STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PHILLIP WEEMS,

Defendant-Appellee.

UNPUBLISHED
July 9, 1996

No. 190390
LC No. 94-005961

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Upon remand from our Supreme Court, we consider plaintiff's appeal as on leave granted from an order dismissing charges of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.549. Defendant pleaded guilty to a lesser charge of careless, reckless or negligent use of a firearm, death resulting, MCL 752.861; MSA 28.436(21), and was sentenced to three years probation. We vacate both the order and defendant's conviction, and reinstate the charges.

Defendant was originally charged with second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm for the fatal shooting of his brother-in-law, Kevin Padgett. The district court declined to bind defendant over on second-degree murder but instead bound him over on manslaughter and felony-firearm charges. Defendant thereafter moved to quash the information in recorder's court. The recorder's court found that the district court abused its discretion in binding defendant over on manslaughter. However, rather than dismissing the case, the recorder's court added the charge to which defendant pleaded guilty.[1]

Plaintiff contends that the trial court erred in granting defendant's motion to quash the information charging defendant with manslaughter. We review the trial court's decision de novo, and determine whether the examining magistrate abused her discretion in binding defendant over on charges. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). The examining magistrate must

* Circuit judge, sitting on the Court of Appeals by assignment.

bind the defendant over if there is evidence of each element of the offense and probable cause to believe that the defendant was the person who committed the crime. *People v Kieronski,* 214 Mich App 222, 228-229; 542 NW2d 339 (1995). While the prosecutor is not required to provide proof beyond a reasonable doubt, there must be evidence of each element of the crime or evidence from which the elements may be inferred. *Id.*; *McBride, supra* at 681. If evidence conflicts or raises a reasonable doubt, the defendant should be bound over and the issue should be resolved by the trier of fact. *People v Selwa,* 214 Mich App 451, 456-457; 543 NW2d 321 (1995). When reviewing the bindover decision, this Court may not substitute its judgment for that of the examining magistrate. *Id.* at 456.

The central issue in the bindover decision was whether defendant acted in self-defense. "Self-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm." *People v George,* 213 Mich App 632, 634-635; 540 NW2d 487 (1995). Inasmuch as the district court elected to bind defendant over rather than dismissing the case, it implicitly found that there was a factual question regarding whether defendant acted in self-defense.[2] The only explanation for the bindover decision is that the district court concluded that there was a factual question regarding "imperfect self-defense," i.e. whether defendant had an unreasonable belief of imminent danger or used excessive force. In doing so, the district court considered a form of "imperfect self defense" that is not recognized in Michigan.

This Court has specifically declined to extend the doctrine of imperfect self-defense to circumstances where a defendant has an unreasonable belief of imminent danger or used excessive force. *People v Deason,* 148 Mich App 27, 32; 384 NW2d 72 (1985); see also *People v Kemp,* 202 Mich App 318, 325 n 2; 508 NW2d 184 (1993) (Reilly, J., opinion). There are only two recognized forms of common law voluntary manslaughter. The first type "is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation before a reasonable time has passed for the blood to cool." *People v Hess,* 214 Mich App 33, 38; 543 NW2d 332 (1995). The second type, "imperfect self-defense," mitigates second-degree murder to voluntary manslaughter only "where the defendant would have been entitled to self-defense had he not been the initial aggressor." *People v Butler,* 193 Mich App 63, 67; 483 NW2d 430 (1992).

We nevertheless review the district court's finding regarding self-defense as it pertains to the recognized form of voluntary manslaughter because the district court's legal error favored defendant in that he was bound over on manslaughter rather than the greater offense of second-degree murder. Upon review of the evidence adduced at the preliminary examination, we find that the district court did not abuse its discretion in binding defendant over on manslaughter because the evidence created a reasonable doubt regarding whether defendant acted in self-defense. In his statement to police, defendant stated that he was unsure whether Padgett was armed at the time of the shooting. In fact, Padgett had discarded his handgun prior to being shot. Despite the prior threat by Padgett, defendant's fear of harm may have been unreasonable in light of the fact that Padgett was unarmed. We find that the district court's conclusion regarding this issue was not so palpably and grossly violative of fact and logic as to constitute an abuse of discretion. *Meredith, supra* at 410. Accordingly, we find that the trial

court erred in quashing the information because it substituted its judgment for that of the district court. *Selwa, supra* at 256.

We therefore vacate both the order quashing the information and defendant's conviction, and reinstate the charges. Because jeopardy does not attach when a plea and sentencing occur on a reduced charge and the basis for the reduction is later overturned on appeal, double jeopardy does not bar prosecution on manslaughter. *People v Howard*, 212 Mich App 366, 370; 538 NW2d 44 (1995); *People v Vasquez*, 129 Mich App 691, 695; 341 NW2d 873 (1983).

Reversed and remanded

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin.

[1] We note that the addition of the lesser offense of careless, reckless discharge of a firearm, causing death was improper because upon finding that defendant acted in self-defense, the trial court should have dismissed the case because the killing was a justifiable homicide. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993).

[2] Given this finding, the district court should have bound defendant over on second-degree murder because if defendant did not act in self-defense, the unjustified intentional killing would be murder. See *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991) (the offenses of manslaughter and murder share the element of being intentional killings; it is the element of provocation that distinguishes the offenses); *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1992). Nevertheless, this error is not before this Court because the prosecution failed to appeal from the examining magistrate's bindover decision. See *People v Geocke*, __ Mich App __; __ NW2d __ (Docket No. 177417, issued 2/27/96) slip op pp 2-3 (absent a proper appeal of the bindover decision, the circuit court has no jurisdiction to reinstate the original charge). We are therefore limited to reinstating the lesser charge of voluntary manslaughter.