

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE HENRY STALEY,

Defendant-Appellant.

UNPUBLISHED

December 18, 2008

No. 280081

Wayne Circuit Court

LC No. 07-007962-01

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to two to five years' imprisonment for the felon in possession and carrying a concealed weapon convictions, two years' imprisonment for the felony-firearm conviction, and time served for the possession of marijuana conviction. We affirm defendant's convictions, but remand for a correction of the Judgment of Sentence.

I. Facts

Defendant's convictions arose from his arrest at a gas station in Detroit. Detroit Police Officer Thomas Anton was on patrol when he witnessed defendant and another man standing outside the entrance to the gas station, having what he believed was a "suspicious conversation." Officer Anton parked his patrol car in the gas station's parking lot. When Officer Anton and his partner got out of the vehicle, defendant and the other man ended their conversation and walked away from each other toward separate cars. Officer Anton followed defendant back to his car while his partner followed the other man. Defendant was already in his car by the time Officer Anton reached it, and defendant rolled down the passenger side window to speak with Officer Anton as he arrived. Officer Anton immediately smelled marijuana, and saw a pair of "Phillies blunts," which are commonly used for rolling and smoking marijuana, on the center console.

Officer Anton ordered defendant to show his hands and defendant complied. Then, Officer Anton circled around the back of the car and ordered defendant out of the car: defendant complied. Officer Anton patted down defendant to search him for weapons, felt what he

suspected was marijuana in his pocket, and then recovered what was later revealed to be marijuana from that pocket. He arrested defendant and then searched defendant's car. During his search of the middle console of the vehicle, Officer Anton found a handgun.

II. Double Jeopardy

Defendant first argues that the crime of felon in possession of a firearm cannot serve as a predicate felony for a felony-firearm conviction because felon in possession punishes possession without unlawful intent, and the Legislature did not intend for such crimes to serve as underlying felonies to felony-firearm convictions. We disagree.

Under double jeopardy principles, an issue is unpreserved if the defendant fails to object at the trial court level. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Because defendant failed to object to this issue during the jury trial or sentencing, this issue is unpreserved. This Court reviews unpreserved claims that a defendant's double jeopardy rights have been violated for plain error. *Id.* Defendant must show that a plain error occurred, which affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The Michigan Constitution states that “[n]o person shall be subject for the same offense to be twice put in jeopardy.” *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007) (quoting Const 1963, art 1, § 15). Double jeopardy protections are not violated, however, when there is clear legislative intent to impose multiple punishments for related offenses. *Id.* at 316. Absent a clear indication of legislative intent to impose multiple punishments for related offenses, the “same elements” test is used to determine whether a defendant's double jeopardy rights have been violated. *Id.* To apply the “same elements” test, the elements of the felonies are compared, and if each contains an element not possessed by the other, then multiple punishments are allowed. *Id.* at 319.

In *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001), this Court held that, by specifically exempting only four felonies as predicate felonies, the Legislature that enacted the felony-firearm statute “clearly intended to permit a defendant charged with felon in possession to be properly charged with an additional felony-firearm count.” Defendant argues that the Court in *Dillard* failed to take into account the fact that the felony-firearm statute was enacted before the felon in possession statute. However, the Court did address and specifically reject that argument, holding that the Legislature was presumably aware of the felony-firearm statute, which had been amended in 1990 to include four exemptions, and would have amended that statute to include felon in possession as an exempted offense had it intended for that offense not to serve as a predicate offense to felony-firearm. *Id.* at 168. In *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003) (citing *Dillard*, *supra*, at 163), the Michigan Supreme Court held that cumulative punishments had been authorized by the Legislature for felony-firearm and felon in possession.

Defendant further contends that the holdings in both *Dillard* and *Calloway* were subsequently overruled by the Michigan Supreme Court when it adopted the “same elements” test in *Smith*, *supra* at 316. In that case, however, the Court did not create a new standard for determining whether the Legislature intended multiple punishments for related offenses, but rather, adopted a new test for those cases where clear legislative intent was absent. *Id.* In cases where clear legislative intent to authorize cumulative punishment for related offenses is

established, double jeopardy protections are not violated. *Id.* Because *Dillard* and *Calloway* both hold that clear legislative intent authorizing cumulative punishment for felony-firearm and felon in possession exists, the *Smith* double jeopardy analysis ends at that point, and the “same elements” test is not applied.

III. Correction of Judgment of Sentence

Additionally, defendant argues that he is entitled to a correction to his Judgment of Sentence to reflect 19 days credit as time served toward his felony-firearm conviction. We agree.

In order to preserve an issue for appellate review and avoid forfeiture, it must be raised at the trial court level. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). Because defendant failed to object to the jail time credit below, that claim of error is forfeited. Forfeited, nonconstitutional claims are reviewed for plain error. *Carines, supra*, at 750. Defendant must show that a plain error occurred, which affected his substantial rights. *Id.*

A defendant who has served jail time before sentencing due to either an inability to post bond or the denial of bond must be credited with the time that he served in jail. *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006) (citing MCL 769.11b). Defendant’s Judgment of Sentence (Commitment to Jail) reflects a 19 day credit as time served toward his conviction for possession of marijuana, which was ordered by the trial court at sentencing. However, at sentencing, the trial court awarded 19 days’ jail credit time toward the felony-firearm conviction, which is not reflected on defendant’s Judgment of Sentence (Commitment to Corrections Department).

Thus, the Judgment of Sentence is plainly in error, and that error deprives defendant of his substantial right to jail time credit provided by MCL 769.11b. With no explanation offered in the lower court record for the difference between the trial court’s statement at sentencing in open court and the sentencing reflected on the Judgment of Sentence, it is clear that the discrepancy is a clerical error. Given the fact that the trial court awarded defendant 19 days’ jail time credit toward his felony-firearm conviction, a failure to correct this clerical error would prejudice defendant. *Carines, supra* at 774. We remand to the trial court for correction of the Judgment of Sentence to reflect 19 days’ jail credit time on the felony-firearm conviction. MCR 7.216(A)(1).

Affirmed and remanded for correction of Judgment of Sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly