

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK SYLVESTER NICHOLS,

Defendant-Appellant.

UNPUBLISHED

September 17, 1996

No. 179013

LC No. 93-013581

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was subsequently sentenced to two years' imprisonment. He appeals as of right and we affirm.

This case arose out of a shooting at defendant's girlfriend's house. Defendant shot the complainant, Douglas Age, in the shoulder with defendant's handgun. Defendant was charged with felony-firearm and assault with intent to commit murder. Defendant pleaded not guilty to both charges and went to trial. The jury acquitted defendant of the latter charge, but convicted him of felony-firearm. Defendant then filed a motion to withdraw his not guilty plea on the felony-firearm charge so that he could plead guilty to felony-firearm and be assigned youthful trainee status under MCL 762.11; MSA 28.285(11). The trial court denied this motion.

Defendant first argues that the trial court erred in refusing to consider him for youthful trainee status on the basis that the felony-firearm statute mandates a two-year prison term and disqualifies a minor from seeking youthful trainee status. A trial court is not required to assign youthful trainee status, but has discretion in making its decision. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). Defendant has provided no basis to conclude that the trial court abused its discretion other than the assertion that assignment to youthful trainee status is not considered a conviction and that "[h]aving a felony conviction could have serious future repercussions for a young person." While this may be true,

* Circuit judge, sitting on the Court of Appeals by assignment.

it does not demonstrate that the trial court abused its discretion when it denied defendant's motion to withdraw his plea. Moreover, given the serious nature of the offense of which defendant was charged, the trial court had ample reason to deny defendant's motion. Further, defendant initially chose to plead not guilty and exercise his right to a jury trial. It was not until six months after he was sentenced that defendant attempted to set aside his not guilty plea and seek youthful trainee status. Therefore, the trial court did not abuse its discretion in denying defendant's motion to withdraw his not guilty plea because the reasons propounded by defendant are not adequate.

Defendant next argues that the trial court's jury instructions were misleading because the jury could have believed that defendant could be convicted of felony-firearm based on a finding that he was guilty of carrying a concealed weapon. Defendant did not, however, request a different instruction nor did he object to the instructions as given. Therefore, review of this issue is precluded absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). There is no manifest injustice because the trial court specifically instructed the jury that a felony-firearm conviction required a finding that defendant committed assault with intent to murder and that defendant knowingly carried or possessed a firearm while he committed or attempted to commit the crime of assault with intent to commit murder.

Defendant's third argument is that a felony-firearm conviction cannot stand where the jury acquits the defendant on the underlying felony charge. Defendant acknowledges our Supreme Court's holding to the contrary in *People v Lewis*, 415 Mich 443, 452; 330 NW2d 16 (1982), but argues nevertheless that that decision should be overturned. This Court does not have the power to overturn a decision of the Michigan Supreme Court. A decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Thus, because defendant does not distinguish his case from *Lewis*, he is not entitled to relief on this issue.

Finally, defendant argues that he was denied due process when he was arrested one and one-half years after the offense was committed. Defendant was nineteen years old at the time the shooting occurred, but was twenty-one years old when he was arrested. Defendant claims that there was no explainable reason for the delay except for the "supposition" that the police intended to delay defendant's arrest until after his twenty-first birthday so that youthful trainee status would be "overlooked." The threshold test for determining whether delay in arrest constitutes a denial of due process is whether the defendant was prejudiced. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). In this case, defendant was not prejudiced by the delay. Even if defendant was eligible for youthful trainee status, his eligibility would not be affected by his age at the time of arrest. The relevant date for purposes of the statute is the date the youth is alleged to have committed the offense, not the defendant's age at the time of arrest. *Gow, supra*, p 96. Therefore, the delay in defendant's arrest did not effect his eligibility for youthful trainee status, and defendant cannot establish prejudice on this basis.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza