

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEE ROBERTS,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 286955

Wayne Circuit Court

LC No. 07-023488-FC

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

MEMORANDUM.

Defendant appeals by right the sentences imposed on his jury trial convictions of felon in possession of a firearm, MCL 750.224f and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ He was sentenced to consecutive terms of two to five years in prison for felon in possession and two years for felony-firearm. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal defendant argues that the trial court should have sentenced him to concurrent sentences, and that the trial court’s failure to do so constitutes double jeopardy. Defendant failed to raise this issue below. We review an unpreserved double jeopardy challenge for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

Defendant’s argument was explicitly rejected in *People v Dillard*, 246 Mich App 163, 168; 631 NW2d 755 (2001), where this Court held:

We reject defendant’s suggestion that “there is no conclusive evidence that the Legislature intended to authorize multiple punishment” for both felon in possession of a firearm and felony-firearm because the felon in possession of a firearm statute was not enacted until after the Legislature had, in 1990, amended and expanded the list of exceptions to the felony-firearm statute. In enacting the felon in possession statute the Legislature presumably was aware of the four exceptions to the felony-firearm statute. We conclude that had the Legislature

¹ Defendant was acquitted of concurrent charges of armed robbery and assault with intent to murder.

wished to exclude the felon in possession charge as a basis for liability under the felony-firearm statute, the Legislature would have amended the felony-firearm statute to explicitly exclude the possibility of a conviction under the felony-firearm statute that was premised on MCL 750.224f. (Citations omitted).

Our Supreme Court has also held that it is constitutionally permissible for the underlying felony of a felony-firearm conviction to be felon in possession of a firearm because “felon in possession of a firearm” is not one of the four felonies expressly enumerated as exceptions to the statute. MCL 750.227b(1); *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), citing *Dillard, supra*. Citing the concurrence in *Calloway*, and noting that the defendant in that case was convicted of both felon in possession and assault with intent to commit great bodily harm, as well as felony-firearm, defendant maintains that this holding in *Calloway* was unnecessary and thus constituted dictum. However, defendant is mistaken. Had the *Calloway* Court not found that felon in possession could be a predicate offense to felony-firearm, it would have instead required that Calloway’s sentence for the felony-firearm conviction be served consecutively to the assault conviction, and concurrently with the felon in possession conviction. See *People v Clark*, 463 Mich 459, 463-465; 619 NW2d 538 (2000); *People v Wyatt*, 470 Mich 878; 683 NW2d 143 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O’Connell
/s/ Alton T. Davis