



conviction. *People v. Carter*, 2014 IL App (1st) 123589-U (unpublished order under Supreme Court Rule 23).

¶ 3 On June 16, 2016, our supreme court decided *People v. McFadden*, 2016 IL 117424, *pet. for certiorari pending*, No. 16-7346 (U.S. Dec. 22, 2016), which involved a direct appeal from a UUW by a felon conviction predicated on the defendant's possession of a firearm at a time when he had previously been convicted of AUUW. The defendant in *McFadden* argued that *Aguilar* prevented the State's use of a prior AUUW conviction to establish the predicate for the UUW by a felon charge, notwithstanding that the prior conviction had been vacated. 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)) was unconstitutional as it violated the right to bear arms under the second amendment of the United States Constitution. Later, in *McFadden*, the court concluded that the defendant's status as a felon was not affected by *Aguilar* and that unless and until the prior conviction was vacated, his prior felony conviction precluded the defendant from possessing a firearm. *McFadden*, 2016 IL 117424, ¶ 31 ("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.").

¶ 4 In light of *McFadden*, the supreme court entered a supervisory order directing us to vacate the judgment in this case and reconsider it to determine if a different result was warranted. On November 18, 2016, we vacated our prior judgment. The parties filed supplemental briefs regarding *McFadden's* impact on this case. We briefly recite the pertinent facts.

¶ 5 The defendant was charged with UUW by a felon, (720 ILCS 5/24-1.1(a) (West 2008)), in that he knowingly possessed two .40 caliber Winchester rounds, after he had been previously convicted of AUUW, (720 ILCS 5/24-1.6(a)(1) and (a)(3)(A) (West 2008)), in case number 08 C6 60144.

¶ 6 At trial, the parties first stipulated to the defendant's prior felony conviction for AUUW in 2008. Detective Ostrowski testified that, on June 2, 2012, he and three other police officers went to the defendant's residence in Harvey, Illinois to execute a search warrant. When the police officers arrived at the apartment, the defendant was in the apartment with his brother and sister, who lived with him.

¶ 7 The defendant, who was in a bathroom, spoke with Detective Ostrowski and directed the detective to his bedroom, which the detective then searched. During the course of the search, Detective Ostrowski found two live .40 caliber bullets and one .40 caliber spent shell casing, both of which he inventoried and identified at trial.

¶ 8 The defendant was transported to the Harvey Police Department, where he was advised of his *Miranda* rights and signed a Notice of Rights form. He signed a written statement explaining that in January or February 2012 someone fired bullets into his bedroom window. Some of the bullet fragments were lodged in his wall. After the shooting, the defendant went to the front of his building near the sidewalk and found two .40 caliber bullets and one spent bullet shell casing on the ground which he decided to keep as "souvenirs." He kept the bullets and casing on his dresser and they remained there until the police officers came and removed them during their search. However, the police officers did not find a gun, box of ammunition, receipt or anything else connected with the bullets.

¶ 9 At the conclusion of the trial, the court found the defendant guilty. The trial court denied the defendant's motion for a new trial and sentenced him to two years' imprisonment.

¶ 10 In his supplemental brief, defendant argues that United States Supreme Court precedent requires that his UUI by a felon 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 contends that *McFadden* ignored these two cases even though they constitute binding authority, which would require that his conviction be vacated.

¶ 11 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* examined 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.*

¶ 12 Defendant argues that the *Aguilar* decision is entitled to the same retroactive effect and that the State's reliance on his prior AUUI 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.* He contends that our supreme court “ignored” *Montgomery*; however, the State points out that several months before the *McFadden* decision, McFadden filed a motion to cite *Montgomery* as additional authority, advancing the same arguments defendant presents here. The supreme court granted McFadden’s motion and considered the same arguments again in his petition for rehearing. The supreme court rejected McFadden’s argument concerning *Montgomery* both times.

¶ 13 In this case, *Montgomery* posed no constitutional impediment to affirmance of defendant’s U UW by a felon conviction, since he was not seeking to vacate his prior conviction. *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9. By contrast, in *Montgomery*, the defendant was challenging his unconstitutional mandatory life sentence. *Montgomery*, 577 U.S. at \_\_\_\_, 136 S. Ct. at 726-27. Furthermore, *Siebold* did not address whether the United States Constitution requires new substantive rules to have retroactive effect in cases on state collateral review. See *Montgomery*, 577 U.S. at \_\_\_\_, 136 S. Ct. at 731. Addressing precisely the same argument, the *Perkins* court agreed with the State that the Supreme Court’s holding in *Lewis v. United States*, 445 U.S. 55, 60-62 (1980), controlled the outcome. *Perkins*, 2016 IL App (1st) 150889, ¶ 9. In *Lewis*, the Court held that, if a defendant failed to vacate a prior felony conviction on grounds that it was unconstitutional, this failure would be “fatal to a challenge to a [subsequent] felon-in-possession conviction.” *Lewis*, 445 U.S. at 60-62.

¶ 14 Here, too, at the time of defendant’s U UW by a felon conviction, the parties stipulated that he had a prior AU UW conviction. As explained in *McFadden*, even if defendant was successful in later having his prior AU UW conviction vacated, “that remedy would neither alter nor extinguish the requirement under section 24-1.1(a) that defendant clear his felon status

*before* obtaining a firearm.” *McFadden*, 2016 IL 117424, ¶ 37 (citing 720 ILCS 5/24-1.1(a) (West 2008)). We affirm defendant’s UUI by a felon conviction because, as in *McFadden*, defendant failed to have his prior AUUI conviction set aside before he possessed a firearm on June 2, 2012. *McFadden*, 2016 IL 117424, ¶ 37.

¶ 15 Affirmed.