

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY NEGEL SANDERS,

Defendant-Appellant.

UNPUBLISHED

February 10, 2005

No. 251445

Wayne Circuit Court

LC No. 03-003128-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm during the commission of a felony, MCL 750.227b. He was sentenced to the mandatory two-year term for the felony-firearm conviction, and a concurrent term of two years' probation for the felon in possession conviction. Defendant appeals as of right, and we affirm.

The facts that led to defendant's convictions were not disputed. Detroit Police Officers Paula Redmond and Robert Nill testified that around 3:30 a.m. on February 23, 2003, they went to 16854 Beaverland in Detroit in response to two separate reports: the first, that someone heard prowling noises inside the garage, and the second, that someone was "now kicking in the side door, home invasion one," and that shots were fired. Redmond and Nill saw a man lying partially in the street and partially in the driveway. The man had been shot in the stomach.

Defendant appeared in the front doorway of the house and said "I shot him." Nill went inside the house and observed "on the floor right where the kitchen and living room" met a "[l]arge rectangular" firearm, with a "high capacity magazine" inserted in the bottom.¹ Nill believed that the magazine clip had broken because he saw "a lot of loose [and live] ammo laying around it." Nill noted melting snow on the gun and a "fog on it, as if it were really cold."

¹ Nill testified that the large gun was an Uzi "or a Mack 10."

Nill then inquired of defendant, who stood in the living room near the front door, what had happened.² According to Nill, defendant initially replied that the wounded man had “dropped the gun and shot himself.” Nill did not believe defendant based on the appearance of the gunshot wound. When Nill asked defendant “what really happened,” defendant responded that “when the deceased had broken in, he heard the noise, and had shot him in [self-]defense.”

Defendant told Nill that the .45-caliber gun he had used to shoot the man was upstairs. Nill went upstairs and noticed in an open doorway of the main, finished room, “just protruding past the doorway in the eaves, . . . the buttstock of a long gun,” a high capacity magazine, and a “blue steel automatic that appeared to be a .45.” Nill collected the guns, removed their ammunition magazines, and “ejected the round that was in the chamber of the .45.”

Detroit Police Officer Moises Jimenez testified that he went to 16854 Beaverland at around 5:00 a.m. or 5:30 a.m. on February 23, 2003, and that he obtained a written statement from defendant.³ In the written statement, defendant explained that he had fallen asleep between 10:30 p.m. and 11:00 p.m. the previous evening; he awoke to “the sound of kicking in a side door and . . . beeping”; he locked his bedroom door and retrieved his “gun off the night stand and squatted next to [his] bed”; the bedroom door flew open after someone kicked it three times; defendant “shot one time towards the door and . . . heard the guy run out”; defendant phoned the police from the bedroom; and after hearing “the guy screaming for help,” defendant “went out there and looked at him” before reentering the house. The statement also contained defendant’s clarification that he had fired only one shot with a .45-caliber semiautomatic weapon in the direction of the two or three people who had entered his house. Defendant then signed the written statement.

Defense counsel and the prosecutor stipulated that defendant had a felony conviction in 2002, and that he was “ineligible to possess a firearm on February 23, 2003.” The circuit court found defendant guilty of both the felon in possession and felony-firearm charges.

I

Defendant first asserts that a person (including a convicted felon) has a constitutional right to possess a firearm inside his own home for self defense purposes. This Court reviews de novo questions of constitutional law. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

We conclude that defendant’s felon in possession conviction did not violate his state constitutional right to keep and bear arms in defense because (1) the felon in possession statute generally constitutes a reasonable restriction on the constitutional right to bear arms, *Swint*, *supra*, and (2) although defendant may have *used* his firearm in reasonable self-defense, he

² Nill stated that defendant was the only civilian he saw inside the house after the police arrived.

³ Jimenez also saw at the house three weapons, “an AK-47 type assault rifle, a .45 auto and a . . . Mack 10 look alike” that he believed was a nine-millimeter weapon.

possessed the firearm for some period before he used it, and there is no indication that his prior possession was for self-defense.

The prosecutor correctly cites *Swint, supra*, for the proposition that the statute prohibiting felons from possessing firearms, MCL 750.224f, is constitutional notwithstanding the state constitution's guarantee of the right to keep and bear arms, Const 1963, art I, § 6. Michigan courts long have recognized that while the constitutional right to bear arms provision protects the right of any person to bear arms "in the legitimate defense of his person and property," the constitutional guarantee remains "subject . . . to the valid exercise of the police power of the State to regulate the carrying of firearms." *People v Brown*, 253 Mich 537, 540-541; 235 NW 245 (1931)⁴; see also *Swint, supra* at 363 (explaining that "the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power"), quoting *Bay Co Concealed Weapons Licensing Bd v Gasta*, 96 Mich App 784, 788; 293 NW2d 707 (1980).

In *Swint*, the defendant, who was convicted of being a felon in possession of a firearm after handling a rifle inside his house and issuing some threats to shoot people with it, raised on appeal the question of first impression whether MCL 750.224f violated Const 1963, art I, § 6. *Swint, supra* at 355-359. Unlike in this case, the defendant in *Swint* did not allege that the felon in possession statute compromised his right to defend himself, but "merely challenge[d] the . . . statute because it denies him, for a limited time, the right to bear arms for any purpose." *Id.* at 362. After reviewing case law from other states having similar constitutional right to bear arms provisions, this Court initially concluded that Const 1963, art I, § 6 "does not guarantee defendant the right to possess a firearm after defendant is convicted of a felony" because the right to keep and bear arms conferred within art I, § 6 is for the limited purpose of defending himself or the state. *Swint, supra* at 359-363. The Court also noted that although § 224f temporarily prohibited the defendant from keeping or using a firearm, the category of "arms" to which art I, § 6 refers includes anything an individual "takes in his hands as a weapon." *Swint, supra* at 362, quoting Black's Law Dictionary (6th ed), p 109. The Court opined that "[a]rguably, MCL 750.224f . . . does not completely foreclose defendant's constitutional right to bear 'arms,' i.e., nonfirearm weapons, in defense of himself." *Swint, supra* at 362.

The *Swint* Court further found that "[e]ven assuming that the felon-in-possession statute infringes upon defendant's right to keep and bear arms under the Michigan Constitution, we find that MCL 750.224f . . . represents a reasonable regulation by the state in the exercise of its police power to protect the health, safety, and welfare of Michigan citizens." *Swint, supra* at 363. The Court reviewed at length several persuasive decisions from other jurisdictions that "upheld the constitutionality of their felon-in-possession statutes in the face of similar challenges grounded in

⁴ The Michigan Supreme Court in *Brown* analyzed Const 1908, art II, § 5, which read, "Every person has a right to bear arms for the defense of himself and the State." *Brown, supra* at 538. The current right to bear arms provision appears at Const 1963, art I, § 6, and states, "Every person has a right to *keep and* bear arms for the defense of himself and the state." (Emphasis added). The convention comment concerning art I, § 6 explains that the two emphasized words were added to the current constitution to "bring[] the section into conformity with a similar provision in the U.S. Constitution. Hence, the right to 'keep' as well as 'bear' arms is recognized."

the right to keep and bear arms.” *Id.* at 364-374. The Court explained that in Michigan, the “Legislature has made the determination that felons, who have exhibited their disregard for ordered society and pose a threat to public safety, and firearms are a lethal combination—at least for three to five years after a felon successfully completes his term of incarceration and probation and pays all requisite fines.” *Id.* at 374. The Court observed that the felon in possession statute “has effectively achieved the legitimate legislative purpose of keeping guns out of the hands of those most likely to use them against the public,” and concluded that the “defendant’s right to bear arms under Const 1963, art I, § 6 is not absolute and is subject to the reasonable limitations set forth in MCL 750.224f” *Swint, supra* at 374-375.

The holdings in *Swint*, that an individual’s constitutional right to keep and bear arms in defense remains subject to reasonable restrictions, and that the felon in possession statute constitutes such a reasonable restriction, do not address the specific question raised by defendant in this case, -- whether the application of MCL 750.224f under the circumstances of this case unconstitutionally infringes on his right to keep and bear arms in self-defense. Even assuming that defendant correctly theorizes that the felon in possession statute might be unconstitutional when applied to a convicted felon who reasonably *uses* a firearm in self-defense against armed individuals who intrude into his home, we find no constitutional violation here.

While the felon in possession statute prohibits a recently convicted felon from possessing, using, transporting, selling, purchasing, carrying shipping, receiving, or distributing “a firearm in this state,” defendant in this case was charged only with “possess[ing] a firearm when ineligible to do so because he had been convicted of” two prior felonies. Because the prosecutor did not specifically charge, and the circuit court did not convict, defendant for the act of using the firearm in defense of himself, this Court need not address the alleged unconstitutionality of the “use” prohibition of MCL 750.224f in the context of reasonable self-defense.

As the circuit court recognized, § 224f plainly encompasses both the separate concepts of use and possession of a firearm by a felon. No facts suggested that defendant wrested a firearm from one of the assailants and then used it against them in self-defense. The following portions of defendant’s own statement indicate to the contrary:

Tonight I turn [sic] in about 10:30 p.m./11 p.m. I fell asleep and I was awakened by the sound of kicking in a side door and the beeping. *I was in my room with the door locked.* There [sic] is *when I got my gun off the night stand and squatted next to my bed.* There was three kicks to the bedroom door and the door flew open. I shot one time towards the door and I heard the guy run out. [Emphasis added.]

Defendant’s account⁵ raises the reasonable inference that he had dominion and control over the firearm inside his bedroom for some indeterminate period before the attempted break in on

⁵ Defendant further explained that he had fired at the intruders a .45-caliber semiautomatic weapon, which the police found upstairs where defendant told them it would be.

February 23, 2003. *People v Burgenmeyer*, 461 Mich 431, 436-439; 606 NW2d 645 (2000). Given that defendant's own account establishes that he possessed his gun inside his bedroom before the time of the break in, and that no evidence suggests he received any prior, imminent threats of a break in or threats to his own well being that may have necessitated his possession of the gun, the circuit court properly found defendant guilty under § 224f because his *possession* of the gun predated the invasion of his home, despite that he ultimately may have reasonably *used* the weapon in self-defense.⁶

In support of the proposition that § 224f is unconstitutional as applied to him, defendant places great reliance on *State v Hamdan*, 264 Wis 2d 433; 665 NW2d 785 (2003), in which the Wisconsin Supreme Court held that, under the circumstances presented, the application of a statute prohibiting anyone but peace officers from carrying concealed weapons (CCW statute) violated the constitutional right to bear arms⁷ possessed by the defendant, a business owner in a high crime neighborhood who carried a gun concealed in his pants while inside his store. *Id.* at 441-443, 448. Although a Wisconsin court had found that the CCW statute withstood "a facial challenge to its constitutionality under" the state constitution's right to bear arms guarantee, the Wisconsin Supreme Court in *Hamdan* "recognize[d] that there are . . . circumstances in which a strict application of the CCW statute may result in an unreasonable limitation of the new constitutional right." *Id.* at 442-443, 470.

The *Hamdan* Court continued that should the state apply "reasonable laws in circumstances that unreasonably impair the right to keep and bear arms, [its] police power must yield in those circumstances to the exercise of the right." *Hamdan, supra* at 461. In determining whether the application of a firearm restriction under the facts of that particular case constituted an unreasonable restriction of the constitutional right to bear arms, the *Hamdan* Court considered whether the public benefit gained through the enforcement of the firearm regulation was "substantially outweighed by an individual's need to conceal a weapon in the exercise of the right to bear arms." *Id.* at 462-464, 472-473. The Supreme Court found that while the CCW restriction enhanced public safety by limiting the likelihood that someone could "act violently on impulse," placing "people on notice when they are dealing with an individual who is carrying a dangerous weapon," and stigmatizing the dangerous behavior of carrying concealed weapons,

⁶ The circuit court found that if defendant had taken a gun from an assailant and possessed it only momentarily for the purpose of shooting in self-defense, this momentary use of the gun would not afford a basis for conviction under § 224f. The circuit court's view appears consistent with the views of several cases from other jurisdictions that recognize a limited exception to a statute prohibiting a felon from possessing weapons when the defendant defends himself with a weapon that he possessed only momentarily, without preconceived design, for the purpose of defending himself against an imminent threat of harm. Anno: *Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons*, 39 ALR4th 967, § 4, pp 970-974.

⁷ Article I, § 25 of the Wisconsin Constitution provides that "[t]he people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." *Hamdan, supra* at 447-448. The Wisconsin constitutional provision expressly contemplates more potential circumstances in which the right to bear arms applies than the Michigan Constitution does.

“[n]one of these rationales is particularly compelling when applied to a person owning and operating a small store.” *Id.* at 470-472. The Supreme Court concluded that application of the CCW statute was unconstitutional under the circumstances because it infringed Hamdan’s substantial interest in security, while promoting public welfare to a slight degree. *Id.* at 479.⁸

Unlike the very broad CCW statute addressed in *Hamdan, supra* at 459-461, 465-470, the instant case involves MCL 750.224f, which does not destroy or functionally disallow Michigan’s constitutional right to bear arms because it (1) applies to the much narrower class of felons alone, (2) restricts acts of a felon with respect to the limited category of firearms, and (3) only temporarily limits the felon’s ability to possess a firearm for three to five years after he satisfies various conditions related to the judgment of sentence for his prior felony. The CCW statute in *Hamdan* was not supported by a legislative “determination that felons, who have exhibited their disregard for ordered society and pose a threat to public safety, and firearms are a lethal combination—at least for three to five years after a felon successfully completes his terms of incarceration and probation and pays all requisite fines.” *Swint, supra* at 374.

Further, after engaging in its balancing analysis, the *Hamdan* Court set forth the “final element to a constitutional challenge of an application of the CCW statute,” and explained that “a defendant is not entitled to assert a constitutional defense to a CCW charge if he or she carried a concealed weapon for an unlawful purpose,” “even if [the] defendant were able to satisfy the two other tests for an unreasonable restriction.” *Hamdan, supra* at 483. The Court recognized that in some instances a defendant might have “multiple purposes for carrying a concealed weapon,” and that in those instances “the dispositive issue is whether the defendant had *an* unlawful purpose, irrespective of whether he or she had a concurrent lawful purpose. [Emphasis in original.] For example, *a convicted felon who carries a weapon, concealed or not, for his security is acting in furtherance of a crime and may not avail himself of a constitutional defense*” (emphasis added). *Id.* at 484 n 36. Thus, even were we to agree with defendant’s suggestion to adopt wholesale the *Hamdan* balancing analysis to the facts of this case, defendant would not be entitled to a ruling that MCL 750.224f was unconstitutional as applied to him because, as the circuit court found, he did not possess the firearms for wholly lawful purposes.

II

Defendant next asserts that his convictions of felony-firearm and felon in possession arising from the same possession violate the double jeopardy protection against the imposition of multiple punishments. Defendant recognizes, however, that this Court has determined that a defendant’s convictions of both felony-firearm and felon in possession do not violate the Double Jeopardy Clauses of the United States or Michigan Constitutions. *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001).

⁸ The Supreme Court added that after engaging in the balancing analysis, “a court must assess whether an individual could have exercised the right in a reasonable, alternative manner that did not violate the statute.” *Id.* at 479. The Supreme Court disbelieved that under the CCW statute, “requiring the continuous, open carrying of a firearm in one’s business” constituted a “realistic alternative means to exercise the right” to bear arms, as the prosecutor suggested. *Id.* at 479-481.

Defendant suggests that this Court should reject the analysis in *Dillard* as faulty. We are not at liberty to do so. The Michigan Supreme Court recently declined to overrule *Dillard* in *People v Calloway*, 469 Mich 448, 449-450; 671 NW2d 733 (2003), involving a challenge to a defendant's convictions of both felony-firearm and felon in possession on federal and state double jeopardy grounds. After reviewing the language of MCL 750.227b and MCL 750.224f and its prior ruling in *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998), the Supreme Court explained:

We follow, as did the Court of Appeals in *Dillard*, *supra*, our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. Because there is no violation of the double jeopardy clause, the Court of Appeals properly affirmed defendant's convictions. [*Calloway*, *supra* at 452.]

Defendant's right to be free from double jeopardy was not violated.

IV

Defendant next asserts that the prosecutor abused his charging discretion by charging defendant with the two felonies under the circumstances involved. "[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 charges supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). We find no abuse of that broad discretion.

V

Lastly, defendant asserts that the circuit court erred in admitting defendant's statement to police at his house because the statement was necessary to establish the corpus delicti of the offense of felon in possession. We disagree.

"The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). "The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury [or loss] and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *Konrad*, *supra* at 270, quoting *United States v Di Oro*, 150 F2d 938, 939 (CA 3, 1945).

Before trial testimony began in this case, defendant stipulated to the fact that he had a felony conviction on February 23, 2003.

The evidence apart from defendant's admissions and written statement to the police showed that shots reportedly were fired inside 16854 Beaverland, a person with a gunshot wound was found laying in the driveway of the house, defendant was the only person the police found

inside the house, and the house contained three firearms in different locations upstairs and downstairs. The appearance of the weapons inside the house occupied only by defendant, together with the reported home invasion and the gunshot-wounded man in the driveway, reasonably raise the inference that someone, likely defendant, possessed a weapon. Given the additional fact that defendant stipulated he had a felony conviction in 2003, a preponderance of circumstantial evidence independent of defendant's own admissions or confessions established the corpus delicti of the charged offenses.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White