STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWARD JUDE,

Defendant-Appellant.

UNPUBLISHED
October 13, 2009

No. 286664
Genesee Circuit Court
LC No. 07-020780-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession of a firearm during the commission of a felony, MCL 750.227b, carrying a concealed weapon, MCL 750.227, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to two years' imprisonment for the felony-firearm conviction, consecutive to concurrent terms of five months' jail incarceration imposed with respect to the two other weapon convictions. Defendant appeals as of right. We affirm, but remand this case to the trial court for the ministerial task of preparing an amended judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecution presented evidence that in June 2007, police officers stopped a car in which defendant was riding as a passenger upon noticing that the driver had failed to stop at a stop sign or signal a turn. The police found a handgun in defendant's possession.

On appeal, defendant requests a new trial on the ground that the trial court proceeded to a waiver or bench trial without making a proper record of his decision to waive a jury trial, and he argues that his felony-firearm conviction should be vacated because neither carrying a concealed weapon nor felon-in-possession could serve as the underlying felony.

I. Waiver Procedure

On the day before trial, a pretrial hearing was held at which defendant was present along with his attorney. At the hearing, defense counsel stated, "And, with the Court's permission, my client has indicated to me [that] he wishes to waive jury trial and have a bench trial." The prosecutor responded, "And the People have no objection to a bench trial, Your Honor." The trial court then chimed in, stating that it would "agree to conduct a bench trial since both sides have no problem with it." The next day, before trial commenced, the court stated that "[t]he

defense has requested and the People have agreed to a nonjury trial." Defense counsel indicated that he had no objection to and was satisfied with the court conducting a bench trial. The transcripts of the pretrial hearing and of the trial do not reveal any statements on the record by defendant himself. However, after the trial and at sentencing, the following colloquy took place between the court and defendant personally:

> *Q*. Mr. Jude, you had a non-jury trial in this case, is that correct, sir?
>
> *A*. Yes.
>
> *Q*. All right. And you could have had a jury trial but you wanted a non-jury [trial], is that right?
>
> *A*. Yes.
>
> *Q*. Okay. And you were aware that you could have had a jury trial, right?
>
> *A*. Yes.
>
> *Q*. And you didn't want to have it?
>
> *A*. Yes.[1]

MCR 6.402(B) sets forth the requirements for acceptance of a criminal defendant's decision to waive a jury trial:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

The record reflects that the trial court failed to comply with the requirements of MCR 6.402(B). In *People v Cook*, __ Mich App __; __ NW2d __, issued August 27, 2009 (Docket No. 280600), slip op at 2, this Court, setting forth some of the analytical framework with respect to the issue presented here, stated:

> The adequacy of jury trial waiver is a mixed question of fact and law. A criminal defendant has a constitutionally guaranteed right to a jury determination that he is guilty beyond a reasonable doubt. However, with the consent of the prosecutor and approval of the trial court a defendant may waive his right to a

[1] This colloquy occurred before the trial court imposed sentence, at which time defendant would have been highly motivated to make an assertion that he was denied his right to a jury trial, had that been the case, yet no such claim was made. Even during his allocution, defendant made no mention whatsoever that he was denied his right to trial by jury.

jury trial. In order for a jury trial waiver to be valid, however, it must be both knowingly and voluntarily made.

> By complying with the requirements of MCR 6.402(B), a trial court ensures that a defendant's waiver is knowing and voluntary. See *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003) (noting that compliance with these procedures creates a presumption that the waiver was knowing, voluntary, and intelligent). In the present case, the trial court did not comply with the requirements of MCR 6.402(B). However, the prosecution argues that failure to follow the procedure set out in MCR 6.402(B) does not merit automatic reversal, so long as defendant's waiver was knowingly, voluntarily, and intelligently made. *Mosly, supra.*
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> [A]n attorney cannot waive the right to a jury trial "without the fully informed and publicly acknowledged consent of the client." *Taylor v Illinois*, 484 US 400, 417-418, 418 n 24; 108 S Ct 646; 98 L Ed 2d 798 (1987); see also *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2008) (noting that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate"); *People v Newson*, 173 Mich App 160, 165; 433 NW2d 386 (1988) (noting that a defendant's trial counsel may not waive his client's right to a jury trial) . . . . Therefore, defendant's trial counsel's statement that defendant agreed to waive his jury trial right along with the written waiver signed only by counsel does not rise to the level of a valid waiver. *Without any evidence on the record that defendant was fully informed about his right to a jury trial and voluntarily waived that right,* we must conclude that defendant did not validly waive his right to a jury trial. Therefore, the trial court was without the authority to proceed with a bench trial. [Citations omitted; emphasis added.]

The *Cook* panel proceeded to hold "that a *constitutionally* invalid jury waiver is a structural error requiring reversal." *Cook, supra*, slip op at 4 (emphasis added). This Court rejected the prosecutor's argument that *Mosly, supra*, required a harmless-error analysis, distinguishing *Mosly* on the basis that *Mosly* said that failure to comply with MCR 6.402(B) could be harmless if the defendant nonetheless understood that he had a right to a jury trial and voluntarily waived it, and where the facts in *Cook* showed more than a court-rule failure but also a failure to satisfy minimum constitutional requirements for a jury waiver. *Cook, supra,* slip op at 3. Indeed, in *Mosly, supra* at 96, this Court stated:

> Although the trial court clearly failed to comply with the oral waiver procedure set forth in MCR 6.402(B), we are not persuaded that the trial court's failure to follow the rule requires reversal *if the record establishes that defendant nonetheless understood that he had a right to a trial by jury and voluntarily chose to waive that right*. In the federal courts, a trial court's failure to follow procedural rules for securing a waiver of the right to a jury trial does not violate the federal constitution nor does it require automatic reversal. Indeed, compliance with the court rules only creates a presumption that a defendant's waiver was voluntary,

> knowing, and intelligent. If a defendant's waiver was otherwise knowingly, voluntarily, and intelligently made, reversal will not be predicated on a waiver that is invalid under the court rules because courts will disregard errors that do not affect the substantial rights of a defendant. [Citations omitted; emphasis added.][2]

We take from *Cook* and *Mosly* that if the record shows that a defendant personally understood or was informed that he or she had a right to a jury trial and then voluntarily chose to waive that right, reversal is unwarranted. In other words, even though there may be a violation of MCR 6.402(B), if there is no constitutional violation, we need not vacate the verdict, but if the violation reaches constitutional proportions, as in *Cook*, a structural error occurs and reversal is mandated.

We first note that the facts here are dissimilar from those in *Cook*, where there the defendant expressly voiced a claim to the trial court denying any waiver of his right to a jury trial. Here, at the pretrial on the day before trial, defendant sat quietly as defense counsel expressed to the court that defendant wished a bench trial. Of course, if this was all that the record revealed, *Cook* would still require reversal, given the lack of personal acknowledgment by defendant. However, defendant's own statements at sentencing supply the necessary record to affirm. The court's questioning or inquiry, while conducted after the fact of trial, spoke to defendant's knowledge and understanding before the trial, e.g., "you *were* aware that you *could have had* a jury trial, right?" (Emphasis added.) The questioning and defendant's responses established that he personally understood, *before trial*, that he had a right to a jury trial and voluntarily chose to waive that right. There was no constitutional violation and thus no structural error. We emphasize that we do not condone the procedure that took place in the case at bar; the matter was handled very sloppily. It is important for courts to comply with MCR 6.402(B) in order to avoid the problems that arose here.

II. Felony-Firearm

The trial court's written verdict indicates that it regarded carrying a concealed weapon as the felony underlying the felony-firearm charge. This was obvious inadvertence. The charging documents clearly set forth felon-in-possession as the felony underlying the felony-firearm charge. Because the charging instruments were correct in this regard, and a result harmonizing with those proper charges inheres in the verdict, we deem the trial court's slip in naming the wrong one of the two other charges as serving as the predicate felony for the felony-firearm charge harmless error. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The trial court clearly ruled that a gun was found on defendant's person and that he was a felon at the time, which served as the basis to find defendant guilty of felon-in-possession, and which would necessarily also make defendant guilty of felony-firearm.

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[2] We do note that *Mosly* was analyzed through the lens of MCR 6.508(D), which addresses postappeal relief. And the Court stated that it did not need to "determine whether the trial court's failure to follow the mandates of MCR 6.402(B) warrants *an automatic* reversal of defendant's conviction[,]" where the defendant did not argue that his rights were violated for failure to comply with the court rule, only that the waiver of his constitutional right to a jury trial was invalid because it was not made voluntarily or knowingly. *Mosly, supra* at 94.

Furthermore, we reject defendant's argument that felon-in-possession cannot be a predicate felony for purposes of felony-firearm. This argument was rejected in *People v Dillard*, 246 Mich App 163, 168; 631 NW2d 755 (2001), wherein the Court held:

> We reject defendant's suggestion that "there is no conclusive evidence that the Legislature intended to authorize multiple punishment" for both felon in possession of a firearm and felony-firearm because the felon in possession of a firearm statute was not enacted until after the Legislature had, in 1990, amended and expanded the list of exceptions to the felony-firearm statute. In enacting the felon in possession statute the Legislature presumably was aware of the four exceptions to the felony-firearm statute. We conclude that had the Legislature wished to exclude the felon in possession charge as a basis for liability 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. [Citations omitted; see also *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).]

Defendant argues that *Dillard* and *Calloway* were wrongly decided; however, they are controlling. But this discussion does bring a minor sentencing irregularity to light, which we take this opportunity to correct.

III. Consecutive Sentencing

Concurrent sentencing is the norm. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Consecutive sentences may be imposed only when specifically authorized by statute. *Id*. A sentence for felony-firearm must run consecutively to the felony upon which it is predicated. MCL 750.227b(2). Felony-firearm may not be predicated on carrying a concealed weapon. MCL 750.227b(1). There is no basis for causing a sentence for felony-firearm to run consecutively to one for carrying a concealed weapon. As our Supreme Court stated in *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000):

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense. [Footnotes omitted.]

This Court is authorized, on any terms it deems just, to "exercise any or all of the powers of amendment of the trial court," MCR 7.216(A)(1), or to "enter any judgment or order or grant further or different relief as the case may require," MCR 7.216(A)(7). We hereby exercise that discretion and remand this case to the trial court with instructions to prepare an amended judgment of sentence to reflect the concurrent running of the sentences for the convictions of carrying a concealed weapon and felony-firearm.

Convictions and sentences affirmed, except that we remand to the trial court for the ministerial task of preparing an amended judgment of sentence consistent with our discussion above. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter