

# Illinois Official Reports

## Appellate Court

### *People v. Allgood, 2019 IL App (2d) 160810*

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TODD ALLGOOD, Defendant-Appellant.
District & No.	Second District Docket No. 2-16-0810
Filed	July 10, 2019
Decision Under Review	Appeal from the Circuit Court of De Kalb County, No. 01-CF-229; the Hon. Robbin J. Stuckert, Judge, presiding.
Judgment	Affirmed in part and vacated in part; cause remanded.
Counsel on Appeal	James E. Chadd, Thomas A. Lilien, and Bruce Kirkham, of State Appellate Defender's Office, of Elgin, for appellant.  Richard D. Amato, State's Attorney, of Sycamore (Patrick Delfino, David J. Robinson, and Richard S. London, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	PRESIDING JUSTICE BIRKETT delivered the judgment of the court, with opinion. Justices Hutchinson and Schostok concurred in the judgment and opinion.

## OPINION

¶ 1 Defendant, Todd Allgood, appeals his convictions of aggravated criminal sexual assault while armed with a firearm (720 ILCS 5/12-14(a)(8) (West 2000)) and aggravated kidnapping while armed with a firearm (*id.* § 10-2(a)(6)). He contends that the 15-year sentencing enhancements for those offenses, added by Public Act 91-404, § 5 (eff. Jan. 1, 2000) (amending 720 ILCS 5/10-2, 12-14), violated the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) and require reversal of his convictions. We agree that the enhancements violated the proportionate-penalties clause. However, we disagree that this requires reversal of defendant's convictions. Instead, we remand for resentencing on both convictions based on the statutes as they existed before they were amended to add the unconstitutional enhancements.

### ¶ 2 I. BACKGROUND

¶ 3 Defendant was indicted for the April 25, 2001, abduction and sexual assault of N.K. In September 2002, a jury found him guilty of two counts of aggravated criminal sexual assault, one based on being armed with a firearm (720 ILCS 5/12-14(a)(8) (West 2000)) and the other based on acting in a manner that threatened N.K.'s life (*id.* § 12-14(a)(3)). The court merged those convictions and sentenced defendant on the conviction based on being armed with a firearm to 30 years' incarceration, plus a 15-year enhancement under section 12-14(d)(1) of the Criminal Code of 1961 (*id.* § 12-14(d)(1)). Defendant was sentenced to a consecutive 10-year term for aggravated kidnapping. Although the aggravated-kidnapping statute also included a 15-year enhancement for being armed with a firearm (*id.* § 10-2(b)), the court found that it could apply the enhancement only once. We affirmed. *People v. Allgood*, 355 Ill. App. 3d 1194 (2005) (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 In September 2006, defendant filed a postconviction petition, alleging ineffective assistance of counsel. Counsel was appointed, and in September 2011, an amended petition was filed, alleging in part that the 15-year sentencing enhancement for aggravated criminal sexual assault violated the proportionate-penalties clause because it punished defendant twice for the same crime.

¶ 5 The State moved to dismiss, and the trial court granted the motion, finding that the allegations were barred by principles of *res judicata*. On appeal, we noted that the issue was raised and rejected on direct appeal. However, we held that, because the law had changed since defendant's appeal was decided, fundamental fairness dictated that he could raise the issue in a postconviction petition. *People v. Allgood*, 2015 IL App (2d) 130511-U, ¶ 23.

¶ 6 Based on *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007), which held that the 15-year sentencing enhancement for armed robbery while armed with a firearm violated the proportionate-penalties clause, and *People v. Hampton*, 406 Ill. App. 3d 925, 942 (2010), which applied *Hauschild* to the enhancement for aggravated criminal sexual assault while armed with a firearm, we vacated defendant's sentence for aggravated criminal sexual assault and remanded for resentencing. In doing so, we rejected defendant's argument that we simply vacate the 15-year enhancement, as *Hauschild* held that the remedy was a remand for resentencing. *Allgood*, 2015 IL App (2d) 130511-U, ¶ 24.

¶ 7 On remand, the trial court sentenced defendant to 21 years' incarceration for aggravated criminal sexual assault, to be served consecutively to the 10-year term previously imposed for aggravated kidnapping. Defendant appeals.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues for the first time that his convictions must be reversed because the 15-year enhancements violated the proportionate-penalties clause and cannot be severed from the substantive offenses. He contends that, under our decision in *People v. Andrews*, 364 Ill. App. 3d 253, 282 (2006), the unconstitutionality of the statutes renders the convictions void *ab initio*. As to aggravated kidnapping, he asks us to reverse the conviction outright because the State dismissed a lesser included kidnapping charge after jeopardy attached. As to aggravated criminal sexual assault, he asks us to reinstate the merged conviction based on acting in a manner that threatened N.K.'s life. The State argues that, under *Hauschild*, defendant is entitled only to resentencing. Because defendant has already been resentenced for aggravated criminal sexual assault, the State asks that we remand for resentencing only for aggravated kidnapping.

¶ 10 Defendant concedes that he did not raise his contentions in the trial court or in his previous appeals. However, a challenge to the constitutionality of a statute may be raised at any time. *Hauschild*, 226 Ill. 2d at 73. Thus, defendant has not forfeited his claim. See *id.* Whether a sentencing provision violates the proportionate-penalties clause is a matter of law, which we review *de novo*. *People v. Gibson*, 403 Ill. App. 3d 942, 953 (2010), *abrogated on other grounds by People v. Bailey*, 2014 IL 115459.

¶ 11 Effective January 1, 2000, our legislature enacted Public Act 91-404, the stated purpose of which was "to deter the use of firearms in the commission of a felony offense." Pub. Act 91-404, § 5 (eff. Jan. 1, 2000) (amending 720 ILCS 5/33A-1(b)(1)). To accomplish this purpose, the legislature enhanced the penalties for certain felonies when the offender possessed or used a firearm during the commission of the offense. See *Hauschild*, 226 Ill. 2d at 71. However, as previously noted, the 15-year enhancement for aggravated criminal sexual assault while armed with a firearm violated the proportionate-penalties clause. *Hampton*, 406 Ill. App. 3d at 942. Likewise, the enhancement for aggravated kidnapping while armed with a firearm violated the proportionate-penalties clause. *Gibson*, 403 Ill. App. 3d at 953-54.

¶ 12 Relying on *Andrews*, defendant contends that his convictions must be reversed because the enhancements render them void *ab initio*. In *Andrews*, the defendant was convicted of aggravated vehicular hijacking while armed with a firearm (720 ILCS 5/18-4(a)(4) (West 2002)). *Andrews*, 364 Ill. App. 3d at 264. The trial court found that the 15-year enhancement for that offense (720 ILCS 5/18-4(b) (West 2002)) violated the proportionate-penalties clause. *Andrews*, 364 Ill. App. 3d at 264. Then, purporting to apply the law as it existed before the enactment of Public Act 91-404, the trial court severed the enhancement, upheld the defendant's conviction under section 18-4(a)(4), and imposed an unenhanced Class X sentence. *Id.* However, we observed that Public Act 91-404 had created not only the enhancement but also the substantive offense under section 18-4(a)(4). Thus, under the law as it existed before the enactment of Public Act 91-404, the defendant could not have been convicted of that offense. *Id.* at 280. Although he could have been convicted of aggravated vehicular hijacking while armed with a "dangerous weapon" (720 ILCS 5/18-4(a)(3) (West 1998)), we could not allow the State to amend an indictment on appeal "to charge an existing

valid criminal offense in place of a charged offense that has been declared void.” *Andrews*, 364 Ill. App. 3d at 282 (citing *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526-27 (1999)). Thus, we reversed the defendant’s conviction under section 18-4(a)(4). *Id.* at 283.

¶ 13 Here, likewise, defendant asserts that Public Act 91-404 created not only the enhancements but also the substantive offenses under sections 12-14(a)(8) and 10-2(a)(6). Under the law as it existed before the enactment of Public Act 91-404, defendant could not have been convicted of those offenses. Although he could have been convicted of both offenses while armed with a “dangerous weapon” (720 ILCS 5/10-2(a)(5), 12-14(a)(1) (West 1998)), he could not have been convicted of the offenses with which he was charged. Thus, he concludes that, under *Andrews*, his convictions are void and must be reversed.

¶ 14 However, in *Hauschild*, the supreme court implicitly overruled *Andrews*. There, the defendant was convicted of, *inter alia*, armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2000)). *Hauschild*, 226 Ill. 2d at 68. However, finding that the 15-year enhancement for that offense (720 ILCS 5/18-2(b) (West 2000)) violated the proportionate-penalties clause, the trial court refused to apply it. *Hauschild*, 226 Ill. 2d at 69. Instead, the trial court “chose to impose a [12-year] term of imprisonment in accordance with the armed robbery statute as it existed before its amendment by Public Act 91-404, which added the 15-year sentence enhancement.” *Id.* at 88. “Prior to being amended by Public Act 91-404, armed robbery was a Class X felony punishable by 6 to 30 years’ imprisonment.” *Id.* (citing 720 ILCS 5/18-2(b) (West 1998), and 730 ILCS 5/5-8-1(a)(3) (West 1998)). The supreme court affirmed the trial court, holding that, “when an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.” *Id.* at 88-89. Although the trial court had imposed a proper sentence, the supreme court remanded the cause “to allow the trial court to reevaluate defendant’s sentence in light of his cumulative sentence and to then resentence him within the range for armed robbery as it existed prior to being amended by Public Act 91-404.” *Id.* at 89. “In light of this holding,” the supreme court “reject[ed] defendant’s claim that his armed robbery while armed with a firearm conviction should be reduced to ‘simple robbery.’ ” *Id.* Accordingly, in *Gibson*, where the defendant was convicted of aggravated kidnapping while armed with a firearm and was subjected to the 15-year enhancement, we followed *Hauschild* and remanded for resentencing “in accordance with the statute as it existed prior to the amendment.” *Gibson*, 403 Ill. App. 3d at 955. We noted that, “[p]rior to the enactment of Public Act 91-404 \*\*\*, aggravated kidnapping was a Class X felony with a sentencing range of 6 to 30 years’ imprisonment.” *Id.* at 955 n.2 (citing 720 ILCS 5/10-2(b) (West 1998), and 730 ILCS 5/5-8-1(a)(3) (West 1998)).

¶ 15 Defendant argues that *Andrews* is still good law because, in *Hauschild*, the supreme court did not address “the severability of the statute creating the substantive offense and whether the underlying conviction was void as in *Andrews*.” We acknowledge that the supreme court did not explicitly observe that, as in *Andrews*, Public Act 91-404 had created not only the enhancement but also the substantive offense under section 18-2(a)(2). Indeed, as in *Andrews*, under the law as it existed before the enactment of Public Act 91-404, the defendant could have been convicted of armed robbery only while armed with a “dangerous weapon.” 720 ILCS 5/18-2(a) (West 1998). However, in rejecting the defendant’s claim “that his armed robbery while armed with a firearm conviction should be reduced to ‘simple robbery.’ ” (*Hauschild*, 226 Ill. 2d at 89), the supreme court necessarily held that those facts did not invalidate the

defendant's conviction of armed robbery while armed with a firearm. In any event, as the facts here are essentially the same, we would be bound to do as the supreme court did. See *People v. Trimarco*, 364 Ill. App. 3d 549, 556 (2006) (McLaren, J., dissenting) (“*Stare decisis* requires that the holding of a case with facts sufficiently similar to the case at issue be applied by courts of equal or lesser position in the hierarchy within the same jurisdiction.”).

¶ 16 Thus, we affirm defendant's convictions of aggravated criminal sexual assault while armed with a firearm and aggravated kidnapping while armed with a firearm, but we vacate his sentences and remand the cause for resentencing under the statutes as they existed prior to the enactment of Public Act 91-404. Under those statutes, aggravated criminal sexual assault and aggravated kidnapping were Class X felonies punishable by 6 to 30 years' imprisonment. 720 ILCS 5/10-2(b), 12-14(d)(1) (West 1998); 730 ILCS 5/5-8-1(a)(3) (West 1998). Although the trial court did not apply the enhancement to defendant's sentence for aggravated kidnapping, the State concedes that we must remand the cause for resentencing on that conviction. Noting that defendant has already been resentenced for aggravated criminal sexual assault, the State does not ask that we vacate that sentence. However, as in *Hauschild*, we remand for resentencing on that conviction as well, “to allow the trial court to reevaluate defendant's sentence in light of his cumulative sentence.” *Hauschild*, 226 Ill. 2d at 89; see *Gibson*, 403 Ill. App. 3d at 955; see also *People v. Harris*, 2012 IL App (1st) 092251, ¶¶ 17-18.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, the judgment of the circuit court of De Kalb County is affirmed in part and vacated in part, and the cause is remanded for resentencing.

¶ 19 Affirmed in part and vacated in part; cause remanded.