STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION December 27, 2012 9:15 a.m.
v	No. 308080 Clare Circuit Court
KRIS EDWARD SITERLET, Defendant-Appellant.	LC No. 10-004061-FH

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant, Kris Edward Siterlet, appeals as of right from his jury-trial conviction of operating a vehicle while visibly impaired, third offense, MCL 257.625(3), (11)(c).[1] At issue is whether the trial court could sentence defendant as a fourth habitual offender, MCL 769.12, after the prosecution twice amended the felony information to change defendant's habitual-offender level. The prosecution originally charged defendant as a fourth habitual offender. However, the prosecution amended the felony information during plea negotiations to charge defendant as a third habitual offender, MCL 769.11. After defendant rejected the prosecution's plea offers, the prosecution pursued the case as if defendant was charged as a fourth habitual offender, to which defendant did not object. Defendant was tried and convicted of operating a vehicle while visually impaired, third offense. Four days after trial, the prosecution filed a second amended felony information to increase defendant's habitual-offender level back to fourth-offense status. Defendant did not object to this amendment, and the trial court sentenced him as a fourth habitual offender to 46 months to 25 years in prison.

Defendant argues on appeal that the trial court erred by sentencing him as a fourth habitual offender because the information in place during plea negotiations and at trial alleged that he was a third habitual offender. We hold that the trial court erred by sentencing defendant as a fourth habitual offender because the prosecution improperly amended the felony information to increase defendant's habitual-offender level after the 21-day period provided for in MCL

[1] Defendant also pleaded guilty to operating a vehicle with a suspended or revoked license, second offense, MCL 257.904(1), (3)(b), and the trial court imposed a one-year sentence. However, this plea-based conviction is not at issue in this appeal.

769.13(1). However, we also hold that defendant is not entitled to relief with regard to this unpreserved argument because the trial court's error was not plain and did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Therefore, we affirm.

I. PERTINENT FACTS

On October 15, 2010, the police arrested defendant for driving while impaired; breathalyzer tests indicated that defendant's blood alcohol level was 0.11. In a felony information filed on November 19, 2010, the prosecutor charged defendant as a fourth habitual offender with operating a vehicle while visibly impaired, third offense, and operating a vehicle with a suspended or revoked license, second offense. On June 15, 2011, the prosecutor amended the felony information to charge defendant as a third habitual offender. The amendment occurred during plea negotiations, where the prosecutor first offered to charge defendant as a third habitual offender and later offered to charge defendant as a second habitual offender. However, defendant rejected these plea offers.

On August 18, 2011, the prosecution filed three motions in the trial court referencing how defendant was currently charged as an habitual offender. In a motion in limine, the prosecution alleged that defendant was currently charged as a third habitual offender. However, in both a motion to suppress evidence and a motion to suppress nonexpert testimony, the prosecution alleged that defendant was currently charged as a fourth habitual offender. In response to the prosecution's motion to suppress nonexpert testimony, defendant admitted the prosecution's allegation that he was currently charged as a fourth habitual offender.

The amended information charging defendant as a third habitual offender remained during defendant's trial. On the first day of trial, defendant pleaded guilty to operating a vehicle while his license was suspended or revoked, second offense. A jury then convicted him of operating a vehicle while visibly impaired, third offense. On September 27, 2011 (four days after trial), the prosecution filed a second amended felony information to increase defendant's habitual-offender level back to fourth-offense status. Defendant did not object to this amendment, and on December 5, 2011, the trial court sentenced him as a fourth habitual offender.

II. ANALYSIS

Defendant's only argument on appeal is that the trial court erred by sentencing him as a fourth habitual offender. Defendant did not raise this issue before the trial court; therefore, our review is for plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture for plain error, defendant must prove the following: (1) there was an error, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., the outcome of the lower-court proceedings. *Id*. at 763. Once defendant has established these three requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. *Id.* at 763-764. A plain error that affects substantial rights does necessarily result in the conviction of an actually innocent person or seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *People v Vaughn*, 491 Mich 642, 666-667; 821 NW2d

288 (2012) (holding that the closure of a courtroom during jury selection, a structural error, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings); see also *Johnson v United States*, 520 US 461, 469-470; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (holding that a plain error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings even when the error is assumed to have affected substantial rights).

MCL 769.13 governs the procedure for seeking sentence enhancement as an habitual offender. MCL 769.13(1) states the following:

> 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.

The purpose of the 21-day notice rule is to give the defendant notice of the potential consequences should a conviction arise. *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), superseded in part by statute as stated in *People v Ellis*, 224 Mich App 752, 754-755; 569 NW2d 917 (1997). The 21-day notice rule is a bright-line test that must be strictly applied. *People v Morales*, 240 Mich App 571, 575-576; 618 NW2d 10 (2000).

Under MCL 767.76, "[a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), citing MCL 767.76. Similarly, MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

This Court has harmonized MCL 769.13 and MCL 767.76 to determine that the prosecution may not amend an information after the 21-day period provided for in MCL 769.13(1) to include additional prior convictions and, therefore, increase potential sentence consequences. See *Ellis*, 224 Mich App at 756-757; *People v Hornsby*, 251 Mich App 462, 472-473; 650 NW2d 700 (2002). In *Ellis*, the prosecutor promptly filed a supplemental information charging the defendant as a second habitual offender. *Ellis*, 224 Mich App at 755. About six weeks later, however, the prosecutor amended the information to charge the defendant as a fourth habitual offender by alleging two additional prior convictions. *Id.* This Court held that the trial court erred by allowing the amended information. *Id.* at 755, 757. We explained that a "supplemental information may be amended outside the [21-day] statutory period only to the extent that the proposed amendment does not . . . relate to additional prior convictions not included in the timely filed supplemental information." *Id.* at 757. We emphasized that "[t]o hold otherwise would be to permit prosecutors to avoid making the necessary 'prompt' decision regarding the level of supplementation, if any, they wish to pursue and would materially alter the 'potential consequences' to the accused of conviction or plea." *Id.*, quoting *Shelton*, 412 Mich at 569.

Significantly, the *Ellis* Court distinguished its case from *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987), overruled in part on other grounds *People v Bailey*, 483 Mich 905; 762 NW2d 161 (2009), "where the Court upheld an amendment of a supplemental information outside the [applicable notice rule.]" *Id.* at 757 n 2. The *Ellis* Court explained that, "[i]n *Manning*, the amended supplemental information corrected an error in the specific convictions that formed the basis of the habitual offender, fourth offense charge. However, the amendment did not elevate the level of the supplemental charge." *Id.*

Several years after *Ellis*, this Court reaffirmed the rule that "the prosecutor may not amend a notice to seek enhancement to include additional prior convictions after the twenty-one-day period"; we again expressly distinguished the circumstances in *Ellis* from cases where the effect of an amendment is only "to correct an error in the initial notice that did not otherwise affect the level of [a] defendant's potential sentence enhancement." *Hornsby*, 251 Mich App at 470-471. In *Hornsby*, the prosecutor initially filed a notice that it intended to enhance the defendant's sentence under MCL 769.11 (third habitual offender) and listed two prior convictions. *Id.* at 469. One month later, the prosecutor amended the notice by replacing one of the listed prior convictions with a different conviction. *Id.* at 470. The defendant challenged the amendment during his sentencing hearing, but the trial court permitted the amendment. *Id.* This Court affirmed, explaining that "a recognized difference exists between an amendment of a notice to seek sentence enhancement that attempts to impose more severe adverse consequences to a defendant and one that does not." *Id.* at 472. We further explained that "*Ellis* does not preclude the amendment of a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences." *Id.* We, therefore, held that the trial court properly sentenced the defendant as a third habitual offender where "the amended information did not increase [the] defendant's potential sentence because the amendment did not change [the] defendant's habitual offender level." *Id.* at 472-473.

Consistent with these decisions, we conclude that the trial court erred by sentencing defendant as a fourth habitual offender. Well after the expiration of the 21-day period provided for in MCL 769.13(1), the prosecutor filed a second amended felony information to increase defendant's habitual-offender level. This case does not involve an error or defect in the June 15, 2011, felony information; as the prosecutor explains on appeal, it intentionally decreased defendant's habitual-offender level in the June 15, 2011, felony information to help obtain a plea. Furthermore, the post-trial, pre-sentencing amendment to the June 15, 2011, felony information sought to "impose more severe adverse consequences" on defendant by increasing his habitual-offender level and, therefore, his potential sentence. *Id.* at 472. Specifically, the increase in the habitual-offender level raised defendant's potential minimum sentence by 12 months, i.e., from 34 months as a third habitual offender to 46 months as a fourth habitual offender. See MCL 777.66. And defendant's potential maximum sentence increased from 10 years as a third habitual offender to life imprisonment as a fourth habitual offender. See MCL 769.11(1)(a); MCL 769.12(1)(b); MCL 257.625(11)(c)(*i*). As previously discussed, the trial court sentenced defendant to a term of 46 months' to 25 years' imprisonment. Defendant, therefore, has demonstrated the first and third plain-error requirements: an error that affected the outcome of the lower-court proceedings. See *Carines*, 460 Mich at 763; see also generally *Higuera*, 244 Mich App at 444 (stating that amendment to an information is allowed so long as it

does not prejudice the defendant); MCR 6.112(H) (permitting the prosecutor to amend the information so long as the amendment does not prejudice the defendant).

The prosecution argues that neither error nor prejudice occurred in this case because defendant knew that he qualified as a fourth habitual offender and that the prosecutor would change his habitual-offender level back to fourth-offense status if he rejected the prosecution's plea offer. We reject this argument. While the first felony information notified defendant that he qualified as a fourth habitual offender, the first felony information was amended, i.e., replaced, to actually charge defendant as a third habitual offender. Moreover, the prosecution's claim assumes that it could amend the June 15, 2011, felony information to increase defendant's habitual-offender level to fourth-offense status. As previously discussed, the prosecution could not do so. Although the prosecution was certainly free to make and withdraw plea offers to defendant that addressed his habitual-offender level, it could not amend the information after the 21-day period to increase defendant's habitual-offender level.

Despite defendant's demonstration of an error affecting the outcome of the lower-court proceedings, we conclude that defendant is not entitled to relief for two reasons. First, the error in this case was not plain. See *Carines*, 460 Mich at 763-764. Given the existing legal precedent and the facts of this case, it was not clear or obvious that the prosecution was prohibited from amending the June 15, 2011, felony information to increase defendant's habitual-offender level. No binding precedent existed that clearly established that, after the expiration of the 21-day period provided for in MCL 769.13(1), an amended felony information (that decreased the habitual-offender level charged in an original felony information) may not be amended to increase a defendant's habitual-offender level back to the level charged in the original felony information. See generally *id.* at 770 (evaluating whether the rule of law serving as the basis for error was clearly established by Michigan case law to determine whether an error was plain).

Second, even if the error was plain, we would decline to exercise our discretion in this case to order resentencing. See *id.* at 763-764. Defendant is not arguing that he is innocent. Moreover, sentencing defendant as a fourth habitual offender did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. See *id.*; see also *Vaughn*, 491 Mich at 666-667. The factual basis supporting defendant's status as a fourth habitual offender was beyond dispute. Indeed, defendant has an extensive criminal history illustrating that he is a habitual drunk driver. The original felony information notified defendant that he qualified as a fourth habitual offender. It also informed him that the prosecution would initially pursue the fourth-offense enhancement. Significantly, the record illustrates that defendant knew that the prosecution would pursue a fourth-offense enhancement after he rejected the prosecution's plea offer. The prosecution alleged in two motions filed on August 18, 2011, that defendant was currently charged as a fourth habitual offender. Although this was not true in light of the June 15, 2011, felony information, defendant not only failed to challenge the prosecution's allegation in the lower court but admitted this allegation in his answer to the prosecution's motion to suppress nonexpert testimony. Defendant cannot make this admission in the trial court and now argue on appeal that the prosecution abandoned its intent to charge him as a fourth habitual offender. See *Flint City Council v Mich*, 253 Mich App 378, 395; 655 NW2d 604 (2002) ("[A] party may not seek redress on appeal on the basis of a position contrary to that it took in the proceedings under review."); *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) ("A party may not take a position in the trial court and subsequently seek

redress in an appellate court that is based on a position contrary to that taken in the trial court."). In addition, the prosecutor after the jury announced its verdict, the presentence investigation report, and the trial court at sentencing all referred to defendant as a fourth habitual offender; yet, defendant remained silent regarding this habitual-offender designation. Given defendant's qualification as a fourth habitual offender and his knowledge that the prosecution was pursuing the fourth-offense enhancement, we cannot conclude that defendant's sentence as a fourth habitual offender seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Accordingly, we hold that defendant has failed to establish that he is entitled to relief under a plain-error framework.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering