

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON D. GILBERT,

Defendant-Appellant.

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UNPUBLISHED

August 9, 2002

No. 232823

Wayne Circuit Court

LC No. 00-009165

Before: Talbot, P.J., and Cooper and D. P. Ryan\*, JJ.

PER CURIAM.

A trial court convicted defendant of carrying a concealed weapon (CCW), MCL 750.227, and sentenced him to forty months to five years' imprisonment. Defendant appeals as of right. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with two counts of felonious assault, MCL 750.82, and one count of carrying a firearm during the commission of a felony, MCL 750.227b. Complainant testified that during the incident defendant lifted his shirt and revealed a handgun stuck in the waistband of his pants. The trial court acquitted defendant of the charges of felonious assault, but convicted him of the uncharged offense of CCW.<sup>1</sup> The applicable statutory sentencing guidelines recommended a minimum term of seventeen to twenty-three months' imprisonment for the CCW conviction. The trial court stated that because defendant was on parole when he was charged with the original offenses an upward departure from the guidelines was justified. The trial court sentenced defendant to forty months to five years' imprisonment.

Defendant argues that the trial court violated his right to due process by convicting him of an uncharged offense, CCW, without adequate notice. We agree. A defendant may not be convicted of an uncharged crime without adequate notice. *People v James*, 142 Mich App 225, 227; 369 NW2d 216 (1985). The requirement of adequate notice is met if the subsequent charge

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<sup>1</sup> A conviction of CCW cannot serve as the underlying felony for a conviction of felony-firearm. MCL 750.227b(1). Therefore, the trial court could not convict defendant of felony-firearm.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

is a lesser included offense of the originally charged greater offense. *Id.* A lesser included offense can be either a necessarily included lesser offense or a cognate lesser included offense. *Id.* All of the elements of a necessarily included lesser offense are contained within the greater offense; whereas, a cognate offense merely has some elements in common. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A cognate lesser included offense is an offense in the same class or category as the greater offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). An offense can be a lesser included offense of another offense even if the penalties for the two offenses are the same. *People v Torres (On Remand)*, 222 Mich App 411, 421-422; 564 NW2d 149 (1997).

The offense of CCW is not a necessarily included lesser offense of felonious assault. While concealment is an element of CCW, *People v Kincade*, 61 Mich App 498, 502; 233 NW2d 54 (1975), it is not an element of felonious assault, *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). It is possible to commit felonious assault without concealing the weapon. Moreover, the offense of CCW is not a cognate lesser included offense of felonious assault. The only element the offenses have in common is the possession of a weapon; otherwise, the proofs necessary to establish the offenses could be entirely different. Furthermore, CCW is properly classified as an offense against public safety, whereas felonious assault is properly classified as an offense against a person. Finally, CCW carries a higher maximum penalty than does felonious assault.

While a lesser included offense may carry the same penalty as a greater offense, *Torres, supra*, no authority indicates that a lesser offense may carry a greater penalty. The determination whether an offense is a necessarily included lesser offense or a cognate lesser included offense of another offense is made by comparing elements and categories, *Bearss, supra*, and not, as plaintiff suggests without citation to authority, by comparing cumulative terms on possible multiple convictions.

We conclude that the trial court violated defendant's right to due process by convicting him of an uncharged offense without proper notice. Consequently, we reverse defendant's conviction. *James, supra*. Because defendant was acquitted of felonious assault, the constitutional protections against double jeopardy precludes retrial on those charges. US Const, Am V; Const 1963, art 1, § 15; *In re Wayne County Prosecutor*, 192 Mich App 677, 680; 481 NW2d 733 (1991).<sup>2</sup>

Reversed.

/s/ Michael J. Talbot  
/s/ Jessica R. Cooper  
/s/ Daniel P. Ryan

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<sup>2</sup> Defendant also contends that the trial court abused its discretion when it imposed a minimum sentence exceeding the guidelines. However, our reversal of defendant's CCW conviction renders this issue moot.