

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO COMBS,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 228139

Wayne Circuit Court

LC No. 99-009189

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a bench trial, of carrying a concealed weapon in a motor vehicle (CCW-MV), MCL 750.227. Defendant was sentenced to two to five years in prison on the CCW-MV conviction. We reverse.

Defendant was charged with felonious assault, MCL 750.82, and felony firearm, MCL 750.227b, arising out of an altercation between the defendant and the complainant precipitated by a near automobile collision. Defendant allegedly pointed a firearm at the complainant during a heated verbal exchange. After hearing the testimony, rather than convicting the defendant of felony firearm, the trial court found defendant guilty of CCW-MV, an offense which had not been charged by the prosecutor.¹

Defendant moved to set aside the CCW-MV conviction first on the basis that CCW-MV is not a lesser included offense of the felony firearm charge, and second on the basis that because the prosecutor had not alternatively charged defendant with CCW-MV, defendant's conviction of an offense that he had no notice he would face violated his rights under the Sixth Amendment of the United States Constitution. In particular, defendant noted that while he had been charged by the prosecutor with a two-year felony, he had been convicted by the trial court of a five-year felony.

¹ Defendant was also convicted of intentionally aiming a firearm without malice, MCL 750.233, rather than felonious assault, and received a thirty-day suspended sentence on this conviction. Defendant does not appeal this conviction or sentence.

During a hearing on defendant's motion to set aside the CCW-MV conviction, the trial court acknowledged that defendant's argument opposing his conviction for CCW-MV may be technically correct but, nevertheless, denied the motion and explained the rationale for its findings as follows:

Now, in this particular case this gentleman was charged with Felony Firearm, which is a mandatory two-year consecutive offense. And he was charged with Felonious Assault, which would be consecutive to the Felony Firearm.

So, this Court, trying to give him a break and not send him to prison, depending on the Presentence Report, found him guilty of an offense which is probationary, and which is not consecutive. So, I gave him . . . misdemeanor, so I wouldn't have to send him to prison. . . . I tried to help him out. And I think that I can. I think the fact finder can do whatever the fact finder wants to do. And I was the fact finder."

The trial court's finding that as the fact finder it could do whatever it wanted was in error. In *People v Pasha*, 466 Mich 378, 383-384; 645 NW2d 275 (2002), our Supreme Court expressly renounced the exact practice employed in this case by the trial court:

Moreover, we express our disapproval of the practice employed by the trial court in this case. The prosecutor charged defendant with felony-firearm, MCL 750.227b. The trial court did not explain why defendant was not guilty of that offense. Instead, it convicted defendant of CCW, an offense that the prosecutor did *not* charge. It is doubtful that CCW was truly a "cognate" offense of felony-firearm, so the trial court probably lacked authority to convict the defendant of that offense even under this Court's pre - *People v Cornell* 466 Mich 335; 646 NW2d 127 (2002), jurisprudence.

The Supreme Court found that because the defendant in *Pasha* was actually innocent of the crime he was convicted of, his conviction was required to be reversed, and a verdict of acquittal was to be entered. *Id.* at 384. We are compelled by *Pasha* to reach the same result here. The trial court clearly lacked the authority to convict defendant of CCW-MV, whether applying *Cornell* or pre-*Cornell* jurisprudence to the facts of this case. Accordingly, defendant's conviction must be reversed and an order of acquittal entered on the felony-firearm charge.

Reversed and remanded for entry of an order of acquittal. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra