

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDWARD NATKIE,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 235343

Midland Circuit Court

LC No. 00-009514-FH

Before: Kelly, P.J. and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his conviction as a second habitual offender, MCL 769.10, and the trial court's order denying his motion for resentencing. We affirm.

I. Basic Facts and Procedural History

In 1994, after a military court-martial, defendant was convicted of rape and indecent assault at Rhein-Main Air Base in Germany. Captain Peter Richards represented defendant at the court-martial. According to the voting procedures employed by the military court, to find defendant guilty, two-thirds, or four out of a total of five members had to concur. The members of the court-martial found defendant guilty of rape and indecent assault.

Although the voting results are not disclosed in the record, defendant contends that he was not convicted by unanimous vote. Defendant indicated that Captain Richards told him that the rest of the members pressured one member of the court-martial because he voted to acquit defendant. Defendant was sentenced to five years' confinement and received a dishonorable discharge.

In March, 2000, defendant was charged with two counts of breaking and entering with intent to commit a larceny, MCL 750.110, one count of larceny in a building, MCL 750.360, and one count of failure to register as a sex offender, MCL 28.729(1)(a). The prosecution served the requisite notice that it would seek to enhance defendant's sentence as a second habitual offender based on the 1994 conviction by the military court-martial.

Defendant pleaded guilty to two counts of breaking and entering with intent to commit larceny in exchange for dismissal of the other charges. He acknowledged that he was convicted of rape by court-martial. The court sentenced defendant, as a second habitual offender, MCL

769.10, to a consecutive term of twenty-eight months to fifteen years' imprisonment on each count.

Thereafter, defendant filed a motion for resentencing with the court on the basis that his prior convictions for rape and indecent assault, which were obtained by a nonunanimous, five-member military court-martial, could not be used to enhance his sentence. Defendant argued that the Legislature did not intend for such a conviction to be used for sentence enhancement because it could not be "obtained" in Michigan. After conducting a hearing, the court denied defendant's motion concluding that defendant's habitual offender conviction was valid because the conviction on which it was based would constitute a felony if perpetrated in Michigan.

II. Standard of Review

This Court reviews a trial court's decision regarding a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). However, whether defendant's prior military court conviction can be used to enhance his sentence as an habitual offender presents a question of law which this Court reviews de novo. See *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

III. MCL 796.10

On appeal, defendant does not challenge the validity or legality of his prior court-martial conviction, rather, he argues that because the court-martial procedure would not be constitutional in Michigan, it cannot be used to enhance his sentence resulting from a subsequent Michigan conviction.

MCL 769.10-769.13 provides for escalating penalties for persons repeatedly convicted of felonies. *People v Stoudemire*, 429 Mich 262, 264; 414 NW2d 693 (1987), mod *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). MCL 769.10 provides in pertinent part:

(1) If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows . . .

MCL 769.13 (4) further provides, in pertinent part:

A defendant . . . may challenge the accuracy or the constitutional validity of 1 or more of the prior convictions listed in the notice by filing a written motion with the court . . .

Defendant argues that his court-martial conviction was not unanimous and was rendered by a jury consisting of only five members. Defendant asserts that a conviction by a non-unanimous verdict rendered by a jury consisting of fewer than twelve members could not be "obtained" in Michigan, see Const 1963, art 1, § 14, and thus cannot serve as the underlying

conviction for purposes of sentence enhancement pursuant to MCL 769.10. Defendant's arguments are misplaced.

First, the habitual offender statute does not require that the prior conviction obtain in accord with procedural standards applicable in Michigan. Instead,

[t]he act requires that the offense be a felony in Michigan under Michigan law, irrespective of whether the offense was or was not a felony in the state or county where originally perpetrated. Hence, the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose are determinative. *People v Quintanilla*, 225 Mich App 477, 479; 571 NW2d 228 (1997).

As the *Quintanilla* court explained, the substantive facts underlying the prior conviction must be considered under the law as it exists in Michigan to determine whether, the crime, if perpetrated within this state's boundaries, would constitute an appropriate basis upon which to enhance a defendant's sentence. Thus, the facts comprising the out of state crime for which a defendant stands convicted must drive the court's analysis to determine the applicability of MCL 769.10. We agree with the court's analysis and reasoning in *Quintanilla*.

In the case at bar, the facts underlying defendant's prior court-martial and subsequent conviction establish that defendant accomplished a sexual assault which involves penetration thus constituting either criminal sexual conduct in the first or third degree both of which are felonies in Michigan. MCL 750.520b; MCL 750.520d. The prior conviction that provided the basis to convict defendant as a second habitual offender would be a felony if originally charged and tried in a Michigan tribunal. *Id.*

Second, court-martials conducted under the Uniform Code of Military Justice (UCMJ) are considered lawful tribunals. *In re Losinger*, 329 Mich 47, 49; 44 NW2d 864 (1950). The UCMJ is consistent with due process and provides a system to guard fundamental liberties. A defendant is provided with essential constitutional protections embodied in federal and state law which govern civilian criminal trials. See 10 USC 801 *et seq.*; *Burns v Wilson*, 346 US 137, 142; 73 S Ct 1045; 97 L Ed 2d 1508 (1953). The UCMJ provides for: an arrested only upon a showing of probable cause, 10 USC 807(b); the right to a speedy resolution, 10 USC 830 (b); the right to competent counsel, 10 USC 827 (a) and 838; the right against self-incrimination, 10 USC 831(a); the right to remain silent and not have the silence used as a sword, 10 USC 831(b); the right to confront witnesses, 10 USC 832(b); the right against double jeopardy, 10 USC 844 (a); and, the right to appellate review, 10 USC 861 and 870. Further, "military courts, like the state courts have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Burns, supra* at 142. Further, the UCMJ contains specific voting procedures for use in court-martial proceedings. Under the UCMJ, before a vote is taken on the findings, the members are instructed as to the elements of the offense, advised that the accused is presumed innocent, and that the prosecution's burden is proof beyond a reasonable doubt, 10 USC 851 (c). We find that the court-martial in the instant case was indeed valid and congruent with both the state and federal constitutions.

Finally, although MCL 769.13(4) suggests that a prior final conviction may be subject to attack for potential constitutional errors, it is silent regarding the nature of constitutional

challenges that the Legislature intended to allow. See MCL 769.13(4). Michigan courts have historically limited collateral challenges regarding the constitutional validity of a prior conviction to those allegedly obtained in violation of a defendant's right to counsel under *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). *People v Zinn*, 217 Mich App 340, 342; 551 NW2d 704 (1996).¹ In another context, however, this Court recognized that the "right to counsel is wholly distinct from the right to a jury trial," and the "analysis of one should not shape the analysis of the other." *People v Antkowiak*, 242 Mich App 424, 440 n 6; 619 NW2d 18 (2000). Thus, we decline to afford legitimacy to a collateral challenge brought against a nonunanimous six person jury in the context of a validly obtained court martial.

We find that a trial court may consider a conviction rendered pursuant to a valid military court martial for purposes of enhancing a defendant's conviction in accord with MCL 769.10 – 769.13 provided that the offense would constitute a felony under Michigan law. Accordingly, the trial court did not err in denying defendant's motion for resentencing.

IV. MCL 769.13

Defendant also argues that because his military conviction was based on an offense committed prior to May 1, 1994 he had the right to have a trial by jury to determine whether the prior conviction exists, and then required the prosecution prove its existence beyond a reasonable doubt. Because defendant did not raise this issue in the trial court, ours is to review for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find that defendant's argument is without merit.

Previously, a defendant charged as an habitual offender had the right to a jury trial at which the prosecution was required to prove the existence of the prior conviction or convictions beyond a reasonable doubt. 1994 PA 110, effective May 1, 1994, eliminated the right to a jury trial and amended MCL 769.13 to provide that the existence of the prior conviction or convictions was to be determined by the trial court at sentencing or at a hearing for that purpose prior to sentencing. The changes enacted by 1994 PA 110 apply to prosecutions for offenses committed on or after May 1, 1994.

The habitual offender statutes do not implicate the constitutional rights to trial by jury and proof beyond a reasonable doubt because the court-martial provides mechanisms to enhance sentences separate and apart from substantive crimes. The trial court's reliance upon and use of the amended procedure for determining the existence of defendant's prior conviction did not violate defendant's constitutional rights. *Zinn, supra* at 344-347.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

¹ See also, *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994); *People v Ingram*, 439 Mich 288, 296; 484 NW2d 241 (1992); *People v Moore*, 391 Mich 426, 436-438; 216 NW2d 770 (1974).