

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KERMIT ELDRIDGE HAYNES,

Defendant-Appellant.

UNPUBLISHED

January 17, 2006

No. 256745

Wayne Circuit Court

LC No. 90-002571-01

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

MEMORANDUM.

Defendant pleaded nolo contendere to second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in exchange for consecutive terms of imprisonment of two years for felony-firearm, and twenty to thirty years for murder, and the dropping of a charge of first-degree murder, MCL 750.316. Defendant appeals as of right,¹ challenging only his felony-firearm conviction. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Defendant pleaded guilty to first-degree murder, assault with intent to rob while armed, and felony-firearm, in connection with the same incident underlying this appeal. The trial court sentenced him as a juvenile, but on appeal this Court remanded for resentencing as an adult. *People v Haynes*, 199 Mich App 593; 502 NW2d 758 (1993). This Court also concluded, sua sponte, that the trial court lacked jurisdiction to convict defendant of felony-firearm, and so vacated that conviction. *Id.* at 603-604. Before resentencing, defendant moved to withdraw his plea on the ground that it was not offered knowingly and voluntarily, citing ineffective assistance of counsel. The trial court granted the motion, but this Court reversed. *People v Haynes (After Remand)*, 221 Mich App 551, 554-556; 562 NW2d 241 (1997). Defendant ultimately persuaded a federal court, on a writ of habeas corpus, to order him retried or released. *Haynes v Burke*, 115 F Supp 2d 813 (ED Mich, 2000), *aff’d sub nom Miller v Straub*, 299 F3d 570 (CA 6, 2002).

¹ Defendant is claiming an appeal, rather than seeking leave, because this case arises from conduct and proceedings taking place before the 1994 amendment of Const 1963, art 1, § 20, in accordance with which plea-based convictions no longer engender a constitutional right to appeal. See also MCL 770.3(1)(d).

The nolo contendere plea agreement underlying the instant appeal followed. Defendant argues that the prosecutor's failure to cross-appeal this Court's decision in the first appeal to vacate his felony-firearm conviction left that aspect of the earlier proceedings the law of the case, thus rendering his new conviction of that offense invalid. We disagree.

Criminal defendants pleading guilty or nolo contendere thereby waive most appellate opportunities, but may nonetheless challenge the state's authority to obtain the resulting convictions in the first instance. *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986). Defendant, however, having obtained habeas relief in connection with his request to withdraw his guilty plea, thereby cleared the way for his reprosecution for felony-firearm.

"If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered." MCR 6.312. Defendant, having achieved the withdrawal of his initial plea, thereby invited the prosecutor to begin anew. His subsequent plea-based conviction of and sentence for felony-firearm are thus valid.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot