STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC MAURICE BLAND,

Defendant-Appellant.

UNPUBLISHED
October 12, 2004

No. 248568
Macomb Circuit Court
LC No. 02-003599-FC

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while armed, MCL 750.89. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of eighty-one months to twenty-two years. Defendant appeals as of right. We affirm.

Defendant first argues that using a conviction more than ten years old to enhance a sentence violates the ex post facto and bill of attainder provisions of the Michigan and United States constitutions. Issues of constitutional law are subject to review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Both the Michigan and federal constitutions prohibit ex post facto laws. *People v Callon*, 256 Mich App 312, 316; 662 NW2d 501 (2003). An ex post facto law is a law that affects the prosecution or disposition of cases involving crimes committed before the law's effective date by (1) criminalizing conduct that was innocent, (2) making an act a more serious offense, (3) inflicting greater punishment for a crime, or (4) allowing conviction on lesser evidence. *Id*. at 317; *People v Haynes*, 256 Mich App 341, 350; 664 NW2d 225 (2003). The Michigan ex post facto clause does not afford wider protections than its federal counterpart. *Callon, supra* at 317. Both clauses are intended to protect citizens from arbitrary and oppressive legislation and to ensure fair notice of conduct that is criminal. *People v Westman*, 262 Mich App 184, 186; 685 NW2d 423 (2004).

Defendant argues that the court punished him with an ex post facto law by using prior convictions over ten years old for the purpose of sentence enhancement. We disagree. Michigan's habitual offender statutes are merely sentence enhancement mechanisms rather than substantive crimes. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996); *People v Anderson*, 210 Mich App 295; 532 NW2d 918 (1995). This Court has held that there is "no valid reason why convictions over ten years old . . . may not be used by the trial court in determining a

proper sentence." *Zinn, supra* at 345; *People v Line*, 145 Mich App 567, 571-572; 378 NW2d 781 (1985). Thus, it is not unconstitutional for a trial court to consider convictions that are over ten years old in determining whether a defendant is an habitual offender. *Zinn, supra* at 349. There is no retroactive application of the law where a prior conviction is used to enhance the penalty for a new offense committed after the effective date of the statute, and no violation of the ex post facto clauses of the Michigan or United States constitutions. *Callon, supra* at 320-321.[1]

Bills of attainder are addressed in both the state and federal constitutions. Const 1963, art 1, § 10, provides:

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

Similarly, US Const, art I, § 9, cl 3, provides:

> No Bill of Attainder or ex post facto law shall be passed.

And US Const, art I, § 10, cl 1, provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

A bill of attainder is a legislative act that inflicts punishment without a judicial trial. See *United States v Lovett*, 328 US 303, 315; 66 S Ct 1073; 90 L Ed 1252 (1946). The habitual offender statute does not adjudge a defendant guilty without a trial. Defendant had a trial administered by the judicial branch of government for every previous conviction under MCL 769.13. Thus, the statute is not a bill of attainder. *People v Rafalko*, 26 Mich App 565, 570-571; 182 NW2d 732 (1970).

Defendant next argues that the prosecutor failed to provide proper notice of sentence enhancement pursuant to MCL 769.13. Whether the prosecutor fulfilled the statutory requirements regarding habitual offender enhancements is a question of law subject to review de novo. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

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[1] Defendant's reliance on *Stogner v California*, 539 US 607, 611; 123 S Ct 2446; 156 L Ed 2d 544 (2003), is misplaced. In *Stogner*, the Supreme Court held that a state law that is enacted after the expiration of the applicable statute of limitations violates the Ex Post Facto Clause when applied retroactively to revive a previously time-barred prosecution. *Stogner, supra* at 539 US 611.

MCL 769.12 allows for sentence enhancement if defendant is an habitual offender. MCL 769.13 sets forth the procedure that the prosecution and trial court must follow for sentence enhancement under MCL 769.12, and includes defendant's rights to challenge the accuracy or constitutional validity of the enhancement.

MCL 769.13 provides, in relevant part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section . . . . 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 . . . .
>
> (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.

Although the failure to timely file notice of a habitual offender charge prohibits the prosecutor from pursuing the charge, *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997), the Supreme Court has not required strict adherence to the other statutory requirements in all cases. The Court has concluded that the statutes' purpose "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." See, generally, *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), superceded in part by statute as stated in *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997). Thus, the courts have considered whether the defendant received notice of possible sentence enhancement and whether failure to comply with a particular requirement prejudiced defendant. See, e.g., *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999); *Ellis*, *supra* at 756-757.

Here, defendant was bound over for trial on November 7, 2002. A "Waiver/Schedule of Arraignment" dated that same date provided:

> NOTICE: The Defendant is subject to sentence enhancement as a prior offender. The People intend to file a supplemental information which may include penalties up to life in prison . . .

An habitual offender information filed November 25, 2002, charged defendant with being an habitual offender, third offense, and cited two prior felony convictions. An "Arraignment/Conference Court Disposition" form dated December 2, 2002, indicated that defendant was charged with being a fourth habitual offender and cited three prior felony convictions. An "Habitual Offender Information" charging defendant with being a fourth habitual offender was filed on December 3, 2002. The matter proceeded to trial on March 5,

2003. Under these circumstances, defendant cannot credibly argue that the prosecutor's filing of the "Habitual Offender's Information" did not serve as proper notice.[2]

Lastly, defendant argues that the entire statutory guidelines sentencing system violates the separation of powers. We disagree. This constitutional issue was not raised below and, therefore, is reviewed for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Reversal is required only if the defendant is actually innocent or the error seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Id*.

If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or absent inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231, on rem 258 Mich App 679; 672 NW2d 533 (2003). This limitation on review does not violate the constitutional separation of powers. *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003). Further, "the Legislature may impose restrictions on a judge's exercise of discretion in imposing sentence." *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001). Because a judge may still determine an appropriate sentence within the guidelines and may depart from the guidelines for substantial and compelling reasons, the Legislature's promulgation of the statutory sentencing guidelines does not violate separation of powers. *Id*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

[2] Defendant's reliance on *People v Morales*, 240 Mich App 571; 618 NW2d 10 (2000), is misplaced. In *Morales,* this Court stated that use of a supplemental information rather than a written notice is of no import, indicating that substance prevails over form. *Id.* at 585.