No. 120407

IN THE
SUPREME COURT OF ILLINOIS

****

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, First District.
	)	No. 1-14-1256
Respondent-Appellant,	)	
	)	There on Appeal from the
v.	)	Circuit Court of
	)	Cook County, Illinois
DAVID HOLMES,	)	No. 12 CR 11423
	)	
	)	The Honorable
Petitioner-Appellee.	)	Dennis J. Porter,
	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

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NATURE OF THE CASE

Defendant David Holmes was charged with aggravated unlawful use of a weapon (AUUW) for carrying an uncased, loaded, immediately accessible firearm (Counts I and III), and for carrying a firearm without a valid Firearm Owner's ID (FOID) card (Counts II and IV). C26-30.[1] Following this Court's opinion in *People v. Aguilar*, 2013 IL 112116 (invalidating 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)), defendant filed a motion to quash his arrest and suppress evidence on the ground that the arresting officer only had probable cause to believe defendant was violating 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) and 720 ILCS 5/24-1.6(a)(2), (a)(3)(A), both of which had been declared unconstitutional. C55-C57. The circuit court granted defendant's motion to quash his arrest and suppress evidence, RA15-A16, and the People appealed, C65-66.

The First District affirmed the trial court's judgment. *People v. Holmes*, 2015 IL App (1st) 141256, at ¶ 40. The People appeal from the appellate court's judgment affirming the trial court's order granting defendant's motion to quash his arrest and suppress evidence.

[1] "C_" denotes the common law record; "SC_" denotes the supplemental common law record; "R_" denotes the report of proceedings.

ISSUE PRESENTED

A police officer observed defendant carrying a firearm in the waistband of his jeans, a violation of the AUUW statute. Upon arrest, a search revealed that defendant did not have a FOID card, which was an additional violation of the AUUW statute. Subsequently, this Court in *Aguilar* held that the portion of the AUUW statute banning carriage of a loaded, uncased, immediately accessible firearm violated the Second Amendment of the Constitution of the United States.

The issues presented here are:

(1) whether an arrest made upon probable cause to believe a defendant is violating a then-valid criminal statute comports with the Fourth Amendment; and

(2) if the subsequent invalidation of a criminal statute renders a previously valid arrest illegal, whether the good-faith exception should apply.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(a)(2), and 612(b). This Court granted leave to appeal on September 28, 2016.

STATEMENT OF FACTS

The People charged defendant with four counts of AUUW. Counts I and III alleged that defendant carried a loaded, uncased, immediately accessible firearm, and counts II and IV alleged that he did so without a FOID card. C26-30. Following this Court's opinion in *Aguilar*, the parties agreed that counts I and III should be dismissed because subsection (a)(3)(A) of the AUUW statute was unconstitutional. C42-47, 49. Defendant then filed a motion to quash his arrest and suppress evidence on the ground that the arresting officer only

had probable cause to believe defendant was violating the unconstitutional portions of the AUUW statute. C55-C57.

At the hearing on defendant's motion, the arresting officer Gabriel Barrera testified that, on June 8, 2012, he was patrolling the 63rd Street Beach in Chicago on a bicycle. RA4, 7. He saw defendant lean into the passenger-side window of a vehicle to speak to the driver, and as defendant did so, his shirt rode up, revealing a revolver tucked into his waistband. RA5. Barrera approached defendant, asked him to place his hands on his head, and removed defendant's revolver. RA6. Barrera's partner then took defendant into custody. *Id.* After defendant was in custody, Barrera learned defendant's name and that he did not have a FOID card. *Id.* Barrera had no arrest or search warrant for defendant at the time of his arrest. RA5.

Following Barrera's testimony, defendant argued that the arrest should be quashed and all evidence resulting from the arrest suppressed:

> At the time, yes, the officer did have the right to place [defendant] under arrest. He had a right to search him and recover that gun.
>
> Post-*Aguilar*, Judge, he didn't because that portion of the statute was found to be unconstitutional. It was found to be void. It had [*sic*] ab initio. The point being though now that's no longer okay. Just somebody carrying a gun is not a reason for officers to place him in custody and place him under arrest.

RA11-12. The trial court was sympathetic to the arresting officer, but it agreed with defendant's analysis:

> It might be kind of unfortunate because the officer didn't do anything wrong at the time. But if it is true that the statute is void ab initio then it is like it never existed. And if it never existed it is that portion of the statute [*sic*] then the officer didn't have probable cause.

RA15.

On appeal, the First District agreed, relying principally on this Court's decision in *People v. Carrera*, 203 Ill. 2d 1 (2002):

> [O]ur supreme court in *Carrera* stated that a facially invalid statute is void *ab initio*. In other words, "it is as though no such law had ever been passed." . . . The *Carrera* court then went on to state that "to apply the good-faith exception would run counter to our single subject clause and void *ab initio* jurisprudence — specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted."

Holmes, 2015 IL App (1st) 141256, at ¶ 29 (quoting *Carrera*, 203 Ill.2d at 14, 16). The appellate court rejected the People's argument that *Carrera* was distinguishable because the unconstitutional statute in *Carrera* conferred search and seizure authority upon the police, rather than defining a substantive criminal offense: "To the contrary, the *Carrera* court used expansive language, stating that the void *ab initio* doctrine applied both to legislative acts that were found unconstitutional for violating substantive constitutional guarantees as well as those adopted in violation of the single subject clause." *Id.* at ¶ 31. The First District recognized that 725 ILCS 5/114-12(b)(2)(ii) codified the good-faith exception to the exclusionary rule for evidence obtained incident to an arrest for a violation of a statute later declared unconstitutional, but left it to this Court to determine whether *Carrera* had declared that statute unconstitutional *sub silentio*. *Id.* at ¶¶ 32-33.

ARGUMENT

I. Standard of Review

When reviewing a trial court's ruling on a motion to quash an arrest and suppress evidence, this Court affords great deference to the trial court's factual determinations, and will reverse them only if they are against the manifest weight of the evidence, but it reviews *de novo* the ultimate legal conclusion whether the evidence should be suppressed. *People v. Almond*, 2015 IL 113817, ¶ 55.

II. Defendant's Warrantless Arrest Did Not Violate the Fourth Amendment Because There Was Probable Cause at the Time of His Arrest.

Both the Fourth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, and Article I, Section 6 of the Illinois Constitution of 1970 guarantee Illinois citizens the right to be free from unreasonable searches and seizures. *See People v. Gaytan*, 2015 IL 116223, ¶ 20. An arrest made without a warrant is valid only if there is probable cause. *People v. Grant*, 2013 IL 112734, ¶ 11. Probable cause exists when the facts known to the officer at the time of the arrest are sufficient to cause a reasonably cautious person to believe that the arrestee has committed a crime. *Id.* This determination depends upon the totality of circumstances at the time of the arrest. *Id.*

Here, the trial court found that there was probable cause at the time of the arrest to believe that defendant was committing a crime — specifically, carrying a loaded, uncased, easily accessible firearm. RA15. Indeed, defendant conceded this point in the trial court. RA11 ("At the time, yes, the officer did have the right to place [defendant] under arrest."). Officer Barrera saw defendant on city property carrying what he "immediately" recognized

to be a handgun. RA8-9. Therefore, he had probable cause to believe that defendant was committing a crime — specifically AUUW — by carrying a loaded, uncased, immediately accessible firearm on public lands, in violation of 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (2012) and 720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (2012). Thus, defendant's arrest was valid based on the totality of the circumstances, and no Fourth Amendment violation occurred. *See Grant*, 2013 IL 112734, ¶ 11.

It makes no difference that subsections (a)(1), (a)(3)(A) and (a)(2), (a)(3)(A) were subsequently declared unconstitutional. *See Aguilar*, 2013 IL 112116 (invalidating 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)); *People v. Mosely*, 2015 IL 115872 (invalidating 720 ILCS 5/24-1.6(a)(2), (a)(3)(A)). These subsections of the AUUW statute were relevant to the validity of the arrest in that they were part of the totality of circumstances giving rise to probable cause at the time of the arrest. *See Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979) (holding ordinance defendant violated was "relevant to the validity of the arrest and search only as it pertains to the facts and circumstances we hold constituted probable cause for arrest"). That those portions of the AUUW statute were later invalidated does not undermine the validity of an arrest made for a violation of a then presumptively valid criminal statute. *Id.* And because the search that followed, which produced the firearm, defendant's name, and defendant's lack of a FOID card, was incident to that arrest, it was also valid. *Id.*; *see also United States v. Charles*, 801 F.3d 855, 861 (7th Cir. 2015) (arrest and search incident to arrest based on subsection of AUUW subsequently held unconstitutional did not violate Fourth Amendment).

A prudent officer determining whether defendant had committed a crime based on the totality of the circumstances at the time of the arrest was not required to anticipate that

the relevant subsections of the AUUW statute would later be declared unconstitutional. *DeFillipo*, 443 U.S. at 37-38. This is particularly so because controlling precedent at the time of defendant's arrest had upheld the statute as constitutional. *See, e.g.*, *People v. Montyce H.*, 2011 IL App (1st) 101788, ¶¶ 20-34 (abrogated by *Aguilar*). Nor would it be wise to ask officers to attempt to anticipate such changes in the law. "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *DeFillippo*, 443 U.S. at 38. An officer's job is "to enforce laws until and unless they are declared unconstitutional." *Id.*

Because Officer Barrera had probable cause to believe that defendant was breaking the law based on the totality of the circumstances at the time of the arrest, the arrest was valid under the Fourth Amendment and Article I, Section 6. Therefore, the search incident to that arrest was also valid and the evidence obtained from it should not have been suppressed.

III. If the Subsequent Invalidation of Portions of the AUUW Statute Retroactively Rendered Defendant's Arrest Invalid, the Good Faith Exception Applies, and the Evidence Obtained Should Not Be Suppressed.

Even if this Court were to declare for the first time that the subsequent invalidation of a substantive criminal statute retroactively invalidates a previously constitutional arrest, it should apply the good faith exception to the exclusionary rule and allow the People to use the evidence obtained during the search incident to that arrest. Section 114-12 of the Code of Criminal Procedure provides in relevant part:

> (1) If a defendant seeks to suppress evidence because of the conduct of a peace officer in obtaining the evidence, the State may urge that the peace officer's conduct was taken in a reasonable and objective good faith belief that the conduct was proper and that the evidence discovered should not be suppressed if otherwise admissible. *The court shall not suppress evidence which is otherwise admissible in a*

> *criminal proceeding if the court determines that the evidence was seized by a peace officer who acted in good faith.*
>
> (2) "Good faith" means whenever a peace officer obtains evidence:
>
> * * *
>
> (ii) pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance *which is later declared unconstitutional or otherwise invalidated*.

725 ILCS 5/114-12 (emphasis added). Section 114-12 is a codification of the good-faith exception to the exclusionary rule articulated in *United States v. Leon*, 468 U.S. 897 (1984). *See People v. Carlson*, 185 Ill. 2d 546, 560 (1999).

The question of whether evidence must be suppressed is separate from whether the search was legal. *People v. Sutherland*, 223 Ill. 2d 187, 227 (2006). The United States Supreme Court fashioned the exclusionary rule as a deterrent to future violations of the Fourth Amendment. *See People v. LeFlore*, 2015 IL 116799, ¶ 17 (citing *Arizona v. Evans*, 514 U.S. 1, 10 (1995)). But application of the exclusionary rule is restricted to those "unusual cases" where it would serve the objective of deterring future violations. *Id.* at ¶ 22 (quoting *United States v. Katzin*, 769 F.3d 163, 170 (3d Cir. 2014) (*en banc*) (citing *Leon*, 468 U.S. at 909)). Exclusion of evidence should be a "last resort," not a "first impulse," *id.* (quoting *Herring v. United States*, 555 U.S. 135, 140 (2009)), because the exclusionary rule exacts a "heavy toll" on the judicial system and society at large by requiring courts to ignore reliable, trustworthy evidence bearing on a defendant's guilt, and often sets a criminal loose in the community without punishment, *id.* at ¶ 23 (citing *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014) (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011))). For these reasons, even when a Fourth Amendment violation has occurred, the evidence obtained

will not be suppressed where the good faith exception applies. *Id.* at ¶ 17. Where an officer acts with an objective good-faith belief that his conduct is lawful, the deterrent effect of the exclusionary rule "loses much of its force and exclusion cannot pay its way." *Id.* at ¶ 24 (quoting *Davis*, 564 U.S. at 238).

To determine whether the good-faith exception applies, this Court asks "whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." *Id.* at ¶ 25 (quoting *Herring*, 555 U.S. at 145). The General Assembly answered that question in Section 114-12 when it defined "good faith" to include an arrest or search for a violation of a statute later declared unconstitutional. 725 ILCS 5/114-12(b)(2)(ii). And its definition is undoubtedly correct. A well-trained officer determining whether he had probable cause to arrest defendant could not have known that the relevant subsections of the AUUW statute would subsequently be declared unconstitutional. *See DeFillippo*, 443 U.S. at 37-38; *see also Charles*, 801 F.3d at 861. Indeed, controlling precedent at the time of the arrest upheld that statute as constitutional. *See, e.g.*, *Montyce H.*, 2011 IL App (1st) 101788, ¶¶ 20-34. Therefore, applying the exclusionary rule here would not serve the purpose of the rule and might deter an officer in a future situation from doing his job. *See LeFlore*, 2015 IL 116799, ¶ 27 (quoting *Davis*, 564 U.S. at 241); *see also DeFillippo*, 443 U.S. at 38 (an officer's job is "to enforce laws until and unless they are declared unconstitutional").

It is true that this Court has declined to apply the good-faith exception where evidence was obtained pursuant to an unconstitutional statute, but only where the statute, by its own terms, purported to authorize searches or seizures. *See People v. Krueger*, 175 Ill. 2d 60, 74-75 (1996). Indeed, in doing so, this Court recognized the distinction between the

invalidation of a procedural statute authorizing searches and seizures and the invalidation of a substantive statute defining the underlying criminal offense. *Id.* (citing *DeFillippo*, 443 U.S. at 39). That distinction is dispositive here.

The United States Supreme Court applies the good-faith exception even to procedural statutes governing searches and seizures. *See Illinois v. Krull*, 480 U.S. 340, 356 (1987) (applying good-faith exception to evidence seized by officer relying on Illinois statute authorizing warrantless searches that this Court subsequently held unconstitutional). In *Krueger*, this Court held that the good-faith exception did not apply in such circumstances under Article I, Section 6 of the Illinois Constitution. *See Krueger*, 175 Ill. 2d at 74-75 (holding *Krull* exception did not apply in Illinois and excluding evidence obtained pursuant to a then-valid statute authorizing no-knock warrants). In departing from the lockstep doctrine, this Court relied on the reasoning in Justice O'Connor's dissent in *Krull*. Justice O'Connor argued that the "core concern" of the Fourth Amendment was to prohibit the enactment of statutes that authorize unconstitutional searches. *See Krueger*, 175 Ill. 2d at 72 (citing *Krull*, 480 U.S. at 362-63 (O'Connor, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.)). Legislators, the Framers recognized, "often pose a serious threat to fourth amendment values." *Id.* But where, as here, the unconstitutional statute was not enacted to authorize searches, but rather to define a substantive underlying criminal offense and is later deemed to run afoul of a different constitutional provision (here, the Second Amendment), the statute falls outside the core concerns of the Fourth Amendment. Exclusion of evidence obtained pursuant to a statute that authorizes unconstitutional searches or seizures may deter the legislature from passing future legislation that threatens Fourth Amendment values, as *Krueger* recognized. But the exclusionary rule serves no such purpose here. The General

Assembly did not set out to authorize searches. It set out to ban the carriage of loaded, uncased, immediately accessible firearms. That such a ban was subsequently declared unconstitutional under the Second Amendment does not mean that the General Assembly undermined the Fourth Amendment in passing the law.

Justice O'Connor in *Krull* and this Court in *Krueger* also expressed concern that if the aggrieved party had no remedy for the illegal search, he would have no incentive to challenge the constitutionality of the statute authorizing the search or seizure. *Id.* at 73. But this concern is absent where the unconstitutional statute is substantive in nature. The remedy for a defendant who challenges the constitutionality of a statute under which he is charged is the dismissal of charges (or the vacatur of his conviction). That is precisely what happened in *Aguilar*. 2013 IL 112116, ¶ 30. Defendants have ample incentive and ability to challenge substantive criminal statutes without any extension of the exclusionary rule.

Krueger reaffirmed this Court's acceptance of the good-faith exception as expressed in *Leon*, *see LeFlore*, 2015 IL 116799, ¶ 67, and codified in section 114-12, *see Carlson*, 185 Ill. 2d at 560. And section 114-12 explicitly provides that the exception applies when an officer makes an arrest or conducts a search for a violation of a substantive criminal statute later declared unconstitutional. 725 ILCS 5/114-12(b)(2)(ii). Thus, contrary to the First District's suggestion, *Krueger* did not invalidate section 114-12 *sub silentio*. *Krueger* dealt only with the distinct question of whether the good faith exception applies when an officer relies on a statute, later held unconstitutional, that specifically purports to authorize searches and seizures.

People v. Carrera, on which the First District relied in this case, also dealt with a procedural statute authorizing arrests, and is therefore distinguishable. *See Holmes*, 2015 IL

App (1st) 141256, ¶ 36 ("We recognize that both *DeFillippo* and *Charles* contain facts similar to our case. Nonetheless, we are bound by the supreme court's decision in *Carrera* and the void *ab initio* doctrine."). *Carrera* concerned a statute that authorized police to effect extraterritorial arrests. *Carrera*, 203 Ill. 2d at 14. Accordingly, *Carrera*, like *Krueger*, dealt with an invalidated *procedural* statute governing searches and seizures, as opposed to this case, which deals with an invalidated *substantive* criminal statute. Resolving this case in the People's favor need not disturb *Carrera*. The First District's speculation that *Krueger* and *Carrera* invalidated section 114-12(b)(2)(ii)'s application of the good-faith exception to substantive criminal statutes *sub silentio* is baseless; those cases dealt with the very different question of statutes that authorize police to make arrests. *See Holmes*, 2015 IL App (1st) 141256, ¶ 33 ("it can be argued that section 114-12(b)(2)(ii) has been invalidated by *Krueger* and *Carrera*").

Carrera should be limited to statutes that authorize police to make arrests. The First District dismissed the substantive-procedural distinction as meaningless:

> To the contrary, the *Carrera* court used expansive language, stating that the void *ab initio* doctrine applied both to legislative acts that were found unconstitutional for violating substantive constitutional guarantees as well as those adopted in violation of the single subject clause. The *Carrera* court further stated that applying "the good-faith exception would run counter to our void *ab initio* jurisprudence — specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted."

Holmes, 2015 IL App (1st) 141256, ¶ 31 (quoting *Carrera*, 203 Ill. 2d at 16). To the extent that *Carrera* holds that the invalidation of a substantive criminal statute retroactively invalidates every arrest for which the violation of that statute provided probable cause, and requires exclusion of all evidence obtained incident to those arrests, *Carrera* should be overturned. First, as discussed, application of the exclusionary rule under such

circumstances offers no deterrent against future Fourth Amendment violations by either law enforcement officers or the General Assembly. And because application of the exclusionary rule is a last resort reserved for cases where that deterrent effect outweighs the cost to society of allowing criminals to go unpunished, the exclusionary rule should not be employed in cases involving the subsequent invalidation of a substantive criminal provision.

Second, the void *ab initio* doctrine does not require courts to pretend that a statute never existed. *See People v. Blair*, 2013 IL 114122, at ¶ 29 (holding that "the void *ab initio* doctrine does not mean that a statute held unconstitutional never existed"). "The actual existence of a statute, prior to a determination that the statute is unconstitutional, is an operative fact and may have consequences which cannot be justly ignored." *Id.* (quoting *Perlstein v. Wolk*, 218 Ill. 2d 448, 461 (2006)). For example, the People may obtain a conviction for unlawful possession of a weapon by a felon (UPWF) where the defendant's predicate felony conviction was a violation of the unconstitutional portion of the AUUW statute. *See People v. McFadden*, 2016 IL 117424, ¶ 37. This is because the UPWF statute depends on the defendant's status as a convicted felon at the time he illegally used the weapon. *Id.* at ¶ 29. This Court reasoned:

> 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. In other words, although *Aguilar* rendered a portion of the AUUW statute void *ab initio*, it did not require courts to pretend that it never existed. "A declaration that a statute is void *ab initio* means that the statute was constitutionally infirm from the moment of its enactment and, therefore, is unenforceable." *Id.* at ¶ 17 (citing *Blair*, 2013 IL 114122,

at ¶ 30). Indeed, as the People conceded in this case, defendant could not be convicted for carrying a loaded, uncased, easily accessible firearm. But just as the Court in *McFadden* did not pretend that the defendant did not have an AUUW conviction at the time he was convicted of UPWF, the void *ab initio* doctrine does not compel this Court to pretend that subsection (a)(3)(A) did not exist at the time Officer Barerra concluded that he had probable cause to believe that defendant was violating that provision. Therefore, the void *ab initio* doctrine does not dictate exclusion of the evidence gathered incident to defendant's arrest.

The *Carrera* dissent is correct that the Illinois Constitution should not prohibit application of the good-faith exception unless the invalidated statute violates the Fourth Amendment. The statute at issue in *Carrera*, though it authorized arrests, was not unconstitutional under the Fourth Amendment or Article I, Section 6, but rather violated the Single Subject Rule:

> Our concern in *Krueger* was with a statute authorizing police conduct that was, in itself, unconstitutional. This case does not pose the same threat to liberty as the statute at issue in *Krueger*, which purported to authorize unconstitutional no-knock entries by the police when executing a search warrant.

Carrera, 203 Ill. 2d at 25-26 (Garman, J., dissenting, joined by Fitzgerald and Thomas, JJ.). For the People to prevail here, this Court need only decline to extend *Carrera* to substantive criminal statutes. However, as Justice Garman's dissent points out, the core Fourth Amendment principles implicated by a statute, such as the one at issue in *Krueger*, that authorizes unconstitutional police conduct, do not prevent application of the good-faith exception to statutes like the ones in both *Carrera* and this case, which do not purport to authorize conduct that violates the Fourth Amendment. And because *Blair* has clarified that the void *ab initio* doctrine does not require, as *Carrera* suggested, that the Court pretend that

an unconstitutional statute never existed, this Court should now hold that the void *ab initio* doctrine does not require the extension of *Krueger*'s exclusionary rule to any statute where such core Fourth Amendment principles are not directly implicated.

CONCLUSION

This Court should reverse the judgment of the appellate court and remand for further proceedings.

November 2, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is fifteen pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

APPENDIX

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant, vs. David Holmes Defendant-Appellee.	)	Indictment No. 12CR11423 Honorable Dennis Porter Trial Judge

FILED
Judge Dennis Porter #1512
MAY 01 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

NOTICE OF APPEAL
Joining Prior Appeal / Separate Appeal / Cross Appeal
(circle one)

An appeal is taken from the order or judgment described below:

1. Court to which appeal is taken: 1st District Appellate Court
2. Name and address of Appellant's attorney on appeal:
   Name: Cook County State's Attorney
   Address: 50 West Washington
   Richard J. Daley Center, 3rd Floor
   Chicago, Illinois 60602
   Phone: 312-603-5496
3. Name of Appellee's Attorney and address to which notices shall be sent:
   Name: VINCENT Colucci, ASSISTANT Public Defender
   Address: 69 W. WASHINGTON, 15th fl.
   CHICAGO IL 60602
   If Appellee is indigent and has no attorney; does he want one appointed? _____
4. Date of Judgment or Order: February 14, 2014, April 3, 2014, ✓
5. Appeal is taken from: Trial Court Order
   Suppressing evidence and denial of motion to reconsider

C. Bowden
Christa Bowden
Assistant State's Attorney

Notice filed dated: _____
Appeal check date: _____

People v. Holmes, 2015 IL App (1st) 141256 (2015)
45 N.E.3d 326, 398 Ill.Dec. 895

KeyCite Yellow Flag - Negative Treatment
Appeal Allowed by People v. Holmes, Ill., September 28, 2016

2015 IL App (1st) 141256
Appellate Court of Illinois,
First District, Fifth Division.

The PEOPLE of the State of Illinois, Plaintiff–Appellant,
v.
David HOLMES, Defendant–Appellee.

No. 1–14–1256.
|
Opinion Filed Nov. 25, 2015.
|
Rehearing Denied Dec. 31, 2015.

Synopsis

Background: Defendant was arrested for two counts of aggravated unlawful use of a weapon (AUUW) for carrying firearm without valid Firearm Owner's Identification (FOID) card. The Circuit Court, Cook County, Dennis J. Porter, J., granted defendant's motion to quash arrest and suppress evidence. State appealed.

[Holding:] The Appellate Court, Palmer, J., held that good-faith exception to exclusionary rule did not apply to arrest under AUUW statute that was later found facially unconstitutional.

Affirmed.

West Headnotes (3)

[1] **Criminal Law** ⇐ Review De Novo
Criminal Law ⇐ Evidence wrongfully obtained

Appellate court applies a two-part standard of review when reviewing a ruling on a motion to quash arrest and suppress evidence: the appellate court affords great deference to the trial court's findings of fact and will reverse those findings only where they are against the manifest weight of the evidence; however, the appellate court reviews de novo the trial court's ultimate ruling on whether the evidence should be suppressed.

2 Cases that cite this headnote

[2] **Criminal Law** ⇐ Exclusionary Rule in General

Where evidence is obtained in violation of the Fourth Amendment, the exclusionary rule precludes the use of such evidence against the defendant in a criminal proceeding. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[3] **Criminal Law** ⇐ Reliance on statute, ordinance, or precedent;mistake of law

Good faith exception to exclusionary rule did not apply to arrest of defendant based on statute criminalizing aggravated unlawful use of a weapon (AUUW) for carrying a firearm without a valid Firearm Owner's Identification (FOID) card, which was later found to be facially unconstitutional while defendant's case was pending, and thus defendant was entitled to have arrest quashed and evidence suppressed, since facially invalid criminal statute was void ab initio and viewed as if it had never existed. S.H.A. Const. Art. 1, § 6; S.H.A. 720 ILCS 5/24–1.6(a)(1, 2), (a)(3)(C).

1 Cases that cite this headnote

West Codenotes

Validity Called into Doubt
S.H.A. 725 ILCS 5/114–12(b)(2)(ii)

Attorneys and Law Firms

***326** Anita M. Alvarez, State's Attorney, Chicago (Alan J. Spellberg, Carol L. Gaines, and Paul J. Connery, Assistant State's Attorneys, of counsel), for the People.

Amy P. Campanelli, Public Defender, Chicago (Eileen T. Pahl, Assistant Public Defender, of counsel), for appellee.

OPINION

Justice PALMER delivered the judgment of the court, with opinion.

****895** ¶ 1 Defendant, David Holmes, was arrested when a Chicago police officer observed a revolver in his waistband. After placing defendant under arrest, police also discovered that he did not have a Firearm Owner's Identification (FOID) card, and defendant was subsequently charged with, *inter alia,* two counts of aggravated unlawful ****896** ***327** use of a weapon (AUUW) for carrying a firearm without a valid FOID card (720 ILCS 5/24–1.6(a)(1), (a)(2), (a)(3)(C) (West 2012)).

¶ 2 Following defendant's arrest, the Illinois supreme court issued its decision in *People v. Aguilar,* 2013 IL 112116, 377 Ill.Dec. 405, 2 N.E.3d 321. Thereafter, defendant filed a motion to quash arrest and suppress evidence with respect to the two FOID-card counts. He argued that his arrest was invalid, as the probable cause for his arrest was based on the portion of the AUUW statute found unconstitutional in *Aguilar.* After a hearing, the trial court granted defendant's motion.

¶ 3 The State appeals, arguing the trial court erred by granting defendant's motion to quash arrest and suppress evidence. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2012, the State charged defendant with two counts of AUUW for carrying an uncased, loaded, and immediately accessible firearm (720 ILCS 5/24–1.6(a)(1), (a)(2), (a)(3)(A) (West 2012)), and two counts of AUUW for carrying a firearm without a valid FOID card (720 ILCS 5/24–1.6(a)(1), (a)(2), (a)(3)(C) (West 2012)). Following the decision in *Aguilar,* the State conceded that the two counts based on subsection (a)(3)(A) for carrying an uncased, loaded,

and immediately accessible weapon (counts I and III) should be dismissed. The State entered a *nolle prosequi* on those counts.

¶ 6 In January 2014, defendant filed a motion to quash his arrest and suppress evidence[1] with respect to the two remaining AUUW counts, alleging that his arrest violated his right to be free from unreasonable search and seizure under the state and federal constitutions. He argued that police lacked probable cause to believe he was committing a crime. Defendant noted the decision in *Aguilar* and asserted that the good-faith exception to the exclusionary rule did not apply where police were enforcing an unconstitutional statute. In support of his assertion, defendant cited to *People v. Carrera,* 203 Ill.2d 1, 270 Ill.Dec. 440, 783 N.E.2d 15 (2002).

¶ 7 A hearing on defendant's motion commenced in February 2014. At the hearing, Chicago police officer Barrera testified that he was working near the 63rd Street Beach at approximately 9 p.m. on June 8, 2012, when he observed that defendant had a revolver sticking out of his waistband. Barrera approached defendant, told him to place his hands on his head, and then reached into defendant's waistband and removed the revolver. Barrera's partner placed defendant under arrest. After defendant was arrested, another officer researched defendant's FOID-card status. Barrera conceded that before arresting defendant, he did not know any information about defendant.

¶ 8 During arguments, defense counsel asserted that no probable cause existed "for a violation of any law," as the officer was investigating defendant for carrying a concealed gun in public, and the *Aguilar* court had found that portion of the AUUW statute unconstitutional. Defense counsel likened defendant's case to *Carrera,* positing that the supreme court in that case "basically ruled that officers cannot use the good faith exception when that good faith exception is based on an unconstitutional statute." The State responded that the gun was in plain view, the police officers' actions were not unreasonable, and *Aguilar* did not invalidate the FOID-card provision of the AUUW statute.

***328** ****897** ¶ 9 The trial court held the officer lacked probable cause for defendant's arrest given that, if a statute is void *ab initio,* it is as if it never existed. The court noted defendant's case was "kind of unfortunate because the officer didn't do anything wrong at the time" and the officer could have effectuated a valid *Terry* stop (*Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) and inquired right away whether defendant had a FOID card. However, the officer did not do so. Thus, the court granted defendant's motion.

¶ 10 The State filed a motion to reconsider the quashed arrest, arguing, *inter alia,* that *Carrera,*[2] like *Illinois v. Krull,* 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), did not apply because those cases involved unconstitutional statutes that authorized warrantless searches, whereas defendant's case involved a criminal statute that was only found partially unconstitutional. The State also asserted that, even if the trial court found that *Krull* and *Carrera* applied, the court should nonetheless apply the good-faith exception set forth in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The State argued that the court should refuse to exclude evidence by the officers who reasonably relied on a then-valid statute when they arrested defendant. In his response, defendant reiterated that the police lacked probable cause to arrest him in light of *Aguilar,* as a criminal statute that is unconstitutional is void *ab initio.*

¶ 11 Following an April 2014 hearing, the trial court denied the State's motion to reconsider. Thereafter, the State filed a notice of appeal and a certificate of substantial impairment from the trial court's February 2014 and April 2014 orders pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. Feb. 6, 2013).

¶ 12 II. ANALYSIS

¶ 13 On appeal, the State argues that the trial court erred by granting defendant's motion to suppress evidence. The State maintains that *Carrera* is distinguishable and the court should have recognized a good-faith exception to the exclusionary rule, as the officer was operating under the law in effect at the time of defendant's arrest and defendant's

fourth amendment rights were not violated. Further, the State contends, the good-faith exception should be applied pursuant to section 114–12(b)(2)(ii) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114–12(b)(2)(ii) (West 2012)). Defendant responds that the court properly granted his motion to suppress evidence, as it is well settled that a finding of unconstitutionality on any ground renders a statute void *ab initio* and the good-faith exception to the exclusionary rule may not be applied to statutes that are void *ab initio.*

[1] ¶ 14 We apply a two-part standard of review when reviewing a ruling on a motion to quash arrest and suppress evidence. *People v. Almond,* 2015 IL 113817, ¶ 55, 392 Ill.Dec. 227, 32 N.E.3d 535. We afford great deference to the trial court's findings of fact and will reverse those findings only where they are against the manifest weight of the evidence. *Id.* However, we review *de novo* the court's ultimate ruling on whether the evidence should be suppressed. *Id.*

¶ 15 Before turning to the parties' arguments, we wish to set forth the pertinent United States Supreme Court and Illinois supreme court decisions governing this appeal.

***329 **898** ¶ 16 A. The Supreme Court's Decisions in *Leon* and *Krull*

[2] ¶ 17 Both the fourth amendment of the United States Constitution and the Illinois Constitution of 1970 guarantee the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. Where evidence is obtained in violation of the fourth amendment, the exclusionary rule precludes the use of such evidence against the defendant in a criminal proceeding. *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (citing *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)).

¶ 18 In *Leon,* the Supreme Court concluded that the exclusionary rule did not bar the use of evidence obtained by officers who acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate that was ultimately found to be unsupported by probable cause. *Leon,* 468 U.S. at 900, 913, 104 S.Ct. 3405. The Supreme Court explained the exclusionary rule was designed to deter police misbehavior and, further, it could discern no basis for believing that excluding evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate. *Id.* at 916, 104 S.Ct. 3405. Moreover, the Supreme Court explained, where an officer's conduct is objectively reasonable, " 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' " *Id.* at 919–20, 104 S.Ct. 3405 (quoting *Stone v. Powell,* 428 U.S. 465, 539–40, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (White, J., dissenting)). Our supreme court subsequently adopted the *Leon* good-faith exception in *People v. Stewart,* 104 Ill.2d 463, 477, 85 Ill.Dec. 422, 473 N.E.2d 1227 (1984).

¶ 19 Following *Leon,* the Supreme Court in *Krull* extended the good-faith exception to encompass the situation wherein an officer acts in objectively reasonable reliance on a statute authorizing warrantless administrative searches, which is ultimately found to violate the fourth amendment. *Krull,* 480 U.S. at 342, 346, 107 S.Ct. 1160. The statute at issue in *Krull* required a person engaged in certain types of automotive business to obtain a license from the Illinois Secretary of State, and a licensee was required to permit state officials to inspect his records " 'at any reasonable time during the night or day' " and to allow officials to examine the premises of his business to determine the accuracy of his records. *Id.* at 342–43, 107 S.Ct. 1160 (quoting Ill.Rev.Stat. 1981, ch. 95 1/2, ¶ 5–401(e)). Pursuant to the statute, an officer entered the respondents' automobile wrecking yard and discovered that three vehicles were stolen and the identification number on a fourth had been removed. *Id.* at 343, 107 S.Ct. 1160. The respondents were charged with various criminal violations, and they filed a motion to suppress the evidence seized from the yard, noting a federal court had found the statute authorizing warrantless administrative searches of licensees unconstitutional. *Id.* at 344, 107 S.Ct. 1160. The Supreme Court explained that applying "the exclusionary rule to suppress evidence obtained by an officer acting in

objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Id.* at 349, 107 S.Ct. 1160. Further, the Supreme ****899 *330** Court reasoned, it had been given no basis for believing legislators were inclined to act in contravention of fourth amendment principles, nor had the respondents offered any reason to believe that applying the exclusionary rule would have a significant deterrent effect on legislators enacting unconstitutional statutes. *Id.* at 350–52, 107 S.Ct. 1160.

¶ 20 B. The Illinois Supreme Court's Decision in *Krueger*

¶ 21 Our supreme court, however, subsequently declined to adopt the *Krull* good-faith exception, concluding the Illinois Constitution barred its application. *People v. Krueger,* 175 Ill.2d 60, 61, 221 Ill.Dec. 409, 675 N.E.2d 604 (1996). In *Krueger,* the supreme court considered a "no-knock" statute that allowed a judge to issue a warrant authorizing an officer to enter a person's home without first knocking and announcing his office when an occupant of the building had previously possessed firearms within a certain period of time. *Id.* at 64, 221 Ill.Dec. 409, 675 N.E.2d 604 (quoting 725 ILCS 5/108–8(b)(2) (West 1994)). After concluding the statute violated the defendant's constitutional rights to be free from unreasonable searches and seizures, the *Krueger* court turned to the State's argument that the good-faith exception recognized in *Krull* should apply. *Id.* at 69–70, 221 Ill.Dec. 409, 675 N.E.2d 604. In reviewing the *Krull* decision, the supreme court cited extensive portions of Justice O'Connor's dissent. *Id.* at 72, 221 Ill.Dec. 409, 675 N.E.2d 604. It noted that Justice O'Connor had persuasively distinguished *Leon* on two grounds. *Id.* First, Justice O'Connor stated that a " 'powerful historical basis' " existed " 'for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute.' " *Id.* (quoting *Krull,* 480 U.S. at 362, 107 S.Ct. 1160 (O'Connor, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.)). Such statutes were " 'the core concern of the Framers of the Fourth Amendment,' " and the exclusionary rule had also "regularly been applied to suppress evidence gathered under unconstitutional statutes." *Id.* (quoting *Krull,* 480 U.S. at 362–63, 107 S.Ct. 1160 (O'Connor, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.)) Second, the supreme court noted, Justice O'Connor found the aforementioned history showed that legislators often pose a serious threat to fourth amendment values. *Id.* Justice O'Connor's dissent also pointed out that applying the good-faith exception would provide "a 'grace period' for unconstitutional search and seizure legislation." *Id.*

¶ 22 The Illinois Supreme Court thus departed from its tradition of applying the lockstep doctrine and following Supreme Court decisions in fourth amendment cases. *Id.* at 74, 221 Ill.Dec. 409, 675 N.E.2d 604. The *Krueger* court explained that Illinois' exclusionary rule had "always been understood to bar evidence gathered under the authority of an unconstitutional statute [citations], so long as that statute purported to authorize an unconstitutional search or seizure (see *Michigan v. DeFillippo,* 443 U.S. 31 [99 S.Ct. 2627, 61 L.Ed.2d 343] (1979) (recognizing a substantive-procedural distinction not at issue here; specifically holding that the fourth amendment exclusionary rule did not apply where an ordinance was held unconstitutional on vagueness grounds))." *Id.* at 74–75, 221 Ill.Dec. 409, 675 N.E.2d 604. Thus, the supreme court found that adopting the good-faith exception in *Krull* "would drastically change this state's constitutional law." *Id.* at 75, 221 Ill.Dec. 409, 675 N.E.2d 604. Further, in balancing the legitimate aims of law enforcement against citizens' rights to be free from unreasonable governmental intrusion, the supreme ****900 *331** court concluded citizens' rights prevailed. *Id.* The *Krueger* court stated that recognizing a good-faith exception to the state exclusionary rule would "provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity." *Id.*

¶ 23 C. The Illinois Supreme Court's Decision in *Carrera*

¶ 24 Subsequent to *Krueger,* the supreme court issued its decision in *Carrera,* in which it refused to apply the good-faith exception to the defendant's case based on the void *ab initio* doctrine. *Carrera,* 203 Ill.2d at 16, 270 Ill.Dec. 440, 783 N.E.2d 15. In *Carrera,* Chicago police officers arrested the defendant outside of Chicago pursuant to an extraterritorial

jurisdiction arrest statute that was later declared unconstitutional and void *ab initio* for violating the single-subject rule. *Id.* at 3, 8, 16, 270 Ill.Dec. 440, 783 N.E.2d 15. The defendant filed a motion to quash his arrest and suppress evidence, maintaining the officers lacked authority to arrest him outside of Chicago. *Id.* at 7, 270 Ill.Dec. 440, 783 N.E.2d 15. On appeal, the State argued, *inter alia,* that the good-faith exception to the exclusionary rule should apply, as the officers did not violate the defendant's substantive constitutional rights when effectuating the extraterritorial arrest. *Id.* at 13, 270 Ill.Dec. 440, 783 N.E.2d 15. While acknowledging the State's arguments, the *Carrera* court stated it was electing to resolve the case "on narrower grounds," finding the void *ab initio* doctrine dictated the result it reached. *Id.* at 13–14, 270 Ill.Dec. 440, 783 N.E.2d 15. It noted that a statute that is unconstitutional is void *ab initio* and confers no right, imposes no duty, and offers no protection. *Id.* at 14, 270 Ill.Dec. 440, 783 N.E.2d 15. Instead, "[i]t is as though no such law had ever been passed." *Id.* The *Carrera* court further stated that the void *ab initio* doctrine applied to both statutes deemed unconstitutional for violating substantive constitutional guarantees as well as statutes adopted in violation of the single subject clause of the constitution. *Id.* at 14–15, 270 Ill.Dec. 440, 783 N.E.2d 15.

¶ 25 Our supreme court thus refused to apply the good-faith exception to the defendant's case, concluding that to do so "would run counter to our single subject clause and void *ab initio* jurisprudence—specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted." *Id.* at 16, 270 Ill.Dec. 440, 783 N.E.2d 15. The *Carrera* court explained that giving effect to the historical fact that the amendment existed when the defendant was arrested "would effectively resurrect the amendment and provide a grace period * * * during which our citizens would have been subject to extraterritorial arrests without proper authorization." *Id.*

¶ 26 Justice Garman authored a dissent in which Justices Fitzgerald and Thomas joined. The dissent argued that the majority did not answer the narrow question posed by the State, *i.e.,* "whether the good-faith exception to the exclusionary rule applies when officers relied on an apparently valid statute when they made an arrest that, while unlawful, did not violate the individual's state or federal constitutional rights." *Id.* at 17, 270 Ill.Dec. 440, 783 N.E.2d 15 (Garman, J., dissenting, joined by Fitzgerald and Thomas, JJ.). According to the dissent, the majority obscured the distinction "between quashing an arrest because it was not authorized by a valid statute and applying the exclusionary rule to suppress evidence that was obtained in violation of a defendant's right to be free from unreasonable search and seizure." *Id.* The dissent agreed that the ****901** ***332** statute upon which the officers relied was void *ab initio* and explained that the effect of finding the statute unconstitutional on single-subject grounds was to return the law to its *status quo ante. Id.* at 18, 270 Ill.Dec. 440, 783 N.E.2d 15. Thus, to resolve the State's question, the dissent stated that the majority should have applied the earlier version of the statute and common law regarding extraterritorial arrests. *Id.* The dissent noted that the officers' actions in arresting the defendant violated the preexisting statute. *Id.* at 23, 270 Ill.Dec. 440, 783 N.E.2d 15. However, "the question of whether a search or arrest is legal is entirely separate from the question of whether evidence derived from that search or arrest should be excluded." *Id.* at 22, 270 Ill.Dec. 440, 783 N.E.2d 15. According to the dissent, the exclusionary rule applied (1) when suppressing the evidence would further its purpose of deterring police misconduct or (2) where giving effect to search and seizure legislation that violated the fourth amendment or state constitution would permit citizens' constitutional rights to be violated. *Id.* The dissent concluded that although the seizure of the defendant was unlawful, the exclusionary rule did not apply because the seizure did not violate the defendant's state or federal constitutional rights, nor did the officers willfully violate the governing statute. *Id.* at 24, 270 Ill.Dec. 440, 783 N.E.2d 15.

¶ 27 Further, the dissent opined that even if the exclusionary rule applied, the evidence should have been admitted based on the officers' good-faith reliance on the then-applicable statute. *Id.* at 25, 270 Ill.Dec. 440, 783 N.E.2d 15. The dissent explained as follows.

> "Our concern in *Krueger* was with a statute authorizing police conduct that was, in itself, unconstitutional. This case does not pose the same threat to liberty as the statute at issue in *Krueger,* which purported to authorize unconstitutional no-knock entries by the police when executing a search warrant. Recognizing a good-faith exception for action taken by the police pursuant to a statute authorizing certain extraterritorial arrests, but enacted in violation of the single subject rule, would not subject the citizens of Illinois to 'a grace period * * * during which time * * * constitutional

rights can be violated with impunity.' " *Id.* at 25–26, 270 Ill.Dec. 440, 783 N.E.2d 15 (quoting *Krueger,* 175 Ill.2d at 75–76, 221 Ill.Dec. 409, 675 N.E.2d 604).

¶ 28 D. Whether The Evidence Should be Suppressed in This Case

[3] ¶ 29 Having reviewed the aforementioned decisions, we conclude the trial court properly suppressed the evidence in this case. As previously detailed, our supreme court in *Carrera* stated that a facially invalid statute is void *ab initio. Id.* at 14, 270 Ill.Dec. 440, 783 N.E.2d 15 (majority opinion). In other words, "[i]t is as though no such law had ever been passed." *Id.* The *Carrera* court further stated that the void *ab initio* doctrine applies both to statutes that "are unconstitutional because they violate substantive constitutional guarantees" and statutes that are unconstitutional because they violate the single subject clause. *Id.* at 15, 270 Ill.Dec. 440, 783 N.E.2d 15. The *Carrera* court then went on to state that "to apply the good-faith exception would run counter to our single subject clause and void *ab initio* jurisprudence—specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted." *Id.* at 16, 270 Ill.Dec. 440, 783 N.E.2d 15.

¶ 30 Based on the *Carrera* court's language, we conclude the void *ab initio* doctrine precludes the application of the good-****902 *333** faith doctrine in defendant's case. The supreme court in *Aguilar* found the portion of the AUUW statute pursuant to which defendant was arrested unconstitutional on its face. Thus, that statute was void *ab initio.* See *id.* at 14, 270 Ill.Dec. 440, 783 N.E.2d 15. As the *Carrera* court explained, applying the good-faith exception to defendant's case would "run counter to * * * void *ab initio* jurisprudence." *Id.* at 16, 270 Ill.Dec. 440, 783 N.E.2d 15. Further, the *Carrera* court stated that giving "legal effect" to the fact that the prior statute existed in the defendant's case would "effectively resurrect" the statute "and provide a grace period * * * during which our citizens would have been subject to extraterritorial arrests without proper authorization." *Id.* The same concern with a "grace period" is implicated on the facts of our case, where individuals would have continued to be subject to arrests for violating the portion of the AUUW statute that was invalidated in *Aguilar.*

¶ 31 The State contends that *Carrera* is distinguishable. It maintains that the defendants in *Carrera, Krueger,* and *Krull* were each subject to fourth amendment violations based on statutes that gave police unconstitutional search and seizure authority. It is true that the statutes at issue in *Carrera, Krueger,* and *Krull* were all procedural statutes providing expanded authority to law enforcement officials regarding either the search or arrest of individuals, whereas the AUUW statute was a substantive statute. However, the supreme court in *Carrera* drew no distinction between procedural and substantive statutes. To the contrary, the *Carrera* court used expansive language, stating that the void *ab initio* doctrine applied both to legislative acts that were found unconstitutional for violating substantive constitutional guarantees as well as those adopted in violation of the single subject clause. *Id.* at 15, 270 Ill.Dec. 440, 783 N.E.2d 15. The *Carrera* court further stated that applying "the good-faith exception would run counter to our * * * void *ab initio* jurisprudence —specifically, that once a statute is declared facially unconstitutional, it is as if it had never been enacted." *Id.* at 16, 270 Ill.Dec. 440, 783 N.E.2d 15.

¶ 32 We acknowledge, as the State points out, that the Code allows for the admission of evidence obtained pursuant to an arrest for a substantive statute that is later invalidated. Specifically, section 114–12(b)(2)(ii) of the Code provides that evidence shall not be suppressed where a court determines the evidence was seized by an officer acting in good faith, and "good faith" is defined, in relevant part, as existing when an officer "obtains evidence * * * pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated." 725 ILCS 5/114–12(b)(2)(ii) (West 2012). Our supreme court has stated that section 114–12(b)(2) is a codification of *Leon. People v. Carlson,* 185 Ill.2d 546, 560, 236 Ill.Dec. 786, 708 N.E.2d 372 (1999). In *Carlson,* the supreme court applied the good-faith exception to the use of an invalid anticipatory search warrant. *Id.* at 561, 236 Ill.Dec. 786, 708 N.E.2d 372. The *Carlson* court cited to section 114–12(b)(2)(i) of the Code, which defines "good faith" as existing when an officer obtains evidence pursuant to a search or arrest warrant from a neutral and detached judge,

which the officer reasonably believed to be valid. *Id.* at 560, 236 Ill.Dec. 786, 708 N.E.2d 372 (quoting 725 ILCS 5/114–12(b)(2)(i) (West 1996)).

¶ 33 The *Carrera* court did not mention section 114–12(b)(2)(ii) of the Code in its opinion, and its broad language regarding the void *ab initio* doctrine made no exception for evidence obtained in a search incident to an arrest for a statute later found ****903 *334** unconstitutional. We further note that the statute was not mentioned in *Krueger.* While it can be argued that section 114–12(b)(2)(ii) has been invalidated by *Krueger* and *Carrera,* that has not explicitly been done. We do not reach that question here as we are bound to follow the majority opinion in *Carrera.* We leave it to further jurisprudence as to how the conflict between the void *ab initio* doctrine and the statute in question should ultimately be resolved.

¶ 34 The State also relies on *DeFillippo,* positing that it is "especially relevant" as it was cited in *Krueger,* which was in turn cited by the supreme court recently in *People v. LeFlore,* 2015 IL 116799, 392 Ill.Dec. 467, 32 N.E.3d 1043. In *DeFillippo,* the Supreme Court concluded that suppression was not warranted where a defendant was arrested for violating an ordinance that was later found unconstitutionally vague on its face. *DeFillippo,* 443 U.S. at 35, 37–38, 99 S.Ct. 2627. The Supreme Court in that case concluded that probable cause existed for the defendant's arrest, rejecting the idea that the officer should have been required to anticipate that a court would subsequently find the ordinance unconstitutional. *Id.* at 37–38, 99 S.Ct. 2627. The *DeFillippo* Court explained that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional," and "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.* at 38, 99 S.Ct. 2627. The *DeFillippo* Court also distinguished prior cases in which it had held the exclusionary rule required suppression of evidence obtained in searches that were carried out in reliance on statutes purportedly authorizing those searches without probable cause or a warrant. *Id.* at 39, 99 S.Ct. 2627. The Court explained that those statutes, "by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment." *Id.* By contrast, the Court explained, the ordinance in respondent's case "did not directly authorize the arrest or search." *Id.* Instead, the officer had probable cause to believe the respondent was committing an offense in his presence, the State's general arrest statute authorized the respondent's arrest independent of the ordinance, and the subsequent search "was valid because it was incidental to that arrest." *Id.* at 40, 99 S.Ct. 2627.

¶ 35 We note that the Seventh Circuit Court of Appeals also recently concluded that an officer had probable cause to search the car of a defendant, who was found guilty of possessing a firearm as a felon, even though Chicago's handgun ban and Illinois' ban against the possession of guns outside the home were subsequently invalidated. *United States v. Charles,* 801 F.3d 855, 858, 861 (7th Cir.2015). There, a witness called 911 to report that she saw a gun in the defendant's waistband, and a dispatcher broadcasted that information over the police radio. *Id.* at 858. The Seventh Circuit noted that at the time, Chicago had a comprehensive handgun ban and Illinois prohibited carrying concealed guns in public unless they were unloaded and enclosed in a container. *Id.* at 860–61. The *Charles* court concluded that the police had probable cause to believe that the defendant had violated the Chicago ordinance and Illinois statute and that evidence of those crimes could be found in his car. *Id.* at 861. The Seventh Circuit explained that although Chicago's ban and Illinois' concealed-carry law were both subsequently invalidated, "the '[p]olice are charged to enforce laws until and unless they are declared unconstitutional,' so a search based on a violation of a law later ****904 *335** declared unconstitutional does not necessarily violate the Fourth Amendment. *Michigan v. DeFillippo,* 443 U.S. 31, 38 [99 S.Ct. 2627, 61 L.Ed.2d 343] (1979). Although [the defendant] could not be punished for violating an unconstitutional statute or ordinance, unless a law is 'grossly and flagrantly unconstitutional,' a police officer conducting a search may reasonably rely on it for Fourth Amendment purposes. *Id.*" *Id.*

¶ 36 We recognize that both *DeFillippo* and *Charles* contain facts similar to our case. Nonetheless, we are bound by the supreme court's decision in *Carrera* and the void *ab initio* doctrine. As previously detailed, the supreme court explicitly stated that a statute that is unconstitutional on its face is void *ab initio* and that applying the good-faith exception "would run counter to our * * * void *ab initio* jurisprudence—specifically, that once a statute is declared facially unconstitutional,

it is as if it had never been enacted." *Carrera,* 203 Ill.2d at 16, 270 Ill.Dec. 440, 783 N.E.2d 15. As a result of the Illinois void *ab initio* doctrine, we are therefore in the unique position of having to hold that the same exact conduct could establish probable cause if a case was brought in the federal system but not if it was brought in our state courts.

¶ 37 The State also relies on *LeFlore,* claiming that although the supreme court in that case considered the good-faith exception in the context of judicial precedent, its discussion of the exception is nonetheless instructive in our case. The State quotes various portions of the *LeFlore* decision, such as its reiteration that the exclusionary rule has been restricted to those "unusual cases" in which "it can achieve its sole objective: to deter future fourth amendment violations." (Internal quotation marks omitted.) *LeFlore,* 2015 IL 116799, ¶ 22, 392 Ill.Dec. 467, 32 N.E.3d 1043. However, the fact that *LeFlore* involved invalidated judicial precedent and not an invalidated statute is a crucial distinction, as the *Carrera* decision makes clear that statutes that are unconstitutional on their face are void *ab initio* and that the good-faith doctrine cannot be applied to statutes that are void *ab initio.* See *Carrera,* 203 Ill.2d at 15–16, 270 Ill.Dec. 440, 783 N.E.2d 15. Accordingly, *LeFlore* does not support the State's position that reversal is warranted in this case.

¶ 38 In sum, we conclude the trial court properly granted defendant's motion to quash his arrest and suppress evidence.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.

Presiding Justice REYES and Justice LAMPKIN concurred in the judgment and opinion.

All Citations

2015 IL App (1st) 141256, 45 N.E.3d 326, 398 Ill.Dec. 895

Footnotes

1 Defendant later orally amended the motion to also ask for relief from the evidence seized.

2 In its motion, the State cited to the appellate decision in *People v. Carrera,* 321 Ill.App.3d 582, 254 Ill.Dec. 934, 748 N.E.2d 652 (2001).

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SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

September 28, 2016

Hon. Lisa Madigan
Attorney General, Criminal Appeals Div.
100 W. Randolph St., 12th Flr.
Chicago, IL 60601

No. 120407 - People State of Illinois, petitioner, v. David Holmes, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on November 2, 2016, the foregoing **Brief and Appendix of Plaintiff-Appellant** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601, in envelopes bearing sufficient first-class postage:

Eileen T. Paul
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Defender
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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail a copy of the brief sto the Clerk of the Supreme Court of Illinois, Michael A. Bilandic Building, 160 North LaSalle, Chicago, Illinois 60601.

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