

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN GLEN HULBURT,

Defendant-Appellant.

UNPUBLISHED

July 20, 2004

No. 248454

Tuscola Circuit Court

LC No. 01-008233

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of unlawfully driving away an automobile, MCL 750.413. He was sentenced as an habitual offender-second, MCL 769.10, to a term of two to five years. Defendant appeals as of right. We affirm defendant's conviction but vacate his sentence and remand for resentencing.

Defendant argues on appeal that resentencing is required because the prosecution did not file written notice of its intent to seek sentence enhancement within twenty-one days of defendant's waiver of arraignment. MCL 769.13(1) provides, in part:

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 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.

MCR 6.112, provides, in part:

(F) A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed within 21 days after the defendant is arraigned or has waived arraignment on the information charging the underlying felony, or before trial begins, if the defendant is tried within the 21-day period.

(G) 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 variation 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.

Statutory interpretation is a question of law which this Court reviews de novo on appeal. *People v Stone Transport, Inc*, 241 Mich App 49; 613 NW2d 737 (2000). “The starting point in every case involving construction of a statute is the language of the statute itself.” *Hills of Lone Pine v Texel*, 226 Mich App 120, 123; 572 NW2d 256 (1997). If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).

The prosecutor does not dispute that notice was not timely, but argues that this is really a sentencing issue and that, because defendant did not challenge the scoring of the sentencing guidelines below, and because the habitual information was only relevant to sentencing, defendant has forfeited this issue on appeal. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). We note, however, that this Court has been summarily reversed under similar circumstances on at least two occasions. See *People v Mary Williams*, 462 Mich 882; 617 NW2d 330 (2000); *People v Cobley*, 463 Mich 893; 618 NW2d 768 (2000). “[W]hatever notice is given must be given within a strict time frame,” *People v Morales*, 240 Mich App 571, 586; 618 NW2d 10 (2000), and the prosecutor may not amend a notice after expiration of the 21-day period, as was done here, in a way that will materially alter defendant’s ‘potential consequences,’ *People v Ellis*, 224 Mich App 752, 755; 569 NW2d 917 (1999). Considering the clear language of both the statute and the court rule, and our Supreme Court orders requiring strict compliance, we conclude that sentence enhancement was impermissible in this case and that resentencing is required.

Defendant also argues on appeal that he was improperly impeached by evidence of a 1995 misdemeanor embezzlement conviction. There is no merit to this claim. MRE 609 provides for impeachment of a defendant’s credibility through evidence of conviction of a crime involving an element of dishonesty or false statement, *or* a crime that contains an element of theft and is punishable by imprisonment by more than one year. MRE 609. Defendant does not dispute that embezzlement has been held to contain an element of dishonesty. *People v Allen*, 429 Mich 558, 586; 420 NW2d 499 (1988). Crimes that have “an element of dishonesty or false statement are directly probative of a witness’ truthfulness,” and MRE 609 “does not permit the exclusion of these convictions. *Id.*

Finally, defendant argues that he was denied the effective assistance of counsel. We do not agree. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel’s conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Nor will we assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445;

597 NW2d 843 (1999). The decision whether to try to impeach the complainant's testimony with photographs of the scene was a matter of trial strategy. Counsel testified that she did what she could to find Jason Humpert, and that she asked defendant for the names of his other purported witnesses. Counsel objected to introduction of impeachment evidence, and testified that she discussed jury instructions with defendant. Defendant's bare assertions to the contrary are not sufficient to overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant's conviction is affirmed, defendant's sentence is vacated, and this matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder