THIRD DIVISION
September 28, 2018

No. 1-14-1366

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 88 CR 1134642
	)	
RONALD KLINER,	)	The Honorable
	)	Kay Marie Hanlon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Ellis and Cobbs concurred in the judgment and opinion.

ORDER

¶ 1 *Held:* The petitioner's 1988 conviction for unlawful use of a weapon is vacated, as the version of section 24-1(a)(10) of the unlawful use of weapons statute under which he was convicted is facially unconstitutional and void *ab initio*. Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10).

¶ 2 The petitioner, Ronald Kliner, is well known to this court from various appeals arising out of his conviction on two counts of first degree murder and one count of conspiracy to commit murder. See *People v. Kliner*, 2015 IL App (1st) 122285, ¶¶ 2-3; see also *People v. Kliner*, 185 Ill. 2d 81 (1998). For those convictions, he is serving a term of natural life in prison. This appeal,

however, does not arise out of that case. Instead, it arises out of his conviction on October 4, 1988, on one count of unlawful use of a weapon, under the version of section 24-1(a)(10) of the Unlawful Use of Weapons (UUW) statute as it became effective January 1, 1988. Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10). He was convicted based on an act of "road rage," in which, while driving on Harlem Avenue in Chicago, he pointed a gun at another driver. He also fired shots at the other driver's vehicle. For that, he was sentenced to a one-year term of conditional discharge.

¶ 3 Beginning twenty years after petitioner's conviction, a series of landmark cases from the United States Supreme Court were issued addressing the scope of constitutional rights guaranteed under the second amendment to the United States Constitution (U.S. Const., amend. II). *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). These were followed in 2012 by *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), which held *inter alia* that a later version of the section of the UUW statute under which the petitioner was convicted was facially unconstitutional. The next year, in *People v. Aguilar*, 2013 IL 112116, ¶¶ 20-21, our supreme court adopted the holding of *Moore* and held that a different statute, section 24-1.6(a)(1), (a)(3)(A) of the Aggravated Unlawful Use of a Weapon (AUUW) statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)), was facially unconstitutional because it prohibited conduct that was constitutionally protected under the second amendment.

¶ 4 On November 13, 2013, the petitioner, acting *pro se*, filed in the trial court a "motion to vacate and expunge." In the part of that motion pertinent to this appeal, he argued that he had arrests and convictions on his record for unlawful use of a weapon and, pursuant to the supreme court's holding in *Aguilar*, his "conviction(s) obtained, i.e.: in 88 CR 1134642, should all be vacated, expunged and removed from [petitioner's] criminal record." The motion also requested other relief not pursued in this appeal, including ordering a new sentencing hearing in his murder

case and ordering the return of all of his firearms which were seized during the investigation of the murder case. The trial court denied the petitioner's motion in its entirety. On appeal, the petitioner argues only that his 1988 conviction for UUW should be vacated. For the following reasons, we agree with the petitioner and vacate his 1988 conviction for UUW.

¶ 5 ANALYSIS

¶ 6 Although the petitioner did not cite section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)) as the basis for his *pro se* "motion to vacate and expunge," we consider a motion to vacate an order or judgment as void to be a petition under section 2-1401. *People v. Rodriguez*, 355 Ill. App. 3d 290, 293 (2005) (citing *Sarkissian v. Chicago Bd. of Educ.*, 201 Ill. 2d 95, 99-102 (2002)). Section 2-1401 provides a mechanism by which parties may seek relief from final judgments, when brought more than 30 days after judgment has been entered. *Sarkissian*, 201 Ill. 2d at 101. One such basis by which relief may be sought under section 2-1401 is a challenge to a conviction on the grounds that it based on a statute that is facially unconstitutional and void *ab initio*, meaning the statute was constitutionally infirm and thus unenforceable from the moment of its enactment. *People v. Thompson*, 2015 IL 118151, ¶¶ 30-32. While a section 2-1401 petition normally involves certain procedural requirements (that the petition be filed within two years of the order or judgment challenged, that the petitioner allege a meritorious defense to the original action, and that the petitioner must show that the petition was brought with due diligence), those general procedural rules do not apply to petitions challenging a conviction as void on the grounds that it is based on a facially unconstitutional statute that is void *ab initio*. *Id.*; *Sarkissian*, 201 Ill. 2d at 104; 735 ILCS 5/2-1401(f) (West 2016) ("Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief."). Where a section 2-1401 petition challenges

a final judgment or order as void, we review the denial of such a petition *de novo*. *Warren County Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶¶ 47-49.

¶ 7 The petition that was before the trial court in this case was a 9-page, handwritten motion, filed *pro se*, in which the petitioner sought a variety of relief, such as a new sentencing hearing in his murder case and the return of all his firearms. While the motion is not readily comprehensible and is primarily devoted to discussing the other relief sought, a close reading does reveal that part of what the petitioner was seeking was to have his UUW conviction in Case No. 88 CR 1134642 vacated based on the supreme court's holding in *Aguilar*, 2013 IL 112116. The sole issue he pursues on appeal is the argument that his 1988 UUW conviction should be vacated on the basis that the version of the UUW statute under which he was convicted was facially unconstitutional and void *ab initio*.[1] This issue is properly before this court. *In re N.G.*, 2018 IL 121939, ¶ 57.

¶ 8 The State agrees with the petitioner that the version of section 24-1(a)(10) of the UUW statute, as it became effective January 1, 1988, is unconstitutional, and the petitioner's 1988 conviction under that statute should be vacated. Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10). At the time of the offense at issue, that statute provided in pertinent part:

"(a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

[1] The caption of the petitioner's motion in the trial court lists six case numbers. One is the petitioner's murder case (Case No. 93 CR 15476), and one is for the 1988 UUW conviction at issue in this appeal (Case No. 88 CR 1134642). The other four are apparently cases in which the petitioner was arrested and charged, but not convicted, under the UUW statute. The petitioner's initial notice of appeal listed only Case No. 93 CR 15476, although after briefing was completed, the petitioner did file an amended notice of appeal listing only Case No. 88 CR 1134642. As the arguments and relief sought on appeal pertain to Case No. 88 CR 1134642 only, we treat this as a clerical error, amend the caption accordingly, and proceed to decide this case on the merits. *People v. Bennett*, 144 Ill. App. 3d 184, 185 (1986).

(10) Carries or possesses on or about his 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 land or in his own abode or fixed place of business, any pistol, revolver, stun gun or taser or other firearm. * * *." *Id.*

¶ 9 In 2012, the United States Court of Appeals for the Seventh Circuit held that a later version of section 24-1(a)(10) of the UUW statute (720 ILCS 5/24-1(a)(10) (West 2010)) was unconstitutional because it prohibited conduct protected under the second amendment to the United States Constitution.[2] *Moore*, 702 F.3d at 942. The version of the statute that was found unconstitutional in *Moore* provided in pertinent part as follows:

"(a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(10) Carries or possesses on or about his 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 land or in his own 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, except that this subsection (a)(10) does not apply to or affect transportation of weapons that meet

[2] The Seventh Circuit also held that section 24-1(a)(4) of the UUW statute (720 ILCS 5/24-1(a)(4) (West 2010)) and section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute (*id.* § 1.6(a)(1), (a)(3)(A), (d) (West 2010)) were unconstitutional on the same basis. *Moore*, 702 F.3d at 942.

one of the following conditions:

(i) are broken down in a non-functioning state; or

(ii) are not immediately accessible; or

(iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card." 720 ILCS 5/24-1(a)(10) (West 2010).

The Seventh Circuit held that statutes that comprehensively ban individuals from carrying ready-to-use firearms (loaded, immediately accessible, and uncased) outside the home are unconstitutional restrictions on citizens' Second Amendment rights. *Moore*, 702 F.3d at 942. Because the version of section 24-1(a)(10) of the UUW statute as it existed in 2010 constituted such a ban, it was held unconstitutional. *Id.*

¶ 10 The following year, the Illinois Supreme Court adopted the reasoning of *Moore* and held that section 24-1.6(a)(1), (a)(3)(A) of the version of the AUUW statute then in effect (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) was unconstitutional. *Aguilar*, 2013 IL 112116, ¶¶ 20-21. That statute provided that a person commits the offense of aggravated unlawful use of a weapon when he or she knowingly carries on or about his or her person or in any vehicle, any pistol, revolver, stun gun, taser or other firearm, when the firearm possessed is uncased, loaded, and immediately accessible at the time of the offense. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008). Our supreme court held that the statute "categorically prohibits the possession and use of an operable firearm for self-defense outside the home," which "amounts to a wholesale statutory ban on the exercise of a personal right that is specifically named in an guaranteed by the United States Constitution, as construed by the United states Supreme Court." *Aguilar*, 2013 IL 112116,

¶ 21; see also *People v. Burns*, 2015 IL 117387, ¶ 25.

¶ 11 In *People v. Mosley*, 2015 IL 115872, ¶ 25, the supreme court extended *Aguilar*'s holding of facial unconstitutionality to another portion of the AUUW statute, section 24-1.6(a)(2), (a)(3)(A) (720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2012)). That statute provided as follows:

> (a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> * * *
>
> (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, 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
>
> (3) One of the following factors is present:
>
> (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]" *Id.*

Comparing this section of the statute to the provision it had invalidated in *Aguilar*, the Supreme Court reasoned that "[i]f, under *Aguilar*, a person cannot be barred from carrying an uncased, loaded and immediately accessible firearm while in a vehicle or concealed on or about his or her person based on the second amendment of the United States Constitution, it is logical that the same conduct should not be barred when the alleged offender similarly carries a firearm on a

public way." *Mosley*, 2015 IL 115872, ¶ 25.

¶ 12 The petitioner argues that the version of section 24-1(a)(10) of the UUW statute as it became effective January 1, 1988, under which he was convicted, suffers from the same constitutional infirmity as the provisions that were invalidated in the cases set forth above. Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10). This court agrees. A comparison of the section of the 1988 UUW statute under which the petitioner was convicted with the 2010 version of the same section of the UUW statute at issue in *Moore* and the provision of the AUUW statute at issue in *Mosley* demonstrate that all three are categorical bans on the carrying or possession of ready-to-use firearms upon any public street, alley, or public lands within the corporate limits of a city, village, or incorporated town. Nothing about the statutory language as it existed at the time of the petitioner's conviction prevents it from suffering from the constitutional infirmities identified in later versions of the UUW and AUUW statutes, as discussed in the cases above. In fact, the version of the statute under which petitioner was convicted is an even broader prohibition on the carrying of firearms than the provisions held unconstitutional in *Moore* and *Mosley*. Thus, just as the statutes were held unconstitutional in those cases, here the version of section 24-1(a)(10) of the UUW statute as it became effective January 1, 1988, under which the petitioner was convicted, must also be held facially unconstitutional and thus void *ab initio*. Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10). As such, the petitioner's conviction under this statutory provision must therefore be vacated. *Mosley*, 2015 IL 115872, ¶ 24.

¶ 13 CONCLUSION

¶ 14 For the foregoing reasons, we conclude that the petitioner's 1988 conviction under section 24-1(a)(10) of the UUW statute (Ill. Rev. Stat. 1987, ch. 38 ¶ 24-1(a)(10)) must be vacated.

¶ 15 Conviction vacated.