

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
July 29, 2014

v

FATEEN ROHN MUHAMMAD,

Defendant-Appellee.

No. 317054
Ingham Circuit Court
LC No. 13-000161-FH

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

BORRELLO, J., (*dissenting*).

In this interlocutory appeal, the prosecution appeals by leave granted the trial court's order dismissing a habitual offender notice for failure to timely serve the notice on defendant. My colleagues in the majority would hold that the harmless error rule, codified in statute, MCL 769.26 and court rule, MCR 2.613(A) applies to errors in the application of MCL 769.13(2). Accordingly, they would we reverse. While I find no fault in the reasoning behind their application of the afore-cited harmless error rule to MCL 769.13(2), I respectfully dissent because I believe we, like the trial court, are bound by our Supreme Court's order in *People v Cobby*, 463 Mich 893; 618 NW2d 768 (2000).

This Court, in *People v Cobby*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 1999 (Docket No. 204155) had a virtually identical factual scenario as is presented in this case. In *Cobby*, this Court made the following specific findings and conclusions of law relevant to this issue:

We conclude that although the prosecutor's failure to serve notice upon defendant was technically a violation of the statute, such error was harmless because defendant had actual notice of this filing well before trial, and he did not suffer any prejudice by the lack of service.

It is undisputed that the prosecutor filed timely notice of his intent to seek an enhanced sentence based upon defendant's habitual offender status. In addition, the record indicates that the prosecutor informed the court, defendant and defense counsel at the arraignment that he "will be filing a supplemental information alleging him as a fourth time habitual offender." In fact, defense counsel did not contest that he received actual notice of the prosecutor's intent to file the supplemental information well in advance of trial, nor did he contest that

the habitual offender charge was a factor that was used in ongoing plea negotiations. The proof of service requirement in MCL 769.13(2) . . . is designed to ensure that a defendant promptly receives notice of the potential consequences of an habitual offender charge should he be convicted of the underlying offense. . . . Thus, where there is no dispute that defendant was actually aware of the prosecutor's intent to file the habitual information, we conclude that defendant was not prejudiced by the prosecutor's noncompliance with the statute. [*Cobley*, unpub. op at 1-2 (citations and footnote omitted.)]

In lieu of granting leave to appeal, our Supreme Court remanded the matter to the trial court instructing the trial court that the defendant's fourth habitual offender status was vacated "because the prosecutor has not proven that the notice of sentence enhancement was served on defendant within twenty-one days after the defendant was arraigned." *Cobley*, 463 Mich at 893. As stated by the majority, an order of our Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, n 6; 560 NW2d 360 (1996). Clearly, this Court in *Cobley* based its affirmance of the defendant's fourth habitual status on the harmless error rule. MCL 769.26. Our Supreme Court rejected application of the harmless error rule to violations of MCL 769.13(2) when the prosecutor cannot prove that the notice of sentence enhancement was served on the defendant within the statutory timeframe. Most assuredly in *Cobley*, had our Supreme Court been of the opinion that a violation of MCL 769.13(2) was subject to the harmless error rule, it would have so stated. Instead, the Court reversed this Court's decision, which was based on the very same rationale the majority relies on in this case.

This issue arose again in the case of *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2012 (Docket No. 304273). In *Johnson*, this Court found that the prosecution timely filed the original information on September 28, 2006. The trial court arraigned the defendant on October 13, 2006 and on February 23, 2007, the prosecutor filed a motion seeking to amend the supplemental information based on a realization that the dates and convictions listed pertaining to sentencing enhancement were incorrect. This Court, citing its prior decision in *People v Walker*, 234 Mich App 299, 314; 593 NW2d 673 (1999), held as follows:

Similar to the factual circumstances of *Walker*, [the defendant] makes no claim that he did not receive the notice of intent to enhance but simply contends that the [order permitting amendment of the supplemental information] was not filed with the lower court. If true, this in no way prejudiced defendant's ability to respond to the habitual offender charge. Specifically, a prosecutor's failure to strictly follow the statute does not necessarily offend due process, if in fact a defendant has received actual notice. [*Johnson*, unpub op at 8 (quotation marks and citations omitted).]

The defendant in *Johnson* applied for leave to appeal in our Supreme Court, which held:

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we AFFIRM the result reached in the June 21, 2012 judgment of the Court of Appeals. Defendant was given timely notice of his enhancement level and had sufficient prior convictions to support a fourth habitual enhancement. Relief is

barred by MCL 769.26 because there was no miscarriage of justice when the trial court allowed the prosecution to amend the notice to correct the convictions or when it sentenced defendant as a fourth habitual offender. In addition, affirming defendant's sentence as a fourth habitual offender is not inconsistent with substantial justice. MCR 2.613(A). [*People v Johnson*, 495 Mich 919; 840 NW2d 373 (2013).]

While our Supreme Court affirmed this Court's result in *Johnson*, it specifically stated as one of its reasons for so finding was that "[d]efendant was given timely notice of his enhancement level" Such was not the case here. The prosecution admits, and the majority concedes, that defendant was not given timely notice pursuant to MCL 769.13(2). Therefore, while I have no quarrel with the majority's application of the harmless error rule to situations such as this where defendant had notice of the prosecutor's intent to file the enhancement, and where it appears the district court informed defendant that he would be facing enhanced charges, because there was no timely notice in this case, it is analogous to *Cobley* and not *Johnson*, and I believe we are bound by our Supreme Court to affirm the trial court's ruling.

/s/ Stephen L. Borrello