2014 IL App (1st) 113786-U

FIFTH DIVISION
February 28, 2014

No. 1-11-3786

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 10 CR 13094
	)	
CARLOS ANDRADE,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

HELD: Defendant was convicted of four counts of aggravated unlawful use of a weapon (AUUW) and appealed, challenging the constitutionality of the AUUW statute. Pursuant to *People v. Aguilar*, 2013 IL 112116, we reversed that portion of his conviction that was based upon the trial court's finding that he knowingly carried an uncased, loaded, immediately accessible firearm on his person outside his abode or place of business. However, we affirmed the remainder of his conviction, which was based upon the fact that he did not have a valid Firearm Owner's Identification Card.

¶ 1 Defendant Carlos Andrade appeals his conviction for aggravated unlawful use of a weapon (AUUW), contending that the AUUW statute violates the right to bear arms as guaranteed by the second amendment to the United States Constitution. For the reasons that follow, we affirm in part, reverse in part, and remand for resentencing.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with AUUW under section 24-1.6(a) of the Criminal Code (720 ILCS 5/24-1.6(a) (West 2010)).[1] As shall be discussed more fully below, this section prohibits possession of a firearm outside one's abode or place of business if the firearm at issue "was uncased, loaded and immediately accessible at the time of the offense" or if the defendant lacked a valid Firearm Owner's Identification (FOID) Card. *Id.*

¶ 4 The case proceeded to a bench trial. The following evidence was presented by the State at trial and is not in dispute for purposes of this appeal. On July 3, 2010, at around 9:30 p.m., Officers Dennis Graber, Kevin Stanula, and Pedro Ortiz were in uniform on patrol in a marked squad car. As they approached the intersection of 27th Street and Sawyer, they heard defendant yell "King love" and observed him flash a Latin King gang sign at a passing car. When they drove toward the defendant, the defendant ran away. Officers Graber and Ortiz exited the car and pursued him on foot. As the officers chased him over a gangway at 2707 S. Sawyer, Officer

[1] Defendant was also charged with unlawful possession of a firearm by a street gang member in violation of section 24-1.8 of the Criminal Code (720 ILCS 5/24-1.8 (West 2010)). However, defendant was acquitted of this charge because the State did not prove that the Latin Kings constituted a street gang under Illinois law, and this charge is not at issue in this appeal.

Graber observed the defendant reach into the right side of his waistband, remove a silver handgun, and throw the gun over a neighboring two-story house. Officer Stanula subsequently searched the area and recovered a silver handgun with five rounds. When defendant was apprehended, after waiving his *Miranda* rights, he admitted being in possession of the gun "because the Two Sixers [street gang] were out to get my ass." Defendant further admitted being a member of the Latin Kings street gang. While processing defendant at the police station, the officers learned that he did not reside at 2707 S. Sawyer. In addition, the parties stipulated that the Firearms Service Bureau of the Illinois State Police had no record that a FOID Card was ever issued to defendant as of October 24, 2011.

¶ 5 The trial court found defendant guilty of four counts of AUUW. Three of the counts (counts II, V, and VI) were predicated upon the court's finding that defendant knowingly carried an uncased, loaded, immediately accessible firearm on his person outside his abode or place of business, while the remaining count (count III) was based upon the fact that defendant did not have a valid FOID card. The court sentenced defendant to 24 months of felony probation with the gang probation unit. Defendant now appeals.

¶ 6 II. ANALYSIS

¶ 7 On appeal, defendant's sole contention is that the AUUW statute under which he was convicted is unconstitutional on its face. Although defendant did not raise this issue in the trial court, a constitutional challenge to a statute can be made at any time. *People v. Bryant*, 128 Ill. 2d 448, 454. We review the constitutionality of a statute *de novo*. *People ex rel. Birkett v. Konetski*, 283 Ill. 2d 185, 200 (2009).

¶ 8 Defendant was convicted under section 24-1.6(a) of the Criminal Code, which provides, in relevant part:

> "(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, other than a pistol, revolver, or handgun, possessed was uncased, loaded, and immediately accessible at the time of the offense; or
>
> ***
>
> (C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card ***." 720 ILCS 5/24-1.6(a) (West 2010).

Defendant contends that both subsection (a)(3)(A), which categorically prohibits the possession and use of an operable firearm outside the home, and subsection (a)(3)(C), which prohibits possession of a firearm without a valid FOID card, are unconstitutional.

¶ 9 In the recent case of *People v. Aguilar*, 2013 IL 112116, which was decided during the pendency of this appeal, our supreme court held that subsection (a)(3)(A), in conjunction with subsection (a)(1), violates the second amendment on its face. The second amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. The *Aguilar* court noted that the United States Supreme Court has stated that a " 'central' " component of this right is " 'the inherent right of self-defense.' " *Id.* ¶ 16 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008)); see also *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3026 (2010) (reiterating *Heller's* conclusion that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense"). The *Aguilar* court found this constitutional principle to be at odds with subsection (a)(3)(A), which "categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Aguilar*, 2013 IL 112116, ¶ 21. Thus, the court held that subsection (a)(3)(A) violated the right to keep and bear arms as guaranteed by the second amendment, and it reversed defendant's conviction under that subsection. *Id.* ¶ 22.

¶ 10 In reaching this conclusion, the *Aguilar* court emphasized that its decision was a limited one:

> "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." *Id.* ¶ 21.

See also *id.* ¶ 26 (" 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, *** or laws imposing conditions and qualifications on the commercial sale of arms' ") (quoting *Heller*, 554 U.S. at 626-27).

¶ 11 Pursuant to *Aguilar*, defendant's conviction under counts II, V, and VI is invalid and must be vacated, insofar as those three counts were premised upon the trial court's finding that defendant knowingly carried an uncased, loaded, immediately accessible firearm on his person outside his abode or place of business in violation of subsection (a)(3)(A).

¶ 12 However, our inquiry does not end there, because the trial court also found defendant guilty of AUUW on count III based on his possession of a firearm without a valid FOID card, in violation of subsection (a)(3)(C). The State argues that, even if subsection (a)(3)(A) is unconstitutional, subsection (a)(3)(C) passes constitutional muster, so defendant's conviction on count III should be affirmed. We note that defendant makes no response to this argument by the State except to assert in a footnote of his reply brief that "as the AUUW statute is facially unconstitutional, no AUUW conviction may stand." He presents no further argument or authority in support of this assertion.

¶ 13 In any event, we agree with the State on this point. The *Aguilar* court did not purport to find subsection (a)(3)(C) unconstitutional. On the contrary, as noted, it carefully limited its decision to the "comprehensive ban" on possession of firearms outside the home contained in subsection (a)(3)(A), contrasting it with "reasonable regulation" that remains permissible under the second amendment. *Aguilar*, 2013 IL 112116, ¶¶ 21, 26; see *People v. Henderson*, 2013 IL

App (1st) 113294, ¶ 36 (holding that the validity of subsection (a)(3)(C) was "unaffected by *Aguilar*"). In our recent decision in *Henderson*, this court upheld a defendant's conviction for AUUW under subsection (a)(3)(C), holding that the subsection was not facially unconstitutional and was severable from the subsection struck in *Aguilar*. *Id.* ¶ 13-23. With regard to its severability, the court reasoned that the subsection was not " 'so intertwined with the rest of the statute that the legislature intended the statute to stand or fall as a whole' " (*id.* ¶ 22 (quoting *People v. Singmouangthong*, 334 Ill. App. 3d 542 (2002))) but, rather, could stand independently of the stricken portion of the statute. Defendant has not presented us with any reason to depart from this decision, nor has our research disclosed any. Accordingly, we reaffirm our holding in *Henderson* that subsection (a)(3)(C) remains good law even in light of *Aguilar*.

¶ 14 For the foregoing reasons, we reverse defendant's convictions for AUUW on counts II, V, and VI, but we affirm his conviction on count III. Since the trial court did not impose a sentence for count III, which was merged with the other counts for sentencing purposes, we remand the cause for sentencing on that conviction pursuant to Illinois Supreme Court Rule 615(b)(2). Ill. S. Ct. R. 615(b)(2) (reviewing court may "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken"); see *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982) (court is authorized under Rule 615(b)(2) to remand cause for imposition of sentence).

¶ 15 Affirmed in part, reversed in part, and remanded with directions.