

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DOBBEN,

Defendant-Appellant.

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UNPUBLISHED

January 11, 2002

No. 225888

Muskegon Circuit Court

LC No. 99-043460-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625, and receiving and concealing stolen property worth at least \$200 but less than \$1000, MCL 750.535(4)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to an enhanced term of forty-six months to twenty years' imprisonment for the OUIL conviction, and a concurrent term of twelve months for the receiving and concealing conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his sentences must be vacated because the prosecutor failed to timely file a notice that he intended to seek habitual offender enhancement of defendant's sentences. Whether the undisputed actions of the prosecutor in this case satisfied the statutory requirements regarding habitual offender enhancements constitutes a question of law that we review de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Defendant challenges the prosecutor's adherence to the procedural requirements found within MCL 769.13, which provides in relevant part as follows:

(1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, *by filing written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.*

(2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. *The notice shall be filed with*

*the court and served upon the defendant or his or her attorney within the time provided in subsection (1).* The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecutor shall file a written proof of service with the clerk of the court. [Emphasis added.]

As this Court has recognized, service of the notice of intent within twenty-one days constitutes a bright line rule that precludes a prosecutor who serves the notice of intent beyond this period from seeking habitual offender enhanced terms. *People v Morales*, 240 Mich App 571, 574-576; 618 NW2d 10 (2000); *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997).

The prosecutor first indicated his intent to seek habitual enhanced sentences for defendant within the initial “Felony Complaint”<sup>1</sup> and the felony warrant by incorporating the following language:

#### NOTICE OF INTENT TO SEEK ENHANCED SENTENCE

Take notice that the defendant was previously convicted of three or more felonies or attempts to commit felonies in that on or about June 12, 1984, he or she was convicted of the offense of UDAA in the County of Newaygo County, State of Michigan;

And that on or about July 7, 1994, he or she was convicted of the offense of OUIL 3<sup>rd</sup> in the County of Muskegon, State of Michigan;

And that on or about June 11, 1992, he or she was convicted of the offense of OUIL 3<sup>rd</sup> in the County of Muskegon, State of Michigan;

Therefore, defendant is subject to the penalties provided by MCL 769.12, MSA 28.1084.

#### HABITUAL OFFENDER—FOURTH OFFENSE NOTICE (769.12)

**PENALTY:** Life if primary offense has penalty of 5 years or more; 15 years or less if primary offense has penalty under 5 years.

At his May 17, 1999 district court arraignment, defendant affirmatively expressed his understanding that he was being charged as a fourth habitual offender on the basis of the above-listed felonies. In a written waiver signed on May 28, 1999 and filed on June 2, 1999, defendant and his attorney each indicated their agreement to waive any preliminary examination of the charges against defendant. The waiver form listed “Habitual 4<sup>th</sup>” as one of the charges against him.

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<sup>1</sup> The complaint was sworn on May 15, 1999, and filed in the circuit court on June 2, 1999.

On June 3, 1999, the prosecutor filed in the circuit court a felony information against defendant that included verbatim the same (1) notice of intent to seek enhancement of defendant's sentence pursuant to MCL 769.12, (2) list of defendant's prior convictions, and (3) notice of potential penalties under MCL 769.12, that had appeared in the initial complaint and warrant. On June 7, defendant's waiver of arraignment on the felony information was filed. Within this document, defendant and his counsel expressly acknowledged that they had "received a copy of the Information and/or Supplemental Information filed in this case," that "defendant has read the Information(s), or had it read or explained to him[]," and that defendant and his counsel each understood "the substance of the charge(s)." Defendant waived his circuit court arraignment, and indicated his intent to stand mute to the charges and his wish that the circuit court enter a not guilty plea.

After reviewing these facts, which defendant does not dispute, we find that the prosecutor timely filed his notice of intent to seek habitual offender enhancement. By incorporating into the information filed in the circuit court the notice of intent to seek enhancement under MCL 769.12 and information regarding the prior convictions of defendant on which the prosecutor intended to rely, the prosecutor clearly complied with the statutory directive to file a written notice of intent to seek enhancement within 21 days of the filing of the circuit court information.<sup>2</sup> MCL 769.13(1), (2). Furthermore, although the record does not substantiate the precise manner of service, defendant acknowledged in the June 7 waiver he executed concerning his circuit court arraignment that the prosecutor provided defendant and his counsel with a copy of the circuit court information that contained the notice of intent to seek enhancement well within twenty-one days of the information's filing. MCL 769.13(1), (2).

We note that while defendant repeatedly suggests that the prosecutor did not file a "notice of intent," defendant apparently intends to attack the prosecutor's allegedly untimely filing of a "proof of service" of the notice of intent on defendant. The prosecutor failed to file a written proof of service with the court until August 1999. Although the prosecutor's notice of intent to seek enhancement clearly must be filed within twenty-one days of the filing of the information, MCL 769.13 does not require that the proof of service likewise must be filed within this time frame. In *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999), this Court rejected a defendant's claim that the prosecutor's failure to ever file a proof of service of a notice of intent to enhance his sentence violated his federal and state constitutional rights. The Court found that even assuming that the prosecutor never filed the proof of service, this failure did not constitute a violation of the defendant's due process rights. *Id.* The Court observed that in light of the fact that the defendant made no claim that he did not receive the notice of intent to enhance, any error arising from the missing proof of service qualified as harmless beyond a

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<sup>2</sup> While defendant asserts on several occasions that the prosecutor had to file an independent notice of his intent to seek enhancement, we note that MCL 769.13 plainly does not contain such a requirement. See *Morales, supra* at 583 (noting that "the prosecutor is no longer required to file a supplemental information"). Furthermore, defendant cites no authority for the proposition that the notice of intent must appear in a document separate from the felony information. See *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.").

reasonable doubt because the lack of a proof of service “in no way prejudiced [the] defendant’s ability to respond to the habitual offender charge.” *Id.* at 314-315.

We likewise find in this case that because the prosecutor undisputedly filed with the court and provided defendant and his counsel the notice of intent to seek enhancement, which listed defendant’s prior felony convictions that the prosecutor intended to utilize, well within twenty-one days of the filing of the information in the circuit court, the mere untimely filing of the proof of service alone in no way prejudiced defendant’s ability to respond to the habitual offender charge. *Walker, supra* at 315. We reiterate that defendant acknowledged his understanding of the notice of intent to seek enhancement as early as May 17, 1999 and has never challenged the adequacy of the notice of intent itself or argued that he experienced any prejudice, i.e., lack of notice, arising from any of the prosecutor’s allegedly improper actions in this case.

Even were we to view the instant proof of service filing as somehow untimely and violative of MCL 769.13, any error would qualify as harmless under MCR 6.112(F). As it existed at the time of the underlying events, this rule provided that “[a]bsent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing (*except of an habitual offender information*).” MCR 6.112(F).<sup>3</sup> While the rule contemplates an error requiring reversal the untimely filing of the habitual offender information, otherwise known as the notice of intent to seek enhancement, the rule says nothing regarding an untimely filed proof of service. Because defendant offers no allegation whatsoever that he experienced any prejudice arising from the allegedly tardily filed proof of service, the later filing of the proof of service did not constitute error requiring reversal.

Defendant next argues that the trial court erroneously read a special jury instruction regarding “operating” proffered by the prosecutor and improperly instructed the jury concerning a city ordinance inapplicable to defendant’s case. This Court reviews de novo claims of instructional error by considering the instructions as a whole to determine whether error requiring reversal has occurred. The instructions must include all elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant’s rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

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<sup>3</sup> Effective October 3, 2000, the subrule presently states as follows:

Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. *This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.* [MCR 6.112(G) (emphasis added).]

The staff comment to this rule states that the October 3, 2000 amendment, which changed the phrase “habitual offender information” to “notice of intent to seek an enhanced sentence,” “made the court rule consistent with MCL 769.13.”

The trial court instructed the jury regarding the operating element of OUIL that “[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.” The instruction mirrored language set forth by the Michigan Supreme Court in *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), in which the Court rejected a prior holding that tended to suggest that an unconscious individual could not operate a motor vehicle. We find the trial court’s utilization of a *Wood*-based instruction relevant and entirely appropriate in this case in which defendant was found unconscious inside a running motor vehicle that was parked several feet away from a curb. The instruction aided the jury in determining whether defendant could have operated the vehicle while unconscious. Contrary to defendant’s argument, the instruction did not shift the burden of proof because the jury still had to conclude whether defendant was drunk and unconscious, whether he operated the vehicle, and whether he placed it in a position that created a significant risk of collision.

Furthermore, in light of the facts of this case and defendant’s argument that he could not have been operating a motor vehicle because the testimony at trial established that the vehicle was parked when the police arrived, we conclude that the trial court properly instructed the jury regarding a Muskegon city code section providing that an individual who parks a vehicle beyond twelve inches from a curb has committed a civil infraction. The instruction simply clarified what constituted a valid parking spot. No one argued that a violation of the ordinance per se amounted to placing a vehicle in a position posing a significant risk of causing a collision, and the trial court explicitly directed the jury not to consider whether any ordinance violation had occurred but only to utilize the ordinance for “the limited purpose of determining whether the Defendant was operating a vehicle.”

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter