

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 26, 2009

No. 283653

Wayne Circuit Court

LC No. 07-014477-FH

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted disarming of a police officer, MCL 750.92 and MCL 750.479b(2),¹ and sentenced to two to five years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts

On July 29, 2007, at 3:00 a.m., Officers Combs and Wade responded to a report of a domestic dispute between defendant and his girlfriend. The officers had information that defendant was armed with a knife. Combs entered the house with his gun drawn and observed defendant and his girlfriend in a physical altercation. Eventually, Combs approached defendant and, preparing to handcuff him, returned his gun to his holster. Combs testified that defendant "grabbed [his] weapon," and had "sole possession" of the gun "when it first came out" of the holster. Combs explained that as defendant was holding the gun's handle, he was able to hold onto the barrel. Combs indicated that he and defendant fought and defendant ignored his orders to release the gun. Wade testified that, from outside the house, he heard Combs calling for help and saying that defendant had his gun. When Wade entered the house, he saw defendant and Combs struggling over the gun, so he pinned down defendant and ordered him to release the weapon. Both officers testified that defendant refused and told Wade that he would "have to kill him." The officers were able to subdue defendant after using pepper spray and punching him.

¹ Defendant was originally charged with disarming a police officer. He was acquitted of additional charges of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

At trial, defendant denied any wrongdoing. He acknowledged that his girlfriend called the police because she thought he was intoxicated, had a knife, and would harm her children. He claimed that when the police arrived, they hit him, tackled him, and choked him without cause. Although defendant acknowledged that the officers advised him that he was resisting arrest, he claimed that he was trying to breathe. On cross-examination, defendant acknowledged that the officers were injured during the incident and “guess[ed]” that they injured themselves while beating him.

II. Double Jeopardy Violation Against Multiple Punishments

Defendant argues that he was “punished three times for commission of a single offense,” because the prosecution charged him with disarming a police officer, felon in possession of a firearm, and felony-firearm. Because defendant did not timely raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In this case, defendant was acquitted of the felon-in-possession and felony-firearm charges. Therefore, he was sentenced only for disarming a police officer and, thus, was not subjected to multiple punishments. Consequently, his double jeopardy challenge is misplaced.

We note, however, that, even if defendant were convicted as charged, it would not implicate his double jeopardy protections. The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is determined under the “same-elements test,” which requires the reviewing court to determine “whether each provision requires proof of a fact which the other does not.” *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007) (citation omitted). If the Legislature has clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. *Id.* at 316. First, it is well established that convictions of felon in possession and felony-firearm as a predicate felony do not violate the constitutional double jeopardy protections. See *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003), and *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), lv den 466 Mich 864 (2002). Further, the offense of disarming a police officer² has elements that felon in possession³ and felony-firearm⁴ do not, and, therefore, convictions and sentences for all three offenses is permissible.

² Disarming a police officer requires (1) that defendant knew or had reason to believe that the person from whom the firearm was taken was a police officer, (2) that at the time of the offense the police officer was performing his duties as a police officer, (3) that defendant took the firearm without the consent of the police officer, and (4) that at the time of the offense, the police officer was authorized to carry the firearm in the line of duty. MCL 750.479b(2). See also CJI2d 13.18.

³ Felon in possession of a firearm requires that the defendant (1) possessed a firearm, (2) had been convicted of a prior felony, and (3) less than five years had elapsed since the defendant was discharged from probation or parole. MCL 750.224f; *People v Parker*, 230 Mich App 677, 684-685; 584 NW2d 753 (1998).

III. Prosecution's Charging Discretion

In a related argument, defendant contends that the prosecution abused its discretion by charging him with the three offenses because doing so violated his double jeopardy protection against multiple punishments for the same offense. We disagree. “[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if “a choice is made for reasons that are ‘unconstitutional, illegal, or ultra vires.’” *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996) (citation omitted).

As preciously indicated, multiple convictions for the charged offenses would not have offended defendant's doubly jeopardy protections. Thus, the multiple charges did not violate defendant's double jeopardy rights. In addition, defendant does not offer any information or evidence suggesting that the charges were brought for an unconstitutional, illegal, or illegitimate reason, so there is no basis to conclude that the prosecution abused its power in charging defendant.

III. Effective Assistance of Counsel

In his final claim, defendant argues that he was denied the effective assistance of counsel. We again disagree. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Permitting the Three Charges

Defendant argues that defense counsel was ineffective for permitting the three charges and failing to object on double jeopardy grounds. Because defendant has failed to establish a basis for objecting to the charges, his claim of ineffective assistance of counsel cannot succeed. *Frazier, supra*.

B. Failing To Exclude Status as a Convicted Felon

(...continued)

⁴ Felony-firearm requires that “the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant also argues that had defense counsel excluded evidence of his status as a convicted felon, the jury would not have known that he had a prior felony conviction and would have acquitted him of all three charges. To this end, defendant contends that defense counsel was ineffective for stipulating to his status as a felon, failing to negotiate a plea on the felon in possession charge, and failing to move to sever the felon in possession charge.

1. Stipulating to Status as a Felon

Defense counsel stipulated that defendant was convicted of a specified felony, and thus, was ineligible to possess a firearm. A felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, and it is apparent that defense counsel made a tactical decision to stipulate that defendant has been convicted of a specified felony to minimize the potential prejudice to defendant. See *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (a defendant may stipulate to a prior conviction that is a necessary element of a charged crime in order to avoid the prejudice associated with the prosecution's proof of that element). Further, defense counsel stipulated to an element that could easily be proven, and left the prosecution to its proofs on the crucial element of possession. Defendant has not overcome the presumption of sound strategy.

2. Failing to Negotiate a Plea Agreement

Because defendant was acquitted of the felon in possession charge, it is axiomatic that it would have been a mistake for defendant to plead guilty to that charge. Nonetheless, defendant has not provided any witness affidavits or other record evidence establishing that the prosecution offered or would have agreed to a plea agreement.

3. Failing to Move to Sever

A court may "sever for separate trials offenses that are not related[.]" MCR 6.120(C). Offenses are related if they are based on "the same conduct or transaction." MCR 6.120(B)(1)(a). In this case, the evidence indicated that all three charges arose from defendant's conduct with a police officer during a single, three-minute episode on July 29, 2007. Consequently, severance was not proper under MCR 6.120(B)(1)(a) and (C). Therefore, defense counsel was not ineffective for failing to file a motion for severance. *Frazier, supra*.

Affirmed.

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis