

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDELL K. BANKS,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 232254

Wayne Circuit Court

LC No. 00-000523

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a short-barreled shotgun, MCL 750.224b, possession of a firearm by a person convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was subsequently sentenced as a third-offense habitual offender, MCL 769.11, to terms of three to ten years in prison for both convictions of possession of a short-barreled shotgun and possession of a firearm by a person convicted of a felony and two years in prison for the conviction of felony-firearm. Defendant appeals as of right and we affirm.

The incident in this case occurred on December 16, 1999, when defendant entered his mother's (Marcella Bankston) home and struck her arm. When the police arrived, Bankston informed them where defendant could probably be located, the police went to that area, and defendant was found with a shotgun inside his jacket.

Defendant first argues that his dual convictions of possession of a firearm by a person convicted of a felony and felony-firearm, where the conviction of possession of a firearm by a person convicted of a felony was used as the predicate felony for the felony-firearm charge, violates the constitutional protections against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Defendant concedes that this Court recently ruled that prosecution of both possession of a firearm by a person convicted of a felony and felony-firearm does not violate the constitutional prohibitions against double jeopardy. *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). Defendant maintains that *Dillard* was wrongly decided and seeks to preserve

this issue for further appellate review. This issue has clearly been preserved in the trial court and this Court and defendant may certainly pursue his challenge in the Supreme Court.¹

Defendant next argues that he is entitled to resentencing because the trial court clearly erred in finding a factual basis for scoring offense variable three (OV 3) and offense variable ten (OV 10) at five and ten points respectively. Defendant objected to the scoring of both OV 3 and OV 10 before the trial court. A sentencing court's determination in scoring an offense variable will be upheld if there is any evidence in the record adequately supporting the score. *People v Hornsby*, ___ Mich App ___; ___ NW2d ___ (Docket No. 227945, issued 5/24/2002), slip op, p 3.

With respect to OV 3, the trial court assessed five points for bodily injury not requiring medical treatment that occurred to the victim. MCL 777.33. Although the victim did not testify at trial, a responding police officer testified that he observed an abrasion to the victim's right hand and forearm that appeared to be recently inflicted. We agree with the trial court that the police officer's testimony regarding what he observed is sufficient to justify a score of five points for OV 3.

With respect to OV 10, the trial court assessed ten points for exploiting the victim's age and domestic relationship. MCL 777.40. Although there is no evidence of the victim's age, it is undisputed that defendant was living with his mother at the time of the offense, giving defendant easy accessibility to his mother's house. We again agree with the trial court that the facts of this case justify a score of ten points for OV 10.

Accordingly, we conclude that the trial court's scores for OV 3 and OV 10 are adequately supported by record evidence and defendant is not, therefore, entitled to resentencing.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen

¹ To the extent that defendant relies on this Court's decisions in *People v Walker*, 167 Mich App 377; 422 NW2d 8 (1988) and *People v Booker (After Remand)*, 208 Mich App 163; 527 NW2d 42 (1994), in contending that *Dillard* was wrongly decided, we note that our Supreme Court in *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998), overruled *Walker* and its progeny "to the extent that they are in conflict with our opinion today." In *Mitchell*, *supra* at 698, the Court held that "the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." Possession of a firearm by a person convicted of a felony is not one of those four felonies explicitly excluded in the felony-firearm statute.