STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 292548 Cass Circuit Court
WILLIE EARL BROWN, Defendant-Appellant.	LC No. 07-010123-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

K. F. KELLY, J. (*dissenting in part and concurring in part*).

I respectfully dissent from my colleagues' conclusion that the trial court's decision to sentence defendant as a fourth habitual offender resulted in a violation of the Ex Post Facto Clause. In my view, the proper application of the habitual offender statutes, as interpreted in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), does not result in an increased punishment. I agree with the majority opinion in all other respects. I would affirm defendant's sentence.

The statutory provision at issue is MCL 769.12, which provides:

> (1) *If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies,* whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, *and that person commits a subsequent felony within this state,* the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.
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> (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term that is less than 5 years, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term of not more than 15 years. [Emphasis added.]

Our Supreme Court recently interpreted the relevant language of the habitual offender statute in *People v Gardner*, 482 Mich at 41. It held that the plain language of the habitual offender statutes, MCL 769.10 *et seq.*, requires that *each* prior felony conviction be counted separately, even if the convictions arose from the same criminal incident. *Gardner*, 482 Mich at 68. The significance of *Gardner* is that it applied the plain language of the statute, overruling previous precedent that strayed from it, thereby permitting courts to count multiple felony convictions that arose out of one criminal transaction as a single felony for purposes of sentencing defendants under the habitual offender statutes. *Id*; see *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990); *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), mod by *Preuss*, supra at 739. Thus, in *Gardner*, where the sentencing court sentenced the defendant as a third habitual offender by counting each of the defendant's felonies, although they arose from the same transaction, the Supreme Court *rejected* the defendant's argument that he had been erroneously sentenced. *Gardner*, 482 Mich at 45, 68-69.

Gardner is indistinguishable from the facts presented here. Defendant committed the instant crimes on or around May 3, 2007. His amended felony information listed three prior felonies as the basis for charging defendant as a fourth habitual offender, including: breaking and entering a building, with a sentence date of April 16, 1999; maintaining a drug house, with a sentence date of February 7, 2005; and, possession of less than 25 grams of a controlled substance, also with a sentence date of February 7, 2005. He was tried and convicted by a jury in November 2007. In December 2007, before *Gardner* was decided, defendant was sentenced as a fourth habitual offender to two terms of 30 months to 15 years' imprisonment for his possession of a controlled substance conviction and his maintaining a drug house conviction, and to 180 days' imprisonment for his possession of marijuana conviction. Consistent with the statutory mandate, the trial court counted each of defendant's prior felony convictions separately, despite the fact that two of them allegedly arose from the same incident, i.e., his February 7, 2005 convictions for possession and maintaining a drug house.

Defendant now contends that his sentence is a violation of the prohibition against ex post facto laws. The majority agrees, reasoning that it cannot retroactively apply the *Gardner* decision because doing so would result in an ex post facto increase in defendant's sentence. I cannot agree. Certainly retroactive application of a judicial decision is inappropriate if it violates due process by functioning as an ex post facto law. *Doyle*, 451 Mich 93, 100; 545 NW2d 627 (1996). However, application of *Gardner* to the present matter has no such effect. A judicial decision is prohibited as ex post facto if it "[(1)] punishes as a crime an act previously committed, which was innocent when done; [(2)]. . . makes more burdensome the punishment for a crime, after its commission[;] or [(3)] . . . deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." *People v Jackson*, 465 Mich 390, 402; 633 NW2d 825 (2001); *Doyle*, 451 Mich at 100-101.

The only relevant inquiry is whether application of *Gardner*, under the present circumstances, increases the punishment for defendant's crimes. The obvious answer is no. When the trial court sentenced defendant in 2007, it counted each of defendant's prior felony convictions separately, consistent with the plain language of the statute. Accordingly, it sentenced defendant as a fourth habitual offender. Application of the habitual offender statute under *Gardner* requires the same result, i.e., the court must count each prior felony conviction separately regardless of whether each arose from the same criminal incident. See *Gardner*, 482

Mich at 68-69. Thus, defendant's punishment for his crimes is not increased as a result of the *Gardner* case. Again, the present matter is factually indistinguishable from the facts of *Gardner*, where the defendant was sentenced according to the plain language of the habitual offender statutes, but contrary to the established precedent at the time. Just as the case is here, the sentence of the defendant in *Gardner* was not increased by the correct application of the statutory language. Accordingly, the trial court's sentence did not effect an ex post facto increase in defendant's sentence. Defendant was properly sentenced as a fourth habitual offender because he had "been convicted of . . . 3 or more felonies . . . and commit[ted] a subsequent felony within this state . . . ." MCL 769.12. I would affirm.

/s/ Kirsten Frank Kelly