STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v STANLEY JONES, Defendant-Appellant.	No. 297690 Wayne Circuit Court LC No. 09-014002-FH

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b, and possession of a firearm by a felon ("felon-in-possession"), MCL 750.224f. On remand from this Court, the trial court held a *Ginther*[1] hearing and determined that defendant was denied the effective assistance of counsel. Because defense counsel's failure to request a self-defense jury instruction regarding the felon-in-possession charge did not constitute ineffective assistance of counsel, we vacate the trial court's order and affirm.

This case arises out of the fatal shooting of his neighbor, Marcus Perry. In March 2009, defendant saw Perry hit defendant's ex-girlfriend, Shantle Hayden, while Perry and Hayden were arguing in front of defendant's house. When Perry realized that defendant had observed the incident, Perry "flashed his gun" at defendant. Defendant did not confront Perry or call the police. Approximately three weeks later, on April 2, 2009, Perry and Hayden were again arguing and shouting in the street while defendant was in his driveway cleaning his car. According to defendant's statement to the police, he went inside his house and retrieved a gun because Perry was armed with a gun. Defendant placed the gun in his waistband, returned outside, and continued cleaning his car. Although the evidence differs regarding who fired the first shot, it is undisputed that defendant and Perry thereafter engaged in a gunfight, during which defendant shot Perry in the chest, killing him. After the shooting, defendant fled in his car. He turned himself in to the police on April 21, 2009, and told the police that the gun was in the trunk of his car, parked at the Motor City Casino. The police recovered the gun from

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant's car at the casino. The prosecution did not charge defendant with a crime related to Perry's death, but charged him with felon-in-possession and felony-firearm, and the jury convicted defendant of both offenses.

Defendant argues that defense counsel rendered ineffective assistance for failing to request a self-defense jury instruction regarding the felon-in-possession charge. Following a *Ginther* hearing, the trial court agreed with defendant and determined that defendant was denied his constitutional right to the effective assistance of counsel. "Whether a [defendant] has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review for clear error a trial court's factual findings and review de novo questions of constitutional law. *Id*. at 484-485.

"To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defendant must overcome the strong presumption that counsel's decisions constituted sound trial strategy. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003).

Defendant contends that he was entitled to a self-defense jury instruction pursuant to this Court's decision in *People v Dupree*, 284 Mich App 89, 106; 771 NW2d 470 (2009) ("*Dupree I*"), aff'd 486 Mich 693 (2010) ("*Dupree II*"), and the self-defense act ("SDA"), MCL 780.971 *et seq*. In *Dupree I*, 284 Mich App at 104-105, the majority determined that a defendant may raise a justification defense to absolve himself from criminal liability with respect to a felon-in-possession charge. The majority stated, however, that the "defense must be analyzed in the context of the purpose underlying [the felon-in-possession statute]" which is "to ensure that those persons who are more likely to misuse firearms do not maintain ready possession of them." *Id.* at 105-106. The majority further stated that "[t]his purpose would be severely undermined if former felons were permitted to arm themselves whenever they happened to have some generalized fear of being attacked." *Id.* at 106. Thus, the majority opined that a defendant may assert justification as a defense to felon-in-possession by introducing evidence from which the jury may conclude:

> (1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, and the threat actually caused a fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.
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> (2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she would be forced to engage in criminal conduct.
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> (3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also to avoid the threatened harm.

> (4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.
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> (5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed. [*Id.* at 108.]

In *Dupree II*, 486 Mich at 696-697, 706, decided after defendant's trial in this case, our Supreme Court affirmed *Dupree I*, holding that a defendant may assert the common-law affirmative defense of self-defense to defend against a felon-in-possession charge if sufficient evidence supports the defense. The Court noted that, in enacting the SDA, the Legislature codified the circumstances under which a person may use deadly force in self-defense without a duty to retreat. *Id.* at 708. The Court stated, however, that because the altercation in *Dupree* occurred before the Legislature enacted the SDA, the traditional common-law defense of self-defense, rather than the SDA, governed that case. Unlike *Dupree*, the altercation here occurred after October 1, 2006, the effective date of the SDA. Thus, the SDA applies to this case.

Defendant argues that he was entitled to a self-defense jury instruction because sufficient evidence was presented from which a jury could have concluded that his possession of a firearm was justified under the SDA. MCL 780.972 of the SDA states, in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
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> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.[2] [Footnote added.]

Therefore, a person may not rely on the SDA if he committed or was engaged in the commission of a crime at the time that he used deadly force. Defendant, a convicted felon, committed a crime when he took possession of the firearm in this case. Thus, the SDA arguably does not apply to violations of the felon-in-possession statute because a person prohibited from possessing a firearm cannot take possession of a firearm and use it without technically committing a felony. Even if a defendant may rely on the SDA in defense of a felon-in-possession charge, the circumstances of this case did not satisfy the requirements of the act.

Both *Dupree I*, involving common-law self-defense, and the SDA require that the person using deadly force have an honest and reasonable belief that such force is necessary to prevent imminent death or serious bodily harm. The SDA did not change this common-law requirement

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[2] The SDA abrogated the common-law duty to retreat imposed when a person is attacked in a place other than his own home. *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008).

for the permissible use of deadly force.[3] *People v Orlewicz*, __Mich App__; __NW2d__ (2011) (Docket No. 285672, issued June 14, 2011). Here, defendant possessed the firearm before any threat of imminent death or serious bodily harm arose. Defendant told the police that he saw Perry and Hayden arguing in front of Perry's house and that Perry had a gun. Defendant told Hayden to leave Perry alone and go home. Defendant admitted that he went into his house and retrieved his gun because he did not like the situation and thought Perry might "go crazy." He stated that he did not want to be "out there" and have Perry start shooting at him. Defendant admitted that Perry did not threaten him or say anything to him that day, but claimed that he did not know what Perry was going to do since he had a gun and was arguing with Hayden. By the time that defendant returned outside, Perry had gone inside his house, and Hayden was arguing with Perry's aunt before Hayden finally left. When defendant was walking to get another towel to wipe down his car, he heard gunshots. He claimed that he "couldn't believe it." He further stated that, at that point, he was not concerned about Perry because he had no personal "beef" with Perry and the argument was between Perry and Hayden and did not involve him.

Therefore, based on defendant's own version of the incident, he did not possess the firearm in response to an imminent threat of death or serious bodily harm. Rather, he possessed the gun because Perry and Hayden were fighting and he did not know what would happen. As this Court recognized in *Dupree I*, 284 Mich App at 106, the purpose of the felon-in-possession statute "would be severely undermined if former felons were permitted to arm themselves

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[3] We note that the *Dupree I* factors are, for the most part, consistent with the SDA. In particular, the second factor, that the defendant did not recklessly or negligently put himself in a position requiring him to break the law, is consistent with the SDA's requirement that a person may use deadly force only if he "has not or is not engaged in the commission of a crime." MCL 780.972(1). The third factor parallels the SDA's requirement that the use of force be necessary because force is not necessary if reasonable alternatives exist. The fourth factor, i.e., that the possession be causally connected to the threatened harm, is consistent with the SDA's requirement that the force be necessary to prevent the attack. Finally, the fifth factor reflects the SDA's limitation that deadly force may be used only against an imminent threat. Thus, if a person continues to possess a weapon after the threat has dissipated, the justification for allowing the possession is no longer present.

whenever they happened to have some generalized fear of being attacked." Such was the circumstance in this case. Because defendant was not entitled to a self-defense instruction under *Dupree I* or the SDA, defense counsel did not render ineffective assistance by failing to request the instruction. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, we vacate the trial court's order determining that defendant received ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause