STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 276590 Wayne Circuit Court
ROD STERLING HOLMES, Defendant-Appellant.	LC No. 06-003320-01

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of one to five years each for the CCW and felon-in-possession convictions to be served consecutively to two years' imprisonment for the felony-firearm conviction. He appeals by right. We affirm.

Defendant first argues that the trial court erroneously applied the preponderance of the evidence standard and shifted the burden of proof by convicting him on the basis of its belief that he failed to show that he was probably not guilty. We disagree. In reviewing a verdict reached in a bench trial, we review the trial court's factual findings for clear error and its conclusions of law de novo. MCR 2.613(C); *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

Convicting a defendant of a criminal offense requires due process: the prosecutor must present sufficient evidence from which a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). A trial court sitting without a jury must make findings of fact and conclusions of law on contested matters and state its findings and conclusions either on the record or in a written opinion. MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989).

The court's findings show that although it stated that a mere possibility existed that Officer Dwayne Robinson planted the gun in defendant's vehicle, it determined beyond a

reasonable doubt that defendant instead possessed the weapon. Although the trial court mentioned possibilities and probabilities, it did not apply the preponderance of the evidence standard or shift the burden of proof. Rather, our review of the record clearly shows that the court determined that the prosecutor proved that defendant possessed the weapon beyond a reasonable doubt. Indeed, the court repeatedly referenced the beyond a reasonable doubt standard. Thus, the record fails to support defendant's argument.

Defendant also argues that the trial court based its verdict in part on its erroneous finding that Officer Myron Watkins observed Officer Robinson retrieve the gun from defendant's vehicle. The trial court's finding was not erroneous. Officer Watkins testified as follows:

Q. Did you see if Officer Robinson recovered anything?

A. Yes, he did.

Q. What did he recover?

A. He recovered a handgun.

Q. Did you see where Officer Robinson recovered this handgun from?

A. From the center console.

* * *

Q. Did you see Officer Robinson make a confiscation?

A. After he pulled the gun out of the console.

Q. Did you see Officer Robinson go into the console and extract a gun, yes or not? Did you see that?

A. No.

Although Officer Watkins's testimony is contradictory regarding whether he saw Officer Robinson retrieve the gun from the console, it can be read as supporting the trial court's finding that Officer Watkins witnessed Officer Robinson retrieve a gun from defendant's *vehicle*. Officer Watkins merely testified that he did not see Officer Robinson reach into the console.

In any event, Officer Nevin Hughes testified that he witnessed Officer Robinson open the console and retrieve a weapon. Defendant argues that Officer Hughes's testimony was equivocal. Officer Hughes testified as follows:

Q. And, do you watch Officer Robinson confiscate the weapon?

A. I see him look into the vehicle, check it and –

Q. My question is –

A. – retrieve a weapon.

Q. – my question is this.

Do you watch Officer Robinson go into that console and pull out that weapon, yes or no?

A. I see the console opened, but I couldn't see exactly him – no, I can't answer that question like that, no.

Q. All right.

Now, I'm asking this. Either you saw it or you didn't. So, my question is again, did you see Officer Robinson pull the – confiscate the weapon, outside of that console?

* * *

A. At what point do you mean –

Q. Any point in time –

A. – inside?

Q. Well, let me clarify?

Did you see Officer Robinson open the console, put his hand in and pull out a weapon, yes or no? Did you witness that?

A. I witnessed that part, yes.

Q. What part?

A. From the side, standing from the driver's side of the door – I mean, the passenger side of the door, I observed him check the vehicle and pull the weapon out –

Q. Now, you –

A. – from inside the console.

* * *

Q. And when you advised him of this, what did he do? What did you see him do, Officer Robinson, that is?

A. Open the console and take out a weapon.

Officer Hughes's testimony was initially equivocal, but he definitively testified that he saw Officer Robinson open the console and remove a weapon. The trial court repeatedly stated that it found Officer Hughes's testimony credible. Officer Hughes's credibility was for the trial court to determine, and this Court will not resolve credibility questions anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant next argues that the evidence was insufficient to support his felony-firearm conviction because the Legislature did not intend felon-in-possession to serve as the basis for a felony-firearm conviction. Whether a felon-in-possession conviction may serve as the predicate felony for a felony-firearm conviction is a question of law that this Court reviews de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005).

Defendant argues that *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007), rejected the reasoning of *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), and *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), which held that the language of the felony-firearm statute, MCL 750.227b, permits convictions of both felony-firearm and felon-in-possession because the felony-firearm statute does not exempt felon-in-possession as a predicate offense. Thus, defendant argues, those decisions are no longer binding. In *Smith, supra* at 316, however, our Supreme Court acknowledged that for purposes of the multiple punishment strand of double jeopardy "courts first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed." The Court held that if the Legislature clearly intended to impose multiple punishments, imposition of such punishments does not violate the constitution regardless of whether the offenses share the same elements. *Id.* Only where the Legislature's intention is not clearly expressed is it necessary to apply the *Blockburger*[1] "same elements" test to determine whether multiple punishments are permissible. *Id.* Thus, as determined in *Calloway, supra* at 451-452, and *Dillard, supra* at 166-168, because the plain language of the felony-firearm statute does not exempt felon-in-possession as a predicate felony, the Legislature has clearly conveyed its intent that a conviction for being a felon-in-possession may serve as a predicate felony for a felony-firearm offense. Accordingly, it is unnecessary to apply the "same elements" test. Therefore, although our Supreme Court in *Smith* adopted the *Blockburger* "same elements" test, this holding does not undermine the soundness of *Calloway* and *Dillard* to the extent that those decisions focused on the plain text of the felony-firearm statute.

Defendant further argues that the rationale of *Calloway* and *Dillard* should not persuade this Court because neither case addressed the intent of the Legislature that enacted the felony-firearm statute in 1976 and because the felon-in-possession statute was not enacted until 1992, making it impossible to have been included in the list of exceptions contained in the felony-firearm statute. As recognized in *Dillard, supra* at 168, quoting *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993), "'the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.'" Therefore, "had the Legislature wished to exclude the felon in possession charge as a basis for liability

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

under the felony-firearm statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f." *Dillard, supra* at 168. The Legislature failed to do so. Accordingly, defendant's argument lacks merit.

We affirm.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot