

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AGUSTIIN SHQALSI,

Defendant-Appellant.

UNPUBLISHED

January 16, 2001

No. 217293

Oakland Circuit Court

LC No. 98-158868-FH

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Defendant Agustiin Shqalsi appeals as of right from a jury conviction of first-degree retail fraud,¹ for which he was sentenced to thirty days in jail or a \$1,000 fine. Shqalsi rejected an offer to plead guilty to the misdemeanor offense of second-degree retail fraud.² We affirm.

I. Basic Facts And Procedural History

Michael Tiernan, Kmart's loss control manager at the Waterford store, testified that he was working on February 6, 1998. While walking through the store, he saw Shqalsi remove a toy car from its box, replace it with a boxed stereo CD player, and tape the box closed. Shqalsi placed the box in his shopping cart and proceeded to another area where he discarded the roll of tape. After adding a bottle of windshield washer fluid to the cart, Shqalsi went to the checkout lane, paid for the items, and left the store. Tiernan stopped Shqalsi outside and brought him and the toy car box back into the store. Inside the toy car box was the CD player, which was priced at \$349.99. The cash register receipt showed that Shqalsi paid \$38.99, the price marked on the toy car box.

Shqalsi testified that he went to the store to buy the toy car for his children. Shqalsi stated that already owned two stereos and had no interest in having a third. He denied seeing a stereo in the toy car box and denied stealing anything from the store.

¹ MCL 750.356c; MSA 28.588(3).

² MCL 750.356d; MSA 28.588(4).

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

Following closing arguments and instructions, the jury retired to deliberate. Within ten minutes, it returned a verdict finding Shqalsi guilty as charged.

II. Statutory Provisions

At the time the crime was committed and at the time Shqalsi was tried, the retail fraud statute³ provided in pertinent part:

(1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the first degree, a felony punishable by imprisonment for not more than 2 years, or a fine of not more than \$1,000.00, or both:

(a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale, with the intent not to pay for the property or to pay less than the price at which the property is offered for sale, if the resulting difference in price is more than \$100.00.^[4]

The statute was amended to provide:

(1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the first degree, a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00 or 3 times the value of the difference in price, property stolen, or money or property obtained or attempted to be obtained, whichever is greater, or both imprisonment and a fine:

(a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale, with the intent not to pay for the property or to pay less than the price at which the property is offered for sale, if the resulting difference in price is \$1,000.00 or more.^[5]

The amendment took effect January 1, 1999, approximately two weeks before Shqalsi was sentenced.

³ MCL 750.356c; MSA 28.588(3).

⁴ If the difference was less than \$100, the crime was second-degree retail fraud, a crime punishable by up to 93 days in jail, a \$100 fine, or both. MCL 750.356d(1)(a); MSA 28.588(4)(1)(a).

⁵ If the difference in price was more than \$200 but less than \$1,000, the crime was second-degree retail fraud, “a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00 or 3 times the value of the difference in price, property stolen, or money or property obtained or attempted to be obtained, whichever is greater, or both imprisonment and a fine.” MCL 750.356d(1)(a); MSA 28.588(4)(1)(a).

III. The Guilty Plea Offer

A. Argument

Shqalsi contends that because his crime would have been a misdemeanor under the amended statute, the plea bargain was illusory. In other words, Shqalsi argues that he was offered no consideration for a plea because the prosecutor “was offering exactly what the law would require if Mr. Shqalsi had been arrested on January 1, 1999.” Given that plus the fact that the Legislature subsequently determined that it is no longer reasonable to classify a \$311 crime as a felony, Shqalsi argues that he should be given a new trial under the amended statute or the judgment of sentence should be amended to reflect conviction of the misdemeanor offense.

B. Standard of Review

Because Shqalsi’s arguments raise questions of law, including whether to apply a statute retroactively, our review is *de novo*.⁶

C. Evaluating Pleas And Plea Offers

Because a guilty plea must be knowingly, intelligently, and voluntarily made,⁷ “[a] guilty plea will be invalidated if it is involuntary as a matter of law because the bargain on which the plea was based was illusory.”⁸ A plea bargain may be illusory where the defendant pleads guilty to a lesser offense to avoid conviction of a greater offense but was improperly charged with and could not have been convicted of the greater offense.⁹ Thus, it is the illusory nature of the bargain that renders the plea involuntary and entitles the defendant to relief. However, we are not aware of any authority that entitles a defendant to relief because he *rejected* an illusory plea bargain, and Shqalsi failed to provide us with any legal support for this argument.

D. The Effect Of Amendment To The Statute

Shqalsi’s underlying premise – that he was entitled to be prosecuted and sentenced under the amended statute – is also without merit. The sentence or punishment that is prescribed by the statute in force at the time the crime was committed must be imposed; an amendment of a criminal statute concerning sentence or punishment is not retroactive.¹⁰ In fact, MCL 8.4a; MSA 2.214 provides that “[t]he repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty . . . incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty” In other words, “unless there is a specific provision voiding a

⁶ *People v Webb*, 458 Mich 265, 274-275; 580 NW2d 884 (1998).

⁷ MCR 6.302; *People v Peter Williams*, 153 Mich App 346, 350; 395 NW2d 316 (1986).

⁸ *People v Mrozek*, 147 Mich App 304, 306-307; 382 NW2d 774 (1985).

⁹ *Id.* at 308.

¹⁰ *People v Poole*, 7 Mich App 237, 243; 151 NW2d 365 (1967).

former law, any actions pending on the effective date of a new law are saved.”¹¹ Nothing in the amendment of the retail fraud statutes to release or relinquish the repealed portions, so the subsequent change in the law under which Shqalsi was prosecuted and convicted did not affect these proceedings.¹²

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

¹¹ *People v Gravedoni*, 172 Mich App 195, 197; 431 NW2d 221 (1988).

¹² *Id.* at 197-198; *People v Dickerson*, 17 Mich App 201, 203; 169 NW2d 336 (1969).