

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYREE ANTHONY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2004

No. 246927

Wayne Circuit Court

LC No. 02-008388-01

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of felonious assault, MCL 750.82 and his sentence of seventeen to forty-eight months' imprisonment. We affirm defendant's conviction, vacate his sentence and remand for resentencing.

I

Defendant first argues that the trial court reached inconsistent verdicts in finding him guilty of felonious assault but not guilty of felony-firearm. We agree but conclude that, under the circumstances and on this record, defendant's conviction of felonious assault must be affirmed.

The trial court's factual findings with regard to the felonious assault and felony-firearm charges are inconsistent under any rational view of the evidence. The trial court found defendant guilty of felonious assault based on a finding that defendant shot a weapon at the complainant. In this regard, the critical evidence was the complainant's testimony that he saw defendant shooting a gun while it was pointed at him. Another witness also testified that she observed defendant point and shoot a gun at the complainant. There was no evidence that defendant assaulted the complainant with any dangerous weapon other than a firearm. Thus, the trial court's finding "beyond a reasonable doubt" that defendant shot a weapon at the complainant in connection with the felonious assault conviction could only have been based on a finding that defendant discharged, and thus possessed, a firearm. The trial court's ensuing remarks expressing that it was not established beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony are entirely inconsistent with its findings in the felonious assault conviction.

Defendant relies heavily on this Court's opinion in *People v Williams*, 99 Mich App 463; 297 NW2d 702 (1980).¹ In *Williams*, the defendant was found guilty at a bench trial of felonious assault, but not guilty of felony-firearm. *Id.* at 464. The only weapon that could have supported a conviction of felonious assault in that case was the same weapon that would have led to a finding of guilt on the felony-firearm charge. *Id.* The trial court in *Williams* "found, since the firearm was never introduced in evidence, that it had a reasonable doubt as to the defendant's guilt of the felony-firearm charge." *Id.* This Court held that the defendant's conviction of felonious assault could not stand and ordered the defendant "discharged." *Id.* at 464-465. This means that this Court in *Williams* did not allow the defendant to be retried for the felonious assault charge, but rather, effectively concluded that he had to be considered acquitted of that charge.

On the other hand, the prosecution relies largely on *People v Ellis*, 468 Mich 25; 658 NW2d 142 (2003). In *Ellis*, the defendant was found guilty in a bench trial of carjacking and felonious assault but acquitted of other charges including felony-firearm and felon in possession of a firearm. *Id.* at 26-27. Our Supreme Court affirmed this Court's decision to affirm the defendant's convictions in that case. *Id.* at 26. In its opinion, the Court set forth remarks by the trial court including a statement that it had been proven beyond a reasonable doubt that the defendant had a gun. *Id.* at 27. The Court then stated that the trial court's "clear statement of the factual findings" was plainly inconsistent with the acquittals on the felony-firearm and felon in possession charges. *Id.* Essentially the prosecution contends that because our Supreme Court in *Ellis* allowed convictions to stand despite acquittals that were logically inconsistent with those convictions, the conviction in this case should likewise be affirmed.

Even if *Williams* were binding, *Ellis* is more similar to this case than *Williams* because the record in this case contains a "clear statement" of the relevant factual findings. From the discussion in *Ellis*, it is apparent that our Supreme Court regarded the trial court as having made a clear factual finding that the defendant possessed a gun and then having simply acquitted the defendant of certain charges despite the fact that its findings warranted conviction on those charges. In this case, the trial court similarly found, in connection with the felonious assault charge, beyond a reasonable doubt that defendant used, and thus necessarily possessed, a firearm. But then in connection with the felony-firearm charge the trial court expressly stated, in direct contradiction of its findings regarding the felonious assault charge, that it was *not* proven beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony. On this record, it is clear that the evidence supports both the felonious assault conviction and the finding that defendant possessed a firearm during the commission of the felonious assault.

The trial court's "finding" in relation to the felony-firearm charge is a thinly veiled "waiver break," i.e., a trial court in a bench trial acquitting a defendant of a charge despite being convinced of guilt beyond a reasonable doubt as to that charge as a reward for the defendant having waived a jury trial. See *Ellis*, *supra* at 26. In *Ellis*, our Supreme Court admonished trial courts that this practice "violates the law and a trial judge's ethical obligations." *Id.* at 28. But

¹ Because this case was decided before November 1, 1990, we are not required to follow it. MCR 7.215(J).

because even an improper acquittal is constitutionally protected by double jeopardy principles, *id.*, “a trial judge that rewards a defendant for waiving a jury trial by ‘finding’ him not guilty of a charge for which acquittal is inconsistent with the court’s factual findings cannot be corrected on appeal.” *Id.* Thus, although the trial court erred in acquitting defendant of the felony-firearm charge, this Court is powerless to remedy that error.

II

Defendant also argues that the trial court’s imposition of a sentence of seventeen to forty-eight months’ imprisonment constituted an abuse of sentencing discretion. The prosecution responds that defendant’s sentence is not subject to appellate review because it was within the sentencing guidelines. We agree with defendant, vacate the sentence and remand for resentencing.

A trial court is required to impose an “intermediate sanction” rather than a prison term if the upper limit of the sentencing guidelines range is eighteen months or less unless the trial court “states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a). The sentencing guidelines in this case were scored at zero to seventeen months. The trial court did not articulate any substantial and compelling reasons for imposing a prison term. Moreover, the fact that defendant’s minimum sentence was seventeen months, the highest point within the scoring of the guidelines on their face, i.e., without considering MCL 769.34(4)(a), at least strongly suggests that the trial court incorrectly believed that it was simply sentencing defendant within the guidelines. Accordingly, upon remand, the trial court must consider an intermediate sanction and, if it does not, specify the substantial and compelling reasons for imposing a prison term. *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly