

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 26, 2011

v

JACOB RODOLFO GARZA,

Defendant-Appellant.

No. 296089
Ottawa Circuit Court
LC No. 09-033875-FH

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; in the alternative, defendant challenges the imposition of consecutive sentences for his convictions of carrying a concealed weapon, MCL 750.227, and felony-firearm. We affirm defendant's conviction of felony-firearm, but remand with instructions that the trial court amend the judgment of sentence to reflect that defendant's sentences for his convictions of felony-firearm and carrying a concealed weapon are to run concurrently.

The police sought to question defendant in connection with a shooting. When the police stopped defendant, he was found to be carrying a gun in his pocket. The police subsequently determined that defendant had three prior felony convictions.

Defendant was originally charged with carrying a concealed weapon and felon in possession of a firearm, MCL 750.224f. At the conclusion of the preliminary examination, the prosecutor moved to amend the information to add a charge of felony-firearm, with the predicate felony being the charge of felon in possession of a firearm. The district court granted the motion.

Defendant was tried on charges of carrying a concealed weapon, felon in possession of a firearm, and felony-firearm. The trial court instructed the jury that in order to convict defendant of felony-firearm, it had to find that at the time defendant possessed the firearm, he committed or attempted to commit the felony of felon in possession of a firearm. The jury convicted defendant as charged.

The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve two years in prison for felony-firearm, with credit for 125 days, and to serve 15 to 120 months

for carrying a concealed weapon and felon in possession of a firearm. Defendant's sentences for carrying a concealed weapon and felon in possession of a firearm were to be concurrent with each other and consecutive to the sentence for felony-firearm.

On appeal, defendant argues that, because he was arrested for carrying a concealed weapon, that charge served as the predicate felony for the charge of felony-firearm. Defendant asserts that, because MCL 750.227b(1) prohibits a charge of carrying a concealed weapon from serving as the predicate felony for a charge of felony-firearm, his conviction for felony-firearm must be reversed. We disagree.

Defendant did not raise this issue in the trial court; thus, it is not preserved. An unpreserved issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The interpretation of a statute presents a question of law that this Court reviews de novo. *People v Burgenmeyer*, 461 Mich 431, 436; 606 NW2d 645 (2000).

MCL 750.227b(1) provides:

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 two 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.

Under the clear language of this statute, the offense of carrying a concealed weapon, MCL 750.227, cannot serve as a predicate felony for a charge of felony-firearm. However, in this case, the predicate felony was the charge of felon in possession of a firearm. Defendant was committing that felony when the police arrested him, notwithstanding the fact that the police did not stop defendant for that reason. Moreover, the information stated that the charge of felon in possession of a firearm served as the predicate felony for the charge of felony-firearm and the trial court instructed the jury that it must find that defendant committed or attempted to commit the offense of felon in possession of a firearm in order to find defendant guilty of felony-firearm. Defendant was properly convicted of felony-firearm, with the predicate felony being felon in possession of a firearm. See *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

Next, defendant argues that because a charge of carrying a concealed weapon cannot be the predicate felony for a charge of felony-firearm, his sentence for carrying a concealed weapon should run concurrently with his sentence for felony-firearm. We agree.

Defendant did not object to the trial court's imposition of consecutive sentences. Review is for plain error. *Carines*, 460 Mich at 763-764. The interpretation of a statute presents a question of law that we review de novo. *Burgenmeyer*, 461 Mich at 436.

MCL 750.227b(2) provides:

A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of

imprisonment imposed for the conviction of the felony or attempt to commit the felony.

The clear language of this statute mandates that the sentence for felony-firearm be consecutive to and precede the sentence for the predicate felony. However, because carrying a concealed weapon cannot serve as the predicate felony, MCL 750.227b(1), and because no statute mandates that a sentence for a conviction of carrying a concealed weapon run consecutively to a sentence for a conviction of felony-firearm, any term of imprisonment for a conviction of carrying a concealed weapon must run concurrently with a sentence for a conviction of felony-firearm. See *People v McGrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995).

We affirm defendant's conviction of felony-firearm, but remand this case with instructions that the trial court correct the judgment of sentence to reflect that defendant's sentences for his convictions of felony-firearm and carrying a concealed weapon are to run concurrently. The trial court is further instructed to ensure that a copy of the corrected judgment of sentence is delivered to the Department of Corrections. See *People v Brown*, 220 Mich App 680, 685; 560 NW2d 80 (1996).

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello