

2017 IL App (1st) 152042-U  
No. 1-15-2042  
Order filed September 29, 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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 10431
	)	
MARVIN GAINES,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's aggravated unlawful use of a weapon (AUUW) conviction under section 24-1.6(a)(1), (3)(A) of the Illinois Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2014)) is vacated in light of *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387.

¶ 2 Following a bench trial, defendant Marvin Gaines was convicted of two counts of aggravated unlawful use of a firearm (AUUW) (720 ILCS 5/24-1.6 (West 2014)) and sentenced to two concurrent terms of eight years' imprisonment. On appeal, defendant argues that one of

his AAUW convictions is void pursuant to our supreme court's decisions in *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387, and, accordingly, must be vacated. For the following reasons, we vacate defendant's first AUUW conviction and affirm his conviction and sentence for his second AUUW conviction.

¶ 3 Defendant was charged with seven counts: four counts of AUUW, one count of defacing identification marks of firearms, and two counts of unlawful use or possession of a weapon by a felon. Five counts were nol-prossed before trial. The State only proceeded to trial on two counts of AUUW. Count one alleged that defendant committed AUUW when he possessed a firearm outside of "his own land or in his own abode or fixed place of business" and it was "uncased, loaded, and immediately accessible." 720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2014). Count two alleged that defendant committed the offense of AUUW in that he possessed a firearm outside of "his own land or in his own abode or fixed place of business" and he "did not have a valid firearm owner's identification card." 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2014).

¶ 4 After a bench trial, defendant was convicted of both counts and was sentenced to two concurrent terms of eight years' imprisonment.

¶ 5 This timely appeal followed.

¶ 6 On appeal, defendant only challenges his AUUW conviction under section 24-1.6(a)(1), (3)(A) and does not challenge his second AUUW conviction under section 24-1.6(a)(1), (3)(C). He argues, and the State agrees, that his conviction of AUUW under subsection (3)(A) violated his right to keep and bear arms under the second amendment of the United States Constitution and must be vacated. We agree with defendant and accept the State's concession.

¶ 7 The AUUW statute provides in relevant part:

“(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(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, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; [and]

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(3) One of the following factors is present:

(A) the firearm, other than a pistol, revolver, or handgun, possessed was uncased, loaded, and immediately accessible at the time of the offense; or

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(C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card[.]” 720 ILCS 5/24-1.6 (West 2014).

¶ 8 In *People v. Burns*, 2015 IL 117387, our supreme court considered a constitutional challenge to section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute. *Burns*, 2015 IL 117387, ¶ 19. Our supreme court noted that, in *People v. Aguilar*, 2013 IL 112116, it held that the provision was facially unconstitutional because it impermissibly infringed on the rights granted by the second amendment to the United States constitution. *Id.* ¶ 15. The court stated that, regardless of

whether a defendant is sentenced as a Class 4 offender or a Class 2 offender, the law was facially invalid and that it was “not enforceable against anyone.” *Id.* ¶¶ 24, 32. We therefore vacate defendant's conviction and sentence for AUUW under section 24-1.6(a)(1), (3)(A).

¶ 9 As a final matter, the State requests that this court require defendant to pay costs and a fee of \$100 to the State for having to defend this appeal. In support, the State cites *People v. Nicholls*, 71 Ill. 2d 166 (1978), in which our supreme court held that the State is authorized by statute to recover attorney fees as costs in the appellate court against “an unsuccessful criminal appellant upon affirmance of his conviction.” *Id.* at 174; see 55 ILCS 5/4-2002.1 (West 2014). However, insofar as we find one of defendant's convictions should be vacated, defendant has prevailed on the only issue he raised and, therefore, he is not an unsuccessful appellant against whom the State may recover costs.

¶ 10 For the reasons stated, we affirm defendant’s conviction of AUUW under section 24-1.6(a)(1), (3)(C) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2014)) and vacate his conviction and sentence for AUUW under section 24-1.6(a)(1), (3)(A) (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2014)).

¶ 11 Affirmed in part and vacated in part.