STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 316921 Wayne Circuit Court
ERNEST ANTHONY DAVIS, Defendant-Appellant.	LC No. 13-001227-FC

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 3½ to 15 years for the assault conviction and one to seven years each for the CCW and felon-in-possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant's convictions arise from the shooting of Lacey Pollard, a security guard at Cutter's Bar & Grill in Detroit. Pollard testified that he became involved in an argument with defendant outside the bar, during which defendant produced a gun and shot Pollard in the abdomen. Pollard denied possessing a gun or threatening defendant. Defendant admitted that he was armed with a gun that was concealed in his coat pocket and that he shot Pollard, but claimed that he shot Pollard in self-defense after Pollard first produced a gun. The trial court rejected defendant's claim of self-defense, finding that defendant's version of the events was not reasonable.

II

Defendant argues that he should not have been sentenced as a second habitual offender because notice of the prosecutor's intent to seek to enhance his sentence was not timely filed in accordance with MCL 769.13(1). The interpretation of the habitual offender statutes is a

question of law that we review de novo on appeal. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002).

MCL 769.13 provides, in pertinent part:

> (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.
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> (2) A notice of intent to seek an enhanced sentence under subsection (1) . . . 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 of service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

The purpose of the 21-day notice rule is to give the defendant "notice, at an early stage in the proceedings, of the potential consequences should [he] be convicted of the underlying offense." *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982). The 21-day notice rule is a bright-line test that must be strictly applied. *People v Morales*, 240 Mich App 571, 575-576; 618 NW2d 10 (2000). The failure to file the notice in a timely manner precludes sentencing as an habitual offender.[1] *Morales*, 240 Mich App at 574-575; *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997). See also *People v Williams*, 462 Mich 882; 617 NW2d 330 (2000) (vacating defendant's habitual offender sentence because the habitual offender notice was not filed within 21 days of arraignment).

Defendant was arraigned on February 13, 2013. Therefore the notice of the prosecutor's intent to seek to enhance his sentence should have been filed by March 6, 2013. We note that defendant does not contend that he did not actually receive the habitual offender notice on or before March 6, 2013. He contends only that the notice was not timely because it was included in the information and the record does not establish if and when the information was filed in the circuit court. Although it is unclear from the record if and when the information was filed in the circuit court, the record establishes that the habitual offender notice was also included in the complaint and warrant filed in the district court, that defendant was arraigned on the warrant, and

[1] While the statute requires that the notice be filed within 21 days *after* arraignment or *after* the filing of the information if the defendant is not arraigned, that does not mean that a notice filed before arraignment is invalid. See *People v Marshall*, 298 Mich App 607, 627; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (in a case in which the defendant was not arraigned on the information, this Court held that the habitual offender notice was timely because it was included in the information and the information was filed).

the complaint and warrant, along with the entire district court record, were transferred to the circuit court on February 11, 2013. Because the habitual offender notice had been included in the charging documents from the inception of the case and defendant does not deny that he actually received the notice before the March 6, 2013 deadline, the trial court did not err by sentencing defendant as an habitual offender.

In a related claim, defendant argues that his trial counsel was ineffective for failing to object that the notice was not timely filed in accordance with MCL 769.13(1). To establish ineffective assistance of counsel, defendant must "show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Because we conclude that notice was proper, any objection to it would have been futile, and trial counsel was therefore not ineffective for failing to object. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("[d]efense counsel is not required to make a meritless motion or a futile objection").

III

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he is entitled to a new trial because defense counsel was ineffective for failing to impeach Pollard with his preliminary examination testimony. Defendant raised this issue in a motion for a new trial, but the trial court did not conduct an evidentiary hearing on the motion. Thus, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"A witness can be impeached by the use of prior inconsistent statements." *People v Patton*, 66 Mich App 118, 121; 238 NW2d 545 (1975). But decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). However, the trial strategy must be sound, and "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Therefore, counsel may be found ineffective with regard to a strategic decision if the strategy employed was not a sound one. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

The record shows that counsel was aware that Pollard had testified at the preliminary examination and that he did not impeach him with his prior testimony. Defendant contends that counsel was ineffective for failing to impeach Pollard because Pollard's trial testimony conflicted with his preliminary examination testimony "about how he entered Cutter's Bar after the shooting, how and when he learned [defendant's] name, and when the police came to see him." However, defendant has not identified any specific testimony that Pollard gave at the preliminary examination that was contrary to his trial testimony such that it could have been used

for impeachment. Accordingly, defendant has not met his burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, defendant has not shown a reasonable probability that the outcome of the trial would likely have been different had Pollard been impeached in the manner stated. The key issue at trial was defendant's self-defense claim. Pollard maintained that he was unarmed, but defendant testified that Pollard was about to shoot him and he pulled his gun, which was concealed in his coat pocket, and shot Pollard first. The trial court did not reject defendant's claim of self-defense simply because it found Pollard's testimony more credible than defendant's testimony. Rather, it found defendant's claim of self-defense was inherently implausible—the trial court did not believe that defendant could have drawn his gun and shot Pollard before Pollard shot him if Pollard already had his gun out and ready to fire. Any unrelated impeachment of Pollard's testimony based on his preliminary examination testimony would not have remedied the implausibility of defendant's own testimony. Therefore, defendant has failed to establish that counsel was ineffective.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Donald S. Owens