STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2000
v OTIS BANKS, Defendant-Appellant.	No. 211439 Ingham Circuit Court LC No. 97-072735-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v OTIS BANKS, Defendant-Appellant.	No. 216965 Ingham Circuit Court LC No. 97-072735-FH

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of uttering and publishing a state warrant, MCL 750.253; MSA 28.450. The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12; MSA 28.1084, sentenced him to fifteen to twenty-five years' imprisonment.[1] We affirm, but remand for the ministerial task of correcting defendant's judgment of sentence.

Defendant was charged on October 16, 1997, with uttering and publishing, MCL 750.249; MSA 28.446. Following a preliminary examination, he was bound over for this offense, which allows a maximum penalty of fourteen years' imprisonment. On December 1, 1997, the prosecutor indicated that because the check that defendant had allegedly uttered and published was a state paycheck, the

proper statute under which to prosecute him was not MCL 750.249; MSA 28.446 – the general uttering and publishing statute – but was instead MCL 750.250; MSA 28.447, a more specific statute that involves the alteration of a state warrant and that allows a maximum penalty of seven years' imprisonment.[2] The prosecutor stated that he would amend the information to reflect the new statute, but an amended information was never filed.

At the start of trial on March 23, 1998, the prosecutor requested an "alternative information" charging defendant with uttering and publishing a state warrant under MCL 750.253; MSA 28.450.[3] Defense counsel concurred, indicating that only the statute prohibiting the uttering and publishing of a state warrant, and not the general uttering and publishing statute, should be considered by the jury. The trial court agreed that because the check in question was a state paycheck, only the following statutes relating to state warrants were applicable: MCL 750.250; MSA 28.447, which, as indicated earlier, involves the alteration of a state warrant and which allows a maximum penalty of seven years' imprisonment, and MCL 750.253; MSA 28.450, which involves uttering and publishing a state warrant and which allows a maximum penalty of five years' imprisonment.

With the consent of the parties, the trial court instructed the jury using the standard jury instructions relating to the general uttering and publishing statute and did not provide the jury with a definition of "state warrant." During the reading of the verdict and on the written verdict form, the jurors answered affirmatively when asked if defendant was guilty of "uttering and publishing a state warrant."

During defendant's initial sentencing, the trial court, relying on defense counsel's indication that MCL 750.250; MSA 28.447 (alteration of a state warrant) was the statute under which defendant was convicted, originally sentenced defendant to a maximum of seven years' imprisonment on his underlying conviction (i.e., before the fourth-offense habitual offender enhancement was applied). At resentencing, the trial court, with the agreement of the prosecutor, accepted defendant's argument that he had actually been convicted under MCL 750.253; MSA 28.450 (uttering and publishing a state warrant) and that this statute's five-year statutory maximum should therefore apply to the underlying conviction. See note 1, *supra*.

Defendant first argues that his conviction under MCL 750.253; MSA 28.450 was invalid because he had not been given a preliminary examination with regard to that offense. We review this issue de novo. See generally *People v Hunt*, 442 Mich 359, 360-365; 501 NW2d 151 (1993), and *People v Fortson*, 202 Mich App 13, 15-17; 507 NW2d 763 (1993). In *Hunt, supra* at 362, the Supreme Court observed that "the right to a preliminary examination in Michigan is a creation of statute. There is no federal or state constitutional requirement." The *Hunt* Court then held that amending an information to add a new charge was allowable as long as (1) the proofs presented at the preliminary examination were sufficient to support a bindover on the added charge; and (2) the added charge did not cause the defendant "unfair surprise, inadequate notice, or [an] insufficient opportunity to defend." *Hunt, supra* at 364-365. See also *Fortson, supra* at 15-17 (where prosecutor moved to amend information four months after preliminary examination and refused to grant new preliminary examination, addition of new charge was allowable because defendant had sufficient notice and opportunity to defend on the new charge).

Here, the crime of which defendant was convicted – uttering and publishing a state warrant – was essentially identical to the charge on which defendant was bound over, the only difference being the nature of the check in question. Moreover, the evidence at the preliminary examination unequivocally established that the check in question was a state treasurer's warrant, and defendant did not contest below, nor does he suggest on appeal, that the check was *not* in fact a state treasurer's warrant. Accordingly, as in *Hunt*, *supra* at 364, and *Fortson*, *supra* at 16-17, the evidence at the preliminary examination was sufficient to support a bindover under the added charge, and, given the similar nature of the charges, the added charge did not result in "unfair surprise, inadequate notice, or [an] insufficient opportunity to defend." Thus, a new preliminary examination was not required, see *Hunt*, *supra* at 364, especially since defendant did not request a remand for a preliminary examination on the added charge.

Next, defendant argues that his conviction under MCL 750.253; MSA 28.450 violated his due process right to notice of the charge against him because (1) even the court and the attorneys were confused about which statute defendant was alleged to have violated, and (2) no amended information setting forth the new charge was filed. This Court reviews constitutional issues de novo. *People v McRunels*, 237 Mich App 168, 171; 603 NW2d 95 (1999). As indicated in *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995), "due process is satisfied when interested parties are given notice through a method that is reasonably calculated under the circumstances to apprise them of proceedings that may directly and adversely affect their legally protected interests and afford them an opportunity to respond." See also *People v Ritter*, 186 Mich App 701, 709, n 3; 464 NW2d 919 (1991) ("Due process requires only that the defendant receive notice reasonably calculated to apprise him of the charges and an opportunity for a hearing.").

Here, we conclude that despite the confusion over the proper charge and despite the fact that no amended information was filed (as set forth earlier in this opinion), defendant nonetheless was sufficiently apprised of the charge against him. Indeed, defendant knew throughout the proceedings that he was charged with uttering and publishing. At no time did he allege – either below or on appeal – that the prosecutor's mistaken citation on December 1, 1997 led him to believe he was being tried for the alteration of a state warrant under MCL 750.250; MSA 28.447. Moreover, the only relevant difference between the ultimate charge and the original charge was the specification of the check in question as a state warrant, and defendant alleges no prejudice resulting from this difference. Indeed, defense counsel did not object to the addition, prior to the start of trial, of the charge of uttering and publishing a state warrant. Finally, even though there was some confusion about the proper statute under which defendant should be sentenced, any prejudice resulting from this confusion was eliminated upon defendant's motion for resentencing. Under these circumstances – where by the start of trial, there was no confusion over or objection to the fact that the prosecutor was adding an alternative charge under MCL 750.253; MSA 28.450, where defendant was aware of the nature of the charge against him, and where defendant was ultimately sentenced under the correct statute – we conclude that defendant's due process rights were not violated.

Next, defendant claims that reversal is warranted because the trial court mistakenly justified the addition of the charge under MCL 750.253; MSA 28.450 by indicating that it was a lesser-included

offense of the general uttering and publishing statutes. Whether the trial court erred in this regard is a question of law. This Court reviews questions of law de novo. *People v Grayer*, 235 Mich App 737, 739; 599 NW2d 527 (1999). We disagree that the trial court mistakenly concluded that the charge under MCL 750.253; MSA 28.450 was a lesser-included charge of the general uttering and publishing statutes. Instead, the trial court, while considering defendant's post-trial claim that he should have been granted a new preliminary examination on the added charge, merely indicated that the new charge was "*in the nature of* a lesser-included charge" (emphasis added). Ultimately, the court did not base its ruling on a conclusion that uttering and publishing a state warrant *was* a lesser-included offense, but on the basis that (1) defendant did not request a remand for a preliminary examination on the added charge, and (2) the added charge was *in the nature of* a lesser-included charge. This was not erroneous. Moreover, the trial court's ruling that defendant was not entitled to a new preliminary examination on the added charge was correct, as discussed earlier, and this court may affirm a trial court's correct ruling even if based on improper reasoning. See *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999). Accordingly, defendant has demonstrated no basis for reversal with respect to this issue.

Next, defendant argues that the prosecutor had no power to proceed against him under MCL 750.249; MSA 28.446 because the check in question was a state treasurer's warrant. This issue is essentially one of statutory interpretation, and this Court reviews questions of statutory interpretation de novo. *People v Webb*, 458 Mich 265, 274-275; 580 NW2d 884 (1998). In support of his argument, defendant cites *People v Hall*, 391 Mich 175; 215 NW2d 166 (1974), *People v Beckner*, 92 Mich App 166; 285 NW2d 52 (1979), *People v Shears*, 84 Mich App 175; 269 NW2d 519 (1978), and *People v Jackson*, 98 Mich App 735; 296 NW2d 348 (1980), which stand for the proposition that a conviction under MCL 750.249; MSA 28.446 must be reversed if the conviction was based on uttering and publishing a state warrant, since the uttering and publishing of a state warrant is exclusively covered by MCL 750.253; MSA 28.450. This case is distinguishable, however, from *Hall*, *Beckner*, *Shears*, and *Jackson*, since (1) the information was effectively amended prior to trial to add § 253, the proper section under which defendant could be tried; (2) defendant was clearly informed that he was being tried under § 253; (3) defense counsel indicated prior to trial that only the § 253 charge should go to the jury; (4) during discussion of jury instructions, the trial court indicated that it would follow *Hall*, *Shears*, and *Beckner* by charging the jury on § 253, because it was "the more restricted state warrant statute;" and (5) during the reading of the verdict and on the written verdict form, the jurors answered affirmatively when asked if defendant was guilty of "uttering and publishing a state warrant." Defendant's argument that he was tried under § 249 and that reversal is required under *Hall*, *Beckner*, *Shears*, and *Jackson* is simply without merit, since he was actually tried and convicted under § 253.

Alternatively, defendant argues that a conviction under § 253 was inappropriate because the jury was not asked to determine whether the document in question was in fact a state warrant. However, defendant did not request an instruction on the definition of "state warrant" and did not object to the jury instructions. If a particular instruction was not requested by a defendant, the failure to give the instruction does not warrant reversal unless it constituted a plain error that affected substantial rights and (1) the defendant was actually innocent, or (2) the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 767-774;

597 NW2d 130 (1999). To establish plain error, a defendant must demonstrate that a different outcome would have resulted in the absence of the error. *Id*. at 763, 771-772. Here, defendant has not met this burden. Indeed, there was no dispute that the document in question was a state treasurer's warrant, and defendant does not contend otherwise on appeal. Accordingly, this issue provides no basis for reversal. *Id*.

Next, defendant argues that the trial court should have suppressed an oral statement he made to a police officer before being read his *Miranda*[4] rights. Defendant contends that suppression was necessary because he made the statement while "under arrest" and "in custody." We review a trial court's ultimate decision on a motion to suppress de novo. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). However, "[f]actual findings made in conjunction with a motion to suppress are reviewed for clear error." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). See also *Garvin, supra* at 96.

We conclude that the statement in question was admissible *whether or not* defendant was in custody at the time he made it, since he made the statement voluntarily, without being subject to interrogation. See *People v Anderson*, 209 Mich App 527, 531; 531 NW2d 780 (1995), and *People v Fisher*, 166 Mich App 699, 707-708; 420 NW2d 858 (1988), reversed on other grounds 442 Mich 560 (1993) (volunteered statements given prior to the issuance of *Miranda* warnings need not be suppressed). Indeed, the police officer had not initiated any questioning when defendant spontaneously made the statement at issue.

Defendant additionally suggests that he gave the statement while subject to an illegal arrest. We disagree. "A person is arrested when, by means of physical force or show of authority, his freedom of movement is restrained." *People v Michael*, 181 Mich App 236, 238; 448 NW2d 786 (1989). A person has been arrested only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave. *People v O'Neal*, 167 Mich App 274, 280; 421 NW2d 662 (1988). Here, our review of the record indicates that a reasonable person in defendant's shoes at the time defendant made the statement in question would indeed have recognized that he was free to leave. Defendant had not been handcuffed, accused, or interrogated but had merely been asked to sit in the back seat of a patrol car, with the door open, while the investigating officer determined "exactly what the situation was." Accordingly, defendant's argument that he made the statement while subject to an illegal arrest is without merit.

Next, defendant argues that his trial attorney was ineffective for (1) failing to file a motion to quash the initial information, and (2) failing to request a jury instruction on attempted uttering and publishing of a state warrant. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonably probability that, but for counsel's unprofessional error or errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant's claim that his counsel was ineffective for failing to quash the information is without merit. "[A]s long as jeopardy has not attached, or the statute of limitations not run, our law permits a prosecutor to reinstate the original charge on the basis of obtaining a new indictment and thus beginning the process anew." *People v Sierb*, 456 Mich 519, 531-532; 581 NW2d 219 (1998), quoting *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973). Here, even if counsel had successfully moved to quash the information, the prosecutor could simply have reinitiated the proceedings under the correct statute. Accordingly, the outcome of the proceedings would not reasonably have changed, and this portion of defendant's ineffective assistance claim must therefore fail. *Stanaway, supra* at 687-688.

Similarly without merit is defendant's argument that counsel was ineffective for failing to request a jury instruction on attempted uttering and publishing of a state warrant. Defendant contends that because he did not actually receive any money when attempting to cash the check, the jury should have been asked to consider the charge of attempted uttering and publishing. However, in *People v Brandon*, 46 Mich App 484, 491-492; 208 NW2d 214 (1973), disapproved of on other grounds in *In re Guilty Plea Cases*, 395 Mich 96 (1975), and rejected on other grounds in *People v Genes*, 58 Mich App 108 (1975), this Court held that the crime of uttering and publishing requires only that the defendant *present* a forged instrument (i.e., the receipt of money is not required). Accordingly, even though defendant received no money from the check in question, the facts of this case fit only a charge of uttering and publishing, not attempted uttering and publishing. See *In re Guilty Plea Cases*, 395 Mich 96, 131-132; 235 NW2d 132 (1975) (attempted uttering and publishing a proper charge if a person "enter[s] a bank with a forged instrument and [is] apprehended as he is withdrawing it from his wallet immediately before [offering it as genuine]").[5] See also *People v Shively*, 230 Mich App 626, 632; 584 NW2d 740 (1998) (attempted uttering and publishing is not a lesser-included offense of uttering and publishing). Because the facts of this case did not fit a charge of attempted uttering and publishing, defense counsel would not have succeeded had he made the motion that defendant now desires. The meritless motion would not have affected the outcome of the proceedings, and defendant's ineffective assistance claim must therefore fail in its entirety. *Stanaway, supra* at 687-688.

Finally, defendant argues that his sentence enhancement as a fourth-offense habitual offender must be vacated because he was not served with an habitual offender notice as required by statute and because the prosecutor did not file a proof of service as required by statute. This issue involves statutory construction. We review questions of statutory interpretation de novo. *Webb, supra* at 274-275.

MCL 769.13(1) and (2); MSA 28.1085(1) and (2), as amended by 1994 PA 110, provide:

> (1) 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.

> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

Defendant contends that vacation of his habitual offender enhancement is required because he was not served with an habitual offender notice and because the prosecutor did not file a proof of service as required by the above statute. However, the deputy clerk of the trial court testified that the habitual offender notice was attached to the original information and filed with the original information on the date of the arraignment. The trial court's docket entries confirm this testimony. Because defendant does not contend that he was not served with notice of the original information, and because the habitual offender notice was attached to and filed with the information, defendant cannot legitimately claim that he was not notified of the habitual offender enhancement. Moreover, on the date of the arraignment, the prosecutor indicated that defendant "has received notice that this will be his fourth felony conviction . . . making it as a consequence a life offense." Defendant did not object to this statement. We conclude that under these circumstances, defendant's claim of inadequate notice must fail.

Furthermore, the lack of a written proof of service does not require reversal. As indicated in *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999), the lack of a written proof of service under MCL 769.13; MSA 28.1085 does not require reversal as long as the defendant had notice of the intent to seek an habitual offender enhancement. Here, because defendant had notice of the intent to seek an habitual offender enhancement, reversal is unwarranted. *Walker*, *supra* at 314-315.

Although not raised by defendant on appeal, we note that defendant's current judgment of sentence incorrectly reflects that he was convicted under MCL 750.249; MSA 28.446. The judgment of sentence should be corrected to reflect the correct statute, MCL 750.253; MSA 28.450.

Affirmed, but remanded for the ministerial task of correcting defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] Originally, the trial court sentenced defendant to three to seven years' imprisonment for the underlying conviction, vacated that sentence, and sentenced defendant to fifteen to twenty-five years' imprisonment for the habitual offender fourth. Subsequently, and as explained more thoroughly *infra*, defendant moved for resentencing, after which the trial court resentenced defendant to three to five years' imprisonment for the underlying conviction, vacated that sentence, and then again sentenced defendant

to fifteen to twenty-five years' imprisonment for the habitual offender fourth. Defendant filed separate claims of appeal from each of the two judgments of sentence, which is why this case involves two separate Court of Appeals docket numbers.

[2] As noted *infra*, the prosecutor erred in stating that MCL 750.250; MSA 28.447 – involving the *alteration or forgery* of state warrants – was the appropriate statute under which to charge defendant. Instead, the appropriate statute was MCL 750.253; MSA 28.450, which involves *uttering and publishing* a state warrant.

[3] We note that the prosecutor did not provide this statutory citation to the court. Nevertheless, the prosecutor requested that defendant be charged with "uttering and publishing a state warrant," making MCL 750.253; MSA 28.450 the only applicable citation.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966), superseded by statute as applied to federal cases as stated in *US v Dickerson*, 166 F3d 667 (CA 4, 1999), cert granted in part 120 S Ct 578 (1999).

[5] Although *Brandon* and *In re Guilty Plea Cases* dealt with the general uttering and publishing statute, there is no reason to depart from their reasoning in the context of the "state warrant" uttering and publishing statute, given the similarity between the two offenses.