

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK WAYNE FELTSON,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 274911

Livingston Circuit Court

LC No. 04-014745-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted sentences imposed following his nolo contendere plea to possession with intent to deliver marijuana, MCL 333.7401(2)(d), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and operating a vehicle while license suspended, MCL 257.904 (a misdemeanor). Because defendant's sentence for the underlying felony was not required to run concurrently with his sentence for felony-firearm, we remand only for ministerial correction of defendant's judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's plea agreement was made pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). Pursuant to the plea agreement, the trial court sentenced defendant as a third habitual offender, MCL 769.11, to two years in prison for felony-firearm.¹ The trial court also sentenced defendant to a term of eleven months incarceration in jail and then added one day of probation for the convictions of possession with intent to deliver marijuana, carrying a concealed weapon, and felon in possession of a firearm. The record clearly expresses the trial judge's intent that defendant serve a consecutive sentence as it pertains to the felony-firearm and the underlying "offenses." The trial court referred to "offenses" in the plural although only the conviction for possession with intent to deliver forms the predicate offense for felony-firearm. Because the trial court also sentenced defendant to one day of probation after the 11 month incarceration the record contains some probationary language. The trial court also sentenced

¹ The charge of possession with intent to deliver marijuana was designated as the underlying felony for the charge of felony-firearm.

defendant to 90 days in jail for operating a vehicle while license suspended. The trial court stated that the two-year prison term for felony-firearm was to be consecutive to the remaining sentences, which were to be concurrent to each other.

Following sentencing, defendant moved for correction of the judgment of sentence and/or resentencing, arguing that because the mandatory term of imprisonment for felony-firearm cannot be served consecutively to a probationary sentence, he was entitled to have his sentences run concurrently. The trial court denied defendant's motion for correction of the judgment of sentence and/or for resentencing and reaffirmed its intent of making the 11-month jail term consecutive to the two-year prison term citing *People v Spann*, 469 Mich 904; 668 NW2d 904 (2003) and three unpublished opinions from this Court.² This appeal followed.

On appeal, defendant again argues that he is entitled to resentencing. Defendant emphasizes that this Court has held that a probationary sentence cannot run consecutively to a term of imprisonment for felony-firearm relying on *People v Brown*, 220 Mich App 680, 682-685; 560 NW2d 80 (1996). Defendant specifically asserts that he is entitled to have all of his sentences run concurrently. The proper interpretation of a statute presents a question of law that we review de novo on appeal. *People v Clark*, 463 Mich 459, 463 n 9; 619 NW2d 538 (2000).

MCL 750.227b provides in pertinent part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

A sentence for felony-firearm must be served consecutively to and prior to "any term of imprisonment imposed" for the underlying felony, MCL 750.227b(2); *People v Fortson*, 202 Mich App 13, 20-21; 507 NW2d 763 (1993), but not consecutively to a sentence imposed for any other offense. *Clark, supra* at 464. A sentence of probation imposed for an underlying felony cannot run consecutively to a term of imprisonment for felony-firearm. *Brown, supra* at 682-685.

² See *People v Phason*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2005 (Docket No. 252598), *People v Strickland*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2004 (Docket No. 249897), and *People v Purcell*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2001 (Docket No. 221448).

In this case, the underlying felony for the charge of felony-firearm was possession with intent to deliver marijuana. The trial court sentenced defendant to 11 months in jail for that conviction. While the trial court may have labeled the sentence for the underlying felony as a probationary one, our review of the record reveals the actual sentence was incarceration followed by one day of probation. A jail sentence as well as a prison sentence constitutes “imprisonment.” *Spann, supra*. The mandatory two-year term for felony-firearm must be served consecutively to and preceding a term of imprisonment imposed for any other felony. MCL 750.227b(2). Because “imprisonment” includes confinement in jail as well as in a state prison, *Spann, supra*, and the actual sentence imposed for the underlying felony of possession with intent to deliver marijuana was imprisonment and not probation, *Brown* does not apply and defendant’s sentence for the underlying felony was not required to run concurrently with his sentence for felony-firearm.

But, defendant’s sentences for the offenses of carrying a concealed weapon and felon in possession of a firearm must run concurrently because the sentence for felony-firearm cannot run consecutively to sentences imposed for offenses other than the underlying felony. *Clark, supra* at 464.³ And, defendant’s sentence for the misdemeanor offense of driving while license suspended must run concurrently because the sentence for felony-firearm can run consecutively only to a sentence imposed for an underlying felony conviction. MCL 750.227b(1) and (2). Therefore, we remand the case for correction of the judgment of sentence to reflect separately the concurrent sentences from the consecutive sentences and to provide that the one-day term of probation also ran concurrently.

Remanded for the ministerial task of correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

³ The offense of carrying a concealed weapon cannot serve as the underlying offense for felony-firearm in the first instance. MCL 750.227b(1).