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Appendix A: Illinois Appellate Court's unpublished decision affirming White's conviction for armed habitual criminal, reported at 2017 IL App (1st) 122371-UB, entered on May 5, 2017.

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APPENDIX A

2017 IL App (1st) 122371-UB

No. 1-12-2371

Order filed May 5, 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. 09 CR 21053
	)	
CALVIN WHITE,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's denial of defendant's motion to suppress evidence of a weapon recovered from his vehicle during a traffic stop is affirmed, where a police officer observed the weapon in plain view upon entering defendant's truck to move it from site of traffic stop. Additionally, defendant's convictions for being an armed habitual criminal and for UUWF are affirmed because his prior convictions for weapons offenses can serve as predicate convictions for those main offenses even in light of *People v. Aguilar*, 2013 IL 112116.
- ¶ 2 Following a bench trial in 2012, defendant Calvin White was convicted of one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)) and one count of unlawful

use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2008)). Defendant's prior convictions for aggravated unlawful use of a weapon (AUUW) were elements of each of those offenses. Defendant was sentenced to two concurrent terms of seven years in prison.

¶ 3 In defendant's initial appeal, he argued, *inter alia*, that his convictions should be vacated because his prior AUUW offenses were based on a statute eventually found unconstitutional during the pendency of that appeal in *People v. Aguilar*, 2013 IL 112116. On September 5, 2014, we issued an unpublished order agreeing with that contention based on this court's holding in *People v. McFadden*, 2014 IL App (1st) 102939, and defendant's convictions were vacated. *People v. White*, 2014 IL App (1st) 122371-U, ¶ 12. This case now returns to this court following the Illinois Supreme Court's supervisory order directing us to reconsider our decision in light of *People v. McFadden*, 2016 IL 117424. For the reasons set out below, we affirm defendant's convictions for armed habitual criminal and for UUWF and correct the mittimus.

¶ 4 Defendant was charged with various weapons offenses arising from the recovery of a loaded weapon from a vehicle he was driving in November 2009. Count 1 charged defendant being an armed habitual criminal and included as elements of that offense his two previous convictions for AUUW: (1) his August 2003 conviction for carrying in a vehicle a firearm that was uncased, loaded and immediately accessible in violation of subsection (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2002)) (case No. 02 C5 50698) and (2) his May 2003 conviction for carrying in a vehicle a firearm that was uncased and unloaded and the ammunition was immediately accessible in violation of subsection (a)(3)(B) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(B) (West 2002)) (case No. 02 CR 15630).

¶ 5 Count 2 charged defendant with UUWF based on his possession of a firearm having the prior felony conviction in case No. 02 CR 15630. Count 3 charged defendant with UUWF based on the possession of firearm ammunition having the prior conviction in case No. 02 CR 15630. Counts 4, 5 and 6 charged defendant with AUUW based on the facts set out above.

¶ 6 Chicago police officer Fernando Rodriguez recovered a weapon from the open center console of defendant's truck upon his arrest after a traffic stop. Prior to trial, defendant filed a motion to quash his arrest and suppress evidence, asserting that the search of his vehicle was performed without a warrant, without his consent and without probable cause and reasonable suspicion of criminal activity. At the hearing on the motion, Chicago police officer Marco Proano, who was assigned to the Sixth District, testified that at about 11 p.m. on November 8, 2009, he was riding in a marked squad car driven by Officer Rodriguez.

¶ 7 Officer Proano testified that he observed defendant drive a passenger truck through an intersection at Peoria and 79th streets in Chicago and fail to stop at a stop sign. The police car's lights and sirens were activated, and the officers followed defendant as he failed to observe two additional stop signs and weaved in and out of a lane of traffic.

¶ 8 Defendant stopped his truck in a parking space on the street in front of his residence at 7605 South Green in Chicago. Officer Proano testified that as he got out of the squad car, he "thought the vehicle was going to stop." As he approached defendant's truck, the truck moved in reverse in the officer's direction for four or feet before it stopped. Defendant was shouting that he was drunk and was "just trying to get home."

¶ 9 Defendant was handcuffed and placed under arrest for driving under the influence of alcohol (DUI). According to Officer Proano, Officer Rodriguez entered defendant's truck

“[a]fter we made the decision that we were going to relocate to the Sixth District” station, which was three blocks away from where the traffic stop took place. Upon entering defendant’s truck, Officer Rodriguez recovered a loaded 9-millimeter weapon from the open center compartment between the front seats.

¶ 10 Officer Proano testified that six or seven people had gathered and were “questioning us for stopping the vehicle” and defendant was moved to the Sixth District station to “further investigate the driving under the influence” and “[f]or officer safety.” On cross-examination, Officer Proano stated defendant had a strong odor of alcohol and was “almost falling [] asleep” and that his eyes were puffy and bloodshot. According to the officer, defendant and the truck were relocated for the performance of field sobriety tests and because the officer “just didn’t want to escalate anything further on scene.”

¶ 11 Officer Rodriguez’s testimony regarding the traffic stop was consistent with his partner’s account. Regarding his entry into defendant’s truck, he testified that “for officer safety, once we decided that we were going to go the Sixth District rather [than] having to deal with the family coming out of the house, we went to -- the offender was placed into the back of one squad car and the other partner drives the vehicle in.” He testified that when he got into defendant’s vehicle to start it, he saw the weapon in the open center console.

¶ 12 In denying defendant’s motion to quash his arrest and suppress admission of the weapon into evidence, the trial court found the officers had a valid basis to stop defendant’s vehicle. Additionally, the court rejected defense counsel’s contention that the officer lacked the right to enter the vehicle, holding that “[t]hey certainly had a right to get into that car to secure it whether they left it at that [] location or not.”

¶ 13 At defendant's bench trial, Officer Rodriguez offered testimony consistent with that presented at the motion hearing. As proof of prior crimes as required elements of the instant offense, the State introduced certified copies of defendant's two AUUW convictions in 2003 in case No. 02 C5 50698 and case No. 02 CR 15630. The defense presented testimony of a friend of defendant who was at the scene and stated he did not see an officer recover anything from defendant's truck.

¶ 14 The trial court found defendant guilty of being an armed habitual criminal and of the unlawful use of a weapon by a felon. The court stated that Counts 3, 4 and 6 would merge with Count 2. Defendant was not convicted of Count 5, which alleged that defendant had not been issued a valid firearm owner's identification (FOID) card. The trial court sentenced defendant to concurrent terms of seven years in prison on Counts 1 and 2. We vacated those convictions based, in part, on this court's holding in *People v. McFadden*, 2014 IL App (1st) 102939. *People v. White*, 2014 IL App (1st) 122371-U, ¶ 12.

¶ 15 In September 2016, our supreme court issued a supervisory order directing this court to reconsider that decision in light of its ruling in *People v. McFadden*, 2016 IL 117424. This order addresses the impact of *McFadden*, on which the parties have provided supplemental briefs. We also discuss the additional claims of error raised in defendant's original brief that were not reached in our 2014 order, given the original disposition of this case.

¶ 16 On appeal, we first consider defendant's contention that his convictions should be reversed because the trial court erred in denying his motion to suppress evidence of the weapon recovered from his truck. He argues that despite the weapon's presence in the plain view of Officer Rodriguez, the State presented no evidence that the officer was authorized to enter the

vehicle, that moving or impounding defendant's vehicle was routine procedure, or that the officers were required to transport the vehicle to Sixth District headquarters. Defendant further contends the officers could not search his vehicle incident to his arrest or perform a protective search of the vehicle based on a suspicion that he had immediate access to weapons or posed a physical threat.

¶ 17 The fourth amendment of the United States Constitution requires searches and seizures to be reasonable "measured in objective terms by examining the totality of the circumstances." *People v. Lampitok*, 207 Ill. 2d 231, 241 (2003) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L. Ed. 2d 347 (1996)). Generally, a search and seizure is only reasonable if the government has first obtained a warrant authorizing the action; otherwise, the circumstance must fall under one of the specific and recognized exceptions to this requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

¶ 18 One such exception is the "plain view" doctrine, which allows the admission into evidence of an object if three conditions are met: (1) the officer was lawfully in a position from which he observed the object; (2) the incriminating character of the property was immediately apparent; and (3) the officer had a lawful right of access to the property. *People v. Jones*, 215 Ill. 2d 261, 271-72 (2005). In this case, the plain view doctrine upholds the recovery of the object if Officer Rodriguez had the legal right to enter defendant's vehicle.

¶ 19 The State contends that Officer Rodriguez was legally justified in entering defendant's vehicle to secure it for transport to the police station. The State relies on section 11-1302(c)(3) of the Illinois Vehicle Code (625 ILCS 5/11-1302(c)(3) (West 2008)), which authorizes a police officer to remove a vehicle from a highway after the driver is arrested for "an alleged offense for

which the officer is required by law to take the person arrested before a proper magistrate without unnecessary delay.” The State also cites a section of the Chicago Municipal Code (Chicago Municipal Code § 7-24-226(b) (amended Nov. 8, 2012)) allowing for the seizure and impoundment of any vehicle used while driving under the influence of alcohol or drugs. In addition, the State refers to a Chicago Police Department general order authorizing an officer to relocate a defendant’s vehicle to the officer’s assigned district.

¶ 20 The State concedes that it did not specify those legal bases in the trial court but argues it has not waived the ability to now raise those provisions in support of the trial court’s ruling. In response, defendant contends the State cannot cite those regulations for the first time on appeal to support Officer Rodriguez’s entry into his vehicle.

¶ 21 Generally, a party waives its right to challenge an issue on appeal by having failed to raise the issue in the trial court. *People v. Thompson*, 337 Ill. App. 3d 849, 854 (2003). However, as the prevailing party in the court below, the State on appeal may raise any arguments in support of that court’s judgment. *People v. Durr*, 215 Ill. 2d 283, 305 (2005), citing *People v. Pinkonsly*, 207 Ill. 2d 555, 563 (2003) (an appellee may raise arguments in support of the trial court’s judgment, even though they were not raised before the trial court, provided they have a sufficient factual basis before the trial court).

¶ 22 Here, although no legal authority was expressly cited at the motion hearing or at trial for the State’s theory that Officer Rodriguez was authorized to enter defendant’s truck, the State presented a factual basis for its position, which was argued before the trial court. At the suppression hearing, both Officer Proano and Officer Rodriguez testified that Officer Rodriguez

got into the truck because the police had decided to move away from the area where defendant was stopped and continue the investigation of this offense at the nearby police headquarters.

¶ 23 Our review of the trial court's ultimate ruling on defendant's motion to suppress is *de novo*. *People v. Mason*, 403 Ill. App. 3d 1048, 1053 (2010). This court, as a reviewing court, can sustain a circuit court ruling for any appropriate reason, regardless of whether the lower court relied on those grounds. *People v. Young*, 2013 IL App (1st) 111733, ¶ 36 (citing *People v. Johnson*, 208 Ill. 2d 118, 129 (2003)).

¶ 24 The State presented evidence supporting the officer's entry into the vehicle. Officer Rodriguez testified that he entered defendant's truck after his arrest for DUI because his partner was with defendant in the squad car and "the other partner drives the vehicle in." Given the officer's testimony of a cognizable reason to secure defendant's vehicle, it was not necessary that the State present evidence of written procedures. See *Mason*, 403 Ill. App. 3d at 1054-55. Under the provisions cited by the State, the officer's entry into the vehicle was lawful. Officer Rodriguez had a lawful right of access to the vehicle and was lawfully in a position from which he observed the weapon in plain view. See *Jones*, 215 Ill. 2d at 271-72. Therefore, the denial of defendant's motion to suppress evidence of the weapon is affirmed.

¶ 25 We next turn to defendant's contention that the State failed to prove the elements of both offenses of which he was convicted, which was the basis of our initial order in this case. Defendant was convicted of being an armed habitual criminal and of UUWF.

¶ 26 The armed habitual criminal offense prohibits the possession of firearm by a person with at least two prior convictions for certain qualifying offenses. 720 ILCS 5/24-1.7(a)(2) (West 2008)). In this case, the State presented evidence of defendant's two prior convictions for

AUUW, a qualifying offense. One of defendant's prior convictions (case No. 02 C5 50698) was for carrying in a vehicle a firearm that was uncased, loaded and immediately accessible in violation of subsection (a)(3)(A) of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2002)). That statutory subsection was found unconstitutional in *Aguilar* during the pendency of defendant's initial appeal. *White*, 2014 IL App (1st) 122371-U, ¶ 3; *Aguilar*, 2013 IL 112116, ¶¶ 20-22 (noting the incongruity of a categorical prohibition "of the possession and use of an operable firearm for self-defense outside the home" when measured against the second amendment's right to "keep and bear arms").

¶ 27 As previously noted, our initial order agreed with *People v. McFadden*, 2014 IL App (1st) 102939, ¶¶ 42-43, which found that the defendant's conviction for UUWF in that case must be vacated because his prior felony conviction was based on a statute found to be facially unconstitutional in *Aguilar*. However, the supreme court reversed the appellate court decision in *McFadden*, holding that the defendant's felon status based on the prior conviction was unaffected by *Aguilar* and unless the prior conviction is vacated, it remained viable and precluded the defendant from possessing a firearm. *McFadden*, 2016 IL 117424, ¶ 31.

¶ 28 In *McFadden*, the supreme court relied on *Lewis v. United States*, 445 U.S. 55, 63, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), in which the United States Supreme Court held that a federal firearms statute that prohibited the possession of a firearm by a felon did not require the government to "prove the validity of the predicate [felony] conviction." Based on *Lewis*, our supreme court concluded in *McFadden* that a defendant's "remedy is to challenge the judgment of conviction and have the unlawful judgment of conviction set aside before deciding to possess a firearm." *McFadden*, 2016 IL 117424, ¶ 34. "[A] conviction is valid until the judicial process

has declared otherwise by direct appeal or collateral attack” and the supreme court held that because the defendant’s predicate felony had not been vacated by the time he committed the instant UUWF offense, it was unlawful for the defendant to possess firearms. *McFadden*, 2016 IL 117424, ¶ 31.

¶ 29 The parties have submitted supplemental briefs with additional arguments addressing *McFadden*’s effect on this case. First, defendant contends that *McFadden* “disregarded” the United States Supreme Court cases of *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), and *Ex parte Siebold*, 100 U.S. 371, 25 L. Ed. 717 (1880), which preclude the use of a prior conviction that was based on a statute later found to be unconstitutional. We cannot agree with defendant’s contention that the supreme court in *McFadden* did not consider *Montgomery*. Defense counsel in *McFadden* was granted leave to cite *Montgomery* as additional authority for its arguments in that case. In response to the defense’s reliance on *Montgomery*, the State asserted that the United States Supreme Court decision in *Lewis* was controlling in this context, and the supreme court agreed. *People v. Smith*, 2017 IL App (1st) 122370-B, ¶ 28; *McFadden*, 2016 IL 117424, ¶ 34; *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 9.

¶ 30 As precedent from our supreme court, we are bound by *McFadden*. See *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008) (an Illinois Supreme Court ruling is binding on lower courts). Accordingly, under *McFadden*, we affirm defendant’s armed habitual criminal conviction in this case even though the underlying felony offense was based on the statute found unconstitutional in *Aguilar*.

¶ 31 In *Perkins* and in *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 33, this court addressed the impact of the supreme court's decision in *McFadden* and rejected the same arguments now raised by defendant. The *Perkins* court noted:

“Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses[.] *** [B]ecause here, as in *McFadden*, Perkins' prior convictions has not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction.”

Perkins, 2016 IL App (1st) 150889, ¶ 7.

¶ 32 Here, as in those cases, defendant's convictions for being an armed habitual criminal and for UUWF should not be reversed based on the invalidity of his predicate felony convictions.

¶ 33 We next consider defendant's contention that his UUWF conviction should be vacated pursuant to the one-act, one-crime rule. That doctrine prohibits multiple convictions where more than one offense is carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). Defendant contends his UUWF conviction should be vacated because it was based on the same physical act of possessing a weapon as his armed habitual criminal conviction.

¶ 34 The State agrees that defendant's UUWF conviction, which was based on Count 2, should be vacated under the one-act, one-crime doctrine. However, the State asserts, and defendant concurs, that because he was also convicted under Count 3 for UUWF based on his possession of firearm ammunition (which the trial court merged with Count 2), this court can now enter judgment on Count 3 and enter the same sentence of seven years, to be served concurrently with his sentencing for being an armed habitual criminal. We agree that a

conviction can be entered on Count 3, as *Aguilar* did not affect the portion of the AUUW statute that bans the possession of firearm ammunition.

¶ 35 Defendant further contends that if we affirm his UUWF conviction (which is occurring in this case because we are entering a UUWF conviction on a different count), his conviction for that offense must be reduced to a Class 3 felony. Defendant argues that his prior AUUW convictions increased his punishment because they were used to enhance his sentence to a Class X sentencing range for the armed habitual criminal offense, relying on *United States v. Tucker*, 404 U.S. 443, 447-48, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972).

¶ 36 However, the Supreme Court in *Lewis* distinguished *Tucker*, noting the gun laws in *Lewis* were intended to “keep firearms away from potentially dangerous persons” and did not represent an enhancement of the offender’s punishment. *Smith*, 2017 IL App (1st) 122370-B, ¶ 31 (quoting *Lewis*, 445 U.S. at 67).

¶ 37 As with the defendants in *Faulkner*, 2017 IL App (1st) 132884, ¶¶ 23-27 and *Perkins*, 2016 IL App (1st) 150889, ¶ 7, defendant here argues that the offense of UUWF is based on his status as a felon, whereas the offense of armed habitual criminal requires proof of his prior conduct in committing two qualifying offenses. That assertion was squarely addressed by this court in *Perkins*, which noted the armed habitual criminal statute does not require examination of the defendant’s conduct in committing the enumerated offenses. *Id.*; see also *Faulkner*, 2017 IL App (1st) 132884, ¶ 27 (adopting the reasoning in *Perkins*). Thus, as in *Perkins* and *Faulkner*, we reject defendant’s argument on this point as well.

¶ 38 As a final matter, the parties acknowledge that the mittimus included in the record incorrectly indicates that along with defendant’s conviction for being an armed habitual criminal,

he was also convicted of one count of possession of a controlled substance with intent to deliver. We note that defendant's record as listed on the Illinois Department of Corrections (IDOC) website indicates he was convicted of the offenses of being an armed habitual criminal and UUWF. See *People v. Ware*, 2014 IL App (1st) 120485, ¶ 29 (this court may take judicial notice of IDOC's records). We further note that this court has the authority to correct the mittimus at any time without remanding the matter to the circuit court. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 39 Accordingly, for all of the reasons set out above, defendant's conviction for being an armed habitual criminal is affirmed. Defendant's conviction under Count 2 for UUWF is vacated pursuant to the one-act, one-crime rule. We order the clerk of the circuit court to correct the mittimus to reflect a conviction on Count 3, which charged defendant with UUWF based on his possession of firearm ammunition, as opposed to possession of the weapon itself, along with defendant's conviction for being an armed habitual criminal. Furthermore, the corrected mittimus should omit the offense of possession of a controlled substance with intent to deliver.

¶ 40 Affirmed in part and vacated in part; mittimus corrected.

APPENDIX B

JUN 02 2017

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

No. 12-2371

ORDER ENTERED
JUN -1 2017
APPELLATE COURT, FIRST DISTRICT

JUSTICE

JUSTICE

JUSTICE

APPENDIX C

2017 WL 4386847 (Table)
(This disposition of a Petition for Leave to Appeal
is referenced in the North Eastern Reporter.)
Only the Westlaw citation is currently available.
Supreme Court of Illinois.

PEOPLE State of Illinois, respondent,

v.

Calvin WHITE, petitioner.

No. 122423

|
September 27, 2017

Leave to appeal, Appellate Court, First District.
1-12-2371

Opinion

***1** Petition for Leave to Appeal Denied.

All Citations

Slip Copy, 2017 WL 4386847 (Table)

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