

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY JOE FRONEY,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 250324

Wayne Circuit Court

LC No. 03-002594-01

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

MEMORANDUM.

Defendant was charged with felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f(2), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was acquitted of felonious assault and convicted of the two weapons offenses. He was sentenced to two months to five years on the felon in possession conviction, to be served consecutively to the mandatory two-year term for felony-firearm. Defendant appeals his convictions as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that his convictions on the two weapons offenses violate the constitutional prohibition against double jeopardy. We disagree. This same argument was considered and rejected in *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). While defendant contends that *Dillard* was wrongly decided, our Supreme Court rejected such an argument in *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003).

Defendant next contends that the trial court erred in instructing the jury that he had the burden of proving that his right to possess a weapon had been restored. Again we disagree.

“[T]he ultimate burden of proof in criminal cases never shifts from the prosecution.” *People v Habel*, 50 Mich App 630, 632; 213 NW2d 822 (1973), modified on rehearing 53 Mich App 399; 220 NW2d 74 (1974). However, “the burden of establishing any exception, excuse, proviso or exemption” to a charge relating to the use, licensing and possession of firearms “shall be upon the defendant,” although it “does not shift the burden of proof for the violation.” MCL 776.20. Thus, in *People v Perkins*, 262 Mich App 267, 271; 686 NW2d 237 (2004), lv gtd ___ Mich ___ (2004), this Court held that the prosecutor’s burden of proof for establishing a violation of MCL 750.224f(2) consists of only two elements: that (1) defendant possessed a weapon after (2) being convicted of a specified felony. The defendant has the burden of proof as to the

defense of restoration of possessory rights. Once he produces some evidence on that point, the nonrestoration of defendant's possessory rights must be proved by the prosecution. If the defendant does not produce any evidence of restoration, the prosecutor need only prove that defendant possessed a firearm after being convicted of a specified felony. The court's instruction was thus a correct statement of the law.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello