2017 IL App (1st) 132681-UB

No. 1-13-2681

Order filed September 7, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 12 CR 15882
	)	
NICHOLAS CLAXTON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Absent vacatur of defendant's prior conviction for version of aggravated unlawful use of a weapon found unconstitutional on its face, it was valid predicate felony for the instant conviction for unlawful use of a weapon by a felon.

¶ 2 Following a jury trial, defendant Nicholas Claxton was convicted of unlawful use of a weapon by a felon (UUWF) and sentenced to 10 years' imprisonment. On appeal, defendant contends that his conviction must be reversed because his only prior felony conviction is for a

version of aggravated unlawful use of a weapon (AUUW) that has been found facially unconstitutional. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with multiple counts of UUWF for possessing a firearm and ammunition on his land, abode, or person on or about July 28, 2012, and between July 28 and August 4, 2012. All counts alleged that he did so with a conviction for AUUW in case 11CR16293, and all sought a Class X sentence as he allegedly possessed body armor while committing UUWF. Defendant was also charged with cyberstalking for sending "picture texts" to Herbert Brown on or about July 28, 2012, that he knew or should have known would cause a reasonable person to fear for his safety or the safety of another and to suffer emotional distress.

¶ 4 In case 11CR16293, defendant was found guilty of two counts of AUUW based on having an "uncased, loaded, and immediately accessible" firearm on his person outside his land or abode on a public way. 720 ILCS 5/24-1.6(a)(1), (3)(A); 24-1.6(a)(2), (3)(A) (West 2010). He was sentenced to 18 months' probation for AUUW.

¶ 5 Defendant filed a motion to dismiss the UUWF charges, citing *Moore v. Madigan*, 702 F. 3d 933 (7th Cir. 2012), finding the UUW and AUUW statutes unconstitutional. Noting that the ramifications of the *Moore* decision were uncertain, as the Court of Appeals had stayed its mandate to allow the legislature to amend the statutes, the court denied dismissal.

¶ 6 At trial, the evidence was that defendant "texted" former coworker Brown a photograph of defendant wearing a bulletproof vest and holding a shotgun. A search of defendant's home with the consent of his cohabiting girlfriend found a bag containing a loaded shotgun, loose ammunition and a vest. She testified to seeing the bag, shotgun, and vest in their home before the search. Testing showed that the vest contained "ballistic-grade high-strength fibers" and ceramic armor plates suitable to stop 7.62mm rifle-fired ammunition. On this evidence, the jury found

defendant guilty of UUWF of a firearm and UUWF of ammunition, and found that he possessed body armor during these offenses, while finding him not guilty of cyberstalking.

¶ 7 In his unsuccessful posttrial motion, defendant argued the unconstitutionality under *Moore* of his predicate conviction for AUUW. The court held a sentencing hearing and sentenced defendant to the minimum 10 years in prison for UUWF while wearing body armor.

¶ 8 On appeal, defendant contends that his UUWF conviction must be reversed because his only prior felony conviction is for a version of AUUW found facially unconstitutional. The State responds that it proved beyond a reasonable doubt that defendant was a convicted felon when he possessed a firearm and ammunition in 2012 as charged. Defendant replies that his AUUW conviction is void *ab initio* and cannot serve as the predicate for his UUWF conviction.

¶ 9 As of 2011, the time of defendant's offense in 11CR16293, the UUW 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). Specifically, section 24-1.6(a)(1) and (2) concerned when a person either:

> "(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business [a] firearm; or (2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her

own land or in his or her own abode or fixed place of business [a] firearm." 720 ILCS 5/24-1.6(a)(1), (2) (West 2010).

¶ 10 In *Moore*, the United States Court of Appeals for the Seventh Circuit found the UUW and AUUW statutes unconstitutional. The United States Supreme Court has found that the second amendment (U.S. Const., amend. II) creates a personal right, binding upon the States through the fourteenth amendment (U.S. Const., amend. XIV, § 1), to keep and bear arms for lawful purposes including self-defense in one's home. *McDonald v. City of Chicago*, 561 U.S. 742 (2010), citing *District of Columbia v. Heller*, 554 U.S. 570 (2008). The *Moore* court found that the "right to bear arms for self-defense *** is as important outside the home as inside" and found that the UUW and AUUW statutes create a "uniquely sweeping ban." *Moore*, 702 F. 3d at 942. While the right to keep and bear arms does not preclude "the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places such as public schools, the propriety of which was not questioned in *Heller*," the UUW and AUUW statutes created "a flat ban on carrying ready-to-use guns outside the home." *Moore*, 702 F. 3d at 940.[1]

¶ 12 In *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387, our supreme court followed *Moore* and held that section 24-1.6(a)(1), (a)(3)(A) violates the right to keep and bear arms in self-defense outside one's home. The *Aguilar* court clarified that this right is not unlimited but subject to reasonable regulation, affirming the constitutionality of a conviction for possessing a concealable firearm while under 18 years of age. *Aguilar*, ¶¶ 21, 24-28, citing 720 ILCS 5/24-3.1(a)(1) (West 2008). The *Burns* court noted "that the legislature *could* constitutionally prohibit felons from carrying readily accessible guns outside the home"

[1] The *Moore* court stayed its mandate to allow Illinois to adopt compliant statutes, and the legislature has since amended the UUW and AUUW statutes. Pub. Act 98-0063 (eff. July 9, 2013).

(emphasis in original) and has in fact done so in the UUWF statute. *Burns*, ¶ 29, citing *Heller*, 554 U.S. at 626-27.

¶ 11 Since *Aguilar* and *Burns*, this court considered the issue raised here: whether a conviction for UUWF may stand where the defendant's predicate felony is a version of UUW or AUUW unconstitutional under *Aguilar* and *Burns*. In *People v. McFadden*, 2014 IL App (1st) 102939, *rev'd*, 2016 IL 117424, we vacated a UUWF conviction with a predicate felony of AUUW on the basis that the AUUW conviction was void under *Aguilar* and could not serve as a predicate offense for UUWF. In *People v. Fields***,** 2014 IL App (1st) 110311, *vacated* No. 117475 (Ill. Sep. 28, 2016); 2017 IL App (1st) 110311-B, we agreed with a defendant that his armed habitual criminal conviction must be reversed because his prior conviction for AUUW was void under *Aguilar* and could not serve as the predicate offense for armed habitual criminal.

¶ 12 Following these cases, we initially reversed defendant's UUWF conviction on the basis that his sole felony conviction was for an unconstitutional version of AUUW and thus void. *People v. Claxton*, 2014 IL App (1st) 132681. However, our supreme court has issued a supervisory order directing us to vacate that opinion and reconsider in light of its subsequent decision in *McFadden*. *People v. Claxton*, No. 118477 (Sep. 28, 2016). We have vacated our earlier opinion and now consider the supreme court's decision in *McFadden*.

¶ 13 In *McFadden*, our supreme court expressly reaffirmed "the principle 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. Thus, a defendant could:

> "seek to vacate his [void predicate] AUUW conviction by filing an appropriate pleading. However, in this case, defendant is not seeking to apply the void *ab initio* doctrine to

> vacate his prior *** AUUW conviction. Rather, defendant is seeking to reverse his *** conviction for UUW by a felon, a constitutionally valid offense, by challenging the sufficiency of the evidence to convict him. This distinction presents a different question, namely 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 UUW by a felon." *Id.*, ¶ 21.

Finding that our supreme court precedent did not resolve that question, the *McFadden* court cited *Lewis v. United States*, 445 U.S. 55 (1980). In *Lewis*, the United States Supreme Court held that, under the federal equivalent of the UUWF statute, a constitutionally-infirm prior felony conviction could be used as the predicate felony. *Lewis*, 445 U.S. at 65. The Court found that the federal statute imposed a firearm disability upon a felon until his conviction is vacated or he is otherwise relieved of the firearm disability by some affirmative act. *Lewis*, 445 U.S. at 60-61.

¶ 14 Turning to the Illinois UUWF statute, the *McFadden* court concluded that it requires the State to prove a defendant's felon status at the time he possessed a firearm or ammunition, so that subsequent invalidity of the predicate felony conviction is irrelevant. *McFadden*, ¶¶ 25-30. "There is nothing absurd or unjust or unreasonable about requiring a person who believes he has been wrongly convicted of a felony to clear his status through the judicial process before being allowed to possess a firearm. The [UUWF] statute represents a considered and deliberate decision to require that a prior felony conviction be vacated or expunged before a firearm is possessed." *Id.*, ¶ 30. As the *McFadden* defendant had not obtained vacatur of his prior AUUW conviction, that "prior conviction properly served as proof of the predicate felony conviction for" UUWF. *Id.*, ¶ 37.

¶ 15 The parties here have filed supplemental briefs discussing *McFadden*. Defendant contends that *McFadden* fails to address binding precedent to the contrary, *Montgomery v. Louisiana*, 577 U.S. ––, 136 S. Ct. 718 (2016), and *Ex Parte Siebold*, 100 U.S. 371 (1879). The State responds that the *McFadden* court was aware of *Montgomery* and *Siebold* because the *McFadden* defendant was first allowed to cite *Montgomery* as additional authority, and then argued *Montgomery* and *Siebold* in his unsuccessful rehearing petition. The State contends that we cannot disregard our supreme court's decision in *McFadden*.

¶ 16 We have previously rejected the contentions regarding *Montgomery* and *Siebold* that defendant now raises. *People v. McGee*, 2017 IL App (1st) 141013-B, ¶¶ 24-25; *People v. Spivey*, 2017 IL App (1st) 123563, ¶¶ 11-14; *People v. Cowart*, 2017 IL App (1st) 113085, ¶¶ 51-53; *People v. Faulkner*, 2017 IL App (1st) 132884, ¶¶ 28-32; *People v. Smith*, 2017 IL App (1st) 122370-B, ¶¶ 28-29; *People v. Perkins*, 2016 IL App (1st) 150889, ¶¶ 8-9. We do so here as well. Following *McFadden* as we must, we conclude that defendant's invalid but unvacated prior conviction for AUUW was a valid predicate felony for his instant UUWF conviction.

¶ 17 Finally, we note that in defendant's supplemental reply brief, he cites *In re N.G.*, 2017 IL App (3d) 160277. In *N.G.*, the third district appellate court considered whether a father's AUUW conviction could support the trial court's finding that the father was an unfit parent based on "depravity," thus terminating his parental rights to his minor child. The appellate court distinguished *McFadden*, and found that the father's AAUW conviction was "null and void" and could not serve as a basis for a depravity consideration. Accordingly, it vacated the conviction, and reversed and remanded for further proceedings.

¶ 18 Because *N.G.* arose in the context of a parental rights proceeding, it is clearly factually distinguishable from the case at bar. We also observe that there is a dissent in *N.G.*, which

disagreed with the majority's vacateur the father's 2008 conviction, and the case is currently pending before the supreme court. Moreover, to the extent that *N.G.* is read to conflict with *McFadden*, we are bound to follow the supreme court precedent. *People v. Muhammad*, 398 Ill. App. 3d 1013, 1017 (2010), citing *Angelini v. Snow*, 58 Ill. App. 3d 116, 119 (1978) ("state appellate courts are bound by the state supreme court and have no authority to overrule the supreme court or to modify its decisions"). Accordingly, we decline defendant's request to rely on *N.G.* here.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.