2019 IL App (1st) 161356-U

SIXTH DIVISION
July 12, 2019

No. 1-16-1356

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	14 CR 9303 (02)
	)	
GRANT OWENS,	)	
	)	
	)	Honorable Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's AUUW convictions pursuant to facially unconstitutional AUUW statute are vacated as void; we lack jurisdiction to address the merits of defendant's unsentenced convictions but remand for imposition of sentence on his remaining convictions; vacated and remanded for sentencing.

¶ 2 Defendant, Grant Owens, was charged with multiple counts of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon (UUWF) after he was observed possessing a gun by a Chicago police officer. After a bench trial, defendant was convicted of four counts of AUUW and two counts of UUWF. The court merged all counts into a single

count of AUUW and sentenced defendant to seven years in prison on that single count. Defendant appeals, arguing that: (1) the State failed to prove him guilty beyond a reasonable doubt because his conviction was based on the unbelievable and implausible testimony of a single officer; (2) his convictions under sections 5/24-1.6(a)(1)/(a)(3)(A) and 5/24-1.6(a)(2)/(a)(3)(A) of the Criminal Code of 2012 (Code) must be vacated because that statute was struck down as facially unconstitutional; (3) his trial counsel was ineffective for failing to object to the admission of defendant's prior convictions that were unconstitutional, and thus void, and should not have been used against defendant; and (4) his constitutional rights to confrontation were violated when the State introduced certified documents to prove that defendant did not possess a firearm owner's identification (FOID) card to prove him guilty of AUUW. For the reasons that follow, we vacate defendant's convictions under counts I and IV as void *ab initio*, and remand this matter for imposition of sentence on defendant's unsentenced convictions on counts III, VI, VII, and VIII.

¶ 3 BACKGROUND

¶ 4 Due to the narrow issues we are able to address in this appeal, we set forth only those limited[1] facts necessary to our resolution.

¶ 5 Defendant was charged by information on May 22, 2014. The information contained 16 counts— 8 counts against defendant and 8 counts against Floyd Murray, a codefendant who is not a party to this appeal. Prior to defendant's bench trial, the court re-numbered[2] the counts against defendant, respectively, as follows: (I) AUUW (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West

[1] We do not recite the detailed facts related, for example, to defendant's pretrial motion or the testimony from his bench trial so that if in the future defendant opts to appeal from a non-void conviction and sentence, it is clear that this decision did not address or resolve any of his contentions on the merits for purposes of *res judicata*.

[2] When we refer to a "count [#]", we are actually referring to the re-numbered count numbers set forth by the court prior to trial. The mittimus refers to the counts by their re-numbered count numbers and defendant was ultimately sentenced under re-numbered count 1.

2014)); (II) AUUW (720 ILCS 5/24-1.6(a)(1)/(3)(A-5) (West 2014)); (III) AUUW (720 ILCS 5/24-1.6(a)(1)/(3)(C) (West 2014)); (IV) AUUW (720 ILCS 5/24-1.6(a)(2)/(3)(A) (West 2014)); (V) AUUW (720 ILCS 5/24-1.6(a)(1)/(3)(A-5) (West 2014)); (VI) AUUW (720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2014)); (VII) UUWF (720 ILCS 5/24-1.1(a) (West 2014)); and (VIII) UUWF (720 ILCS 5/24-1.1(a) (West 2014)).

¶ 6 The contents of counts I and IV in the charging instrument are of particular relevance to this appeal. Count I of the information alleged that defendant committed the offense of AUUW on May 10, 2014, as follows:

> "HE KNOWINGLY CARRIED ON OR ABOUT HIS PERSON *** A PISTOL, REVOLVER, OR HANDGUN, AND THE PISTOL, REVOLVER, OR HANDGUN POSSESSED WAS UNCASED, LOADED, AND IMMEDIATELY ACCESSIBLE AT THE TIME OF THE OFFENSE, IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.6(a) (1)/(3) (A)[.]" (Emphasis in original.)

Count IV of the information alleged that defendant committed the offense of AUUW on May 10, 2014, as follows:

> "HE KNOWINGLY, CARRIED OR POSSESSED ON OR ABOUT HIS PERSON, UPON ANY PUBLIC STREET, TO WIT: SOUTH EAST END AVENUE, WITHIN THE CORPORATE CITY LIMITS OF THE CITY OF CHICAGO, *** A PISTOL, REVOLVER, OR HANDGUN, AND THE PISTOL, REVOLVER, OR HANDGUN POSSESSED WAS UNCASED, LOADED, AND IMMEDIATELY ACCESSIBLE AT THE TIME OF THE OFFENSE IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.6(a) (2)/(3)(A)[.]" (Emphasis in original.)

¶ 7 The charges against defendant arose from an incident that occurred on May 10, 2014, at around 11:40 p.m., during which a police officer observed defendant possess a firearm in the parking lot of a liquor store.

¶ 8 Defendant's bench trial took place on September 20, 2015. The State presented three witnesses and the defense presented three witnesses, one of whom was defendant. One of the officers who testified for the State stated that he saw defendant with a gun. The other two witnesses for the State did not see defendant with a gun. Defendant testified that he did not have a gun on the date in question and did not know codefendant Murray. After trial, defendant was found guilty on counts I, III, IV, VI, VII, and VIII—*i.e.*, four counts of AUUW and two counts of UUWF, respectively. The court found defendant not guilty on counts II and V.

¶ 9 Sentencing occurred on November 13, 2015. The court merged counts III, IV, VI, VII, and VIII into count I, and sentenced defendant to seven years in prison under count I, finding "[t]his is a mandatory Class X sentence."

¶ 10 This court granted defendant leave to file his late notice of appeal on June 1, 2016.

¶ 11 The record on appeal was filed on April 10, 2017, and defendant filed his opening brief on October 4, 2017. The State did not file its response brief until May 8, 2019, which was approximately 18 months after defendant's brief was filed. In fact, in response to the State's fourth request for an extension of time to file its brief, this court granted a final extension to July 9, 2018, but the State did not file its brief by that date. On April 30, 2019, the State filed a motion for leave to file its brief instanter, which this court granted on May 8, 2019, in an order that recognized that the State's brief was originally due on November 8, 2017, and that "[t]he nearly 18 month delay in filing that brief is unacceptable." We adopt and emphasize that

sentiment here, especially in light of the fact that the State's brief concedes that the sole conviction under which defendant was sentenced was improper.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant challenges his convictions, arguing that the State failed to prove him guilty beyond a reasonable doubt because the sole officer's testimony that defendant possessed a firearm was unbelievable and implausible; his trial counsel was ineffective for failing to object to the use of prior convictions that were void as impeachment evidence; and his constitutional right to confrontation was violated. Defendant also contends, and the State concedes, that his convictions on counts I and IV were improper.

¶ 14 Defendant's Unsentenced Convictions

¶ 15 Although defendant attacks a number of his convictions by raising various issues, we do not have jurisdiction to address most of defendant's arguments. "A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them." *People v. Lee*, 2018 IL App (1st) 152522, ¶ 25. It is well-settled that "[t]he final judgment in a criminal case is the sentence, and, in the absence of imposition of a sentence, an appeal cannot be entertained." *People v. Caballero*, 102 Ill. 2d 23, 51 (1984); see also *People v. Flores*, 128 Ill. 2d 66, 95 (1989).

¶ 16 Here, defendant was convicted on counts I, III, IV, VI, VII, and VIII. However, the court merged counts III, IV, VI, VII, and VIII into count I and imposed a sentence only on count I. Thus, the only final judgment in this case is defendant's conviction and seven-year sentence on count I. Defendant contends that even if we vacate or reverse his conviction under count I, we must address the remaining counts pursuant to *People v. Neely*, 2013 IL App (1st) 120043. We

disagree and find that we lack jurisdiction to address the substantive merits of defendant's unsentenced convictions.

¶ 17 Defendant relies on *Neely* for the proposition that "this court should entertain jurisdiction where a greater conviction is vacated so that a nonfinal, unsentenced conviction can be reinstated." 2013 IL App (1st) 120043, ¶ 14. *Neely* cited our supreme court's decision in *People v. Dixon*, 91 Ill. 2d 346 (1982), as the basis for such a conclusion. In *Dixon*, the trial court (incorrectly) found that the defendant's conviction for two lesser offenses merged into his convictions for two more serious offenses. *Id.* at 349. The appellate court reversed one of the sentenced convictions, but declined the State's request to remand for sentencing on the lesser, unsentenced convictions. *Id.* The State appealed and our supreme court reversed, holding that the "anomalous" situation allowed the appellate court to remand for imposition of sentence. *Id.* at 353. The court explained that even though the unsentenced convictions were not final judgments, both the sentenced and unsentenced convictions "all arose from a series of separate but closely related acts." *Id.* The close relation of the acts coupled with the fact that the unsentenced convictions were "intimately related to and 'dependent upon' the [sentenced] convictions" allowed this court to remand for sentencing. *Id.* (quoting Ill. S. Ct. R. 615(b)(2)).

¶ 18 However, in *People v. Relerford*[3], 2017 IL 121094, our supreme court re-examined *Dixon* and clarified that its application should be narrow. In *Relerford*, the supreme court noted that the situation in *Dixon* that allowed the court to address the defendant's nonfinal convictions was " 'anamolous' because the circuit court determined, albeit incorrectly, that sentences could not be imposed on the lesser offenses because they merged into the other offenses." *Id.* ¶ 74. The court explained that "the decision in *Dixon* must be understood to be limited to the type

[3] Defendant's opening brief was filed on October 4, 2017, and *Relerford* was decided on November 30, 2017. However, it is unclear why defendant did not address *Relerford* or its impact on *Dixon*, in his reply brief, which was not filed until May 22, 2019.

of factual scenario presented in that case ***." *Id.* Most significantly, the court opined that *Dixon* must be given a narrower interpretation, specifically stating that "[a] close reading of *Dixon* makes clear that, to the extent the appellate court had any jurisdiction to address the nonfinal convictions, that jurisdiction was limited to ordering a remand for imposition of sentences on the lesser convictions." *Id.* ¶ 75. Therefore, *Relerford* mandates that to the extent that we have any jurisdiction to address nonfinal, unsentenced convictions, our jurisdiction extends only to remanding the matter for imposition of sentence on defendant's nonfinal convictions.

¶ 19 Here, defendant's sentenced conviction under count I (AUUW) and his unsentenced convictions under counts III, IV, VI, VII, and VIII (AUUW and UUWF) are "intimately related" to each other, as they arise from the same act. Further, as in *Dixon*, the trial court's reasoning for declining to sentence defendant on counts III, IV, VI, VII, and VIII is clear from the record—the court merged those offenses into count I. Contra *Relerford*, 2017 IL 121094, ¶ 74 (where the record was silent regarding why the trial court failed to sentence the defendant on three convictions, appellate court lacked jurisdiction to address merits of those convictions or remand for sentencing). As a result, we find that we have jurisdiction to remand for sentencing on counts III, IV, VI, VII, and VIII.

¶ 20 Defendant's Sentenced Conviction

¶ 21 Because we lack jurisdiction to address the substantive merits of defendant's nonfinal, unsentenced convictions, we turn our analysis to count I, the only final judgment in this case. Defendant contends that his convictions under counts I and IV[4] must be "vacated" as void

[4] As a brief aside, we find it pertinent to clarify that although defendant's conviction under count IV was unsentenced, and thus nonfinal, we address it in this section with count I because defendant has challenged it as void, which may be done at any time and in any court, and is not subject to any ordinary procedural bar. *In re N.G.*, 2018 IL 121939, ¶ 57.

because the version of the statute pursuant to which those counts were brought has been declared facially unconstitutional. The State agrees that defendant's convictions under counts I and IV were improper but for a different reason—namely, defendant was charged and convicted in error on counts I and IV because the version of the statute in the charging instrument was no longer the law during the time period at issue.

¶ 22 As support, the State cites *Moore v. Madigan*, 702 F. 3d 933, 942 (7th Cir. 2012), a case in which the Seventh Circuit determined that Illinois's unlawful use of a weapon (UUW) and AUUW statutes violated the second amendment right to bear arms for self-defense outside the home. The statutes at issue prohibited a person (with limited exceptions) from carrying a gun ready to use, *i.e.*, loaded, immediately accessible—that is, easy to reach—and uncased. *Id.* at 934. The court in *Moore* noted that Illinois was "the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home." (Emphasis in original.) *Id.* at 940. The court ultimately recognized that because the United States Supreme Court had decided that the second amendment confers a right to bear arms for self-defense, which is as important outside the home as inside, Illinois' "sweeping ban" could not stand. *Id.* at 942. After reaching such a conclusion, the Seventh Circuit ordered its mandate in that case stayed for 180 days "to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public." *Id.*

¶ 23 In response to *Moore*, our legislature amended[5] the AUUW statute, effective July 9, 2013, to only criminalize possession of a "firearm, *other than* a pistol, revolver, or *handgun*." (Emphasis added.) 720 ILCS 5/24-1.6 (a)(3)(A) (West 2014). Despite this amendment,

[5] The unconstitutional version of section 24-1.6(a) was amended by Public Act 98-63 (Pub. Act 98-63, § 155 (eff. Jul 9, 2013) (amending 720 ILCS 5/24-1.6 (West 2008)), by adding the words "other than a pistol, revolver, or handgun" to subsection (a)(3)(A).

defendant was charged and convicted of possessing "a pistol, revolver, or handgun" (*supra* ¶ 6) —an act that was not a crime under section 24-1.6(a)(3)(A) on May 20, 2014, the date of the events at issue, and approximately 10 months after our legislature amended the AUUW statute to comply with *Moore*. The State admits that this was "an error that neither the parties nor the circuit court recognized."

¶ 24 Further complicating matters is the fact that the sections of the AUUW statute under which counts I and IV were charged, and pursuant to which defendant was convicted, were declared facially unconstitutional by our supreme court, rendering them void *ab initio*. See *People v. Burns*, 2015 IL 117387, ¶ 2 (count I); *People v. Mosley*, 2015 IL 115872, ¶ 25 (count IV); and *People v. Aguilar*, 2013 IL 112116, ¶ 19 (count I).

¶ 25 As a brief aside, we note that defendant was not convicted under the amended, constitutional form of section 24-1.6 (a)(3)(A) that became effective on July 9, 2013, because the only firearm that the State presented evidence of defendant possessing was a handgun, which was not criminalized conduct under the amended AUUW statute. The amended AUUW statute criminalized possession of a firearm "other than a pistol, revolver, or handgun" (720 ILCS 5/24-1.6(a)(3)(A) (West 2014)). Thus, if defendant possessed a handgun on May 10, 2014, his conduct was not criminal under the version of the AUUW statute that was in effect on that date. It is well-settled that "[a] trial court is without jurisdiction to enter a conviction against a defendant based on actions that do not constitute a criminal offense." *People v. Dunmore*, 2013 IL App (1st) 121170, ¶ 9. On May 10, 2014, the possession of a handgun was not a criminal offense under the section of the AUUW statute that defendant was charged in counts I and IV. Thus, we proceed with our analysis with the assumption that defendant was convicted pursuant to the facially unconstitutional version of the AUUW statute.

¶ 26 As a result, we must determine the effect of defendant's convictions under a facially unconstitutional statute. The unconstitutional version of section 24-1.6 (a)(3)(A), which was examined in *Moore*, prohibited the carrying of *any* firearm that was uncased, loaded and immediately accessible. (Emphasis added.) 720 ILCS 5/24-1.6(a) (1), (2) (a)(3)(A) (West 2008). Citing *Moore*, our supreme court determined in *Aguilar* that section 5/24-1.6(a)(1), (a)(3)(A)—*i.e.*, the basis for count I here—violated the second amendment right to keep and bear arms because it amounted to a comprehensive ban on one's right to possess and use a firearm for self-defense outside the home. *Aguilar*, 2013 IL 112116, ¶ 21. In reaching this decision, our supreme court noted that "[f]ollowing the decision in *Moore*, the General Assembly enacted the Firearm Concealed Carry Act, which *inter alia* amended the AUUW statute to allow for a limited right to carry certain firearms in public. [Citation.] ***." *Id.* ¶ 22 n.4. Similarly, our supreme court has declared that section 24-1.6(a)(2), (a)(3)(A)—*i.e.*, the basis for count IV here—is facially unconstitutional. *Mosely*, 2015 IL 115872, ¶ 25.

¶ 27 "When a statute is found to be unconstitutional in Illinois, it is said to be void *ab initio*; that is, it is as if the law had never been passed [citations] and never existed [citation]. Such laws are 'infirm from the moment of their enactment and, therefore, [are] unenforceable.' " *In re N.G.*, 2018 IL 121939, ¶ 57; see also *Dunmore*, 2013 IL App (1st) 121170, ¶ 9.

¶ 28 Here, defendant was charged and convicted under counts I and IV pursuant to facially unconstitutional sections of the AUUW statute. As a result, we find that defendant's convictions under counts I and IV are void and must be vacated. See *In re N.G.*, 2018 IL 121939, ¶ 57 (recognizing that this court "has an independent duty to vacate the void judgment and may do so *sua sponte*"). We therefore order the trial court to vacate defendant's convictions under counts I and IV.

¶ 29 We also find it pertinent to address a final issue. *Pielet v. Pielet*, 2012 IL 112064, ¶ 56 ("When appropriate, a reviewing court may address issues that are likely to recur on remand in order to provide guidance to the lower court and thereby expedite the ultimate termination of the litigation."). Defendant asserts that he has two prior AUUW convictions that are also void *ab initio* pursuant to *Aguilar*. Because we are remanding this matter for sentencing on defendant's nonfinal convictions, we direct the trial court to reexamine whether the prior convictions should also be vacated, and whether defendant is still eligible for Class X sentencing in this case. Defendant shall have the opportunity to present the circuit court with any argument and/or motion addressing whether his prior convictions for AUUW[6] should also be vacated as void *ab initio* prior to the imposition of sentence.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we vacate defendant's convictions under counts I and IV and remand this matter for imposition of sentence on defendant's convictions under counts III, VI, VII, and VIII. Further, due to the State's unacceptable delay in filing its response brief, we order that sentencing on defendant's nonfinal convictions occur within 30 days of the issuance of this court's mandate.

¶ 32 Vacated and remanded for sentencing with directions.

[6] During his sentencing hearing, the State introduced certified copies of convictions for a 2009 AUUW in case number 09CR1652201 and a 2006 AUUW in case number 06CR0382301.