

FOURTH DIVISION
May 1, 2014

No. 1-12-0320

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
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 10 CR 16895
TYRIS JACKSON,)	
)	Honorable
Defendant-Appellant.)	James M. Obbish,
)	Judge Presiding.

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

ORDER

¶ 1 *HELD:* Defendant's Class 2 conviction under the AUUW statute for carrying a weapon that was uncased, loaded and immediately accessible is affirmed; the statute which prohibits felons from possessing firearms is a longstanding and reasonable restriction as recognized in our supreme court's modified ruling in *People v. Aguilar*, 2013 IL 112116, and does not violate the constitutional rights of defendant.

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¶ 2 Following a bench trial, defendant Tyris Jackson was convicted of aggravated unlawful use of a weapon (AUUW), unlawful use of a weapon by a felon (UUWF), and armed habitual criminal while on mandatory supervised release. The trial court dismissed defendant's conviction under the armed habitual criminal statute prior to sentencing on the basis that the underlying felony admitted into evidence by the State was not among the statutorily-required offenses needed to support the offense of armed habitual criminal. Defendant's remaining convictions were merged, and defendant was sentenced to a six-year prison term for his conviction under the AUUW statute. His sentence was enhanced to a category 2 felony due to his prior 2008 conviction of aggravated battery of a police officer.

¶ 3 On appeal, defendant contends that the AUUW statute violates both federal and state guarantees of an individual's right to bear arms and is unconstitutional, making his conviction void. For the reasons that follow, we affirm defendant's AUUW conviction.

¶ 4 BACKGROUND

¶ 5 On September 8, 2010, at approximately 11:00 p.m., while Chicago police officers Robert Long and Rocio Salgado were out patrolling, Long observed defendant riding a bicycle near 4800 South Drexel. As the officers approached defendant, Long

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observed defendant put a silver handgun in his right jacket pocket. Long announced his office and ordered defendant to stop. Defendant began to flee and Long followed. Defendant ultimately dropped his bike at 4825 South Drexel, hopped a fence and continued running. The officers called for backup, and defendant was subsequently arrested by Vacek in the backyard of 927 East 49th Street. When the officers went back to where defendant had dropped his bike, they recovered a silver Smith & Wesson .38 special revolver next to the bike. Long recognized the gun to be the same gun that he saw defendant put into his pocket earlier. Four live rounds and two spent shell casings were removed from the gun.

¶ 6 Defendant was convicted of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)), UUWF (720 ILCS 5/24-1.1(a) (West 2008)), and AUUW (720 ILCS 5/24-1.6(a)(1) (West 2008)). The trial court subsequently vacated the armed habitual criminal conviction, merged defendant's convictions and sentenced defendant to a six-year prison term for AUUW based on the fact that the firearm found next to defendant's bike was uncased, loaded and immediately accessible. Defendant's conviction was enhanced to a class 2 felony due to his prior 2008 conviction of aggravated battery of a police officer. Defendant's motion to reconsider his sentence was denied, and this timely appeal

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followed.

¶ 7 In this appeal, we initially filed a Rule 23 order on September 26, 2013, wherein we vacated defendant's AUUW conviction based upon our supreme court's ruling in *People v. Aguilar*, 2013 IL 112116. The State then filed a petition for rehearing, and we stayed the matter, pending the outcome of our supreme court's rehearing of *Aguilar*. On rehearing, the supreme court modified its ruling in *Aguilar* and, in response, we issued a new Rule 23 order on January 23, 2014 affirming defendant's conviction under the Class 2 form of the AUUW statute. We subsequently withdrew the January 23, 2014 Rule 23 order and ordered the parties' to file an answer and reply addressing the issues raised in the State's petition for rehearing.¹ Having reviewed the briefs, and for the reasons that follow, we now affirm defendant's Class 2 AUUW conviction based upon our supreme court's modified ruling in *Aguilar*.

¶ 8 ANALYSIS

¶ 9 Standing

¶ 10 Before addressing defendant's constitutional claims, we must first address the State's position that defendant lacks standing

¹Defendant filed a petition for rehearing following the January 23, 2014 order; however, defendant's petition was withdrawn in light of the fact that we withdrew our January 23, 2014 order and allowed the parties an opportunity to brief the State's petition for rehearing.

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to challenge the constitutionality of the AUUW statute. The State argues that defendant does not have standing to challenge the constitutionality of the AUUW statute because he relinquished his right to possess a firearm as a parolee serving a mandatory supervised release (MSR) and because he cannot enjoy the protections of the second amendment since he was previously convicted of a felony. We disagree with the state's argument and find the defendant does have standing challenge the constitutionality of the AUUW statute.

¶ 11 "The doctrine of standing is intended to insure that issues are raised and argued only by those parties with a real interest in the outcome of the controversy." *People v. Greco*, 204 Ill. 2d 400, 409 (2003). "To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206 (2000); *People v. Hill*, 199 Ill. 2d 440, 445 (2002) ("A defendant does not ordinarily have standing to challenge a statute as it might be applied to others in different circumstances."). "The claimed injury must be (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of

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the requested relief." (Internal quotation marks omitted.) *Chicago Teachers Union*, 189 Ill. 2d at 207. "Standing is an element of justiciability, and it must be defined on a case-by-case basis." *Greco*, 204 Ill. 2d at 409.

¶ 12 Here, while we realize that defendant was currently serving a term of MSR, which required him to refrain from possessing a firearm, and that defendant was previously convicted of a felony, defendant was not convicted of violating his MSR. Here, defendant was convicted of possessing a weapon that was "uncased, loaded, and immediately accessible" under the AUUW statute and was sentenced to 6 years in prison for this violation. As such, he sustained a direct injury as a result of the AUUW statute being enforced against him. As stated by our supreme court in *People v. Aguilar*, 2013 IL 112116, ¶ 12 (2013), a case in which the defendant was convicted under the AUUW statute, "[i]f anyone has standing to challenge the validity of these sections, it is defendant. Or to put it another way, if defendant does *not* have standing to challenge the validity of these sections, then no one does." *Id.* at ¶ 12.

¶ 13 Had defendant been charged with violating his MSR and the State sought to take away his firearm or have him re-incarcerated for the violation, or had the punishment under the AUUW statute been taking away his weapon or re-incarcerating defendant--

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punishments that would not be any greater than those imposed for violating his MSR--we would likely agree that defendant had no standing to challenge the constitutionality of the AUUW statute. However, in this case, the consequence of defendant's violation of the AUUW statute was not merely taking away his weapon or re-incarcerating him. Defendant here suffered a direct adverse consequence for his violation of the AUUW statute because he was sentenced to a separate six-year imprisonment specifically for violating the AUUW statute. These consequences were distinct from and went beyond any punishment he could have received for violating his MSR. As such, the six-year sentence under the AUUW statute was "distinct and palpable," traceable to defendant's actions of carrying a gun in public that was "uncased, loaded, and immediately accessible," and, if the AUUW statute was found to be unconstitutional, it would void his conviction. Therefore, defendant has standing to challenge the constitutionality of the AUUW statute. See *Chicago Teachers Union*, 189 Ill. 2d at 207.

¶ 14 Constitutionality of the AUUW statute

¶ 15 Our review of the constitutionality of a statute is *de novo*. *People v. Davis*, 408 Ill. App. 3d 747, 749 (2011). A challenge to the constitutionality of a criminal statute may be raised for the first time on appeal. *People v. Marin*, 342 Ill. App. 3d 716, 722 (2003). Because we assume that a statute is constitutional,

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defendant has the burden of showing the constitutional violation. *People v. Sole*, 357 Ill. App. 3d 988, 991 (2005). "Our duty is to construe a statute in a manner that upholds its validity and constitutionality if it can be reasonably done." (Internal quotation marks omitted.) *Id.*

¶ 16 The second amendment provides that "A well regulated Militia, being necessary to secure a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. The Illinois Constitution provides that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. 1970, art. I, § 22.

¶ 17 The relevant provisions of the AUUW statute are as follows:

"(a) 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, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's

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permission, any pistol, revolver, stun gun or taser or other firearm; *** and ***

(3) One of the following factors is present:

(A) the firearm, other than a pistol, revolver, or handgun, possessed was uncased, loaded, and immediately accessible at the time of the offense ***.

(d) Sentence. Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years. Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.”
720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008).

¶ 18 Defendant contends that his conviction under the AUUW

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statute is void because the Seventh Circuit Court of Appeals found the AUUW statute to be unconstitutional in *Moore v. Madigan*. See *Moore v. Madigan*, 702 F.3d 933 (2012). Defendant further contends that the provisions of the AUUW statute at issue in this case violate the second amendment right to bear arms as discussed in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010).²

¶ 19 Since this appeal was initially briefed, the Illinois Supreme Court decided *People v. Aguilar*, 2013 IL 112116, which was modified on December 19, 2013. The State argues that defendant's conviction should be affirmed in light of *Aguilar*. In the modified ruling in *Aguilar*, our supreme court held that the Class 4 form of section 24-1.6(a)(a), (a)(3)(A), (d) of the Criminal Code of 1961 (the Code) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution, and therefore is unconstitutional. *Aguilar*,

² While defendant states that he is making facial and as-applied challenges on page 8 of his brief, there is no argument with respect to an as-applied constitutional challenge anywhere within the brief. Further, defendant's reply brief merely requests that the court strike down the AUUW statute as facially unconstitutional. Thus, the only constitutional claim before this court is a facial challenge to the AUUW statute.

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2013 IL 112116 at ¶ 22.³ The Court emphasized that its ruling was "specifically limited to the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute" (*id.* at n.3), because "the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Id.* at ¶ 21. The court distinguished the class 4 flat ban of the possession of firearms outside the home from the class 2 form of AUUW which prohibited felons from possessing firearms. The court determined that the Class 2 prohibition against felons possessing firearms is a longstanding and reasonable prohibition which passes constitutional muster.

¶ 20 In coming to its holding in the modified *Aguilar* opinion, the Court noted that "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." *Id.* at ¶ 19 (citing *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012)). However, the Court went on to recognize that "in concluding that the second amendment protects the right to

³ The Illinois Supreme Court initially held that the elements of section 24-1.6(a)(1), (a)(3)(A) of the AUUW violated the second amendment right to keep and bear arms, however, within its modified opinion, the court limits its ruling by stating that the Class 4 form of the AUUW, section 24-1.6(a)(1), (a)(3)(A), (d) of the Code, violates the second amendment right to keep and bear arms. *Aguilar*, 2013 IL 112116, at ¶ 40.

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possess and use a firearm for self-defense outside the home, we are in no way saying that such a right is unlimited or is not subject to meaningful regulation," and further cited the Supreme Court's statement in *District of Columbia v. Heller*, that "'nothing in our opinion should be taken to cast doubt on the 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 law imposing conditions and qualifications on the commercial sale of arms.'" *Id.* at ¶ 26 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)). Thus, while the Court in its modified *Aguilar* ruling held that the Class 4 form of the AUUW statute was unconstitutional, it still recognized and acknowledged the longstanding prohibitions on the possession of firearms by felons. As such, because defendant's AUUW conviction was enhanced to a Class 2 conviction because of his prior felony conviction, and because our supreme court has held that the Class 4 form of the AUUW statute is unconstitutional and did not make any such ruling with respect to the Class 2 form of the AUUW statute, we affirm defendant's AUUW conviction here. See *Aguilar*, 2013 IL 112116; *People v. Burns*, 2013 IL App (1st) 120929, ¶ 27 (2013) (holding that "the Class 2 form of the AUUW at issue merely regulates the possession of a firearm by a person

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who has been previously convicted of a felony" and, therefore, is not unconstitutional).

¶ 21 We take note of Justice Theis' dissent in *Aguilar* in which she expresses concern about the majority's choice to evaluate the constitutionality of the AUUW statute in light of the elements of the statute as well as the sentencing provisions contained in the statute. *Aguilar*, 2013 IL 112116, ¶ 41-48 (J. Theis, dissenting). Such concerns are especially well taken given that the classification of an AUUW conviction only sets out the penalty that may be imposed (see 720 ILCS 24-1.6(d) (West 2002)), and given that in Illinois there is a separate statute that prohibits felons from possessing firearms, section 24-1.1 of the Code (720 ILCS 24-1.1 (West 2002)), which remains valid despite numerous constitutional challenges.⁴ See *People v. Davis*, 408 Ill. App.3d 747, 750-51 (2011); *People v. Williams*, 405 Ill. App. 3d 958, 964 (2010); see also *People v. Ross*, 407 Ill. App. 3d 931, 942 (2011). However, here, because defendant had a previous felony conviction, and because our courts and the Supreme Court of the United States have persistently recognized "longstanding prohibitions on the possession of firearms by felons" (*Heller*,

⁴ Defendant here was convicted of possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1 (West 2008)) and AUUW (720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) (West 2008)). His convictions were merged prior to sentencing, and he was sentenced on his AUUW conviction.

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544 U.S. at 626-27; *Aguilar*, 2013 IL 112116, at ¶ 26), we find that defendant's conviction under the Class 2 form of the AUUW statute, to the extent that the statute restricts felons from possessing firearms, does not violate the second amendment right to keep and bear arms and, therefore, must be affirmed.

¶ 22 We also take note of defendant's argument that the fourth district appellate court found the AUUW statute to be facially unconstitutional in *People v. Campbell*, 2013 IL App. (4th) 120635 and, as such, cannot be applied to anyone. However, we observe that *Campbell* failed to address the specific modifications our supreme court made in *Aguilar*--that its ruling only held that the Class 4 form of the AUUW statute is unconstitutional. *Aguilar*, 2013 IL 112116, at n. 3, ¶ 21; *Burns*, 2013 IL App. (1st) 120929, ¶ 24 ("The modified opinion in *Aguilar*, however, specifies the decision 'is specifically limited to the Class 4 form of AUUW' " and, therefore, "left open the issue of whether any other section or subsection of the AUUW is unconstitutional"); *People v. Soto*, 2014 IL App. (1st) 121937, ¶ 14 ("We see no need to depart from the well-reasoned opinion in *Burns*, and we agree that the Class 2 form of AUUW under section 24-1.6(a)(1), (a)(3)(A) is a reasonable regulation of the second amendment right to bear arms."). Accordingly, because we must follow our supreme court's precedent, we affirm defendant's conviction. See *Rosewood Care*

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Center, Inc. v. Caterpillar, Inc., 366 Ill. App. 3d 730, 734 (2006) (all lower courts are bound to follow supreme court precedent).

¶ 23 We further acknowledge defendant's argument that the State failed to prove beyond a reasonable doubt that defendant committed a Class 2 AUUW offense because there was no proof submitted at trial to support defendant's prior felony conviction. Specifically, defendant argues that "the parties stipulated to the admission of certified copies of conviction for the 'limited purpose' to meet the prior felony conviction elements of the armed habitual criminal charge," and not the AUUW charge, and that the armed habitual criminal charge was vacated because the evidence of defendant's prior felonies did not qualify as felonies under the armed habitual criminal statute. However, we find that not only was this issue waived as it was never raised in defendant's original briefs (Ill. Sup. Ct. R. 341(h)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing")), but a "reviewing court may affirm a correct decision for any reason in the record regardless of the trial court's basis for the decision." *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 338 (1998); *People v. Merz*, 122 Ill. App. 3d 972, 976 (1984) ("we may affirm the trial court when

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correct for any reason appearing in the record and even though its decision may be based on improper reasoning."). Here, the record contains evidence of certified copies of defendant's prior felony conviction and specifically his 2008 conviction of aggravated battery of a police officer, which is sufficient to uphold his Class 2 AUUW conviction. Further, as defendant here does not contest his prior felony conviction in any way, "a defendant is not prejudiced by finding that a certified copy of his prior felony conviction, without more, meets the State's burden of proving this element beyond a reasonable doubt."

People v. Moton, 277 Ill. App. 3d 1010, 1012 (1996); see also *People v. Bond*, 178 Ill. App. 3d 959 (1989) (certified copy of defendant's prior felony conviction had been offered for substantive purposes and, thus, that evidence could be used to establish prior felony conviction, as an element of unlawful possession of prohibited weapon by a convicted felon). As such, based on the evidence and legal precedent before us, defendant's Class 2 AUUW conviction must be upheld.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, defendant's Class 2 conviction under the AUUW statute is affirmed in light of our supreme court's modified ruling in *People v. Aguilar*.

¶ 26 Affirmed.