

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS VINCENT DURKIN,

Defendant-Appellant.

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UNPUBLISHED

September 20, 1996

No. 175052

LC No. 93122669 FH

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,\* JJ.

PER CURIAM.

Defendant pleaded nolo contendere to solicitation of sale of a weapon to a felon and solicitation of receiving and concealing a stolen firearm. MCL 750.157b; MSA 28.354(2), MCL 750.223; MSA 28.420, MCL 750.535b; MSA 28.803. Defendant pleaded guilty to habitual offender, second offense. MCL 769.10; MSA 28.1082. The trial judge sentenced him to two years' probation, the first sixty days to be spent in the Oakland County jail with work release.

Defendant now appeals as of right, arguing that the plea should have been dismissed, because the statute under which he was convicted is an ex post facto law. He asserts that the conviction amounted to an improper retrospective application of the law. He urges that the plea was involuntary and that he was denied the effective assistance of counsel. Finally, he alleges that he was entrapped. We affirm.

I

Defendant claims that MCL 750.223(4); MSA 28.420(4) is an unconstitutional ex post facto law. We disagree.

The complaint charged that defendant committed the solicitation of sale of weapons to a felon on diverse dates between October 3, 1990 and July 23, 1991. At the time of the offense, MCL 750.223(4); MSA 28.420(4) stated:

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

Except as provided in subsection (5), a person shall not sell a firearm or ammunition to a person the seller knows is under indictment for or has been convicted of a crime punishable by imprisonment of more than 1 year.<sup>1</sup>

Defendant asserts that the statute increased and extended his punishment for his 1976 armed robbery conviction.

Defendant's claim is without merit. A statute which affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not; (2) makes an act a more serious criminal offense; (3) increases the punishment; or (4) allows the prosecution to convict on less evidence. *People v Doyle*, 451 Mich 93; 545 NW2d 627 (1996); *Riley v Michigan Parole Board*, 216 Mich App 242; 548 NW2d 869 (1996); *People v Moon*, 125 Mich App 773, 774; 337 NW2d 293 (1983).

Here, defendant was charged and convicted under a statute that was in effect at the time he committed the crime. Moreover, the statute did not increase the penalty for his 1976 armed robbery conviction. Rather, the prior felony conviction is only an element of the new crime. See *People v Shastal*, 26 Mich App 347, 351-352; 182 NW2d 638 (1970). Therefore, the Ex Post Facto Clauses were not violated.

## II

Defendant's argument that the statute amounts to an improper retrospective application of the law is likewise without merit. It is defendant's conduct between October 3, 1990 and July 23, 1991 that is being punished, not his conduct in 1976. Moreover, a statute is not regarded as operating retrospectively solely because it relates to an antecedent event. *Hughes v Judge's Retirement Bd*, 407 Mich 75, 86; 282 NW2d 160 (1979).

## III

The trial judge did not err by denying defendant's motion for an evidentiary hearing to determine if his plea was voluntary. After a plea has been accepted, there is no absolute right to withdraw it. *People v Eloby (After Remand)*, 215 Mich App 472; 547 NW2d 48 (1996); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). When a defendant moves to withdraw his plea before sentencing, the judge is to grant the motion "in the interest of justice . . . unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). The burden is on the defendant to establish a fair and just reason for withdrawal of the plea. If the defendant sustains that burden, it is shifted to the prosecutor to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *Id.*, pp 611-612.

After reviewing the record, we are convinced that, even though defendant was uncertain about pleading nolo contendere, he has failed to demonstrate that the interest of justice would have been served by allowing him to withdraw his plea. *People v Gomer*, 206 Mich App 55, 59; 520 NW2d

360 (1994). We acknowledge that coercion by counsel is a valid basis for withdrawal. *Jackson, supra*, p 613. However, defendant stated on the record that he was not threatened.

Moreover, here, withdrawal is not warranted on the basis of ineffective assistance of counsel, as there was none. Defendant has not shown a serious error, nor has he overcome the presumption that the challenged action was sound strategy. He makes no assertion that defense counsel failed to: (1) explain the nature of the charges, (2) discuss possible defenses, or (3) explain the consequences of available choices in sufficient detail to enable defendant to make an informed choice. *Jackson, supra*, p 614.

We will not overturn the judge's decision that defendant failed to establish that it was in the interest of justice to withdraw the plea, because he was taking medication at the time. The trial judge was in the best position to determine defendant's demeanor and determine whether the plea was voluntary.

#### IV

Finally, after reviewing the record, we find that defendant was not entrapped. *People v Juillet*, 439 Mich 34; 475 NW2d 786 (1991); *People v Fabiano*, 192 Mich App 523; 482 NW2d 467 (1992). The police, through their undercover informant, did not engage in impermissible conduct that would have induced a person similarly situated as defendant, though otherwise law-abiding, to commit the crime. There was no reprehensible conduct. Rather, defendant was ready and willing to commit the offense.

Affirmed.

/s/ Marilyn Kelly

/s/ Myron H. Wahls

/s/ M. Richard Knoblock

<sup>1</sup> The statute was amended in October, 1992.