

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EARL DIBELL,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 194433

Barry Circuit Court

LC No. 95-000149 FC

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of one count of first degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Defendant was duly and timely notified before trial, pursuant to MCL 769.13(1); MSA 28.1085(1), of the prosecutor's intent to seek an enhanced sentence based on defendant's status as a second offender. The judgment of sentence reflects this status, although the question was not mentioned specifically during sentencing. Defendant contends that the prosecutor's decision to charge him as a second offender was an abuse of discretion, and that the judgment of sentence improperly reflects a recidivist status the trial judge did not mention at sentencing.

MCL 769.13(5); MSA 28.1085(5), requires the trial judge, at sentencing, or at any separate hearing scheduled for the purpose before sentencing, to determine the existence of any charged prior conviction. The statute does not specify how this determination shall be made. It does specify acceptable sources of information concerning the issue, including information contained in a presentence report. Here, the presentence report reflects both defendant's 1957 conviction for larceny in a building and that the present offense is subject to enhancement ("criminal sexual conduct, first degree and habitual offender, second."). Defendant conceded the accuracy of the presentence report in this respect at sentencing. Accordingly, given that the fact of such status is unchallenged, reflection of this fact in the judgment of sentence constitutes an acceptable means by which the trial court made the statutorily requisite determination of second offender status. See *Guilty Plea Cases*, 395 Mich 96, 126; 235 NW2d 132 (1975).

* Circuit judge, sitting on the Court of Appeals by assignment.

The prosecutor's exercise of charging discretion in proceeding against defendant as a second offender reflects executive action which is subject to judicial oversight only if unconstitutional, illegal, or ultra vires. Const 1963, art 3, §2; *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Defendant makes no contention that the recidivist statutes are unconstitutional, that the prosecutor's reasons for charging him as a second offender are unconstitutional or illegal, as being in violation of statute or based on some proscribed personal characteristic, such as race, religion, etc., nor is it suggested that the prosecutor was without authority to seek such enhancement. Accordingly, no abuse of power has occurred. *People v Gwinn*, 111 Mich App 223; 314 NW2d 562 (1981).

Affirmed.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber