

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RYAN KADLEK,

Defendant-Appellant.

UNPUBLISHED

June 2, 2009

No. 285162

Midland Circuit Court

LC No. 07-003169-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant pleaded guilty to third-degree fleeing a police officer, MCL 257.602a(3)(a), and operating a motor vehicle while under the influence of a controlled substance, third offense, MCL 257.625(1)(a) and MCL 257.625(9)(c)(i). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to serve concurrent sentences of 36 to 120 months' imprisonment, and also advised defendant that he would not receive credit for the time he spent in jail in connection with this case because he was on parole when he committed the instant crimes. Defendant challenges by delayed leave granted his habitual offender status, and also the decision to deny jail credit. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In offering his guilty plea, defendant admitted that, in February 2007, in the City of Midland, he was driving a motor vehicle while intoxicated, and then attempted to flee when the police initiated a traffic stop.

Defendant conditioned his plea on his being able to challenge his habitual offender status on the ground that he received inadequate notice of the prosecutor's intent to subject him to enhanced sentencing as a habitual offender.

Defendant additionally argues that the trial court erred in declining to apply any jail credit to his instant sentences.¹ However, because defendant was advised that this would be the case

¹ While we recognize that our Supreme Court has granted leave to appeal in *People v Idziak*, 483 Mich 885; 759 NW2d 401 (2009) to review the authority of a trial court to award jail credit to parolees pursuant to MCL 769.11b, we find that the issue raised in defendant's appeal in this

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before he offered his plea and defendant did not condition his guilty plea on retaining the right to appeal on this basis, this issue is waived. See *People v New*, 427 Mich 482, 490-493; 398 NW2d 358 (1986) (a person convicted upon a guilty plea, but for conditions stated on the record, may raise on appeal only such theories as would preclude the state from obtaining a valid conviction); MCR 6.301(C)(2). We therefore consider the habitual offender challenge only.

A prosecutor may seek to subject a criminal defendant to enhanced sentencing as a habitual offender “by filing a 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.” MCL 769.13(1). Such notice, “shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement.” MCL 769.13(2). The statute further provides that such 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 prosecuting attorney shall file a written proof of service with the clerk of the court. [*Id.*]

In this case, defendant waived the preliminary examination and was arraigned on April 17, 2007. The felony complaint and felony information, both filed the next day, included notice that the prosecutor would be seeking enhanced penalties on the ground that defendant was a habitual offender, and listed with particularity five earlier convictions. In the brief on appeal, plaintiff concedes that “a proof of service of the Information was no[t] filed in the Circuit Court,” but argues that “the Complaint gave Defendant actual notice of the Prosecution’s intent to seek sentencing enhancement”

Failure to provide timely notice of intent to seek sentence enhancement under the habitual offender statute precludes such enhancement. *People v Morales*, 240 Mich App 571, 574-575; 618 NW2d 10 (2000). However, where there is no dispute that the defendant did in fact timely receive the required notice, the failure to file proof of notice may be harmless error. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999).

Defendant complains that the register of actions lists no filing of notice of intent to seek sentence enhancement, but does not otherwise argue, let alone cite authority for the proposition, that written notice for this purpose may not be accomplished by providing the requisite information as part of the felony complaint or information.

Because the latter documents in this instance satisfied the notice requirements of MCL 769.13, but for the lack of proof of service, and because defendant does not argue that he was in

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matter is distinguishable and not dependent on the resolution in *Idziak*.

fact not thereby apprised, in writing and within the required time, of the prosecutor's intent in this regard, defendant's challenge to his sentencing as a habitual offender must fail.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot