

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY DUANE KELLOGG,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 183930
Kent Circuit
LC No. 94-002470-FH

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to operating a motor vehicle while under the influence of intoxicating liquor, third offense, MCL 257.625(1) and (7)(d); MSA 9.2325(1) and (7)(d), and was sentenced to two to five years' imprisonment. He appeals as of right. We affirm defendant's conviction but remand for a hearing regarding the constitutional validity of a prior conviction used to enhance his sentence. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant contends that the trial court erred by ruling that he failed to present prima facie proof that a 1989 Georgia conviction for driving under the influence of intoxicating liquor, which was used to enhance his punishment in the case at bar, was obtained in violation of his Sixth Amendment right to counsel. We agree and remand this case to the trial court for a hearing pursuant to *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972), at which plaintiff will be required to establish the constitutional validity of the Georgia conviction. *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994); *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974).

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

Defendant's arguments that he was entitled to be informed before pleading that his sentence would be consecutive to the one he was serving at the time of the instant offense, and that he is entitled to sentence reduction pursuant to MCL 801.257; MSA 28.1747(7), are without merit.

We address defendant's final allegation in the event that the trial court finds his Georgia conviction constitutionally valid. Defendant contends that his sentence is disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. The sentence is proportional to the seriousness of the circumstances surrounding the offense and the offender.

Defendant's conviction is affirmed, but the case is remanded to the trial court for a hearing at which plaintiff shall have the burden of establishing the constitutional validity of defendant's Georgia conviction. We do not retain jurisdiction.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar