

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREVOR DANIEL PIOTROWSKI,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 228768

Bay Circuit Court

LC No. 99-001391-FH

Before: Jansen, P.J., and Zahra and Owens, JJ.

MEMORANDUM.

Defendant, acting *in propria persona*, appeals by delayed leave granted his conviction as a second habitual offender, MCL 769.10; MSA 28.1082. We affirm.

Defendant pleaded guilty of OUIL, third offense, MCL 257.625(7)(d); MSA 9.2325(7)(d), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced as a second habitual offender to concurrent prison terms of twenty-one months to ninety months and twenty-one months to thirty-six months, respectively, with credit for 155 days. The habitual offender charge was based on a prior conviction for failing to return rental property, MCL 750.362a; MSA 28.594(1). The property at issue was valued at approximately \$157. At the time of defendant's 1995 conviction, MCL 750.362a; MSA 28.594(1) provided that if the value of the property not returned exceeded \$100, the offense constituted a felony. 1998 PA 311, effective January 1, 1999, amended the statute to provide for graduated punishment based on the value of the property and the existence of prior convictions. The amended statute provides that if the value of the property not returned is less than \$1,000, the offense constitutes a misdemeanor.

Defendant argues that the trial court erred by using his prior conviction to convict him as a second habitual offender because the offense is now classified as a misdemeanor. He asserts that use of his prior conviction in this manner violates the *ex post facto* clauses of the United States and Michigan Constitutions. US Const, art 1, § 10, cl 1; Const 1963, art 1, § 10. Defendant also contends that he was deprived of the effective assistance of counsel at sentencing due to counsel's failure to object to the use of his prior conviction to enhance his sentence.

We disagree and affirm defendant's conviction as a second habitual offender and the sentence imposed pursuant to that conviction. A sentencing court may use a prior conviction of a crime that was classified as a felony at the time it was committed to enhance the sentence for a

subsequent felony conviction, even though the prior crime has been reclassified as a misdemeanor. *People v Odendahl*, 200 Mich App 539, 543-544; 505 NW2d 16 (1993). Defendant's prior conviction of failing to return rental property was a felony at the time he committed the offense; therefore, the trial court properly used it to sentence him as a second habitual offender. MCL 769.10; MSA 28.1082.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability that, but for the defective performance, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994); *People v Johnson*, 451 Mich 115, 124; 545 NW2d 63 (1996). Defendant's argument regarding the use of his prior conviction is without merit. Counsel does not render ineffective assistance by failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Donald S. Owens