

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDELL W. COOPER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2012

No. 304043

Oakland Circuit Court

LC No. 2010-231554-FH

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a concealed weapon, MCL 750.227; possession of a firearm by a felon (felon in possession), MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals by right. We affirm.

I. FACTS

On March 28, 2010, defendant was the passenger in a car that was subject to a traffic stop by Officer Michael Gorbe of the Lathrup Village Police Department. Officer Michael Zang was providing backup to Officer Gorbe. While Officer Gorbe arrested the driver for driving on a suspended license, Officer Zang saw defendant pull a silver, semi-automatic handgun out of his pants. When Officer Zang yelled “gun,” defendant dropped the gun. There was one round in the chamber of the gun and the magazine was loaded with extra rounds. Defendant did not have a license to carry a concealed pistol. The parties stipulated that defendant had a prior felony conviction. The jury convicted defendant as set forth above.

Defendant moved for a new trial on the basis that he was denied due process and a fair trial when his status as a convicted felon was introduced and that he was denied effective assistance of counsel because his counsel did not object. Defendant’s motion was denied.

II. FAIR TRIAL

On appeal, defendant first argues he was denied a fair trial because his status as a convicted felon was introduced to the jury. Defendant failed “even to offer any type of objection below”¹ regarding his felony status’s introduction. In fact, defendant stipulated to his felony status at trial, effectively waiving his right to appellate review of this issue.² “One who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.”³

Even if defendant had not waived this issue, we would detect no error in the introduction of his felony status to the jury. Defendant was charged with felon in possession. An element of this charge is a previous felony conviction.⁴ Defendant nevertheless makes the cursory argument that it was “prejudicial to lay before the jury evidence of Mr. Cooper’s previous felony.” To support this argument, defendant cites MRE 403 which provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” However, evidence of the prior conviction is highly relevant; in fact, it is an element of the crime for which defendant was charged. Defendant does not argue that the probative value of this highly relevant evidence was substantially outweighed by unfair prejudice. Having reviewed the record, we find no reason to agree that the evidence should have been precluded.

This Court has previously held that if there are “adequate safeguards,” in place, a defendant may be tried in a single trial for charges of felon in possession and other charges arising from the same incident without unfair prejudice.⁵

Specifically, these “safeguards” are (1) the introduction by stipulation of the fact of the defendant’s prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and

¹ *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997).

² *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the “intentional relinquishment or abandonment of a known right”); see also *id.* at 215-216 (when a defendant’s counsel “affirmatively approve[s]” a course of action at trial, that defendant waives any objection based upon that course of action).

³ *Id.* at 215, quoting *United States v Griffin*, 84 F 3d 912, 924 (CA 7, 1996).

⁴ MCL 750.224f(2).

⁵ *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Defendant argues that *Green* “does not go far enough to insulate a defendant from prejudice.” However, he does not explain, rationalize, or support that statement in any way.

(3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge.⁶

In this case, the first and second safeguards were met. Regarding the first safeguard, defendant's prior conviction was introduced through a stipulation. Regarding the second safeguard, the trial judge specifically instructed the jury to "consider each crime separately in light of all the evidence in the case." Regarding the third safeguard, the jury was not instructed to consider the prior conviction only as it related to the felon in possession charge, nor did defendant request such an instruction. These circumstances are nearly identical to those in *Green*, where this Court held that adequate safeguards against prejudice were in place, and declined to reverse the defendant's conviction, even though the trial court had failed to specifically instruct the jury to consider the stipulated prior conviction only for felon in possession purposes.⁷ Indeed, there is no factual distinction between the circumstances in *Green* and those in this case and we conclude that here, as in *Green*, there were adequate safeguards in place to ensure that defendant was not unduly prejudiced by the submission of felon in possession to the jury alongside his other charges.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues there was insufficient evidence to support his felony-firearm conviction because the Legislature did not intend for felon in possession to be used as the basis for a felony-firearm conviction. We review de novo questions of statutory interpretation.⁸

Our Supreme Court has determined that "the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute."⁹ Accordingly, a felon in possession conviction may properly be considered as the underlying crime for a felony-firearm charge. Defendant's argument is without merit.

⁶ *Id.* at 691-692.

⁷ *Id.* at 692.

⁸ *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

⁹ *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); see also *People v Dillard*, 246 Mich App 163, 168; 631 NW2d 755 (2001) ("[H]ad 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 M.C.L. § 750.224f.").

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective.¹⁰ This issue was preserved because defendant moved for a new trial on this basis.¹¹ A claim of ineffective assistance of counsel is a mixed question of law and fact.¹² If the trial court made any findings of fact, they are reviewed for clear error and the constitutional issue of ineffective assistance of counsel is reviewed de novo.¹³ To establish a claim of ineffective assistance of counsel, a defendant “must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.”¹⁴ “[D]efense counsel is not required to make frivolous or meritless motions or objections.”¹⁵

To the extent defendant bases his ineffective assistance of counsel argument on his counsel’s failure to move to sever the felon in possession charge, as discussed above, adequate safeguards were in place at trial such that defendant was not unduly prejudiced by the submission to the jury of felon in possession along with the other charges.¹⁶ Any objection on this basis would have accordingly been meritless. Thus, defendant has not shown defense counsel’s conduct in failing to move to sever the felon in possession charge fell below an objective standard of reasonableness. .

Moreover, as discussed above, case law is clear that felon in possession can serve as an underlying offense for a felony-firearm conviction. To the extent defendant bases his ineffective assistance of counsel argument on his counsel’s failure to argue below that felon in possession is not a proper underlying offense for a felony-firearm conviction, any such objection or motion

¹⁰ We note that defendant’s appellate brief articulates the standard for ineffective assistance of counsel and cites cases where counsel was found ineffective. However, none of the cases defendant cites are factually analogous to this case, and defendant does not explain why they show that his counsel was ineffective. However, it appears as though defendant’s ineffective assistance of counsel argument is predicated upon his two prior assignments of error; namely, that his counsel was ineffective for failing to move to sever the felon in possession charge and for failing to argue below that felon in possession cannot serve as the underlying felony for a felony-firearm conviction.

¹¹ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002) (citation omitted).

¹² *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹³ *Id.*

¹⁴ *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted).

¹⁵ *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted).

¹⁶ *Green*, 228 Mich App at 692.

would have been meritless. Defendant has not shown defense counsel's conduct fell below an objective standard of reasonableness on this basis.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra