FOURTH DIVISION
May 4, 2017

No. 1-12-1937

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. 11 CR 13152
	)	
CARLOS SOTO,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: (1) Defendant's prior aggravated unlawful use of a weapon was properly used as a predicate offense for unlawful use of a weapon by a felon under *People v. McFadden*, 2016 IL 117424; and (2) defendant was properly convicted of a Class 2 felony.

¶ 2 Pursuant to the supervisory order issued by the Illinois Supreme Court in this case January 20, 2016, we vacated our previous opinion and reconsider our decision in light of *People v. Burns*, 2015 IL 117387.

¶ 3 Following a jury trial, defendant Carlos Soto was convicted of unlawful use of a weapon by a felon. On appeal, defendant contends that: (1) his conviction must be reversed because the State failed to prove an element of the offense, that he was convicted of a prior felony, where the

prior conviction on which the State relied, aggravated unlawful use of a weapon, was based on a statute that has since been declared unconstitutional by our supreme court in *People v. Aguilar*; and (2) he was improperly convicted of unlawful use of a weapon by a felon as a Class 2 felony offense instead of a Class 3 offense because the State only charged defendant with unlawful use of a weapon by a felon as the Class 3 offense and failed to give notice that it intended to charge defendant with the enhanced Class 2 offense.

¶ 4 Defendant was charged with two counts of unlawful use or possession of a weapon by a felon (UUWF) pursuant to section 24-1.1(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.1(a) (West 2010)) "in that he, knowingly possessed in his own abode any firearm ammunition, after having been previously convicted of the felony offense of aggravated unlawful use of a weapon, under case number 08 CR 19898." Count 2 of the information further specified that the State sought to sentence defendant as a Class 2 offender pursuant to section 24-1.1(e) of the Code (720 ILCS 5/24-1.1(e) (West 2010)) "in that he was on parole or mandatory supervised release at the time of the offense." The State only proceeded to trial on count 1.

¶ 5 The information in case number 08 CR 19898 provides that defendant was charged with aggravated unlawful use of a weapon:

> "[I]n that he, knowingly carried on or about his person, a firearm, *** and the firearm possessed was uncased, loaded, and immediately accessible *** and he had been previously convicted of a felony, to wit: manufacture/delivery of controlled substance under case number 05 CR 20515 ***."

¶ 6 The evidence presented at trial by the State essentially showed that at approximately 12:13 p.m. on August 4, 2011, Officers Derrick Patterson and John Sanders, who both testified at

trial, went to defendant's residence in response to a call. Patterson and Sanders followed defendant's mother into the house and then went to defendant's room, where defendant was sitting on his bed. Sanders entered the room and observed a box of ammunition sitting on top of a pile of shoe boxes close to defendant's bed. Sanders picked up the box, felt it was heavy, opened the box, and saw bullets inside the box. Sanders placed defendant in custody, then searched the room and recovered an empty magazine clip underneath defendant's bed. Sanders also testified that defendant told the officers that the bullets and magazine clip were defendant's but that defendant's gun was stolen.

¶ 7 The parties stipulated that defendant had a qualifying prior felony conviction for the limited purpose of proving an element of the offense of UUWF.

¶ 8 Defendant presented the testimony of Andre McCullom and defendant's mother. McCullom testified that he found the box of ammunition and magazine clip in his house the day before defendant was arrested and went to show them to Demar Ferris. McCullom and Ferris then went to defendant's house to lift weights even though defendant was not home. McCullom brought the box of ammunition and magazine clip to defendant's house. McCullom and Ferris went into defendant's bedroom to lift weights and McCullom set the box of ammunition on top of the shoebox next to defendant's bed. McCullom did not recall what he did with the magazine clip. When McCullom left defendant's house, he forgot to take the box of ammunition and empty clip with him. Defendant's mother corroborated that she allowed McCullom and Ferris into defendant's bedroom to lift weights the day before defendant was arrested, although defendant was not home at the time.

¶ 9 The jury found defendant guilty. After noting that defendant was "Class X mandatory," the circuit court sentenced defendant to a seven-year prison sentence. According to the mittimus, defendant was convicted of UUWF as a class 2 felony and was therefore a class X offender.

¶ 10 On appeal, defendant first contends that his conviction for UUWF must be reversed because the prior felony conviction on which the State relied, aggravated unlawful use of a weapon (AUUW), is unconstitutional and void pursuant to our supreme court's decision in *People v. Aguilar*, 2013 IL 112116. Defendant concludes that because his prior felony conviction is void, the State failed to prove an element of the offense of UUWF. We note that defendant does not contest the sufficiency of the evidence; he only contests the constitutionality of the underlying AUUW offense on which his UUWF conviction is based.

¶ 11 To sustain a conviction for UUWF pursuant to section 24-1.1(a) of the Code, the State must prove that the defendant, after having been convicted of a felony, knowingly possessed in his own abode any firearm or any firearm ammunition. 720 ILCS 5/24-1.1(a) (West 2010). Here, the record shows the State relied on defendant's prior felony conviction for AUUW under section 24-1.6(a)(1), (a)(3)(A).

¶ 12 Section 24-1.6(a)(1), (a)(3)(A) of the Code provides that a defendant is guilty of AUUW where he knowingly possesses an uncased, unloaded, and immediately accessible firearm. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010). Section 24-1.6(d) provides the sentences for the offense of AUUW, stating:

> "(1) 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.

***

(3) 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(d)(1), (3) (West 2010).

¶ 13 In *Aguilar*, which was modified upon denial of rehearing on December 19, 2013, the supreme court decided the issue of "whether the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) violates the second amendment right to keep and bear arms." *Aguilar*, 2013 IL 112116, ¶ 18. As we discuss later in more detail, the supreme court expressly pointed out that the right to keep and bear arms is subject to reasonable regulation, including the prohibition of possession of a weapon by a felon. *Id*. ¶ 26. Ultimately, the court held that the Class 4 form of section 24-1.6(a)(1); (a)(3)(A), (d) of the Code did violate the second amendment right to keep and bear arms and, therefore, the court reversed the defendant's conviction for AUUW under that section. *Id*. ¶ 22. A statute that has been declared unconstitutional is void *ab initio*, or "was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable." *People v. Blair*, 2013 IL 114122, ¶ 30.

¶ 14 In *People v. Burns*, 2015 IL 117387, the supreme court clarified that its holding in *Aguilar* applied to all sections of the AUUW. Section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)), is facially unconstitutional because it violates the right to keep and bear arms (*id.* ¶ 32) since, on its face, the "statutory provision constitutes a flat ban on carrying ready-to-use guns outside the home." *Id*. at ¶ 25. The *Burns* court addressed its prior holding in *Aguilar*.

> "Admittedly, in *Aguilar*, we specifically limited our holding of facial invalidity to a so-called 'Class 4 form' of the offense. See *Aguilar*, 2013 IL 112116, ¶ 21. However, we now acknowledge that our reference in *Aguilar* to a 'Class 4 form' of the offense was inappropriate. No such offense exists. There is no 'Class 4 form' or 'Class 2 form' of aggravated unlawful use of a weapon." *Id.* ¶ 22.

¶ 15 However, the holding in *Burns* does not end our analysis of this issue. Subsequent to *Burns*, the supreme court entered into its decision in *People v. McFadden*, 2016 IL 117424, *pet. for cert. pending*, No. 16-7346.

¶ 16 In *McFadden*, the defendant was convicted of unlawful use of a weapon by a felon (UUWF) for possessing a firearm after having a prior conviction for AUUW. *McFadden*, 2016 IL 117424, ¶ 1. On appeal, the defendant argued that his UUWF conviction should be vacated because it was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar*, and thus, the State failed to prove all of the elements of the offense. *Id*. ¶ 13.

¶ 17 The appellate court agreed with the defendant and vacated the defendant's UUWF conviction on the basis of *Aguilar*. *People v. McFadden*, 2014 IL App (1st) 102939. However, the supreme court reversed, finding:

> "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. 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.* ¶ 31.

¶ 18 The supreme court relied largely on the United States Supreme Court's holding "that under a federal felon-in-possession-of-a-firearm statute, a constitutionally infirm prior felony conviction could be used by the government as the predicate felony." *Id.* ¶ 22 (citing *Lewis v. United States*, 445 U.S. 55, 65 (1980)). *McFadden* approvingly cited *Lewis*' reasoning in holding that an AUUW conviction subject to vacatur under *Aguilar* may still serve as a predicate for a UUWF conviction.

¶ 19 The court found that, although the defendant could seek to vacate his prior conviction for AUUW under the void *ab initio* doctrine based on the holding of *Aguilar*, he was still required to clear his felon status prior to obtaining a firearm. *Id.* at ¶ 37. Accordingly, the court concluded that the defendant's prior conviction for AUUW properly served as proof of the predicate felony conviction for UUWF. *Id.*

¶ 20 Here, as in *McFadden*, defendant's prior AUUW conviction had not been vacated prior to his UUWF conviction. Therefore, it could properly serve as a predicate for defendant's conviction. Since the State proved beyond a reasonable doubt that defendant possessed a firearm and was convicted of a prior AUUW, we affirm the ruling of the trial court finding defendant guilty.

¶ 21 Defendant argues that we need not follow *McFadden* because it conflicts with the United States Supreme Court decisions in *Montgomery v. Louisiana*, 577 U.S.___, 136 S.Ct. 718, 736-37 (2016), and *Ex parte Siebold*, 100 U.S. 371, 375-77 (1880), which preclude the use of a prior conviction, premised on a statute later held unconstitutional, as a predicate for defendant's UUWF conviction. Defendant asserts that because the *McFadden* court "did not address" this authority from the United States Supreme Court, this court is "not bound by *McFadden*." We disagree.

¶ 22 In *Montgomery*, the Supreme Court held that the prohibition against mandatory life sentences without parole for juvenile offenders articulated in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), was a substantive rule of constitutional law entitled to retroactive effect on collateral review. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 734. *Montgomery* considered and reaffirmed the Supreme Court's holding in *Siebold*, finding that substantive rules must have retroactive effect regardless of when the defendant's conviction became final because "a conviction under an unconstitutional law 'is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' " *Id*. at 724. The *Montgomery* Court found that "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id*. at 731 (citing *Siebold*, 100 U.S. at 376). The Court further explained that "as a general principle, *** a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id*.

¶ 23 Defendant argues that the decision in *McFadden* cannot be reconciled with *Montgomery* which held that "that a facially unconstitutional conviction can be used as predicate for a separate offense." According to defendant, the State's reliance on his prior AUUW conviction

violates *Montgomery*'s central premise that "[t]here is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." *Id*.

¶ 24 Defendant's argument that *Montgomery* controls over *McFadden* has already been rejected by this court. The Third Division found that "Montgomery posed no constitutional impediment to affirmance of defendant's UUWF conviction given that defendant was not seeking to vacate his prior conviction (relief that, if sought, the State would not oppose), but instead was challenging his status as a convicted felon at the time of his trial." *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9; see also *People v. Faulkner*, 2017 IL App (1st) 132884, ¶¶ 28-33 (following *Perkins* to reject claim that *McFadden* failed to follow *Montgomery* holding). Recently, the First Division of this court found:

> "*Montgomery* did not address the issue we have here. Rather, *Montgomery* cautioned that states have no power to enforce a conviction or penalty barred by the Constitution. *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 729-30. The State does not seek to enforce [the defendant's] invalid felony conviction in contravention of *Montgomery*, and nothing in *McFadden* prevents [the defendant] from seeking to vacate his prior felony conviction. The issue here is whether a prior conviction based on a statute that has been subsequently declared facially unconstitutional may serve as proof of the predicate felony conviction in prosecuting a UUWF offense. In *McFadden*, our supreme court answered in the affirmative, and this court follows *McFadden* as we are bound to

> do. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009)." *People v. Smith*, 2017 IL App (1st) 122370-B, ¶ 29.

¶ 25 We agree with the conclusion in *Perkins, Faulkner*, and *Smith* that *Montgomery* had no bearing on *McFadden*. Here, defendant failed to have his prior AUUW conviction vacated after *Aguilar*, and his resulting UUWF conviction remains valid under *McFadden*.

¶ 26 Alternatively, defendant argues that his offense must be reduced from a Class 2 felony to a Class 3 felony under *Lewis*. Defendant asserts that "while *Lewis* does permit the use of a prior invalid conviction to prove a defendant's status as a felon, it expressly forbids the use of that prior conviction to prove an element of an offense or for enhancement of punishment."

¶ 27 The court in *Smith* considered and rejected the same argument when raised by the defendant in that case.

> "[The defendant] contends that although *Lewis* permitted the use of a prior invalid conviction to prove defendant's status as a felon, it expressly forbade using such a conviction to enhance punishment. As support, he points to *Lewis*'s citation of *Burgett v. Texas*, 389 U.S. 109 (1967), and *United States v. Tucker*, 404 U.S. 443 (1972), and the Court's statement in *Lewis* that 'its interpretation was consistent' with those cases. [The defendant], however, reads too much into *Lewis*'s discussion of *Burgett* and *Tucker*.
>
> As the *Lewis* Court noted, *Burgett* and *Tucker* held that a subsequent conviction or sentence was unconstitutional 'because it depended upon the reliability of a past uncounseled conviction.' *Lewis*, 445 U.S. at 67. The *Lewis* Court held, however, that an

> uncounseled felony conviction may nonetheless be used as the basis to impose 'a civil firearms disability, enforceable by a criminal sanction,' and its interpretation was 'not inconsistent with' *Burgett* and *Tucker*. *Id*. The Court in *Lewis* explained that the subsequent conviction or sentence in *Burgett* and *Tucker* depended upon the reliability of the past uncounseled convictions, whereas the federal gun laws at issue in *Lewis* 'focus not on reliability, but on the mere fact of conviction *** in order to keep firearms away from potentially dangerous persons. *** Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment." [Citation.]' *Id*. Thus, *Lewis* did not forbid the use of a prior uncounseled felony conviction to enhance punishment as [the defendant] contends; rather, *Lewis* determined that the mere enforcement of a statute prohibiting felons from possessing firearms through criminal sanction does not enhance punishment. *Id*. *Lewis* does not support [the defendant's] argument here." *Smith*, 2017 IL App (1st) 122370-B, ¶¶ 30-31.

¶ 28 We agree with and adopt *Smith*'s conclusion that *Lewis* fails to support defendant's argument that his Class 2 felony conviction must be reduced to a Class 3 felony.

¶ 29 Defendant next contends that he was improperly convicted of the Class 2 form of the UUWF offense rather than the Class 3 form of the offense because the State failed to properly give him notice that it was seeking to charge him with an enhanced Class 2 form of the UUWF offense, as required by section 111-3(c) of the Code of Criminal Procedure (725 ILCS 5/111-3(c)

(West 2010)). Defendant argues that his sentence must be vacated and his cause remanded for resentencing.

¶ 30 To sustain a conviction for UUWF, the State must prove that the defendant knowingly possessed firearm ammunition and that defendant had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). Section 24-1.1(e) of the same statute further provides:

> "Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years ***. Violation of this Section by a person not confined in a penal institution who has been convicted of *** a felony violation of Article 24 of this Code (AUUW) *** is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2010).

¶ 31 Section 111-3(c) of the Code of Criminal Procedure requires that:

> "When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior

> conviction from one classification of offense to another higher level classification of offense ***." 725 ILCS 5/111-3(c) (West 2010).

¶ 32 However, the Illinois Supreme Court in *People v. Easley*, 2014 IL 115581, rejected this argument.

> "The indictment in this case alleged that defendant was guilty of unlawful use of a weapon by a felon in that he was previously convicted of unlawful use of a weapon by a felon. The section 111-3(c) notice provision clearly does not apply in this case because the State did not seek to enhance defendant's sentence with his prior conviction. Rather, as alleged in the indictment, defendant's Class 2 sentence was the only statutorily allowed sentence under section 24-1.1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2008)). Defendant could not have been given a Class 3 sentence under the applicable sentencing statute." *Id.* ¶ 22.

¶ 33 Further, "[i]mposing a Class 3 sentence in this case was outside the applicable statutorily mandated sentencing range. If the legislature had intended section 111-3(c) to apply even when the prior conviction is an element of the offense, it would have clearly said so. Logically, such notice is unnecessary when the prior conviction is already a required element of the offense and only one class of felony is possible for that offense as alleged in the charging instrument." *Id.* ¶ 24.

¶ 34 Here, the information alleged defendant had committed the offense of UUWF in that he knowingly possessed firearm ammunition "after having been previously convicted of the felony

offense of aggravated unlawful use of a weapon, under case number 08 CR 19898." The section 111-3(c) notice provision does not apply here because the State did not seek to enhance defendant's sentence; the prior felony conviction was an element that the State had to prove at trial, which it did through a stipulation. As in *Easley*, pursuant to the information, a Class 2 sentence was the only statutorily allowed sentenced available in his situation. See 720 ILCS 5/24-1.1(e) (West 2010) ("Violation of this Section by a person not confined in a penal institution who has been convicted of *** a felony violation of Article 24 of this Code"). Accordingly, we find the defendant was properly convicted of the Class 2 felony offense of UUW by a felon and, based on his criminal history, was properly sentenced as a Class X offender.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 36 Affirmed.

¶ 37 JUSTICE GORDON, specially concurring.

¶ 38 I concur in affirming defendant's conviction and sentence but for different reasons, which I explain below.

¶ 39 First, I concur in affirming defendant's conviction, for the following reasons. In *People v. McFadden*, 2016 IL 117424, ¶ 15, as in the case at bar, the defendant stipulated to his felon status, and the *McFadden* court rejected his argument that "he should be relieved of his stipulation" because his prior felony conviction was void *ab initio*. *McFadden*, 2016 IL 117424, ¶ 15.

¶ 40 Defendant is correct that the *McFadden* court did not discuss *Montgomery v. Lousiana*, 577 U.S. __, __, 136 S.Ct. 718, 730 (2016) (a State cannot legitimate a verdict where the conduct being punished is constitutionally immune from punishment. However, *Montgomery* did not

involve a stipulation, as both *McFadden* and the instant case do. Since our case does involve a stipulation, there is simply no need to engage in a broad reading of *McFadden* in order to decide the case before us. Obviously, we will not disregard *McFadden*, as defendant suggests. *E.g.*, *People v. Smith*, 2017 IL App (1st) 122370-B, ¶ 28 (rejecting a defendant's argument to disregard *McFadden* on the basis of *Montgomery*); *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 28 (same); *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9. However, I would also wait until our supreme court has had an opportunity to consider an unstipulated case before analyzing *McFadden*'s full reach—particularly since it is not necessary to decide that issue in the case in front of us. Therefore, I concur with affirming defendant's conviction, but only on the basis of the stipulation which existed in both *McFadden* and our case.

¶ 41 Second, defendant argues that this court should reduce his offense from a Class 2 felony to a Class 3 felony, because his sentence may not be enhanced on the basis of an offense that was void *ab initio*. I do not find his argument persuasive, for the reasons which I explain below.

¶ 42 In *McFadden*, the defendant asked the court to vacate his sentence and to remand for resentencing on the ground that, without his prior AUUW conviction, he had only one prior felony conviction in his background. *McFadden*, 2016 IL 117424, ¶ 40. Addressing his claim, the court stated in one sentence that it "reiterate[d] that the constitutional invalidity of defendant's 2002 AUUW conviction is not confirmed by the record in this case." *McFadden*, 2016 IL 117424, ¶ 41. However, our supreme court then spent two full pages explaining why that conviction had no effect on defendant's sentence, before concluding that a remand for resentencing was not necessary. *McFadden*, 2016 IL 117424, ¶¶ 41-46. This part of *McFadden* lends some support to defendant's argument.

¶ 43 In the case at bar, the majority rejects defendant's argument by stating that it agrees and adopts the analysis in *Smith*, 2017 IL App (1st) 122370-B, ¶¶ 30-31. In *Smith*, the appellate court observed that the defendant had "stipulated to his felon status" and that, based on his stipulation "only one class of felony [was] possible for that offense." *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. I agree with that part of the *Smith* opinion, and leave for another day the question of what happens in a case without a stipulation, since that is not the case presently before us.

¶ 44 For the above reasons, I respectfully concur.