STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 23, 2000
v	No. 222656 Wayne Circuit Court
BRUCE URBANSKI, Defendant-Appellee.	LC No. 99-006070

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Defendant was charged with attempted unlawful sale of a firearm to a felon, MCL 750.223(3); MSA 28.420(3); MCL 750.92; MSA 28.287. Prior to trial, the trial court entered an order granting defendant's motion to dismiss the charge without prejudice on the basis that the information was defective. The prosecution now appeals as of right, and we reverse.

I. Factual Background[1]

On April 2, 1999, Officers Larry Crider and Mark Osantowski of the Wayne County Sheriff's Department conducted an undercover sting operation at Pegos Gun Shop. Crider told defendant, who was working at the gun shop, that he was interested in a particular revolver in the display case. Defendant refused to take the revolver out of the case unless Crider produced a purchase permit. Crider responded that he could not get a permit because he had been arrested up north for having a firearm in his vehicle and he was still on probation. When Osantowski showed defendant a purchase permit matching his undercover identification, defendant removed the revolver from the case and gave it to Osantowski, telling Crider that he could not hold it.

Osantowski filled out the required paperwork for the purchase of the revolver. With respect to a question on the form asking whether Osantowski was the "actual purchaser," defendant told him that he could lie on the form and that it was none of his business. Crider removed government funds from his pocket and handed them to Osantowski in defendant's presence; Osantowski then gave the funds to defendant, completing the "straw purchase." Crider asked for ammunition, which defendant produced.

Defendant then handed both the weapon and the ammunition to Crider, advising him to carry the two items separately in his car.

II. Dismissal of the Charge on Ground of Defective Information

The prosecutor argues that the trial court erred in dismissing the charge against defendant on the ground the information was defective. Whether the information was insufficient to give defendant notice of the charge against him is a constitutional issue, which this Court reviews de novo. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

Pursuant to MCL 767.45(1); MSA 28.985(1), an indictment or information[2] must contain the following:

> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.
>
> (b) The time of the offense as near as may be. . . .
>
> (c) That the offense was committed in the county or within the jurisdiction of the court. . . .

" 'An information must be specific for two reasons: it affords the defendant due notice of the charges against him and protection against double jeopardy should he be retried.' " *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989), quoting *People v Covington*, 132 Mich App 79, 88; 346 NW2d 903 (1984) (Maher, J., concurring). A defendant's right to adequate notice of the charges against him stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment. *Darden*, *supra* at 600. " 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.' " *Id*., quoting *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948).

The test for sufficiency of an information is as follows:

> "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?" [*People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994), quoting *People v Adams*, 389 Mich 222, 243; 205 NW2d 415 (1973).]

In the instant case, the information provides as follows:

COUNT 1 . . . WEAPONS-FIREARMS-SALE TO FELON

> [Defendant] did attempt to commit an offense prohibited by law, to-wit: sell a firearm and/or ammunition to Larry Crider, a person he or she believed to have been convicted of Carrying Pistol in Motor Vehicle and/or was prohibited under MCL 750.224 f [sic] from possessing, using, receiving, transporting, selling, purchasing, carrying, shipping, or distributing a firearm, a crime punishable for more than 1 year; contrary to MCL 750.223(4); MSA 28.420, and in said attempt did act towards the commission of said offense, but failed in the perpetration or was prevented in the execution thereof; contrary to MCL 750.92; MSA 28.287.

The statute identified in the information, MCL 750.223; MSA 28.420, provides as follows, in relevant part:

> (3) A seller shall not sell a firearm or ammunition to a person if the seller knows that either of the following circumstances exists:
>
> (a) The person is under indictment for a felony. As used in this subdivision, "felony" means a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more.
>
> (b) The person is prohibited under section 224f from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm.
>
> (4) A person who violates subsection (3) is guilty of a felony, punishable by imprisonment for not more than 10 years, or by a fine of not more than $5,000.00, or both. [Footnote omitted.]

Section 224f, in turn, generally establishes two separate periods during which it is unlawful for a convicted felon to carry a firearm: individuals convicted of an unspecified "felony" may not possess (or use, transport, sell, purchase, etc.) a firearm in this state until the expiration of three years after serving any term of imprisonment, parole or probation, while individuals convicted of a "specified felony," as defined by the statute, are subject to a five-year period during which it is unlawful to possess a firearm in the state. MCL 750.224f; MSA 28.421(6); see also *People v Parker*, 230 Mich App 677, 686; 584 NW2d 753 (1998).

We conclude that the information in this case did not fulfill the requirements set forth in MCL 767.45(1); MSA 28.985(1) and *Adams*, *supra* at 243. The information charges defendant with violating MCL 750.223(3)(b); MSA 28.420(3)(b);[3] however, it fails to set forth all of the elements of that offense. In charging defendant with attempting to sell a firearm to "a person he or she *believed to have been convicted* of Carrying Pistol in Motor Vehicle and/or was prohibited under MCL 750.224 f [sic] from possessing . . . a firearm," the prosecution omitted an essential element of the offense: that defendant *knew* that Crider was prohibited under § 224f from possessing a firearm. MCL 750.223(3)(b); MSA 28.420(3)(b). See *Traughber*, *supra* at 214, quoting *People v Maki*, 245 Mich 455, 473; 223 NW 70 (1929):

> "Both in this State and elsewhere it is the rule that where a statute uses general or generic terms in describing an offense, does not sufficiently define the crime *or set out all its essential elements*, or where a charge in the language of the statute charges a mere legal conclusion, an information which alleges the crime in the words of the statute is not sufficient, but a more particular statement of facts is necessary." [Emphasis added.]

See also *Weathersby*, *supra* at 101-102; *People v Hardiman*, 132 Mich App 382, 383-384; 347 NW2d 460 (1984).

However, "prejudice is essentially a prerequisite to any claim of inadequate notice." *Darden*, *supra* at 602, n 6. As this Court recently noted, "the constitutional notice requirement is not some abstract legal technicality requiring reversal in the absence of a perfectly drafted information. Instead, it is a practical requirement that gives effect to a defendant's right to know and respond to the charges against him." *Darden*, *supra* at 601. Accordingly,

> the dispositive question is whether the defendant knew what acts he was being tried for so he could adequately put forth a defense. Put another way, was the defendant prejudiced by the information . . . . [*Traughber*, *supra* at 215.]

Defendant was not entitled to a dismissal of the charge against him on the basis that the information was deficient, because he was not prejudiced in any way by the prosecution's use of the words "believed to have been convicted" in the information. The information, which stated "Weapons . . . Sale to Felon" at the top, clearly notified defendant that he was charged with an attempted violation of MCL 750.223(3)(b); MSA 28.420(3)(b). The information identified the time and place of the alleged violation; it further identified the particular purchaser and alleged that defendant "believed" that the purchaser was prohibited from possessing a firearm under § 224f. Moreover, a preliminary examination was conducted, at which the prosecutor argued that evidence had been set forth to establish each element of an attempted violation of MCL 750.223(3)(b); MSA 28.420(3)(b), or from which each of the elements could be inferred. See *Traughber*, *supra* at 215-216. The prosecutor noted that, because defendant had not sold a weapon to a "felon," but to an undercover police officer, he could not be charged with the completed offense; accordingly, the prosecutor explained, the wording in the information was constructed to reflect the fact that defendant was being charged with an attempt. Defendant was fully apprised of the nature of the charges against him and of the proofs the prosecution intended to present at trial. Therefore, defendant was not prejudiced by the information. See *id.* at 215-217.

III. Denial of Motion to Amend Information

We additionally conclude that the trial court abused its discretion in denying the prosecutor's request to amend the defective information. MCL 767.75; MSA 28.1015 provides, in relevant part,

> [n]o indictment shall be quashed, set aside or dismissed for any 1 or more of the following defects: . . . (Third) That any uncertainty exists therein. . . . If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect.

MCL 767.76; MSA 28.1016 provides as follows, in relevant part:

> . . . The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury.

Accordingly, "Michigan law clearly contemplates amending indictments for substantive defects without interrupting the trial process, at least where the amendment would not prejudice the defendant." *Weathersby*, *supra* at 103. Where the original information is sufficient to inform a defendant of the nature of the charge against him, the defendant is not prejudiced by an amendment to cure a defect in the information. *People v Newson*, 173 Mich App 160, 164; 433 NW2d 386 (1988); *People v Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980).

Defendant was adequately informed of the nature of the charges against him, both by the specific language contained in the information and by the proofs and argument presented by the prosecutor at the preliminary examination. The information's deficiency was easily curable by amendment, and the trial court was limited under MCL 767.75; MSA 28.1015 to ordering an amendment to cure the defect; dismissal was improper under these circumstances. See *People v Hunt*, 442 Mich 359, 360-361, 364-365; 501 NW2d 151 (1993).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin

[1] The facts are set forth herein as presented through the testimony of Officer Crider at the preliminary examination.

[2] "All provisions of the law applying to prosecutions upon indictments . . . shall, in the same manner . . . be applied to informations and all prosecutions and proceedings thereon." MCL 767.2; MSA 28.942.

"The word 'indictment' includes information . . . ." MCL 750.10; MSA 28.200. See also *People v Grove*, 455 Mich 439, 459 n 24; 566 NW2d 547 (1997).

[3] The information actually cites MCL 750.223(4); MSA 28.420(4), which sets forth the *penalty* for violating MCL 750.223(3); MSA 28.420(3). However, it is otherwise clear from the language of the information that defendant was being charged under MCL 750.223(3)(b); MSA 28.420(3)(b).