

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TELLY SAVALAS KIRKLAND,

Defendant-Appellant.

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UNPUBLISHED

August 16, 1996

No. 185752

LC No. 94-002292-FH

Before: Kavanagh, T.G.,\* P.J., and R.B. Burns\*\* and G.S. Allen,\*\* JJ.

MEMORANDUM.

Pursuant to an agreement, defendant pleaded guilty to intentional discharge of a firearm at an occupied dwelling, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For those respective convictions, he was sentenced to consecutive terms of two to four years' imprisonment and two years' imprisonment. He appeals as of right. We remand in part. This case has been decided without oral argument pursuant to MCR 7.214(A).

The facts admitted by defendant during the plea hearing, and the reasonable inferences arising therefrom, are insufficient to have permitted a jury to find that defendant assisted his accomplices to obtain or retain possession of the firearms used in the drive-by shooting. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). Accordingly, we remand this case to the trial court to provide the prosecutor with the opportunity to establish that defendant procured, counseled, aided or abetted and so assisted his accomplices to obtain or retain possession of the firearms in question. *Id.* If the prosecutor is able to do so without any contrary evidence, the judgment of conviction of felony-firearm

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\*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

\*\*Former Court of Appeals Judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

should be affirmed. *Id.* However, if the prosecutor is unable to elicit the necessary evidence, the judgment of conviction for felony-firearm should be set aside. *Id.* If contrary evidence is produced, the matter should be treated as a motion to withdraw the guilty plea and the court should decide the matter in the exercise of its discretion. *Id.*; *In re Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975).

Next, defendant's sentence for intentional discharge of a firearm at an occupied dwelling does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas G. Kavanagh

/s/ Robert B. Burns

/s/ Glenn S. Allen, Jr.