2017 IL App (1st) 122651-U
No. 1-12-2651

THIRD DIVISION
May 17, 2017

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 Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11CR 5579
	)	
JOVONTE BROWN,	)	
	)	The Honorable
Defendant-Appellant.	)	Matthew E. Coghlan,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's AHC conviction and sentence are affirmed pursuant to our supreme court's recent decision in *People v. McFadden*, 2016 IL 117424.

¶ 2 Following a joint bench trial with codefendant Lamar Washington, who is not a party to this appeal, defendant Jovonte Brown was found guilty of unlawful use of a weapon by a felon (UUWF), aggravated unlawful use of a weapon (AUUW), and armed habitual criminal (AHC). The trial court merged the convictions and sentenced defendant to six years' imprisonment on the AHC count. Initially on appeal, we vacated, *inter alia*, defendant's AHC conviction under count

V, agreeing with defendant that his prior Class 4 conviction of AUUW in case number 08 CR 2016 is void *ab initio* under *People v. Aguilar*, 2013 IL 112116, and the State could not rely on it in satisfaction of the prior felony element of AHC. See *People v. Brown*, 2015 IL App (1st) 122651-U, ¶ 16 (citing *People v. McFadden*, 2014 IL App (1st) 102939, *aff'd and rev'd in part*, 2016 IL 117424).

¶ 3 On September 28, 2016, the supreme court denied the State's petition for leave to appeal but entered a supervisory order directing us to vacate our judgment and to reconsider the matter in light of *People v. McFadden*, 2016 IL 117424, to determine if a different result is warranted. In *McFadden*, our supreme court concluded that the defendant's status as a felon was unaffected by *Aguilar* and that the prior felony conviction precluded the defendant from possessing a firearm "until the judicial process has declared otherwise by direct appeal or collateral attack." *McFadden*, 2016 IL 117424, ¶ 31.

¶ 4 For the reasons that follow, we conclude that a different result is warranted.

¶ 5 BACKGROUND

¶ 6 The record shows that a grand jury charged defendant and codefendants, Lamar Washington and Davon Reed[1], with firearm-related offenses arising out of an incident on March 21, 2011, when Chicago police officers dispersed a group of men gathered around a makeshift memorial on the 3400 block of West Fulton Boulevard. As relevant here, the April 14, 2011, indictment charged defendant with: (1) count V, being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)), in that he knowingly or intentionally possessed a firearm after having been convicted of AUUW under case number 08 CR 2016 and possession of a controlled

[1] Codefendant Reed pled guilty to unlawful use of a weapon in exchange for a sentence of two years' imprisonment. Codefendant Washington was found guilty of UUWF and AUUW, then sentenced to five years' imprisonment on the former.

substance with intent to deliver under case number 09 CR 8417; (2) count VI, UUWF (720 ILCS 5/24-1.1(a) (West 2010)), in that he knowingly possessed a firearm on or about his person after having been convicted of possession of a controlled substance with intent to deliver under case number 09 CR 8417; and (3) count VII, AUUW (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2010)), in that he knowingly carried a firearm when not on his own land, abode or business, and the firearm was uncased, loaded, and immediately accessible. In counts VI and VII, the State also requested that defendant be sentenced as a Class 2 offender based on his prior Class 4 AUUW conviction in case number 08 CR 2016.

¶ 7 The record also shows that defendant was charged by information, in case number 08 CR 2016, with eight counts of AUUW, then convicted and sentenced to two years' imprisonment on count I of AUUW, a Class 4 felony (720 ILCS 5/24-1.6(a)(2)/(3)(A), (d)(1) (West 2010)). In case number 09 CR 8417, defendant was convicted of possession of a controlled substance with intent to deliver, a Class 2 felony (720 ILCS 570/401(d) (West 2010)).

¶ 8 At trial, the evidence showed in relevant part, that at around noon on March 21, 2011, Chicago police officers Beckman and Gallagher assembled with members of the Eleventh District tactical team in response to a report that several armed men were gathered around a makeshift memorial on the 3400 block of West Fulton Boulevard. The officers converged on that location from various routes. Officers Beckman and Gallagher were approaching from the north alley of Fulton Boulevard when they heard over the "car-to-car" radio frequency that two individuals were running westbound on Fulton Boulevard. Upon reaching the mouth of the alley on St. Louis Avenue, the officers observed defendant running west on Fulton Boulevard. Officers Beckman and Gallagher pursued defendant in their unmarked vehicle and observed him remove a black handgun from his waistband and throw it onto the flat roof of a garage at 3455

West Fulton Boulevard. Officer Gallagher stopped the vehicle at 240 North St. Louis Avenue and Officer Beckman exited and detained defendant. Officer Gallagher subsequently recovered a loaded .357-caliber Rossi handgun from the roof of the garage at 3455 West Fulton Boulevard. Both officers identified the black handgun as the same one that defendant threw onto the garage roof. As part of its case-in-chief, and without objection, the State presented certified statements of defendant's prior Class 2 conviction of possession of a controlled substance with intent to deliver in case number 09 CR 8417 and his prior Class 4 conviction of AUUW in case number 08 CR 2016.

¶ 9 Defendant presented testimony from Cynthia Coleman-Clark, a family friend who lived at 3446 West Fulton Boulevard, across the street from the makeshift memorial where defendant and several others were gathered. Standing on the steps of her front porch, Coleman-Clark did not observe anyone run from the police or any police officer recover a handgun from the roof of the garage at 3455 West Fulton Boulevard. Defendant also presented the testimony of Chicago police officer Alan Rogers, a member of the Eleventh District tactical team, who acknowledged that his case report did not indicate he made a radio call over the "car-to-car" frequency that two individuals were "fleeing westbound on Fulton." In rebuttal, Officer Gallagher identified an aerial map of the 3400 block of West Fulton Boulevard showing that the garage at 3455 West Fulton Boulevard was not visible from the north side of West Fulton Boulevard.

¶ 10 Following closing arguments, the trial court found defendant guilty of UUWF, AUUW, and AHC. The trial court merged the UUWF and AUUW convictions into the AHC conviction and sentenced defendant to six years' imprisonment on the AHC conviction.

¶ 11 ANALYSIS

¶ 12 Defendant contends in his supplemental brief that the Illinois Supreme Court's decision in *McFadden* is factually distinguishable from and inapplicable to the instant case. He reasons that *McFadden* was limited to the offense of UUWF and does not apply here to support his AHC conviction. Alternatively, defendant contends that United States Supreme Court precedent requires that his AHC conviction be reversed, citing *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), and *Ex Parte Siebold*, 100 U.S. 371 (1879). Defendant argues that "this Court is bound by the United States Constitution's Supremacy Clause to follow the law the United States Supreme Court established in *Siebold* and *Montgomery* and need not follow *McFadden*," which failed to address those two cases. See U.S. Const., art. VI, cl. 2.

¶ 13 The State responds in its supplemental brief that our supreme court was well aware of *Montgomery* and *Siebold* when it decided *McFadden* because it allowed McFadden to cite *Montgomery* as additional authority, McFadden made the same unsuccessful argument regarding *Montgomery* and *Siebold* in his rehearing petition that defendant [here] has raised in his supplemental brief," and neither the majority nor the dissent in *McFadden* ultimately cited *Montgomery* or *Siebold* because they were not relevant. The State also responds that this court has already rejected previous attempts to distinguish AHC from UUWF, by categorizing UUWF as a "status-based" offense and AHC as a "conduct-based" offense. The State's position is well taken.

¶ 14 We observe that the same contentions defendant raises here were considered and rejected in *People v. Perkins*, 2016 IL App (1st) 150889, and *People v. Faulkner*, 2017 IL App (1st) 132884, and defendant offers no new grounds that would warrant a different result in this case. *People v. Madej*, 177 Ill. 2d 116, 165 (1997). In *Perkins*, the appellate court rejected the defendant's attempt to distinguish *McFadden* as inapplicable to AHC, explaining as follows:

> "In order to sustain its burden to prove that a defendant is an armed habitual criminal, the State need only prove the fact of the prior convictions of enumerated offenses (*id.*; see *People v. Tolentino*, 409 Ill. App. 3d 598, 607, 351 Ill. Dec. 72, 949 N.E.2d 1167 (2011) (sufficient for State to present certified copies of defendant's prior convictions for qualifying offenses)), just as the State need only prove the fact of a prior felony conviction to support a UUWF conviction. Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses[ ] in order to find that the State has sustained its burden of proof. And because here, as in *McFadden*, Perkins' prior conviction had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." *Perkins*, 2016 IL App (1st) 150889, ¶ 7.

In *Faulkner*, the appellate court agreed with this reasoning and rejected the defendant's argument against the application of *McFadden* to support his AHC offense. *Faulkner*, 2017 IL App (1st) 132884, ¶ 27. *Perkins* and *Faulkner* also rejected the argument that *McFadden* should be disregarded because it did not address the binding United States Supreme Court precedent of *Montgomery* and *Siebold*, noting that counsel in *McFadden* was granted leave to cite *Montgomery*, which discussed *Siebold*. See *Perkins*, 2016 IL App (1st) 150889, ¶¶ 9-10; *Faulkner*, 2017 IL App (1st) 132884, ¶¶ 32-33.

¶ 15 Here, as in *Perkins* and *Faulkner*, we disagree with defendant that *McFadden* is factually distinguishable and inapplicable to the case at bar and that United States Supreme Court precedent requires that his AHC conviction be reversed. Pursuant to *McFadden*, we conclude that defendant's prior AUUW conviction properly satisfied the predicate felony element of AHC. *McFadden*, 2016 IL 117424, ¶ 37. We incorporate the views expressed in Justice Hyman's

special concurrence in *People v. Spivey*, 2017 IL App (1st) 123563, regarding the need for a legislative solution to continuing effects of convictions under the statute found unconstitutional and void *ab initio* in *People v. Aguilar*, 2013 IL 112116.

¶ 16 CONCLUSION

¶ 17 For the reasons stated, we affirm defendant's AHC conviction and sentence.

¶ 18 Affirmed.