

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY FORREST FOX,

Defendant-Appellant.

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UNPUBLISHED

May 8, 2007

No. 268410

Wayne Circuit Court

LC No. 05-006687-01

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of being a felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of two days in jail for the felon in possession and CCW convictions with credit for time served, and to two years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

In the early morning of April 24, 2005, defendant was stopped by police while driving a vehicle because he was not wearing a seat belt. Defendant was arrested when it was discovered that he was driving with a suspended license. During an inventory search of defendant's vehicle, the officer discovered a handgun hidden beneath the center console between the front seats.

On appeal, defendant first asserts that the trial court erred in denying his motion for a directed verdict. We review de novo a trial court's decision to deny such a motion. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

The prosecution must introduce evidence sufficient to justify a rational trier of fact to conclude that all the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). If this standard is not met, due process requires a trial court to enter a directed verdict of acquittal. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). In determining whether to grant a motion for a directed verdict, the court must examine the evidence presented up until the time the motion is made in the light most favorable to the prosecution. *Id.* Further, circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

In the instant case, defendant asserts that the prosecution failed to present sufficient evidence to convict him of any of the three crimes charged. Specifically, he argues that the evidence did not establish that he knowingly carried or possessed the weapon in question.

The statute prohibiting the carrying of a concealed pistol, MCL 750.227(2), provides:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

The felon in possession statute, MCL 750.224f, states in relevant part:

(1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:

- (a) The person has paid all fines imposed for the violation.
- (b) The person has served all terms of imprisonment imposed for the violation.
- (c) The person has successfully completed all conditions of probation or parole imposed for the violation.

Additionally, the felony-firearm statute, MCL 750.227b(1), provides, in relevant part:

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.

In *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982), our Supreme Court discussed the evidence required to establish the carrying element of CCW:

Hard and fast rules regarding what circumstantial evidence is sufficient to sustain a conviction of carrying a weapon in a motor vehicle have not evolved. The decisions have, however, emphasized the relevancy of the following factors either alone or in combination: (1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle. [Citations omitted.]

Further, "carrying" and "possession" are similar terms, denoting intentional control or dominion over a weapon. *Butler, supra* at 390 n 11. Possession may be actual or constructive, and may be

proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). A defendant has constructive possession of a weapon “if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* at 470-471.

In the instant case, sufficient circumstantial evidence existed for the trier of fact to determine that defendant was carrying the pistol in question. Defendant owns the car in which the weapon was found and he was driving the vehicle just before the gun’s discovery. Additionally, the evidence shows that the weapon was both easily accessible and in close proximity to defendant. The gun was close to defendant’s position in the driver’s seat as the arresting officer testified he discovered it beneath the center console where the gearshift lever is located. To access the weapon, defendant merely had to lift up the compartment containing the ashtray.

Considering the factors listed in *Butler*, a rational fact finder could have determined beyond a reasonable doubt that defendant carried or possessed a pistol in his vehicle. Thus, the prosecution presented sufficient evidence to convict defendant of CCW. Because defendant stipulated to the fact that he had been convicted of a specified felony and had not regained his eligibility to carry a firearm, sufficient evidence existed to sustain his conviction for being a felon in possession. Further, the evidence establishing possession combined with his violation of MCL 750.224f provides a sufficient basis for finding defendant guilty of the felony-firearm charge. Consequently, the trial court did not err in denying defendant’s motion for a directed verdict.

Nevertheless, defendant argues the trial court should have granted the motion because no evidence established that the item discovered in his car is actually a firearm. Specifically, he contends that the prosecution failed to present laboratory reports or other evidence showing that the handgun was an operable weapon. Based on our Supreme Court’s recent decision in *People v Peals*, 476 Mich 636; 720 NW2d 196 (2006), we hold that the prosecution did not have to prove the weapon was operable for defendant to be convicted of the charged offenses.

The felon in possession and felony-firearm statutes prohibit the possession or carrying of a firearm. MCL 750.224f; MCL 750.227b. Similarly, a conviction for CCW requires proof that the accused carried a “pistol” in his vehicle. MCL 750.227(2). All three offenses are found in Chapter XXXVII of the Michigan Penal Code, which concerns firearms. MCL 750.222(d) provides the definition of firearm used within this chapter:

“Firearm” means a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB’s not exceeding .177 caliber.

Additionally, MCL 750.222(e) defines “pistol” as follows:

“Pistol” means a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals itself as a firearm.

In *Peals, supra* at 642, the Supreme Court found that because the legislature used the term “may” when defining firearm in MCL 750.222(d), “the statute requires only that the weapon be of a type that is designed or intended to propel a dangerous projectile.” It therefore held “that there is no operability requirement for the offenses of felony-firearm and felon in possession of a firearm.” *Id.* at 656. Because the defendant in *Peals* did not dispute that the weapon in question was of a type “designed to propel a dangerous projectile by an explosive, gas, or air,” the Court affirmed his convictions for these offenses. *Id.*

In the instant case, the arresting officer testified that the item found in defendant’s vehicle was a .380 caliber semi-automatic handgun. He further stated that the weapon was loaded at the time of its discovery. Based on this testimony, a rational trier of fact could have determined that the weapon was of a type designed to propel a dangerous projectile by an explosive, gas, or air. Under *Peals*, the prosecution did not have to present further proof regarding the weapon’s operability to sustain defendant’s convictions for felony-firearm and being a felon in possession. Further, because the definition of pistol in MCL 750.222(e) incorporates the definition of firearm from MCL 750.222(d), the prosecution did not have to prove the weapon was operable for defendant to be convicted of CCW.<sup>1</sup>

In his second issue on appeal, defendant asserts the trial court erred in denying his motion for a new trial based on newly discovered evidence.

A trial court’s decision to grant or deny a motion for new trial based on newly discovered evidence is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A “mere difference in judicial opinion does not establish an abuse of discretion.” *Id.* The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court’s judgment. “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).

To obtain a new trial on the basis of newly discovered evidence, a defendant must establish that:

- (1) the evidence itself, not merely its materiality, was newly discovered;
- (2) the newly discovered evidence was not cumulative;
- (3) the party could not, using

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<sup>1</sup> We note that no Michigan court has yet applied the interpretation of the term “firearm” provided by the Court in *Peals* to CCW. Previously, this Court has stated that, although the prosecution need not establish operability when making its prima facie case, an affirmative defense to CCW “can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire.” *People v Gardner*, 194 Mich App 652, 655; 487 NW2d 515 (1992). But *Peals, supra* at 642, explicitly overrules the interpretation of MCL 750.222(d) relied upon in *Gardner, supra*. Thus, we hold that inoperability of a pistol cannot constitute a valid affirmative defense to MCL 750.227(2).

reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Cress, supra* at 692, citations omitted.]

The new evidence proffered by defendant consists of a statement allegedly made by defendant's roommate, Jeron Lucky, who was also the passenger in the car at the time of defendant's arrest. At trial, defendant's girlfriend, Bobby Veness, testified that the weapon belonged to Lucky and that she placed it in a black Maxima outside of defendant's home after her son discovered it in Lucky's bedroom. Defendant clearly knew Lucky's identity before trial. Based on the testimony of Veness, defendant should have known that Lucky might be the source of useful evidence. As the prosecution argued below, defendant should have, through the exercise of reasonable diligence, been able to present a statement from Lucky at trial.

Further, the new evidence offered by defendant would likely have made no difference in the outcome of his trial. Lucky refused to testify at the hearing on defendant's motion. In the statement attributed to him, Lucky asserted that, after discovering the gun in a black Maxima that he owns, he placed the weapon in defendant's red Grand Prix. Defendant argued that this statement supports Veness's testimony that she placed the gun in the Maxima and explains why the gun was later discovered in his vehicle. But when delivering the verdict, the trial court specifically found that Veness's testimony lacked credibility. Thus, the statement offered by defendant would not have made a different result probable upon retrial.

Defendant failed to establish that he could not, through the exercise of reasonable diligence, have presented a statement from Lucky at trial. He also did not show that the introduction of such a statement would likely lead to his acquittal upon retrial. Consequently, the trial court did not abuse its discretion in denying his motion for a new trial.

Affirmed.

/s/ Michael J. Talbot  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto