

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES CLEMONS,

Defendant-Appellant.

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UNPUBLISHED

September 14, 1999

No. 202864

Recorder's Court

LC No. 87-002880

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant appeals by leave granted from the recorder's court's order denying his motion for relief from judgment, wherein defendant alleged that his guilty plea to three counts of second-degree murder was the product of an illusory plea bargain. We affirm.

I

Defendant was originally charged with three counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of burning of other real property, MCL 750.73; MSA 28.268. Pursuant to a plea agreement, he pleaded guilty to three counts of second-degree murder and one count of burning of real property, in exchange for dismissal of the three felony murder charges. As a factual basis for his guilty pleas, defendant admitted that on March 12, 1987, he set fire to two bales of rags located on the third floor of the empty Whiting Cloth Company warehouse on Jeffries in Detroit. Tragically, three firemen died trying to extinguish the resulting blaze. The court sentenced defendant to life imprisonment on two of the second-degree murder counts, twenty-five to seventy-five years' imprisonment on the third count of second-degree murder, and six to ten years' imprisonment on the burning of other real property count.

Defendant appealed as of right, claiming, inter alia, that his plea bargain was illusory since he could not have been convicted of first-degree felony murder because burning real property other than a dwelling is not included within the felony-murder statute. *People v Clemons*, 184 Mich App 726, 727; 459 NW2d 40 (1990). This Court rejected defendant's argument:

MCL 750.316; MSA 28.548 provides that murder which is committed in the perpetration or attempt to perpetrate arson is murder in the first degree. In order to determine the meaning of arson within the felony-murder statute, we examine what the drafters of the 1931 felony-murder statute intended. *People v Whetstone (On Reh)*, 131 Mich App 669, 673-674; 346 NW2d 845 (1982), lv den 419 Mich. 881 (1984). We find that the Legislature intended that the word "arson" apply to MCL 750.73; MSA 28.268, burning of real property. This statute was derived from 1929 CL 16935 which was specifically designated as the crime of arson. The charge of burning real property is included presently under the section entitled "Arson and Burning." We find that the defendant therefore could have been charged with first-degree felony murder and that his plea bargain was not illusory. [*Clemons, supra* at 728.]

The Court also found the other claims raised by defendant to be without merit, and affirmed his convictions and sentences. *Clemons, supra* at 728-730. Although defendant sought leave to appeal to the Michigan Supreme Court, the Court denied his application for leave. *People v Clemons*, 437 Mich 1018 (1991).

In 1995, however, the Supreme Court in an unrelated case explicitly overruled this Court's *Clemons* analysis regarding the scope of arson under the felony-murder statute. In *People v Reeves*, 448 Mich 1, 3-5, 14-15, 20-21; 528 NW2d 160 (1995), the court explained that the construction of the word "arson" in the felony-murder statute refers to the common law crime of arson, that is, the malicious and voluntary or wilful burning of a dwelling house of another, and does not include the burning of other real property.

Subsequent to the release of the Supreme Court's *Reeves* decision, defendant filed with the Recorder's Court an amended motion for relief from judgment in which he again argued that his guilty pleas to the second-degree murder counts were illusory and therefore invalid. Defendant claimed entitlement to relief pursuant to MCR 6.508(D)(2), alleging that *Reeves* constituted "a retroactive change in the law [that] ha[d] undermined th[is Court's] prior decision." On May 2, 1996, the Recorder's Court denied defendant's motion for relief from judgment on the basis that "[t]he Court of Appeals previously ruled against the defendant on this exact issue in his appeal of right."

This Court on November 18, 1997, granted defendant's delayed application for leave to appeal.

## II

On appeal, defendant again maintains that his guilty pleas to the reduced charges of second-degree murder must be set aside as illusory because he could not have been convicted of the first-degree felony murder charges brought by the prosecutor. Defendant does not challenge his guilty plea to or conviction of burning other real property. Defendant alleges that he is entitled to relief pursuant to MCR 6.508, which in relevant part provides:

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

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(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision.

Defendant has set forth the same grounds for relief in his amended motion for relief from the judgment as he alleged in his prior appeal to this Court. As indicated above, this Court previously held that defendant's plea bargain was not illusory because the felony-murder statute extended to arsons involving the burning of real property other than dwellings. *Clemons, supra* at 728. In *Reeves*, however, this Court's *Clemons* holding was explicitly overruled. Defendant asserts that *Reeves* established a retroactive change in the law, thus qualifying him for relief under MCR 6.508(D)(2). We disagree.

The scope of the word "arson" within Michigan's felony-murder statute was an issue of first impression for the Supreme Court in *Reeves*. In that case the Supreme Court reviewed conflicting analyses of the issue presented by decisions of this Court that reached inconsistent conclusions. In addition to the *Clemons* decision that was ultimately overruled, the Supreme Court considered the case of *People v Foster*, 103 Mich App 311; 302 NW2d 862 (1981). The defendant in *Foster* had set fire to a vacant house and was charged with felony murder after a rookie fire fighter died while battling the blaze. *Id.* at 315. The defendant appealed from his resulting manslaughter conviction and a different panel of this Court concluded that the house burned was uninhabitable and reversed, implicitly determining that for the purpose of the felony-murder statute the word "arson" referred to the burning of a dwelling house. *Id.* at 315-318. After conducting an extensive statutory analysis of the development of the arson statute between 1827 and 1931, the Supreme Court examined its relationship to the felony-murder statute and held that *Foster* had reached the correct result, consequently overruling *Clemons*. *Reeves, supra* at 20.

A defendant may be entitled to withdraw a guilty plea if the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement. *People v Harris*, 224 Mich App 130, 132; 568 NW2d 149 (1997). We do not believe that the Supreme Court's subsequent clarification of the scope of the word "arson" within Michigan's felony-murder statute rendered defendant's plea illusory *at the time it was made*. We note that in deciding *Reeves* the Supreme Court neither held that *Foster* was established precedent regarding this issue, nor explicitly found that *Clemons* was an unreasonable interpretation at the time it was decided. Thus, notwithstanding the implicitly limited interpretation of the scope of the word "arson" in the earlier *Foster* decision, we believe that at the time this Court decided *Clemons* its analysis was arguably equally viable and therefore the law regarding this issue was unsettled when defendant pleaded. Defendant was charged in good faith, see section III, *infra*, and not only did a panel of this Court affirm defendant's plea convictions but the Supreme Court denied defendant's application for leave to appeal from that decision. Consequently, by avoiding the risk of a trial on first-degree murder charges, and

correspondingly the risk of convictions that may have been affirmed at the time, defendant received a tangible benefit at the time he pleaded. Because the relevant law regarding the charged greater offense was unsettled at the time of the plea hearing, we decline to hold illusory defendant's plea to a lesser offense that was unquestionably supported by a sufficient factual basis. See *Clemons, supra* at 728.

### III

Defendant additionally asserts that the prosecutor acted outside his authority in improperly bringing first-degree felony murder charges against him, that his plea was therefore involuntary, and that it "would be a manifest injustice to allow this involuntary guilty plea . . . to stand." Defendant's claim of prosecutorial overcharging constitutes a nonjurisdictional defect apparently not raised by defendant in his appeal as of right. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995); *People v Stevens*, 130 Mich App 1, 3-4; 343 NW2d 219 (1983). Thus, pursuant to MCR 6.508(D)(3)(a), (b)(ii), defendant must demonstrate both good cause for his failure to previously raise this issue and that, in light of the prosecutorial abuse of discretion, "it would be manifestly unjust to allow the conviction to stand."

The prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which statute a prosecution will be instituted. *People v Morrow*, 214 Mich App 158, 160; 542 NW2d 324 (1995), quoting *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). See also *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998) (We have repeatedly recognized that the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.). That discretion is abused only if the prosecutor makes a choice for reasons that are unconstitutional, illegal or ultra vires. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Courts thus review the prosecutor's charging decision under an abuse of power standard, questioning whether a prosecutor has acted in contravention of the constitution or the law. *Id.*

We do not find that the prosecutor abused his power in bringing the three felony-murder charges against defendant. Defendant does not allege that the prosecutor entertained any improper considerations in charging him. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993) (The prosecutor's discretion will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification.); *People v Monroe*, 127 Mich App 817, 819; 339 NW2d 260 (1983). We are also unable to discern from the record that the prosecutor engaged in any unconstitutional, illegal or ultra vires activity. Although defendant argues that according to *Foster, supra*, the prosecutor could not have properly charged him with felony murder, the prosecutor made a good faith argument, based in part on legislative history, that the felony murder statute did indeed contemplate as arson burnings of other real property, successfully convincing a panel of this Court. *Clemons, supra* at 727-728. Because defendant has established neither an abuse of prosecutorial discretion that would render the entry of defendant's guilty plea

manifestly unjust, MCR 6.508(D)(3)(b)(ii), nor advanced a good cause for his failure to raise this issue in his prior appeal of right, MCR 6.508(D)(3)(a), we conclude that defendant is not entitled to relief on this basis pursuant to MCR 6.508(D).

Affirmed.

/s/ William B. Murphy

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage