

FOURTH DIVISION  
June 26, 2014

1-13-0082

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 21186
	)	
DARRICK LEE,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* Defendant's conviction for Class 2 aggravated unlawful use of a weapon is affirmed; the offense is not unconstitutional because it is not a total ban on the possession of a weapon and only punishes possession of a weapon by a felon, which is beyond the scope of the second amendment's protection.

¶ 2 The circuit court of Cook County convicted and sentenced defendant, Darrick Lee, for aggravated unlawful use of a weapon. Defendant appeals, arguing the offense is an unconstitutional violation of the second amendment. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The State charged defendant, Darrick Lee, with six counts of aggravated unlawful use of a weapon. The information alleged that defendant carried a firearm about his person (count I), carried a firearm in a vehicle (count II), carried a firearm without a valid Firearm Owner's Identification Card (FOID card) (count III), carried a firearm in a vehicle without a FOID card (count IV), carried or possessed a firearm in a public street (count V) and carried or possessed a firearm in a public street without a FOID card (count VI). The State also charged defendant with two counts of unlawful use of a weapon.

¶ 5 The charge in count I of the information alleged that defendant violated section 24-1.6(a)(1)/(3)(A) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). Count I also read, in pertinent part, as follows:

“THE STATE SHALL SEEK TO SENTENCE DARRICK LEE  
AS A CLASS 2 OFFENDER IN THAT HE HAS BEEN  
PREVIOUSLY CONVICTED OF A FELONY, TO WIT:  
POSSESSION OF A CONTROLLED SUBSTANCE, UNDER  
CASE NUMBER 07CR06614.” (Emphasis in original.)

¶ 6 Following a bench trial, the circuit court of Cook County found defendant guilty of each count. The court merged the counts in the information into count I and sentenced defendant based on his conviction for aggravated unlawful use of a weapon in violation of

sections 24-1.6(a)(1) and (a)(3)(A) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)). The court sentenced defendant as a Class X offender based on his criminal history to six years' imprisonment. This appeal followed.

¶ 7 For the following reasons, we affirm.

¶ 8 ANALYSIS

¶ 9 Defendant's sole contention on appeal is that his convictions for aggravated unlawful use of a weapon must be vacated pursuant to our supreme court's holding in *People v. Aguilar*, 2013 IL 112116 that the aggravated unlawful use of a weapon statute is unconstitutional. Our review of the constitutionality of a statute is *de novo*. *People v. Neely*, 2013 IL App (1st) 120043, ¶ 8.

¶ 10 The State charged defendant with Class 2 aggravated unlawful use of a weapon. Section 24-1.6(d)(3) of the Criminal Code states as follows:

“Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.” 720 ILCS 5/24-1.6(d)(3) (West 2010).

¶ 11 The charge for which the trial court sentenced defendant alleged that defendant committed Class 2 aggravated unlawful use of a weapon. The information is sufficient to charge defendant with that particular offense. *People v. Alvarado*, 301 Ill. App. 3d 1017, 1023 (1998) (charging instrument is sufficient if it gives notice of the elements of the charge and particularizes it with allegations of the essential facts to enable the accused to prepare a

defense). The information alleges defendant committed that offense because defendant (1) knowingly carried on or about his person a firearm and (2) has previously been convicted of a felony. Defendant argues that section 24-1.6(d)(3) does not create a new offense and the State did not treat it as such, thus the substantive offense underlying his sentence (the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) (see *Aguilar*, 2013 IL 112116, ¶ 22)) is void. He asserts that the fact a “sentencing enhancement” was imposed under section 24-1.6(d)(3) (720 ILCS 5/24-1.6(d)(3) (West 2010)) does not remove defendant’s conviction from *Aguilar*’s reach.

Defendant argued for the first time in his reply brief that felon status is not an element of the aggravated unlawful use of a weapon statute.

¶ 12 Arguments raised for the first time in a reply brief are deemed forfeited. *People v. Robinson*, 2013 IL App (2d) 120087, ¶ 15. Nonetheless, this court has recognized Class 2 aggravated unlawful use of a weapon as a distinct form of the offense. *People v. Burns*, 2013 IL App (1st) 120929, ¶ 24. The *Burns* court addressed the constitutionality of the Class 2 form of the offense. *Id.* The court held that the Class 2 form of aggravated unlawful use of a weapon merely regulates the possession of a firearm by a person who has been previously convicted of a felony. *Id.* at ¶ 27. The court noted that our supreme court has observed that the second amendment is subject to meaningful regulation, including “longstanding prohibitions on the possession of firearms by felons.” (Internal quotation marks and emphasis omitted.) *Id.* at ¶ 25. “[T]he United States Supreme Court described such provisions as ‘presumptively lawful.’ [Citation.]” *Id.* Thus, the *Burns* court concluded that the possession of firearms by felons is conduct that falls outside the scope of the second amendment and, therefore, the Class 2 form

of aggravated unlawful use of a weapon is constitutional under the second amendment. *Id.* at ¶ 27.

¶ 13 In this case, the trial court did not convict defendant of a void offense and apply a sentencing enhancement. The court convicted defendant of a form of the offense that this court has found to be constitutional. Defendant argues his convictions for carrying a firearm in a vehicle and on a public street must be vacated because the provisions on which those convictions are based are similarly unconstitutional. In *Neely*, 2013 IL App (1st) 120043, ¶ 6, the trial court found the defendant guilty of two counts of unlawful use of a weapon by a felon and one count of aggravated unlawful use of a weapon. The court merged one count of unlawful use of a weapon by a felon and the count for aggravated unlawful use of a weapon into a single count for unlawful use of a weapon by a felon. *Id.* The court sentenced the defendant on a single count of unlawful use of a weapon by a felon. *Id.* The *Neely* court affirmed the defendant's conviction for unlawful use of a weapon by a felon against a challenge based on the constitutionality of the offense under the second amendment. *Id.* at ¶ 12.

¶ 14 In that case, the defendant had also argued that his conviction for aggravated unlawful use of a weapon should be vacated. *Id.* at ¶ 13. The court held that the defendant's challenge to that conviction was not properly before the court. *Id.* The court found that the defendant was not sentenced for aggravated unlawful use of a weapon because the trial court merged that conviction into the single count for which the court did sentence the defendant, and the conviction for which the court did sentence the defendant had not been reversed. *Id.* at ¶ 15. In light of our holding that the single count for which the trial court convicted defendant in

this case is constitutional, and that defendant's conviction under that count will be affirmed, defendant's challenges to his convictions for aggravated unlawful use of a weapon based on possessing a weapon in a vehicle and on a public street, and for not having a FOID card, are moot.

¶ 15 Defendant raises a number of other contentions for the first time in his reply brief, all of which are forfeit for our review (*Robinson*, 2013 IL App (2d) 120087, ¶ 15) but which are easily dispensed with. Defendant argues that *Aguilar* held that section 24-1.6(a)(1), (a)(3)(A) is facially unconstitutional and cannot be enforced against anyone, including a felon. Defendant's argument ignores our supreme court's clear statement in *Aguilar* that its "finding of unconstitutionality in this decision is specifically limited to the Class 4 form of AUUW, as set forth in section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. We make no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute." *Aguilar*, 2013 IL 112116, ¶ 22 n. 3.

¶ 16 *Aguilar* does not support defendant's contention that the statute cannot be constitutionally applied to felons because it is allegedly "broadly written to bar all instances of the conduct, without limiting the offense to those persons whose conduct is not constitutionally protected." (Emphasis omitted.) This court, as well as a dissenting justice in *Aguilar*, recognized that, to the contrary, "the implication of the court's holding is that the so-called 'Class 2 form of the offense,' \*\*\* could potentially remain enforceable." (Internal quotation marks omitted.) *Burns*, 2013 IL App (1st) 120929, ¶ 24 (quoting *Aguilar*, 2013 IL 112116, ¶ 47 (Theis, J., dissenting)). Nor does defendant's conviction rely on a categorical ban on the possession and use of firearms outside the home with a sentencing enhancement.

Rather, the Class 2 form of aggravated unlawful use of a weapon specifically regulates the possession of a firearm by a person who has been previously convicted of a felony. *Id.* at ¶ 27. There has been no finding that such a prohibition is unconstitutional. The United States Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), from which *Aguilar* arose, noted that “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 forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 626-27.

¶ 17 This court and our supreme court have recognized and delineated the distinction between the unconstitutional portions of the aggravated unlawful use of a weapon statute and those which are not violative of the second amendment. *Aguilar*, 2013 IL 112116, ¶ 22 n. 3; *Burns*, 2013 IL App (1st) 120929, ¶ 24. In *People v. Taylor*, 2013 IL App (1st) 110166, ¶¶ 30-32, this court upheld the “failure to have been issued a FOID card” section of the aggravated unlawful use of a weapon statute against a second amendment attack using both “strict scrutiny analysis or the more recently used ‘text, history, and tradition’ approach.” The court upheld that portion of the statute because that “restriction \*\*\* is limited to those lacking a FOID card and is not a flat ban.” *Id.* at ¶ 32. Accord *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 35. Therefore, we reject defendant’s forfeited argument that all sections of the aggravated unlawful use of a weapon statute are unconstitutional because none are severable from the unconstitutional subsection.

¶ 18 The Class 2 felony offense of aggravated unlawful use of a weapon is constitutional.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, defendant's conviction is affirmed.

¶ 21 Affirmed.