

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL DUANE WHITE,

Defendant-Appellant.

UNPUBLISHED

December 2, 2010

No. 293233

Muskegon Circuit Court

LC No. 08-056801-FH

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of being a felon in possession of a firearm, MCL 750.224f, and of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to 18 months to ten years' imprisonment on the felon-in-possession conviction and to two years' consecutive imprisonment on the felony-firearm conviction. On remand from this Court, defendant was resentenced to a term of 16 months to 10 years for the felon-in-possession conviction.¹ Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

While executing a search warrant in an unrelated breaking and entering case at a home owned by defendant, the police discovered a lockbox containing a loaded Colt .380 pistol under a bed in the basement of the home. Defendant contended at trial that he did not live in the basement where the lockbox was discovered. However, the trial court found that defendant's testimony was not credible, crediting instead the testimony of a detective and of a female tenant stating that defendant admitted to owning the weapon. The court therefore concluded that defendant was guilty of the charge of being a felon-in-possession of a firearm, and that he possessed a firearm during the commission of that felony.

¹ Defendant raises an issue on appeal regarding the scoring of Prior Record Variable (PRV) 5, MCL 777.55, at twenty points. On remand from this Court, the trial court amended its scoring of PRV 5 to ten points and resentenced defendant to the 16 months to ten years term. Accordingly, the issue is now moot.

Defendant first contends that his conviction for felon-in-possession was in violation of his federal constitutional right to bear arms. US Const, Am II. Because he failed to raise this issue below, this Court reviews this unpreserved claim of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

In *District of Columbia v Heller*, __ US __; 128 S Ct 2783, 2797; 17 L Ed 2d 637 (2008), the United States Supreme Court held that the Second Amendment guarantees an individual the "right to possess and carry weapons in case of confrontation." However, the *Heller* Court expressly instructed that its ruling "should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . ." *Id.* at 2816-2817. Defendant contends that this instruction is mere dicta, relying on a concurrence in *United States v McCane*, 573 F3d 1037, 1047-1048 (CA 10, 2009) (Tymkovich, J. concurring), which stated that this statement should not limit lower courts in assessing firearm restriction challenges under the Second Amendment. However, even dicta of the United States Supreme Court, especially recent dicta, will bind lower courts "almost as firmly as . . . the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Surefoot, LC v Sure Foot Corp*, 531 F3d 1236, 1243 (CA 10, 2008), quoting *Gaylor v United States*, 74 F3d 214, 217 (CA 10, 1996). Moreover, the Michigan Supreme Court has admonished that statutes are to be construed as constitutional unless unconstitutionality is readily apparent. See *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). Defendant has failed to demonstrate a plain error requiring reversal.

Defendant next argues that his conviction for felon-in-possession violates his state constitutional right to bear arms. Const 1963, art 1, § 6. This argument is meritless. This Court held in *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998), that the constitutional right to bear arms under Const 1963, art 1, § 6, is "not absolute and is subject to the limits set forth in MCL 750.224f . . . as part of the state's police power." Accordingly, defendant's state constitutional right to bear arms was not violated when he was convicted of a crime under MCL 750.224f.

Defendant next asserts that his convictions for felon-in-possession and felony-firearm violate federal and state constitutional provisions prohibiting multiple punishments for the same offense. See US Const, Am V; Const 1963, art 1, § 15. Defendant did not raise this issue before the trial court, so it is reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763; *Sands*, 261 Mich App at 160.

Convictions for felony-firearm and felon-in-possession do not violate the double jeopardy clauses of the United States and Michigan Constitutions. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 166-167; 631 NW2d 755 (2001). Despite the authoritative case law on this issue, defendant contends there is a split of authority. He relies on *White v Howes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 24, 2008 (No. 06-10707) (Battani, J.), slip op at 11, which held that convictions for felon-in-possession and felony-firearm were based on the same *offense*, not the same *conduct*, and therefore violate double jeopardy protections. Regardless of whether the federal court decision may be well reasoned, this Court is bound to follow the Michigan Supreme Court's decision in *Calloway*, 469 Mich at 452, which reaffirmed its decision in *People v Mitchell*, 456 Mich 693, 696-698; 575 NW2d 283 (1998), and this

Court's decision in *Dillard*, 246 Mich App at 166. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007); *Griswold Props v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Defendant's convictions do not violate the federal and state prohibitions on double jeopardy.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray