2015 IL App (1st) 142461-U

No. 1-14-2461

FOURTH DIVISION
October 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARQUIS MARSHALL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 20139 Honorable Gregory Robert Ginex, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held***: Defendant's convictions for armed habitual criminal and unlawful use of a weapon by a felon are reversed where the predicate offense upon which those convictions were based was void *ab initio* pursuant to *People v. Aguilar*, 2013 IL 112116.

¶ 2 Following a bench trial, defendant Marquis Marshall was found guilty of armed habitual criminal pursuant to section 24-1.7(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.7(a) (West 2012)) and two counts of unlawful use or possession of a weapon by a felon (UUWF) pursuant to section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2012)), and was

sentenced to an aggregate term of seven years' imprisonment. On appeal, defendant asserts that the evidence was insufficient to sustain those convictions in that the predicate offense upon which those convictions were based is void pursuant to *People v. Aguilar,* 2013 IL 112116. In the alternative, defendant argues that one of his UUWF convictions must be vacated pursuant to the one-act, one-crime doctrine.

¶ 3 BACKGROUND

¶ 4 The record reveals that defendant was charged with count 1, armed habitual criminal for possessing a handgun after having been previously convicted of armed robbery and UUWF in 2008; count 2, UUWF for possessing firearm ammunition in his own abode after having been previously convicted of the felony offense of UUWF in 2008, and count 3, UUWF for possessing a firearm in his own abode after having been previously convicted of the felony offense of UUWF in 2008. The charging instrument for defendant's 2008 UUWF conviction, upon which all of his present convictions are predicated, stated that defendant was being charged with UUWF for possessing a firearm after having been previously convicted of the felony offense of UUWF in 2005. The record reveals, however, that in 2005, defendant was not charged and convicted of UUWF, but rather, was charged and convicted of the Class 4 offense of aggravated unlawful use of a weapon (AUUW) for possessing in a motor vehicle a firearm that was uncased, loaded and immediately accessible at the time of the offense, pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Code. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004). The following facts were adduced at trial.

¶ 5 Jason Smith testified that around 7:30 p.m. on July 29, 2012, he visited his girlfriend, Brittany Mell, at her apartment located at 1015 South 13th Avenue in Maywood, Illinois, where she lived with her family, including defendant, who is her brother. Upon arriving, Smith saw that

Mell and defendant were arguing and he heard defendant say, "if you want somebody to whoop my ass, why don't you get him to whoop my ass." Smith, who was standing two feet away from defendant, told him "you don't have no reason to say nothing to me." At that point, defendant pulled out a black gun and pointed it at Smith. Smith then left the apartment and drove away from the area, but returned a short time later and spoke with police about the incident. Smith was not present when police discovered a gun on the premises, but officers showed a gun to him later that day at the police station and he identified it as the one that defendant pointed at him. Smith identified People's Exhibit 1 as a picture of that gun. On cross-examination, Smith testified that the gun he identified to police did not have any distinguishing marks.

¶ 6 Mell testified that around 7:30 p.m. on July 29, 2012, she and defendant were arguing in their apartment. Shortly thereafter, Smith arrived and began to argue with defendant as well, at which point Mell saw defendant "pull out a gun." On cross-examination, Mell testified that she had never previously seen the gun in defendant's possession.

¶ 7 Chicago police officer Joseph Escamilla testified that around 7:30 p.m. on July 29, 2012, he was dispatched to an apartment located at 1015 South 13th Avenue in Maywood in relation to a report of an unwanted subject possibly with a handgun. Upon arriving, he saw another officer on the scene attempt to detain defendant, who was exiting the ground level of the apartment building on the southeast corner. Defendant began to flee the area, and Officer Escamilla chased him and placed him into custody. After being Mirandized, defendant told Officer Escamilla that he did have a gun, and that it was in his room. Officers gained permission from defendant's mother, who was the lessee of the apartment where defendant lived, to search the apartment. Officers did not find a gun in defendant's room, but did find a black gun in a shoebox located under a stairwell near the general area where Officer Escamilla had seen defendant exit the

apartment building. Officer Escamilla identified People's Exhibit 1 as a photograph of the gun that he recovered at the scene on the day of the incident. Officer Escamilla further testified that Smith subsequently identified that gun to police as the one that defendant had pointed at him earlier that day.

¶ 8 The State then introduced certified statements of conviction against defendant for armed robbery with a firearm in 2008 and for UUWF in 2008, and rested its case. Following the close of the State's case, defendant moved for a directed finding, arguing that the State had failed to prove beyond a reasonable doubt that he had been in possession of a handgun, and that because his two prior convictions ran concurrently, they did not satisfy the armed habitual criminal statute, which requires a conviction followed by a "later in time" conviction, followed by a third conviction. The trial court denied defendant's motion. The defense then rested its case without presenting testimony or evidence. Both parties waived closing argument, opting to rely on the arguments presented on the motion for a directed finding.

¶ 9 The trial court found defendant guilty of all three counts. In doing so, the court stated that the case was "fairly straightforward," and that it was clear that defendant had a weapon in his possession and pointed it at Smith.

¶ 10 Defendant subsequently filed a motion for a new trial, arguing, *inter alia*, that the trial court erred in denying his motion for a directed finding. At the hearing on the motion, defense counsel reiterated his argument pertaining to the timing requirements of the armed habitual criminal statute. Counsel also raised an issue that had not been raised at trial or included in the written motion; that defendant's conviction for armed habitual criminal cannot stand because one of the two requisite predicate convictions is void under *Aguilar*. More specifically, defense counsel argued that defendant's 2005 conviction for AUUW is void under *Aguilar*, thereby

rendering void defendant's 2008 conviction for UUWF because it relied upon the now-void 2005 AUUW conviction as a predicate offense. Counsel thus argued that because the State cannot rely on a void conviction to serve as a predicate offense for defendant's armed habitual criminal conviction, it failed to prove a necessary element of that offense.

¶ 11 The State argued that the armed habitual criminal statute does not contain a "later-in-time" requirement in relation to predicate offenses. The State further argued that defense counsel's contention relating to *Aguilar* would have been better suited for a motion to dismiss. Defense counsel acknowledged that this argument would have been better suited for such a motion, but asked the court to "pursue justice" in this matter.

¶ 12 The trial court denied defendant's motion for a new trial. In doing so, the court found, *inter alia*, that "*Aguilar* appears to be prospective only" and that the armed habitual criminal statute does not require a certain sequence in time pertaining to predicate convictions. The case proceeded to a sentencing hearing. After hearing evidence in aggravation and mitigation, the trial court sentenced defendant to a seven-year term of imprisonment for armed habitual criminal, and to five-year terms of imprisonment on both counts of UUWF, with all sentences to run concurrently.

¶ 13 Defendant filed a motion to reconsider sentence, however the record does not reflect whether a ruling on that motion was entered. On September 3, 2014, this court granted defendant's motion to file a late notice of appeal. For the reasons that follow, we reverse the judgment of the circuit court.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant first contends that all three of his convictions must be reversed because they all relied upon his 2008 conviction for UUWF as an element of the offense, which,

in turn, used as a predicate offense his 2005 AUUW conviction, which is now void pursuant to *Aguilar*. Defendant's argument amounts to a challenge to the sufficiency of the evidence supporting his armed habitual criminal and two UUWF convictions.

¶ 16 In general, the standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). However, where, as here, the argument raised presents a pure question of law, our standard of review is *de novo*. See *People v. Richardson*, 2015 IL App (1st) 130203, ¶¶ 14-15 (applying a *de novo* standard of review to the question of whether an AUUW conviction based on a statute declared unconstitutional by *Aguilar* can serve as a valid predicate offense to support a subsequent conviction).

¶ 17 In *Aguilar*, which was modified upon denial of rehearing on December 19, 2013, our supreme court held that the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute, which prohibited possession of an "uncased, loaded and immediately accessible" firearm outside the home (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), violated the second amendment of the United States Constitution, and was therefore unconstitutional. *Aguilar*, 2013 IL 112116, ¶¶ 15, 22. In doing so, the court relied upon the United States Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which recognized that the second amendment protects the right of citizens to bear arms for self-defense outside the home. *Aguilar*, 2013 IL 112116, ¶¶ 20-21. Our supreme court reasoned that because the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d), categorically prohibited the possession and use of firearms outside the home, it amounted to a wholesale statutory ban on the exercise of a personal right that is specifically named and

guaranteed in the United States Constitution. *Id.* ¶ 21. Our supreme court emphasized, however, that it was limiting its holding to the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute and that it was making no express or implied finding with respect to the constitutionality of any other section or subsection of the AUUW statute. *Id.* ¶ 22, n.3.

¶ 18 Defendant argues that pursuant to *Aguilar*, his 2005 AUUW conviction is void *ab initio* and cannot be used as a predicate offense for either his UUWF conviction in 2008, or for his convictions in the case at bar. This court has previously addressed the question of whether a Class 4 AUUW conviction can serve as a predicate offense in light of *Aguilar*, and repeatedly held that it cannot.

¶ 19 In *People v. Dunmore*, 2013 IL App (1st) 121170, ¶ 1, the defendant appealed the revocation of the sentence of probation he received in exchange for his guilty plea to a Class 4 AUUW conviction. *Aguilar* was decided while his appeal was pending, and, in response, this court found that it had "an independent duty to vacate void orders," and reversed the defendant's AUUW conviction because it arose from a facially unconstitutional statute, and was therefore void. *Id.* ¶¶ 9-10. Notably, although in *Dunmore* the direct underlying conviction was a Class 4 AUUW conviction, following *Dunmore*, this court has relied on the reasoning expressed therein to vacate a defendant's conviction for a subsequent offense because it was predicated on a Class 4 AUUW conviction that was rendered void in light of *Aguilar*.

¶ 20 For example, in *People v. McFadden*, 2014 IL App (1st) 102939, *appeal allowed*, No. 117424 (Ill. May 28, 2014), this court vacated the defendant's UUWF conviction, which was predicated on his prior Class 4 AUUW conviction. In doing so, this court reasoned that the State failed to prove an essential element of UUWF where it alleged in the charging instrument, and proved at trial, a predicate offense that has been declared unconstitutional and void *ab initio*. *Id.*

¶ 43. This court further stated that "[a] void conviction for the Class 4 form of AUUW found to be unconstitutional in *Aguilar* cannot now, nor can it ever, serve as a predicate offense for any charge." *Id.*

¶ 21 Shortly thereafter, in *People v. Fields*, 2014 IL App (1st) 110311, ¶ 44, this court held that a Class 4 AUUW conviction that was rendered void in light of *Aguilar* could not be used as a predicate offense for a subsequent charge of armed habitual criminal. This court thus vacated the defendant's conviction for armed habitual criminal. *Id.* Subsequently, in *People v. Cowart*, 2015 IL App (1st) 113085, ¶¶ 47, 49, this court expressly reaffirmed the principles of *Fields* and *McFadden* and reversed the defendant's armed habitual criminal conviction, which had been predicated on his prior Class 4 AUUW conviction. In doing so, this court reasoned that the State was required to, but did not, prove beyond a reasonable doubt an element of the offense where the statute underlying the defendant's Class 4 AUUW conviction was found to be unconstitutional. *Id.* ¶ 47. As in *McFadden*, this court stated that such a conviction is void *ab initio* and cannot serve as a predicate offense for any subsequent charge. *Id.*

¶ 22 More recently, in *People v. Richardson*, 2015 IL App (1st) 130203, ¶¶ 25-26, this court reversed the defendant's UUWF conviction because it was predicated on his prior Class 4 AUUW conviction, which was void *ab initio* in light of *Aguilar*. In doing so, this court relied upon *McFadden* and *Fields*, described the logic expressed therein as "remain[ing] persuasive," and found no reason to deviate from those holdings. *Id.* ¶ 25. We continue to adhere to our reasoning as expressed in *McFadden*, *Fields*, *Cowart*, and *Richardson* and find that a prior Class 4 AUUW conviction under a statute that was declared unconstitutional in *Aguilar* is void *ab initio* and cannot serve as a predicate offense for any subsequent charge.

¶ 23 Here, defendant was convicted of armed habitual criminal and two counts of UUWF. To prove defendant guilty of armed habitual criminal, the State was required to show that he possessed a firearm after having been convicted of two or more specified qualifying offenses. 720 ILCS 5/24-1.7(a) (West 2012). To prove defendant guilty of UUWF, the State was required to show, *inter alia*, that defendant had been previously convicted of a felony offense. 720 ILCS 5/24-1.1(a) (West 2012).

¶ 24 The record shows that all three of the charges against defendant in this case were predicated upon his 2008 UUWF conviction. In turn, the record shows that defendant's 2008 UUWF conviction was predicted upon his Class 4 AUUW conviction in 2005. However, in light of *Aguilar*, defendant's Class 4 AUUW conviction is void *ab initio*, and cannot serve as a predicate offense for any subsequent charge, including his 2008 UUWF conviction, or any of his three convictions in the case at bar. *Fields*, 2014 IL App (1st) 110311, ¶ 44; *McFadden*, 2014 IL App (1st) 102939, ¶ 43. Because the State cannot rely upon defendant's 2005 AUUW conviction as a predicate offense for the charges in the case at bar, it has failed to prove an essential element of each of those offenses beyond a reasonable doubt (*Richardson*, 2015 IL App (1st) 130203, ¶¶ 25-26), and, accordingly, we reverse defendant's conviction for armed habitual criminal, as well as his two convictions for UUWF.

¶ 25 In reaching this determination, we have considered the State's arguments that *McFadden* and *Fields* were wrongly decided and that it is the status of the prior felony conviction at the time the defendant possesses the firearm that controls, regardless of whether that prior conviction might later be found to be unconstitutional. In support of these arguments, the State cites to decisions from other states, as well as cases decided by federal courts, and relies primarily on *Lewis v. United States*, 445 U.S. 55 (1980), which analyzed a federal statute. As this court has

previously noted, *Lewis* does not involve a predicate felony conviction that was based on an unconstitutional statute, and thus has no applicability to the facts in this case. *Cowart*, 2015 IL App (1st) 113085, ¶ 48; *Richardson*, 2015 IL App (1st) 130203, ¶ 24. Further, federal cases interpreting federal statutes are not binding on this court's interpretation of Illinois law (*People v. Claxton*, 2014 IL App (1st) 132681, ¶ 19), and we disagree that the decisions from other states or federal courts warrant departing from the well-settled precedent of our courts (*Richardson*, 2015 IL App (1st) 130203, ¶ 26).

¶ 26 Given that we are reversing all three of defendant's convictions, we need not address his alternative argument that one of his UUWF convictions must be reversed pursuant to the one-act, one-crime doctrine. We further note, as we did in *Richardson* and *Cowart*, that although we find that defendant's Class 4 AUUW conviction is void *ab initio*, we are not vacating that conviction, and do not address whether formal proceedings for collateral relief may be available to defendant to vacate that conviction. See *Richardson*, 2015 IL App (1st) 130203, ¶ 27; *Cowart*, 2015 IL App (1st) 113085, ¶ 49.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 29 Reversed.