

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
August 12, 2014

v

VINICIUS RODY JAQUERY,
Defendant-Appellee.

No. 315065
Ingham Circuit Court
LC No. 11-000908-FH

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant pled guilty to possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The court sentenced defendant to 24 months' to 20 years' imprisonment for the possession with intent to deliver cocaine conviction and three years' probation on youthful trainee status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, for the felony-firearm conviction. Plaintiff now appeals by leave granted. We affirm.

I. BACKGROUND

In August and September 2011, defendant, an eighteen-year-old college student, sold cocaine to undercover police officers on several occasions. Subsequently, defendant was charged with delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver 50 to 449 grams of cocaine, possession of marijuana, MCL 333.7401(2)(d)(iii), and felony-firearm. At the same time, defendant was charged in a separate case with three counts of delivery of less than 50 grams of cocaine. Thereafter, defendant entered into an agreement to work with narcotics officers. Nearly one year later, however, defendant was charged in a third case with possession with intent to distribute Gamma-hydroxybutyrate (GHB), MCL 333.7401(2)(b)(ii), and possession with intent to deliver marijuana. Defendant's agreement to work with narcotics officers was revoked due to these new charges.

II. HYTA STATUS FOR A FELONY-FIREARM CONVICTION

Plaintiff argues that the trial court abused its discretion by placing defendant on HYTA status for the felony-firearm conviction. " 'This Court reviews for an abuse of discretion a trial court's decision concerning a defendant's assignment under the [HYTA].' " *People v Khanani*,

296 Mich App 175, 177-178; 817 NW2d 655 (2012), quoting *People v Giovannini*, 271 Mich App 409, 411; 722 NW2d 237 (2006). “An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

“ ‘The [HYTA] offers a mechanism by which youths charged with committing certain crimes between their seventeenth and twenty-first birthdays may be excused from having a criminal record.’ ” *Khanani*, 296 Mich App at 178, quoting *People v Bobek*, 217 Mich App 524, 528-529; 553 NW2d 18 (1996). “The HYTA ‘evidences a legislative desire that persons in this age group not be stigmatized with criminal records for unreflective and immature acts.’ ” *Id.*, quoting *People v Perkins*, 107 Mich App 440, 444; 309 NW2d 634 (1981). “ ‘A trial court has wide discretion in placing a youthful offender under the [HYTA], subject to review by the appellate courts.’ ” *Id.* at 179, quoting *Giovannini*, 271 Mich App at 416. “In exercising its discretion, a trial court should consider the seriousness of the offense as a factor on an equal footing with the defendant’s age.” *Id.*, citing *People v Fitchett*, 96 Mich App 251, 253; 292 NW2d 191 (1980). “ ‘The [HYTA] is a remedial statute and should be construed liberally for the advancement of the remedy.’ ” *Giovannini*, 271 Mich App at 417, quoting *Bobek*, 217 Mich App at 529.

In *Khanani*, the defendant, aged nineteen, had committed a home invasion while he was on bond and awaiting sentencing in two other cases. *Khanani*, 296 Mich App at 179-180. In sentencing, the trial court “stated that it was ‘frighten[ed]’ by defendant’s actions,” *id.* at 181, but suggested that it granted the defendant HYTA status for the sake of his family: “I think that they deserve some acknowledgement of the effort that they’ve put into trying to raise you to be a productive and constructive citizen. So, I did it for them. Now you take it from here, okay.” *Id.* This Court concluded that the trial court had abused its discretion, stating as follows:

[T]he trial court’s decision to grant youthful-trainee status fell outside the range of reasonable and principled outcomes in light of the relevant circumstances, including defendant’s age, the seriousness of the home-invasion offense and the timing of its commission a mere three weeks after being placed on bond pending sentencing for the earlier offenses [*Id.* at 179.]

The Court concluded that the trial court’s statement that “it was ‘frighten[ed]’ by defendant’s actions[.]” indicated “that defendant was not an appropriate candidate for youthful-trainee status.” *Id.* at 181 (alteration by *Khanani* Court). The Court explained that “the trial court’s statement that defendant’s parents deserved acknowledgement for their efforts to raise defendant to be a productive citizen was not a principled basis on which to grant youthful-trainee status.” *Id.* at 182.

In this case, defendant was eighteen years old at the time of the offense. He did not have a prior criminal history. There are factors weighing against assigning HYTA status, but they are not so compelling, on balance, to render the court’s ruling an abuse of discretion. Plaintiff argues that defendant committed a series of felonies and that he was fortunate to be allowed to plead guilty to only two of the nine offenses for which he had been charged. Plaintiff also points out that defendant committed the offenses in the third case “while [he] was on bond in the first two cases and supposedly cooperating with police.” There is scant information in the record

about the facts that gave rise to it. Regarding the charges in the first two cases, defendant will still have a criminal record for possession with intent to deliver 50 to 449 grams of cocaine, but MCL 762.11(1) does not preclude assignment to HYTA status under such circumstances. Because HYTA is a remedial statute that should be construed liberally, a defendant should not be ineligible for HYTA status for one offense because he is ineligible for HYTA status for a different offense. Although defendant will still have a criminal record, that record will undoubtedly be less burdensome without a felony-firearm conviction. The trial court recognized this, stating that he would still have the cocaine charge “looming over [him],” which was “[s]till a huge hurdle for [him].”

Plaintiff also argues that defendant made a conscious decision to traffic in illegal drugs. However, the statute does not preclude defendants who commit intentional crimes from attaining HYTA status, and it seems that few would be eligible otherwise.

In addition, defendant’s placement on HYTA status will have implications if he is convicted of felony-firearm in the future. MCL 750.227b provides that a defendant must serve two years’ imprisonment for his or her first conviction for felony-firearm, that term to “be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.” MCL 750.227b(2). The statute also provides that a defendant must serve five years’ imprisonment for a second felony-firearm conviction and 10 years for a third or subsequent conviction, those terms again to “be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.” *Id.* If defendant is successfully discharged from HYTA status, he will not carry a felony-firearm conviction. MCL 762.14. Thus, if he is later convicted of felony-firearm, he will only be required to serve two years’ imprisonment rather than five years’, as it would be his first conviction.

Plaintiff also argues that, regardless of whether defendant was placed on HYTA status, the trial court was required to sentence defendant to two years’ imprisonment under the felony-firearm statute, rather than three years’ probation. As this issue presents a question of statutory interpretation, we review it de novo. *Giovannini*, 271 Mich App at 411.

This issue involves the interplay of the HYTA with MCL 762.11(1) which provides as follows:

Except as provided in subsections (2) and (3), if an individual pleads guilty to a criminal offense, committed on or after the individual’s seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, *without entering a judgment of conviction* and with the consent of that individual, consider and assign that individual to the status of youthful trainee. [Emphasis added.]

Subsections (2) and (3) list offenses for which HYTA status is ineligible. MCL 750.227b is not among those listed. MCL 762.12 provides for revocation of HYTA status as follows:

The court of record having jurisdiction over the criminal offense referred to in section 11 of this chapter may, at any time, terminate its consideration of the

individual as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release. If an individual who is required to be registered pursuant to the sex offenders registration act willfully violates that act, the court shall revoke the individual's status as a youthful trainee. *Upon termination of consideration or revocation of status as a youthful trainee, the court may enter an adjudication of guilt and proceed as provided by law. If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed* [Emphasis added.]

MCL 762.13(l) provides the trial court with options for commitment as follows:

If an individual is assigned to the status of a youthful trainee and the underlying charge is an offense punishable by imprisonment for a term of more than 1 year, the court shall do 1 of the following:

(a) Commit the individual to the department of corrections for custodial supervision and training for not more than 3 years in an institutional facility designated by the department for that purpose.

(b) *Place the individual on probation for not more than 3 years* subject to probation conditions as provided in section 3 of chapter XI. Beginning January 1, 2005, the terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.

(c) Commit the individual to the county jail for not more than 1 year. [Emphasis added.]

MCL 762.14 provides in pertinent part the discharge and dismissal of HYTA status as follows:

(1) If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, *upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.*

(2) *An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime* [Emphasis added.]

The felony-firearm statute, MCL 750.227b, provides in pertinent part as follows:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second *conviction* under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent *conviction* under this subsection, the person shall be imprisoned for 10 years. [Emphasis added.]

Because the trial court placed defendant on HYTA status, it was not required to sentence him to two years' imprisonment under MCL 750.227b. MCL 750.227b(1) requires an adjudication of guilt before a two-year prison sentence is mandated. Generally, an adjudication of guilt is otherwise known as a "conviction." *People v James*, 267 Mich App 675, 679; 705 NW2d 724 (2005), citing the Michigan Sentencing Guidelines Manual (2003), p 7. Moreover, MCL 750.227b(1) implicitly equates a finding of guilt with conviction when it refers to a "second conviction" and a "third or subsequent conviction." In this case, defendant was not convicted under MCL 750.227b, because MCL 762.14 provides that an assignment to HYTA status is not a conviction. Had the Legislature wished to mandate two years' imprisonment under MCL 750.227b regardless of HYTA status, it could have explicitly so stated. Thus, the trial court did not err by placing defendant on HYTA status and sentencing him to probation for the felony-firearm offense.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens