

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALLEN FISHER,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 272738

Oakland Circuit Court

LC No. 06-208258-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was charged with operating a vehicle under the influence of liquor, third offense (OUIL 3rd), MCL 257.625(9), and appeals by leave granted from the trial court's order denying his motion to quash. For the reasons set forth in this opinion, we affirm the trial court. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that the trial court improperly denied his motion to quash the OUIL 3rd charge, given that a vacated conviction may not properly be considered a prior conviction for sentence enhancement purposes under MCL 257.625(9)(c).

This Court reviews a trial court's decision with regard to a motion to quash information for an abuse of discretion. *People v Clement*, 254 Mich App 387, 389; 657 NW2d 172 (2002). To the extent the analysis involves statutory interpretation, the review is de novo. *People v Miller*, 238 Mich App 168, 170; 604 NW2d 781 (1999).

The crux of this appeal centers upon whether a prior plea-based conviction that is vacated after a subsequent offense is committed, may properly be treated as a predicate conviction for sentence enhancement purposes. The statute under which defendant was charged, MCL 257.625, states, in relevant part:

(9) If a person is convicted of violating subsection (1) or (8) [operating a vehicle while under the influence], all of the following apply:

* * *

(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony. . . [and subject to enhanced sentencing].

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *People v Spann*, 250 Mich App 527, 530; 655 NW2d 251 (2002). Nothing will be read into a clear statute which is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Spann, supra* at 532. The Legislature is presumed to have intended the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

MCL 257.625(9)(c) provides that if a person is convicted of OUIL and “the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony” and subject to enhanced sentencing. A conviction may not be used for enhancement purposes unless the date of conviction precedes the date of the subsequent offense. *People v Erwin*, 212 Mich App 55, 60; 536 NW2d 818 (1995). The trial court applied the plain, unambiguous language of the statute and determined that, at the time defendant committed the latest offense, he had two or more “convictions” on his record. The trial court was correct in that although defendant withdrew the guilty plea pertaining to his second offense after commission of his latest offense, there were, nevertheless, two valid convictions in place at the time he committed his third offense. While it is true that defendant withdrew his guilty plea prior to sentencing, the conviction was still valid given that the law recognizes a distinction between “conviction” and “judgment.” *Erwin, supra* at 60. The judgment of a trial court in a criminal case is the sentence; the conviction is the finding of guilt. *Erwin, supra* at 61. The ordinary legal meaning of “conviction” is the confession of the accused in open court or the verdict returned against him by the jury. *Erwin, supra* at 61. “The OUIL recidivist statute may be invoked, even if there has never been a judgment of sentence imposed on the conviction. The conviction itself suffices, without entry of final judgment.” *Erwin, supra* at 61. Further, MCL 257.8a defines conviction as “a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt.” At the plea proceeding of defendant’s second drunk driving offense, defendant entered a guilty plea and admitted that he consumed alcohol and that it impaired his ability to operate a vehicle. In response, the judge indicated, “[a]ll right. All right, I’ll accept your plea.” It was at this point that defendant was convicted. MCL 257.8a. The fact that defendant had his plea set aside after he committed the instant offense does not negate the fact that he had a valid conviction at the time he committed the instant offense.

Defendant argued that a vacated conviction is not the type of conviction contemplated by the sentencing enhancement statute. Defendant, however, does not sufficiently support this proposition. A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *People v Waltonen*, ___ Mich App ___; ___ NW2d ___ (2006). The OUIL statute does not appear to make an exception for defendants whose prior conviction is vacated after the defendant commits a new drunk driving offense. Therefore, the focus is not on the reliability of the previous conviction, but on the mere fact of conviction. *Lewis v United States*, 445 US 55, 65-67; 100 S Ct 915; 63 L Ed 2d 198 (1980) (federal firearms statute prohibits felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds; the law focuses not on reliability, but on the mere fact of conviction).

Indeed, even if reliability of the prior conviction was a relevant factor, defendant cannot persuasively claim innocence with respect to his second drunk driving charge. When defendant entered his guilty plea he admitted to the court that he drove while intoxicated. After withdrawing his plea, defendant stood trial where he waived opening statements and presented no witnesses. The prosecution presented the testimony of the arresting officer who testified to witnessing defendant's erratic driving and that defendant's blood alcohol level was .18. At the close of the prosecution's proofs, defense counsel requested that the judge return a guilty verdict for the lesser offense of impaired driving – the very charge to which defendant originally pled guilty. The trial court found defendant guilty of the greater charge of operating while intoxicated, emphasizing, "I have no doubt about the Defendant's guilt." Not only did defendant lack a meritorious defense, but the motivation behind his plea withdrawal has been called into question. Defendant has at all times been represented by counsel and has not alleged any defects in the plea proceeding. In cases factually similar to defendant's, courts have had no trouble concluding that the principal motivation behind seeking to withdraw a guilty plea is plainly extrication from the sentencing implications of OUIL 3rd. *People v Ward*, 459 Mich 602, 612-614; 594 NW2d 47 (1999); *Clement, supra* at 392. Such motivations are highly disfavored. *Ward, supra* at 612-614.

The trial court's position is further supported by considering the purpose of the OUIL statute. The statute's purpose is to protect citizens and vehicles while on public highways and to deter persons who were once convicted under the statutes from repeatedly violating them. *People v O'Neal*, 198 Mich App 118, 122; 497 NW2d 535 (1993); *People v Lawrence*, 54 Mich App 13, 15; 219 NW2d 802 (1974). Here, 17 days after defendant pled guilty to his second drunk driving offense, he was arrested a third time for driving while intoxicated. The OUIL statutory scheme would be frustrated by precluding the prosecutor from charging defendant with OUIL 3rd.

Finally, as an ancillary argument, defendant alleged that the prosecutor lacks standing to challenge the validity of the withdrawal of defendant's guilty plea. The thrust of this appeal, however, is not the validity of the plea withdrawal, but rather, whether a prior conviction, later withdrawn, may be used for purposes of sentencing enhancement. As for the prosecution's argument that defendant's claim should be dismissed as moot, the factual scenario in *Clement, supra*, was much the same, yet that case proceeded through this Court and this Court made no mention of mootness in its opinion denying defendant's motion to quash. *Clement, supra* at 392. Consequently, it would appear that the mootness issue does not preclude the instant case.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper