STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Murray, P.J., and Whitbeck, and Riordan, J.J.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ALFONZO ANTWON JOHNSON

Defendant-Appellant

______________________________/

Supreme Court No. 145477

Court of Appeals No. 304273

Monroe Circuit Court No. 06-35599-FH

BRIEF OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AS *AMICUS CURIAE*

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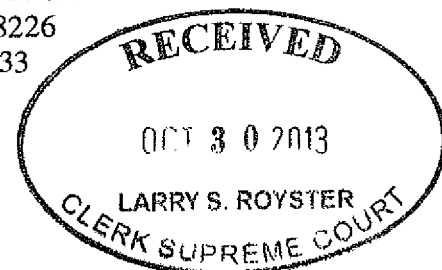

TABLE OF CONTENTS

INDEX OF AUTHORITIES i

STATEMENT OF JURISDICTION ii

STATEMENT OF QUESTIONS PRESENTED iii

STATEMENT OF INTEREST OF AMICUS CURIAE iv

STATEMENT OF FACTS 1

I. THE PROSECUTOR MAY NOT AMEND, MODIFY OR FILE THE HABITUAL OFFENDER NOTICE AFTER THE 21-DAY DEADLINE OF MCL 769.13 IN AN EFFORT TO SEEK SENTENCE ENHANCEMENT OR INCREASE THE LEVEL OF SENTENCE ENHANCEMENT PREVIOUSLY REQUESTED. THE APPROPRIATE REMEDY FOR A DEFECTIVE HABITUAL OFFENDER NOTICE IS RESENTENCING AS A FIRST OFFENDER OR AS A REPEAT OFFENDER CONSISTENT WITH THE LEVEL IDENTIFIED IN THE PROPERLY AND TIMELY FILED NOTICE. 2

INDEX OF AUTHORITIES

CASES

Brinson v Genesee Circuit Judge, 403 Mich 676; 272 NW2d 513 (1978)....................................... 6

Gagnon v Scarpelli, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973) 7

Jakupovic v. City of Hamtramck, 489 Mich 939; 798 NW2d 12 (2011).. 8

Lafler v Cooper, 566 US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012).. 7

Mawri v. City of Dearborn, 486 Mich 908; 780 NW2d 842 (2010)... 8

McCahan v Brennan, 492 Mich 730; 822 NW2d 747 (2012) 8

People v Ancksornby, 231 Mich 271; 203 NW2d 864 (1925)... 6

People v Boatman, 273 Mich App 405; 403 Mich 676 7

People v Brown, 492 Mich 684; 822 NW2d 208 (2012)... 7

People v Campbell, 173 Mich 381; 139 NW2d 24 (1912) 3

People v Eason, 435 Mich 228; 458 NW2d 17 (1990)... 7

People v Fountain, 407 Mich 96; 282 NW2d 168 (1979).. 3

People v Palm, 245 Mich 396; 223 NW2d 67 (1929) 3

People v Shelton, 412 Mich 565; 315 NW2d 537 (1982)... 3

People v Smith, 200 Mich App 237; 504 NW2d 21 (1993)... 4, 5

Rowland v Washtenaw Co. Rd Comm, 477 Mich 197; 731 NW2d 41 (2007)................................ 8

Scarsella v Pollak, 461 Mich 547; 607 NW2d 711 (2000) 8

State v Sneed, 119 So 3d 850 (La Ct App 4 Cir, 2013) 6, 7

CONSTITUTIONS, STATUTES, COURT RULES

Const 1963, art 1, § 17.. 7

MCL 600.1404.. 8

MCL 600.6431.. 8

MCL 691.1404(1) 8

MCL 769.10 et seq... 2

MCL 769.13.. passim

MCL 769.13(1) 2, 3, 8

US Const Amends XIV.. 7

STATEMENT OF JURISDICTION

The Criminal Defense Attorneys of Michigan accept that this Honorable Court has jurisdiction over this matter.

STATEMENT OF QUESTIONS PRESENTED

I. MAY THE PROSECUTOR AMEND, MODIFY OR FILE THE HABITUAL OFFENDER NOTICE TO SUPPORT SENTENCE ENHANCEMENT OR INCREASE THE LEVEL OF ENHANCEMENT AFTER THE 21-DAY DEADLINE OF MCL 769.13? IS THE APPROPRIATE REMEDY RESENTENCING AS A FIRST OFFENDER, OR AS A REPEAT OFFENDER CONSISTENT WITH THE LEVEL IDENTIFIED IN THE PROPERLY FILED NOTICE?

Amicus Curiae answers, "No" to the first question,
And "Yes" to the second question.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2.

CDAM was invited to file an amicus brief in this matter.

STATEMENT OF FACTS

Amicus-CDAM relies on the statement of facts provided by the parties.

I. THE PROSECUTOR MAY NOT AMEND, MODIFY OR FILE THE HABITUAL OFFENDER NOTICE AFTER THE 21-DAY DEADLINE OF MCL 769.13 IN AN EFFORT TO SEEK SENTENCE ENHANCEMENT OR INCREASE THE LEVEL OF SENTENCE ENHANCEMENT PREVIOUSLY REQUESTED. THE APPROPRIATE REMEDY FOR A DEFECTIVE HABITUAL OFFENDER NOTICE IS RESENTENCING AS A FIRST OFFENDER OR AS A REPEAT OFFENDER CONSISTENT WITH THE LEVEL IDENTIFIED IN THE PROPERLY AND TIMELY FILED NOTICE.

Amicus-CDAM urges the Court to hold that the 21-day deadline of MCL 769.13 is mandatory and the prosecutor may not file a late habitual offender notice and may not amend or modify the notice to increase the level of enhancement outside the 21-day period. Further, the Court should conclude that a timely-filed habitual offender notice containing no valid convictions, and which is not amended within the 21-day time period of MCL 769.13, does not permit sentence enhancement under the habitual offender statutes. MCL 769.10 *et seq.* Both of these conclusions flow inexorably from the history and wording of the habitual offender statutes, from MCR 6.112(G), and from the state and federal constitutional right to notice. Moreover, these conclusions are consistent with similar rules that are applied in the civil setting.

The Legislature has spoken as to the timing requirements for habitual offender sentencing. According to MCL 769.13(1), there is a strict twenty-one day time limit for the filing of the habitual offender notice: "In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant . . . by filing a written notice of his or her intent to do so within 21 days . . . ."

This bright-line rule is consistent with the history of the habitual offender statutes as reflected both in the elimination of the right to trial in 1994 (substituting a written notice and a

strict deadline), and the 1949 transition from mandatory to discretionary prosecutorial charging authority.

Repeat offender provisions have existed in Michigan since the 1800s. *See People v Campbell,* 173 Mich 381; 139 NW 24 (1912) (analyzing repeat offender provision of section 11786 of Compiled Laws of Michigan of 1897). An early habitual offender law permitted enhancement whenever the prosecutor discovered the prior conviction – even after sentencing: "If at any time after conviction and either before or after sentence it shall appear that a person convicted of a felony has previously been convicted of crimes . . . , it shall be the duty of the prosecuting attorney . . . to file an information in such cause accusing the said person of such previous convictions." *People v Palm,* 245 Mich 396, 398; 223 NW 67 (1929).

Over time, however, the courts became concerned with "fair notice" to the offender and developed a rule that prosecutors must "promptly" file the habitual offender notice. *People v Fountain*, 407 Mich 96; 282 NW2d 168 (1979). This turned into a bright-line rule that the supplemental information must be filed within 14 days of the arraignment in circuit court or the defendant's waiver of arraignment. *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982). But in either setting, "The purpose of requiring a prosecutor to proceed "promptly" to file the supplemental information is to provide an accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." *Id.* at 568-569.

The twenty-one day limitation found in the current version of MCL 769.13(1) represents a compromise between those who favored full trial protections for the habitual offender and those who advocated a streamlined process that required no trial and only written notice with an opportunity to be heard. The legislative history behind 1994 PA 110 § 1 reflects competing

arguments over the right to trial with constitutional due process protections versus the safeguards of written notice:

> **ARGUMENTS:**
>
> * * *
>
> ***Against:***
>
> Current habitual offender procedures safeguard important constitutional rights to due process of law. The potential loss of liberty engendered by conviction as an habitual offender means that basic protections such as trial by jury are at least justified, if not specifically required by case law. Of greatest concern perhaps, is the way the bill could in effect shift the burden of proof from the prosecution, which now must prove its case beyond a reasonable doubt, to the defense. Under the bill, if the defense wished to contest the matter, it would have the burden of developing a prima facie showing that information regarding an alleged prior conviction was inaccurate or that the conviction was constitutionally invalid. If it did, the prosecutor would merely have to prove its case by a preponderance of the evidence.
>
> ***Response:***
>
> The bill would provide adequate procedural safeguards. It affords a defendant sufficient notice to contest habitual offender allegations, provides for an adversarial hearing at which issues can be resolved, and allows the defense to present evidence. [Legislative Analysis of House Bill 5306, First Analysis (2-22-94) pp. 2-3.; Copy attached as Appendix A.]

In the end, the Legislature chose a hard deadline of 21 days when it eliminated the right to trial. This was an intentional choice designed to address due process concerns.

The twenty-one day deadline must be viewed as mandatory, rather than directory, because it was designed to safeguard individual rights. As Judge Clifford Taylor explained in *People v Smith*, 200 Mich App 237, 242; 504 NW2d 21 (1993), deadlines that are designed to protect individual rights are subject to mandatory observance:

> It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and

> justice, time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specific time, it is directory. *However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.* [*Id.*, quoting 3 Sutherland, Statutory Construction (5th ed.), § 57.19, pp. 47-48; emphasis added.]

Consistent with this history, MCR 6.112(F) – adopted after the 1994 amendment of MCL 769.13 - makes plain that the prosecutor's obligation to list the defendant's convictions which "may" be used to enhance the sentence is a "must," clearly precluding any argument that a failure to do so might be ignored as a default for which no remedy exists:

> (F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed 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 very next sub-part of the rule explicitly forbids any harmless error argument by a prosecutor whose notice under MCL 769.13 was untimely. MCR 6.112(G) excuses all harmless errors except untimely filings like the one at issue here.

> (G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. *This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.* (Emphasis added).

Both the statute and court rule make clear that the prosecutor must act, if at all, within twenty-one days of arraignment on the information or waiver of arraignment.

The prosecutor does not have to file the habitual offender notice. The Legislature passed tough habitual offender laws in 1927 that included the prosecutor's "duty" to charge the repeat offender as a habitual offender. *Brinson v Genesee Circuit Judge*, 403 Mich 676, 681; 272 NW 2d 513 (1978). But this duty was eliminated in 1949, and the prosecutor was given discretion to seek or not seek habitual offender enhancement. *Id.* at 682. Implicitly, the Legislature recognized that some habitual offenders would not be sentenced as habitual offenders in light of the prosecutor's discretionary charging authority. The subsequent amendment of MCL 769.13 in 1994, with the strict twenty-one day limitation, likewise recognizes that not all habitual offenders will be sentenced as habitual offenders.

One of the questions posed by this Court in the order granting leave to appeal was whether "if the original notice was defective . . . the trial court had the authority to sentence the defendant as a fourth habitual offender." 493 Mich at 972-973. But this Court recognized nearly a century ago that the trial court has no authority to sentence an individual as a habitual offender unless the prosecutor properly requests habitual offender treatment:

> The trial judge was in error. He sentenced the defendant for an offense of which he had not been convicted. The statute provides an increased punishment for a second or subsequent offense, but it must be charged as such in the information. That was not done in this case. As the sentence imposed was greater than that prescribed for the offense charged, to which the defendant entered a plea of guilty, it is excessive and illegal. The case will be remanded for proper sentence as for a first offense. [*People v Ancksornby*, 231 Mich 271, 272; 203 NW 864 (1925).]

See also State v Sneed, 119 So 3d 850 (La Ct App 4 Cir, 2013) (trial court has no authority to apply sentence enhancement where notice was not timely filed).

Enforcing MCL 769.13's strict rule for habitual offender enhancement recognizes the significance of the liberty interest and the due process protections that apply. When a defendant

faces additional time in prison, written notice should be a minimum due process requirement. *See Gagnon* v *Scarpelli,* 411 US 778, 786; 93 S Ct 1756; 36 L Ed 2d 656 (1973) (written notice before revocation of probation); *State v Sneed, supra* (recognizing notice provision in enhancement statute reflects due process considerations); *People v Eason,* 435 Mich 228, 234, 251; 458 NW2d 17 (1990) (recognizing some due process right to notice vis-à-vis sentence enhancement); US Const Amends XIV; Const 1963, art 1, § 17. Notice also animates the rule that a defendant must understand the limits of the maximum sentence with habitual offender enhancement in order to enter a constitutionally voluntary guilty plea. *People v Brown*, 492 Mich 684; 822 NW2d 208 (2012). Notice even supports a rule that the defendant must be aware of the effect of sentence enhancement on the sentencing guidelines range before pleading guilty. *People v Boatman*, 273 Mich App 405; 703 NW2d 251 (2006), *overruled on other grds in People v Brown, supra.* And more broadly speaking, a defendant must have notice of the applicability of habitual offender enhancement *before* trial so that counsel may render effective assistance of counsel during the plea bargaining stage. *See generally Lafler v Cooper*, 566 US ___; 132 S Ct 1376; 182 L Ed 2d 398 (2012).

The notice filed in Mr. Johnson's case should be declared a nullity and of no effect because it did not meet the requirements of MCL 769.13. While the prosecutor filed a list of prior convictions, those prior convictions did not belong to Mr. Johnson. In effect, the prosecutor filed a piece of paper conveying its intent to seek enhancement, but failed to properly seek sentence enhancement as required by the statute.

This Court has consistently demanded strict compliance with filing and notice requirements in a number of civil settings. For example, in medical malpractice actions, the Court has applied the statutes of limitations against timely-filed complaints that failed to include

the requisite physician's affidavit of merit as required by the Legislature's tort reform provisions. *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). In *Scarsella* , this Court affirmed the dismissal of the deficient complaint, which the trial court had characterized as a nullity. 461 Mich. at 549.

So too, claims against the State of Michigan in the Court of Claims have been dismissed for lack of specificity in notices required under the governmental immunity statutes. *Rowland v Washtenaw Co. Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) (construing MCL 600.1404, defendant need not establish prejudice from lack of "exact location" detail in notice to bar action); *Jakupovic v. City of Hamtramck*, 489 Mich. 939; 798 N.W.2d 12 (2011)(same); *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012) (construing MCL 600.6431).

Similarly, Michigan courts have consistently enforced strict filing and notice requirements against plaintiffs suing the State for defects in city sidewalks. MCL 691.1404(1) requires pre-filing notice to the municipality of the exact location of the injury within 120 days of the accident. *Mawri v. City of Dearborn*, 486 Mich 908 (2010). In *Mawri*, the plaintiff's written notice to the City stated the defect in the sidewalk was "in the area of 5034 Middlesex." The accident had occurred next door at 5028 Middlesex, fifteen feet away. Although the City had actual notice of the accident – and all agreed that it had occurred at 5028 Middlesex– the Court of Appeals affirmed dismissal of the Complaint with prejudice for failure to comply with the statute. See *Mawri*, 2009 Mich. App. LEXIS 1714 (unpublished *per curiam*, August 9, 2009, attached as Appendix B). This Court initially granted leave to appeal in the case, 485 Mich. 1003 (2009), but later vacated that order. 486 Mich 908 (2010).

Taken together, the history of the habitual offender statutes, the bright-line rule of MCL 769.13(1), the harmless error provision in MCR 6.112, the due process right to notice in

connection with deprivation of a significant liberty interest, and this Court's earlier precedent respecting strict deadlines in civil settings all support the conclusion that habitual offender enhancement is not permitted when the notice is not timely filed (including untimely amendments to increase the level of enhancement) or the notice otherwise fails to meet the requirements of the statute. The remedy is resentencing either as a first-time offender or as a habitual offender consistent with the level specified in a timely and properly filed written notice.

Respectfully submitted,

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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Date: October 29, 2013

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Murray, P.J., and Whitbeck, and Riordan, J.J.

PEOPLE OF THE STATE OF MICHIGAN	
Plaintiff-Appellee	**Supreme Court No. 145477**
	Court of Appeals No. 304273
-vs-	**Monroe Circuit Court No. 06-35599-FH**
ALFONZO ANTWON JOHNSON	
Defendant-Appellant.	

______________________________________/

BRIEF OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AS *AMICUS CURIAE*

(APPENDIX)

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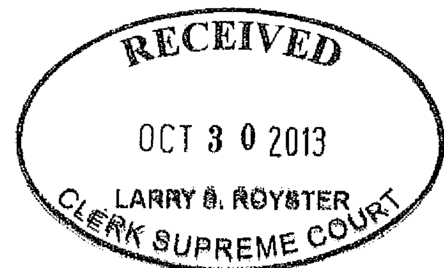

TABLE OF CONTENTS

Habitual Offender Procedure..1a - 3a

Mawri v *City of Dearborn*, Docket No. 283893 (2009).. 4a - 6a

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

HABITUAL OFFENDER PROCEDURE

RECEIVED
MAR 11 1994
LIBRARY OF MICH./LAW

House Bill 5306 as introduced
First Analysis (2-22-94)

Sponsor: Rep. Thomas C. Mathieu
Committee: Judiciary

THE APPARENT PROBLEM:

The Code of Criminal Procedure provides for sentence enhancements for convicted felons who have previously been convicted of one or more felonies. Life offenses constitute special cases, but generally speaking, if the defendant had one prior felony, the habitual offender provisions authorize a sentence of 1.5 times the maximum term that otherwise would apply; if there were two previous felonies, two times the maximum is authorized. The enhancement for someone with three or more previous felonies depends on the penalty authorized for the instant offense: if it was punishable by less than five years in prison, the total sentence may be up to 15 years; if the instant offense was punishable by imprisonment for five years or more or for life, the court could sentence the defendant to life. Repeat drug offenders are subject to the sentence enhancements provided under the portion of the Public Health Code that deals with controlled substances.

Current law calls for a prosecutor to seek a sentence enhancement following conviction (although case law has refined this to generally require that the necessary papers be filed shortly after arraignment, so that the defense has adequate notice), and if the defendant pleads not guilty or remains silent to the allegation of being an habitual offender, for a jury to determine whether the person is an habitual offender.

Current procedures have been criticized for the burdens and expense they present for the criminal justice system. Many argue that having a jury determine whether a person is an habitual offender is a waste of court resources when the facts of the existence of any prior convictions are routinely available as a matter of record. The habitual offender law has been said to be underutilized because of the cumbersomeness of the procedures, which many believe exceed the demands of due process of law.

Such arguments were lent fresh strength recently, say some, when the Michigan Supreme Court decided People v. Eason (435 Mich 228; 1990). Although that case dealt with sentence enhancements under the Public Health Code, the court said that where statute did not contemplate a separate trial-type proceeding, but rather provided for sentence enhancement, due process requires a reasonable opportunity to challenge the accuracy of the information relied on in passing sentence, but does not entitle the defendant to a trial-type procedure regarding the use of the prior convictions for sentencing purposes. In a separate concurring opinion, Justice Cavanagh, joined by Justice Archer, said that the constitutional guarantee of due process of law does not require that a defendant's prior conviction be treated as a new crime that must be separately charged and proven at a separate trial.

A revision of the habitual offender procedures has been proposed.

THE CONTENT OF THE BILL:

The bill would amend the Code of Criminal Procedure to revise the procedures for prosecutors to seek sentence enhancements for habitual offenders. Rather than accusing a person of being an habitual offender in a separate charging document (a separate or supplemental information), the prosecutor would file a written notice of any intent to seek habitual offender sentence enhancements within 21 days after the defendant's arraignment. The judge, rather than a jury, would decide on the existence of the defendant's prior conviction or convictions, either at sentencing or at a separate hearing scheduled before sentencing. The bill would take effect May 1, 1994. A more detailed explanation follows.

Notice of intent. A prosecutor could seek an habitual offender sentence enhancement by filing a

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written notice of intent to do so within 21 days after the defendant's arraignment on the information, or if arraignment was waived, within 21 days after the filing of the information charging the underlying offense. The notice would list the prior conviction(s) that might be relied upon for purposes of sentence enhancement. The notice would have to be filed with the court and served on the defendant or his or her attorney within the 21-day period. If the defendant pleads guilty or no-contest at the arraignment, the prosecutor could file the notice of intent following conviction.

Defense response. A defendant could challenge the accuracy or constitutional validity of one or more of the prior convictions listed in the prosecutor's notice by filing a written motion with the court and serving a copy on the prosecutor in accordance with rules of the supreme court.

Court determination. The existence of a defendant's prior convictions would be determined by the court, without a jury, either at sentencing or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction could be established by any evidence that was relevant for that purpose, including but not limited to the following: a copy of a judgment of conviction; a transcript of a prior trial or plea-taking or sentencing proceeding; information contained in a presentence report; a statement of the defendant.

Defense challenges would be resolved at sentencing or at a separate hearing scheduled for that purpose before sentencing. The defense would be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction(s) before sentence was imposed, and would be permitted to present relevant evidence for that purpose. The defendant would have the burden of establishing a prima facie showing that an alleged prior conviction was inaccurate or constitutionally invalid. If the defense established a prima facie showing that information or evidence regarding an alleged prior conviction was inaccurate, or that an alleged prior conviction was constitutionally invalid, the prosecutor would have the burden of proving the contrary by a preponderance of the evidence.

MCL 769.13

FISCAL IMPLICATIONS:

There is no fiscal information at present. (2-18-94)

ARGUMENTS:

For:

The bill would make habitual offender procedures more efficient and improve the administration of justice. Prosecutors would no longer have to charge habitual offender status in a separate information and prove that status to a jury, which could lead to a broader use of habitual offender sentence enhancements. Broader use could in turn provide greater protection to the public: habitual offenders are not eligible for disciplinary credits, so incarceration as an habitual offender can be an especially effective way to incapacitate a dangerous criminal.

Response:

It may be faulty to assume that cumbersome procedures are responsible for any apparent underutilization of the habitual offender law. Charges of being an habitual offender are not uncommonly dropped in plea bargains. Moreover, it appears that use of the law is increasing, despite its due process demands, possibly because of the exemption to disciplinary credits. Indeed, several counties have adopted prosecutorial policies of pursuing habitual offender enhancements wherever possible.

Against:

Current habitual offender procedures safeguard important constitutional rights to due process of law. The potential loss of liberty engendered by conviction as an habitual offender means that basic protections such as trial by jury are at least justified, if not specifically required by case law. Of greatest concern perhaps, is the way the bill could in effect shift the burden of proof from the prosecution, which now must prove its case beyond a reasonable doubt, to the defense. Under the bill, if the defense wished to contest the matter, it would have the burden of developing a prima facie showing that information regarding an alleged prior conviction was inaccurate or that the conviction was constitutionally invalid. If it did, the prosecutor would merely have to prove its case by a preponderance of the evidence.

Response:

The bill would provide adequate procedural safeguards. It affords a defendant sufficient notice

DIGITAL

to contest habitual offender allegations, provides for an adversarial hearing at which issues can be resolved, and allows the defense to present evidence.

Against:
More widespread use of habitual offender sentence enhancements could but worsen prison overcrowding and sentencing disparities. Sentence enhancements are available regardless of how serious those prior felonies were or how long ago they occurred. If due process protections are to be diminished, then there should be simultaneous adjustments in the application of the enhancements. At the least, any changes in habitual offender statutes should await enactment of a comprehensive and coherent sentencing guidelines scheme that includes guidelines for habitual offenders and ensures that the harshest punishments (as well as limited prison space) are reserved for the worst offenders.

Response:
The bill would not substantively change who may be sentenced as an habitual offender or how much additional incarceration may be imposed under habitual offender sentence enhancements. The bill would affect not so much the results of habitual offender proceedings, but rather at what cost habitual offender sentence enhancements are obtained.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bill. (2-16-94)

The Michigan Council on Crime and Delinquency opposes the bill because of the need to first enact sentencing guidelines legislation. (2-16-94)

Westlaw.

Not Reported in N.W.2d, 2009 WL 2426318 (Mich.App.)
(Cite as: 2009 WL 2426318 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
Mohamed **MAWRI**, Plaintiff-Appellee,
v.
CITY OF DEARBORN, Defendant-Appellant.

Docket No. 283893.
Aug. 6, 2009.

West KeySummary**Municipal Corporations 268 ⚷788**

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k787 Notice of Defect or Obstruction
268k788 k. In General. Most Cited Cases

Pedestrian's notice of injury and defect failed to give the city proper notice of the exact location of defect in a sidewalk and thus failed to satisfy statutory requirements. The notice gave the location of the defect as "in the area of" a street address for a particular residential home. However, the photographic evidence showed that the location of the alleged defect was very close to a trunk of a tree that was located nearly at the midpoint of another property. M.C.L.A. § 691.1404(1).

Before: WILDER, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

*1 Defendant appeals as of right from the circuit court's order denying its motion for summary disposition. We reverse and remand for entry of an order granting defendant's motion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff fell on an icy sidewalk near his home on March 2, 2006, and injured his hip. On May 26, 2006, plaintiff's counsel provided defendant with a letter purporting to be notice of the incident. The text of the letter read:

> Please be advised that I represent Mohamed **Mawri** for injuries he sustained when he fell on a defective side-walk on March 2nd, 2006 in the area of 5034 Middlesex, Dearborn Michigan. It is my understanding that since this fall, the City has repaired the area. As indicated, my client fell due to the defective side-walk, fracturing his right hip, necessitating surgery. Please consider this statutory notice. If you need any further information please do not hesitate to contact me.

Defendant moved for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing, among other things, that the notice was legally insufficient. The circuit court denied the motion, holding that plaintiff had complied with the statutory notice requirement because the police investigated and took pictures, and city workers had "tagged the sidewalk" some time before the accident.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v. Barton Malow Co.*, 480 Mich. 105, 111, 746 N.W.2d 868 (2008). Determination of the applicability of the highway exception to governmental immunity is a question of law which we review de novo on appeal. *Stevenson v. Detroit*, 264 Mich.App. 37, 40-41, 689 N.W.2d 239 (2004).

Defendant has a duty to keep a sidewalk in its jurisdiction "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1); see also *Listanski v. Canton Twp.*, 452 Mich. 678, 682, 551 N.W.2d 98 (1996), and *Jones*

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v. Ypsilanti, 26 Mich.App. 574, 581, 182 N.W.2d 795 (1970). Defendant does not dispute that it has jurisdiction over the sidewalk in this case. The notice provision at issue, MCL 691.1404, provides, in part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) [dealing with injured minors] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. *The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.*
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [Emphasis added.]

*2 MCR 2.105(G)(2) governs service of process on cities, and provides that service of process is made by serving the summons and complaint on "the mayor, the city clerk, or the city attorney of a city." In *Rowland v. Washtenaw Co. Rd. Comm.,* 477 Mich. 197, 200, 204, 731 N.W.2d 41 (2007), the Supreme Court held that the notice requirement must be complied with as it is written, overruling earlier cases that had "engrafted an actual prejudice component onto the statute." *Rowland* was given full retroactivity. *Id.* at 222-223, 731 N.W.2d 41.

In this case, plaintiff served the city attorney, so proper service was given. However, the notice that was served gave the location of the defect as "in the area of 5034 Middlesex" and described the defect merely as "a defective side-walk." The police report and photographs indicate that the site of the fall was actually next door, at 5026 Middlesex. The area marked by plaintiff is next to a good-sized tree, which is immediately in front of 5026 Middlesex. In his deposition, plaintiff stated that he parked on the street "two houses away" from his house, walked up the neighbor's driveway approach, and then onto the sidewalk, walking north. He testified that he fell by the tree in front of the neighbor's house:

> *Q.* Okay. This house that's shown, when you pointed out the tree here in Exhibit 2 as being the approximate location where the accident happened on the sidewalk.
>
> *A.* Yes. Right here. Like, where the tree is and the sidewalk. That's where I fall [sic].
>
> *Q.* And that location is in front of the neighbor's house that is one house south of your house?
>
> *A.* Yes.

Plaintiff's notice letter and complaint both give 5034 Middlesex as the location of the accident, and he later attempted to reconcile this discrepancy by averring that the fall occurred "between" the two addresses and having his expert aver that either address could be used to describe the location. These statements are not in accord with the photographic evidence, which shows the location to be very close to the trunk of the tree and the tree to be nearly at the midpoint of 5026 Middlesex. There is no dispute over which slab of concrete is at issue. Plaintiff essentially argues that the address he gave is close enough or that the affidavits create a question of fact regarding which address the slab abuts. However, the statute requires the "exact" location to be given, MCL 691.1404(1), and "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition...." *Kaufman & Payton, PC v. Nikkila,* 200 Mich.App. 250, 256-257, 503 N.W.2d 728 (1993). The circuit court erred in finding that the address given in the notice was sufficient under the statute. It also erred in relying on the police report as giving defendant notice of the location of the defect about which plaintiff complained in his letter. The police recor-

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ded the location as 5026 Middlesex, not 5034 Middlesex. For all defendant knew, there could have been more than one defect allegedly causing more than one fall. Moreover, whatever notice the police had does not impute to being notice given to defendant.

*3 Even if the address was "close enough," the letter to defendant does not describe the "nature of the defect" as required by MCL 691.1404(1). Plaintiff's letter simply says "defective side-walk." While this description is more specific than that given in *Rowland,* where the plaintiff merely mentioned "an incident" occurring at an intersection of named streets, see *Rowland, supra* at 249, 731 N.W.2d 41 (Kelly, J.), to say "defective" describes the "nature of the defect" is circular. A description of a defect's "nature" would have to be more than simply calling it "defective." An examination of the photographs shows the "defect" is not self-explanatory: there is no glaring defect, such as a missing slab or a protruding pipe. The circuit court again erred by relying on defendant's constructive notice of the problem.

In light of our decision, it is unnecessary to address defendant's other issues.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

Mich.App.,2009.
Mawri v. City of Dearborn
Not Reported in N.W.2d, 2009 WL 2426318 (Mich.App.)

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