STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2001
v	No. 221040 Van Buren Circuit Court
CHARLES DEAN LAMP, Defendant-Appellant.	LC No. 99-011265-FH

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of carrying a concealed weapon, MCL 750.227; MSA 28.424; felon in possession of a firearm, MCL 750.224f; MSA 28.421(6); possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d); second offense, MCL 333.7413(2); MSA 14.15(7413)(2); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm defendant's convictions but remand for the limited purpose of amending the judgment of sentence. The amended judgment of sentence shall provide that defendant's sentences for carrying a concealed weapon and felony-firearm shall be served concurrently, not consecutively. In all other respects, we affirm.

I

As his first issue on appeal, defendant argues that the trial court committed error requiring reversal in denying his motion to suppress evidence of marijuana and a firearm discovered during a warrantless search of the trunk of defendant's motor vehicle. We disagree. In the lower court, defendant sought to exclude this evidence pursuant to both the United States Constitution (US Const, Am IV and Am XIV), and Michigan Constitution (Const 1963, art 1, § 11). However, because the seizure at issue occurred outside a dwelling house and involved a narcotic drug and a firearm, the Michigan Constitution affords no greater protection than the United States Constitution. *People v Catania*, 427 Mich 447, 466; 398 NW2d 343 (1996), and *People v Nash*, 418 Mich 196, 208-215; 341 NW2d 439 (1993).

In *People v Levine*, 461 Mich 172, 178-179; 600 NW2d 622 (1999), the Michigan Supreme Court summarized the Fourth Amendment automobile search exception as follows:

> "The Fourth Amendment generally requires police to secure a warrant before conducting a search." *Maryland v Dyson*, 527 US 465; 119 S Ct 2013, 2014; 144 L Ed 2d 442 (1999). See also *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). An exception to the warrant requirement exists for searches of automobiles. *United States v Ross*, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982); *Carroll v United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925); [*People v*] *Faucett*, [442 Mich 153] *supra* at 171, n 21 [499 NW2d 764 (1993)]. The exception applies only to searches supported by probable cause. *Ross*, *supra* at 809. "In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." Id.

The facts of the present case and *Levine* are nearly identical. Further, the holding of *Levine* is controlling. In *Levine*, the police received information from an undercover police officer based on a tip from an informant not known by the investigating officers. Thereafter, this information was corroborated and supplemented by the investigating officers' own investigation to warrant, in their view, a finding of probable cause, i.e., a fair probability that contraband or evidence of the crime would be found in a particular place. Believing that the combined facts and circumstances would justify the issuance of a warrant, the police conducted a warrantless search of the trunk of the defendant's vehicle during which marijuana was discovered. In *Levine*, our Supreme Court held that the warrantless search of the defendant's trunk did not violate the defendant's Fourth Amendment rights because

> Under the totality of the circumstances, the information provided by the undercover police officer was sufficiently corroborated and supplemented by officer Turner's own investigation to warrant a finding of probable cause, i.e., "a fair probability that contraband or evidence of a crime will be found in a particular place." [*Illinois* v] Gates, 238; [462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).] *United States v Sokolow*, 490 US 1, 7; 109 S Ct 1581; 104 L Ed 2d 1 (1989). [*Id.* at 185.]

In the instant case, Detective Brian Stump of the Van Buren Sheriff's Department testified that he received information from a confidential police informant (CPI) who advised Stump of the following information:

> [A] subject by the name of Dean, who was described as a white male, that had a receding hairline and at the time was wearing a black leather jacket. And he was in the presence of a subject by the last name of Underwood. That these individuals were occupying an older red Ford Escort type vehicle and were residing at the Underwood residence just north of the Almena Store.
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> * * *
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> With that information from CPI is that Mr. - well, who was later identified as Mr. Lamp, Dean was in possession of two handguns. One in particular described as a stainless steel .45 I believe to be an AMT and I believe that's a brand name. And along with approximately a pound of marijuana or a large

> quantity of marijuana . . . that these subjects would be leaving the area of the Underwood residence that these subjects were supposed to meet with a subject in the Paw Paw area to possibly sell the marijuana and/or one of the handguns.

Stump testified that over the past few years the confidential police informant had provided him with reliable information in approximately twenty-three cases leading to the seizure of drugs and firearms as well as the arrest and conviction of the individuals involved. In addition, Stump stated that his personal knowledge of both Underwood and the location of the residence was consistent with the information provided him by the confidential police informant. After receiving the information from the confidential police informant, Detective Stump went to the residence and observed a vehicle generally matching the CPI's description.[1]

Shortly after the vehicle was driven from the residence, it was stopped by Deputy Virg Franks. Stump testified as follows regarding the information provided to him by Deputy Franks:

> Deputy Franks advised that Mr. Lamp had the black leather coat, that he had the receding hairline, uh, and that the occupant was Mr. Underwood. He advised me that he had asked for a consent to search the vehicle and that the consent was denied by Mr. Lamp. In view of the information that the CPI had provided me, with me being able to find that there was such a vehicle that existed, that it was at the residence that was described by the CPI, that the vehicle and occupants were that that [sic] the CPI had given me, and the reliability of the information provided over the period of time that the CPI had, and due to the fact that the vehicle . . . was moveable, I told Deputy Franks at that point, to go ahead and search the vehicle.

During the search of the trunk of defendant's vehicle, Deputy Franks discovered marijuana and a firearm.

Following defendant's preliminary examination, the district court judge denied defendant's motion to suppress. The court reasoned, in part, as follows:

> [T]he information given by the informant, the informant himself having been reliably established in Detective Stump's mind and as shown here by his testimony today. And the corroborating facts observed by Deputy Franks, corroborating the name Underwood as one of the occupants, corroborating the identification of the person driving the car, receding hairline, black coat, et cetera and the fact that this vehicle was going to move before noon time and did in fact do that all lead to a reasonable conclusion that the information about the contraband was good information. And therefore, I find that they did have probable cause to seize the vehicle and having seized it at that point against

[1] The vehicle observed at the residence was an older red Ford Tempo, rather than "an older red Ford Escort type vehicle."

> because it was a motor vehicle there was no reason at that point to go get a search warrant. So I find that they've acted within the law.

Later, defendant's motion was also denied by the circuit court on the basis that probable cause was established and that the search was reasonable.

In light of the corroboration of the CPI's information from the police officer's own investigation, we hold that the trial court did not clearly err in finding probable cause for the search. *Levine, id.* Defendant's motion to suppress the evidence was properly denied. *Id.*

II

Next, defendant argues that the trial court erred in sentencing defendant to consecutive terms for felony-firearm and carrying a concealed weapon. We agree. *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994). However, defendant's felony-firearm sentence still runs consecutively to the two remaining felonies. *Id*. Accordingly, we remand for the limited purpose of correcting defendant's judgment of sentence to specify that defendant's sentences for carrying a concealed weapon and felony-firearm shall be served concurrently, not consecutively. *Id.*

III

For his third issue, defendant argues that his possession of marijuana, second offense, cannot serve as the underlying felony for defendant's felony-firearm conviction because possession of marijuana is a misdemeanor, not a felony. We disagree. A review of the record indicates that the trial court ruled the underlying felony was felon in possession of a firearm, not possession of marijuana. Thus, defendant's argument in this regard is meritless.

IV

Next, defendant alleges that insufficient evidence was presented to sustain his conviction of felony-firearm. In this regard, defendant contends that the elements of "possession" and "carrying" were not proven. We disagree. In *People v Williams*, 212 Mich App 607; 538 NW2d 89 (1995), we emphasized that *either* "carrying" *or* "possessing" a firearm during the commission of a felony would satisfy MCL 750.227(b)(1); MSA 28.424(2)(1). Further, possession may be either factual or constructive and proved by circumstantial evidence:

> Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him. . . . However, constructive possession of a firearm for use in connection with a felony is not analogous to constructive possession of drugs. The difference lies in the distinctive purpose of the felony-firearm statute.
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> "By punishing the 'possession,' as opposed to the 'use,' of a firearm during the commission of a felony, the Legislature was attempting to reduce the

> possibility of injury to victims, passersby and police officers. Had defendant's criminal enterprise gone awry, he may well have been tempted to use his firearm to effect an escape. *The mere fact that a felon has a firearm at his disposal, should he need it, creates a sufficient enough risk to others that it is within the state's power to punish its possession*. Moreover, the statute as written may act to deter the felony itself . . . ."
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> Punishing a defendant for possession of a firearm that is not accessible or at his disposal, as opposed to being under less immediate dominion or control, does not fulfill the purpose of the felony-firearm statute. Accordingly, the possession requirement of the felony-firearm statute has been described in terms of ready accessibility. [*Williams, supra* at 609-610, quoting *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978) (other citations omitted and emphasis in original).]

Cf. *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000), ("[t]he proper question in *Williams* [*supra*]--and in the case before us today -- is whether the defendant possessed a firearm *at the time he committed a felony*.") (Emphasis in original.)

The issue whether a firearm is readily accessible is a question of fact. *People v Myers*, 153 Mich App 124, 126; 395 NW2d 256 (1986). In the present case, the trial court's implicit finding that the firearm was readily "accessible" to defendant not withstanding its location in the trunk is not clearly erroneous. See, generally, *Burgenmeyer, supra*. Therefore, we reject defendant's argument based on the alleged insufficiency of the evidence.

V

Finally, defendant argues that his convictions for carrying a concealed weapon, felon in possession of a firearm, and felony-firearm constitute double jeopardy in violation of the double jeopardy guarantees of the United States and Michigan Constitutions. We disagree.

In *People v Mayfield*, 221 Mich App 656, 661-662; 562 NW2d 272 (1997), this Court considered whether a defendant's convictions for both carrying a concealed weapon and felon in possession constituted a double jeopardy violation. This Court held as follows:

> Here, the statutes are unquestionably aimed at distinctly different conduct. The concealed weapon statute, MCL 750.227; MSA 28.424, is aimed at protecting the public from the dangers of concealed weapons, regardless of who might be carrying them. On the other hand, the felon-in-possession statute, MCL 750.224f; MSA 28.421(6), is aimed at protecting the public from guns in the hands of convicted felons, whether those weapons are concealed or not. The distinct nature of these statutes leaves no question that the Legislature intended to permit multiple punishments when a single act violates both statutes. [*Id.* at 662.]

Thus, this Court concluded that the defendant's conviction for both offenses was not a double jeopardy violation. *Id.* at 662.

This Court has also considered whether double jeopardy prevents convictions for both carrying a concealed weapon and felony-firearm. In *People v Peyton*, 167 Mich App 230, 235; 421 NW2d 643 (1988), our Court quoted the following portion of the Supreme Court's decision in *People v Sturgis*, 427 Mich 392, 409-410; 397 NW2d 783 (1986):

> The conduct made punishable under the felony-firearm statute, is not the mere possession of a firearm. Rather, it is possession of the firearm *during the commission of or attempt to commit a felony* that triggers a felony-firearm conviction. The conduct made punishable by the concealed weapon statute is likewise not the possession of a firearm, it is the carrying of a weapon, concealed. Each statute is directed at a distinct object which the Legislature seeks to achieve through the imposition of criminal penalties. Where the act giving rise to the predicate felony is distinct from the act giving rise to the concealed weapon felony, both convictions are authorized by the Legislature. [Emphasis in original.]

Because the defendant in *Peyton* was convicted of felony-firearm with an underlying felony of possession of cocaine, this Court ruled that "the double jeopardy clause did not prohibit convictions for both carrying a concealed weapon and felony-firearm." *Id.* at 235.

For double jeopardy purposes, "statutes prohibiting conduct that violates distinct societal norms generally can be viewed as separate and as permitting multiple punishments." *People v Fox*, 232 Mich App 541, 556; 591 NW2d 384 (1999).

In the present case, the three statutes prevent the distinct societal norms of: (i) protecting the public from the dangers of concealed weapons; (ii) protecting society from the inherent risk of adjudicated felons possessing weapons at any time; and (iii) protecting society from the risk of any individual possessing a weapon during the commission of a felony. Accordingly, defendant's convictions for all three offenses concern a distinct societal norm and therefore do not constitute double jeopardy under the Michigan Constitution. See, generally, *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997).

In addition, the federal *Blockburger*[2] test is not violated. Under the federal constitution, multiple punishments are allowed where the offenses are deemed different if each requires "proof of a fact which the other does not." *Rutledge v United States*, 517 US 297; 116 S Ct 1241, 1245; 134 L Ed 2d 419 (1996). In the present case, felon in possession of a firearm requires proof that the defendant has previously been convicted of a felony. On the other hand, felony-firearm required proof that defendant was engaged in a felony in addition to mere possession of a firearm. Finally, carrying a concealed weapon requires proof of concealment, as well as "carrying" instead of mere possession. Consequently, in light of the distinct facts required to prove each conviction, defendant's federal double jeopardy rights were not violated because of his multiple convictions.

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[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

We affirm defendant's convictions and remand for the limited purpose of amending the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin