STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2010
v	No. 285752 Jackson Circuit Court
LONNIE MILLER, Defendant-Appellant.	LC Nos. 06-003995-FH; 06-004443-FH

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted his guilty plea convictions of two counts of felon in possession of a firearm, MCL 750.224f, for which he was sentenced to concurrent terms of 270 days in jail and five years probation. We reverse.

Background Facts and Arguments

Defendant pleaded guilty to two counts of being a felon in possession of a firearm, in violation of MCL 750.224f, premised on a 1983 conviction for unlawfully driving away an automobile (UDAA) in violation of MCL 750.413, after his challenge to the factual basis for these charges was rejected by the trial court. Defendant asserts on appeal, as he did below, that his prior UDAA conviction did not preclude him from possessing a firearm at times relevant to the instant offenses. More specifically, defendant argues that UDAA is not a "specified felony" within the meaning of the felon in possession statute and that he successfully completed and was discharged from probation in 1986. Thus, defendant claims his right to possess a firearm was automatically restored well before the dates, in 2004 and 2006, on which the prosecution alleges that he was illegally in possession of hunting rifles stored in the basement of his home. In response, the prosecution maintains that UDAA is a "specified felony" within the meaning of the felon in possession statute, so defendant's right to possess firearms could not have been automatically restored to him at any time. Alternatively, the prosecution argues that, even if UDAA is not a "specified felony," defendant failed to pay the fine imposed as part of his sentence and did not successfully complete all conditions of probation for the UDAA offense as required by the statute, and, therefore, the right to possess firearms had not been restored to defendant at the time he was found to be in possession of the rifles.

Analysis

The felon in possession statute provides in relevant part:

> (1) Except as provided in subsection (2), a person convicted of *a felony* shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has *paid all fines imposed* for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has *successfully completed all conditions of probation* or parole imposed for the violation.
>
> (2) A person convicted of *a specified felony* shall not possess, use, transport, sell, purchase, carry, ship, receive or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has *paid all fines imposed* for the violation.
>
> (*ii*) The person has served all terms of imprisonment imposed for the violation.
>
> (*iii*) The person has *successfully completed all conditions of probation* or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm *has been restored* pursuant to [MCL 28.424]. [MCL 750.224f (emphasis added).]

Thus, by its plain language,

> [The felon in possession statute] places felons in two different categories. The first category consists of persons convicted of a "felony." These persons regain their right to possess a firearm three years after paying all fines imposed for their violations, serving all jail time imposed, and successfully completing all conditions of parole or probation. The second category consists of persons convicted of a "specified felony." These persons must wait five years after completing the same requirements and, moreover, must have their right to possess a firearm restored. [*Perkins*, 473 Mich 630-631 (citations omitted).]

Whether UDAA is a "specified felony" within the meaning of the felon in possession statute presents a question of statutory interpretation that this Court reviews de novo. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005). Whether defendant "paid all fines" imposed for his prior felony conviction, or "successfully completed all conditions of probation," within the meaning of the statute is also a question of statutory interpretation to be reviewed de novo. *Id*.; see also, *People v Sessions*, 262 Mich App 80, 84; 684 NW2d 371 (2004); reversed and vacated, *People v Sessions*, 474 Mich 1120, 1121 (Kelly, J); 712 NW2d 718 (2006).

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first step is to examine the plain language of the statute itself. The Legislature is presumed to have intended the meaning it plainly expressed. If the statutory language is clear and unambiguous, appellate courts presume that the Legislature intended the meaning plainly expressed, and further judicial construction is not permitted. [*McElhaney ex rel McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493; 711 NW2d 795 (2006) (citations omitted).]

A dictionary may be consulted to determine the ordinary meaning of undefined words in the statute. *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007).

Defendant does not dispute that he possessed a firearm on the dates in question, that he was previously convicted of UDAA, or that UDAA is a felony. Defendant also does not assert that he made any attempt to have his rights to possess a firearm restored pursuant to MCL 28.424. Consequently, if UDAA is a "specified felony" within the meaning of MCL 750.224f(2), there was a sufficient factual basis for defendant's pleas. Alternatively, if defendant's UDAA conviction does not constitute a "specified felony," but defendant did not "pa[y] all fines imposed for [that] violation" or did not "successfully complete[] all conditions of probation . . . imposed for [that] violation," as required by MCL 750.224f(1), there likewise was a sufficient factual basis for defendant's pleas.

The statute defines a "specified felony" as:

> a felony in which 1 or more of the following circumstances exist:
>
> (*i*) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> (*ii*) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (*iii*) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (*iv*) An element of that felony is the unlawful use of an explosive.

(*v*) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson. [MCL 750.224f(6)].

The elements of the offense of UDAA are "(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) [that] the possession and driving away [were] done without authority or permission." *Landon v Titan Ins Co*, 251 Mich App 633, 639; 651 NW2d 93 (2002) (internal citation and quotation marks omitted); *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435, 521 NW2d 546 (1994)[1]. UDAA is a property offense aimed at the unauthorized use of a motor vehicle. *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994). It does not require any specific intent to permanently deprive the owner of possession of the motor vehicle. *Id.* Rather it is only necessary that the defendant took possession of the vehicle and drove it away and that he acted "wilfully or wilfully and wantonly and without authority" or permission when doing so. *Landon*, 251 Mich App at 641-643 (internal citation and quotation marks omitted).

The prosecution does not assert that an element of UDAA is "the use, attempted use, or threatened use of physical force against the person or property of another." MCL 750.224f(6)(*i*). Nor do any of the criteria set forth in MCL 750-224f(6)(*ii*)-(*v*) apply in this case. Therefore, the only inquiry is whether UDAA is an offense that, "by its nature, involves a *substantial risk* that physical force against the person or property of another may be used in the course of committing the offense." MCL 750.224f(6)(*i*) (emphasis added). As our Supreme Court has noted, "'[s]ubstantial' is defined as 'of ample or considerable amount quantity, size, etc.'" *Perkins*, 473 Mich at 633, quoting *Random House Webster's College Dictionary* (1995). Accordingly, whether UDAA is a "specified felony" turns on whether, by its nature, it is an offense that involves an ample or considerable risk that physical force will be used, against a person or property, during its commission. *Id.* We hold that it is not.

In concluding otherwise, the trial court, after correctly noting a lack of Michigan precedent on this issue, found persuasive the decision from the United States Court of Appeals for the Fifth Circuit in *United States v Galvan-Rodriguez*, 169 F3d 217 (CA 5, 1999). *Galvan-Rodriguez* held that the offense of unauthorized use of a motor vehicle, under Texas law, is a "crime of violence," and therefore an aggravated felony, for purposes of the requirement under federal immigration law that an alien convicted of illegal reentry receive a 16-level enhancement for a prior aggravated felony. However, that case has been harshly criticized by a number of federal courts, see, e.g., *Nguyen v Holder*, 571 F3d 524 (CA 6, 2009); *United States v Sanchez-Garcia*, 501 F3d 1208, 1213-1214 (CA 10, 2007); *United States v Charles*, 275 F3d 468, 470 (CA 5, 2001) reh en banc 301 F3d 309 (2002), and the rationale underlying its conclusion, that there is a strong probability of damage to a vehicle during such a UDAA offense, was rejected by the United States Supreme Court. See, *Leocal v Ashcroft*, 543 US 1, 11; 125 S Ct 377; 160 L Ed

[1] Specifically, MCL 750.413 provides that "[a]ny person who shall, willfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . ."

2d 271 (2004). Further, *Galvan-Rodriguez* arose in a very different legal and factual context, with different considerations than are presented in this case. The United States Court of Appeals for the Fifth Circuit has itself rejected the *Galvan-Rodriguez* analysis when deciding whether simple automobile theft constitutes a crime of violence under the federal sentencing guidelines in application to a defendant convicted of being a felon in possession of a firearm. *Charles*, 301 F3d at 312. We thus find *Galvan-Rodriguez* to be both unpersuasive and inapposite to the case presented here.

The potential risk of the use of force in some small subset of cases that might be charged as UDAA offenses is not sufficient to classify the offense as one involving a substantial risk of the use of force; rather there must be an ample or considerable risk that force will be used in all UDAA offenses to classify the offense in this manner. See, e.g., *Perkins*, 473 Mich at 633 n 8; *Leocal*, 543 US at 11; *Nguyen*, 571 F3d at 530. As previously noted, UDAA consists of the driving away of a vehicle belonging to another without authority or permission. MCL 750.413; *Landon*, 251 Mich App at 639; *Hendricks*, 200 Mich App at 71. By its statutory definition, UDAA does not require the use of force, it is not implied that force is necessary to complete the offense, and there is no requirement that a prosecutor establish any use or threat of force to obtain a conviction. The elements of the offense of UDAA, and the general understanding of the nature of this offense, do not entail an ample or considerable risk that physical force will be used during its commission. And, a defendant who obtains possession of the vehicle by use of force against a person would likely be charged with an assaultive offense, such as armed robbery, larceny from a person or carjacking. Further, in determining whether UDAA presents a substantial risk of the use of force, it is appropriate to consider the generally understood nature of the offense in the context of the statutory structure. See *Perkins*, 473 Mich at 633-635; see also, *Leocal*, 543 US at 11; *Nguyen*, 571 F3d at 530. The commission of UDAA does not pose the same risk of the use of force as the other offenses identified as "specified felonies" for purposes of the felon in possession statute (to wit: felonies involving the actual use, attempted use or threatened use of force, controlled substance offenses, felonies involving the unlawful possession or distribution of a firearm or the unlawful use of an explosive, arson, the burglary of or breaking and entering an occupied dwelling, MCL 750.224f(6), or larceny from a person, *Perkins*, *supra* at 473 Mich 632). Accordingly, we conclude that UDAA is not a "specified felony" for purposes of the felon in possession statute.

The question next becomes whether defendant "successfully completed all conditions" of his probation, and paid "all fines imposed for" his UDAA offense such that his right to possess a firearm was automatically restored to him before the instant offenses occurred. Under the circumstances presented, we conclude that he did.

After pleading guilty to the UDAA charge, defendant was sentenced, on December 29, 1983, to serve 2 1/2 years probation, the first nine months of which were to be spent in the county jail, with credit for 24 days served and with the last three months "temporarily suspended for good jail record." Defendant was also ordered to pay $450 in court costs and a $50 fine, to successfully complete a substance abuse counseling program, to refrain from possessing, consuming or using alcohol or any non-prescribed controlled substance, to keep current on child support payments after his release from jail and to make a restitution payment to his victim.

Approximately three months later, on March 23, 1984, the balance of defendant's jail term was "suspended for as long as he complie[d] with the probation conditions." Then, on November 7, 1985, defendant's probation order was further amended to provide that defendant, who had previously established his indigence, "may be allowed to perform community service work in lieu of payment of fines and costs at the rate of $4.00 per hour." Finally, a September 9, 1986 Petition for Discharge from Probation[2] states:

> Probation to be terminated.
>
> Costs of $450 (Bal. $172) – TO BE CANCELLED.
> (Worked 67 hrs. through volunteer hours)
>
> Fines of $50 – TO BE CANCELLED.
>
> Restitution of $3264.34 – TO BE CANCELLED.
>
> "WITHOUT IMPROVEMENT"

The trial court here noted that defendant's prior probation had been terminated "WITHOUT IMPROVEMENT" and that his court costs, fine and restitution obligations had been cancelled by the circuit judge. Accordingly, the court decided that defendant failed to pay all fines or to successfully complete all conditions of probation for the UDAA offense, as required by the statute for automatic restoration of his right to possess a firearm. We disagree.

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[2] A close reading of the order of discharge might suggest that there is some question whether the circuit judge intended to adopt the probation officer's recommendations, in the Petition language quoted below, that the fine, costs and restitution be canceled and that defendant be discharged "WITHOUT IMPROVEMENT." However, consistently during the proceedings below and on appeal, the prosecutor has affirmatively relied on the probation officer's language. The prosecution relies on the fact that the financial obligations had been canceled to argue that this cancellation plainly established that those obligations had not been paid. Further, the prosecution's argument is largely based on the meaning of "WITHOUT IMPROVEMENT" in the probation officer's recommendations. The prosecution does not argue on appeal that the circuit court did anything other than adopt the probation officer's language by entry of the discharge order, nor could it now be heard to do so. As our Supreme Court has explained in *People v McGraw*, 484 Mich 120, 131, n 6; 771 NW2d 655 (2009), quoting *Gross v Gen Motors* Corp, 448 Mich 147, 162, n 8; 528 NW2d 707 (1995), when a cause of action is presented for appellate review "'a party is bound to the theory on which the cause was prosecuted or defended in the court below.'" See also, *People v Bryant*, 483 Mich 132, 156-157; 768 NW2d 65 (2009) (The prosecution's abandonment of the theory that a victim's statements constituted dying declarations after preliminary examination and failure to raise that issue in this Court or in the Supreme Court until after leave was granted constituted a concession that the victim's statements were not dying declarations or, at the very least, abandonment of the issue on appeal.)

Random House Webster's College Dictionary, 1992 ed., defines "cancel" as "to make void; revoke; annul." To make something void is to make it without "legal force or effect; not legally binding or enforceable." *Id.* To revoke is "to take back or withdraw." *Id.* To annul is to "invalidate," to "abolish," or "to reduce to nothing; obliterate." *Id.* Thus, the cancellation of the costs, fines and restitution imposed against defendant withdrew, abolished or otherwise rendered those obligations without legal force, as if never imposed. Consequently, defendant cannot be said to have failed to pay any fine imposed for his UDAA conviction; at the time of his discharge from probation, all payment obligations having been cancelled, there was no longer any fine imposed on defendant within the meaning of MC 750.224f(1)(a).

We similarly conclude that the language of MCL 750.224f(1)(c) means that, once probation has been unconditionally discharged, "all conditions of probation" have been "successfully completed" because there are simply no conditions remaining for a defendant to complete. And, this is more obviously so here, where the cancellation of the fine, costs and restitution obligations eliminated any outstanding conditions of defendant's probation at the time of his discharge, leaving no conditions of probation with which defendant was not compliant at that time.

Thus, the act of unconditionally discharging a probationer from probation constitutes "successful completion" of that probation for purposes of MCL 750.724f(1)(c). And, that is the case without regard to any prior failure to comply with or benefit from conditions imposed during the probationary period, such as may be suggested by the "WITHOUT IMPROVEMENT" language on the discharge order. In this regard, we note Justice Kelly's dissent from our Supreme Court's order vacating this Court's opinion in *Sessions*:

> The parties dispute the meaning of "successfully" in this statute. A Webster's dictionary defines the root word "success" as "the favorable or prosperous termination of attempts or endeavors." Applying that definition, in order to be "successful," a defendant must achieve a favorable termination of all conditions of probation. This is the only means of satisfying MCL 750.224f(1)(c).
>
> In this case, defendant did achieve a favorable termination. His probation conditions favorably terminated when the court unconditionally discharged him from probation. The judge left no lingering probation requirement for defendant to complete. He was free from court supervision without the obligation to report to a probation officer. Therefore, he successfully completed all conditions of probation.
>
> * * *
>
> "All" conditions means "the whole number of" or "every one" of the conditions. Hence, a probationer must complete every one of the conditions of probation before the [] waiting period for the restoration of the right to possess a firearm can begin to run. MCL 750.224f(1).

> By using this phrasing, the Legislature indicated that substantial completion of probation is insufficient to start the clock running toward restoration. For instance, if the court released a probationer from all the conditions of probation except one, that probationer would not have satisfied the requirements of MCL 750.224f(1)(c). The probationer would satisfy that subsection only by fulfilling the final condition of probation. Then, as required by the Legislature, the probationer would have completed "all conditions of probation."
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> * * *
>
> A felon successfully completes all conditions of probation for purposes of MCL 750.224f(1)(c) when the court discharges the felon from probation. . . . As a consequence, there exists no judicial determination that a judge is authorized to include in an order discharging a probationer that the probation was unsuccessfully completed. It is a concept beyond the ken of MCL 750.224f(1)(c). [*Sessions*, 474 Mich at 1121-1123 (KELLY, J. dissenting).]

Here, too, defendant achieved a favorable termination of his probation; he was unconditionally discharged, free from supervision, with no lingering probation requirements remaining to complete. Thus, any notation that he completed probation "WITHOUT IMPROVEMENT" was without legal import; it was "beyond the ken of MCL 750.224f(1)(c)." *Id.*[3]

For the reasons set forth above, we conclude that defendant "paid all fines" imposed and "successfully completed all conditions of probation" for his UDAA offense, within the meaning of MCL 750.224f(1), as of September 9, 1986, the date the probation discharge order was entered. Consequently, the UDAA not being a "specified felony" under MCL 750.224f(6), defendant's right to possess firearms was automatically restored to him three years later, on September 9, 1989. This was well before the occasions in 2004 and 2006, when the prosecution charged that he was illegally in possession of firearms. Therefore, there was an insufficient factual basis for defendant's guilty pleas to two counts of being a felon in possession.

We reverse.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens

[3] The prosecution asks, "[i]f as defendant claims, being discharged 'without improvement' still somehow means that he has 'successfully completed all conditions of probation,' then whenever would MCL 750.224(1)(c) apply?" The answer, quite simply, is when one or more conditions of probation remain outstanding – that is, uncompleted and uncancelled – and probation has not been discharged.