433 Mich. 464 (Mich. 1989)

446 N.W.2d 140

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Rodney HILL, Defendant-Appellee.

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Derrick MEDLEY, Defendant-Appellee.

Docket Nos. 81818, 81819.

Supreme Court of Michigan.

September 27, 1989

Argued May 1, 1989.

[446 N.W.2d 141]

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Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., John D. O'Hair, Pros. Atty., County of Wayne, Timothy A. Baughman, Chief of Crim. Div., Research, Training and Appeals, Don W. Atkins, Principal Atty., Appeals, Detroit, for People.

Carole M. Stanyar, Detroit, Mich., for Derrick Medley.

Michael A. Reynolds, Southfield, Mich., for Rodney Hill.

OPINION

RILEY, Chief Justice.

We granted leave to appeal in these cases to decide whether two defendants can be charged with possession of one short-barreled shotgun contrary to M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2), when each defendant had in his possession one of the two component parts that comprised the short-barreled shotgun.

We find that possession of a prohibited firearm is not limited to actual possession, but may include both constructive possession, and joint possession by defendants acting in concert. Further, we find that the fact that a firearm is temporarily inoperable does not preclude prosecution for its possession where the statute expressly prohibits such possession. Therefore, we conclude that there is sufficient record support in the cases we decide today to support the charge of illegal possession of a short-barreled shotgun brought against each defendant.

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Finally, we are persuaded that there are strong policy considerations that support our holding which discourages the practice of "breaking down" a shotgun to escape prosecution for illegal possession of weapons which our legislature has clearly prohibited.

Accordingly, we hold that the Court of Appeals erred in affirming the dismissal of the charges. Thus, we reverse the decision of the Court of Appeals, reinstate the charges against the defendants, and remand the cases to the trial court for proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On the evening of January 17, 1986, Detroit Police Officers Thomas Dogonski and Earl Cunningham were dispatched to the intersection of Ellis and Grandmont to investigate a report of a "large fight." They arrived two minutes after receiving the call and saw the two defendants standing together near the intersection of Ellis and Woodmont, approximately one block away. Unable to see anyone else in the area, the officers drove up to the defendants to inquire about the reported fight.

As the police drew even with the two men, Officer Dogonski noticed blood dripping from a fresh cut under defendant Medley's left eye. At this point, he also observed a large bulge under the left side of Medley's coat. Explaining that it was an iron pipe, Medley began to reach toward his coat. Dogonski instructed him not to move, held onto Medley, and pulled out the **[446 N.W.2d 142]** breech portion of a shotgun. [1] Also found in Medley's possession was one loaded 12-gauge shotgun shell.

After being alerted that Medley appeared to

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have a weapon, Officer Cunningham conducted a "pat-down" search of defendant Hill. He discovered the barrel portion of a sawed-off, double-barreled shotgun stuffed in the front of Hill's pants. Not only did the barrel portion "lock[ ] right up together" with the breech, but both parts came from the same manufacturer and had matching serial numbers. The barrel was twelve inches long, and the assembled gun totaled seventeen inches in length. Consequently, the defendants were charged with possession of a short-barreled shotgun pursuant to M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2).

After Medley's preliminary examination, the magistrate dismissed the charges. The plaintiff filed an application for leave to appeal the dismissal of the charges against Medley in the Detroit Recorder's Court. This application was denied on the ground that the examining magistrate did not abuse her discretion in dismissing the case. The plaintiff then filed an application for leave to appeal in the Court of Appeals, which was granted on January 6, 1987.

Conversely, Hill was ordered to stand trial. The acting magistrate, Judge Lubienski, ruled that the defendants were so close in time and place that the "two pieces of gun could come together, [and] become an active and very dangerous weapon." Judge Lubienski also noted that this created a "danger contemplated by the statute" and that this danger is what the "Legislature wants to prevent." Following the preliminary examination, Hill filed a motion to quash in the Recorder's Court. In granting the motion, the court found that the prosecution failed to show that Hill was in possession of a "shotgun," and the case was dismissed. On May 9, 1986, the plaintiff appealed the dismissal.

Upon the plaintiff's motion, the Court of appeals consolidated the two cases, and on

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September 11, 1987, it upheld the lower courts' dismissal of the cases against each defendant. [2] The plaintiff sought leave to appeal, which we granted on March 22, 1988. [3]

II. ANALYSIS

If it appears that a felony has been committed for which there is probable cause to charge the defendant, it is the statutory duty of the magistrate to bind the defendant over for trial. M.C.L. Sec. 766.13; M.S.A. Sec. 28.931. Although the magistrate need not establish guilt beyond a reasonable doubt, there must exist evidence of each element of the crime charged or evidence from which the elements may be inferred. *People v. Doss,* 406 Mich. 90, 276 N.W.2d 9 (1979). It is not the function of the magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt as to guilt. Such questions are for the trier of fact. *People v. Coons,* 158 Mich.App. 735, 405 N.W.2d 153 (1987), lv. den. 428 Mich. 900 (1987). Thus, the issue we must now decide is whether the conduct of Hill and Medley, as shown by the evidence presented at their preliminary examinations, falls within the scope of the statute prohibiting the possession of a short-barreled shotgun.

A

Possession may be proven by circumstantial as well as direct evidence. *United States v. Smith,* 591 F.2d 1105 (CA 5, 1979). The question of possession is factual and is to be answered by the jury. *United States v. Holt,* 427 F.2d 1114 (CA 8, 1970).

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A general discussion of "possession" is found in 72 C.J.S., Possession, p. 233 (1951), which provides, "[the term possession] is interchangeably used to describe **[446 N.W.2d 143]** actual possession and constructive possession, which often so shade into one another that it is difficult to say where one ends and the other begins."

Federal courts consistently have recognized two types of possession, actual and constructive. *United States v. Burch,* 313 F.2d 628 (CA 6, 1963); *United States v. LaGue,* 472 F.2d 151 (CA 9, 1973). Although not in actual possession, a person has constructive possession if he "knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons...." Burch, supra at 629; see also *United States v. Craven,* 478 F.2d 1329 (CA 6, 1973). Possession of a firearm need only be constructive to establish the element of possession. *United States v. Martin,* 706 F.2d 263 (CA 8, 1983); Holt, supra. Whether actual or constructive, possession may be joint as well as exclusive. Craven and Holt, supra. It has been held:

" 'The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.' " Smith, supra at 1107, quoting *United States v. Ransom,* 515 F.2d 885, 890-891 (CA 5, 1975), cert. den. 424 U.S. 944, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976), reh. den. 425 U.S. 945, 96 S.Ct. 1687, 48 L.Ed.2d 189 (1976).

Michigan courts also have recognized that the term "possession" includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. *People v. Davis,* 101 Mich.App. 198, 300 N.W.2d 497 (1980). Put another way, a defendant has

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constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. *People v. Terry,* 124 Mich.App. 656, 335 N.W.2d 116 (1983).

We find that the decisions of the Court of Appeals and the federal courts are well-reasoned interpretations of the intent of the respective Legislatures when they enacted the applicable statutes regulating the possession and use of firearms. Therefore, we agree with the theory of constructive firearm possession and recognize the theory of joint firearm possession if the evidence suggests two or more defendants acting in concert.

B

We must now decide if the two shotgun parts constitute the firearm prohibited by the short-barreled shotgun statute. Section 224b of the Michigan Penal Code prohibits the possession of short-barreled shotguns. [4] The term "short-barreled shotgun" is defined in Sec. 222(e) of

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the Penal Code. [5] Because a "short-barreled shotgun"

[446 N.W.2d 144] is described as a modified or altered "shotgun," we must look to the definition of "shotgun." [6] Noting that "shotgun" is described as a "firearm," we are lead to the statutory definition of "firearm." [7] The defendants contend that because each component part, individually without the other, is incapable of "propelling a dangerous projectile," neither defendant can be charged with possession of a short-barreled shotgun. We disagree.

In determining the purpose of the law prohibiting the possession of short-barreled shotguns, the

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statutory rule of construction provided for in the Penal Code should be applied. M.C.L. Sec. 750.2; M.S.A. Sec. 28.192 provides:

"The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law." (Emphasis added.)

We now look to 94 C.J.S., Weapons, Sec. 2, pp. 479-480, and Sec. 6, p. 489, which offer:

"Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and being ready for offense or defense in case of conflict with another, and to outlaw instruments ordinarily used for criminal and improper purposes.... The statutes should receive a reasonable construction in accord with the purpose of the legislature and in the light of the evil to be remedied, and they should be construed with the thought in mind that they are aimed at persons of criminal instincts and for the prevention of crime...."

* * * * * *

"A deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment if the parts, with reasonable preparation, may be easily assembled so as to be effective."

Michigan courts have followed the "reasonable construction" guideline in interpreting the legislative intent behind our statutes governing the use and possession of firearms in order to "effect the

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object of the law." [8] In *People v. Bailey,* 10 Mich.App. 636, 160 N.W.2d 380 (1968), two defendants were convicted of carrying a concealed weapon, one sawed-off shotgun, when it was found in the car in which they were driving. The Court said:

"The basic intent of the legislature as indicated in the concealed weapon statute was that weapons should not be carried where they might be used to take lives. Courts should look for reasonable rather than tortured interpretations of statutes, or exceptions thereto, so as to reflect the intent of the legislature." *Id*. at 639-640, 160 N.W.2d 380. See also *People v. Jiminez,* 27 Mich.App. 633, 183 N.W.2d 853 (1970), lv. den. 384 Mich. 819 (1971) (when used in a statute, the term "dangerous weapons" should not be narrowly construed by the court).

In interpreting the statute that prohibits the possession of a firearm in the commission **[446 N.W.2d 145]** of a felony, the Court of Appeals again followed the "primary and fundamental rule of statutory construction," which is to "ascertain and give effect to the purpose and intention of the *Legislature." People v. Gibson,* 94 Mich.App. 172, 177, 288 N.W.2d 366 (1979), rev'd on other grounds 411 Mich. 993, 308 N.W.2d 111 (1981).

"Intent must be inferred from the language used, but it is not the meaning of the particular words in the abstract only or their strictly grammatical construction alone that governs. The words are to be applied to the subject matter and to the general

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scope of the provision, and they are to be considered in light of the general purpose sought to be accomplished or the evil sought to be remedied." Id., citing *White v. Ann Arbor,* 406 Mich. 554, 562, 281 N.W.2d 283 (1979).

Applying this reasoning, courts have held that it is unnecessary to prove the operability of a weapon as an element of a prosecution of possession of a firearm during the commission of a felony because this would be " 'inconsistent with the legislative intent of discouraging the practice of carrying guns in circumstances where harm is apt to occur.' " *People v. Jackson,* 108 Mich.App. 346, 350, 310 N.W.2d 238 (1981), citing with approvalGibson, supra. [9]

The concealed weapon statute and the felony-firearm statute necessitate the same statutory construction. Both laws refer to firearms carried by a person. "It is clear that the Legislature intended that a broad construction be given both laws." *People v. Stephenson,* 94 Mich.App.

300, 302, 288 N.W.2d 364 (1979). Consequently, the Court found that the felony-firearm statute prohibited firearms which are inoperable because they are unloaded, as well as firearms which are not operable for mechanical reasons. Stephenson, supra. [10] See also *People v. Sanchez,* 98 Mich.App. 562, 296 N.W.2d

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312 (1980) (the distinction between unloaded and inoperable firearms is meaningless).

Even though a temporarily inoperable weapon is incapable of "propelling a dangerous projectile," the courts have followed Stephenson to sustain convictions for the illegal possession of firearms. In *People v. Boswell,* 95 Mich.App. 405, 408-409, 291 N.W.2d 57 (1980), the argument that because the gun was "jammed," thus temporarily inoperable, it did not meet the statutory definition of a "firearm," was rejected. The Court held that the firearm statute, M.C.L. Sec. 8.3t; M.S.A. Sec. 2.212(20),

"demonstrates a legislative intent to distinguish the firearm from other potentially dangerous weapons by describing its general construction and manner of use.... Furthermore, this Court found the operability of a gun to be irrelevant for a conviction ... a contrary result would thwart the deterrent purpose of the felony-firearm statute." Boswell, supra at 409, 291 N.W.2d 57. See also *People v. Brooks,* 135 Mich.App. 193, 353 N.W.2d 118 (1984) ("firearm" includes a weapon from which a dangerous projectile may be propelled even though the weapon may be in a state of temporary disrepair and, therefore, be incapable of firing).

Finally, the Michigan Criminal Jury Instructions recognize that a gun must be, "totally inoperable as a firearm and cannot be readily repaired " before this can be raised as a defense to a charge of illegal **[446 N.W.2d 146]** firearm possession. CJI 11:1:09 [11] (emphasis added).

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A short-barreled shotgun is "obviously a man-killing weapon." Bailey, supra 10 Mich.App. at 640, 160 N.W.2d 380. It is readily apparent that the legislative intent of the statute prohibiting its possession is consistent with that of the concealed weapon and felony-firearm statutes, to discourage the practice of carrying short-barreled shotguns. [12] Therefore, we agree with the holdings of the Court of Appeals and recognize that a reasonable interpretation best effects the objects of the laws regulating the use and possession of firearms, including the statute prohibiting the possession of short-barreled shotguns. Thus, temporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms. [13]

C

In the instant cases, the Court of Appeals was not persuaded by the argument that because the defendants were in proximity to each other at the time of arrest, and the two components constituted one short-barreled shotgun, they were in possession of the shotgun. [14] We disagree.

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During the preliminary examinations, it was demonstrated that both components of the short-barreled shotgun were marked with the identical serial number. Also, the evidence indicated that the two defendants were the only people in the vicinity of the reported fight and that they appeared to be together. Further, at defendant Medley's preliminary examination, Officer Dogonski testified that the two components could be attached in "[a]bout two seconds." Noting that Medley was carrying a loaded 12-gauge shotgun shell, it is evident that within seconds the defendants were capable of discharging a short-barreled shotgun. It would be naive to believe that this is not within the "evil sought to be remedied" by the Legislature when it enacted the short-barreled shotgun statute.

While the dissent would have us believe that its interpretation of the short-barreled shotgun statute best evidences the intent of the Legislature, the consequence of its position is the elimination of the legal effect of the statute prohibiting the possession of short-barreled shotguns. Certainly, the Legislature could not have intended to pass a statute, one which expressly limits the possession of an "obviously man-killing device," whose legal effect is limited only to the narrowest of circumstances.

For instance, two individuals could be walking along a street, each brandishing one of two component parts of a short-barreled shotgun within inches of each other. Even though these two parts could be assembled within seconds to create a deadly weapon, the dissent would maintain that

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no crime has been committed notwithstanding the fact that all the elements of a weapons possession crime are present--the intentional possession of the prohibited gun with the knowledge of its character as a weapon. See CJI 11:8:01. The effect becomes evident, unless the theoretical one-inch gap between the two parts is eliminated **[446 N.W.2d 147]** and the gun is assembled, the statute is meaningless. Clearly, this could not have been the result contemplated when the Legislature enacted the short-barreled shotgun statute.

Accordingly, we find that M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2) was intended to prohibit the constructive and joint possession of short-barreled

shotguns. In light of our decision, we hold that the evidence produced during the preliminary examinations necessitates that the defendants be bound over for trial as charged. As such, we find that it was an abuse of discretion to dismiss the charge against defendant Medley. Conversely, we find no abuse of discretion in binding defendant Hill over for trial.

III. CONCLUSION

The policy behind statutes that prohibit the possession of specific firearms is that of crime prevention. The Legislature has recognized the extreme danger presented by short-barreled shotguns and has expressly outlawed their possession. [15] To apply an overly narrow construction to the statute would undermine this policy by allowing the criminal element to "break down" a firearm and move about freely within society without the threat of criminal prosecution. The law prohibiting the possession of short-barreled shotguns must be given a reasonable interpretation in order to retain its legal effect. Thus, the presence of two

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different components of the same firearm in the possession of two persons in proximity, when the two components comprise the essential parts of one proscribed firearm, provides a sufficient basis for a factfinder to conclude that it is intended that each of the persons have sufficient control of the assembled firearm to amount to constructive and joint possession of the assembled firearm in each person.

We conclude that two defendants may be charged with possession of one short-barreled shotgun when each defendant has in his possession one of two components that comprise the weapon.

Accordingly, we reverse the decision of the Court of Appeals and order the parties to proceed to trial.

GRIFFEN, BRICKLEY and BOYLE, JJ., concur.

LEVIN, Justice (separate opinion).

I join in the decision of the Court remanding the causes for trial because I agree that there was evidence from which the magistrates could find probable cause of a concert of action [1] between Hill and Medley to possess, or that Hill and Medley aided and abetted each other in possessing, an operable shotgun. [2] I agree that "temporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms." [3]

I write separately because I am unable to join in some of the other statements in the opinion of the

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Court. I do not agree that a defendant "has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant" [4] or that "two defendants may be charged with possession of one short-barreled shotgun when each defendant has in his possession one of two components that comprise the weapon" [5] absent evidence of a concert of action to possess, or that they aided and abetted each other in possessing, the shotgun.

Nor do I agree that "[t]he concealed weapon statute and the felony-firearm statute necessitate the same statutory construction" [6] even though "[b]oth laws refer **[446 N.W.2d 148]** to firearms carried by a person." [7]

Also, it is one thing to hold, as did this Court in *People v. Williamson,* 200 Mich. 342, 166 N.W. 917 (1918), that the people need not show that a concealed weapon is loaded, and quite another to hold

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that they need not show that it is operable. An unloaded gun, it appears, can be loaded in a few seconds. An inoperable gun might also, as appears in the instant case, be made operable within a few seconds. Where, however, there is a mechanical problem, it may take considerable time, days or weeks, to make the gun operable. If so, it is not a weapon or a "dangerous weapon." [8]

No decision of this Court supports the view that a distinction between "unloaded and inoperable firearms is meaningless." [9] That expression is taken from the four-paragraph per curiam opinion in *People v. Sanchez,* 98 Mich.App. 562, 564, 296 N.W.2d 312 (1980), where, although the parties had stipulated that the weapon was not operable, the defendant's conviction of carrying a concealed weapon [10] was affirmed without any apparent consideration of the cogent and carefully reasoned dissenting opinion where the decisions of this Court were discussed and considered. [11]

I would prefer to remand in Medley to the magistrate for reconsideration in light of the opinion of the Court rather than to find that there was

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an "abuse of discretion" [12] in dismissing the charges against Medley. The circuit court (Recorder's Court), the Court of Appeals, and this Court review a magistrate's decision for abuse of discretion. [13] It is unclear whether the magistrate in Medley in fact exercised his discretion, as distinguished from ruling as a matter of law. Depending on the context, Medley might be entitled to an opportunity to offer evidence controverting the people's proofs [14] before the magistrate exercises his discretion.

ARCHER, Justice (dissenting).

We granted leave to appeal in these cases to decide whether, contrary to M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2), [1] two defendants **[446 N.W.2d 149]** can be charged with possession of one short-barreled shotgun when each defendant had in his possession, one of two component parts of the short-barreled shotgun. The majority holds that possession of a prohibited firearm is not limited to actual possession, but may include both constructive and joint possession by defendants acting

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in concert. The majority further holds that the fact that a firearm was temporarily inoperable does not preclude prosecution for its possession since the statute expressly prohibits such possession.

Although the reasoning set forth in the majority opinion is based on sound legal principles, the present state of the law as set forth in M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2) and M.C.L. Sec. 750.222(d); M.S.A. Sec. 28.419(d), requires that I disagree. Accordingly, I would hold that under M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2) the defendants may not be prosecuted for possession of a short-barreled shotgun if, upon apprehension of the defendants, the firearm in question is unassembled with the relevant parts in possession of different persons, rendering the firearm inoperable.

I

The principal statute examined today criminalizes the manufacture, sale, and possession of short-barreled shotguns and rifles. M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2). Defendant Hill was charged with possession of a shotgun under circumstances which revealed that the gun in question was unassembled and, thus, inoperable when he and his codefendant Medley were apprehended. [2]

In 1978, the Legislature amended M.C.L. Sec. 750.222(d); M.S.A. Sec. 28.419(d) to include, inter alia, the definition of a shotgun. Hence,

"[S]hotgun" means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and

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made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single function of the trigger.

Despite the policy arguments which weave the phrases "evil sought to be remedied," "broad construction" and "legislative intent" throughout the majority opinion, essentially, the majority has rewritten the statute, adding a clause which provides that possession of unassembled firearms also may give rise to criminal prosecution. By taking this step, the majority contravenes the well-settled rule that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed." 3 Sands, Sutherland Statutory Construction (4th ed.), Sec. 59.03, p. 11.

Federal courts, in 26 U.S.C. Sec. 5845(d), have been specifically provided with an avenue through which prosecution may take place when dealing with facts similar to those at bar:

The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which **[446 N.W.2d 150]** may be readily restored to fire a fixed shotgun shell. [Emphasis added.]

Irrespective of the statute's character as an excise tax provision, federal courts utilize this definition to uphold convictions of defendants for

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possession of unassembled shotguns. [3] See *United States v. Woods,* 560 F.2d 660, 664-665 (CA 5, 1977) (the fact that a weapon when found was in two pieces was immaterial to the conviction for possessing an unregistered sawed-off shotgun, where only a minimum of effort was required to make it operable).

Additionally, in terms of other states' statutes, the California Legislature defines the term "short-barreled shotgun" as follows:

As used in this section, a "short-barreled shotgun" means any of the following:

A firearm which is designed or redesigned to fire a fixed shotgun shell and having a barrel or barrels of less than 18 inches in length.

A firearm which has an overall length of less than 26 inches and which is designed or redesigned to fire a fixed shotgun shell.

Any weapon made from a shotgun (whether by alteration, modification or otherwise) if that weapon, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length.

Any device which may be readily restored to fire a fixed shotgun shell which, when so restored, is a device defined in subparagraphs (A) to (C), inclusive. California Penal Code, Sec. 12020(c)(1)(A)-(D). (Emphasis added.)

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Michigan plainly has no comparable statutory clause or provision within its legislation on this subject. Furthermore, expressly included within the title paragraph of the then HB 4972 is the phrase, "to define crimes," which, in my view, is an unambiguous declaration by the Legislature that what was then written was what was intended to be applied. I cannot presume that our Legislature intended to adopt the additional clause. I, therefore, believe it imprudent for our Court to read or write added language into the Michigan statute. "For us to supply the fatally missing words would not be permissible judicial construction but judicial legislation of the boldest kind. However desirable the change might be ... it is still one for the legislature to make by using appropriate language where it is needed. It lies without our province to do so for it." *Ross v. Fisher,* 352 Mich. 555, 559-560, 90 N.W.2d 483 (1958).

II

The majority's frequent citation of Court of Appeals decisions supporting its position overshadows the singular reference to *In re Vaughn,* 160 Mich.App. 236, 408 N.W.2d 85 (1987), lv. den. 428 Mich. 922 (1987), in n. 13. Unlike the decisions cited, the Court in In re Vaughn held that individuals who each possess parts of one completely disassembled short-barreled shotgun may not be convicted of the offense of possession of a short-barreled shotgun where the separate parts by themselves are incapable of being fired. *Id*. at 238-239, 408 N.W.2d 85.

Although this Court is not specifically bound by this analysis, I think the majority is remiss in failing either to completely discuss the view presented in In re Vaughn, or to at least acknowledge the split. Thus, as the decision in Vaughn is consistent with the well-settled rule that

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penal statutes are to be narrowly construed, it is my view that until the Legislature speaks otherwise, In re Vaughn represents **[446 N.W.2d 151]** the appropriate analysis and resolution of this issue.

III

Finally, the majority presents an interesting but incomplete discussion and application of the "constructive possession" theory. *People v. Davis,* 101 Mich.App. 198, 202, 300 N.W.2d 497 (1980), is cited for the proposition that "[o]ne has constructive possession if one has proximity to the article together with an indicia of control." Following this citation, the majority first restates the elements of constructive possession, by summarizing, "a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant," [4] p. 143, and then completely neglects to apply the stated elements to the facts at bar.

I agree with Davis that constructive possession requires proximity as well as some objective indicia of control. Unfortunately, when applying these elements to our facts, the latter factor is missing. Although the defendants indeed had proximity to one another, there is no proof either through the testimony of the officers or from an objective review of the facts, that either defendant exercised control over the other or over that which was in each of their possessions namely, the pieces of the shotgun. Thus, it is my opinion that the constructive possession theory, though valid when applicable, cannot resolve the issues presented here.

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Conclusion

Until such time as the Legislature amends the statutes at issue today, a defendant may not be prosecuted for possession of a short-barreled shotgun under M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2) if, upon apprehension of the defendant, the firearm in question is unassembled with the relevant parts in possession of different persons, rendering the firearm inoperable. I would affirm the decision of the Court of Appeals and dismiss the charges against the defendants.

CAVANAGH, J., concurs.

Notes:

[1] The breech of a shotgun is the handle and firing mechanism.

[2] Unpublished opinion per curiam of the Court of Appeals, decided September 11, 1987 (Docket Nos. 92512, 93975).

[3] People v. Medley, 430 Mich. 858, 420 N.W.2d 567 (1988); People v. Hill, 430 N.W.2d 858, 420 N.W.2d 568 (1988).

[4] M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2) provides:

"(1) A person shall not manufacture, sell, offer for sale, or possess a short-barreled shotgun or a short-barreled rifle.

"(2) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 5 years, or a fine of not more than $2,500.00, or both.

"(3) The provisions of this section shall not apply to the sale, offering for sale or possession of a short-barreled rifle or a short-barreled shotgun which the secretary of the treasury of the United States of America, or his delegate, pursuant to USC title 26, sections 5801 through 5872, or USC title 18, sections 921 through 928, has found to be a curio, relic, antique, museum piece or

collector's item not likely to be used as a weapon, but only if the person selling, offering for sale or possessing the firearm has also fully complied with the provisions of sections 2 and 9 of Act No. 372 of the Public Acts of 1927, as amended, being sections 28.422 and 28.429 of the Michigan Compiled Laws.

"The provisions of section 20 of chapter 16 of Act No. 175 of the Public Acts of 1927, as added by Act No. 299 of the Public Acts of 1968, being section 776.20 of the Michigan Compiled Laws, are applicable to this subsection."

[5] M.C.L. Sec. 750.222(e); M.S.A. Sec. 28.419(e) provides:

" 'Short-barreled shotgun' means a shotgun having 1 or more barrels less than 18 inches in length or a weapon made from a shotgun, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches."

[6] M.C.L. Sec. 750.222(d); M.S.A. Sec. 28.419(d) provides:

" 'Shotgun' means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single function of the trigger."

[7] M.C.L. Sec. 8.3t; M.S.A. Sec. 2.212(20) provides:

"The word 'firearm,' except as otherwise specifically designed in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air."

[8] The words of a penal statute should be read in a sense that best harmonizes with the overall context of the statute and the end sought to be achieved. With criminal statutes, the end is the evil sought to be corrected and the objects of the law sought to be effectuated. People v. Hall, 391 Mich. 175, 190, 215 N.W.2d 166 (1974). See also People v. Goolsby, 284 Mich. 375, 379, 279 N.W. 867 (1938) (construction or interpretation of a penal statute requires consideration of the evil sought to be penalized).

[9] 0ther panels holding that the operability of a firearm is not necessary for the prosecution of a felony-firearm charge include: People v. Garrett, 161 Mich.App. 649, 411 N.W.2d 812 (1987), lv. den. 430 Mich. 856 (1988); People v. Poindexter, 138 Mich.App. 322, 361 N.W.2d 346 (1984); People v. Brooks, 135 Mich.App. 193, 353 N.W.2d 118 (1984); People v. Broach, 126 Mich.App. 711, 337 N.W.2d 642 (1983).

[10] This follows the longstanding rule that a gun need not be loaded to violate the statute which prohibits the carrying of concealed weapons. People v. Williamson, 200 Mich. 342, 349-350, 166 N.W. 917 (1918).

See note, The inoperable gun as a dangerous weapon under Michigan's felonious assault statute: People v. Stevens, 1981 Det.Col.L.R. 909, 921:

"The term 'firearm' is written into the statutory definition of pistol. The court's announcement under the concealed weapon statute that both inoperable and unloaded guns are pistols implies that they are also firearms, even though they lack ability to propel a projectile."

[11] The text of CJI 11:1:09 reads:

"A gun [revolver/pistol] which is so [out of repair/disassembled with parts missing/welded together/plugged with lead] that it is totally inoperable as a firearm and cannot be readily repaired is not included within the statute under which the defendant is charged."

[12] As defendant Medley points out in his brief, one concern addressed by the Legislature when it enacted the short-barreled shotgun statute is the extreme danger inherent in discharging the gun because of the "wide pattern of bullet distribution...." However, defendant Medley also concedes that the legislative history also suggests "concern that the sawed-off shotgun is easily concealable."

[13] In part II(B), we cite the Court of Appeals cases for the purpose of observing how the Court has interpreted the statutory definition of "firearm." We do not purport to interpret the concealed weapon statute or the felony-firearm statute.

[14] The Court based its decision on In re Vaughn, 160 Mich.App. 236, 238, 408 N.W.2d 85 (1987), lv. den. 428 Mich. 922 (1987), where it was held that three defendants could not be charged with possession of one shotgun when "each possessed different parts of a disassembled shotgun which, without the other parts, were incapable of firing a dangerous projectile."

[15] For the enumerated statutory exceptions to this law, see n. 4.

[1] "[I]f the evidence suggests two or more defendants acting in concert." Majority, p. 143.

[2] M.C.L. Sec. 750.224b; M.S.A. Sec. 28.421(2).

[3] Majority, p. 146.

[4] Id., p. 143.

[5] Id., p. 147.

[6] This Court, in a prosecution for armed robbery, said:

"We think it clear from that history that when enacted the words 'dangerous weapon,' etc., contemplated that the defendant would actually have a dangerous weapon; this is implicit in the phrase 'with intent, if resisted, to kill or maim.' The elimination of the 'with intent' requirement reduced the prosecutor's burden of proof, but does not provide a basis for construing the section as no longer requiring that the defendant actually have a dangerous weapon or an article used or fashioned in a manner to lead the persons so assaulted to reasonably believe it to be a dangerous weapon.

"It is not enough that the person assaulted is put in fear; a person who is subjected to an unarmed robbery may be put in fear.

"To constitute armed robbery the robber must be armed with an article which is in fact a dangerous weapon--a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon." People v. Parker, 417 Mich. 556, 564-565, 339 N.W.2d 455 (1983).

[7] Majority, p 145.

[8] M.C.L. Sec. 750.227; M.S.A. Sec. 28.424.

[9] Majority, p 145.

[10] See n. 7.

[11] The opinion of the Court refers to Michigan Criminal Jury Instructions (CJI 11:1:09), providing that a gun that is "totally inoperable as a firearm and cannot be readily repaired" may not be the basis of a charge of carrying a concealed weapon.

I also note that the opinion of the Court states that in citing decisions of the Court of Appeals this Court "do[es] not purport to interpret the concealed weapon statute or the felony firearm statute." Majority, p. 146, n. 13.

There is a significant difference between simply carrying or possessing a weapon, which a law-abiding, or otherwise lawabiding, person might do, and carrying, possessing, or brandishing a weapon during the course of the commission of a criminal offense. That difference may properly be considered in deciding the correct construction and operative effect of the diverse statutes proscribing, with various other qualifications and limitations, the carrying, possessing, or using of weapons.

[12] Majority, p. 147.

[13] See People v. Talley, 410 Mich. 378, 386, 301 N.W.2d 809 (1981).

[14] See M.C.L. Sec. 766.12; M.S.A. Sec. 28.930; People v. King, 412 Mich. 145, 153, 312 N.W.2d 629 (1981); People v. Talley, supra, 410 Mich. p. 386, 301 N.W.2d 809.

[1] (1) A person shall not manufacture, sell, offer for sale, or possess a short-barreled shotgun or a short-barreled rifle.

(2) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 5 years, or a fine of not more than $2,500.00, or both.

(3) The provisions of this section shall not apply to the sale, offering for sale or possession of a short-barreled rifle or a short-barreled shotgun which the secretary of the treasury of the United States of America, or his delegate, pursuant to U.S.C. title 26, sections 5801 through 5872, or U.S.C. title 18, sections 921 through 928, has found to be a curio, relic, antique, museum piece or collector's item not likely to be used as a weapon, but only if the person selling, offering for sale or possessing the firearm has also fully complied with the provisions of sections 2 and 9 of Act No. 372 of the Public Acts of 1927, as amended, being sections 28.422 and 28.429 of the Michigan Compiled Laws.

[2] As indicated on pages 141-142 of the lead opinion, the charges against defendant Medley were dismissed.

[3] But see 18 U.S.C. Sec. 921 of the National Firearms Act which provides:

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than twenty-six inches.

[4] The majority cites People v. Terry, 124 Mich.App. 656, 335 N.W.2d 116 (1983), which, though dealing with a firearm, did not address the situation presented at bar, i.e., unassembled firearms.
