

No. 1-14-2948

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 12754
)	
BRIAN MURDOCK,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction for armed habitual criminal where the State proved every element of the offense beyond a reasonable doubt. We reverse defendant's conviction for unauthorized use of a weapon based on firearm ammunition as the State concedes there was no evidence to support a finding that defendant possessed ammunition. We vacate defendant's conviction for unauthorized use of a weapon based on a firearm as it violates the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Brian Murdock was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) and two counts of unlawful use or possession of a weapon by a felon for possessing a firearm (UUWF/firearm) and ammunition (UUWF/ammunition) (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to six years' imprisonment. On appeal, defendant contends that all three convictions must be reversed as the State failed to prove that (1) he had possession of the recovered firearm or any ammunition; and (2) the predicate aggravated unlawful use of a weapon conviction (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)) used as an element of the offenses was declared unconstitutional and void *ab initio* by our supreme court in *People v. Aguilar*, 2013 IL 112116. Defendant also argues that his conviction for UUWF/firearm must be reversed as it violates the one-act, one-crime doctrine. We reverse in part, vacate in part, and affirm in part.

¶ 3 Defendant was charged with one count of armed habitual criminal and two counts of UUWF, one based on the possession of a firearm and the other based on the possession of firearm ammunition. The case proceeded as a bench trial.

¶ 4 At trial, Officer Robert Hilliard testified that, on June 10, 2013, he responded to a call reporting "a man with a gun" at 119 East 59th Street in Chicago, Illinois. When Hilliard and his partner, Officer Goldie, arrived at the aforementioned address, they ran up the stairs and entered the apartment. From the entry door, they "observed somebody," identified in court as defendant, "coming out of a bedroom *** closest to *** the front door" and leaving the apartment. Hilliard continued into the apartment, spoke to the person who made the call, and searched the bedroom that defendant exited. They did not search any other room. No one was in the bedroom when Hilliard, Goldie, and Officer Pendarvis entered it. Pendarvis recovered "a small caliber pistol

with white handles" from the bedroom. Hilliard could not recall if the weapon was loaded. Pendarvis also recovered from the bedroom four pieces of mail addressed to defendant at 119 East 59th Street in Chicago, Illinois. When the officers exited the apartment, defendant was being detained in the back of a police car. Goldie inventoried the firearm and the four pieces of mail.

¶ 5 Hilliard testified that Goldie read defendant his Miranda rights at the police station. Defendant indicated he understood and waived his right to counsel. Defendant told the officers that "he had the gun because he was shot by his neighbor earlier, so he kept it for protection." Defendant told them that he "bought it from some White guys from Indiana."

¶ 6 The State introduced three pieces of mail, all addressed to defendant at the residence: 119 East 59th Street, Chicago, Illinois, 60637. One unopened piece was sent from the Cook County Health and Hospital and another from the City of Chicago Emergency Medical Services. An opened piece of mail from Cook County Health and Hospitals appeared to be a bill dated "5-1-13," with a due date of "5-31-13."

¶ 7 The State entered certifications for defendant's prior felony convictions for AUUW (No. 2004-CR-00412) and possession of a controlled substance with intent to deliver (No. 2003-CR-20168). The State rested.

¶ 8 Defendant made a motion for a directed verdict, which the court denied. Defendant then rested without introducing any evidence.

¶ 9 The trial court found defendant guilty of all counts. It stated: "[t]he case rises and falls on the statement that the defendant allegedly made saying that he bought the gun for protection

from some individuals from Indiana. Based on that statement, which is un rebutted, I believe I have to find the defendant guilty."

¶ 10 The court denied defendant's motion for a new trial and sentenced him to the "mandatory minimum" of six years' imprisonment.¹ Defendant timely appealed.

¶ 11 On appeal, defendant first contends that the State failed to prove that he had constructive possession of a firearm or any possession of firearm ammunition and thus the evidence was insufficient to support any of his three convictions and they, therefore, must be reversed.

¶ 12 The State concedes that it did not meet its burden with regards to the UUWF/ammunition charge. That offense requires proof that the defendant knowingly possessed ammunition "on his land or in his own abode." 720 ILCS 5/24-1.1(a)(West 2012). At trial, no evidence was introduced that defendant possessed ammunition, whether in the firearm or anywhere else. Accordingly, we reverse defendant's conviction on count 3, UUWF/ammunition. We now turn to whether the State proved beyond a reasonable doubt that defendant possessed a firearm, an element of both the armed habitual criminal and UUWF/firearm offenses.

¶ 13 When presented with a challenge to the sufficiency of evidence, our inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). The State bears the burden of proving a defendant "guilty beyond a reasonable doubt of the existence of every element of the offense." *People v. Lucas*, 231 Ill. 2d

¹ The trial court did not make a finding that any counts were merged but sentenced defendant to only one term of imprisonment.

169, 178 (2008). It is not the role of the reviewing court to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not set aside a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 14 To prove defendant guilty of being an armed habitual criminal, the State had to prove that he received or possessed a firearm after having been convicted of two or more specified felony offenses. 720 ILCS 5/24-1.7(a) (West 2012). To prove defendant guilty of UUWF/firearm, it had to prove he had been convicted of a felony and knowingly possessed a firearm "on his land or in his own abode." 720 ILCS 5/24-1.1(a)(West 2012).

¶ 15 Possession of a weapon or ammunition can be actual or constructive. *People v. Spencer*, 2012 IL App (1st) 102094 ¶ 17. As defendant was not found in actual possession of the firearm here, the State had to establish constructive possession. *Id.* To establish constructive possession, the State must prove that defendant (1) had knowledge of the presence of the firearm and (2) exercised immediate and exclusive control over the area where the firearm was found. *Id.* "Knowledge may be shown by evidence of a defendant's acts, declarations, or conduct from which it can be inferred that he knew the contraband existed in the place where it was found." *Id.* "Control is established when a person has the 'intent and capability to maintain control and dominion' over an item, even if he lacks personal present dominion over it." *Id.* (quoting *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992)). The trier of fact may, absent other factors that might create a reasonable doubt as to the defendant's guilt, rely on reasonable inferences of knowledge and possession when deciding whether constructive possession has been shown. *Id.*

¶ 16 The State proved beyond a reasonable doubt that defendant had constructive possession of the firearm. Viewing the evidence in the light most favorable to the prosecution, it met its burden to show defendant knew of the firearm's presence in the bedroom where it was found and exercised immediate and exclusive control over the bedroom. Officer Hilliard, standing at the entry to the apartment, observed defendant exit the bedroom where the firearm was subsequently recovered. A defendant's control over the location where a weapon is found gives rise to an inference that he possesses that weapon. *Spencer*, 2012 IL App (1st) 102094, ¶ 17. Further, inside that bedroom were four pieces of mail, all of which were addressed to defendant at the residence where the firearm was found and one of which was an overdue bill. Habitation in the residence in which the firearm was found is sufficient evidence of control to establish constructive possession. *Id.* " "Proof of residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises and therefore controlled them." " *Id.* (quoting *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999) (quoting *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993))). Lastly, defendant admitted to police that he purchased a firearm and maintained possession of it for his protection. As noted previously, knowledge may be shown by evidence of a defendant's declarations. *Id.* at ¶ 17. By making this statement, defendant linked himself to the firearm. *Id.* at ¶ 18. Accordingly, as the State proved that defendant not only controlled the bedroom where the firearm was found but admitted purchasing and possessing the firearm for protection, it established his constructive possession of the firearm beyond a reasonable doubt.

¶ 17 Defendant argues that this case is similar to *People v. Maldonado*, 2015 IL App (1st) 131874, where the court reversed the defendant's conviction for UUWF despite police recovering

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mail addressed to him at the residence where they recovered ammunition. The court stated that "[o]ther than the three pieces of 'proof of residency,' [one delivery receipt and two pieces of unopened mail] which are of minimal value at best, *** the State offered no other credible evidence from which a reasonable inference flows to establish beyond a reasonable doubt that defendant maintained sufficient legal control of the premises," which undermined the usefulness of the mail. *Id.* at ¶ 34. Specifically, the court noted the defendant was not present at the time of the search, he made no admission regarding his residency, and there was no testimony that he had ever been seen inside that location. *Id.* at ¶ 34. In contrast here, police not only recovered multiple pieces of mail addressed to defendant from the bedroom where the gun was found, they also witnessed defendant exit that bedroom. Accordingly, we reject defendant's reliance on *Maldonado*.

¶ 18 As defendant points out, an old bill is not sufficient to prove habitation and control over the premises. See *People v. Ray*, 232 Ill. App. 3d 459, 462-63 (1992) (defendant's conviction for possession of a controlled substance reversed where six-month old invoice found insufficient to link defendants to the premises where the contraband was found). Here, however, the opened bill addressed to defendant at the residence where he was seen was recent, dated approximately 6 weeks before the search, and had been past due for only 10 days, supporting a finding that defendant lived at and controlled the premises where the firearm was found and constructively possessed the firearm.

¶ 19 Defendant argues that, while his statement regarding his possessing *a* gun can be reasonably read to infer his knowledge of a gun, it does not mean he possessed *the* gun recovered by police. However, this argument misstates defendant's confession. Hilliard testified that

defendant told police he "carried *the* gun for protection *** and that he purchased *it* from two White guys in Indiana." (Emphasis added). Given the context in which defendant made the statement, it is a logical inference that he was referring to owning the same gun, and we therefore reject defendant's contention that he admitted to owning any gun other than the one recovered by police.

¶ 20 In sum, police recovered a firearm and mail addressed to defendant from the room they observed defendant leaving and defendant confessed to purchasing and owning the firearm. Viewing the evidence in the light most favorable to the prosecution, coupled with the reasonable inferences that may be drawn therefrom, we conclude that a rational trier of fact could have found that defendant constructively possessed the firearm recovered from the bedroom.

¶ 21 Next, defendant argues that his convictions must be reversed because the State failed to prove beyond a reasonable doubt that he had qualifying convictions to satisfy the necessary elements of the offenses. The UUWF/firearm conviction requires, as an element of the offense, proof of a prior felony conviction. 720 ILCS 5/24-1.1(a)(West 2012). Armed habitual criminal requires proof of two prior felony convictions. 720 ILCS 5/24-1.7(a) (West 2012). At trial, the State, without objection by the defense, entered into evidence certified copies of the defendant's prior felony convictions for AUUW (No. 2004-CR-00412) and possession of a controlled substance with intent to deliver (No. 2003-CR-20168). The AUUW conviction served as the predicate offense underlying defendant's UUWF/firearm conviction and one of the predicate offenses underlying his armed habitual criminal conviction.

¶ 22 Defendant does not dispute that his 2003 felony conviction for possession of a controlled substance with intent to deliver satisfies the prior conviction element of the armed habitual

criminal statute. Rather, he argues that his prior AUUW conviction cannot serve as a predicate felony for his convictions because the statute under which he was convicted for the offense (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004)) was declared unconstitutional by our supreme court in *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387.

¶ 23 The State counters that defendant's convictions should be affirmed as his prior AUUW conviction was valid at the time of the instant offenses in 2013. The State argues that it is the status of defendant's prior conviction at the time he possessed the firearm that controls, and, therefore, because defendant was a twice-convicted felon at the time of the incident on June 10, 2013, he was properly charged and convicted of being an armed habitual criminal and UUWF.

¶ 24 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 violates the second amendment right to bear arms. When a statute is declared unconstitutional, it is void *ab initio*, or as though the law had never been passed. See *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Defendant's 2004 conviction for AUUW was for the Class 2 form of the offense (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)(d) (West 2012)). In *Burns*, 2015 IL 117387, our supreme court clarified that "section 24-1.6(a)(1), (a)(3)(A) of the [AUUW] statute is facially unconstitutional, without limitation," as there is no distinction between class 4 and class 2 "forms" of AUUW. *Burns* at ¶ 24-25. Thus, the holding in *Aguilar* renders defendant's 2004 AUUW conviction void *ab initio*.

¶ 25 Our supreme court in *People v. McFadden*, 2016 IL 117424, addressed the same issue defendant raises here and controls our disposition in this case. In *McFadden*, the defendant was convicted of UUWF as he possessed a firearm after having a prior conviction for AUUW.

McFadden, 2016 IL 117424, ¶ 1. He appealed, arguing, as defendant does here, that his conviction should be vacated because the prior AUUW conviction on which it was predicated was facially unconstitutional under *Aguilar* and the State, therefore, failed to prove all of the elements of the offense. *Id.* at ¶ 13. The court disagreed, concluding that "the language of the [UUWF] statute requires the State to prove only 'the defendant's felon status,' " and does not require that the State prove the predicate offense at trial. *Id.* at ¶ 27 (quoting *People v. Walker*, 211 Ill. 2d 317, 337 (2004)). It explained "the language of [the UUWF statute] is 'consistent with the common-sense notion that a disability based on one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.'" *Id.* at ¶ 29 (quoting *Lewis v. United States*, 445 U.S. 55, 61 n. 5 (1980)).

¶ 26 The court held:

"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. Thus, at the time defendant committed the UUW by a felon offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *Id.* at ¶ 31.

The reasoning in *McFadden* applies equally to the offense of armed habitual criminal, where, "the State need only prove the fact of the prior convictions of enumerated offenses [citations], just as the State need only prove the fact of a prior felony conviction to support a UUWF conviction." *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 7.

¶ 27 Here, as in *McFadden*, defendant's prior AUUW conviction had not been vacated prior to his armed habitual criminal and UUWF convictions. It could, therefore, properly serve as a predicate for those convictions. *Perkins* at ¶ 7. Defendant's failure to vacate his prior AUUW conviction on grounds that it was unconstitutional is fatal to his challenge to his "felon-in-possession" convictions. *Perkins*, ¶ 9 (citing *Lewis*, 445 U.S. at 60-62). Accordingly, as the State proved beyond a reasonable doubt that defendant possessed a firearm and was convicted of felonies properly serving as the predicate offenses for his armed habitual criminal and UUWF/firearm convictions, we affirm the ruling of the trial court finding defendant guilty of those offenses.

¶ 28 Defendant argues that we need not follow *McFadden* because it conflicts with the United States Supreme Court decisions in *United States v. Bryant*, —, 136 S. Ct. 1954 (2016), and *Montgomery v. Louisiana*, —, 136 S. Ct. 718, (2016), which he asserts are binding authority that mandate that his convictions be vacated. However, we are bound by our supreme court's decisions and are thus compelled to adhere to the holding in *McFadden*. *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23. We note however that in *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9, this court rejected the same arguments defendant now makes on appeal.

¶ 29 Finally, defendant contends, and the State correctly concedes, that the UUWF/firearm conviction must be vacated as it violates the one-act, one-crime doctrine. The one-act, one-crime rule, set forth in *People v. King*, 66 Ill. 2d 551, 566 (1977), prohibits multiple convictions based on "precisely the same physical act." *People v. Nunez*, 236 Ill. 2d 488, 494 (2010). "[W]hen multiple convictions are obtained for offenses arising from a single act, a sentence should be imposed on the more serious offense, and the conviction on the less serious offense should be

vacated." *People v. Lee*, 213 Ill. 2d 218, 227 (2004) (citing *People v. Garcia*, 179 Ill. 2d 55, 71 (1997)). Here, the same physical act of possessing a single firearm while being a convicted felon served as the basis for both defendant's class 2 UUWF/firearm conviction and class X armed habitual criminal conviction. As the UUWF/firearm conviction is the less serious offense, we vacate that conviction. *People v. Johnson*, 237 Ill. 2d 81, 99 (2010).

¶ 30 Having found the evidence insufficient to support defendant's conviction for UUWF/ammunition, we reverse that conviction. Defendant's conviction for UUWF/firearm was based on the same act as his conviction for armed habitual criminal and we therefore vacate that conviction. Finally, having found that the State proved beyond a reasonable doubt that defendant had constructive possession of a firearm and multiple prior predicate felony convictions, we affirm his conviction for armed habitual criminal.

¶ 31 Reversed in part, vacated in part, and affirmed in part.