

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK CLIFFORD LINCOLN,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 234114

Midland Circuit Court

LC No. 00-009642-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of liquor with an alcohol content of .10 grams or more (OUIL), MCL 257.625(1). Defendant pleaded guilty to driving a vehicle while his license was suspended (DWLS), MCL 257.904. Thereafter, the trial court sentenced defendant to two years of probation with the first six months in jail for OUIL, third offense, MCL 257.625(8)(c), and a term of ninety days in jail for DWLS, to be served concurrently. Defendant appeals as of right and we affirm.

Defendant's initial contention that the burden should be on the prosecutor to establish the fact and validity of the prior convictions used to establish OUIL, third offense was rejected by a special conflict panel in *People v Weatherholt*, 214 Mich App 507; 543 NW2d 34 (1995), which held that MCL 257.625 establishes only a sentence enhancement scheme and the jury has no role in determining whether a defendant has been convicted of prior drunk driving offenses. Moreover, this argument was not presented below at the motion to quash and is not properly preserved for further appellate review.

Defendant's other contention is that his conviction of OUIL, third offense must be vacated because the prosecutor presented no evidence to rebut defendant's assertion at the motion to quash that a prior conviction in Florida was obtained without counsel and without a valid waiver of counsel and defendant served seven days in jail awaiting his court date.¹

¹ Defendant did not challenge in the trial court, nor does he challenge on appeal, the 1995 conviction of OUIL in Midland County, the other underlying offense used to enhance defendant's sentence.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant was convicted (by a plea of nolo contendere) in 1991 in Volusia County, Florida of driving under the influence of alcohol and was sentenced to six months' probation. At the motion to quash hearing, defendant asserted (without record evidence) that he was not represented by counsel and did not waive his right to counsel.² However, a defendant charged with a misdemeanor is entitled to appointed counsel only if he is actually imprisoned. *People v Reichenbach*, 459 Mich 109, 120; 587 NW2d 1 (1998). Defendant's probation order from Florida unequivocally shows that he was not actually imprisoned.

Defendant, however, argues that he was "actually imprisoned" for the Florida misdemeanor because he spent several days in jail after his arrest because he could not post bond, but without citation to authority for this proposition. Although defendant's argument is creative, it is clear that an indigent defendant must be offered counsel for any misdemeanor offense that actually leads to or results in imprisonment, *Alabama v Shelton*, 535 US ___; 122 S Ct 1764; 152 L Ed 2d 888, 897, 900 (2002), but not for pre-conviction incarceration for the failure to post bond. Therefore, the trial court did not err in ruling that defendant was not actually imprisoned for the Florida misdemeanor where he received only six months' probation and no jail or prison time, but was only confined for failure to post bond before he was convicted.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Robert J. Danhof

² The trial court accepted as true defendant's bare assertion that his Florida misdemeanor conviction was procured without being represented by counsel and without a waiver of the right to counsel. In fact, the burden of proof is initially on the defendant to show that he was not represented by counsel or did not validly waive the right to counsel. *People v Carpentier*, 446 Mich 19, 31-32; 521 NW2d 195 (1994). Consequently, the trial court could have denied defendant's motion to quash for failing to meet his initial burden of proof that the conviction was obtained in violation of the Sixth Amendment right to counsel or a valid waiver of that right.