STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAC JAMES NICHOLS,

Defendant-Appellant.

UNPUBLISHED
February 24, 1998

No. 197510
Cheboygan Circuit Court
LC No. 95-001328 FH

Before: Markey, P.J., and Doctoroff and Smolenski, JJ.

PER CURIAM.

Pursuant to a plea bargain involving sentence concessions under the rule of *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), defendant pleaded guilty to driving while under the influence of intoxicants and causing serious impairment of body function, MCL 257.625(5); MSA 9.2325(5)(A). In exchange for his plea, the prosecution agreed to recommend a minimum sentence of not more than twelve months of incarceration. However, at sentencing, the prosecution announced that at the time it entered into the plea agreement, it was unaware that defendant had two prior felony convictions, that he was on probation for these felonies at the time of the present offense, and that this offense violated a probationary condition precluding the consumption of alcohol. The trial court, after reflection, concluded that it could not adhere to the *Cobbs* bargain, and after allocution imposed a sentence of three to five years' imprisonment. The court allowed defendant until the end of the day to exercise his absolute right to withdraw the plea under *Cobbs*. Apparently defendant chose not to do so, and a judgment of sentence to this effect was duly entered.

Some months later, defendant, represented by new counsel, sought to withdraw his plea, claiming ineffective assistance of counsel in conjunction with the exercise of his right under *Cobbs* to withdraw his plea. Defendant claimed that counsel had originally advised him to not withdraw his plea in order to avoid the possibility that he could be charged as an habitual offender. In his motion to withdraw, defendant claimed that recidivist charges were no longer available due to time limitations in recently amended MCL 769.13(1); MSA 28.1085(1). Defendant also contended that the court considered inaccurate information at sentencing. The trial court denied defendant's motion to withdraw

the plea, and this Court then granted defendant's delayed application for leave to appeal. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Under MCL 769.13(1); MSA 28.1085(1), the prosecuting attorney may seek to enhance a defendant's sentence as an habitual offender by filing a notice of intent to do so within 21 days after defendant's arraignment on the information charging the underlying offense, within 21 days after the filing of the information if arraignment is waived, or after conviction on plea of guilty or nolo contendere if the plea were entered within the 21 days allowed for filing of the notice of intent to seek an enhanced sentence. Here, defendant's plea was entered more than 21 days after the arraignment on the information. Accordingly, he contends that, under the "bright line" test established by the statute, it was too late for the prosecutor to charge him as an habitual offender, and thus he received the ineffective assistance of counsel in conjunction with his original attorney's advice not to withdraw his plea. *People v Ellis*, 224 Mich App 752, 755-756; 569 NW2d 917(1997); *People v Bollinger*, 224 Mich App 491, 491-493; 569NW2d 646 (1997); See *People v Mrozek*, 147 Mich App 304, 306-308; 382 NW2d 774 (1985).

Here, although the statute sets an explicit time limit, that time limit applies to a public officer, the prosecutor, whose duty it is to protect the public interest. Time limits in statutes of this nature are generally directory, in the absence of language denying performance after the specified time. 3 Sutherland, Statutory Construction, § 57.19, p 47 (5th Ed). The statute appears to codify prior case law, except for establishing a 21 day rather than 14 day rule, for the filing of a notice of intent to seek an enhanced sentence (previously, a task accomplished by the filing of the supplemental information). The case law indicated that the prosecution would be foreclosed from pursuing habitual offender charges if it had timely knowledge of the existence of requisite prior convictions; further, prosecutors were presumed to know of prior felony convictions if their respective offices had prosecuted those cases.

On the other hand, where as here the prior convictions had been prosecuted in other jurisdictions and there was no evidence that the prosecutor was aware of such prior felony record until the time of sentencing, so long as the prosecutor proceeded with due diligence after the information came to light, a late filing was permissible. *People v Borney*, 110 Mich App 490, 498-499; 313 NW2d 329 (1981). That rule applies here. The prosecutor explained at sentencing how it was that at least one of defendant's prior felonies had not been known despite diligent inquiry using generally accepted procedures which usually bring such criminal records to light. There is no evidence that the prosecutor was less than diligent. Even if the prosecutor knew of one of defendant's prior convictions, that might well have not prompted the prosecutor, in his discretion, to pursue a second offender charge, but once apprised that defendant is a third offender, and that this third offense was committed in violation of two probationary sentences, the prosecutor was entitled anew to consider the propriety of seeking sentence enhancement. Accordingly, the advice given defendant by his first attorney, assuming arguendo that defendant's ex parte representations are the reason for his failure to invoke his *Cobbs* rights to withdraw the plea at the time of the original sentencing, was well within the range of competence demanded of criminal defense attorneys and does not constitute the ineffective assistance of counsel warranting relief from the judgment. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant also contends that his attorney was ineffective in failing to object to numerous inaccuracies in the presentence report. The errors involve the number of defendant's children, whether he started smoking marijuana at age ten or age fifteen, whether he denied or admitted being an alcoholic, and whether the presentence investigator's interpretation of a statement defendant made was incorrect. At the time of sentencing, defendant's counsel indicated that he had reviewed the presentence report with his client, and although some corrections were offered, there was no objection to any of these matters. Most of these matters are obviously irrelevant, both facially and because the trial court at sentencing made no mention of them. Further, these points are of such tangential materiality that a minimally competent criminal defense attorney could conclude that there would be nothing to be gained by bringing such matters to the court's attention, inasmuch as other factors were of far more import to the sentencing process. *Pickens*, *supra*. But even if counsel were derelict in this respect, because the trial court made no mention of such matters in explaining the reason for the sentence imposed, defendant has failed to establish the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel. *Id*.

Affirmed.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski