

No. 1-12-2371

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 21053
)	
CALVIN WHITE,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's convictions are vacated because the predicate offenses used as elements of the current offenses are void under *People v. Aguilar*, 2013 IL 112116, including defendant's conviction for having an uncased and unloaded weapon with ammunition that was immediately accessible.
- ¶ 2 Following a bench trial in 2012, defendant Calvin White was convicted of being an armed habitual criminal and of unlawful use of a weapon by a felon based on two prior convictions in 2003 for aggravated unlawful use of a weapon (AUUW). On appeal, defendant

asserts that his two present convictions must be vacated because the predicate offenses of AUUW required by both convictions cannot be established in light of the supreme court decision in *People v. Aguilar*, 2013 IL 112116, which held a portion of the AUUW statute unconstitutional. We agree and vacate defendant's convictions.

¶ 3 Notably, *Aguilar* was decided during the pendency of this appeal. In turn, defendant properly raised this dispositive issue in his reply brief and also cited additional authority to support his position. The State has not responded to this issue by asking to file a surreply brief or by responding to defendant's motions to cite additional authority.

¶ 4 The two instant convictions were based on the recovery of a weapon from the open center console of defendant's truck by Chicago police officer Fernando Rodriguez after a traffic stop on November 8, 2009. Before trial, the court denied defendant's motion to quash his arrest and suppress evidence.

¶ 5 At trial, the weapon recovered from defendant's car was identified as a 9 mm handgun with 1 bullet in the chamber and 10 bullets in the magazine. The parties stipulated to the certified copies of defendant's two prior AUUW convictions. First, defendant had been convicted in August 2003 of AUUW for carrying in a vehicle a firearm that was uncased, loaded and immediately accessible in violation of subsection (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2002)) (case No. 02 C5 50698). Second, defendant had been convicted in May 2003 of AUUW for carrying in a vehicle a firearm that was uncased, unloaded and the ammunition was immediately accessible in violation of subsection (a)(3)(B) of the AUUW statute (720 ILCS 5-24-1.6(a)(1), (a)(3)(B) (West 2002) (case No. 02 CR 15630).

¶ 6 With these two prior felonies in evidence, the trial court found defendant guilty of being an armed habitual criminal and of unlawful use of a weapon by a felon. The court imposed two concurrent seven-year prison terms.

¶ 7 The armed habitual criminal statute prohibits the possession of a firearm by a person with at least two prior convictions for certain qualifying offenses, including AUUW. 720 ILCS 5/24-1.7(a)(2) (West 2008). To prove the requisite element of two prior convictions, the State first used the August 2003 conviction where defendant was convicted for carrying in a vehicle a firearm that was uncased, loaded and immediately accessible in violation of subsection (a)(3)(A) of the AUUW statute. This identical subsection was held unconstitutional in *Aguilar* and, thus, cannot be used here to establish the offense of armed habitual criminal. Accordingly, we vacate defendant's conviction and sentence for this offense.

¶ 8 This conclusion accords with our decisions in *People v. McFadden*, 2014 IL App (1st) 102939, *appeal allowed*, No. 117424 (May 28, 2014), and *People v. Fields*, 2014 IL App (1st) 110311. In *Fields*, we vacated the conviction for armed habitual criminal where the prior AUUW conviction used as a predicate offense was void under *Aguilar*. *Id.* at ¶ 44 (the specific subsection of the AUUW statute was not identified). In *McFadden*, we vacated the conviction for unlawful use of a weapon by a felon because the predicate felony was identical to the subsection held unconstitutional in *Aguilar*. *McFadden*, 2014 IL App (1st) 102939, ¶ 42.

¶ 9 Here, defendant was also convicted of the offense of unlawful use of a weapon by a felon, which prohibits the possession of firearms by a person who was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). The requisite prior felony charged and evidenced at trial was defendant's May 2003 AUUW conviction for carrying in a vehicle a firearm that was

uncased and unloaded with the ammunition immediately accessible in violation of subsection (a)(3)(B) of the AUUW statute. Accordingly, the inquiry becomes whether subsection (a)(3)(B) should be invalid like subsection (a)(3)(A) in *Aguilar*.

¶ 10 The now-invalid subsection (a)(3)(A) specifically prohibited the possession of an uncased firearm that was "loaded and immediately accessible." Subsection (a)(3)(B) specifically prohibits the possession of an uncased firearm that is "unloaded and the ammunition for the weapon was immediately accessible." *Aguilar* held that a qualified person has a constitutional right under the second amendment to have a *loaded* firearm immediately accessible. To hold that a qualified person cannot have an *unloaded* firearm with ammunition immediately accessible would produce the absurd result of constitutionally protecting the possession of a *loaded* gun but criminalizing the possession of an *unloaded* gun. Stated another way, if the second amendment protects an individual's right to carry a loaded firearm as held by *Aguilar*, then the same constitutional right should protect an individual's right to carry an unloaded firearm that potentially could be loaded.

¶ 11 For the foregoing reasons, we find that subsection (a)(3)(B) is constitutionally invalid based on *Aguilar* and, therefore, cannot serve as the predicate offense for unlawful use of a weapon by a felon in the present case.

¶ 12 In conclusion, we vacate both convictions and corresponding sentences. Given this disposition, we need not consider any other issue raised by defendant in this appeal.

¶ 13 Convictions vacated.