

No. 1-14-0914

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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. 13 CR 2839
	)	
MANUEL DIAZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Reyes and Justice Burke concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's conviction on two counts of aggravated unlawful use of a weapon must be vacated in light of *People v. Aguilar*. Additionally, where defendant's multiple convictions for possessing a single handgun violated the one-act, one-crime rule, we affirm defendant's conviction of the most serious crime, unlawful possession of a weapon by a felon, because that offense carried the highest sentencing range.

¶ 2 Following a bench trial, defendant Manuel Diaz was found guilty of seven charged offenses relating to weapons possession after a handgun was recovered from a vehicle in which he was a passenger in 2012. The trial court entered judgment on three of those counts. On appeal,

1-14-0914

defendant contends that three of the seven counts involve the version of aggravated unlawful use of a weapon (AUUW) that was found unconstitutional in *People v. Aguilar*, 2013 IL 112116.

Defendant also asserts that under the one-act, one-crime rule, only one of his convictions for AUUW can stand because a single gun was recovered.

¶ 3 Count 1 charged defendant with unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)). Defendant was also charged with six counts of AUUW (720 ILCS 5/24-1.6 (West 2012)). Counts 2, 4 and 6 charged defendant with AUUW for possessing a firearm that was uncased, loaded and immediately accessible while defendant was on a public street (Count 2) (720 ILCS 5/24-1.6 (a)(2), (a)(3)(A) (West 2012)), in a vehicle (Count 4) (720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) (West 2012)) and not on his own land (Count 6) (720 ILCS 5/24-1.6 (a)(1), (a)(3)(A) (West 2012)). Counts 3, 5 and 7 charged defendant with AUUW for possessing a firearm under each of those three circumstances without a valid Firearm Owner's Identification (FOID) card. 720 ILCS 5/24-1.6 (a)(2), (a)(3)(C) (West 2012); 720 ILCS 5/24-1.6 (a)(1), (a)(3)(C) (West 2012)). In addition, Counts 2 through 7 alleged that the State would "seek to sentence [defendant] as a Class 2 offender in that he has previously been convicted of the felony offense of unlawful use of a weapon by a felon."

¶ 4 At trial, two police officers testified that a car in which defendant was riding was pulled over on December 7, 2012, for having tinted windows. One of the officers testified that he saw defendant, who was seated in the right rear passenger seat, make a "furtive movement" toward the inside door panel. A weapon was recovered from the area near where defendant was sitting. According to one of the officers, after defendant received *Miranda* warnings, he admitted the

1-14-0914

weapon was his, stating he was a "Dragon driving through the Kings 'hood and I have to protect my boys."

¶ 5 The State introduced evidence that defendant had never been issued a FOID card. The State also introduced a certified copy of defendant's prior conviction in case No. 10 CR 07228-01; in that case, defendant pled guilty to unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). Two of the other passengers in the car testified for the defense.

¶ 6 At the close of evidence, the trial court stated that it found the police officers more credible than the defense witnesses. After making that determination, the court stated "[t]here will be a finding of guilty." The mittimus in the record on appeal indicates that the court entered judgments of conviction on Counts 1, 2 and 4. The court sentenced defendant to 54 months in prison on each count, with those terms to be served concurrently.

¶ 7 On appeal, defendant contends that the charges underlying Counts 2, 4 and 6 involve the version of AUUW that was found unconstitutional in *People v. Aguilar*, 2013 IL 112116. This issue is properly before this court, because defendant could not have challenged the *Aguilar* decision earlier<sup>1</sup> and because a challenge to the constitutionality of a statute may be raised at any time. See *In re M.I.*, 2013 IL 113776, ¶ 39. Moreover, the constitutionality of a statute is a matter of law that is reviewed *de novo*. *People v. Clark*, 2014 IL 115776, ¶ 9.

¶ 8 In *Aguilar*, the Illinois Supreme Court held that section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute represented a ban on an individual's right to possess a gun for self-defense outside the home and, as such, was facially unconstitutional under the second amendment of the

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<sup>1</sup> Defendant's bench trial began in October 2013 and concluded in November 2013. Although the Illinois Supreme Court issued its initial opinion in *Aguilar* on September 12, 2013, that decision was modified upon denial of rehearing on December 19, 2013.

United States Constitution as a violation of the individual's right to keep and bear arms. *Id.* ¶ 22. The supreme court later modified that decision to state that it was limited to the "Class 4 form" of AUUW, or the conviction subject to sentencing as a Class 4 felony. *Id.* ¶ 22 n. 3. In the time since defendant filed his initial brief to this court, the supreme court in *People v. Burns*, 2015 IL 117387, ¶ 25, clarified its holding in *Aguilar*, stating that any violation of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute is facially unconstitutional.

¶ 9 In addition, the supreme court has held in *People v. Mosley*, 2015 IL 115872, ¶ 25, that the reasoning of *Aguilar* extends to a conviction under section 24-1.6(a)(2), (a)(3)(A) of the AUUW statute, a subsection that was not at issue in *Aguilar* or *Burns*. The supreme court reasoned in *Mosley* that its finding in *Aguilar* of unconstitutionality as to the section 24-1.6(a)(1), (a)(3)(A) that prohibits the carrying of an uncased, loaded and immediately accessible firearm on one's person or in a vehicle necessarily must also extend to section 24-1.6(a)(2), (a)(3)(A), which prohibits possession of such a weapon on a public street. *Mosley*, 2015 IL 115872, ¶ 25 (defendant's AUUW conviction under section 24-1.6(a)(2), (a)(3)(A) is vacated as void *ab initio*).

¶ 10 As explained previously, the trial court entered a general finding of guilty. The mittimus reflects that the court entered convictions on Counts 1, 2, and 4.

¶ 11 Under *Aguilar*, *Burns* and *Mosley*, the statutes underlying defendant's conviction on Count 2 and Count 4 have been deemed unconstitutional. Therefore, defendant's convictions on Counts 2 and 4 are vacated. For the same reason, no judgment can be entered against defendant on Count 6. Indeed, the State concedes that four viable counts (Counts, 1, 3, 5 and 7) remain under which defendant could be sentenced.

¶ 12 Defendant further asserts that because only one weapon was recovered, a conviction on only one of the remaining counts can be entered under the one-act, one-crime doctrine. He acknowledges that this issue is raised for the first time on appeal but points out that a forfeited one-act, one-crime argument is properly reviewed under the second prong of the plain-error rule because it implicates the integrity of the judicial process. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). The State concedes that this issue is reviewable now as plain error.

¶ 13 Under the one-act, one-crime doctrine, a defendant cannot be subject to multiple convictions based on precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Where all of the counts against a defendant involve the single act of possessing a handgun, the conviction on the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97-98 (2010). To determine which offense is the least serious, this court considers the legislature's intent as shown in the plain language of the statutes in question. *Id.* at 97. The punishment imposed by the legislature is the best indicator of what crime is deemed to be more serious. *Id.*

¶ 14 Although defendant and the State initially dispute which of defendant's convictions should stand, defendant concedes in his reply brief that his conviction on Count 1 should be remain because that offense is subject to a greater penalty than the other offenses under which the trial court could still impose sentence. An examination of the relevant statutes confirms that result.

¶ 15 Under Count 1, defendant was convicted in this case of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)). The State introduced a certified copy of defendant's prior conviction in case No. 10 CR 07228-01 for unlawful possession of a weapon by

1-14-0914

a felon. Because defendant's conviction in this case under Count 1 was his second such conviction for unlawful use of a weapon by a felon, defendant's conviction under Count 1 is a Class 2 felony subject to a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (West 2012).

¶ 16 By contrast, the remaining counts in this case (Counts 3, 5 and 7) charged defendant with AUUW for possessing a firearm on a public street, in a vehicle, and not on his own land without a valid FOID card. 720 ILCS 5/24-1.6 (a)(2), (a)(3)(C) (West 2012); 720 ILCS 5/24-1.6 (a)(1), (a)(3)(C) (West 2012)). A conviction under those sections of the AUUW statute is a Class 4 felony (720 ILCS 5/24-1.6(d)(1) (West 2012)); however, given defendant's prior felony conviction, a conviction for AUUW would be a Class 2 felony subject to a sentencing range of 3 to 7 years, were he to be sentenced on one of those counts. 720 ILCS 5/24-1.6 (d)(3) (West 2012). Defendant's conviction on Count 1 carries a higher maximum sentence and thus is the more serious offense for one-act, one crime purposes.

¶ 17 In conclusion, defendant's convictions under Counts 2 and 4 must be vacated as unconstitutional under *Aguilar* and subsequent decisions of the Illinois Supreme Court. Only one of defendant's convictions can stand under the one-act, one-crime rule. Because Count 1 carries the greatest penalty, defendant's conviction on that count should be affirmed. Given the concurrent nature of defendant's sentences, this outcome has no effect on the overall length of defendant's term of imprisonment.

¶ 18 Convictions on Counts 2 and 4 vacated; conviction on Count 1 affirmed.

¶ 19 Affirmed in part; vacated in part.