46-13-108. Notice by prosecutor seeking persistent felony offender status. (1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant.

History: En. 95-1506 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 20, Ch. 184, L. 1977; R.C.M. 1947, 95-1506; amd. Sec. 171, Ch. 800, L. 1991; Sec. 46-18-503, MCA 1989; redes. 46-13-108 by Code Commissioner, 1991; amd. Sec. 23, Ch. 262, L. 1993; amd. Sec. 12, Ch. 395, L. 1999.

Commission Comments:

1991 Comment: This statute retains the requirement contained in 1987 MCA 46-18-503 that the prosecutor notify the defendant that he is seeking persistent felony offender status. Subsection (1) requires that the notice be given at or before the omnibus hearing and references 46-13-101. Subsection (2) retains the 1987 code's requirement for notice that the prosecutor is seeking persistent felony offender status. See 1987 MCA 46-18-503(2). Subsection (3) reflects the statute change that requires notice at or before the omnibus hearing. Subsection (4) retains the 1987 code's hearing requirements. See 1987 MCA 46-18-503(4).

Source: Revised Sections of Nebraska, 1943 (29-2221(2)).

The section is a new approach to charging prior convictions and is intended to give the defendant the requisite notice and to avoid infecting any trial of the case with the potentially prejudicial information of the defendant's prior criminal record.

Compiler's Comments:

1999 Amendment: Chapter 395 in (5) inserted "or nolo contendere". Amendment effective October 1, 1999.

1993 Amendment: Chapter 262 at end of (1) substituted "46-13-110" for "46-13-101".

1991 Amendment: In (1), at beginning, inserted exception clause, before "seeks" substituted "prosecution" for "state", after "offender" deleted "under 46-18-502", and after "given" substituted "at or before the omnibus hearing pursuant to 46-13-101" for "in writing to the accused or his attorney before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty"; in (2) substituted "and may not be" for "The notice and the charges of prior convictions contained therein shall not be made public or in any manner", after "returned" deleted "upon the felony charge", and at end substituted "except as allowed by the Montana Rules of Evidence" for "However, if the defendant testifies in his own behalf, he is subject to impeachment as provided in the Montana Rules of Evidence"; in (3), at beginning, substituted "defendant objects to the allegations contained in" for "accused is convicted upon the felony charge", after "notice" deleted "together with proper proof of timely service, shall be filed with the court before the time fixed for sentencing", and at end substituted "the judge shall conduct a hearing to determine if the allegations in the notice are true" for "the court shall then fix a time for hearing with at least 3 days' notice to the accused"; in (4), in two places, substituted "judge" for "court" and at end substituted "as provided by law" for "under the provisions of 46-18-502"; inserted (5) regarding filing and sealing of notice; and made minor changes in style.

Case Notes:

GENERAL

Alternative Sentence for Drug Offense Not Precluded by Persistent Felony Offender Statutes, but Incarceration Not Error: Brendal pleaded guilty to fraudulently obtaining dangerous drugs and was sentenced to 25 years in prison with 15 years suspended. Based on prior convictions for the same offense, the sentencing court designated Brendal as a persistent felony offender and imposed a mandatory 10-year prison sentence. Brendal appealed the sentence on grounds that the sentencing court

should have considered a sentence to a drug treatment program pursuant to the alternative sentencing authority in 45-9-202. However, the Supreme Court affirmed. The persistent felony offender statutes do not preclude a District Court from providing an alternative sentence under 45-9-202 for a person convicted of a drug-related offense, as long as the required criteria for imposing an alternative sentence are satisfied. Therefore, although the District Court could have provided an alternative sentence, it was not error to sentence Brendal to incarceration. St. v. Brendal, 2009 MT 236, 351 M 395, 213 P3d 448 (2009).

Failure to Object to Persistent Felony Offender Notice -- No Hearing or Findings Required: If a defendant fails to object to a persistent felony offender notice, no hearing or findings regarding alleged prior convictions are required. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

District Court Jurisdiction to Apply Persistent Felony Offender Designation to Felony DUI: Yorek pleaded guilty to and was sentenced on a felony DUI charge. The District Court determined that it had jurisdiction and imposed a persistent felony offender designation. Yorek sought postconviction relief on grounds that the District Court lacked subject matter jurisdiction to impose a persistent felony offender designation for felony DUI. The District Court denied the petition for postconviction relief, concluding that sentencing for felony DUI is not solely governed by 61-8-731 and 61-8-734, that nothing in the persistent felony offender statute excludes felony DUI offenders from its application, and that Yorek waived any jurisdiction claim by pleading guilty. The Supreme Court affirmed. Nothing in 46-18-502 distinguishes between or among the types of felonies to which it applies, or excludes DUI offenders. Rather, if the underlying charge meets the definition of a felony and if the state has provided proper notice of its intent to seek persistent felony offender status under this section, a District Court has the statutory authority to designate and sentence an offender as a persistent felony offender. Yorek's crime met the definition of a felony, and Yorek fell squarely within the persistent felony offender statute. The state met the notice provisions, and the District Court possessed subject matter jurisdiction to designate Yorek as a persistent felony offender. Because the jurisdiction question was dispositive, the Supreme Court did not reach the question of whether Yorek's guilty plea was a procedural bar against bringing the claim. St. v. Yorek, 2002 MT 74, 309 M 238, 45 P3d 872 (2002), followed in St. v. Pettijohn, 2002 MT 75, 309 M 244, 45 P3d 870 (2002), and St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005).

Sentencing Hearings -- Montana Rules of Evidence Not Applicable: Rule 101(c)(3), Montana Rules of Evidence, exempts sentencing proceedings from evidentiary constraints, and because felony offender hearings are part of the sentencing proceedings, they too are subject to the Montana Rules of Evidence. St. v. Lamere, 202 M 313, 658 P2d 376, 40 St. Rep. 110 (1983).

Similar Break-Ins on Same Day Admissible: Defendant was charged with felony theft for stealing a pickup, burglary for a break-in at the Ulm Bar, burglary for a break-in at the Mountain Palace Bar, and theft of personal property from the Ulm Bar break-in. On the same day these break-ins occurred, the Craig Bar was broken into and burglarized. The District Court denied defendant's motion in limine to exclude evidence from similar crimes committed on the same date as those with which defendant was charged. On appeal the Supreme Court said that applying the four-part test set forth in St v. Just, 184 M 262, 602 P2d 957 (1979), the evidence was admissible, that the proper procedure was followed as to the form and content of the notice, and that the jury was properly instructed. St. v. Van Natta, 200 M 312, 651 P2d 57, 39 St. Rep. 1771 (1982).

Admissibility of Evidence of Prior Crimes or Acts: To introduce evidence of prior uncharged offenses for the limited purposes allowed, the potential for prejudice to the defendant requires the prospective application of a three-part procedure in addition to any other requirements: (1) the defendant must be given notice of planned introduction and its purpose, following the form and procedure in 46-18-503 (renumbered as this section); (2) the court must give a cautionary instruction on the purpose of the evidence; and (3) the court must charge the jury that the defendant is not being tried and may not be convicted for any other offense. St. v. Just, 184 M 262, 602 P2d 957 (1979).

Statutes Construed Together: The Supreme Court saw no problem in construing 46-18-502 and 46-18-503 (renumbered as this section) together to provide both the procedural requirements and substantive basis for implementing persistent felony offender sanctions since that is precisely what the Legislature intended. St. v. Radi, 176 M 451, 578 P2d 1169 (1978).

Not Retroactive: The statute precluding disclosure to the jury in a criminal proceeding of any prior

convictions does not apply retroactively to a criminal trial prior to the effective date of the statute. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

NOTICE

Filing of Amended Information -- New Omnibus Hearing or Persistent Felony Offender Notice Not Required: Potter asserted that because he was not notified anew that the state would seek a persistent felony offender designation following the filing of an amended information adding an additional felony charge, the trial court erred in sentencing him as a persistent felony offender. The Supreme Court disagreed. Nothing in statute requires either a new omnibus hearing or a new persistent felony offender notice upon the filing of an amended information. Potter knew for over a year that the state would seek a persistent felony offender designation, and nothing in the record indicated that he was prejudiced by the timing of the notice. The persistent felony offender designation was affirmed. St. v. Potter, 2008 MT 381, 347 M 38, 197 P3d 471 (2008).

Adequate Notice of State's Intention to File Persistent Felony Offender Status -- Failure of Defendant to File Objection to Prior Offense Despite Opportunity to Do So: Shults asserted that the state failed to properly notify of its intention to seek persistent felony offender (PFO) status by not specifying the alleged prior convictions before or at the omnibus hearing. The Supreme Court held that notice was adequate. The Supreme Court will not overturn a PFO designation if a defendant has ample opportunity to object to PFO treatment, including the underlying charge on which the statute is based, and the defendant is not prejudiced by the timing of the filing. Here, Shults had 4 months to file an objection to the alleged prior offense prior to sentencing, but failed to do so. The sentencing designation was affirmed. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006), followed in St. v. Ramsey, 2007 MT 31, 336 M 44, 152 P3d 710 (2007), and St. v. Dodson, 2009 MT 419, 354 M 28, 221 P3d 687 (2009).

Belated Notice to Seek Persistent Felony Offender Status Based on "Good Cause": Fields, charged with felony theft and DUI, negotiated a plea agreement under which the state agreed not to seek persistent felony offender status and recommended a 7-year suspended sentence. After the signing of the agreement and the filing of an omnibus status report, the state reinstituted its intent to seek persistent felony offender status after Fields informed officials that he would not abide by the agreement and would be seeking a jury trial. When upon conviction, the District Court sentenced Fields to a prison term as a persistent felony offender, Fields appealed, alleging that the District Court erred when it determined that the state had "good cause" to increase Fields' sentence as a persistent felony offender because the state had not given Fields notice of that intent at the omnibus hearing. In affirming the District Court decision, the Supreme Court ruled that there was "good cause" for allowing the state to file its intent to seek persistent felony offender status as a result of Fields' decision not to follow through with the negotiated plea agreement. St. v. Fields, 2000 MT 328, 303 M 56, 15 P3d 400, 57 St. Rep. 1391 (2000).

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Following Niederklopfer's omnibus hearing on charges of deliberate homicide, the state filed a notice to seek increased punishment of Niederklopfer as a persistent felony offender. Niederklopfer subsequently waived his rights, pleaded guilty to mitigated deliberate homicide pursuant to a plea agreement, and was sentenced to 80 years as a persistent felony offender. Niederklopfer later sought postconviction relief on grounds that the state did not give sufficient notice that it would seek persistent felony offender status. The Supreme Court affirmed the sentence. The District Court had jurisdiction to consider Niederklopfer a persistent felony offender when notice was filed to designate him as such, even though the notice was filed late. Timeliness of the notice was not jurisdictional, but rather the late notice was a procedural defect that Niederklopfer did not object to when filed. Niederklopfer's voluntary and intelligent guilty plea constituted a waiver of nonjurisdictional or procedural defects, including the timeliness of the notice. Because Niederklopfer failed to allege that he would have gone to trial but for his counsel's failure to object, the second prong of the Strickland test (466 US 668) for ineffective assistance of counsel was not met, and the District Court did not err in denying his petition for postconviction relief. St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448, 57 St. Rep. 742 (2000).

Notice of Intent to Seek Increased Punishment Not Filed With Court Until After Trial -- No Error in Persistent Felony Offender Designation: The state timely served defense counsel with notice of its intent to seek increased punishment for McQuiston as a persistent felony offender but did not file the notice with the court until after trial was concluded, 5 months before sentencing. McQuiston contended that timely

filing of the notice was a jurisdictional prerequisite and that failure to so do constituted reversible error. However, the state's notice to defense counsel 5 months before trial and to the court 5 months before sentencing did not prejudice McQuiston, and the persistent felony offender designation was not made in error. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Notice to Specify Purpose of Proposed Evidence: The prosecution's notice to the defendant of the state's intent to introduce evidence of prior conduct stated that the evidence was to be introduced for the purpose of showing "opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in committing the offenses charged". The Supreme Court held that the introduction of the evidence was reversible error because the prosecution had used a "shotgun" approach in listing reasons for introducing the evidence rather than giving the defendant a specific purpose for the evidence's admission. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Prejudice of Untimely Notice Not Cured by Right to Continuance: On the first day of trial, the prosecution gave the defense notice of additional evidence of prior acts that the state intended to introduce. The Supreme Court held that the defendant had the right to a speedy trial and to proper notice and that the defendant could not be compelled due to untimely notice to choose between the two. St. v. Croteau, 248 M 403, 812 P2d 1251, 48 St. Rep. 484 (1991).

Time of Giving: The state could give defendant who pleaded not guilty notice of intent to seek increased punishment at any point prior to the beginning of the trial and did not have to give the notice before or at the pretrial omnibus hearing. St. v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987).

When notice of the invocation of the persistent felony offender statute was given 12 days before the case came to trial, the State's invocation adequately conformed with the statute and due process. St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979).

The county attorney had the right to seek increased punishment under 46-18-502, whether plea bargaining negotiations were in progress or not. There was no record of retaliation on his part. The only question presented was whether the giving of the notice required by 46-18-503 (renumbered as this section) violated due process when given on a Friday afternoon when the trial was to commence the following Monday. The Supreme Court held that notice can be given any time before the case is "called for trial", meaning the beginning of the trial. St. v. Johnson, 179 M 61, 585 P2d 1328 (1978).

Notice of Exact Crimes and Form of Testimony Required: Defendant was charged with slashing his ex-wife's tires. During the trial, evidence was introduced that the wife had had a total of 36 tires slashed since her divorce from defendant. Additionally, men she had dated testified to having their tires slashed during the dating period. Defense counsel challenged this evidence of prior conduct because the defense had not received notice that the State would introduce such evidence. The State said that there was no prejudice as defendant was aware the State intended to introduce such evidence. The Supreme Court said prejudice was found in the fact that defendant did not know exactly what acts or crimes he would have to be prepared to defend against at trial, nor did he know the form of such testimony. The case was remanded for retrial. St. v. Brown, 209 M 502, 680 P2d 582, 41 St. Rep. 852 (1984).

Notice as Jurisdictional or Procedural: This section, which provides for sentencing persons designated as persistent felony offenders, requires that two notices be given to the accused or his attorney. The first notice must be given prior to the entry of a guilty plea or before a trial is called upon a not guilty plea. The second notice applies when a defendant is convicted. The first notice is jurisdictional and was clearly given in this case. The second notice is procedural. The record does not show any prejudice due to lack of the second notice, because defendant appeared at the hearing with counsel and did not contest the lack of notice. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). See also St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Written Notice Required: Although the defendant was aware of the State's intention to have him designated as a persistent felony offender, the State did not file written notice of its intent until the day of sentencing. The case was remanded for sentencing, with written notice of the State's intent to be given at least 3 days prior to sentencing. St. v. Welling, 199 M 135, 647 P2d 852, 39 St. Rep. 1215 (1982).

Failure to Object to Lack of Notice: Failure to object to lack of notice at the time of sentencing as a persistent felony offender does not constitute a waiver of the requirement of notice to the defendant. In re Davis, 179 M 196, 587 P2d 30 (1978).

Notice Not Error When Jury Uninformed: When the State, pursuant to this section, gave proper

notice to the defendant of its intention to seek increased punishment if the defendant was convicted on a charge of rape, on the basis of the defendant's prior conviction of a felony, there was no error since the jury was not in possession of such information. St. v. Metcalf, 153 M 369, 457 P2d 453 (1969).

Alleging Previous Conviction: Under former law, in an information charging, among other things, a prior conviction of an offense in another state which in this state was punishable by imprisonment in the state prison, it was unnecessary to allege the facts constituting the crime in the foreign state, and it was immaterial whether the offense of which the defendant was alleged to have been previously convicted in the sister state was a felony there. St. v. Paisley, 36 M 237, 92 P 566 (1907).

HEARING

Finding of No Mitigating Factors Supported in Record: Where the trial court considered defendant's drinking and sexual problems but concluded that those conditions did not excuse defendant from accountability for his acts, and the evidence presented at the hearing and in the presentence investigation report supported the trial court's conclusion, there was no abuse of discretion in sentencing defendant as a persistent felony offender. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Specific Objection to Evidence Required: By failing to make a specific objection, the defendant waived his right to assert that the State's certificate of prior conviction was not competent evidence without proof that he was the person named in the certificate. The defendant was informed well in advance of the time he entered his guilty plea that he would be tried as a persistent felony offender. At the hearing to determine whether the defendant was a persistent felony offender, he had an opportunity to object to the State's lack of identification but failed to do so. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Impeachment of Defendant's Testimony: Subsection (2)(b) of this section does not change any law relative to informing the jury of a defendant's prior record for impeachment purposes. A prior record of the defendant may still be used to impeach his testimony should he decide to testify in his own behalf. St. v. Romero, 161 M 333, 505 P2d 1207 (1973).

Sufficiency of Evidence: A mere showing that the defendant's name is similar to the name of a person on a charge sheet showing an alleged prior offense is not sufficient to authorize an enhanced sentence. There must be competent proof that the defendant is the same person as the one named on the charge sheet. Failure to produce such proof does not invalidate the conviction, only the sentence. St. v. Cooper, 158 M 102, 489 P2d 99 (1971).

Cross-Examination of Defendant: Even though the prosecutor gave notice under this section, the defendant was not entitled to enjoin the prosecutor from cross-examining the defendant on prior convictions in the absence of a showing of prejudice from the cross-examination and the defendant was not prejudiced by his failure to testify after an injunction was denied. St. v. Lewis, 157 M 452, 486 P2d 863 (1971).

Constitutionality: Subsection (4) of this section does not unconstitutionally deprive the accused of the right to a jury trial. Newman v. Estelle, 156 M 502, 484 P2d 276 (1971), certiorari denied, 404 US 966, 30 L Ed 2d 285, 92 S Ct 341 (1971).