

No. 1-14-0040

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 18843
	)	
ERWIN MARRERO,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justice Hoffman and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's 12-year sentence for aggravated battery with a firearm affirmed where his forfeited claim of sentencing error due to consideration of an improper sentencing factor (a conviction for aggravated unlawful use of a weapon defendant claims was void under *People v. Aguilar*, 2013 IL 112116), was not in error and did not rise to second prong plain error; and trial counsel was not ineffective for failing to preserve the issue for review.

¶ 2 Following a bench trial, defendant Erwin Marrero was found guilty of aggravated battery with a firearm, a Class X felony, and sentenced to 12 years' imprisonment with three years of mandatory supervised release. On appeal, defendant maintains that the circuit court relied upon an improper sentencing factor—his 2003 conviction for aggravated unlawful use of a weapon

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(AUUW) and, therefore, the sentence should be vacated and this cause be remanded for resentencing. Defendant concedes that he failed to preserve this issue but argues that it may be reviewed as second prong plain error. Alternatively, defendant contends that the failure to preserve this issue for review constituted ineffective assistance of counsel. For the following reasons, we affirm.

¶ 3 In connection with the October 1, 2010, shooting of Jerry Blackburn, defendant was charged with three counts of attempted first degree murder, one count of aggravated battery with a firearm, one count of aggravated discharge of a firearm, four counts of AUUW, and two counts of unlawful use of a weapon (UW) by a felon.

¶ 4 Because defendant does not contest the sufficiency of the evidence, we need not discuss in detail the evidence presented at trial.

¶ 5 Mr. Blackburn testified that, on October 1, 2010, at approximately noon, he was outside his home when he saw defendant exiting a gray Cadillac. Defendant approached Mr. Blackburn's nephew and another man. Defendant said that he was "going to get them, b\*\*\*h, maniac killer, Four Corner Hustlers love," that he would be back, and then drove away. Shortly thereafter, defendant walked out of a gangway firing shots toward the two men. Mr. Blackburn was unarmed, but chased defendant as he fled. Defendant shot Mr. Blackburn, striking his right leg, and grazing his stomach and his left leg. Mr. Blackburn subsequently identified defendant as the offender in a photographic array and, again, in a physical lineup several days later.

¶ 6 The State presented evidence that, while free on bond with electronic monitoring in this case, defendant was charged with the intimidation and harassment of Mr. Blackburn. Specifically, Mr. Blackburn testified that as he and his daughter left their home, in the late

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afternoon of February 21, 2011, defendant got out of a car claiming to be on "house arrest" because his father was a judge. Defendant threatened to burn down Mr. Blackburn's house and to kill Mr. Blackburn "this time" if he went to the next court date. The court had granted the State's uncontested pretrial motion to admit this evidence of other crimes to establish defendant's identity and consciousness of guilt.

¶ 7 The State also introduced a certified statement of defendant's prior conviction for AUUW in circuit court case number 02 CR 24298. The certified statement shows an "indictment/information" was filed against defendant which included six charges of AAUW, with three charges brought under section 24-1.6(a)(1), and three charges brought under section 24-1.6(a)(2) (720 ILCS 5/24-1.6 *et seq.* (West 2002)).<sup>1</sup> The certified statement also shows defendant pled guilty on April 23, 2003, to count one, and that the State *nolle prossed* counts 2 through 6. The various charges, however, are not numbered by count as set forth in the certified statement.

¶ 8 Defendant testified he did not shoot anyone on October 1, 2010. On cross-examination, defendant denied knowing Mr. Blackburn. Defendant stated that he was a member of the Four Corner Hustlers when he was 15 years old, but that he was no longer in the gang. He denied driving or owning a gray Cadillac.

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<sup>1</sup> The certified statement expressly states that defendant was charged with:

"720-5/24-1.6(A)(1)1	F4	AGG UNLAWFUL USE OF WEAPON/VEH
720-5/24-1.6(A)(1)1	F4	AGG UNLAWFUL USE OF WEAPON/VEH
720-5/24-1.6(A)(1)1	F4	AGG UNLAWFUL USE OF WEAPON/VEH
720-5/24-1.6(A)(2)1	F4	AGG UNLAWFUL USE OF WEAPON/PER
720-5/24-1.6(A)(2)1	F4	AGG UNLAWFUL USE OF WEAPON/PER
720-5/24-1.6(A)(2)1	F4	AGG UNLAWFUL USE OF WEAPON/PER"

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¶ 9 In rebuttal, Officer Salvetti testified that, during a traffic stop on July 14, 2008, defendant was the only person in a gray Cadillac that was blocking the street. The police contact card regarding the traffic stop was admitted into evidence.

¶ 10 The trial court found defendant guilty of aggravated battery with a firearm, aggravated discharge of a firearm, AUUW, and UUW by a felon. In entering its guilty findings, the court stated that the evidence as to defendant's intimidation of Mr. Blackburn was corroborative of his identification of defendant as the shooter and defendant's consciousness of guilt.

¶ 11 The trial court denied defendant's motion for a new trial.

¶ 12 At the sentencing hearing, the presentence investigation report (PSI) was before the circuit court and was corrected by the parties to reflect that defendant had not been convicted of attempted first-degree murder in this case. No other corrections were suggested.

¶ 13 The State presented the testimony of a Chicago police detective that, while this case was pending, defendant was charged with intimidation of a witness for his conduct in threatening Mr. Blackburn. However, the State *nolle prossed* the charges in that case, after they were presented in aggravation against defendant in this case.

¶ 14 In further aggravation, the State reminded the court of the "brazen" and "evil" nature of the shooting of Mr. Blackburn by defendant: that Mr. Blackburn was struck three times by bullets in front of his home in "broad daylight." The State emphasized that defendant, while on electronic monitoring, sought out, confronted and threatened Mr. Blackburn.

¶ 15 The State also presented defendant's criminal history which began as a juvenile where defendant received one year of felony probation for burglary in 1998. As an adult, his criminal history included: (1) court-ordered supervision in 2001 for misdemeanor battery; (2) two days in

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jail in 2002 for misdemeanor unlawful display of title; (3) a felony AUUW conviction with a sentence of two years' probation in 2003 (the conviction at issue on appeal); (4) a 2005 conviction for resisting a police officer resulting in 24 months of conditional discharge; (5) two days in jail in 2005 for a misdemeanor, knowingly damaging property conviction; and (6) two days in jail in 2009 for driving on a suspended license conviction.

¶ 16 In mitigation, defense counsel argued that, at the time of this incident, defendant never shot at the victim, nor threatened him. Defense counsel presented documents to the court showing that defendant had completed a mental health recovery program on November 18, 2013. In reviewing the mental health records, the court noted that defendant, while in custody and awaiting sentence, had "reportedly attempt[ed] to commit suicide." Defendant was subsequently evaluated and found fit for trial and for sentencing.

¶ 17 In allocution, defendant stated that he was sorry for "my incidents" in the county jail and apologized if his court absences irritated the trial court. Defendant explained that he had mental health issues before he was arrested. The court assured him that his mental health issues would not be considered as aggravation in sentencing.

¶ 18 Before imposing sentence, the court stated that it had reviewed its notes from the trial proceedings and the PSI. The court discussed and considered each of the statutory factors in mitigation and aggravation.

¶ 19 As to the statutory mitigating factor of whether defendant had a history of prior delinquency or criminal activity or had been law-abiding for a substantial period of time before the commission of the present offenses, the court stated:

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"In reviewing the [PSI], I find that the record is to the contrary. The defendant does have a prior felony conviction from April 23rd of 2003. I am mindful of the fact that it was as we sit here today in 2013 ten and a half years ago. However, this case itself happened in 2010 so at that point it was seven years earlier and it was a significant felony, aggravated unlawful use of a weapon. Another gun offense. So that weighs heavily in the court's mind when evaluating the aggravation and mitigation in this case.

The defendant while that is the only felony as an adult he did go on and have contact with the criminal justice system in 2002, 2004, 2005, 2009. Misdemeanors though they may have been, it still was contact with the criminal justice system."

Having reviewed defendant's criminal history, the court then remarked:

"And what is very significantly troubling to the court is that the defendant was out on a bond, this court's bond, for the very serious offense of what was then attempt first degree murder. Prior to the trial that was the charge and that the second offense of intimidation or harassment of a witness was committed as was detailed by the detective in aggravation, but was also testified to as proof of other crimes during the bench trial itself. So that is incredibly egregious and I'm giving that significant weight."

¶ 20 The court found that defendant's conduct in this case caused or threatened serious physical harm, and based on his criminal history that there was no assurance that defendant would not commit future offenses. The circuit court believed that the only applicable mitigating factor was excessive hardship to defendant's young child and other family members if defendant was incarcerated for any length of time.

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¶ 21 The circuit court reviewed the statutory factors in aggravation and in summary, remarked:

"This is obviously \*\*\* a serious case. It started out as some type of a gang altercation or a gang shooting attempting to get at some rival gang members that were sitting there next to [Mr.] Blackburn. I did find his testimony to be very credible. I thought he was forthright. I thought his testimony rang true. \*\*\* I believe that [Mr.] Blackburn, the victim, thought the gun was empty and thought he was just going to take [defendant] down and tackle him if he could for the police because he was shooting at his nephew and some other individual out on the street and [lo] and behold the gun was loaded and it wound up with him being shot about three separate times. And then the person went over to his home. \*\*\* So very, very egregious and serious. The bond on bond scenario. The intimidation which I found to have occurred. As well as the fact that his prior background includes an aggravated unlawful use of a weapon."

¶ 22 The court sentenced defendant to 12 years' imprisonment on count 4—aggravated battery with a firearm—and merged the other counts. Defendant filed a motion to vacate his sentence, arguing that the sentence was excessive and that the sentencing statute was unconstitutional. In his motion, defendant did not raise an objection as to the court's consideration of the 2003 AAUW conviction at the sentencing hearing. The court denied the motion and this appeal followed.

¶ 23 The record on appeal includes a one-volume supplemental record, pursuant to the stipulation of defendant and the State, which is properly bound and certified by the clerk of the circuit court. The supplemental record includes the sentencing order and the indictment against

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defendant in circuit court case number 02 CR 24298. It does not appear that the documents in the supplemental volume were submitted to the circuit court but neither side objects to our consideration of them and we can take judicial notice of them. The indictment charges defendant under the following sections of the AUUW statute: 24-1.6(a)(1),(a)(3)(A), the section found unconstitutional in *People v. Aguilar*, 2013 IL 112116; 24-1.6(a)(1),(a)(3)(C), possession of a firearm without a valid firearm owner identification card; 24-1.6(a)(1), (a)(3)(I), possession of a handgun while under the age of 21; 24-1.6(2)(3)(A), possession of an uncased and loaded firearm while in a vehicle outside the home; and 24-1.6(a)(2)(3)(c), possession of a firearm without a valid firearm owner identification card while in a vehicle outside the home. 720 ILCS 5/24-1.6(a)(2) (West 2002). The indictment does not include numbered counts. The sentencing order imposed a sentence of probation and reflects the sentence was entered on a charge of "AGGUUW" without specifying a statute, or section thereof, and does not include a count number.

¶ 24 On appeal, defendant argues that the circuit court relied upon an improper sentencing factor when it considered his 2003 conviction for AUUW at the sentencing hearing. Defendant asserts that the 2003 conviction was on a charge brought under the section of the AUUW statute later declared to be facially unconstitutional in *Aguilar*, 2013 IL 112116.<sup>2</sup> Defendant argues that his 2003 conviction is void *ab initio* and, therefore, the circuit court's reliance upon that prior conviction was error. Defendant urges this court to vacate his sentence and remand the matter for resentencing.

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<sup>2</sup> The supreme court issued its original opinion in *Aguilar* on September 12, 2013. On December 19, 2013, the supreme court issued a modified opinion on rehearing. The sentencing hearing in this case took place on December 3, 2013, when the petition for rehearing in *Aguilar* was still pending.



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¶ 25 Defendant concedes that he failed to preserve for review his challenge to the consideration of his 2003 conviction as a sentencing factor. Defendant maintains the issue may be reviewed under the second prong of the plain-error doctrine as his sentence impinges upon his fundamental right to liberty. In the alternative, defendant contends that his counsel was ineffective for failing to preserve this sentencing issue for review.

¶ 26 To obtain relief from the forfeiture of a sentencing issue under the plain-error doctrine, a defendant must show that a clear or obvious error occurred and, either: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). It is the second prong of the plain-error doctrine which defendant has raised here. A defendant has the burden of persuasion under both prongs of the plain-error exception. *Id.* at 545. Absent error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Therefore, the first step of plain-error review is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 27 The circuit court has broad discretion in the imposition of a sentence. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). Defendant's conviction for aggravated battery with a firearm, a Class X felony, subjected him to a possible jail term of six to thirty years' imprisonment. 720 ILCS 5/12-3.05(e) (West 2015).

¶ 28 We must decide whether the court's consideration of defendant's 2003 AUWW conviction when imposing a sentence was in error. The AAUW statute, in effect in 2002, stated:

"(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 permission, any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own 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 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; or

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(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card; or

\* \* \*

(I) the person possessing the weapon was under 21 years of age and in possession of a handgun, unless the person under 21 is engaged in lawful activities under the Wildlife Code<sup>4</sup> or described in subsection 24-2(b)(1), (b)(3), or 24-2(f)." 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (C), (I) (West 2013).

The supreme court in *Aguilar* found that section 24-1.6(a)(1), (a)(3)(A) was unconstitutional and void *ab initio*. *Aguilar*, 2013 IL 112116, ¶ 22; *People v. Burns*, 2015 IL 117387, ¶ 21 (where supreme court clarified its holding in *Aguilar*).

¶ 29 We look to our supreme court's recent decision in *People v. McFadden*, 2016 IL 117424 (petition for rehearing filed July 7, 2016, pending), for guidance as to whether there was error in the circuit court's consideration of defendant's 2003 AAUW conviction as a sentencing factor. In 2008, the defendant in *McFadden* was convicted of three counts of armed robbery and two counts of UUW by a felon predicated upon his 2002 felony conviction for AUUW. *Id.* ¶¶ 5-7. The appellate court affirmed his armed robbery convictions and sentence and vacated one of the UUW by a felon convictions based on one-act, one-crime principles. *Id.* ¶ 8. Noting that it was "bound to apply *Aguilar*," the appellate court found defendant's 2002 AUUW conviction was void *ab initio*, and vacated his remaining UUW by a felon conviction. *Id.*

¶ 30 On review, our supreme court considered whether the defendant's prior AUUW conviction could serve as a predicate offense after *Aguilar*. Our supreme court noted that the AUUW conviction had not been vacated at the time the defendant was charged with possession of a weapon and, therefore, the conviction could serve as a predicate offense for his UUW by a felony conviction. *Id.* ¶ 31. The reasoning of the supreme court was as follows:

"It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction." *Id.*

¶ 31 Additionally, the defendant in *McFadden* had cross-appealed the appellate court's decision to uphold his 29-year concurrent sentences for the armed robberies. The defendant argued, in relevant part, that if the circuit court "had been aware" that his 2002 AUUW conviction was unconstitutional, it would likely have sentenced him to a lesser term. *Id.* ¶ 39. Our supreme court disagreed.

¶ 32 First, the supreme court "reiterat[ed] that the constitutional invalidity of defendant's 2002 AUUW conviction is not confirmed by the record in this case." *Id.* ¶ 41. As to the record, the supreme court, earlier in its opinion, noted:

"The indictment in the 02 CR 30903 case reflects six separate charges of AUUW based on two separate guns, under various subsections of the statute, including the fact that defendant was under 21 at the time he possessed the firearms and lacked an FOID card. The record further indicates that defendant pleaded guilty in case No. 02CR 30903 to one count of AUUW, but the record does not affirmatively reflect that defendant pleaded guilty under section 24-1.6(a)(1), (a)(3)(A), the only section held unconstitutional in *Aguilar*. The record does not contain the plea colloquy or the factual basis for that plea." *Id.* ¶ 33.

¶ 33 Further, the supreme court found that, "even if it was constitutionally infirm, the record adequately demonstrates that the weight placed on the 2002 AUUW conviction was not significant and did not warrant a new sentencing hearing." *Id.* ¶ 41. The sentencing hearing showed that the circuit court in *McFadden* had carefully examined the factors in mitigation and aggravation before imposing the sentences. *Id.* ¶ 43.

¶ 34 Here, as in *McFadden*, defendant's prior 2003 AUUW conviction has not been vacated in an appropriate proceeding. *Id.* ¶ 21. Further, defendant is not seeking to vacate that conviction on appeal. *Id.* On this basis alone, it is arguable that we could find no error in the consideration of the 2003 conviction by the circuit court here.

¶ 35 We acknowledge, however, that when considering the defendant's cross-appeal as to the use of the defendant's prior AAUW at the sentencing hearing, the supreme court stated that the record did not "confirm" the invalidity of the prior conviction under *Aguilar*. The supreme court did not explicitly refer to its earlier language in the State's appeal that the defendant was required to file the necessary pleading to vacate the challenged prior conviction in order to raise the impropriety of using the conviction as a factor at sentencing.<sup>3</sup> See *id.* ¶¶ 72-73 (Justice Kilbride concurring in part and dissenting in part, where he did not agree that defendant was required to vacate the conviction in the State's appeal, but agreed with the decision on cross-appeal).

¶ 36 Similarly, the record in this case does not "confirm" that defendant's 2003 conviction was invalid under *Aguilar*. In circuit court case number 02 CR 24298, which resulted in his 2003 conviction, defendant, as the defendant in *McFadden*, was charged with six violations of the AAUW statute. Some of the charges against defendant were under sections of the AAUW

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<sup>3</sup> The *vacatur* of the prior conviction would certainly establish its invalidity.

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statute which were not found unconstitutional in *Aguilar*. The sentencing order in circuit court case number 02 CR 24298 does not specify a statutory section. Additionally, as in *McFadden*, the record does not include the transcripts of the plea proceedings, nor the factual basis for the plea. The certified statement of the 2003 conviction refers to count I, but the charges, as set forth in the certified statement, are not identified by count. Moreover, the sentencing order in the supplemental record does not refer to a count. Therefore, because the record before us does not affirmatively demonstrate the invalidity of defendant's 2003 conviction, defendant has not met his burden of establishing error by the circuit court at his sentencing hearing. *Thompson*, 238 Ill. 2d at 613 ("In plain error review, the burden of persuasion rests with the defendant.").

¶ 37 Absent error, the plain-error doctrine does not apply in the instant case. See *Bannister*, 232 Ill. 2d at 79.

¶ 38 Even if the circuit court erred in considering defendant's 2003 conviction, we would not find the weight placed on the conviction by the circuit court was significant. *McFadden*, 2016 IL 117424, ¶ 41. The circuit court heard the evidence in aggravation and mitigation, reviewed the PSI and carefully considered all of the statutory factors in mitigation and aggravation. The court found that the only mitigating factor which existed was the harm to defendant's family should defendant be incarcerated. The circuit court did give the 2003 conviction importance, but went on to observe that defendant continued to have involvement with the criminal courts after that 2003 conviction. The court concluded that there was no assurance that defendant would not reoffend. The circuit court found both the nature of the crime and defendant's subsequent charges for intimidation of the victim while on bond with electronic home monitoring to be egregious. The court imposed a 12-year sentence which was well within the possible sentencing

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range for defendant's Class X conviction and 18 years below the maximum sentence of 30 years.

We conclude that, even if the 2003 conviction was an improper sentencing factor, it did not lead to a greater sentence, and remand for resentencing is not required. *Id.* ¶ 46; *Ware*, 2014 IL App (1st) 120485, ¶¶ 35-36.

¶ 39 Similarly, defendant's trial counsel was not ineffective for failing to object to the 2003 conviction at the sentencing hearing and include the issue in a postsentencing motion. See *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (where underlying issue has no merit, a defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal). Defendant's arguments fail.

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.