STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM J. MCFEELY,

Defendant-Appellant.

UNPUBLISHED
June 9, 1998

No. 199942
Oakland Circuit Court
LC No. 96-147251 FH

Before: Wahls, P.J., and Jansen and Gage, JJ.

MEMORANDUM.

Defendant appeals by leave granted his plea-based conviction for operating a motor vehicle while under the influence of intoxicating liquor, third offense, MCL 257.625(1) and (7); MSA 9.2325(1) and (7), and his sentence of two years' probation, with the first year to be served in the county jail. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

We reject defendant's claim that MCL 257.625(7) does not authorize the use of his 1992 conviction for attempted OUIL to serve as a predicate for elevating his current conviction to a felony. At the time of defendant's plea, MCL 257.625(7)(e)[1] defined a "prior conviction" for enhancement purposes as " a conviction for . . . [an] attempted violation of subsection (1) . . . or former section 625(1) or (2) . . . or a local ordinance substantially corresponding to subsection (1). . . or former section 625(1) or (2) . . . ." MCL 257.625(d) provides that prior convictions, including convictions for attempted OUIL, may be used for enhancement purposes if those prior convictions were secured within ten years preceding the instant violation. Before the Legislature enacted 1991 PA 98, effective January 1, 1992, which added subparagraph 13 to MCL 257.625 and, thereby, expressly provided for punishment for a conviction of attempted OUIL conviction, there was no provision in the motor vehicle code that provided for punishment of an attempt conviction.[2] Because there was no express provision in the motor vehicle code to punish an attempted OUIL before January 1, 1992, any prosecution and resulting conviction for attempted OUIL must have been secured under the general attempt statute, MCL 750.92. *Wayne Co Prosecutor v Recorder's Court Judge*, 177 Mich App 762, 764; 442 NW2d 771 (1989). The Legislature is presumed to be aware of this fact and to have considered the effect of enacting MCL 257.625(e) on this fact. *Walen v Dep't of Corrections*, 443 Mich 240, 248;

505 NW2d 519 (1993); *People v Tracy*, 186 Mich App 171, 177; 463 NW2d 457 (1990). Accordingly, by defining a prior conviction for enhancement purposes as inclusive of convictions for attempted OUIL, and by expressly allowing for attempt convictions secured up to ten years preceding the instant violation to be used for enhancement purposes, such ten-year period necessarily inclusive of the time when attempted OUIL convictions could only be secured under the general attempt statute, the language employed unambiguously and certainly demonstrates the Legislature's intent that convictions for attempted OUIL secured under the general attempt statute be used for enhancement purposes. *People v Nantelle*, 215 Mich App 77, 80; 544 NW2d 667 (1996).

We also reject defendant's claim that the use of his prior attempt conviction violates the Ex Post Facto Clauses of the United States and Michigan Constitutions. US Const, art I, § 9; Const 1963, art 1, § 10. Because it is the current OUIL offense, committed after MCL 257.625(7) was amended to allow use of the 1992 prior conviction for enhancement purposes, that is punished more harshly by the amended statute, and not the 1992 offense, the amended statute is not ex post facto. *People v Miller*, 357 Mich 400, 410; 98 NW2d 524 (1959); *People v Shastal*, 26 Mich App 347, 351-352; 182 NW2d 638 (1970).

Likewise, we reject defendant's due process argument. The record is devoid of any factual support for the conclusion that defendant bargained for the attempt conviction to avoid a possible future use of the conviction for enhancement purposes. Additionally, there can be no invested right in an existing law which precludes its change. *Rookledge v Garwood*, 340 Mich 444, 457; 65 NW2d 785 (1954).

Finally, we reject defendant's argument that the trial court lacked authority to order a five-year revocation of his driver's license. The Legislature's use of the phrases "not less than 1 year" and "not less than 5 years" in MCL 257.52(1); MSA 9.1852(1) certainly and unambiguously indicate the intent of the Legislature to impose mandatory minimum periods of revocation, see e.g., MCL 333.7401(2)(a)(ii)-(iv); MSA 14.15(7401)(2)(a)(ii)-(iv), while affording the trial court the discretion to impose longer terms of revocation than one and five years where the circumstances warrant it, *People v Lawes*, 258 AD 643, 644-646; 17 NYS2d 748, 750-751 (1940).

Affirmed.

/s/ Myron H. Wahls
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[1] MCL 257.625 was amended by 1996 PA 491, effective April 1, 1997, resulting in subparagraph 7(e) being redesignated as subparagraph 7(g). The language of the provision remains unchanged.

[2] MCL 257.625(13) has been amended in ways not relevant to the issue raised by defendant and redesignated as subparagraph 17. 1996 PA 491; 1994 PA 449.