STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST K. COHEN,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 191062
Oakland Circuit Court
LC No. 95-138003 FC

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the December 19, 1994, shooting death of Marquise Rush. Defendant was also charged with [ ] being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), in connection with the incident. The trial court granted defendant's motion to sever the murder and felony-firearm charges from the felon in possession of a firearm charge for purposes of trial. Defendant was first tried for murder and felony-firearm and was acquitted. Following a jury trial, he was convicted of felon in possession of a firearm. The trial court subsequently found that defendant was a fourth offense habitual offender, MCL 769.12; MSA 28.1084, and sentenced him to ten to twenty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant argues that his conviction for felon in possession of a firearm was precluded by "principles of collateral estoppel embodied in the guarantee against double jeopardy." We conclude that defendant has waived this argument. As noted above, defendant moved to sever his trial on the charge of felon in possession of a firearm from his trial on the murder and felony-firearm charges, and the trial court granted the motion. "[T]here is no violation of the Double Jeopardy Clause when [a defendant] elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers v United States*, 432 US 137, 152; 97 S Ct 2207; 53 L Ed 2d 168 (1977). See also *People v Hoag*, 89 Mich App 611, 616-617; 281 NW2d 137 (1979); *People v Tocco*, 60 Mich App 130, 141; 230 NW2d 341 (1975); *State v Chenique-Puey*, 145 NJ 334; 678 A2d 694, 698-699 (1996); *Stone v State*, 218 Ga App 350; 461 SE2d 548, 550 (1995). The double jeopardy clause protects a defendant's interest in having his guilt or innocence decided in one proceeding.

People v Dawson, 431 Mich 234, 252 n 44; 427 NW2d 886 (1988), quoting *Oregon v Kennedy*, 456 US 667, 682; 102 S Ct 2083; 72 L Ed 2d 416 (1982) (Stevens, J., concurring). If the prosecution sought to try the offenses separately, double jeopardy concerns would be implicated. *Chenique-Puey, supra,* 678 A2d 694, 698-699; *Jeffers, supra,* 432 US 137, 152 n 20. However, generally, if a defendant consents to the discontinuation of a trial, he consents to the loss of his interest in having one proceeding. See *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997).

United States v Edmond, 288 US App DC 17; 924 F2d 261 (1991), is illustrative. In *Edmond*, the defendant successfully moved to sever counts in a multi-count indictment, forcing two trials – one for conspiracy and one for murder allegedly committed in furtherance of the conspiracy. Edmond contended that the double jeopardy clause barred the government in the second trial from asserting that defendant's participation in the conspiracy established his guilt in the murder case. The *Edmond* court stated:

> The absence of prosecutorial abuse is . . . apparent here. Nothing constrained Edmond to move for a severance of counts except the hope of gaining some tactical advantage. When his motion succeeded, it was not the government who, in the language of the Double Jeopardy Clause, cause Edmond "to be twice put in jeopardy." Edmond did this to himself. [924 F2d 270.]

And as observed in *United States v Blyden*, 930 F2d 323, 327-328 (CA 3, 1991):

> The instant case is a classic example of able lawyers pursuing what Roscoe Pound once called "the sporting theory of justice." In essence it is as if one were flipping a coin yelling, "Heads I win; tails you lose." This case began with counsel urging that there should be trial on only one of the two informations. If the trial judge had not granted the severance to remedy the alleged "severe prejudice" and if any convictions had resulted, appellants most likely would now be arguing before us that it was an abuse of discretion for the trial judge to not have severed the trials. Although the judge granted them the severance they sought, they have now taken a more intensive position on the double jeopardy issue because they were acquitted on the[trial of the first of the severed] charges. If the trial judge had fully appreciated the fact that they would later complain after they had received the severance they requested, he very well may not have given them the severance and directed that they proceed to a trial which consolidated the two informations. [Citations and footnote omitted.]

Based on these authorities, we decline to reverse defendant's conviction based on his double jeopardy/collateral estoppel claim.

Even if we were to conclude that the collateral estoppel/double jeopardy claim was not waived, collateral estoppel principles would not have barred defendant's trial on the charge of felon in possession of a firearm. As the parties recognize, the seminal case involving collateral estoppel in criminal cases is *Ashe v Swenson,* 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970). In *Ashe*, three or four persons robbed six individuals at a poker game. The defendant was tried and acquitted of robbing one of the poker players. He was then tried and convicted of robbing another of the poker

players. The Supreme Court reversed the second conviction, concluding that the "single rationally conceivable issue in dispute before the jury [in the first trial] was whether the petitioner had been one of the robbers," 397 US 436, 445, and that, once the issue of the defendant's identity as one of the robbers was determined by a jury in the defendant's favor, the prosecution was barred from relitigating it. In defendant's case, the defense theory in the first case was that another individual at the scene was the shooter. The only issue before the jury in his first trial, therefore, was whether defendant was the person who shot Marquise Rush. The jury determined that defendant was not the shooter. Unlike *Ashe*, however, the question before the jury in the second trial in this case was not once again defendant's identity as the shooter. Rather, the issue was whether defendant was in possession of a gun. The first jury's determination that defendant was not the shooter is not the equivalent of a determination that defendant was without a firearm; the jury may have accepted the testimony that defendant was in possession of a gun, but simply not have been persuaded beyond a reasonable doubt that defendant was the individual who killed Rush. Because the issue of defendant's possession of a firearm was not resolved by the first jury, the prosecution was not barred under principles of collateral estoppel from trying the second case.

Defendant next argues that the felon in possession statute, MCL 750.224f; MSA 28.421(6), violates Const 1963 art 1, § 6. This Court has held that the right to bear arms under Const 1963, art 1, § 6 is not absolute and is subject to the reasonable limitations set forth in MCL 750.224f; MSA 28.421(6) as part of the state's police power. *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). Defendant claims that this Court in *Swint* did not consider the precedential effect of *People v Zerillo*, 219 Mich 635; 189 NW 927 (1922). However, the issue resolved by *Zerillo* was that it was unconstitutional to prevent a non-citizen from possessing a firearm for defense of their person or property; the Court was not faced with the issue whether it was constitutional to restrict possession of firearms by felons. Moreover, although defendant contends that this Court in *Swint* altogether ignored the impact of *Zerillo*, this Court recognized that MCL 750.224f; MSA 28.421(6) does not completely foreclose a felon's constitutional right to bear "arms" in defense of himself. While it prevents a felon from bearing a firearm, it does not proscribe the possession of other non-firearm weapons. *Swint, supra*, p 362. *Swint* correctly held that the felon in possession statute does not violate defendant's constitutional right to bear arms pursuant to Const 1963, art 1, § 6.

Defendant also argues that MCL 750.224f; MSA 28.421(6) violates the Ex Post Facto Clause of the state and federal constitutions because it was enacted in 1992 and punishes him for a 1991 felony conviction. This argument was also addressed in *Swint, supra*, where this Court held that application of MCL 750.224f; MSA 28.421(6) to a defendant based upon his possession of a firearm after the effective date of the statute where he was convicted of the predicate felony before the statute's effective date does not violate the Ex Post Facto Clauses of the Michigan and United States Constitutions. *Id.*, pp 375-376. See also *People v Tice*, 220 Mich App 47, 51-52; 558 NW2d 245 (1996). Accordingly, defendant's conviction for felon in possession of a firearm did not violate the Ex Post Facto Clause.

Finally, defendant argues that his sentence is disproportionate and that the trial court essentially imposed the sentence on the basis that a person was killed. In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion. *People v*

Hansford (*After Remand*), 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We reject defendant's contention that he was effectively sentenced for murder. The trial court specifically stated at sentencing that defendant was being sentenced "strictly [for being] a Felon in Possession of a Firearm." Moreover, the sentence was justified by defendant's extremely poor record. Defendant was 22 years old at the time of the current offense. He had previously been convicted of two misdemeanors and four felonies, including carrying a concealed weapon and delivery of a controlled substance. While incarcerated, defendant incurred at least five misconducts. He escaped from prison while serving a two-to-twenty year sentence for the controlled substance conviction and then committed a felonious assault. Defendant was on parole at the time he committed the instant offense. Under these circumstances, the trial court did not abuse its discretion in sentencing defendant to ten to twenty years' imprisonment.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman