STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOSEPH RYAN KADLEK, Defendant-Appellant.	UNPUBLISHED June 2, 2009 No. 285162 Midland Circuit Court LC No. 07-003169-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as to the majority's conclusions in both issues in this case. As to the first issue, the prosecution concedes that it did not comply with MCL 769.13(2); MSA 28.1085(2). I would therefore vacate the habitual offender conviction and order the lower court to resentence the defendant within the correct guidelines, namely, a minimum term of 12 to 24 months. As to the second issue, i.e., jail credit on a new sentence committed while on probation, I would hold this case in abeyance for the Michigan Supreme Court decision in *People v Idziak*, 483 Mich 885; 759 NW2d 401 (2009), where the Supreme Court is considering precisely this issue.

MCL 769.13(1) provides that the "prosecuting attorney may seek to enhance the sentence of defendant 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." MCL 769.13(2) sets forth additional requirements and reads in pertinent part:

> 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 charged in the underline defense, or may be served in the matter provided by law or court rule or service or written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

The requirement of subsection (1) is met in this case. The notice is present in the file and date stamped within the required time frame. As to subsection two, defendant alleges and the prosecutor concedes that the notice of intent was not "personally served upon the defendant or his or her attorney at the arraignment on the information charging the underline offense" and

similarly that it was not "served in the matter provided by law or court rule for service or pleadings." The prosecution also admits that it did not "file a written proof of service with the clerk of the court."

The question then is whether the failure to comply with subsection (2) while complying with subsection (1) is grounds to strike the enhancement. Further, the prosecutor argues that the defense had actual notice of the intent to habitualize defendant and, therefore, any failure under subsection (2) is cured.

As a general rule, failures to comply with precise procedure requirements should not overcome substantive realities particularly where a party alleging a lack of written notice did, in fact, have actual notice. However, I conclude that the language of MCL 769.13 evidences a legislative requirement that the prosecutor serve the notice as set forth in the statute. The Legislature did not merely require that the notice be filed with the court, but specifically added that the prosecutor "shall" (a) serve the notice on defendant;[1] (b) serve the notice in a manner specifically defined; and (c) file a proof of that service with the court. I conclude that in setting forth these additional requirements, the Legislature addressed its concern that a notice might be filed with the court, but not served on the defendant and added subsection (2) to deter any error or oversight by the prosecution in this regard. As the Legislature has evidenced its intent to require not only filing of the notice, but also service of the notice, and it is conceded that service did not occur, I conclude that the sentence enhancement must be stricken in this case.[2]

On the issue of sentence credit during the period of parole, this issue is before the Michigan Supreme Court in *Idziak*, *supra*. While the majority states that the issue in this case is some how distinguishable from *Idziak*, I see no distinction nor does the majority articulate one. Accordingly, I believe the case should be held in abeyance in that regard.

/s/ Douglas B. Shapiro

---

[1] While the majority opinion quotes much of the statute, it fails to quote the language of subsection (2) which reads "the notice shall be filed with the court and served upon the defendant or his or attorney within the time provided in subsection (1).

[2] The majority cites *People v Walker*, 234 Mich App 299; 593 NW2d 673 (1999), where the failure to file the proof of service was not found to require vacation of the enhancement. However, the *Walker* court specifically relied upon the fact "defendant makes no claim that he did not receive the notice of intent to enhance." By contrast, in the instant case not only does defense maintain that he never received the notice, but the prosecutor admits that the notice was never served.