

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY JOE FRONEY,

Defendant-Appellant.

UNPUBLISHED

November 22, 2005

No. 250324

Wayne Circuit Court

LC No. 03-002594-01

ON REMAND

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for reconsideration in light of the Court's decision in *People v Perkins*, 473 Mich 626; 703 NW2d 448 (2005).¹ Because we are satisfied that our original analysis and conclusion is consistent with the Court's decision in *Perkins*, we once again affirm.

Defendant was convicted by jury of possessing a firearm as a person convicted of a specified felony, in violation of MCL 750.224f(2). In challenging this conviction on appeal, defendant argued that the trial court erred in instructing the jury that he "must show some evidence that his gun rights were restored before the prosecutor has the burden of proving" that defendant's rights in that regard had not been restored. Specifically, defendant argued that although MCL 776.20, which shifts to a defendant the burden of establishing any "exception,

¹ We note that in its order of remand the Court indicates that defendant raised on appeal a claim that evidence exists from which to infer that his previous conviction was 'expunged or set aside' within the meaning of MCL 750.224f(4), and that the trial court thus erred in instructing the jury that, '[a] mere assertion by defendant that his right to carry a firearm were restored is not enough evidence to shift the burden of proof to the prosecution to show that the defendant's rights to possess a firearm were not restored.' [*People v Froney*, 474 Mich 864; 703 NW2d 802 (2005).]

After review of the arguments raised by defendant in his brief on appeal, we find that no such claim was made by defendant.

excuse, proviso, or exemption” for the violation of a statute concerning the use, licensing or possession of firearms, is clearly applicable to the exemptions expressly set forth in MCL 750.224f(4), prosecutions under MCL 750.224f(2) are not subject to the burden shifting requirement of MCL 776.20 because “[t]he legislature [sic] chose not to include the restoration provision in the portion of the statute dealing with exceptions.” Thus, defendant argued, lack of restoration is an element of the offense that the prosecution was required to prove beyond a reasonable doubt, regardless whether defendant proffered any evidence that his rights to possess a firearm had been restored. See MCL 750.224f(2)(b).

In our prior opinion, relying in part on MCL 776.20, we found no error in the trial court’s instruction. *People v Froney*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2005 (Docket No. 250324). The Supreme Court thereafter released its decision in *Perkins*, *supra*, wherein the Court held that the condition of restoration set forth in MCL 750.224f(2)(b) is a “proviso” to which the burden shifting requirement MCL 776.20 plainly applies. *Id.* at 639. Thus, the Court held, before the prosecution must prove that a defendant’s right to carry a firearm has not been restored, the defendant must first present some evidence that such right has been restored. *Id.* at 639-640. Because the instruction at issue here is wholly consistent with the Court’s analysis and holding in *Perkins*, we again find no error in the trial court’s instruction that defendant “must show some evidence that his gun rights were restored before the prosecutor has the burden of proving” that defendant’s rights in that regard had not been restored.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello