

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON RICHARD COX,

Defendant-Appellee.

UNPUBLISHED

January 25, 2000

No. 220901

Saginaw Circuit Court

LC No. 98-016350 FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

A jury convicted defendant Jason Richard Cox of operating a vehicle under the influence of liquor, MCL 257.625(1); MSA 9.2325(1), operating a vehicle with a suspended or revoked license, MCL 257.904(1)(b); MSA 9.2604(1)(b), and transporting alcohol in an open container, MCL 257.624a(1); MSA 9.2324(1)(1). The trial court sentenced Cox to 365 days' imprisonment for the OUIL offense, 365 days' imprisonment for his conviction for driving with a suspended or revoked license, and 90 days' imprisonment for transporting alcohol in an open container. The prosecution appeals as of right an order denying its motion for resentencing. We remand for resentencing.

I. Basic Facts And Procedural History

This appeal focuses on Cox's sentence for the OUIL offense, which the trial court did not enhance as a felony, third offense. At issue is whether the trial court was *required* to count an OUIL offense Cox committed while a juvenile when imposing a sentence for the OUIL offense in this case.

In September 1990, Cox entered a plea of admission to a first OUIL offense that occurred in August 1990, when he was sixteen years old (the "juvenile OUIL adjudication"). In September 1997, Cox was arrested for a second OUIL offense and sentenced to ninety days' imprisonment. In July 1998, Cox was arrested for this third OUIL offense.¹ He was convicted in April 1999. At the May 1999 sentencing hearing, defense counsel urged the trial court to disregard Cox's juvenile OUIL adjudication while calculating and imposing a sentence. The trial court adjourned the hearing to allow the parties to research whether a juvenile OUIL adjudication should be disregarded when calculating the sentence for an adult OUIL conviction.

The trial court reconvened one week later, at which time defense counsel argued that Cox's juvenile OUIL adjudication should not be used as a predicate offense to charge him as a third offender under the OUIL statute. Defense counsel argued that under the juvenile and penal codes, a juvenile adjudication did not constitute a prior conviction. The trial court agreed and treated Cox's conduct as a second OUIL offense, a misdemeanor.

The prosecutor moved for resentencing contending that the sentence the trial court imposed on Cox was invalid in light of a more expansive definition of "conviction" in the motor vehicle code. Thus, the prosecutor argued, MCR 6.429 permitted resentencing. At the motion hearing, defense counsel admitted that the Legislature amended the motor vehicle code to define a "juvenile adjudication" as a "conviction" after Cox's juvenile OUIL adjudication in 1990. However, defense counsel informed the trial court that Cox was not represented by counsel at the time of the juvenile OUIL adjudication, suggesting that the trial court could not consider the adjudication a conviction in the absence of counsel. Finally, the defense argued that the trial court did not have the authority to change Cox's sentence through resentencing because the prosecutor was requesting more than correction of a clerical error and the sentence imposed was valid.

The trial court informed the parties that, as a matter of policy, when imposing sentence it did not consider prior convictions for which a defendant lacked representation by an attorney. The trial court found that it was without authority to alter Cox's sentence in the absence of a clerical error, and none appeared in the sentence he imposed in May 1999. The trial court did, however, leave the door open to resentencing if the prosecutor could provide authority that would permit resentencing absent a clerical error and authority indicating that it could consider a juvenile adjudication without counsel a conviction. Ultimately, the trial court denied resentencing.

The prosecutor now argues that trial court erred when it disregarded Cox's juvenile OUIL adjudication.

II. Preservation Of The Issue And Standard Of Review

This appeal addresses the same issues the parties raised in the lower court while arguing the motion for resentencing. Therefore, this issue is preserved for our review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Ordinarily, this Court reviews a trial court's denial of a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). However, we must address questions of law to resolve the issue on appeal. We review those questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

III. Statutory OUIL Provisions And The Juvenile Adjudication

MCL 257.625(7)(d); MSA 9.2325(7)(d), as it existed at the time Cox committed the third OUIL offense, provided that if a defendant committed an OUIL violation within ten years of two or more "prior convictions," the defendant was guilty of a felony. The statute required a trial court to fine a

felony offender between \$500 and \$5,000, and sentence the offender either to imprisonment with the department of corrections for one to five years or probation with incarceration in the county jail for thirty days to one year. *Id.* The sentence Cox received for a third OUIL offense within seven years fell within the more lenient statutory limits of a \$200 to \$1,000 fine, a maximum one-year term of imprisonment, and up to ninety days of community service. MCL 257.625(7)(b); MSA 9.2325(7)(b). Accordingly, it is in Cox's interest under this statutory scheme to prove that he had only one or no "prior convictions" for OUIL.

In 1990,² when Cox entered his plea that resulted in the juvenile OUIL adjudication, MCL 257.8a; MSA 9.1808(1) defined the term "conviction" in this sentence enhancement context as "a final conviction, the payment of a fine, a plea of guilty or a finding of guilt on a traffic law violation charge, regardless of whether the penalty is rebated or suspended." Following amendments in 1991 and 1993, the Legislature amended MCL 257.8a; MSA 9.1808(1) in 1996 to define "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 for a criminal law violation or a juvenile adjudication or probate court disposition for a violation that if committed by an adult would be a crime, regardless of whether the penalty is rebated or suspended. [*Id.* (emphasis added); see also 1991 PA 99, § 1; 1993 PA 359, § 1.]

This new definition clearly encompasses Cox's juvenile OUIL adjudication, making his conviction in the instant case a third offense that fell under the felony sentencing provisions in MCL 257.625(7)(d); MSA 9.2325(7)(d). Because the statute states that a defendant "shall be sentenced" under the felony provisions for a third offense, the trial court lacked the discretion to ignore the juvenile adjudication when counting Cox's prior offenses to determine the nature of his crime (felony or misdemeanor) in order to impose sentence. MCL 257.625(7)(d); MSA 9.2325(7)(d); *In re Brewington's Estate*, 110 Mich App 672, 677; 313 NW2d 182 (1981).

IV. Juvenile Adjudication Without Counsel

The prosecutor argues that the trial court also erred in disregarding Cox's juvenile OUIL adjudication because he lacked legal representation during those proceedings. We agree. In *People v Daoust*, 228 Mich App 1, 17-18; 577 NW2d 179 (1998), this Court held that the trial court did not err in using the defendant's uncounseled juvenile adjudication to enhance his sentence because the juvenile adjudication did not result in the defendant's actual confinement, which would have violated his right to counsel if there were no knowing or intelligent waiver. Accord *People v Reichenbach*, 459 Mich 109, 120; 587 NW2d 1 (1998). The rule of *Daoust* and *Reichenbach* is clear: as long as Cox received no commitment to an institution in which his freedom would be curtailed for his uncounseled juvenile OUIL adjudication, it should have been used to enhance his sentence under the mandatory language of MCL 257.625(7)(d); MSA 9.2325(7)(d). Here, the presentence report indicates that Cox was not incarcerated as a result of his uncounseled juvenile OUIL conviction. Therefore, as we concluded above, the trial court erred by refusing to consider this "prior conviction" to enhance his sentence.

V. Ex Post Facto Laws

Although we have addressed what we consider to be the dispositive issues in this case, we will address Cox's argument that there is an alternative, constitutional ground for affirming the trial court. In brief, Cox contends that the trial court could have considered MCL 257.8a; MSA 9.1808(1) only as it existed at the time of his juvenile OUIL adjudication. Otherwise, according to Cox, this "retroactive" application of the current definition of "conviction" would violate the constitutional prohibitions against ex post facto laws by inflicting a greater punishment than he could have received under the law when he committed that first offense. US Const, art I, § 9; Const 1963, art 1, § 10; *Lynce v Mathis*, 519 US 433, 441; 117 S Ct 891; 137 L Ed 2d 63 (1997); *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996).

Cox's argument is without merit. Statutes that require harsher penalties for repeat offenders are not ex post facto laws. As we said in *People v Shastal*, 26 Mich App 347, 351-352; 182 NW2d 638 (1970), "[I]t is the *subsequent* offense, committed while the [sentencing enhancement] act is in effect, that is punished more harshly, and not the first offense." (Emphasis added.) The United States Supreme Court long ago came to the same conclusion regarding sentence enhancement under the federal constitution, saying that enhancement statutes merely provide "a stiffened penalty for the *latest* crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Gryger v Burke*, 334 US 728, 732; 68 S Ct 1256; 92 L Ed 1683 (1948) (emphasis added). Indeed, our Supreme Court addressed a highly analogous question regarding sentence enhancement under this very statute in *People v Miller*, 357 Mich 400; 98 NW2d 524 (1959), concluding:

The argument of retroactivity as applied to statutes prescribing more onerous penalties for multiple infractions has been considered often by this court. Heavier penalties for a second offense are well known to the law. They are in no manner ex post facto, nor do such amendments as we have before us have a retroactive effect. It is the subsequent offense that is punished more harshly, not the first. [*Id.* at 410 (citations omitted).]

Whether a defendant's sentence could be enhanced on the basis of a prior juvenile adjudication under MCL 257.625; MSA 9.2325 in 1990 is irrelevant to whether a later amendment can provide such an enhancement for *subsequent* offenses without violating the federal and state constitutions. Simply stated, there was no retroactivity in this case and, therefore, no ex post facto law.

VI. Conclusion

We take this opportunity to clarify one additional element of this case. At the hearing on the motion for resentencing the trial court expressed concern that it lacked the authority to resentence Cox under MCR 6.429(a), which prohibits resentencing when there is a "valid" sentence unless resentencing is "provided by law." However, MCR 6.429(a) does permit a trial court to resentence a defendant "to correct an invalid sentence" Here, the sentence was invalid when imposed because it ignored the juvenile OUIL adjudication and, therefore, erroneously relied on the sentencing provision for misdemeanor OUIL, MCL 257.625(7)(b); MSA 9.2325(7)(b). See *People v Mapp*, 224 Mich App

431, 434; 569 NW2d 523 (1997) (sentence is invalid when it has a “legal flaw”); *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997) (sentence is invalid when its foundation is “tangible legal or procedural error”). Therefore, the trial court had the explicit authority to resentence Cox under MCR 6.429(a) and our decision to remand for resentencing is consistent with that authority.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

¹ At the time of trial in this case, eight separate charges were pending against Cox in Saginaw and Washtenaw Counties, one of which was for OUIL.

² In 1990, MCL 257.625(5); MSA 9.2325(5) defined a “prior conviction” as a “conviction” under the first or second subsections of the statute. Similarly, when Cox committed the instant offense in 1998, MCL 257.625(7)(g); MSA 9.2325(7)(g) defined a “prior conviction” as a “conviction” under subsections (1) or (2) of the former version of the statute or subsections (1), (4), or (5) of the new version of the statute. Given “this term of art within a term of art,” we must decide how the Legislature intended to define the word “conviction” and not the term “prior conviction.”