

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINZIE BERNARD CARSON,

Defendant-Appellant.

UNPUBLISHED

October 6, 2009

No. 287479

Wayne Circuit Court

LC No. 08-004509-FH

Before: Murray, P.J. and Markey and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to two years in prison for felony-firearm, to be served consecutively to two concurrent terms of three years' probation for the concealed carry and felon in possession convictions. Defendant appeals by right. We affirm.

On appeal, defendant concedes that the prosecution presented evidence that, on July 24, 2007, police officers answering a call about a fight in progress observed defendant discarding a firearm. Defendant challenges his felon-in-possession conviction on the ground that the trial court erred in allowing the prosecution to amend the information regarding the prior felony conviction disqualifying him from possessing a firearm and challenges his felony-firearm conviction on the ground that it violated his rights under the state and federal constitutions.

I. Felon in Possession

The information filed in this case alleged that defendant violated the felon-in-possession statute by carrying a gun because he had earlier been convicted of delivery of less than fifty grams of a controlled substance.¹ At trial, the defense challenged the trial court's authority to

¹ MCL 333.7401(1) and (2)(a)(iv) provide, in pertinent part, that "a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and . . . [w]hich is in an amount less than 50 grams"

convict defendant of felon in possession on the ground that defendant had not been convicted of the crime alleged. The defense stipulated, however, that defendant had been convicted of possession with intent to deliver less than fifty grams of cocaine. The trial court allowed the prosecution to amend the information to set forth the correct earlier felony underlying the felon-in-possession charge on the grounds that the amendment was more clerical than substantive and caused defendant no surprise or prejudice.

A trial court's decision to allow the prosecution to amend the information is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). A trial court may permit the prosecution to amend the information before, during, or even after trial, unless the proposed amendment would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998).

We agree with the trial court that the minor adjustment in the information resulted in no surprise or prejudice. That defendant's felony conviction precluded his legal possession of a firearm at the time in question was never in dispute.

Moreover, in his brief on appeal, defendant fails to argue to the contrary. Instead, defendant challenges both his felon-in-possession and his felony-firearm convictions, on the ground that the police testimony was that defendant *discarded* a firearm. Because this argument is not germane to the question presented, we need not address it. See *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003); MCR 7.212(C)(7). The argument has no merit in any event. To observe a person discarding an object is to observe a person with possession give up that possession. One cannot discard what one has not possessed.

For these reasons we affirm defendant's conviction of felon in possession.

II. Felony-Firearm

We review constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). However, defendant did not raise these constitutional challenges to his felony-firearm conviction at trial, leaving the issue unpreserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has not met this burden.

The Michigan Constitution provides, “[e]very person has a right to keep and bear arms for the defense of himself and the state.” Const 1963, art 1, § 6. But, the fact that a right is constitutionally guaranteed does not mean that it can be neither forfeited nor subjected to reasonable regulation. See *People v Swint*, 225 Mich App 353, 374-375; 572 NW2d 666 (1997). Accordingly, “[a] right to bear arms does not encompass the possession of a firearm during the commission of a felony.” *People v Graham*, 125 Mich App 168, 172-173; 335 NW2d 658 (1983).

Under the Second Amendment to the United States Constitution, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This Amendment guarantees a personal right to firearms for lawful purposes such as self-defense and hunting, and as a check against tyranny. *District of Columbia v Heller*, 554 US ___; 128 S Ct 2783, 2799-2802, 2821-2822; 171 L Ed 2d 637

(2008). However, in the course of so decreeing, the United States Supreme Court stated that the right to arms was not without limitation and added that “prohibitions on the possession of firearms by felons” remained presumptively valid. *Id.* at 2816-2817.

Because neither the state nor federal constitutional right to bear arms extends to doing so in connection with felonious conduct, defendant’s constitutional challenges must fail.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello