

**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).

2014 IL App (4th) 130122-U

NO. 4-13-0122

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

November 14, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

|                                      |   |                    |
|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from        |
| Plaintiff-Appellee,                  | ) | Circuit Court of   |
| v.                                   | ) | Coles County       |
| BRYANT A. FURRY,                     | ) | No. 11CF583        |
| Defendant-Appellant.                 | ) |                    |
|                                      | ) | Honorable          |
|                                      | ) | Mitchell K. Shick, |
|                                      | ) | Judge Presiding.   |

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Holder White and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction under 720 ILCS 5/24-1.6(a)(1), (a)(3)(H) (West 2010) is not unconstitutional and void because subsection (a)(3)(H) is severable from the provision of the same statute ruled unconstitutional in *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321.

¶ 2 In August 2012, defendant, Bryan A. Furry, pleaded guilty to several charges, including aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(H) (West 2010)). He received seven years in prison with two years of mandatory supervised release for the AUUW charge. Defendant did not file a direct appeal.

¶ 3 On January 17, 2013, defendant filed a postconviction petition, alleging his attorney was ineffective. On January 25, 2013, the trial court dismissed the petition as "frivolous or patently without merit."

¶ 4 This appeal followed.

¶ 5 I. BACKGROUND

¶ 6 In December 2011, an information was filed against defendant charging him with one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) in that he pointed a black handgun at Joanne Trenholm and removed United States currency from the cash register at Dollar General in Charleston, Illinois, and two counts of AUUW (720 ILCS 5/24-1.6(a)(1)(3)(H) (West 2010)) in that he pointed a black handgun at Joanne Trenholm and, alternatively, at Bradley Bonewitz, during a theft of United States currency from the cash register at Dollar General in Charleston, Illinois. He was also charged with one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2010)) in that he intended to deprive Dollar General permanently of the property, the value of said property not exceeding \$500. Later, in August 2012, a fifth count was filed against defendant. He was charged with one count of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) in that while committing a robbery in violation of 720 ILCS 5/18-1 (West 2010), defendant took property from the person or presence of another by threatening the imminent use of force, while indicating by his actions to the victim he was presently armed with a firearm, in that he pointed a black handgun at Joanne Trenholm and removed United States currency from the cash register at Dollar General in Charleston, Illinois.

¶ 7 On August 29, 2012, defendant pleaded guilty to one count of aggravated robbery and was sentenced to 14 years in prison. He also pleaded guilty to one count of aggravated unlawful use of a weapon and was sentenced to 7 years imprisonment to run consecutively to the first sentence. This appeal involves the AUUW conviction.

¶ 8 Defendant did not file a direct appeal. Instead, on January 17, 2013, he filed a

postconviction petition alleging his attorney was ineffective. On January 25, 2013, the trial court dismissed defendant's petition as "frivolous or patently without merit." This appeal followed.

¶ 9

## II. ANALYSIS

¶ 10 In *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, the Illinois Supreme Court found section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2008)) was facially unconstitutional because it violated the right to keep and bear arms under the United States Constitution.

¶ 11 Defendant now claims his conviction under a different provision of the same statute is unconstitutional because severance is not possible in this case and, therefore, his conviction is void. He further argues the statute's multiple felony classes pose no obstacle to this court when deciding severability because each AUUW charge is enhanced only through sentencing factors and not by elements of the offense.

¶ 12 A constitutional challenge to a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 454, 539 N.E.2d 1221, 1224 (1989). "The constitutionality of a statute is reviewed *de novo*." *People v. Carpenter*, 228 Ill. 2d 250, 267, 888 N.E.2d 105, 116 (2008). A sentence not authorized by statute is void and may be reviewed at any time as it is not subject to forfeiture. *People v. Thompson*, 209 Ill. 2d 19, 23, 27, 805 N.E.2d 1200, 1205 (2004).

¶ 13 The severability doctrine exists because a piece of legislation often contains numerous, disparate provisions within a single act. Therefore, it sometimes applies only if certain provisions of a law are found unconstitutional. The doctrine of severability enables a court to avoid nullifying an entire law by excising the unconstitutional portion and preserving the remainder. Authority to do this is provided by the Illinois general severability statute: 5 ILCS

70/1.31 (West 2012).

¶ 14 Under Illinois law, the appropriateness of severability is analyzed under a two-part test. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 460, 689 N.E.2d 1057, 1101 (1997). First, the trial court must determine whether the law can still serve the purpose for which it was originally passed or whether this is no longer possible because the "valid and invalid provisions of the Act are so mutually connected with and dependent on each other." (Internal quotation marks omitted.) *Id.* Second, it must be determined whether the legislature intended the law be severable. *Id.*

¶ 15 The AUUW statute is structured such that subsection (a)(1) works in conjunction with subsections (a)(3)(A)-(I). In order to violate the act, a person must engage in the activity described in subsection (a)(1), carry on or about his person or in any vehicle or concealed on or about his person except when on his own property or on the property of another when he is the invitee with the other person's permission, any pistol, revolver, stun gun or taser or other firearm, and also engage in one of the nine factors listed in (a)(3)(A)-(I).

¶ 16 In *People v. Aguilar*, 2013 IL 112116, 2N.E.3d 321, the court was concerned with subsections (a)(1) and (a)(3)(A) of 720 ILCS 5/24-1.6 (West 2008). These subsections provide the following:

"(a) A person commits the offense of [AUUW] 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) (West 2008).

¶ 17 The court found, in conjunction, subsections (a)(1) and (a)(3) violated the constitutional right to keep and bear arms because those provisions effectively imposed a *comprehensive* ban on a citizen's right to carry a concealed firearm for self-defense outside the home. *Aguilar*, 2013 IL 112116, ¶ 21, 2 N.E.2d 321. The court held, 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. *Id.* ¶ 22.

¶ 18 In this case, defendant was charged with a violation of subsection (a)(1),(a)(3)(H) of 720 ILCS 5/24-1.6 (West 2010), which provides:

"(a) A person commits the offense of [AUUW] 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, legal dwelling, or fixed place of business \*\*\* any pistol, revolver, stun gun or taser or other firearm; [and]

\* \* \*

(3) One of the following factors is present:

\* \* \*

(H) the person possessing the weapon was engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against the person or property of another[.]"

¶ 19 With respect to severability, the first question to ask is whether the purpose of the AUUW statute can still be achieved without the absolute ban on carrying concealed firearms in public. Even if we accept defendant's argument restricting firearm possession was the main purpose of the law, laws placing limits on firearms are not passed simply for the sake of limiting firearm possession. The motivating factor involves safety concerns given the lethal nature of firearms. The purpose behind the Illinois AUUW statute has been stated to be "the protection of the police and the public from dangerous weapons." (Internal quotation marks omitted.) *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 26, 12 N.E.3d 519. The statute attempts to achieve this goal in many ways, either by prohibiting certain individuals from carrying firearms or prohibiting certain acts involving the use of firearms. *Aguilar* touched on one particularly restrictive portion of the statute, but that does not undercut the overall purpose of the statute. The court in *Aguilar* itself noted it was in no way saying the right provided in the second amendment to possess and use a firearm for self-defense outside the home was unlimited and not subject to meaningful regulation. *Aguilar*, 2013 IL 112116, ¶ 21, 2 N.E.3d 321.

¶ 20 Defendant does not explain why the AUUW statute, and specifically subsection (a)(3)(H), is no longer able to serve the purpose of promoting police and public safety. He

argues subsection (a)(3)(H) cannot remain good law because it is "so mutually connected and dependant [*sic*]" to the portion struck down by *Aguilar* that severability is impossible.

¶ 21 The issue of severability regarding specific provisions of the AUUW statute has already been raised in the wake of *Aguilar*. In *Henderson*, subsection (a)(3)(C), which contains a Firearm Owner's Identification card requirement, was challenged on the same grounds as subsection (a)(3)(H) here. The *Henderson* court found the purpose of the statute to be "the protection of the police and the public from dangerous weapons" and it viewed "the balance of the [AUUW] statute as a continuing reflection of that purpose." (Internal quotation marks omitted.) *Henderson*, 2013 IL App (1st) 113294, ¶ 26, 12 N.E.3d 519. As far as severability, the *Henderson* court stated the remaining factors in subsection (a)(3) could stand independently of subsection (a)(3)(A), the subsection found to be unconstitutional in *Aguilar*. See *id.* ¶ 22, 12 N.E.3d 519. This same reasoning has been adopted in *People v. Taylor*, 2013 IL App (1st) 110166, 3 N.E.3d 288.

¶ 22 The section of AUUW prohibiting the possession of a weapon while engaged in the commission or attempted commission of a misdemeanor involving the use or threat of violence against person or property (720 ILCS 24-1.6(a)(3)(H) (West 2010)) is a reasonable restriction on firearm possession in order to protect police and the general public. It is severable from subsection (a)(3)(A), and it is constitutional.

¶ 23 III. CONCLUSION

¶ 24 We affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 25 Affirmed.