STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DAVID DAWSON,

Defendant-Appellant.

UNPUBLISHED
September 3, 1996

No. 169795
LC Nos. 93-062379-FC;
93-062417-FH

Before: Sawyer, P.J., and Griffin and M.G. Harrison,* JJ.

PER CURIAM.

Defendant pled guilty to attempted kidnapping, MCL 750.349; MSA 28.581 and MCL 750.92; MSA 28.287, and to being a felon is possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to consecutive terms of three to five years in prison on the kidnapping conviction and to one to five years in prison on the firearm conviction. He now appeals and we affirm.

Defendant first argues that his conviction for attempted kidnapping constitutes double jeopardy because he was also convicted of violating a criminal restraining order based upon the same incident. We disagree. Defendant's convictions arise out of an incident in which he abducted his estranged wife, holding her against her will for several hours. In addition to the charges involved in this case, he was also charged with criminal contempt for violating a restraining order entered in the divorce case. The contempt matter was resolved before the instant criminal matter was disposed of.

There are two double jeopardy issues involved here: (1) the prohibition against multiple punishment for the same offense and (2) the prohibition against multiple prosecutions for offenses arising out of the same incident. The first issue, multiple punishments for the same offense, is easily dealt with. This Court has previously held that punishment for contempt serves a different purpose than punishment for any underlying criminal offense which gives rise to the contempt. Accordingly, it does not constitute double jeopardy to punish for both the contempt and the underlying criminal act. *People v McCartney*

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* Circuit judge, sitting on the Court of Appeals by assignment.

(On Remand), 141 Mich App 591, 596; 367 NW2d 865 (1985); see also *People v Szpara*, 196 Mich App 270, 272-273; 492 NW2d 804 (1992).

The second issue, whether defendant's conviction for contempt bars a subsequent prosecution for the underlying criminal conduct, presents a more complex analysis. First, under the federal test, the second prosecution is prohibited if the two offenses, here violation of the restraining order and attempted kidnapping, have the same elements. If not, then separate prosecutions are permitted. *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993); see also *People v Setzler*, 210 Mich App 138, 140-141; 533 NW2d 18 (1995). In the case at bar, both the criminal contempt and the attempted kidnapping charges contain at least one element not found in the other offense. Specifically, the asportation requirement of kidnapping is not an element of the contempt charge and the disobedience of a court order requirement of contempt is not an element of attempted kidnapping. Accordingly, separate prosecutions are permitted under the federal test.

With respect to the question whether the separate prosecutions violate Michigan's same transaction test, this Court has dealt with that issue in *McCartney*, *supra*, and concluded that punishment for both contempt and the underlying criminal act does not violate the same transaction test.

Next, defendant argues that the trial court incorrectly scored Offense Variable 2 of the Sentencing Guidelines. We disagree. The trial court assessed 25 points for OV2, which is appropriate where the victim is subject to terrorism. Under the instructions to the Sentencing Guidelines, terrorism is "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." We will uphold the trial court's scoring if there is evidence to support the score. *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993). We are satisfied that there is sufficient evidence on the record to support the scoring. Defendant's conduct was designed to force the victim to talk to him against her will, it violated a restraining order, defendant approached the victim with an object that she believed was a gun (defendant denies it was a gun, but did state that it was a lead pipe and he threatened to break out the victim's car windows if she did not accompany him), and at one point discarded a shotgun in a field. These facts are adequate to support the trial court's scoring.

Defendant next argues that the trial court failed to adequately respond to his objections to the presentence report. However, at sentencing defense counsel clarified his concerns as being with the report's "attitude." Where an objection to a presentence report is based on the report's "attitude" rather than its accuracy, the trial court's failure to respond is not error. *People v Puckett*, 178 Mich App 224; 443 NW2d 470 (1993).

Finally, defendant argues that his conviction of possession of a weapon by a felon violates the ex post facto provisions of the Michigan and federal constitutions. We disagree. Defendant argues that he cannot be convicted for possessing a shotgun because, at the time of his discharge from probation on his earlier felony conviction, the statute only prohibited felons from possessing a pistol. Defendant, however, focuses on the wrong event. It is not relevant what the law was when he first became a

convicted felon. Rather, what is relevant is what the law was when he possessed the shotgun as a convicted felon. At the time he possessed the shotgun, it was unlawful for him to do so. The statute simply does not attempt to punish defendant for conduct engaged in prior to the effective date of the statute.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael G. Harrison