the predicate felony used to prove an element of his offense unconstitutional and void; therefore his convictions for UUWF and AUUW should be vacated.

For the following reasons, we should vacate Smith's UUWF and AUUW convictions.

¶ 3

JURISDICTION

¶ 4 The trial court sentenced Smith on July 25, 2012. He filed a notice of appeal on the same date. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5

BACKGROUND

¶ 6 Smith was charged, as a previously convicted felon, with one count of UUWF for being in possession of a semiautomatic handgun and one count of AUUW by a felon for possession of a revolver. The following evidence was elicited at Smith's jury trial. On October 3, 2009, at around 9:40 p.m., Chicago Police Tactical officer Ronald Moore, dressed in plain clothes, rode in the front passenger seat of an unmarked police car driven by Officer LeMyles Remias. Sergeant Richard Rochowicz was in the back seat of the car. In the area of 8800 South Halsted, Officer Moore observed that the female driver in the vehicle to the right of him was not wearing a seatbelt. They activated the police car's lights and pulled the car over. Officer Remias approached the driver, later identified as Natasha Kennedy. Officer Moore and Sergeant

Rochowicz approached the passenger side of the car. As they approached, they observed the front seat passenger, defendant Smith, "leaning over as if he appeared to be placing something under his seat." Officer Moore also observed a male passenger, later identified as Christopher Smith, in the rear seat.

¶ 7 The officers learned that Kennedy's license had been revoked and placed her under arrest. The occupants exited the vehicle and Sergeant Rochowicz searched the vehicle before it would be towed. While searching, Sergeant Rochowicz found a gun and announced "143 Adam" to alert the other officers. When he looked in the back seat, Sergeant Rochowicz found a second gun and announced "times two." After being advised of his *Miranda* rights, Sergeant Rochowicz asked Smith, "[W]hat's up with the gun." Smith acknowledged owning the guns and stated that he was taking the weapons to his "aunt's house because we're going out of town." Officer Moore testified that he observed suitcases in the back seat of the car.

¶ 8 On cross-examination, Officer Moore stated that when he checked the ownership of the vehicle, he found that it did not belong to Smith. His towing report did not account for the luggage and he could not recall what had happened to the luggage. Officer Moore also acknowledged that the "143 Adam" code was not noted in any case or police reports, but it was a term officers often used. He stated that he did not see any weapons as he initially approached the car or at any time before Sergeant Rochowicz recovered the weapons. Officer Moore stated that neither he nor the other officers wrote down Smith's statement that the guns belonged to him. Also, an Assistant State's Attorney did not come to interview Smith and his statement was not videotaped.

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¶ 9 Defense counsel then attempted to question Officer Moore about a five page incident report he filed:

Q. And, officer, this is a five-page report, correct?

A. Yes.

Q. And this report - - there is an area where you have to identify suspects, correct?

A. Yes.

Q. Those who are victims, right?

A. Yes

Q. What kind of case this is?

A. Yes.

Q. And it would list all of the suspects, right?

A. Yes.

Q. And there's all kinds of information that you have to put in here about the vehicle?

THE COURT: Ladies and gentlemen, police reports are not evidence. You wont be getting police reports, not just in this case, but in any case just so you understand that. If they were, we would just give you the police report and send you back there. They are not evidence.

MS. PANOZZO [Defense attorney]: Correct?

A. Yes.

Q. And there's a section here where you can prepare a narrative, which is a

summary of what occurred, right?

A. Yes.

Q. And you prepared that summary?

A. Yes.

Q. All right. In that summary it talks about this - -

THE COURT: That will be sustained. Anything in the police report is not evidence. It is not admissible, ladies and gentlemen. Counsel knows that and now you know it too."

¶ 10 On redirect, Officer Moore stated that the other occupants of the vehicle, Christopher Smith and Natasha Kennedy, were found in possession in cannabis and they were brought to the police station on that basis.

¶ 11 Sergeant Richard Rochowicz testified that on October 3, 2009, he worked as a tactical supervisor for a team of officers focused on gang and narcotics enforcement. That night, he, Officer Moore, and Officer Henry Remiasz wore plain clothes and traveled in an unmarked police car. In the vicinity of 88th and Halsted, they observed a female driver not wearing a seat belt. They activated the police car's lights and pulled the car over. As Sergeant Rochowicz approached the stopped vehicle, he noticed the person sitting in the front passenger seat (which he identified as Smith) "crouching down reaching towards the floor area of the vehicle."

¶ 12 After the occupants exited the vehicle, Sergeant Rochowicz looked under the front passenger seat and found a "semiautomatic silver .32 caliber" handgun. The gun contained one live round in its chamber. Sergeant Rochowicz continued his search and found a second gun, a

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38 caliber revolver containing five live rounds, behind the driver's side back seat. He read Smith his *Miranda* rights and after Smith agreed to speak, he asked him, "[W]hat's up with the gun?" Smith told him that the gun was his and there was another gun in the rear compartment of the car. He stated that he was dropping the guns off at his aunt's house because he was going out of town. Sergeant Rochowicz observed luggage in the back seat of the car. At the police station, he gave the recovered weapons and ammunition to Officer Paublo Delgado for inventory.

¶ 13 On cross-examination, Sergeant Rochowicz stated that as he approached the stopped vehicle, he could not see Smith's hands or what he was doing. He acknowledged that while a license check was performed on the driver, he kept his eyes on Smith and did not watch the rear seat passenger. He stated that while he searched the car, he did not wear gloves nor did he wear gloves when handling the recovered weapons. No evidence technician was called to the scene, and no photographs were taken of the car or the guns. Likewise, no one inventoried or photographed the luggage. Sergeant Rochowicz did not write down Smith's statement, nor did he give him paper on which to write down his statement. An Assistant State's Attorney did not take a statement, nor was a statement recorded or videotaped.

¶ 14 On redirect, Sergeant Rochowicz stated that he has pulled over a vehicle and found something illegal hundreds of times in his career. He testified that the police do not call an evidence technician to the scene every time, usually only if a shooting occurred, or if a burglary with an unknown offender occurred. He stated that handwritten statements are usually taken in violent crime situations and video statements in cases of homicide.

¶ 15 Illinois State Police Forensic Chemist Jeanne Hutcherson testified as an expert in latent

print examination. She stated that she examined the revolver and five rounds of ammunition recovered and found with a reasonable degree of scientific certainty no latent prints suitable for identification. Chicago Police Forensic Investigator Herbert Keeler, an expert in fingerprint identification, examined the handgun and one live round of ammunition recovered. He testified that he could only recover "partials and smudges."

¶ 16 The parties stipulated that Smith had been convicted previously of a qualifying felony. Specifically, Smith had a prior conviction of the Class 2 felony offense of AUUW under case number 05 CR 17607. Smith's conviction under case number 05 CR 17607, in turn, was supported by his prior felony conviction under case number 05 CR 13735 for a violation of section 24-1.6(a)(1), (a)(3)(A), of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). The State rested and defense counsel made a motion for a directed finding which the trial court denied. Defense counsel rested without presenting evidence. The jury found Smith guilty of unlawful use of a weapon by a felon regarding the handgun, and aggravated unlawful use of a weapon regarding the revolver. After denying Smith's motion for a new trial, the trial court merged his AAUW conviction into his UUWF conviction and sentenced Smith to five years' imprisonment. Smith filed this timely appeal.

¶ 17

ANALYSIS

¶ 18 Smith's first contention is that the trial court erred when it "*sua sponte* precluded [his] attorney from cross-examining Officer Moore" about Smith's alleged statement and foiled counsel's attempt to impeach Officer Moore by omission using his police report. Smith has forfeited this issue on review, however, by failing to object at trial during the cross-examination.

See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an issue for review, defendant must make an objection at trial and include the issue in a post-trial motion). Smith also failed to set forth an offer of proof at trial. "[I]n order to preserve an issue concerning the trial court's preclusion of impeaching evidence at trial, the defendant must set forth an offer of proof at trial." *People v. Wallace*, 331 Ill. App. 3d 822, 831 (2002).

¶ 19 This court may review forfeited issues as plain error; however, we first must determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). In reviewing the transcript of Officer Moore's cross-examination outlined above, it is unclear whether defense counsel was attempting to impeach him by omission regarding Smith's statement allegedly contained in his police report. Defense counsel generally asked about information contained in a police report, and the trial court properly responded that police reports are not admissible evidence. The record shows that it was during the cross-examination of Sergeant Rochowicz wherein Rochowicz stated that he had put in a police report that Smith made the statement. Defense counsel did not inquire further into the police report and the trial court did not interject at that time. The trial court could not have committed error if it did not preclude defense counsel from questioning Sergeant Rochowicz about his police report.

¶ 20 Even if the trial court improperly limited defense counsel's cross-examination of Officer Moore, the error warrants reversal of Smith's conviction "only where there has been a clear abuse of discretion and a showing of manifest prejudice to the defendant." *People v. Porter*, 96 Ill. App. 3d 976, 983 (1981). Any error in restricting cross-examination of a witness whose testimony merely supports the prosecution, "or on whose credibility alone the prosecution does

not rest, must be deemed harmless." *Id.* Here, both Officer Moore and Sergeant Rochowicz testified that Smith made the statement, so the prosecution did not rely on Officer Moore's credibility alone to support its case. Therefore, any error in restricting Officer Moore's cross-examination may be deemed harmless.

¶ 21 Smith also makes a brief argument, without citation to authority, that the trial court improperly sustained two State objections and overruled one defense objection, during closing arguments. Specifically, Smith contends that the trial court erred in allowing the State to argue that Smith's statement "was documented in the report" when the testimony showed that no one wrote down the statement or gave Smith an opportunity to write it down. However, the prosecutor has great latitude in making a closing argument and may properly "comment on the evidence and any fair, reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Sergeant Rochowicz stated that in his police report he put down that Smith had made a statement. A reasonable inference from that evidence is that he wrote down Smith's statement in the report. Furthermore, defense counsel was permitted to rebut the State in closing argument by arguing that the only evidence of Smith's statement is contained in the officers' oral testimony. We find no error here.

¶ 22 Smith, however, also contends that we must vacate his conviction for UUWF because the statute creating the offense, section 24-1.1(a) of the Code, violates his second amendment right to bear arms for self-defense. We review the constitutionality of a statute *de novo*. *People v. Davis*, 408 Ill. App. 3d 747, 749 (2011).

¶ 23 In *People v. Aguilar*, 2013 IL 112116, ¶18, the issue before our supreme court was

"whether the Class 4 form of section 24-.6(a)(1), (a)(3)(A), (d) violates the second amendment right to keep and bear arms." The court found that the second amendment protects a person's right to bear arms for self-defense outside of the home, and because the Class 4 form of the specified section "categorically prohibits the possession and use of an operable firearm for self-defense outside the home," it was unconstitutional on its face. *Aguilar*, 2013 IL 112116, ¶¶21, 22. However, the supreme court also emphasized that it was "in no way saying that such a right is unlimited or is not subject to meaningful regulation." *Id.* The court expressly recognized that laws can properly prohibit felons from possessing firearms:

" 'Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [Citation.]

*** [N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons.' " *Id.* ¶26 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

¶ 24 Our supreme court in *Aguilar* expressly stated that its holding applied to the Class 4 form of section 24-.6(a)(1), (a)(3)(A), and its reasoning left open the possibility that the Class 2 form of the offense was enforceable. In *People v. Burns*, 2013 IL App (1st) 120929, the sole issue before this court was whether the Class 2 form of the AUUW statute violated the second amendment under *Aguilar*. The court in *Burns* concluded that "the possession of firearms by felons is conduct that falls outside the scope of the second amendment's protections" and upheld

the constitutionality of the Class 2 form of the statute. *Id.* at ¶27. Here, Smith's conviction on appeal is for the Class 2 violation, which pursuant to *Burns* is enforceable, and the predicate felony used to prove his offense was also a Class 2 violation.

¶ 25 However, Smith also argues on appeal that we should vacate his conviction because *Aguilar* rendered the predicate felony (case number 05 CR 17607) used to prove an element of his Class 2 offense void and unenforceable. Smith's conviction for the predicate felony was based on his felony conviction under case number 05 CR 13735 for violating section 24-1.6(a)(1), (a)(3)(A) of the Code, the same Class 4 form of AUUW which our supreme court found unconstitutional on its face in *Aguilar*. A statute that is facially unconstitutional is void *ab initio*. *People v. Blair*, 2013 IL 114122, ¶28. A statute that is void *ab initio* "was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable." *Id.* at ¶30. Since Smith's appeal was pending when the supreme court decided *Aguilar*, we must apply *Aguilar* to the issue before us. *People v. Gersh*, 135 Ill. 2d 384, 397 (1990) (decisions declaring a statute unconstitutional are applicable to cases pending on direct review). Under established principles of law, a party may attack a void order at any time, in any court, either directly or collaterally, and even for the first time on appeal without first being raised in the court below. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004).

¶ 26 Here, the predicate felony used to convict Smith of the UUWF offense was itself based upon the same felony offense our supreme court in *Aguilar* found violated the second amendment. That statutory offense, pursuant to *Aguilar*, is void and unenforceable. See *Aguilar*, 2013 IL 112116, ¶22. Since the State used that void conviction to establish an essential element

of the predicate felony, it failed to prove an essential element of the predicate felony. Without proof of the predicate felony, the State cannot prove an essential element of Smith's UUWF offense and therefore we must vacate his conviction based on that offense. 720 ILCS 5/24-1.1(a) (West 2010). See also *People v. Dunmore*, 2013 IL App (1st) 121170, ¶9 (since defendant's underlying conviction was void pursuant to *Aguilar*, the order of probation based on that conviction was void as was a sentence imposed after revocation of probation); *People v. McFadden*, 2014 IL App (1st) 102939, ¶ 44; *People v. Fields*, 2014 IL App (1st) 110311, ¶ 45.¹

¶ 27 The State argues, however, that this court lacks jurisdiction over the judgments in Smith's prior convictions under 05 CR 17607 and 05 CR 13735 because Smith did not explicitly include those judgments in his notice of appeal. Although a notice of appeal is jurisdictional, we note that we must construe such notice liberally. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). A notice of appeal informs the prevailing party that one seeks review of the judgment, and is sufficient "when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal." *Id.* at 104-5. Here, Smith filed a notice of appeal from his conviction under case number 09 CR 18811, in which the State relied on his prior conviction under 05 CR 17607 to prove an element of the offense. Smith sought relief from the judgment, arguing that our supreme court's decision in *Aguilar* found the statute outlining his offense unconstitutional which rendered his conviction void. Smith's prior felony

¹Smith also requests that if this court vacates his UUWF conviction, we vacate his AUUW conviction as well. For the reasons we vacated Smith's UUWF conviction, outlined above, we also vacate his AUUW conviction.

convictions, which served as predicate felonies, were also based on the unconstitutional statute.

"Where the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal." *Id.* at 105, quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991).

¶ 28 The State further argues that the appellate court does not have the authority to consider the merits of a case simply because the issue involves an allegedly void order or judgment, citing *People v. Flowers*, 208 Ill. 2d 291 (2004) as support. *Flowers* is distinguishable. In *Flowers*, the defendant asserted a belated request for relief under Illinois Supreme Court Rule 604(d) (Ill. S. Ct. Rule 604(d) (eff. Feb. 6, 2013)). Our supreme court found that when defendant made her request, the trial court's jurisdiction "over the underlying criminal case had long lapsed *** [and] the court had no authority to address the Rule 604(d) motion on the merits." *Id.* at 306. Since the trial court had no authority to consider the motion, the appellate court had no authority to consider the merits of her appeal from the trial court's judgment on the motion, which was the only issue before the appellate court. *Id.* at 307.

¶ 29 The court in *Flowers* acknowledged that a void order may be attacked at any time, and in any court. It noted, however, that "the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts." *Id.* at 308. It reasoned that "[i]f a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void." *Id.* Our supreme court then proceeded to find that an "appellate court is not vested with authority to consider the merits of a case merely because the dispute involves an order or judgment that is, or is alleged to be, void." *Id.* Unlike the appellate court in *Flowers*, we have jurisdiction to

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consider the merits of Smith's appeal from the judgment entered under case number 09 CR 18811. Since Smith raised the voidness issue in context of a proceeding properly pending in this court, we have jurisdiction to consider the merits of his argument. *Id.*

¶ 30 To be clear, we are not vacating Smith's convictions under 05 CR 17607 and 05 CR 13735, nor do we address whether Smith may use collateral proceedings to vacate his convictions in those cases. We also offer no opinion on whether *Aguilar* applies retroactively to cases on collateral review, or whether the State could reinstate charges dismissed in 05 CR 17607 and 05 CR 13735 if Smith succeeds in vacating those convictions. See *Dunmore*, 2013 IL App (1st) 121170, ¶ 12.

¶ 31 For the foregoing reasons, we vacate Smith's UUWF and AUUW convictions.

¶ 32 Vacated.