STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BLAINE SALLIER,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 167788
LC No. 93-125329-FH

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4); MSA 9.2325(4), OUIL, MCL 257.625(1)(a); MSA 9.2324(1)(a), and operating a motor vehicle with a blood alcohol content of .10 or more (UBAL), MCL 257.625(1)(b); MSA 9.2325(1)(b). Defendant later pleaded guilty to driving while license suspended (DWLS), MCL 257.904; MSA 9.2604, and habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant's five to fifteen year sentences for the manslaughter and OUIL causing death convictions were vacated, and defendant was sentenced as an habitual offender to 5 to 22 ½years' imprisonment. Defendant received concurrent ninety day sentences for the UBAL[1] and DWLS convictions. Defendant now appeals, and we affirm.

Defendant first argues that one of his felony convictions and his UBAL conviction must be vacated because those convictions violate his constitutional protections against double jeopardy. We find at least part of defendant's argument to be persuasive. As defendant correctly notes, a state is prohibited from imposing multiple punishments for the same offense. *People v Crawford*, 187 Mich App 344; 467 NW2d 818 (1991). In determining whether multiple punishments have been imposed for the same offense, this Court must consider the Legislature's intent in enacting the statutes at issue. *People v Rivera*, 216 Mich App 648, 650; 550 NW2d 593 (1996). This Court considers whether the statutes address conduct violative of distinct social norms, the punishment authorized by each statute,

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* Circuit judge, sitting on the Court of Appeals by assignment.

whether the statutes at issue contain unique elements, and whether the statutes are cumulative or hierarchical. *Id.* at 650-651.

Here, we believe that defendant's conviction of all three offenses violate his constitutional protections against double jeopardy. With regard to the OUIL causing death conviction and the UBAL conviction, we conclude that MCL 257.625; MSA 9.2325 does not demonstrate a legislative intent to provide for multiple punishments for the same offense. The crime of OUIL causing death essentially only increases the penalty of the base misdemeanor of UBAL because of the resulting harm. Because these two crimes evidence a hierarchy built upon a single base statute, defendant's convictions and sentences for both of these crimes violate double jeopardy, and we vacate his UBAL conviction.

Turning now to defendant's claim that his convictions of both involuntary manslaughter and OUIL causing death violate double jeopardy, we recognize that this Court has recently addressed this issue. In *People v Price*, 214 Mich App 538; 543 NW2d 49 (1995), a panel of this Court determined that a defendant may be convicted of both involuntary manslaughter and OUIL causing death without violating the prohibition against multiple punishments. Accordingly, we find that defendant's convictions of both offenses do not violate double jeopardy.

Defendant next argues that his conviction of OUIL causing death must be vacated because the statute, which lacks a requirement of scienter, is unconstitutional. This argument is without merit given our Supreme Court's recent conclusion in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996) that MCL 257.625(4); MSA 9.2325(4) requires proof in this regard of only a defendant's general intent to drink and drive. Furthermore, the Court in *Lardie* rejected the argument urged by defendant that this statutory section is a codification of common law. *Id.* at 245-246.

Defendant further argues that he was denied his right to a fair trial by an erroneous jury instruction regarding proximate cause. Specifically, defendant argues that the instruction should have instructed the jurors that they had to find that defendant was "the" substantial cause of death rather than merely "a" substantial cause. However, defendant did not object to this instruction below, and absent manifest injustice, appellate review is foreclosed. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Here, our failure to review will not result in manifest injustice because defendant's arguments were recently rejected by our Supreme Court in *People v Tims*, 449 Mich 83; 534 NW2d 675 (1995).

Defendant also argues that the trial court committed error warranting reversal in denying defendant's motion to suppress identification testimony given by a witness. We disagree. Given the testimony presented at the *Wade*[2] hearing, we conclude that the trial court's determination that the witness had a basis for identification independent of the preliminary examination was not clearly erroneous. The trial court did not clearly err in declining to suppress the witness' identification of defendant.

Defendant further argues that delays in his arraignment deprived him of a fair trial. Defendant requests that this Court remand the case so that a determination can be made whether the police acted

reasonably in intentionally delaying his arraignment in order to extract incriminating evidence. We find remanding the case for an evidentiary hearing on this basis to be unnecessary. Although defendant was not arraigned within forty-eight hours of his initial arrest at the hospital, an arrest warrant was issued within that time frame. Therefore, a fair and reliable determination of probable cause was made by an impartial magistrate. See *Gerstein v Pugh*, 420 US 103, 120; 95 S Ct 854; 43 L Ed 2d 54 (1975). Furthermore, under the facts of this case, the delay in arraignment was clearly tied to defendant's release from the hospital and, as the police had already obtained an arrest warrant, the delay was not motivated by a desire by the police to gain additional information. Cf. *People v McCray*, 210 Mich App 9; 533 NW2d 359 (1995).

Defendant's next claim on appeal is a challenge to the trial court's decision to score Offense Variable 3 (OV 3) at ten points. Because defendant did not object to the scoring at the time of sentencing or properly raise the issue in a motion to remand, defendant's challenge to the scoring of OV 3 is waived. *People v Eaves*, 203 Mich App 356, 358; 512 NW2d 1 (1994).

Defendant also argues that his 5 to 22 ½ years sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Having reviewed the circumstances surrounding the offender and offenses, we conclude that the sentence imposed does not violate the principle of proportionality, and does not evidence an abuse of discretion by the trial court. *People v Gatewood (On Remand),* 216 Mich App 559, 560; 550 NW2d 265 (1996).

Finally, defendant argues in a *pro per* brief that a new charge was added against him at trial of which he received no notice. This claim is simply not supported by the record. The information which was filed in this case adequately apprised defendant of the charges against him.

Defendant's convictions and sentences are affirmed with the exception of defendant's UBAL conviction, which is vacated. The case is remanded for correction of the judgment of sentence, if necessary.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Edward A. Quinnell

[1] We note that the judgment of sentence indicates that defendant pleaded guilty to OUIL and was sentenced to ninety days' incarceration for that offense. However, according to the sentencing transcript, defendant's OUIL conviction was to be vacated and defendant was to be sentenced for his UBAL conviction. Defendant's arguments on appeal also imply that defendant was sentenced for the UBAL conviction instead of the OUIL conviction. In any event, defendant did not plead guilty to either offense; rather, both convictions were by a jury. We remand so that this discrepancy may be addressed and the judgment of sentence corrected to reflect defendant's conviction by a jury of whichever crime was not, in fact, vacated.

[2] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).