

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CRIMINAL DIVISION

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| PEOPLE OF THE STATE OF ILLINOIS, | ) |             |
|                                  | ) |             |
| Plaintiff,                       | ) |             |
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|                                  | ) |             |
|                                  | ) | 13 CR 10225 |
| v.                               | ) |             |
|                                  | ) |             |
|                                  | ) |             |
|                                  | ) |             |
| JUAN WILLIAMS,                   | ) |             |
|                                  | ) |             |
| Defendant                        | ) |             |

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ORDER

At issue in this case is whether the sentencing scheme for Aggravated Unlawful Use of a Weapon violates the proportionate penalties clause of the Illinois Constitution in light of the Illinois Supreme Court's recent decision in *People v. Aguilar*, 2013 IL 112116. For the reasons stated herein, this court holds that it does.

BACKGROUND

On April 2, 2013 defendant, age 24, was arrested for possessing a firearm while in an automobile. The incident allegedly occurred on a public street within the city of Chicago, the defendant had not been issued a currently valid Firearm Owners Identification Card (FOID), and the weapon was allegedly uncased, loaded and immediately accessible at the time of the offense. Defendant was subsequently charged by information with six counts of Aggravated Unlawful Use of a Weapon (AUUW). 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) & (a)(3)(C); 720 ILCS 5/24-1.6(a)(2), (a)(3)(A) & (a)(3)(C) (West 2008).

On September 12, 2013, the Illinois Supreme Court issued its watershed opinion in *People v. Aguilar*, 2013 IL 112116 (2013) wherein the Court ruled that section 24-1.6(a)(1), (a)(3)(A) violates the right to keep and bear arms as guaranteed by the second amendment to the United States Constitution (U.S. Const., amend II) The Court stopped short of finding that the right to bear arms is absolute however, and ruled that the legislature may enact reasonable regulations on that right. *Aguilar*, at p. 11.

On October 2, 2013, in response to the *Aguilar* decision, the state dismissed, by *nolle prosequi*, all counts against defendant under sections (a)(1), (a)(3)(A) and (a)(2), (a)(3)(A) of the AUUW statute alleging possession of the handgun while “uncased, loaded and immediately accessible at the time of the offense.” The state did not dismiss the remaining counts alleging possession of the handgun while the defendant “had not been issued a currently valid firearm owner’s identification card.” 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) & (a)(2), (a)(3)(C). On the same date, defendant then filed a Motion to Dismiss the remaining charges against him on the grounds that the FOID requirement was not a reasonable regulation on the right to bear arms, but instead amounted to a comprehensive ban on that right. This court denied defendant’s motion to dismiss the remaining counts ruling that the FOID requirement was a reasonable regulation as contemplated by *Aguilar*.

On November 8, 2013 defendant then filed a *Motion to Declare the Sentencing Penalties Under 720 ILCS 5/24-1.6 Unconstitutional as to this Defendant*. Therein, defendant argues that in light of the *Aguilar* decision Sections 24-1.6(a)(1), (a)(3)(C) and 24-1.6(a)(2), (a)(3)(C) of the AUUW statute now contain the same elements as a violation of the Firearm Owner’s Identification Card Act. 430 ILCS 65/2(a)(1). Because a violation of sec. 24-1.6 is punishable as a class 4 felony while a violation of the FOID statute is punishable as a Class A misdemeanor, defendant contends that to sentence him other than as a misdemeanor would be unconstitutional as applied to him. And while defendant in his motion claims this disparate sentencing scheme violates his right to bear arms under the second amendment, the substance of his argument is in fact that sections 24-1.6(a)(1), (a)(3)(C) and 24-1.6(a)(2), (a)(3)(C) violate the *proportionate penalties* clause of the Illinois Constitution (Ill. Const. 1970, art. 1, sec. 11).

On December 10, 2013 the State filed their response to defendant’s motion, arguing that the elements of the AUUW statute are not the same as those of the FOID card statute. After argument, this court took the matter under advisement. This order follows.

#### ANALYSIS

At issue in this case is whether AUUW violates the proportionate penalties clause of the Illinois Constitution in light of the Illinois Supreme Court’s recent *Aguilar* decision. A party challenging the constitutionality of a statute however carries a heavy burden. All statutes carry a strong presumption of constitutionality. *People v. Guevara*, 216 Ill. 2d 533, 543, 837 N.E.2d

901 (2005). To overcome this presumption the party challenging the statute must clearly establish its invalidity. *Guevara*, 216 Ill. 2d at 543. The legislature has broad authority to set criminal penalties, and the courts may not interfere with the legislature's decisions in this area unless the challenged penalty is clearly in excess of the general constitutional limitations on this authority. *People ex rel. Carey v. Bentivenga*, 83 Ill. 2d 537,542, 416 N.E.2d 259 (1981).

To succeed on a facial challenge of a statute's unconstitutionality, the challenging party must show the statute would be invalid under any imaginable set of circumstances. *In re M.T.*, 221 Ill. 2d 517, 533, 852 N.E. 2d 792 (2006). A holding that a statute is unconstitutional as applied does not broadly declare a state statute unconstitutional but narrowly finds that statute unconstitutional under the specific facts of the case. *People v. Huddleston*, 212 Ill. 2d 107, 131, 816 N.E.2d 322 (2004).

Under the proportionate penalties clause of the Illinois Constitution, "...all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, article I, section 11. In analyzing a proportionate penalties challenge, the ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 83, 871 N.E. 2d 1 (2007). To succeed on a proportionate penalties claim, a defendant must show either that the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community; or that it differs from the penalty imposed for an offense containing the same elements. *People v. Sharpe*, 216 Ill. 2d 481, 521, 839 N.E. 2d 492 (2005). The latter method is commonly known as the "identical elements" test. *Hauschild*, 226 Ill. 2d at 83.

Defendant argues that in light of the *Aguilar* decision the elements of AUUW and the FOID card act are now the same. Because AUUW is punished more severely than an offense containing the same elements, it runs afoul of the *proportionate penalties* clause of the Illinois Constitution. The State disagrees. This court therefore sets out the elements of the statutory provisions listed above to determine if their elements are identical.

Defendant remains charged with three counts of Aggravated Unlawful Use of a Weapon under section 24-1.6(a)(1), (a)(3)(C) and section 24-1.6(a)(2), (a)(3)(C). These sections state:

"(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 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; 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, 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:

(C) The person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card.

A violation of sections 24-1.6(a)(1), (a)(3)(C) or 24-1.6(a)(2), (a)(3)(C) is a class 4 felony. 720 ILCS 5/24-1.6(d) (West 2008).

The Firearm Owner's Identification Card Act, 430 ILCS 65/2 (West 2008) states:

"Sec. 2. Firearm Owner's Identification Card required; exceptions.

(a)(1) No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this Act.

(2) No person may acquire or possess firearm ammunition within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this Act.

A violation of the Firearm Owners Identification Card Act where the person does not possess a currently valid firearm owner's identification card but is otherwise eligible under the Act to obtain one is a class A misdemeanor. 430 ILCS 65/14(b).

Historically, the right to keep and bear arms has received greater constitutional protection inside the home than outside the home. See *McDonald v. City of Chicago*, 561 U.S. \_\_\_\_\_, 130 S. Ct. 3020, 3050(2010); *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2010). See also *People v. Moore*, 2013 IL App (1<sup>st</sup>) 110793; *People v. Williams*, 405 Ill App. 3d 958, 940 N.E.2d 95 (1<sup>st</sup> Dist. 2010). Because of this, the AUUW statute excepted from its definition the possession of a firearm *when on one's own land or in one's abode, legal dwelling or fixed place of business.* (emphasis added). Thus, the elements of AUUW sec. 24-1.6 (a)(1), (a)(3)(C) pre-*Aguilar* were as follows:

- 1) That the defendant knowingly carried on or about his person, or in a vehicle, or concealed on or about his person a firearm; and
- 2) That when he did so he was not on his own land, in his abode, or in his fixed place of business; and
- 3) That the defendant had not been issued a currently valid Firearm Owner's identification Card. I.P.I. Criminal 18.04W (Modified.)

Likewise, the elements of Section 24-1.6 (a)(2), (a)(3)(C) *pre-Aguilar* were as follows:

- 1) That the defendant carried or possessed on or about his person a firearm; and
- 2) That when he did so he was upon a public street or alley within the corporate limits of a city; and
- 3) That when he did so he was not an invitee or the purpose of the display of such weapon or lawful commerce in weapons; and
- 4) That when the defendant did so, he was not on his land, in his abode, or in his fixed place of business; and
- 5) That he had not been issued a currently valid firearm owner's identification card. I.P.I Criminal 18.04Z (Modified.)

In *People v. Aguilar* however, the Illinois Supreme Court ruled that, while subject to meaningful regulation, the second amendment protects the right to possess and use a firearm for self-defense outside the home. *People v. Aguilar*, 2013 IL 112116 at p. 8. In doing so, the Court adopted the reasoning of the Seventh Circuit Court of Appeals decision in *Moore v. Madigan*, 702 F. 3d 933 (7<sup>th</sup> Cir. 2012) which held that the "right to bear arms thus implies a right to carry a loaded gun outside the home." *Aguilar*, 2013 IL 112116 at p. 7, citing *Moore v. Madigan* at p. 940. Thus, the right to possess a loaded firearm on the street or in a vehicle has been placed on the same legal footing as the right to possess a firearm within one's own home. The distinction between being in a vehicle or on a public street versus being on one's own land or in one's own abode no longer carries any legal significance, and the possession of a loaded firearm is conduct protected under the second amendment to the United States Constitution so long as the person possessing the weapon is not otherwise disqualified from doing so, is not in a sensitive place such as a school or government building, and the individual complies with the reasonable regulation of first acquiring a Firearm Owner's Identification Card. See discussion *Aguilar* at p. 10, citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Therefore, the effect of the *Aguilar* decision is to *eliminate as irrelevant* all but the first and last elements of the offense of AUUW.

For example, before the decision in *Aguilar*, in order to prove a defendant guilty of AUUW under section (a)(1), (a)(3)(C) the state was required to prove that when a defendant possessed a firearm he "2)...was not on his own land, in his own abode, or in his fixed place of business." I.P.I. 18.04W (Modified). *Post-Aguilar* however, the state no longer has to prove the defendant was not inside his own abode because possessing a firearm inside your home *receives no greater protection* than possessing one outside. The second element under the I.P.I. has been eliminated because it's no longer relevant, and the elements of the offense which remain are 1) that the defendant carried or possessed on or about his person a firearm; and 2) that when he did so he had not been issued a currently valid FOID Card.

Similarly, in light of the decision in *Aguilar*, for an offense under section (a)(2), (a)(3)(C) the state no longer has to prove the second, third and fourth elements of the I.P.I because possessing a firearm upon a public street or alley within the corporate limits of a city *receives no less protection* than possessing one inside one's home; and possessing a firearm while in one's own abode, or engaging in the lawful commerce of weapons, *receives no greater protection* under the law. The second, third and fourth elements under the I.P.I. are eliminated as irrelevant and the elements of the offense under section (a)(2),(a)(3)(C) have become: 1) That the defendant carried or possessed on or about his person a firearm; and 2) That when he did so he had not been issued a currently valid Firearm Owner's Identification Card.

Finally, the elements of a violation of the FOID card statute are:

- 1) That the defendant knowingly possessed a firearm within this state; and
- 2) That the defendant at the time of the possession failed to have in his possession a firearm owner's identification card previously issued in his name by the Department of State Police. I.P.I. Criminal 18.26.

Applying the above analysis to the present case, it is clear that in light of the decision in *Aguilar* the elements of both the Aggravated Unlawful Use of a Weapon statute and the Firearm Owners Identification Card Act are substantively identical, i.e., 1) that the defendant was in possession of a firearm; and 2) that when he did so he was not in possession of a valid FOID card. In that AUUW is punishable as a class 4 felony and the FOID Card Act as a class A misdemeanor, their penalties are disproportionate and the AUUW is unconstitutional both *as applied* to defendant and *on its face*. This court further finds that the statute cannot reasonably be construed in a manner that would preserve its validity, that the finding is necessary to the court's decision, and that the decision of this court cannot rest upon an alternative ground. See Ill. S. Ct. R. 18 (eff. Sept. 1, 2006)

Finally, the court must address the proper remedy for this constitutional violation. Defendant argues that he should be subject to the same class A misdemeanor sentencing scheme as that for a violation of the Firearm Owner's Identification Card Act. However, because the penalty for aggravated unlawful use of a weapon violates the constitutional guarantee of proportionate sentencing, the State's Attorney had no authority, discretionary or otherwise, to charge that offense. *People v. Lewis*, 175 Ill. 2d 412, 423, 677 N.E.2d 830(1996); *People v. Hamm*, 149 Ill. 2d 201, 218-20, 595 N.E.2d 540 (1992). Thus the appropriate remedy is dismissal of the remaining charges against defendant.

#### CONCLUSION

For the reasons stated above, this court finds that in light of the Illinois Supreme Court's decision in *People v. Aguilar*, 2013 IL 112116 (2013) that the elements of Aggravated Unlawful Use of a Weapon, 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) & (a)(2),(a)(3)(C) are now identical to the

elements of the Firearm Owner's Identification Card Act. 430 ILCS 65/2(a)(1). As the two offenses have identical elements but are punished differently, the Aggravated Unlawful Use of a Weapon statute violates the proportionate penalties clause of the Illinois Constitution. (Ill. Const. 1970, Art 1, Sec. 11). The remaining charges against defendant are HEREBY DISMISSED.

**ENTERED:**

*Matthew E. Coghlan 1812*

Judge Matthew E. Coghlan  
Circuit Court of Cook County  
Criminal Division

**ENTERED**  
Judge Matthew Coghlan

**DEC 18 2013**

**DATED:**

12/18/13

Circuit Court 1812