

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN EUGENE LARKINS,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2005

No. 251962

Oakland Circuit Court

LC No. 2002-182441 FC

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his guilty plea convictions of two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was also convicted by guilty plea of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, and conspiracy to commit first-degree home invasion, MCL 750.157a; MCL 750.110a(2). Defendant was sentenced to concurrent terms of three years and six months to thirty years for the conspiracy convictions, to run consecutively to concurrent terms of two years for the felony-firearm convictions, with credit for 867 days served. Defendant moved to vacate his felony-firearm convictions on the ground that the state prosecution was barred on double jeopardy grounds. The trial court denied this motion. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Before his convictions in this case, defendant, a Detroit police officer, was charged in federal court with conspiracy to commit robbery in violation of the Hobbs Act, 18 USC 1951,<sup>1</sup>

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<sup>1</sup> This statute provides in pertinent part:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

and using or carrying a firearm in relation to a crime of violence in violation of 18 USC 924(c)(1). *United States v Turner*, 272 F3d 380 (CA 6, 2001). His first federal trial resulted in an acquittal on the firearm charge and a hung jury and mistrial on the Hobbs Act conspiracy charge. He was retried and found guilty on the conspiracy charge. *Id.* at 383. On appeal, the Court of Appeals for the Sixth Circuit found that the government's proof was insufficient to prove the interstate commerce element of the Hobbs Act and reversed defendant's conviction. *Id.* at 389.

On appeal to this Court, defendant contends that the trial court erred when it denied his motion to vacate his state felony-firearm convictions because his previous acquittal by a federal jury on a similar federal felony-firearm charge barred the state prosecution under the double jeopardy clauses of the federal and state constitutions. We disagree.

A double jeopardy challenge presents a question of constitutional law that we review de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The validity of successive prosecutions under the Michigan constitution is measured under the federal same-elements test enunciated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *Nutt, supra* at 592. The same-elements test “focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.” *Nutt, supra* at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975). “The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.” *Nutt, supra* at 577, quoting *Morey v Commonwealth*, 108 Mass 433, 434 (1871).

Here, the trial court based its decision on the fact that the underlying felonies in the state court were not at all similar to the underlying felony charged in the federal court. In essence, the trial court found that the felony-firearm charges were “attached” to the underlying felonies and could not be used to support a double jeopardy claim. We find this to be correct.

As our Supreme Court has stated, “the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction.” *People v Mitchell*, 456 Mich 693, 697; 575 NW2d 283 (1998), quoting *People v Morton*, 423 Mich 650, 656; 377 NW2d 798 (1985). “[A] defendant can be charged, convicted, and sentenced for felony-firearm for each felony committed in a spree of criminal activity.” *People v Harding*, 443 Mich 693, 716; 506 NW2d 482 (1993). “Felony-firearm can only attach to individual felonies.” *Id.* at 717.

The firearm charge of which defendant was acquitted in federal court was “attached” to a different underlying crime, conspiracy to violate the federal Hobbs Act that protects interstate commerce, than the offenses to which the state felony-firearm convictions were “attached,” the underlying crimes of conspiracy to commit armed robbery and conspiracy to commit home invasion. The double jeopardy analysis must focus on the statutory elements of the underlying offenses. *Nutt, supra* at 576; *Blockburger, supra* at 304.

Because the elements of the federal charge were different than those of the state offenses, and the federal offense involved the additional element of affecting commerce, we conclude that the trial court correctly denied defendant's motion to dismiss his felony-firearm convictions.

The federal and state felony-firearm charges attached not to the same act, but to distinct offenses. Therefore, the state felony-firearm prosecution was not barred by double jeopardy protections. Further, we note that, even if defendant's double jeopardy challenge survived the *Blockburger* same-elements test, it would be unavailing here. Prosecutions by federal and Michigan authorities, representing "separate sovereigns deriving their authority to punish from distinct sources of power" are not barred by the Double Jeopardy Clause. *People v Davis*, 472 Mich 156, 158; 695 NW2d 45 (2005).

We affirm.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Patrick M. Meter