

No. 1-12-3385

**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).

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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. 11 CR 19406
	)	
DARNELL MOTON,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE BURKE delivered the judgment of the court.\*  
Justices Gordon and Reyes concurred in the judgment.

**ORDER**

*Held:* Defendant's conviction for unlawful use of a weapon by a felon is affirmed pursuant to *People v. McFadden*, 2016 IL 117424. Further, defendant is not entitled to have his Class 2 felony reduced to a Class 3 felony.

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\* Justice Palmer delivered the original judgment in this case. Following Justice Palmer's retirement from the court, Justice Burke has been substituted as the authoring judge.

¶ 1 Defendant Darnell Moton was arrested on November 4, 2011, and charged by information with, *inter alia*, the unlawful use or possession of a weapon by a felon (UUWF) in that he knowingly possessed a handgun after having previously being convicted of aggravated unlawful use of a weapon (AUUW) in case number 11 CR 0962501. He was subsequently convicted of UUWF following a jury trial and sentenced to five years' imprisonment.

¶ 2 On direct appeal, defendant contended that pursuant to *People v. Aguilar*, 2013 IL 112116, his UUWF conviction should be vacated because the underlying predicate felony of AUUW was void.

¶ 3 On June 19, 2015, we issued a Rule 23 order reversing defendant's UUWF conviction based on our conclusion that the underlying AUUW conviction was void *ab initio* under *Aguilar*. *People v. Moton*, 2015 IL App (1st) 123385-U. The State filed a petition for leave to appeal in the Illinois Supreme Court on July 20, 2015. In the interim, our supreme court issued *People v. McFadden*, 2016 IL 117424, *pet. for certiorari pending*, No. 16-7346 (U.S. Dec. 22, 2016), on June 16, 2016.

¶ 4 On September 28, 2016, the supreme court denied the State's petition for leave to appeal in this case and entered a supervisory order directing us to vacate our judgment and reconsider in light of *McFadden* to determine if a different result is warranted. In accordance with our supreme court's directive, we vacated our earlier judgment. We also allowed the parties to submit supplemental briefing. After reconsidering this case in light of *McFadden*, we find that a different result is warranted. Accordingly, we now affirm defendant's UUWF conviction.

¶ 5 In *Aguilar*, the Illinois Supreme Court held that the Class 4 form of the AUUW offense was facially unconstitutional because it violated the second amendment. *Aguilar*, 2013 IL 112116, ¶¶ 18-20, 22. In *People v. Burns*, 2015 IL 117387, ¶¶ 24-25, our supreme court further

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 the Class 4 or Class 2 forms of AUUW. Here, the record reveals that defendant was convicted of a Class 4 violation of section 24-1.6(a)(1), (a)(3)(A) (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)) in case number 11 CR 0962501.

¶ 6 In *McFadden*, 2016 IL 117424, ¶¶ 1, 8, 31, the defendant challenged his UUWF conviction on direct appeal based on *Aguilar*, as it was predicated on a prior conviction for AUUW. Our supreme court held that although *Aguilar* may provide a basis for vacating the defendant’s prior predicate AUUW conviction, *Aguilar* did not automatically overturn the prior AUUW judgment of conviction. The court reasoned that “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. In so holding, the court relied on the language of section 24-1.1(a) and the United States Supreme Court case *Lewis v. United States*, 445 U.S. 55 (1980), which interpreted a similar federal statute. *Id.* ¶¶ 22, 29. In *Lewis*, the defendant’s prior underlying felony conviction was unconstitutional as he was unrepresented by counsel, but the Supreme Court found that the federal felon-in-possession statute, which criminalized possession of a firearm by “any person who has been convicted \*\*\* of a felony,” nevertheless imposed liability based on the fact of having a felony conviction, regardless of whether that prior conviction was subject to collateral attack. *Lewis*, 445 U.S. at 60-61. Adopting this reasoning, the *McFadden* court held that as the UUWF statute requires the State to prove a defendant’s status as a felon, “the fact of a felony conviction without any intervening vacatur or other affirmative action to nullify the conviction triggers the firearms disability.” *McFadden*, 2016 IL 117424, ¶ 24.

¶ 7 Accordingly, in the present case, defendant's predicate conviction under the unconstitutional AUUW statute rendered defendant a felon when he possessed a firearm for purposes of the instant UUWF conviction. At the time defendant possessed a firearm, his prior conviction for AUUW was still valid, and this prior conviction has never been vacated, expunged, or collaterally attacked. Thus, because no court had vacated the prior AUUW conviction, his UUWF conviction must stand.

¶ 8 In his supplemental brief on appeal, defendant contends that his UUWF conviction must be reduced from a Class 2 to a Class 3 felony.

¶ 9 Subsection 24-1.1(a) of the UUWF statute provides that it is "unlawful for a person to knowingly possess on or about his person \*\*\* [a firearm] if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2010). Subsection 24-1.1(e) specifies that a "[v]iolation of this Section by a person not confined in a penal institution shall be a Class 3 felony \*\*\*. 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<sup>1</sup> \*\*\* is a Class 2 felony." 720 ILCS 5/24-1.1(e) (West 2010). The offense of AUUW falls under Article 24. See 720 ILCS 5/24-1.6(a)(1) (West 2010).

¶ 10 Defendant asserts that in *McFadden*, our supreme court interpreted the UUWF statute in line with the federal counterpart as set forth in *Lewis* and, as such, his prior, constitutionally invalid AUUW conviction cannot be used to both prove his felon status and to enhance punishment. He asserts this was not permissible under *Lewis*, *Burgett v. Texas*, 389 U.S. 109 (1967), and *United States v. Tucker*, 404 U.S. 443 (1972), which forbid the use of an invalid prior conviction to prove an element of an offense or for enhancement of punishment.

¶ 11 A panel of this court recently rejected a similar argument in *People v. Smith*, 2017 IL App (1st) 122370-B. There, the defendant argued that his UUWF conviction should be reduced from a Class 2 to a Class 3 felony because his prior AUUW conviction (based on the statute found unconstitutional in *Aguilar*) was used as the predicate offense for UUWF and to prove that his UUWF offense was a subsequent violation, which constituted improper enhancement of his sentence. *Id.* ¶ 30. The defendant in *Smith*, like defendant here, relied on *Burgett* and *Tucker* and *Lewis*'s discussion of those cases. *Id.* The *Smith* court cited with approval *Lewis*'s nuanced distinction of *Burgett* and *Tucker*, that is, the latter cases found a subsequent conviction or sentence unconstitutional where they depended on the reliability of a past uncounseled conviction, but the federal gun law prohibiting firearms possession by a felon which was at issue in *Lewis* did not focus on the reliability of the prior conviction, " '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.' " *Smith*, 2017 IL App (1st) 122370-B, ¶ 31 (quoting *Lewis*, 445 U.S. at 67).

¶ 12 The *Smith* court also found *People v. Easley*, 2014 IL 115581, instructive, as we do here. *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. In *Easley*, the defendant asserted that improper double enhancement occurred when his prior UUWF conviction was used to prove an element of his current UUWF offense and to elevate it to a Class 2 offense, and he was thus entitled to notification pursuant to section 111-3(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c) (West 2008)). *Easley*, 2014 IL 115581, ¶ 13. The supreme court held that "section 111-3(c) \*\*\* applies only when the prior conviction that would enhance the sentence is not already an element of the offense." *Id.* ¶ 19. Pursuant to section 24-1.1(a), it is unlawful for a person to possess a firearm if they have previously been "convicted of a felony under the laws of

this State or any other jurisdiction," and under section 24-1.1(e), "any second or subsequent violation shall be a Class 2 \*\*\*." (Emphasis omitted.) *Id.* ¶¶ 20-21 (quoting 720 ILCS 5/24-1.1(a), (e) (West 2008)). Based on these provisions, the court held that the notice provision did not apply because the State was not seeking to enhance the sentence with his prior conviction. *Id.* ¶ 22. Rather, the Class 2 sentence was "the only statutorily allowed sentence under" section 24-1.1(e) and the defendant could not have been given a Class 3 sentence. *Id.*

¶ 13 In *Smith*, the defendant stipulated to his felon status at the time of his UUWF conviction, and his prior AUUW conviction had never been vacated. *Smith*, 2017 IL App (1st) 122370-B, ¶ 32. The court held that pursuant to *Easley*, the defendant's prior AUUW conviction was an element of his UUWF offense and only one class of felony was possible under section 24-1.1(e). *Id.* Thus, the State did not impermissibly use the defendant's prior AUUW conviction to enhance his offense to a Class 2 felony. *Id.*

¶ 14 Based on the reasoning in *Easley* and *Smith*, we find that defendant is not entitled to have his Class 2 UUWF felony conviction reduced to a Class 3. Defendant's prior AUUW conviction was not used to prove both his felon status and enhance his punishment. Rather, like the defendant in *Smith*, it was an element of the UUWF offense and the only statutorily authorized sentence under section 24-1.1(e).

¶ 15 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 16 Affirmed.