

2017 IL App (1st) 143711-U

No. 1-14-3711

Order filed March 17, 2017

Fifth Division

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).

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. 07 CR 20235
)	
DEVONNE REED,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal of defendant's postconviction petition affirmed where the Illinois Supreme Court has expressly rejected the same argument he raises here that his conviction for unlawful use of a weapon by a felon is void.

¶ 2 Defendant Devonne Reed appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his postconviction petition during second-stage proceedings. On appeal, defendant has abandoned all of the allegations raised in his petition, and instead, contends that his conviction for unlawful use of a weapon by a felon (UUWF) is void

and must be vacated because the underlying predicate felony of aggravated unlawful use of a weapon (AUUW) was declared unconstitutional and void *ab initio* in *People v. Aguilar*, 2013 IL 112116. In accordance with our supreme court's recent holding in *People v. McFadden*, 2016 IL 117424, we disagree and affirm the dismissal of defendant's postconviction petition.

¶ 3 Following a 2008 bench trial, defendant was convicted of armed violence, possession of a controlled substance with intent to deliver less than one gram of cocaine, two counts of UUWF, and two counts of AUUW. The trial court merged the UUWF and AUUW counts into one count of UUWF. The court then sentenced defendant to concurrent prison terms of 10 years for armed violence, 8 years for the drug conviction, and 9 years for UUWF. After discovering that the sentence imposed for the armed violence conviction was not in compliance with the statute, the trial court resentenced defendant to 15 years' imprisonment for that conviction. The sentences for the drug conviction and UUWF remained the same, and all sentences ran concurrently.

¶ 4 The UUWF conviction is the subject of this appeal. Defendant was convicted of UUWF for knowingly possessing a firearm after having been previously convicted of the felony offense of AUUW in case number 01 CR 30042. 720 ILCS 5/24-1.1(a) (West 2006). The prior AUUW conviction was entered under section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2000)), which was subsequently declared unconstitutional and void *ab initio* in *Aguilar*. 2013 IL 112116.

¶ 5 On direct appeal, this court found that defendant's armed violence and drug convictions violated the one-act, one-crime principle because both convictions arose from defendant's single act of possessing drugs. Consequently, we vacated defendant's drug conviction as it was the less

serious of the two offenses, and affirmed defendant's armed violence and UUWF convictions. *People v. Reed*, No 1-09-1257 (2011) (unpublished order under Supreme Court Rule 23).

¶ 6 On November 1, 2011, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), in which he raised multiple claims for relief. The circuit court did not rule on defendant's postconviction petition within 90 days, and therefore, appointed counsel to represent defendant and advanced his petition to second-stage proceedings under the Act. Postconviction counsel filed a certificate of compliance in accordance with Supreme Court Rule 651(c) (eff. April 26, 2012) which stated that she did not file an amended petition as defendant's *pro se* petition adequately set forth his claims. On September 12, 2013, defendant filed a *pro se* amended postconviction petition raising additional claims. Thereafter, postconviction counsel filed another 651(c) certificate stating that defendant's petition adequately set forth his claims.

¶ 7 The State filed a motion to dismiss defendant's postconviction petition asserting that all of the issues alleged in his petition could have been raised on direct appeal, and because they were not, they were waived. The State also argued that defendant failed to establish that trial counsel was ineffective, and failed to establish any other claim that was cognizable under the Act. The circuit court granted the State's motion and dismissed defendant's initial and amended postconviction petitions.

¶ 8 On appeal, defendant has abandoned all of the allegations raised in his postconviction petition, and instead, contends that his UUWF conviction is void and must be vacated because the underlying predicate felony of AUUW was declared unconstitutional and void *ab initio* in *People v. Aguilar*, 2013 IL 112116. Alternatively, defendant argues that his UUWF conviction

should be reduced from a Class 2 to a Class 3 felony because his prior AUUW conviction, which is now invalid, automatically enhanced his sentence from Class 3 to Class 2.

¶ 9 Defendant acknowledges that he did not raise this issue in his postconviction petition, but asserts that it is not forfeited because a challenge to a void judgment may be raised at any time. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). The State has not responded to this assertion and does not argue that the issue is forfeited. We find that because defendant is challenging an allegedly void judgment based on a facially unconstitutional statute that is void *ab initio*, his challenge is exempt from forfeiture and may be raised and considered in this appeal. *People v. Thompson*, 2015 IL 118151, ¶ 32.

¶ 10 Defendant also acknowledges that the Illinois Supreme Court recently rejected his void judgment argument in *People v. McFadden*, 2016 IL 117424. He argues, however, that *McFadden* was wrongly decided and should not be followed by this court because its analysis finding that the State need only establish the defendant's "felon status" is flawed. Defendant argues that the State cannot prove a recidivist element such as his "felon status" by using a void prior conviction.

¶ 11 In *McFadden*, as in this case, the defendant was convicted of UUWF for possessing a firearm after having a prior conviction for AUUW. *McFadden*, 2016 IL 117424, ¶ 1. On appeal, the defendant argued that his UUWF conviction should be vacated because it was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar*, and thus, the State failed to prove all of the elements of the offense. *Id.* at ¶ 13.

¶ 12 Initially, the supreme court pointed out that McFadden had chosen to stipulate to his felon status by agreeing that he had been previously convicted of AUUW. *Id.* at ¶ 15. The court stated that it is well settled that by agreeing to a stipulation, a defendant may waive the necessity of proof of all or part of the State's case against him as the stipulation substitutes for proof and dispenses with the need for evidence. *Id.* The court further noted that a defendant is generally precluded from contradicting or attacking a stipulation. *Id.*

¶ 13 Nevertheless, the supreme court then examined the language of the UUWF statute, which prohibits a person from knowingly possessing a firearm “ ‘if the person has been convicted of a felony under the laws of this State or any other jurisdiction.’ ” *Id.* at ¶ 27 (quoting 720 ILCS 5/24-1.1(a) (West 2008)). The court explained that “the language of the statute requires the State to prove only ‘the defendant’s felon status,’ ” and does not require that the State prove the predicate offense at trial. *Id.* (quoting *People v. Walker*, 211 Ill. 2d 317, 337 (2004)). The court expressly found that “[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur.” *Id.*

¶ 14 The court further found that “the language of section 24-1.1(a) is ‘consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.’ ” *Id.* at ¶ 29 (quoting *Lewis v. United States*, 445 U.S. 55, 61 n.5 (1980)). In addition, the purpose of the UUWF statute is to protect the public from persons who are potentially dangerous and irresponsible, and thus, it is immaterial if the predicate conviction is subsequently found invalid for any reason. *Id.* The UUWF statute is not concerned with enforcing the prior conviction, but instead, the legislature was concerned with the role of the prior conviction as a disqualifying

condition for obtaining a firearm. *Id.* Consequently, the court found that the UUWF statute is a “status offense,” and that the legislature intended that a defendant must clear his felon status through the judicial process by having his prior felony conviction vacated or expunged prior to obtaining a firearm. *Id.* at ¶¶ 29-30.

¶ 15 The *McFadden* court further explained:

“It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. 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.” *Id.* at ¶ 31.

The court found that, although the defendant could seek to vacate his prior conviction for AUUW under the void *ab initio* doctrine based on the holding of *Aguilar*, under the UUWF statute, he was still required to clear his felon status prior to obtaining a firearm. *Id.* at ¶ 37. Accordingly, the court concluded that the defendant’s prior conviction for AUUW properly served as proof of the predicate felony conviction for UUWF. *Id.*

¶ 16 Similar to *McFadden*, in the case at bar, defendant has a prior conviction for AUUW from 2002 which served as the predicate felony conviction for the UUWF offense. The record shows that defendant stipulated to his felon status at trial, and thus, should be precluded from attacking it now. *McFadden*, 2016 IL 117424, ¶ 15. Nonetheless, although *Aguilar* may provide

a basis for vacating defendant's prior AUUW conviction, it did not automatically overturn that conviction. At the time defendant committed the UUWF offense in this case, he had a felony conviction that had not been vacated. That prior felony conviction made it unlawful for defendant to possess the firearm in this case.

¶ 17 It is well settled that this court is bound to follow the holdings of our supreme court, and we lack authority to overrule those decisions. *People v. Artis*, 232 Ill. 2d 156, 164 (2009). In accordance with *McFadden*, we conclude that defendant's prior conviction for AUUW properly served as proof of the predicate felony conviction for the UUWF offense. Therefore, the State satisfied that element of the offense and his UUWF conviction is not void.

¶ 18 Defendant further contends, however, that this court is not bound by *McFadden* because it is in direct contravention of controlling case law from the United States Supreme Court. Defendant argues that *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016) and *Ex parte Siebold*, 100 U.S. 371 (1879), which were not addressed in *McFadden*, are binding authority which this court must follow, and mandate that his UUWF conviction be vacated. Defendant argues that pursuant to *Montgomery* and *Siebold*, any conviction entered under an unconstitutional statute " 'is illegal and void, and cannot be a legal cause of imprisonment.' " *Montgomery*, 136 S. Ct. at 730 (quoting *Siebold*, 100 U.S. at 376-77).

¶ 19 The State responds that our supreme court was aware of *Montgomery* and *Siebold* when it decided *McFadden*, and in fact, allowed *McFadden* to cite the two cases as additional authority. The State asserts that the *McFadden* court's decision not to address *Montgomery* and *Siebold* was not an oversight as those cases were not relevant to the court's analysis.

¶ 20 This court has recently addressed and rejected the same argument defendant presents here. *People v. Faulkner*, 2017 IL App (1st) 132884, ¶¶ 28-33; *People v. Perkins*, 2016 IL App (1st) 150889, ¶¶ 8-9. In *Perkins*, this court pointed out that McFadden had raised this same argument in his motion to cite *Montgomery* as additional authority. *Perkins*, 2016 IL App (1st) 150889, ¶ 9. We agreed with the State’s argument that “*Montgomery* posed no constitutional impediment to affirmance of defendant’s UUWF conviction given that defendant was not seeking to vacate his prior conviction (relief that, if sought, the State would not oppose), but instead was challenging his status as a convicted felon at the time of his trial.” *Id.* We further agreed that the United States Supreme Court’s decision in *Lewis*, upon which *McFadden* relied, was the controlling precedent. *Id.* We decline to depart from our reasoning in *Perkins*, and similarly, reject defendant’s *Montgomery* argument here.

¶ 21 Alternatively, defendant argues that his UUWF conviction should be reduced from a Class 2 to a Class 3 felony because his prior AUUW conviction, which is now invalid, automatically enhanced his sentence from Class 3 to Class 2. The State responds that defendant’s prior AUUW conviction was not used to enhance his sentence, but instead, was only used as an element of the offense. The State points out that pursuant to the statute, the offense of UUWF based on a prior AUUW conviction is a Class 2 felony. It argues that because there is only one classification for the offense, defendant’s UUWF conviction cannot be reduced to Class 3.

¶ 22 The UUWF statute provides, in relevant part:

“Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person, if sentenced to a term of imprisonment, shall be sentenced to no less than 2 years and no more than 10 years and any second or subsequent violation

shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years. *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 for which the person shall be sentenced to not less than 3 years and not more than 14 years.*” (Emphasis added.) 720 ILCS 5/24-1.1(e) (West 2007).

¶ 23 Defendant’s prior conviction for AUUW was pursuant to section 24-1.1(a) of the Illinois Criminal Code, and thus, was a violation of Article 24 of the Code. 720 ILCS 5/24-1.1(a) (West 2007). The statute expressly states that a violation of Article 24 is a Class 2 felony. The Class 3 felony classification for the UUWF offense does not apply to defendant. As discussed above, pursuant to *McFadden*, defendant’s prior conviction for AUUW properly served as proof of the predicate felony conviction for his UUWF conviction in this case. Accordingly, defendant’s conviction for UUWF as a Class 2 felony is proper and cannot be reduced to Class 3.

¶ 24 For these reasons, we conclude that defendant’s conviction for UUWF is not void. We therefore affirm the circuit court’s dismissal of defendant’s postconviction petition.

¶ 25 Affirmed.