

No. 1-12-3589

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 C6 60741
	)	
KESHAWN CARTER,	)	
	)	Honorable Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE DELORT delivered the judgment of the court.  
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 **Held:** Conviction vacated where the defendant’s prior conviction for Class 4 aggravated unlawful use of a weapon could not serve as predicate offense for a charge of unlawful possession of firearm ammunition by a felon.

¶ 2 Defendant Keshawn Carter appeals his conviction for unlawful use of a weapon (UUW) by a felon, asserting that this court must vacate his conviction because the underlying predicate felony of aggravated unlawful use of a weapon (AUUW) is void under our supreme court’s decision in *People v. Aguilar*. We agree and vacate the defendant’s conviction.

¶ 3 The defendant was charged with UUW by a felon, (720 ILCS 5/24-1.1(a) (West 2008)), in that he knowingly possessed two .40 caliber Winchester rounds, after he had been previously convicted of AUUW, (720 ILCS 5/24-1.6(a)(1) and (a)(3)(A) (West 2008)), in case number 08 C6 60144.

¶ 4 At trial, the parties first stipulated to the defendant's prior felony conviction for AUUW in 2008. Detective Ostrowski testified that, on June 2, 2012, he and three other police officers went to the defendant's residence in Harvey, Illinois to execute a search warrant. When the police officers arrived at the apartment, the defendant was in the apartment with his brother and sister, who lived with him.

¶ 5 The defendant, who was in a bathroom, spoke with Detective Ostrowski and directed the detective to his bedroom, which the detective then searched. During the course of the search, Detective Ostrowski found two live .40 caliber bullets and one .40 caliber spent shell casing, both of which he inventoried and identified at trial.

¶ 6 The defendant was transported to the Harvey Police Department, where he was advised of his *Miranda* rights and signed a Notice of Rights form. He signed a written statement explaining that in January or February 2012 someone fired bullets into his bedroom window. Some of the bullet fragments were lodged in his wall. After the shooting, the defendant went to the front of his building near the sidewalk and found two .40 caliber bullets and one spent bullet shell casing on the ground which he decided to keep as "souvenirs." He kept the bullets and casing on his dresser and they remained there until the police officers came and removed them during their search. However, the police officers did not find a gun, box of ammunition, receipt or anything else connected with the bullets.

¶ 7 At the conclusion of the trial, the court found the defendant guilty. The trial court denied the defendant's motion for a new trial and sentenced him to two years' imprisonment.

¶ 8 The defendant argues that under *People v. Aguilar*, 2013 IL 112116, this court must vacate his conviction for UUW by a felon because the underlying predicate felony conviction of AUUW from case number 08 C6 60144 under section 24-1.6(a)(1) and (a)(3)(A) is void and unconstitutional. 720 ILCS 5/24-1.6(a)(1) and (a)(3)(A) (West 2008). The defendant's argument is tantamount to a challenge to the sufficiency of the evidence supporting his UUW by a felon conviction.

¶ 9 In *Aguilar*, 2013 IL 112116, ¶ 22, our supreme court found the Class 4 version of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)) to be unconstitutional as it violated the right to bear arms under the second amendment. When a statute is declared unconstitutional, it is void *ab initio*, as if it had never been passed. *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). The defendant maintains that because his prior conviction for AUUW under case number 08 C6 60144 is void under *Aguilar*, it was improper for the State to rely on this conviction to serve as a predicate offense for UUW by a felon. Thus, according to the defendant, the State has failed to prove an essential element of the offense and his conviction should be vacated. However, the State maintains that the defendant's UUW by a felon conviction should not be vacated because he was properly charged and convicted of that offense based on his prior 2008 AUUW even though the statute underlying the AUUW conviction was found to be unconstitutional years later.

¶ 10 This case is similar to *People v. Fields*, 2014 IL App (1st) 110311. The defendant in *Fields* was convicted of armed robbery and being an armed habitual criminal. The armed habitual criminal conviction was based on two predicate offenses, armed robbery and AUUW,

the same Class 4 AUUW statute section found to be void in *Aguilar*. *Id.*, ¶¶ 43, 44. The two prior convictions were statutory elements of the armed habitual criminal conviction that the State was required to prove, and the parties stipulated to those convictions at trial. *Id.*, ¶ 43. The *Fields* court vacated the defendant's armed habitual criminal conviction, holding that the underlying AUUW conviction was void and thus could not satisfy the element of the new conviction:

“A void conviction of 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. Because the issue was raised while defendant's appeal was pending, we are bound to apply *Aguilar* and vacate defendant's armed habitual criminal conviction because the State could not prove an element of the offense of armed habitual criminal through the use of a predicate felony conviction that is void *ab initio*.” *Id.*, ¶ 44.

¶ 11 In this case, the specific offense of UUW by a felon with which the defendant was charged in this case, makes it “unlawful for a person to knowingly possess \* \* \* in his own abode \* \* \* any firearm ammunition \* \* \* if the person has been convicted of a felony under the laws of this State or any other jurisdiction.” 720 ILCS 5/24-1.1(a) (West 2008). The one count information alleged that the defendant committed the offense of UUW by a felon when the defendant knowingly possessed firearm ammunition after having previously been convicted of AUUW (720 ILCS 5/24-1.6(a)(1) and (a)(3)(A) (West 2008)) in case number 08 C6 60144, the same Class 4 form of AUUW that defendant *Aguilar* was convicted of and which our supreme court found to be facially unconstitutional. *Aguilar*, 2013 IL 112116, ¶ 22. No other felony

convictions other than the 2008 AUUW were offered to establish the “has been convicted of a felony” element of the offense of UUW by a felon at trial. In prosecutions for the offense of UUW by a felon, the prior felony conviction is an element of the offense which must be proven beyond a reasonable doubt by the State in its case in chief. *People v. Walker*, 211 Ill. 2d 317 (2004) (recognizing that the prior felony conviction is an element of the offense of our UUW by felon statute and adopting the reasoning of *Old Chief v. United States*, 519 U.S. 172 (1997)).

¶ 12 We cannot allow the defendant’s Class 4 AUUW conviction, which we now know is based on a statute that our supreme court found to be unconstitutional and void *ab initio* in *Aguilar*, to stand as a predicate offense for the defendant’s UUW by a felon conviction. The State alleged and was required to prove the predicate felony Class 4 AUUW beyond a reasonable doubt as an element of the offense of UUW by a felon but has not done so.

¶ 13 That being said, we note that we are not vacating the defendant’s AUUW conviction in case number 08 C6 60144 pursuant to *Aguilar*. We decline to address whether formal proceedings for collateral relief may be available to the defendant to vacate his conviction in that case. We also decline to issue an advisory opinion as to *Aguilar’s* retroactivity to cases on collateral review, or regarding whether the State may reinstate any charges it had dismissed in case number 08 C6 60144 if the defendant successfully vacates that conviction.

¶ 14 Accordingly, we vacate the conviction for UUW by a felon.

¶ 15 Vacated.