STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JOSEPH BOHM,

Defendant-Appellant.

UNPUBLISHED
March 6, 1998

No. 195649
St. Clair Circuit Court
LC No. 95-001542-FH

Before: Michael J. Kelly, P.J., and Cavanagh and N.J. Lambros*, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle under the influence of intoxicating liquor ("OUIL"), third offense, MCL 257.625; MSA 9.2325, unauthorized use of a motor vehicle, MCL 750.414; MSA 28.646, operating a motor vehicle with a suspended license, MCL 257.904(1)(b); MSA 9.2604(1)(b), and fourth felony offender, MCL 769.12; MSA 28.1084. He was sentenced to twenty to forty years' imprisonment for the OUIL third offense, conviction, ten to fifteen years for the unlawful use of a motor vehicle conviction, and six months for driving with a suspended license, for which he received six months credit for time served. Defendant appeals as of right. We affirm but remand for resentencing.

Defendant first argues that the trial court abused its discretion by admitting defendant's Breathalyzer test results into evidence. See *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996). Prior to administering a Breathalyzer examination, the operator of the testing instrument is required, under 1992 AACS, R 325.2655(1)(e), to observe the defendant for fifteen minutes to ensure that the defendant does not smoke, regurgitate, or place anything in his mouth. *People v Boughner*, 209 Mich App 397, 531 NW2d 746 (1995). We have previously noted that failing to comply with this administrative rule renders the accuracy of the Breathalyzer test results sufficiently questionable so as to preclude their admissibility into evidence. *Id.*, 398-399. Defendant maintains that the operator of the Breathalyzer machine did not continuously observe defendant for the requisite period of time. In *Boughner*, the defendant was videotaped for thirty-five minutes prior to the administration of the Breathalyzer test. After reviewing the videotape, we found that the view of the defendant was obstructed making it impossible for the operator of the Breathalyzer machine, or anyone reviewing the

videotape for that matter, to observe the defendant. We could not tell whether the defendant placed something in his mouth during those periods of time when he could not be seen or was not being observed. Therefore, we concluded that the operator did not comply with the administrative rule and vacated the defendant's conviction. *Id*., 400. Unlike the operator in *Boughner*, the operator's view of defendant in this case was not obstructed for any length of time during the observation period. The operator testified that he was in close proximity to defendant and was able to observe defendant through his peripheral vision while he was completing an alcohol influence report. He testified that defendant did not smoke, place anything in his mouth, or regurgitate. By using the phrase "continuously observe" in *Boughner*, we did not intend to require the operator of the Breathalyzer machine to stare fixedly at the defendant for fifteen minutes. We decline to require such supertechnical compliance and hold that under the facts of this case, the operator made an adequate showing that he complied with 1992 AACS, R 325.2655(1)(e).

Next, defendant argues that his OUIL sentence must be vacated because his prior July 12, 1989 OUIL conviction was impermissibly used to enhance his conviction under the Motor Vehicle Code, MCL 257.625(7)(d)(i); MSA 9.2325(7)(d)(i) and under the habitual offender act, MCL 769.12(1)(a); MSA 28.1084. OUIL third offense, (a felony) is a sentence enhancement scheme by which the sentence for an underlying OUIL offense may be augmented. *People v Weatherholt*, 214 Mich App 507, 512; 543 NW2d 35 (1995). Such enhancement is required under the statute. MCL 257.625(7)(d)(i); MSA 9.2325(7)(d)(i). However, neither the habitual offender statute nor the OUIL third offense statute except application of the habitual offender statute's sentence enhancement provision to an OUIL third offense conviction. Moreover, the statutes do not preclude the use of the same prior felony from serving as the basis for enhancement of the underlying OUIL offense and the habitual offender sentence. *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 239 (1991). We believe that the Legislature was capable of excluding enhancement of OUIL felony sentences through application of the habitual offender statute if it had so desired. *Id.*, 72. An application of the plain meaning of both statutes means that defendant's prior July 12, 1989 conviction for OUIL was properly used to establish a basis for both his OUIL third offense, conviction as well as his status as a fourth felony offender.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial after three jurors observed him wearing handcuffs outside of the courtroom. See *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). We have long recognized that the defendant's freedom from shackling during trial is an important component of a fair and impartial trial. *People v Moore*, 164 Mich App 378; 417 NW2d 508 (1987). "However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape. In addition, where a jury inadvertently sees a shackled defendant, there must be some showing that prejudice resulted." *Id*., 384-385. In the present case, defendant moved for a mistrial but did not request an evidentiary hearing to establish that he was indeed seen by several jury members or to determine whether the jurors that allegedly saw him were prejudiced. *People v Herndon*, 98 Mich App 668; 296 NW2d 333 (1980). Defendant merely offers his own unsubstantiated claim that three members of the jury observed him outside of the courtroom in handcuffs and were likely prejudiced as a result. We decline to reverse defendant's conviction on the basis that the jury may have seen him in handcuffs and that they may have been prejudiced as a result.

Finally, defendant argues that his sentence of twenty to forty years' imprisonment for his OUIL third offense, conviction must be vacated because it violates the principle of proportionality. We no longer apply the *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990), proportionality standard when reviewing sentences for habitual offenders. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). Instead, we review the sentence imposed on an habitual offender by the trial court for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A review of defendant's extensive prior criminal record reveals that defendant has a continuing disregard for the criminal justice system and an unwillingness or inability to conform his conduct to the laws of society. He is an inveterate alcoholic with numerous convictions. Nevertheless, defendant's crimes have been nonviolent in nature and "are not among the worst offenses covered by the applicable habitual offender statute." *Id.*, 333 (Kelly, J., dissenting). The presentence recommendation was for 3 to 20 years incarceration consecutive to a pending 5 to 15 year habitual sentence on bad check charges. Because we recognize that the stiffest sentences to be meted out under the habitual offender statutes are reserved for the most egregious crimes, we find that the trial court abused its discretion in imposing defendant's sentence. See *Milbourn, supra*, 435 Mich 650 (acknowledging that the "Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes"). The sentence of 20 to 40 years, only, is vacated. The other sentences as well as all convictions are affirmed.

Affirmed but remanded for resentencing on the OUIL habitual. We retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros