

TO: Criminal Jurisprudence and Practice Committee
FROM: Tom Clement
DATE: November 16, 2011
RE: Proposed Amendment of Rule 6.302 of the Michigan Court Rules
Proposed Amendment to MCR 769.13(1) and (3)

Proposed Amendment of Rule 6.302 of the Michigan Court Rules would reinsert a requirement that a court advise a defendant who pleads guilty that the defendant's maximum possible prison sentence may be longer than the statutory maximum sentence for a particular offense if the defendant qualifies as a habitual offender. The need for the amendment arises from the possibility that a criminal defendant could tender a guilty plea prior to the expiration of the time frame during which the prosecution can permissibly file a habitual offender notice thereby enhancing the applicable penalties. MCL 769.13(1). For example, a defendant charged with the four year offense of larceny in a building could plead guilty at the circuit court arraignment only to have the prosecutor file a habitual offender notice within twenty-one days of the arraignment, thereby increasing the maximum penalty. At the November meeting of the Committee a motion was made and seconded to support the proposed amendment. The Motion was carried by a subsequent e-vote.

While the Committee supports the proposed amendment, the discussion surrounding the issue focused more on MCL 769.13 – Notice of Intent to seek enhanced sentence; contents, filing, service, time, challenge, existence of prior convictions. Specifically, the discussion focused on a potential amendment to the statute which would resolve the apparent objective of the Amendment to the Court Rule. Specifically, any prejudicial result stemming from the filing of a habitual notice after the entry of a plea would be resolved with a limitation on the prosecutions ability to file the notice post-plea. Further, a statutory amendment may alleviate any concerns over whether the entry of a plea is both understanding and voluntary pursuant to MCR 6.302 where a habitual notice is filed post plea.

The pertinent language of MCL 769.13 states as follows:

- (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.

- (3) The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1).

The underlying concern that the entry of an understanding and voluntary plea may not be accomplished where the prosecution files a habitual notice post plea may be addressed with the following proposed statutory amendment:

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
3. The prosecuting attorney may not file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense, upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1) unless, at or before the time of the plea, the prosecuting attorney advises the court and the defendant either in writing or orally, on the record, of its intent to either file a notice of intent to seek an enhanced sentence or determine the defendants eligibility for an enhanced sentence for the purpose of filing a notice of intent to seek an enhanced sentence within the permissible timeframe of subsection (1).

The practical effect of this change is to remove the assumption that the defendant either understands or has been advised of the possibility of an increase in the maximum sentence despite being advised, by the court, at the time of plea that the maximum possible penalty is something other than what it could become.

The change does not alter the ability of the prosecution to file the notice; rather it simply adds a step for the prosecution in an effort to make certain that the defendant completely understands the potential penalties as is required by MCR 6.302.