THIRD DIVISION
November 8, 2017

1-13-0556

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. 12 CR 16013
	)	
MARK STERLING,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment convicting defendant of unlawful use of a weapon by a felon and four counts of aggravated unlawful use of a weapon is affirmed in part and vacated in part; defendant's prior conviction for aggravated unlawful use of a weapon can serve as the predicate felony for a conviction for unlawful use of a weapon by a felon, even after the prior offense was declared unconstitutional, and trial counsel did not render ineffective assistance of counsel based on his failure to present a motion to suppress the handgun found in defendant's possession because such a motion was meritless and unlikely to succeed; therefore, the conviction for unlawful use of a weapon by a felon is affirmed; the State failed to prove an essential element of the charges for aggravated unlawful use of a weapon, therefore those convictions are vacated.

¶ 2 The State charged defendant, Mark Sterling, with unlawful use of a weapon by a felon and four counts of aggravated unlawful use of a weapon. Following a bench trial the circuit court of Cook County found defendant guilty of each of the five counts stated above, merged the four counts of aggravated unlawful use of a weapon into the conviction for unlawful use of a weapon by a felon, and sentenced defendant to four years' imprisonment. Defendant appeals, arguing the State failed to prove an element of the offense of aggravated unlawful use of a weapon by a felon. Defendant agues his prior conviction for aggravated unlawful use of a weapon may not serve as the predicate offense for a charge of unlawful use of a weapon by a felon because the statute defining the prior offense was void *ab initio*.

¶ 3 This court entered an order reversing defendant's conviction for unlawful use of a weapon by a felon on May 14, 2015. On September 28, 2016, our supreme court entered a supervisory order directing this court to reconsider its disposition in light of *People v. McFadden*, 2016 IL 117424, to determine if a different result is warranted. We granted defendant's motion for leave to file a supplemental brief based on our supreme court's supervisory order. We ordered the State to respond and allowed defendant to file a reply to the State's response. We later granted defendant's motion to cite *People v. Horton*, 2017 IL App (1st) 142019 as additional authority in support of his appeal. After considering our supreme court's decision in *McFadden*, the parties' supplemental briefing, and the additional authority cited by defendant, for the following reasons, we affirm defendant's conviction for aggravated unlawful use of a weapon by a felon and vacate defendant's convictions for aggravated unlawful use of a weapon.

¶ 4 BACKGROUND

¶ 5 On August 31, 2012, the State filed a 10-count information against defendant charging him with, *inter alia*, multiple violations of Article 24 of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1 *et seq.* (West 2012)). Specifically, as it pertains to this appeal, the State charged defendant with committing unlawful use or possession of a weapon by a felon (UUWF) in violation of section 24-1.1(a) (count 3), aggravated unlawful use of a weapon (AUUW) in violation of section 24-1.6(a)(1)/(3)(A) (count V), AUUW in violation of section 24-1.6(a)(1)/(3)(C) (count 6), AUUW in violation of section 24-1.6(a)(2)/(3)(A) (count 7), and AUUW in violation of section 24-1.6(a)(2)/(3)(C) (count 8).

¶ 6 Officer Frank Hasenfang testified at defendant's bench trial. Hasenfang is a police officer for the Chicago Police Department. On July 31, 2012, Officer Hasenfang was working with a partner, Officer Dennis Lanning. At approximately 12:45 a.m., Officer Hasenfang and his partner "responded to a call of a male with a gun" in the area of 6724 South Elizabeth Street in the city of Chicago. Officer Hasenfang testified he and his partner were given a description of a "male black who was larger in stature and had a handgun with a fixed laser he was pointing around." Officer Hasenfang testified that when he arrived he saw defendant, and he testified that defendant fit the description Officer Hasenfang was given. Officer Hasenfang testified that when he pulled up, defendant was amongst other individuals walking down the steps to the front porch at 6724 Elizabeth. Defendant looked in Officer Hasenfang's direction, turned around, and "made an adjusting movement to his waistband." Officer Hasenfang testified he then "[i]mmediately went after Mark Sterling." Officer Hasenfang caught up to defendant as defendant got to the door of the residence, at which time Officer Hasenfang conducted a pat-down search. He testified that when he caught up to defendant Officer Hasenfang believed defendant might be in possession of a weapon. The pat-down revealed an uncased and loaded handgun with an

attached laser sight. Officer Hasenfang placed defendant under arrest. On cross-examination, Officer Hasenfang testified that he did not see a bulge when he first saw defendant. Officer Hasenfang testified that he "saw [defendant] turn around and make an adjusting movement to his side and then try to make it back into the house. And by his actions and his demeanor" Officer Hasenfang thought defendant might have a gun. The State also entered evidence of defendant's statement that he lived at the address where he was arrested and evidence of a letter addressed to defendant at that address.

¶ 7 The parties stipulated that on July 31, 2012, defendant had been previously convicted of the felony offense of aggravated unlawful use of a weapon. The parties further stipulated that fact was being "offered for the limited purpose of demonstrating the elements that are required for the charges that are before the court."

¶ 8 Following closing arguments, the trial court found that it was very clear that defendant had possession of the gun found on his person. The court found defendant guilty of counts 3, 5, 6, 7, and 8. At defendant's sentencing hearing, the court ruled that all of the other convictions merge into count 3. The assistant state's attorney informed the court that he believed defendant had been convicted of a Class 2 felony for aggravated unlawful use of a weapon in 2009. The court sentenced defendant to four years' imprisonment.

¶ 9 This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant argues his conviction for unlawful use of a weapon by a felon (UUWF) under count III of the information must be vacated because the predicate felony forming the basis of that conviction—a 2009 conviction for the Class 4 felony of aggravated unlawful use of a

weapon (AUUW)—is void. This issue involves an interpretation of a statute, which presents a question of law subject to *de novo* review. *People v. McFadden*, 2016 IL 117424, ¶ 26.

¶ 12 Initially, we note that the State concedes the evidence failed to sufficiently establish that defendant was not on his own land when he possessed the weapon to prove the elements of AUUW charged in this case. Defendant argues that if this court vacates his conviction under count 3, this court should not remand the matter to the trial court for sentencing on counts 5, 6, 7, or 8 (the merged counts). We agree the evidence was insufficient to prove defendant was not on his own land when he possessed the weapon in this case, which was an element of the offenses charged in the merged counts. Therefore, defendant's convictions under those counts must be vacated. All that remains is defendant's conviction under count 3 for UUWF. Defendant argues that our supreme court found the statute defining the offense of AUUW for which he was convicted in 2009 void *ab initio* in *People v. Aguilar*, 2013 IL 112116 (modified upon denial of rehearing December 19, 2013) and, under the void *ab initio* doctrine, that conviction may not serve as the predicate felony for a conviction for UUWF. Alternatively, defendant argues that his trial counsel rendered ineffective assistance of counsel by failing to move to suppress the gun police seized from defendant's person. Defendant argues the failure to move to suppress the gun was not the result of trial strategy and prejudiced him because a motion to suppress the gun would have been meritorious and would have resulted in a different outcome of the trial. Defendant argues a motion to suppress would have been meritorious because Officer Hasenfang lacked a reasonable articulable suspicion that defendant was in possession of a gun before Officer Hasenfang performed the pat-down search.

¶ 13 We turn first to the issue of whether defendant's 2009 AUUW conviction can serve as the predicate felony for a subsequent charge of UUWF. If, as defendant suggests, the State failed to

prove the elements of UUWF because the predicate felony conviction in the information is void, then we have no need to address defendant's claim of ineffective assistance of counsel.

¶ 14 1. Whether a conviction for AUUW under the void provisions in section 24-1.1 of the Criminal Code may serve as the predicate felony for UUWF.

¶ 15 We note that Count 3 of the information charges defendant with having been previously convicted of a felony in case number 09CR1663101. The supplemental record contains an October 21, 2009 order of commitment and sentence to the Illinois Department of Corrections against defendant for one year in case number 09CR1663101. The October 2009 order of commitment states that the court found defendant guilty of count 4 of the charges against defendant. Count 4 of the 2009 information in the supplemental record charged defendant with unlawful possession of firearms and ammunition in violation of section 24-3.1(A)(1) of the Criminal Code of 1961 (720 ILCS 5/24-3.1(A)(1) (West 2008)); but the order of commitment states that the court found defendant guilty of aggravated unlawful use of a weapon in violation of section 24-1.6(A)(1), and that the offense was a Class 4 felony. Regardless, in this appeal, defendant nor the State disputes that the predicate felony used to convict defendant of UUWF in this case was AUUW, a Class 4 felony.

¶ 16 Our supreme court found the relevant portion of the AUUW statute (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2012)) to be unconstitutional in violation of the second amendment right to bear arms. *People v. Burns*, 2015 IL 117387, ¶ 25. Our supreme court has since addressed "whether a prior conviction, which is asserted to be based on a statute that has been subsequently declared facially unconstitutional, may nevertheless serve as proof of the predicate felony conviction in prosecuting the offense of [UUWF (720 ILCS 5/24-1.1(a) (West 2008))]." *McFadden*, 2016 IL 117424, ¶ 21. In *McFadden* the court found that "under section 24–1.1(a), it is immaterial whether the predicate conviction ultimately might turn out to be invalid for any

reason. [Citation.]" (Internal quotation marks omitted.) *Id.* ¶ 29. "[T]he UUW by a felon offense is a status offense, and the General Assembly intended that a defendant must clear his felon status before obtaining a firearm." *Id.* If a defendant has a judgment of a felony conviction that has not been vacated, even if the defendant could seek to vacate that conviction under the void *ab initio* doctrine, it is unlawful for him to possess a firearm under the UUWF statute. *Id.* ¶¶ 31-37. Therefore, under *McFadden*, a prior conviction under the void AUUW statute may serve as the predicate felony for a subsequent conviction for UUWF if the defendant has not moved to vacate the prior AUUW.

¶ 17 Nonetheless, defendant argues in the supplemental briefing filed in this case that binding precedent from the United States Supreme Court requires his conviction for UUWF be reversed. Alternatively, defendant argues that United States Supreme Court precedent *McFadden* addressed and adopted requires his conviction for UUWF be reduced to a Class 3 felony. Specifically, defendant argues that the Supreme Court's decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Ex parte Siebold*, 100 U.S. 371 (1879), mandate reversal of his conviction for UUWF based on a prior conviction under a void statute. In *Siebold*, the question was whether Congress had the constitutional power to enact the statutes under which the defendants in that case were convicted in federal district court. *Siebold*, 100 U.S. at 374. The Court wrote that "[a]n unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Siebold*, 100 U.S. at 376-77. The Court later applied that principle in *Montgomery*. In *Montgomery*, the issue was whether *Miller v. Alabama*, 567 U.S. 460 (2012), which held that a juvenile may not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and

purposes of juvenile sentencing, announced a substantive rule of law that had to be given retroactive effect upon a collateral review challenging the constitutionality of a juvenile sentence. *Montgomery*, 136 S. Ct. at 725, 731-32. The Court held 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. [Citation.] It follows, as a general principle, that 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." *Montgomery*, 136 S. Ct. at 731. Moreover, "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.*

¶ 18 Defendant argues this court must follow *Siebold* and *Montgomery* because the decision in *McFadden* is in direct contravention of those binding precedents from the United States Supreme Court, and because our supreme court failed to address either of them in *McFadden*. Defendant recognizes that another division of this court recently addressed a contention that the *McFadden* court "ignored" the decision in *Montgomery*. *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9. The *Perkins* court found that in *McFadden*, counsel had sought and was granted leave to cite *Montgomery*, and the State argued in *McFadden* (and in *Perkins*) that *Montgomery* posed no constitutional impediment to affirmance of the convictions at issue (which were challenged on the same grounds raised in this case)—a position with which the *Perkins* court agreed. *Perkins*, 2016 IL App (1st) 150889, ¶ 9. Before this court, defendant acknowledges that the *Perkins* court implied that because the defense cited *Montgomery* in *McFadden*, our supreme court did not ignore *Montgomery*, but defendant argues the *Perkins* court failed to address the central concern that "any mention of *Montgomery* or *Siebold* was missing from the *McFadden* decision itself." Moreover, defendant argues the *Perkins*' court's consideration of the applicability of *Siebold* and

Montgomery in this context was incomplete and incorrect in that it ignored those cases' express holdings. The State, in this case, reasserts its argument from *Perkins* that our supreme court did consider *Siebold* and *Montgomery* in deciding *McFadden* because the *McFadden* court granted the defendant's motion for leave to cite *Montgomery* as additional authority. The State has included that motion to cite additional authority and our supreme court's order thereon in its appendix to its supplemental brief, without filing a motion to supplement the record. Instead, the State argues this court may take judicial notice of briefs filed in other cases. We have no need to address whether the State properly brought the *McFadden* motion to cite additional authority before this court (notwithstanding the fact the authority on which it relied took judicial notice of briefs filed in the same court, not a different court), nor the *Perkins*' court consideration of the question, because based upon our own review we find defendant's argument fatally flawed.

¶ 19 We reject defendant's contention *McFadden* is in direct contravention of *Siebold* and *Montgomery*. Defendant states that because the AUUW statute criminalized constitutionally protected conduct, under *Siebold* and *Montgomery*, "the AUUW statute upon which [defendant] was convicted *** was void *ab initio*, meaning it is as though no such law had ever been passed and no such conviction ever existed." To reach defendant's proffered conclusion that a conviction under the void statute cannot serve as an element of the offense of UUWF, it is necessary to conclude that, in this context, because it is as though "no such conviction ever existed," it is also as though defendant was never subject to the firearm disability imposed by the fact of the prior, albeit void, conviction. Defendant cites nothing in *Siebold* or *Montgomery* to compel that conclusion. Defendant asserts that the United States Supreme Court "has never allowed a State to use a facially unconstitutional/void *ab initio* predicate to form the basis of a new offense." Yet, neither *Siebold* nor *Montgomery* involves an unconstitutional prior

conviction being used to prove an element of a subsequent offense; nor does defendant cite any authority that does. Defendant asserts this court must follow *Siebold* and *Montgomery* as binding precedent, but neither case actually stands for the proposition defendant argues we must follow. The issue presented here is whether, as a result of being convicted under a statute later declared unconstitutional, defendant's status as a felon automatically changes and therefore removes a statutory disability from possessing a firearm. Our supreme court rejected the precise argument that a void conviction cannot form the basis of a firearm disability enforced by a criminal penalty. *McFadden*, 2016 IL 117424, ¶ 34 ("with respect to due process, the legislature 'could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm.' [Citation.] As explained, nothing in the UUW by a felon statute prevents a defendant who believes his prior conviction is invalid from seeking a remedy for the deprivation of a guaranteed right. The remedy is to challenge the judgment of conviction and have the unlawful judgment of conviction set aside before deciding to possess a firearm"). Our supreme court found that "the void *ab initio* doctrine renders a facially unconstitutional statute unenforceable and renders a conviction under that facially unconstitutional statute subject to vacatur." *McFadden*, 2016 IL 117424, ¶ 20. That the AUUW statute is void *ab initio* is given; the question is the effect of that determination on persons who were convicted under that statute who subsequently possess firearms. Defendant does not, and cannot, assert that either *Siebold* or *Montgomery* answers that question. On the contrary, our supreme court answered the question in *McFadden*, holding that that the effect of the determination that the AUUW statute is void *ab initio* on persons previously convicted under that statute who subsequently possess firearms is only to provide a basis for vacating the prior conviction, but not to automatically remove the firearm disability. *Id.* ¶ 31. Further, *Siebold* and

Montgomery are inapposite because this case does not involve conviction under a void statute or a constitutionally infirm sentence. *Cf. Siebold*, 100 U.S. at 374; *Montgomery*, 136 S. Ct. at 727. It is the necessity of seeking vacatur prior to possessing a firearm under these circumstances which *Siebold* and *Montgomery* fail to address that is fatal to defendant's argument. See *McFadden*, 2016 IL 117424, ¶ 37 ("defendant may seek to vacate his prior 2002 conviction for AUUW under the void *ab initio* doctrine ***. Nevertheless, even if successful, 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.").

¶ 20 Here, defendant had not moved to vacate his 2009 conviction for AUUW at the time he possessed a firearm on July 31, 2012; therefore, it was unlawful for defendant to possess a firearm on his person, or on his land or in his own abode. 720 ILCS 5/24-1.1(a) (West 2012). Accordingly, defendant's conviction for UUWF is affirmed. We turn next to defendant's argument this conviction must be reduced to a Class 3 felony.

¶ 21 Our supreme court relied on the United States Supreme Court's interpretation of the federal felon-in-possession-of-a-firearm statute in *Lewis v. United States*, 445 U.S. 55 (1980), to provide guidance in interpreting the UUWF statute. *McFadden*, 2016 IL 117424, ¶ 28. Specifically, our supreme court stated that it saw "no reason to treat the interpretation of section 24-1.1(a) differently than the Supreme Court's interpretation of the similar federal statute in *Lewis*." *Id.* ¶ 28. Defendant argues that under *Lewis*, although a prior invalid conviction may be used to prove defendant's status as a felon, an invalid conviction may not be used "to prove an element of an offense or for enhancement of punishment." Defendant argues the same construction should apply to the UUWF statute, and that, in this case, his AUUW conviction was used not only to prove his felon status but also to enhance the UUWF offense from a Class 3

felony to a Class 2 felony. Section 24-1.1 of the Criminal Code reads, in pertinent part, as follows:

> (a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction.
>
> * * *
>
> (e) Violation 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 *** is a Class 2 felony." 720 ILCS 5/24-1.1 (West 2012).

¶ 22 In *Lewis*, the United States Supreme Court addressed whether a conviction obtained in violation of the sixth amendment right to counsel could serve as the predicate for a subsequent conviction under a federal statute prohibiting persons who have been convicted by a state court of a felony from possessing a firearm. *Lewis*, 445 U.S. at 56. The defendant in *Lewis* based his attack on his conviction under that federal statute on, *inter alia*, *Burgett v. Texas*, 389 U.S. 109 (1967), and *United States v. Tucker*, 404 U.S. 443 (1972). The *Lewis* Court found that in *Burgett*, the Court held that a conviction obtained in violation of the right to counsel could not be used to enhance punishment under a state's recidivist statute. *Lewis*, 445 U.S. at 59 (citing *Burgett*, 389 U.S. at 115-16). In *Burgett*, the sentencing enhancement was found in a separate sentencing statute other than the statute defining the offense. *Burgett*, 389 U.S. at 110 n 1-3. There, evidence of the fact of the defendant's prior void conviction was adduced before the jury,

but the trial court in that case later instructed the jury to disregard that evidence for any purpose whatsoever. *Id.* at 112-13. The *Burgett* court wrote that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense [citation] is to erode the principle of that case." *Burgett*, 389 U.S. at 115. The Court held that "[t]he admission of a prior criminal conviction which is constitutionally infirm *** is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *Id.* at 115. In *Tucker*, the trial judge, exercising discretion, sentenced the defendant based, in part, on his background, which included two convictions that had been obtained in violation of the right to counsel. *Tucker*, 404 U.S. at 447. The *Tucker* Court followed *Burgett* and affirmed the lower court's decision remanding the case to the trial court for reconsideration of the defendant's sentence without taking into account the void convictions. *Id.* at 449.

¶ 23 Before this court, defendant asserts that the *Lewis* court "stated *** that its holding was consistent with" *Burgett* and *Tucker*; therefore, defendant argues, our supreme court's interpretation of the UUWF statute must also be construed consistently with *Burgett* and *Tucker*; thus, defendant argues, the void AUUW conviction may not be used to increase his punishment. Since the mere act of possession of a weapon by a felon is a Class 3 offense that is only a Class 2 offense if the prior felony was AUUW (or another enumerated offense), defendant argues his prior AUUW increased his punishment for the offense from a Class 3 felony to a Class 2 felony. In *Lewis*, the Court found as follows:

> "Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with

> *Burgett* [or] *Tucker* ***. In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. *** Moreover, unlike the situation in *Burgett*, the sanction *** attaches immediately upon the defendant's first conviction." *Lewis*, 445 U.S. at 67.

¶ 24 The *Lewis* Court stated that it recognized "that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes. See *Burgett* [and] *Tucker* ***, *supra*." *Lewis*, 445 U.S. at 66. "The Court, however, has never suggested that an uncounseled conviction is invalid for all purposes. [Citations.]" *Id.* at 66-67. The decisions in *Burgett* and *Tucker* were concerned with subsequent convictions that "depended upon the reliability of a past uncounseled conviction." *Lewis*, 445 U.S. at 67. However, the *Lewis* Court found that "[e]nforcement of [an] essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment,' [citation] on the basis of a conviction that is unreliable when one considers Congress' broad purpose." See *Lewis*, 445 U.S. at 67. "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66. Our supreme court's holding that a prior conviction under the void AUUW statute can be used to prove an element of the offense of UUWF (*McFadden*, 2016 IL 117424, ¶ 37 ("defendant's prior conviction properly served as

proof of the predicate felony conviction for UUW by a felon")) is consistent with the decision in *Lewis* in that use of the void conviction to prove an element of the status offense of UUWF does not violate *Burgett* or *Tucker*. The court found that "as with the federal statute, the UUW by a felon statute is not concerned with prosecuting or enforcing the prior conviction. Rather, the legislation is concerned with 'the role of that conviction as a disqualifying condition for the purpose of obtaining firearms.' [Citation.]" *McFadden*, 2016 IL 117424, ¶ 29. Nor is the classification of the offense as a Class 2 felony "concerned with prosecuting or enforcing the prior conviction."

¶ 25 As to whether that classification amounts to an enhancement of the penalty for possession of a weapon by a felon, we find our supreme court's decision in *People v. Easley*, 2014 IL 115581, cited by the State, instructive. Defendant argues the State's reliance on *Easley* is misplaced because *Easley* addressed "terms of art" in Illinois sentencing that do not mean the same as similar words used in *Lewis*, *Burgett*, and *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016), in which the United States Supreme Court reaffirmed is holding in *Burgett*. We disagree with defendant's characterization of *Easley* in this way. In *Easley*, the defendant argued, in part, that he was "subjected to improper double enhancement" (*Easley*, 2014 IL 115581, ¶ 27) "where the same prior felony conviction was used both to prove an element of the offense and to elevate the class of offense to a Class 2 offense and impose a harsher sentence" (*id.*). The *Easley* court agreed with the State in that case that the defendant's "prior conviction was used only as an element of the offense, and he received the only class of offense and sentence he could receive." *Id.* ¶ 28. The court reasoned that the defendant erroneously assumed he was charged and convicted of a Class 3 offense and sentenced as a Class 2 offender. *Id.* Instead, the defendant was "charged, convicted, and sentenced as a Class 2 offender." *Id.* Thus, the "prior conviction

*** was used only once, as an element of the offense, and not also to enhance the offense." *Id.* Defendant argues *Easley* is inapplicable to this situation because our supreme court found no "double enhancement," but "double enhancement" "is a term of art in Illinois that refers to the use of a single factor as both an element of an offense and as a basis for imposing a harsher punishment." Instead, defendant argues, section 24-1.1(e) is "a recidivist sentencing/repeat offender law under the United States Supreme Court's use of the term." We disagree with defendant's assertion section 24-1.1(e) is a "recidivist statute."

¶ 26 Defendant's argument that the prior AUUW conviction was used to increase his penalty for possessing a firearm while his status was that of a felon (because he had not sought to vacate his void conviction) fails under *Lewis* and *Easley* because the trial court did not rely on the reliability of that prior conviction to impose a harsher sentence; rather, the fact of that prior conviction was merely an element of the offense, which the legislature classified as a Class 2 felony leaving the trial court with no option but to sentence defendant as a Class 2 felon. See *People v. Powell*, 2012 IL App (1st) 102636, ¶ 12. The State charged defendant with unlawful use of a weapon "in that he, knowingly possessed on or about his person any weapon prohibited by section 24-1 of this Code, to wit: a firearm *** after having been previously convicted of the felony offense of aggravated unlawful use of a weapon." Thus, defendant's prior conviction for AUUW "was already included as an element of the charged offense, and section 24-1.1(e) clearly dictates that the crime is a Class 2 offense." *Id.* ¶ 26. "The flaw in defendant's reasoning is that the sentencing court did not determine that defendant committed a Class 2 felony; the General Assembly made that determination in enacting section 24-1.1(e)." *Powell*, 2012 IL App (1st) 102363, ¶ 12. "Thus, by sentencing the defendant according to section 24-1.1(e), the trial court simply imposed the 'penalty range established by the legislature for defendant's conduct'

rather than 'impermissibly enhanc[ing] defendant's penalty.' [Citation.]" *Easley*, 2014 IL 115581, ¶ 29 (quoting *Powell*, 2012 IL App (1st) 102363, ¶ 12).

¶ 27 Defendant relies on *Baldasar v. Illinois*, 446 U.S. 222, 223 (1980), overruled by *Nichols v. United States*, 511 U.S. 738 (1994), for its characterization of a provision of the Illinois theft statute as a "repeat-offender statute." There, the Court reversed a conviction where the defendant was sentenced to a term of imprisonment only because the defendant had been convicted in a previous prosecution, but the previous conviction was invalid because the defendant was not represented by a lawyer and did not formally waive his right to counsel. *Baldasar*, 446 U.S. at 223. See also *id.* at 228 (Marshall, J., concurring) ("a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute"). That decision was later reversed. See *Nichols*, 511 U.S. at 749 ("an uncounseled misdemeanor conviction, valid *** because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction"). Defendant's reliance on *Baldasar* for its characterization of the theft statute is misplaced. That court did not consider whether the sentencing provision in the theft statute was an element of the offense that was charged against the defendant. *Cf. Easley*, 2014 IL 115581, ¶¶ 22, 28. As stated above, the fact of defendant's AUUW conviction was an element of the offense of UUWF. Further, as the Court itself later noted, "[t]he *per curiam* opinion in *Baldasar* provided no rationale for the result; instead, it referred to the 'reasons stated in the concurring opinions.' [Citation.]" *Nichols*, 511 U.S. at 743-44. We find that *Baldasar*'s characterization of the theft statute is inapposite.

¶ 28 The fact of a prior void conviction did not in any way enhance defendant's sentence. Rather, as our supreme court has held, defendant's status as a felon was unchanged by the

determination that the AUUW statute was void *ab initio*. Defendant had to clear his felon status to remove the firearm disability, which he did not do. The fact he did not, which is an element of the offense of UUWF, made defendant guilty of a Class 2 offense. Defendant was properly convicted and sentenced for the Class 2 offense of UUWF. Finally, because State failed to prove an essential element of the merged offenses, defendant's convictions under counts 5, 6, 7, and 8 are vacated. In light of the foregoing disposition, we turn to defendant's argument he received ineffective assistance of counsel based on his attorney's failure to move to suppress the gun found in his possession.

¶ 29 2. Whether trial counsel rendered ineffective assistance of counsel by failing to move to suppress the gun police seized from defendant's person.

¶ 30 Defendant argues trial counsel was ineffective in failing to move to suppress the firearm Officer Hasenfang seized from him. "Where the facts relevant to an ineffective assistance of counsel claim are not disputed, our review is *de novo*." *People v. Falco*, 2014 IL App (1st) 111797, ¶ 14.

> "Ineffective assistance of counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that defendant's trial counsel provided ineffective assistance, he must show that counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and that absent this deficient performance, there was a reasonable probability that the outcome of the proceeding would have been different. [Citation.] A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. [Citation.]" *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 27.

¶ 31 Defendant argues that it was objectively unreasonable for trial counsel not to move to suppress the firearm because Officer Hasenfang lacked a reasonable, articulable suspicion to stop defendant or to conduct a pat-down search, and that this deficient performance prejudiced him because he would have been acquitted had the firearm been suppressed.

> "[W]hen a defendant alleges that counsel failed to file a motion to suppress, he must show, 'first, a reasonable probability that the motion would have been granted and, second, that the outcome of the trial would have been different if the motion had been granted.' [Citation.] Counsel is not required to make futile motions in order to provide effective assistance. [Citation.]" *Id.* ¶ 28.

In this circumstance it is therefore appropriate to address the merits of the underlying claim—here, that Officer Hasenfang lacked a reasonable articulable suspicion that defendant was in possession of a gun before Officer Hasenfang seized defendant and performed a pat-down search—to determine whether such a claim had a reasonable likelihood of success. *Id.*

¶ 32 In this case, a person called 9-1-1 and reported that a man was waving a gun that had a laser scope. The caller provided an exact address, described with particularity what was happening including a description of the gun, and provided a description of defendant's physical appearance. Defendant argues (1) the "tip" police received of a man waving a gun lacked enough detail to be reliable and therefore did not give Officer Hasenfang enough justification to stop and search defendant, and (2) Officer Hasenfang did not witness any suspicious behavior to justify stopping defendant. "When an officer justifiably believes that the individual whose suspicious behavior he or she is investigating at close range is armed and dangerous, the officer *** may conduct a pat down search for a weapon." *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 23. "This is an objective standard that is satisfied if, in light of the totality of the

circumstances, a reasonably prudent person in that situation would believe that his or her safety or the safety of others is in danger. [Citation.]" *People v. Fox*, 2014 IL App (2d) 130320, ¶ 13. This "objective test" can be fulfilled only by specific, articulable circumstances. *Id.* ¶ 25. "Despite the objectiveness of the test, the officer's subjective beliefs and experiences may be taken into account." *Id.* Such circumstances which present potentially dangerous situations include "where the officer is outnumbered or the suspects are making furtive motions that could be consistent with holding a weapon or another dangerous object." *Id.* ¶ 21.

¶ 33 We granted defendant's motion to cite *Horton*, 2017 IL App (1st) 142019, as additional authority. In *Horton*, the court reversed a conviction for armed habitual criminal on the grounds the trial court should have granted the defendant's motion to quash arrest and suppress evidence. *Horton*, 2017 IL App (1st) 142019, ¶ 4. There, an officer testified he saw a metallic object in the defendant's waistband as the officer was driving by what he believed was defendant standing outside his own home. The defendant entered the home when he saw police. Police entered the home, where a gun was recovered near where police found the defendant. *Id.* ¶¶ 22-24. The *Horton* court found that the police officer lacked probable cause for the warrantless entry into the home. *Id.* ¶ 50. The court held: "Post-*Aguilar*, the possible observation of a handgun is not in itself, without any other evidence of a crime, sufficient to provide an officer with probable cause for arrest. We have reviewed the record and have found the evidence established no basis for probable cause other than a hunch that the metallic object might be a handgun, nor does the State provide a different basis for probable cause." *Id.* The court also found that the entry into the home was not justified under *Terry*. *Id.* ¶¶ 66, 74. Defendant argues *Horton* supports his argument that his act of turning around when he saw police did not give Officer Hasenfang a reasonable, articulable suspicion to stop defendant and conduct a pat-down search. See *id.* ¶ 74

("absent any other information tending toward an individualized suspicion that the defendant was involved in the crime, deliberate evasive conduct alone does not support a reasonable suspicion"). Defendant also argues that *Horton* supports his conclusion that the description Hasenfang received was insufficient and "could have easily fit any number of people." See *id.* ¶ 71.

¶ 34 We find that given the totality of the circumstances Officer Hasenfang justifiably believed defendant was armed and dangerous when he seized defendant and conducted the pat-down search. We must assess whether the totality of the circumstances would cause a reasonably prudent person in that situation to believe that his or her safety or the safety of others was in danger. *Fox*, 2014 IL App (2d) 130320, ¶ 13. Based on all of the available information Officer Hasenfang could reasonably believe that defendant had a gun and that the safety of others was in danger. We look to the United States Supreme Court's decision in *Florida v. J.L.*, 529 U.S. 266 (2000), for guidance. There, the Court held that an anonymous tip must bear "standard indicia of reliability in order to justify a stop." *Id.* at 274. However, in that case, "[a]part from the tip, the officers had no reason to suspect [the defendant] of illegal conduct." *Id.* at 268. The Court noted that in *J.L.*, "the officers' suspicion that [the defendant] was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller." *Id.* at 270. This case is readily distinguishable where Officer Hasenfang testified that defendant's movements after they arrived combined with the caller's report that a person matching defendant's description had been waving a gun around caused Officer Hasenfang to suspect defendant was in possession of a weapon. We note that defendant's assertion on appeal, that the description provided of the person with the gun was insufficient to create a reasonable suspicion defendant was armed because "there were likely

many men in the area that also met the description," is based on nothing more than speculation. Officer Hasenfang testified that defendant matched the description he was given, and defendant has provided no factual or legal basis to question that testimony. Thus, defendant has failed to show that a motion to suppress on the basis of the inadequacy of the description had a reasonable probability of success. *Bowen*, 2015 IL App (1st) 132046, ¶ 28. We also find defendant's reliance on *Horton*, 2017 IL App (1st) 142019, ¶ 71, to be misplaced. The *Horton* court cited statistics showing that "Black Chicagoans were subjected to 72 percent of all stops even though this demographic constitutes just 32 percent of the city's population" (*id.*) as part of its discussion of the weight to be given "deliberate evasive conduct" in the reasonable suspicion calculus. *Id.* ¶¶ 71-74. Nothing in the *Horton* court's discussion has any bearing on Officer Hasenfang's testimony that under the particular circumstances presented at the time of defendant's arrest defendant matched the description he received or the weight to be given generally to testimony that an individual matches a description.

¶ 35 Moreover, we do not agree with defendant's premise that the information provided by the call to police lacked suitable corroboration to provide reasonable suspicion to make the investigatory stop. See *id.* at 270 ("there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' [Citation.]"). The Supreme Court did not define was constitutes suitable corroboration in *J.L.*, but it did clarify that the question is whether there are facts demonstrating that a tip is "reliable in its assertion of illegality." *Id.* at 272. The reliability of information pertaining specifically to illegality can be demonstrated by corroborating facts demonstrating that the tipster has inside knowledge about the suspect. In *Alabama v. White*, 496 U.S. 325, 329 (1990), the Court found that only "after police observation showed that the informant had

accurately predicted [the suspect's] movements *** did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion [the suspect was in possession of cocaine.]" *J.L.*, 529 U.S. at 270 (citing *White,* 496 U.S. at 332). However, the Court did not hold that "predictive information," which the Court held provides only "moderate indicia of reliability," is the only "means to test the informant's knowledge or credibility." *Id.* at 271. See *Navarette v. California*, 134 S. Ct. 1683, 1692 (2014) ("Although the indicia present here are different from those we found sufficient in *White,* there is more than one way to demonstrate 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' [Citation.]"). In *Navarette,* the Court held "the indicia of the 9-1-1 caller's reliability here are stronger than those in *J.L.*, where we held that a bare-bones tip was unreliable." *Navarette,* 134 S. Ct. at 1692. Defendant asserts the case before us "is much more similar to *J.L.*" than to *Navarette*. In terms of indicia of reliability of the anonymous caller's information, we disagree.

¶ 36 The *Navarette* Court addressed a similar question to that defendant raised in this court: "whether the 9-1-1 call was sufficiently reliable to credit the allegation" of criminal activity. *Id.* at 1688. The Court held that "the call bore adequate indicia of reliability for the officer to credit the caller's account," and therefore the officer was justified in proceeding from the premise that the suspect had done what the caller said he had done. *Id.* at 1688-89. We find similar indicia of reliability on which the *Navarette* court relied are present in this case; therefore, we hold Officer Hasenfang reasonably suspected defendant was armed and had pointed his gun around based on the tip and his observations. First, the *Navarette* Court found that by reporting specific information about the suspect (including giving a detailed description of his vehicle including a license plate number and the location of their encounter) and what he had done, "the caller

necessarily claimed eyewitness knowledge of the [suspect's] alleged [activity.]" *Id.* at 1689. "That basis of knowledge lends significant support to the tip's reliability." *Id.* In this case, defendant argues the caller provided "only a very vague description of a black man of large stature." We find the caller provided additional details which "necessarily claimed eyewitness knowledge" of defendant's conduct. The caller provided an exact address, described with particularity what was happening including a description of the gun, and provided a description of defendant's physical appearance. We can reasonably infer from the type of information the caller provided that the basis of the caller's knowledge was personal observation. "That basis of knowledge lends significant support to the tip's reliability." *Id.* Defendant argues the caller in *Navarette* provided much greater detail than is present in this case. However, an important fact lending credibility to the caller's information in this case is the fact that the basis of the caller's knowledge is personal observation, not just the level of detail in the report. See *id.* ("This is in contrast to *J.L.*, where the tip provided no basis for concluding that the tipster had actually seen the gun."). In this case, the detailed description of defendant's conduct, the gun, and the precise location the caller provided are bases for concluding that the caller had actually seen the gun.

¶ 37 Second, the *Navarette* Court found there was reason to think the 9-1-1 caller was telling the truth because the "timeline of events suggests that the caller reported the incident soon after" it occurred. *Id.* The caller in *Navarette* had reported a possible drunk driver, and police located the vehicle 19 miles south of the location of its encounter with the caller 18 minutes after the call. *Id.* The court held "[t]hat sort of contemporaneous report has long been treated as especially reliable." In this case, the caller reported defendant at a particular address and when police arrived defendant was still at that address. While the facts in this case are not *as* indicative of a contemporaneous call to police as those in *Navarette*, the fact defendant was still

at the location the caller reported him to be suggests at minimum that the report of defendant's activity was not remote in time, which weighs in favor of the caller's veracity. See *id.* at 1689 ("There was no indication that the tip in *J. L.* (or even in *White*) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.").

¶ 38 Third, the *Navarette* court found that [a]nother indicator of veracity is the caller's use of the 9-1-1 emergency system. *Id.* The court found that "a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id.* at 1690. Defendant argues there is no evidence in the record about where the information relayed to Officer Hasenfang came from, and the State offers no evidence to explain how it knows that calls by a dispatcher are more likely to come from 9-1-1 than some other source. We find that because the information came from a police dispatcher, it is objectively reasonable to infer that the report of the man with the gun was received through the 9-1-1 system; therefore, Officer Hasenfang could reasonably rely on the veracity of the report. The veracity of calls to the 9-1-1 system is not based on the fact the caller dialed 9-1-1, but on the fact the system has "features that allow for identifying and tracing callers" and the "opportunity to identify [a] false tipster's voice and subject him to prosecution." *Navarette*, 134 S. Ct. at 1689-90. Given those safeguards "a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id.* at 1690. "The caller's use of the 9-1-1 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 9-1-1 call." *Id.* Regardless of how the information came to the police dispatcher there can be no reasonable dispute it was relayed to Officer Hasenfang through official channels rather than by a confidential informant. We see no reason why the same rationale that make a caller's use of

the 9-1-1 system a relevant circumstance in assessing whether an officer's reliance on the information being reported is justified should not apply when information is obtained and relayed to police through formal methods for reporting criminal activity.

¶ 39 We hold that Officer Hasenfang could reasonably rely on the information reported to police that a man fitting defendant's description was waving a gun at the address provided. Under the facts of this case, we do not hold that the call to police alone gave rise to a reasonable articulable suspicion of criminal activity by defendant because Officer Hasenfang testified that he also relied on his observations of defendant, specifically defendant's movements at his waistband, to form his suspicion defendant was armed. We reject defendant's argument that nothing Officer Hasenfang saw provided a reasonable suspicion for his seizure and frisk of defendant, when what the officer saw is considered under the totality of the circumstances. Defendant argues there "is nothing suspicious about [defendant] adjusting his waistband *in the absence of anything suggesting that he did this because he was carrying a gun*." (Emphasis added.) We have found that there was something reliable suggesting that defendant was carrying a gun other than defendant adjusting his waistband. *Supra* ¶¶ 37-40. Therefore, this case is distinguishable from *Horton*, where the court found that the officer had no basis for a *Terry* stop because "his differing stories about what he saw did not constitute specific and articulable facts." *Horton*, 2017 IL App (1st) 142019, ¶ 66. The *Horton* court was particularly concerned that the officer's "testimony at trial—that he saw a bulge under Horton's shirt that 'had the characteristics of a weapon' and 'appeared' to be a weapon—was absent from his preliminary hearing testimony." *Id.* ¶ 62. In this case, the additional facts known to the officer include the detailed report to police of defendant's location, appearance, and conduct. Here, unlike *Horton* (see *id.* ¶ 74), in light of the totality of the circumstances (the report to police), the fact defendant

made an adjusting move to his waistband was an additional fact from which Officer Hasenfang could rationally infer defendant was carrying a weapon.

¶ 40 "[I]t is axiomatic that law enforcement officers may conduct warrantless investigatory stops where the officer 'can point to specific, articulable facts that, when combined with rational inferences derived therefrom, create reasonable suspicion that the person seized has committed or is about to commit a crime.' [Citations.]" *People v. Wells*, 403 Ill. App. 3d 849, 855-56 (2010). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *People v. Sorenson*, 196 Ill. 2d 425, 433 (2001). Here, Officer Hasenfang had received a report of an individual pointing a gun around at a particular location and defendant matched the description provided at the location provided. Then, Officer Hasenfang saw defendant make a movement that could be consistent with possession of a weapon. These are specific circumstances that would lead a reasonably prudent person to believe defendant was in possession of a firearm. Officer Hasenfang could reasonably believe that defendant had a gun and that the safety of others was in danger. We hold that based on the information provided to police and Officer Hasenfang the brief investigatory stop and pat-down search of defendant were proper. There is no reasonable probability a motion to suppress the gun found during the pat-down search would have been granted. "Counsel is not required to make futile motions in order to provide effective assistance." *Bowen*, 2015 IL App (1st) 132046, ¶ 28. Therefore, Defendant cannot prove that his trial counsel's performance fell below an objective standard of reasonableness. Accordingly, defendant's claim of ineffective assistance of counsel must fail.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, the circuit court of Cook County is affirmed in part and vacated in part.

¶ 43 Affirmed in part, vacated in part.