

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BURT R. LANCASTER,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 263483

Oakland Circuit Court

LC No. 1993-127632-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a bench trial defendant was convicted of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was not denied his constitutional right to present a defense. The trial court permitted defendant to present evidence in support of his theory that he did not have the requisite intent for first-degree murder. The court only precluded defendant from pursuing a defense of diminished capacity. The trial court properly disallowed the diminished capacity defense because such a defense is not recognized in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001). Further, the refusal to allow evidence of a mental disorder short of insanity to negate the mens rea element of the charged crime did not violate defendant's right to due process. *Clark v Arizona*, ___ US ___, 126 S Ct 2709, 2732-2737; 165 L Ed 2d 842 (2006).

We reject defendant's claim that retroactive application of our Supreme Court's decision in *Carpenter*, *supra*, violates the Ex Post Facto Clauses of the United States¹ and Michigan² Constitutions. The general rule is that judicial decisions are given full retroactive effect. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). In criminal cases, however, ex post facto and due process concerns prevent retroactive application in some cases. *People v Doyle*, 451 Mich 93, 100-101; 545 NW2d 627 (1996). This is especially true where the decision is unforeseeable

¹ US Const, art I, § 10, cl 1; art I, § 9, cl 3.

² Const 1963, art 1, § 10.

and has the effect of changing existing law. *Id.* at 101. But retroactive application does not implicate due process or ex post facto concerns where the decision does not change the law and is not unforeseeable. *Id.*

In this case, as in *Doyle, supra*, the prior decision did not involve a change in the law because it concerned an unambiguous statute that was interpreted by the Supreme Court for the first time. See *id.* at 113. In *Carpenter, supra* at 230-237, our Supreme Court addressed a question of statutory interpretation that had not previously been decided, i.e., whether diminished capacity was a valid defense. In doing so, the Court determined that the comprehensive statutory framework encompassing insanity disclosed that the Legislature intended that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent. *Id.* at 237. Specifically, the Court found that there was no indication that the Legislature intended to make diminished capacity an affirmative defense. *Id.* at 235-236. In these circumstances, retroactive application of *Carpenter* does not violate the Ex Post Facto Clauses or implicate any due process concerns.³

Affirmed.

/s/ Donald S. Owens

/s/ Helene N. White

/s/ Joel P. Hoekstra

³ We note that this Court reached this same conclusion in *People v Talton*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 25, 2002 (Docket No. 231986), slip op at 4-6, which is cited by plaintiff. Although unpublished decisions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), we find the reasoning in *Talton* persuasive.