

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTUAN MONTRELL McFADDEN,

Defendant-Appellant.

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UNPUBLISHED

July 12, 2002

No. 229484

Saginaw Circuit Court

LC No. 00-018431-FH

Before: Bandstra, P.J., and Hoekstra and O’Connell, JJ.

BANDSTRA, P.J. (*concurring in part and dissenting in part*).

I would reverse defendant’s conviction and sentence for the felony-firearm charge, but affirm the remaining convictions and sentences.

As noted by the majority, after the jury inquired whether defendant could be considered to have possessed the gun if the gun was itself inside the car while defendant was outside of the vehicle, the trial court instructed the jury with a modified version of CJ12d 12.7, which defines “possession” for purposes of crimes involving controlled substances. Defendant argues that use of this instruction was error and that, therefore, trial counsel was ineffective in stipulating to the instruction, because the definition of “possession” for purposes of crimes involving controlled substances differs significantly from that concerning the offense of felony-firearm. I agree.

This Court reviews de novo a claim alleging ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). To establish ineffective assistance of counsel, a defendant must affirmatively show that his attorney’s performance was deficient under an objective standard of reasonableness and that the deficiency likely affected the outcome of the case. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). After review of the record, I conclude that defendant has satisfied his burden in this regard.

A conviction for felony-firearm requires proof beyond a reasonable doubt that defendant possessed or carried a firearm, and that he did so during the commission or attempted commission of a felony. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Consistent with these requirements, the trial court instructed the jury that in order to convict defendant of felony-firearm, it had to find beyond a reasonable doubt that “defendant committed or attempted to commit the crime of home invasion second degree or home invasion first degree . . . [and] that at the time the defendant committed or attempted to

commit that crime, he knowingly possessed or carried a firearm.” In defining “possession” for purposes of felony-firearm, however, the trial court further instructed the jury that where a defendant has the right to control a firearm, he has constructive possession of the firearm “even though it is in a different room or place.” Although this definition of constructive possession comports with that found in CJI2d 12.7, as noted by this Court in *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), overruled in part on other grounds by *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000), “constructive possession of a firearm for use in connection with a felony is not analogous to constructive possession of drugs.” Unlike constructive possession of drugs, “[a] defendant may have constructive possession of a firearm [only] if its location is known to the defendant and . . . it is *reasonably accessible* to him.” *Williams*, *supra*, citing *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989) (Emphasis added).<sup>1</sup>

As argued by defendant, the trial court’s instruction, agreed to by defense counsel, improperly expanded the scope of possession for purposes of felony-firearm and permitted the jury to convict defendant of that offense even if it concluded that, as claimed by defendant, the gun was left inside his vehicle during the charged home invasions. I do not agree with the majority’s conclusion that the mistaken use of CJI 2d 12.7 did not amount to error and I conclude that defendant’s trial counsel was ineffective in stipulating to that instruction. Considering that there was nothing in the evidence offered at trial to contradict defendant’s claim that the gun remained inside the car at the time of the home invasions, I further conclude that the improperly expansive instruction likely affected the outcome of the trial on the felony-firearm charge.

In reaching this conclusion, I recognize that instructional error involving the omission or misdescription of a single element may be found to be harmless “where [the] reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, . . .” *Neder v United States*, 527 US 1, 17; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Here, defendant’s conviction of felon in possession of a firearm could validly serve as the predicate offense for a conviction of felony-firearm,<sup>2</sup> and there was ample evidence to support a conviction on these grounds.<sup>3</sup> Nonetheless, counsel for defendant specifically challenged whether

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<sup>1</sup> It does not appear that *Burgenmeyer*, *supra*, overturned the requirement that in order to be convicted of felony-firearm a defendant must have had a firearm reasonably accessible to him while committing or attempting to commit a felony. *Burgenmeyer* merely clarified that to convict a defendant of a felony-firearm charge premised upon felony drug possession, the weapon need only be reasonably accessible to the defendant at some point while he possessed the drugs (not necessarily when the police found the drugs or arrested the defendant for the drug possession, as held by the panel in *Williams*, *supra*).

<sup>2</sup> Although the felony-firearm statute, MCL 750.227b, provides exceptions for certain statutory offenses, the offense of felon in possession is not among those exceptions. This Court has held that the felony-firearm statute applies to individuals who commit this offense and that a conviction of both offenses does not offend the constitutional prohibition against double jeopardy. See, generally, *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001).

<sup>3</sup> Indeed, in his statement to police following arrest, defendant acknowledged that he knowingly transported the gun in his vehicle.

defendant ever had sufficient access to or right of control over the firearm found underneath the passenger seat of his car. Moreover, as noted above, when instructing the jury on felony-firearm the trial court specifically limited the jury's consideration of defendant's guilt of the latter offense to a finding that defendant possessed the firearm at the time he committed or attempted to commit either of the charged home invasions. Accordingly, I do not conclude that the improperly expansive definition of possession stipulated to by counsel was harmless and would hold that defendant's conviction of felony-firearm must be reversed.

I would reverse defendant's conviction and sentence for the felony-firearm charge, but affirm the remaining convictions and sentences.

/s/ Richard A. Bandstra