

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D19868
W/kmg

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Submitted - March 26, 2008

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
JOSEPH COVELLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-07961
2007-07962

DECISION & ORDER

The People, etc., respondent,
v Khari Henry, appellant.

(Ind. Nos. 06-01193, 06-01299)

Stephen J. Pittari, White Plains, N.Y. (Salvatore A. Gaetani of counsel), for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Valerie A. Livingston and Anthony J. Servino of counsel; Owein Charles Levin on the brief), for respondent.

Appeals by the defendant from two judgments of the Supreme Court, Westchester County (Molea, J.), both rendered July 24, 2007, convicting him of criminal possession of a controlled substance on in the third degree under Indictment No. 06-1193 and criminal sale of a controlled substance on or near school grounds under Indictment No. 06-1299, upon his pleas of guilty, and imposing sentences.

ORDERED that the judgments are affirmed.

The defendant was sentenced as a second violent felony offender based upon his prior conviction of attempted criminal possession of a weapon in the third degree, arising from his possession of a loaded semi-automatic handgun (*see* Penal Law former § 265.02[4]). With respect to that charge, the defendant agreed to waive indictment and be prosecuted by a superior court information charging him, in count one, with criminal possession of a weapon in the third degree and charging him, in count two, with attempted criminal possession of a weapon in the third degree as a lesser included offense of count one. In that matter, the defendant pleaded guilty to attempted criminal possession of a weapon in the third degree “to cover all charges contained therein.” The County Court explained to the defendant that “you were charged with Criminal Possession of a Weapon in the Third Degree . . . you are pleading guilty to Attempted Criminal Possession of a Weapon in the Third Degree,” with a lesser prescribed term of imprisonment. The defendant

June 24, 2008

Page 1.

PEOPLE v HENRY, KHARI

acknowledged during the plea allocution in that matter that his conviction was for a class E violent felony offense.

Pursuant to Penal Law § 70.02(1)(d), attempted criminal possession of a weapon in the third degree is a class E violent felony offense if it is “a lesser included offense,” as defined in CPL 220.20, of criminal possession of a weapon in the third degree, as defined in certain subdivisions of Penal Law § 265.02. CPL 220.20(1) defines “lesser included offense” as “an offense of lesser grade than one charged in a count of an indictment” to which a defendant pleads guilty. Penal Law § 70.02(1)(d) was enacted as part of L 1980, ch 233, in an effort to strengthen the criminal penalties for illegal handgun possession and restrict the avoidance of those increased criminal penalties by plea bargaining (*see* 1980 NY Legis Ann, at 105). If a defendant pleads guilty to attempted criminal possession of a weapon in the third degree to avoid the harsher penalty applicable to the class D violent felony offense of criminal possession of a weapon in the third degree, attempted criminal possession of a weapon in the third degree constitutes a violent felony offense (*see People v Tolbert*, 93 NY2d 86, 88).

In *People v Dickerson* (85 NY2d 870, 871), the Court of Appeals determined that a plea of guilty to attempted criminal possession of a weapon in the third degree, when charged in “the top count” of a superior court information, did not constitute a violent felony pursuant to Penal Law § 70.02(1)(d). In its decision, the Court stated that “the plain statutory language” provides that attempted criminal possession of a weapon in the third degree is only a violent felony when the accused pleads guilty to that crime “as a lesser included offense under an indictment charging a greater offense” (*People v Dickerson*, 85 NY2d at 872). Accordingly, a plea of guilty to attempted criminal possession in the third degree, when the crime is charged as the top count or the only count in an accusatory instrument, is not a conviction of a violent felony offense (*see People v Banuchi*, 304 AD2d 402; *People v Williams*, 290 AD2d 570; *People v Williams*, 289 AD2d 117).

In the instant case, the defendant pleaded guilty to attempted criminal possession of a weapon in the third degree under a superior court information charging the greater offense of criminal possession of a weapon in the third degree. Although attempted criminal possession of a weapon in the third degree was charged in a separate count of the superior court information, the defendant’s argument that his prior conviction does not constitute a violent felony offense because it was charged separately is not supported by the relevant case law, the legislative purpose of L 1980, ch 233, or the statutory language. CPL 220.20(1) defines “lesser included offense” as “an offense of lesser grade than one charged in a count of an indictment” (emphasis supplied), not of a lesser grade than all counts charged. Since attempted criminal possession of a weapon in the third degree was not charged as the only count or the top count, but rather, was a lesser-included offense of the top count, the defendant’s conviction of that offense constitutes a conviction of a class E violent felony offense. Accordingly, the defendant’s contention that he should not have been sentenced as a second violent felony offender is without merit.

SKELOS, J.P., SANTUCCI, COVELLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court