FIRST DIVISION
December 31, 2014

No. 1-13-2202
2014 IL App (1st) 132202-U

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. 10 CR 17394
	)	
CENQUE SOMERVILLE,	)	Honorable
	)	Timothy J. Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: Defendant's conviction for armed habitual criminal must be reversed where the predicate convictions are void *ab initio*.

¶ 1 Following a bench trial, defendant Cenque Somerville was convicted of being an armed habitual criminal and sentenced to six and a half years in prison. On appeal, defendant contends that his conviction for being an armed habitual criminal cannot stand because the State used two void prior convictions, aggravated unlawful use of a weapon and unlawful use or possession of a weapon by a felon, as predicate offenses when proving the elements of armed habitual criminal. For the following reasons, we agree and reverse.

¶ 2 The State charged defendant with one count of being an armed habitual criminal, four counts of unlawful use or possession of a weapon by a felon, and six counts of aggravated unlawful use of a weapon, stemming out of an incident that occurred on September 1, 2010, in which police officers allegedly observed defendant flee a car with a gun in his hand. The police officers pursued defendant, saw him toss an object right before he was apprehended, and then recovered a handgun from the sidewalk by a nearby dumpster. The armed habitual criminal count was premised on defendant's prior aggravated unlawful use of a weapon (AUUW) conviction in case number 08 CR 11235, and his prior unlawful use or possession of a weapon by a felon (UUWF) conviction in case number 08 CR 2995.

¶ 3 At the close of defendant's bench trial, the trial court stated "[t]here will be a finding of guilty on all counts, 1 through 11," but found that counts 2 through 11 "will merge into Count 1. There will be a finding of guilty of the offense of armed habitual criminal." Defendant was sentenced to 78 months in prison.

¶ 4 On appeal, defendant contends that his armed habitual criminal conviction must be reversed because his two prior qualifying offenses are now void. As of 2008, the time of defendant's two prior offenses in case numbers 08 CR 11235 and 08 CR 2995, the UUWF statute prohibited a person from carrying or concealing on or about his person, or in any vehicle, a firearm except when on his land or in his abode or fixed place of business (720 ILCS 5/24-1(a)(4) (West 2010)), while the AUUW statute prohibited the same with any of various additional factors, including that the firearm was uncased, loaded, and immediately accessible. 720 ILCS 5/24-1.6(a)(3)(A) (West 2010).

¶ 5 In *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012), the United States Court of Appeals for the Seventh Circuit found the UUWF and AUUW statutes unconstitutional. The Seventh

Circuit found that the "right to bear arms for self-defense * * * is as important outside the home as inside," and that the UUWF and AUUW statutes create a "uniquely sweeping ban." *Moore*, 702 F. 3d at 940. The Seventh Circuit noted that the UUWF and AUUW statute created a "flat ban on carrying ready-to-use guns outside the home." *Id*. The Seventh Circuit remanded the case to the federal district court, but stayed its mandate to "allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public." *Id*. at 942. The General Assembly has since amended the UUWF and AUUW statutes pursuant to *Moore*. Pub. Act 98-0063 (eff. July 9, 2013).

¶ 6 Both parties acknowledge that in *People v. Aguilar*, 2013 IL 112116, our supreme court decided to follow *Moore*, holding that "on its face, the Class 4 form of section 4-1.6(a)(1), (a)(3)(A), (d) violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution." *Aguilar*, 2013 IL 112116, ¶¶ 20, 22. Since *Aguilar*, this court has considered the issue raised here: whether a conviction may stand where the defendant's predicate felony is a version of UUWF or AUUW that is unconstitutional under *Aguilar*.

¶ 7 In *People v. McFadden*, 2014 IL App (1st) 102939, *appeal allowed*, No. 117424 (Ill. May 28, 2014), we vacated a UUWF conviction where the predicate felony was Class 4 AUUW, agreeing with the defendant that "under *Aguilar*, the State could not rely on this no-void conviction to serve as a predicate offense for UUW by a felon. Therefore, it failed to prove an essential element of the offense." *Id*. ¶ 38. Because the prior felony conviction was an element of UUWF that had to be proven beyond a reasonable doubt by the State, we held that a void conviction for the Class 4 form of AUUW, found unconstitutional in *Aguilar*, could not serve as a predicate offense. *Id*. In *McFadden*, we found that because the defendant's case was pending

on direct appeal, we could not ignore *Aguilar*'s effects on his conviction for UUW by a felon, but we refrained from vacating his previous AUUW conviction and declined to address whether formal proceedings for collateral relief may be available to defendant to vacate that conviction. *Id*. ¶¶ 41, 44.

¶ 8 In *People v. Fields*, 2014 IL App (1st) 110311, the defendant argued, as defendant does in this case, that his armed habitual criminal conviction must be reversed in light of *Aguilar*. Specifically, the defendant contended that his prior conviction for Class 4 AUUW was now void under *Aguilar*, and thus the State could not rely on it as a predicate offense. *Id*. ¶¶ 38-39. This court held that we could not allow defendant's 2005 Class 4 AUUW conviction, which we now know to be based on a statute that was found unconstitutional and void *ab initio* in *Aguilar*, to stand as a predicate offense for defendant's armed habitual criminal conviction, where the State was required to prove each element of the Class 4 AUUW beyond a reasonable doubt. *Id*. ¶ 44. We found that a void conviction found to be unconstitutional could not serve as a predicate offense for any charge. *Id*.

¶ 9 Further, we found that because the issue was raised while the defendant's appeal was pending, "we are bound to apply *Aguilar* and vacate defendant's armed habitual criminal conviction because the State could not prove an element of the offense of armed habitual criminal through the use of a predicate felony conviction that is void *ab initio*." *Id*. As in *McFadden*, we declined to address whether formal proceedings for collateral relief were available to defendant to vacate his 2005 AUUW conviction. *Id*. ¶ 45.

¶ 10 In the case at bar, the State contends that we lack jurisdiction to review defendant's past AUUW and UUWF convictions. However, this court recently decided this exact issue in *People v. Claxton*, 2014 IL App (1st) 132681. In *Claxton*, the defendant was charged with multiple

counts of UUWF in 2012. All counts alleged that he did so while having been convicted of AUUW in a 2011 case. Following a jury trial, the defendant was convicted of UUWF and sentenced to 10 years' imprisonment. On appeal, we found that the defendant was timely in his direct appeal of his UUWF conviction on the contention that it could not stand if the predicate felony, his AUUW conviction, was void *ab initio*. *Id.* ¶ 16. Similarly here, defendant's direct appeal of his armed habitual criminal conviction, on the contention that it cannot stand if the predicate felonies are void, is timely.

¶ 11 This court in *Claxton* stated: "A statute declared unconstitutional on its face is void *ab initio*; that is, 'was constitutionally infirm from the moment of its enactment and, therefore, is unenforceable.'" *Id.* (quoting *People v. Davis*, 2014 IL 115595, ¶ 25). This court noted that the clear effect of *Aguilar* "is that a conviction for UUW or AUUW unconstitutional under *Aguilar* is void *ab initio* and cannot serve as the elemental predicate felony for UUWF so that this court both has jurisdiction to and must reverse the UUWF conviction for the absence of an element." *Id.* Likewise, we find that defendant's past felonies for AUUW and UUWF, which were found unconstitutional by *Aguilar*, are void *ab initio* and cannot serve as the predicate felonies for armed habitual criminal. Thus, "this court both has jurisdiction to and must reverse the [armed habitual criminal] conviction for the absence of an element." *Claxton*, 2014 IL App (1st), 132681, ¶ 16.

¶ 12 The State argues, as it did in *Claxton*, that the status of the prior felony conviction at the time the defendant possesses the firearm controls, regardless of whether that prior conviction might later be found to be unconstitutional, citing *Lewis v. United States*, 445 U.S. 55 (1980). The State further argues, again as it did in *Claxton*, that if we reverse defendant's armed habitual criminal conviction, we will sow uncertainty and that adhering to *Fields* and *McFadden* would

prevent the prosecution from proving that a defendant previously had been convicted of a qualifying felony at the time he possessed a firearm if, after defendant possessed the gun, his predicate conviction was later reversed on appeal for any reason.

¶ 13 We found this argument to be disingenuous in *Claxton*. This court explained:

> "[W]e have repeatedly expounded upon the difference between void and voidable judgments, and the State has in various cases ably argued that distinction. To give a relevant example, 'any reason' does not render a statute void *ab initio*, only facial unconstitutionality, which is the most difficult challenge to make because a statute is facially unconstitutional only if there are no circumstances where it could be validly applied. Notably, while cases stating a new constitutional rule are generally not applied retroactively to cases on collateral review (which is not the stance of this case but the similarity is edifying), substantive rules apply retroactively." (citations omitted). *Id*. ¶ 18.

Such rules apply retroactively because they carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him or her. *Davis*, 2014 IL 115595, ¶ 36. This court found that "[t]here is no more apt description of what our supreme court did in *Aguilar* than that it placed particular conduct covered by the UUW and AUUW statutes beyond the State's power to punish." *Claxton*, 2014 IL App (1st) 132681, ¶ 18.

¶ 14 The State cites to several other federal cases to support its proposition that the statue of the prior felony conviction at the time the defendant possessed the firearm controls. As this court recently noted in *Claxton*, however, federal cases interpreting federal statutes are not

binding on us, but rather merely serve as persuasive authority. *Id*. ¶ 19. We specifically found that Illinois courts have maintained the distinction between void and voidable judgments, which we shall not abandon now. *Id*. We are bound to agree with this precedent absent an Illinois Supreme Court case telling us otherwise.

¶ 15 In his prior cases, defendant was convicted of the Class 4 felonies of AUUW and UUWF under section 24-1.6(a)(1), (a)(3)(A) (West 2008). Pursuant to *Aguilar*, we find the defendant's prior convictions are void *ab initio*. As such, they cannot serve as essential elements of his armed habitual criminal conviction so that his armed habitual criminal conviction must be reversed.

¶ 16 Accordingly, we reverse the judgment of the Circuit Court of Cook County.

¶ 17 Reversed.