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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re MONTYCE H., a Minor,)	Appeal from the
)	Circuit Court
(The People of the State of Illinois,)	of Cook County.
Petitioner-Appellee,)	
)	No. 09 JD 3959
v.)	
)	The Honorable
Montyce H.,)	Carl Anthony Walker,
Respondent-Appellant).)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* The aggravated unlawful use of a weapon statute violates the right-to-bear-arms clauses found in the U.S. constitution.

¶ 2 On appeal, respondent argued that the aggravated unlawful use of a weapon (AUUW) statute, insofar as it criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violated the second amendment of the United States Constitution's right to bear arms. We did not find respondent's argument persuasive, and we affirmed. *People v. Montyce H.*, 2011 IL App (1st) 101788. The Illinois Supreme Court subsequently entered a supervisory order directing us to vacate our judgment and reconsider in light of *People v. Aguilar*, 2013 IL 112116.

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Our supreme court held in *People v. Aguilar* that, on its face, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution. *Aguilar*, 2013 IL 112116, ¶ 22. After considering our supreme court's decision in *Aguilar*, we reverse the finding of delinquency on the AUUW count but remand for consideration by the trial court of the other counts in the petition for wardship.

¶ 3 Respondent Montyce H. was 15 years old when he was arrested and charged on September 29, 2009, in a petition for adjudication of wardship. The petition contained a total of four counts: three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (West 2008)), and one count of unlawful possession of a firearm (720 ILCS 5/24-3.1 (West 2008)). After a trial on December 30, 2009, the trial court "hereby found" respondent "to be delinquent on all 4 counts." However, the trial court then stated that it was entering judgment on only the first count and that the other counts were "merged into one." On May 13, 2010, the trial court sentenced respondent to 18 months of probation

¶ 4 The only count upon which judgment was entered was a count for aggravated unlawful use of a firearm. The statute for aggravated unlawful use of a firearm lists several different "factors," any one of which will make the use "aggravated." 720 ILCS 5/24-1.6(a)(3) (West 2008). The count supporting respondent's conviction charged the "factor[]" that the firearm "was uncased, loaded and immediately accessible." 720 ILCS 5/24-1.6(a)(3)(A) (West 2008). The statute criminalizes possession of an uncased, loaded and accessible firearm, only if it is outside the home. 720 ILCS 5/24-1.6(a)(1) (West 2008).

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¶ 5 In his appellate brief, respondent raised two claims: (1) that the aggravated unlawful use of a weapon statute, which criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violates both federal and state guarantees of the right to bear arms; and (2) that the unlawful possession of firearms statute, insofar as it criminalizes a 15-year-old's possession of a handgun, violates both the federal and state guarantees of the right to bear arms.

¶ 6 Since respondent was found delinquent on an aggravated use count, the unlawful possession statute is not properly before us. *Aguilar*, 408 Ill. App. 3d at 150 ("we find that we cannot review defendant's conviction for unlawful possession of a firearm because the trial court did not impose sentence"); *People v. Baldwin*, 199 Ill. 2d 1, 5 (2002) ("Absent a sentence, a conviction is not a final and appealable judgment"). In addition, although respondent claims in the headings in his brief to be raising a state challenge as well as a federal challenge, there is no discussion of the Illinois constitutional right in his brief. His discussion of the aggravated use statute is based entirely on the second amendment right found in the United States constitution and the case law interpreting it. "Points not argued are waived***." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Wilson v. Cook County*, 407 Ill. App. 3d 759, 775-76 (2011) (finding that plaintiffs had waived any argument concerning the Illinois Constitution's right to bear arms where they made a "one-sentence statement" and failed to provide any support or analysis).

¶ 7 Thus, the issue before us on this appeal is solely whether the aggravated unlawful use of a weapon statute, insofar as it criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violates the federal constitutional right to bear arms.

¶ 8

BACKGROUND

¶ 9 On this direct appeal, the facts are not in dispute. Respondent in his brief to this court admits that the following facts are true:

"On September 28, 2009, around 9:43 p.m. Officer Pedraza was on patrol with another marked squad car on the 6400 block of South Peoria when officers noticed a white vehicle double parked in the middle of the road partially blocking traffic. The police cars stopped next to the white car. A male identified in court as Montyce was leaning inside the white car on the passenger's side. Once the officers pulled up, Montyce looked in their direction and ran off grabbing his waistband as he ran. A foot chase ensued, during which Montyce tossed a gun in a nearby gangway. Montyce was quickly arrested a couple [of] houses away.

Officer Pedroza recovered the loaded handgun from the gangway and kept it in his possession until he tendered it at the station to one of his partners for inventory. The gun was inventoried in Pedroza's possession."

Thus, in his brief to this court, respondent admits that "Montyce tossed a gun in a nearby gangway."

¶ 10

ANALYSIS

¶ 11 As we previously observed, the sole issue on this appeal is whether the aggravated unlawful use of a weapon statute, insofar as it criminalizes the possession of a loaded, uncased and accessible firearm outside the home, violates the federal constitutional right to bear arms.

¶ 12

I. Standard of Review

¶ 13 The question of a statute's constitutionality is reviewed *de novo*. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 200 (2009); *People v. Cornelius*, 213 Ill. 2d 178, 188 (2004). Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute has the burden of overcoming this presumption. *Cornelius*, 213 Ill. 2d at 189. After listening to the parties' arguments, a reviewing court should attempt to construe the statute as constitutional. *Cornelius*, 213 Ill. 2d at 189. If the reviewing court has any doubt about how to construe the statute, it should resolve that doubt in favor of finding the statute constitutional. *Cornelius*, 213 Ill. 2d at 189. "This is not to mean that statutes are unassailable" but, rather, that they enjoy a strong presumption of validity. *Cornelius*, 213 Ill. 2d at 190.

¶ 14 Although respondent did not challenge the constitutionality of the statute at trial, a constitutional challenge to a criminal statute can generally be raised at any time. *In re J.W.*, 204 Ill. 2d 50, 61 (2003). Accordingly, respondent has not waived his constitutional challenge to the statute, even though he first raised this challenge in the appellate court. *J.W.*, 204 Ill. 2d at 61-62.

¶ 15 II. Facial and Applied Challenges

¶ 16 Respondent challenges the constitutionality of the statute both as applied and on its face.

"The difference between an as-applied and a facial challenge is that if a plaintiff¹ prevails in an as-applied claim, he may enjoin the objectionable enforcement of a statute only against himself, while a successful facial challenge voids enactment in its entirety and in all applications." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 498 (2008).

¶ 17 This difference affects the scope of our review, because the facts of a defendant's case become relevant only if he or she brings an as-applied challenge. In an "as-applied" challenge, the challenging party contests only how the statute was applied against him or her within a particular context, and as a result, the facts of his or her particular case become relevant.

Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 306 (2008). By contrast, in a facial challenge, the facts of his or her particular case do not affect our review.

¶ 18 Since a successful facial challenge will void the statute for all parties in all contexts, it is "the most difficult challenge to mount successfully." *Napleton*, 229 Ill. 2d at 305. "Facial invalidation "is, manifestly, strong medicine" that "has been employed by the court sparingly and only as a last resort." " *Poo-bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009) (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

¶ 19 Respondent claims that the statute is unconstitutional, not only on its face, but also as applied to him. However, he offers no separate "as applied" arguments, and we can think of no

¹This quote is from a civil case.

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reason why a 15-year-old would have a greater right to possess a loaded handgun on the street than an adult. The United States Supreme Court has recently emphasized that the need for self-defense in the home is at the core of the second amendment. *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3050 (2010) (plurality op.) ("the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense"). We will proceed to review his arguments in the context of a facial challenge.

¶ 20 III. Constitutional Right and Statute at Issue

¶ 21 The constitutional right at issue is the right to bear arms. The second amendment to the federal constitution provides that: "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.

¶ 22 The statute at issue is quoted below. As we noted above, the trial court found respondent delinquent based on count I in the delinquency petition, and count I charged him with violating the following statute:

"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 or fixed place of business any pistol, revolver, stun gun or taser or other firearm *** and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense [.]” 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008).

¶ 23 Defendant argues that the second amendment protects his right to keep a firearm on his person either in or out of his home for the purpose of self-defense. 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. In the last few years, the United States Supreme Court has issued two significant decisions concerning the second amendment: (1) *District of Columbia v. Heller*, 554 U.S. 570 (2008); and (2) *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). Defendant cites both cases as support for his claims. He argues that *Heller* and *McDonald* protect his right to carry a firearm outside the home and that their holdings render the AUUW statute unconstitutional.

¶ 24 Defendant further argues that the Illinois constitution article I, section 22 protects his right to carry a firearm outside of the home. He asks us, in light of *Heller* and *McDonald*, to depart from our state’s supreme court decision in *Kalodimos v. Morton Grove*, 103 Ill. 2d 483, 498 (1984), which held that a reasonable prohibition of handguns is constitutional. For the reasons discussed below, we find defendant’s arguments persuasive.

¶ 25 IV. Facial Challenge

¶ 26 As noted above, defendant relies primarily on two recent United States Supreme Court cases: *Heller* and *McDonald*. The United States Supreme Court found in *Heller* that the second amendment permitted an individual to keep a handgun in his or her home for the purpose of self-

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defense, and it struck down the District of Columbia law that had banned this. *Aguilar*, 408 Ill. App. 3d at 137 (citing *Heller*, 554 U.S. 570). Two years later, in *McDonald*, the Court held that its holding in *Heller* was not limited to the federal District of Columbia but also applied with equal force to the States. *Aguilar*, 408 Ill. App. 3d at 137 (citing *Heller*, 554 U.S. 570).

¶ 27 Specifically, in *Heller*, a District of Columbia police officer, who was authorized to carry a handgun while on duty, applied to register a handgun to keep in his home in the District, and the District refused his application. *Heller*, 554 U.S. at 575-76. The police officer then filed suit in federal court seeking to overturn the District's ban against the registration of handguns, but only in so far as it prohibited him from keeping a handgun in his home. *Heller*, 554 U.S. at 575-76. Before the United States Supreme Court, the District argued that the second amendment protected only the right to keep a firearm in connection with militia service. *Heller*, 554 U.S. at 577. In contrast, the police officer argued that the second amendment also protected the right of an individual, such as himself, to keep a firearm in his home for the purpose of self-defense. *Heller*, 554 U.S. at 577.

¶ 28 In a close 5 to 4 decision, the United States Supreme Court agreed with the officer and protected his right to keep a firearm in his home. *Heller*, 554 U.S. at 636. The *Heller* court held that the second amendment protects only the "rights of law abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

¶ 29 Two years later in *McDonald*, defendants City of Chicago and the village of Oak Park, which had laws similar to the District law struck down in *Heller*, tried to distinguish their case by arguing that, although the second amendment applied in the federal District, it had no application

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to the states. *McDonald*, 130 S. Ct. at 3026. The United States Supreme Court rejected this argument and held in *McDonald* that the holding in *Heller* was fully applicable to the states. *McDonald*, 130 S. Ct. at 3050. The Court ended with: “We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.” *McDonald*, 130 S. Ct. at 3050.

¶ 30 In the case at bar, defendant relies on these recent United States Supreme Court cases to argue that a ban on loaded handguns outside of one's home violates the second amendment. The Illinois Appellate Court has rejected this argument several times before in published opinions. *Montyce*, 2011 IL App (1st) 101788; *People v. Mimes*, 2011 IL App (1st) 082747; *Ross*, 407 Ill. App. 3d 931 (2011); *Aguilar*, 408 Ill. App. 3d 136 (2011); *Dawson*, 403 Ill. App. 3d 499 (2010). We initially followed these cases. However, our Illinois Supreme Court reversed *Aguilar*, 2013 IL 112116 and entered a supervisory order for us to decide this case in light of *Aguilar* and we vacated our judgment in the case at bar and withdraw our previous decision.

¶ 31 Our supreme court now instructs us that, in "stark contrast" to the previous appellate court cases on this subject matter

"stands the Seventh Circuit Court of Appeals' recent decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir.2012). In *Moore*, the court held that the Class 4 form of section 24–1.6(a)(1), (a)(3)(A), (d) is effectively 'a flat ban on carrying ready-to-use guns outside the home' (*id.* at 940) and that, as such, it violates the second amendment right to keep and bear arms, as construed in *Heller* and *McDonald* (*id.* at 942). In reaching this result, *Moore* relied not on the specific

holding of *Heller*—i.e., that the second amendment protects the right to possess a handgun in the home for the purpose of self-defense—but rather on the broad principles that informed that holding. According to *Moore*, the clear implication of *Heller*'s extensive historical analysis is that 'the constitutional right of armed self-defense is broader than the right to have a gun in one's home.' *Id.* at 935. *Moore* notes, for example, that '[t]he first sentence of the *McDonald* opinion states that "two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense."' *Id.* at 935 (quoting *McDonald*, 561 U.S. at —, 130 S.Ct. at 3026). Moreover, *Moore* explains that, although both *Heller* and *McDonald* state that the need for self-defense is 'most acute' in the home, that 'doesn't mean it is not acute outside the home.' *Id.* (quoting *McDonald*, 561 U.S. at —, 130 S.Ct. at 3036, and *Heller*, 554 U.S. at 628, 128 S.Ct. 2783). On the contrary:

Heller repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." [Citation.] Confrontations are not limited to the home.' *Id.* at 935–36 (quoting *Heller*, 554 U.S. at 592, 128 S.Ct. 2783).

Finally, *Moore* notes that the second amendment guarantees not only the right to 'keep' arms, but also the right to 'bear' arms, and that these rights are not the same:

'The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.' *Id.* at 936." *Aguilar*, 2013 IL 112116 at ¶ 19.

¶ 32 As a result, our supreme court has concluded that the United States Supreme Court "has decided that the [second] amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942. As a result, Illinois' "flat ban on carrying ready-to-use guns outside the home" as embodied in the class 4 form of section 24-1.6(a)(1), (a)(3)(A), d, is unconstitutional on its face. *Moore*, 702 F.3d at 940.²

¶ 33 Our supreme court stated in *People v. Aguilar*, 2013 IL 112116:

"In *Heller*, the [United States] Supreme Court expressly stated that:

'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

²The State of Illinois did not appeal from the decision in *Moore*.

whatsoever in any manner whatsoever and for whatever purpose.'

Heller, 554 U.S. at 626, 128 S.Ct. 2783.

From there, the Court went on to emphasize 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.' *Id.* at 626–27, 128 S.Ct. 2783. The Court then immediately added, by way of footnote, that '[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.' *Id.* at 627 n. 26, 128 S.Ct. 2783.

Now admittedly, the list enumerated in *Heller* does not specifically include laws prohibiting the possession of firearms by minors. Nevertheless, several courts have since undertaken a thorough historical examination of such laws, and all of them have concluded that, contrary to defendant's contention, the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection. See, e.g., *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, Explosives*, 700 F.3d 185, 204 (5th Cir.2012) (concluding that '[m]odern restrictions on the ability of persons under 21 to purchase handguns—and the ability of persons under 18 to possess handguns—seem, to us, to be firmly historically rooted'); *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir.2009) (concluding that the 'right to keep arms in the

founding period did not extend to juveniles'); *Powell v. Tompkins*, 926 F.Supp.2d 367, 387–90 (D.Mass.2013) (holding that a Massachusetts law proscribing the carry of firearms by persons under the age of 21 'comports with the Second Amendment and imposes no burden on' the right to keep and bear arms). In essence, these cases explain that, although many colonies *permitted* or even *required* minors to own and possess firearms for purposes of militia service, nothing like *a right* for minors to own and possess firearms has existed at any time in this nation's history. On the contrary, laws banning the juvenile possession of firearms have been commonplace for almost 150 years and both reflect and comport with a 'longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public.' *Rene*, 583 F.3d at 15. We will not repeat or rehash the historical evidence set forth in these decisions. Rather, for present purposes, we need only express our agreement with the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." (Emphases in original.) *Aguilar*, 2013 IL 112116, ¶¶ 26-27.

¶ 34 In *Aguilar*, our supreme court held that "the possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection." *Aguilar*, 2013 IL 112116, ¶ 27 ("nothing like a right for minors to own and possess firearms has existed at any time in this nation's history"). In other words, minors have no second amendment rights. Thus, it follows

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that a minor's adjudication of delinquency due to handgun possession, such as in our case, is not barred by the second amendment.

¶ 35 In *Aguilar*, the minor was prosecuted as an adult, while in the case at bar Montyce H., the minor, was adjudicated delinquent on a petition for wardship. The petition contained a total of four counts: three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a) (West 2008)), and one count of unlawful possession of a firearm (720 ILCS 5/24-3.1 (West 2008)). The trial court found the minor delinquent on all four counts, but entered judgment on only the first count and found that the other counts were "merged into one."

¶ 36 In *Aguilar*, our supreme court found that the class 4 form of AUUW at issue was facially invalid. *Aguilar*, 2013 IL 112116, ¶ 22 ("we here hold that, on its face, the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms"). When a statute is facially invalid, it is void for all parties in all contexts. *Napeleton v. The Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). Thus, the statute, under which defendant was adjudicated delinquent, is void for all purposes, even for this non-criminal proceeding under the Juvenile Court Act (705 ILCS 405/1-1 et seq. (West 2012)). *In re Vincent K.*, 2013 IL App (1st) 112915, ¶ 45 ("proceedings in juvenile court are not criminal trials that result in convictions").

¶ 37 Unlike the fifteen-year old in the case at bar, the seventeen-year old in *Aguilar* was prosecuted as an adult with respect to the Class 4 form of AUUW. *Aguilar*, 2013 IL 112116, ¶ 7. Thus, our supreme court reversed his adult conviction for that count. *Aguilar*, 2013 IL 112116, ¶ 30. However, the supreme court still remanded for resentencing. *Aguilar*, 2013 IL 112116, ¶ 30. The trial court in *Aguilar* had found the defendant guilty both of AUUW and also of unlawful

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possession of a firearm as a minor, but it had imposed sentence on only the AUUW count.

Aguilar, 2013 IL 112116, ¶ 7. There were no merging of counts. Similarly, we reverse the finding of delinquency on the AUUW count but remand for consideration by the trial court of the other counts in the petition for wardship. On remand, the trial court should give credit and due consideration to the time which the minor has already served. 705 ILCS 405/1-2 (2) (West 2012) ("This Act shall be administered in a spirit of humane concern").

¶ 38

V. Article I, section 22 of the Illinois Constitution

¶ 39 Finally, defendant claims that the AUUW statute also violates the section of the Illinois Constitution which, like the second amendment of the federal constitution, protects the right to bear arms. The Illinois Constitution provides: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be in-fringed." Ill. Const. 1970, art. I, § 22. It is important to note that this "section does not mirror the second amendment to the federal constitution (U.S. Const., amend. II); rather it adds the words '[s]ubject only to the police power,' omits prefatory language concerning the importance of a militia, and substitutes 'the individual citizen' for 'the people.'" *Kalodimos*, 103 Ill. 2d at 491.

¶ 40 Since we have already decided that the AUUW statute is unconstitutional under the federal constitution, we need not decide its constitutionality under the Illinois Constitution.

¶ 41

CONCLUSION

¶ 42 For the foregoing reasons, we reverse the finding of delinquency on the AUUW count but remand for consideration by the trial court of the other counts in the petition for wardship. On

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remand, the trial court should give credit and due consideration to the time which the minor has already served.

¶ 43 Remanded with instructions.