

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

JENNIFER JO MEYER,
Defendant-Appellant.

No. 306733
Emmet Circuit Court
LC No. 11-003457-FH

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of illegal use of a financial transaction device, MCL 750.157q, and taking or retaining a financial transaction device without consent, MCL 750.157n. She was sentenced to two years' probation, with 12 months to be served in the county jail. Defendant appeals as of right, solely raising a sentencing issue. We remand to the trial court for a ruling, as required by MCL 769.13(5), with respect to the prosecution's second-habitual-offender notice.

In the felony information, the prosecution set forth the two counts upon which defendant was eventually convicted along with an "habitual offender – second offense notice" relative to an alleged prior drug conviction. At the sentencing hearing, the trial court failed to expressly address the habitual-offender notice, and the judgment of sentence was also silent in regard to the matter. The presentence investigation report (PSIR) indicated that defendant was a second-habitual offender, and the minimum sentence guidelines range was calculated on the basis of that status. Defense counsel articulated at sentencing that there were no objections to the PSIR and the enhanced guidelines range.¹ Despite the absence of a ruling on the prosecution's habitual-offender notice, various court documents, e.g., the appeal and appellate counsel form, included

¹ The guidelines range was set at zero to 13 months, which is the correct range for a second-habitual offender who, like defendant, has committed a class H offense and who has a total prior record variable score of 30 points and a total offense variable score of ten points. MCL 777.16h; MCL 777.69; MCL 777.21(3)(a). The guidelines range would have been zero to 11 months absent consideration of habitual-offender status. *Id.* Both ranges fall within the intermediate sanction cell referenced in MCL 769.34(4)(a).

notations reflecting that defendant was a second-habitual offender. On appeal, defendant argues that due process requires this Court to remand the case to the trial court for correction of these documents which improperly and inaccurately indicate that defendant is a second-habitual offender. Defendant contends that correction is necessary as the trial court did not rule, nor does the judgment of sentence reflect, that defendant is a second-habitual offender.

MCL 769.13 addresses a prosecutor's notice of intent to seek an enhanced sentence based on prior felony convictions as provided in MCL 769.10 (second habitual), MCL 769.11 (third habitual), and MCL 769.12 (fourth habitual). MCL 769.13(5) provides that "[t]he existence of the defendant's prior conviction or convictions *shall be determined by the court*, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing." (Emphasis added.) Defendant's argument is misplaced, where it improperly treats the trial court's silence or failure to expressly make a determination that defendant is a second-habitual offender and failure to include such a finding in the judgment of sentence as a definitive and affirmative ruling that she indeed is not a second-habitual offender. Given the trial court's acknowledgment and defendant's affirmative approval of the PSIR and guidelines range, which both referred to defendant as a second-habitual offender, we are initially tempted to remand simply for clerical correction of the judgment of sentence to show that she is a second-habitual offender, as such a conclusion or finding could be implied or assumed from the sentencing proceedings.² However, because MCL 769.13(5) requires the trial court to determine the issue and there was no specific determination made here by the court, and because we do not wish to improperly intrude on the trial court's authority, we remand for purposes of having the court determine whether defendant is a second-habitual offender, with the various court documents then being amended, if necessary, in accordance with the ruling.

Remanded for purposes of addressing the second-habitual-offender notice in a manner consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

² We note that defendant makes no claim that she was not previously convicted of a felony.