STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE WILLIS,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 179548
Recorder's Court
LC No. 94-004375

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a bench trial in the Detroit Recorder's Court, defendant was convicted of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). He was thereafter sentenced to a term of two years' probation, with the first six months to be served in a Recorder's Court halfway house. He appeals as of right and we affirm.

Defendant's sole contention on appeal is that subsection 2 of the first-degree retail-fraud statute, MCL 750.356c(2); MSA 28.588(3)(2), is unconstitutional in that it criminalizes his status as a convicted criminal, contrary to the Eighth Amendment's prohibition against cruel and unusual punishment. Although defendant did not challenge the constitutionality of the first-degree retail-fraud statute at trial, this Court may consider constitutional claims for the first time on appeal. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Statutes are presumed to be constitutional, and courts are "obligated to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Hubbard (After Remand)*, 217 Mich App 459, 483-484; 552 NW2d 593 (1996).

Defendant's reliance on *Robinson v California*, 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1962), is misplaced. The Supreme Court in *Robinson* held that imprisoning someone because of his status as a drug addict, "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there," constituted cruel and unusual punishment. *Id*. at 667. A defendant's conviction under subsection 2 of the first-degree retail-fraud statute, like a defendant's habitual offender conviction, is based upon the commission of additional, particular criminal acts, and

not the status of being a convicted criminal. See *People v Chandler*, 211 Mich App 604, 616; 536 NW2d 799 (1995). Clearly, defendant could not have been convicted under subsection 2 without having committed a second, underlying theft offense. MCL 750.356c(2); MSA 28.588(3)(2).

Defendant also misapprehends the distinction between subsection 2 and the general habitual offender statutes, MCL 769.10 *et seq.*; MSA 28.1082 *et seq*. It is true that the retail-fraud statute establishes a separate substantive offense, rather than a procedure for sentence enhancement. *People v Brown*, 186 Mich App 350, 356; 463 NW2d 491 (1990). However, that distinction is only relevant to the extent that where a statute establishes a substantive crime, a defendant is entitled to a jury trial and proof of his prior convictions beyond a reasonable doubt, whereas a defendant subject to enhanced sentences under the habitual offender statutes is not. *Zinn*, *supra* at 345-346. Those concerns are simply not present here, where the only issue is whether defendant was punished for his status as a criminal instead of specific criminal acts.

The retail-fraud statute provides for felony treatment of repeat offenders who commit what would normally constitute a simple misdemeanor. *Brown*, *supra* at 356. This type of sentence augmentation was recently described by this Court as "provid[ing] for augmented punishment of a simple misdemeanor for repeat offenders." *People v Erwin*, 212 Mich App 55, 65-66; 536 NW2d 818 (1995). In that respect, subsection 2 accomplishes the same purpose as the habitual offender statutes, to deter repeated criminal acts, not to punish defendants for their status as criminals. See *People v Brewersdorf*, 438 Mich 55, 67; 475 NW2d 231 (1991). Therefore, defendant's conviction under subsection 2 of the first-degree retail-fraud statute does not unconstitutionally punish him for his status as a convicted criminal.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White