

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL R. DOYLE,

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 181124

LC No. 94-131421

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(6)(d); MSA 9.2325(6)(d),¹ and pleaded guilty to driving while license is suspended (DWLS), MCL 257.904(1); MSA 9.2604(1), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to serve three to twenty years in prison for the habitual offender conviction and one year in jail for the DWLS conviction. He appeals as of right. We affirm defendant's convictions, but remand for a correction of the judgment of sentence.

Defendant first argues that the trial court improperly denied his motion for a directed verdict because there was insufficient evidence to show beyond a reasonable doubt that he was intoxicated. When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made and determine whether any rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. This Court applies the same standard on review of a ruling on such a motion. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).²

The OUIL statute, MCL 257.625; MSA 9.2325, provides in pertinent part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor

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

vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.

OUIL is a status crime that focuses only on the fact that the defendant operates an automobile while he is intoxicated. *People v Crawford*, 187 Mich App 344, 350; 467 NW2d 818 (1991).

John Runchey testified that defendant smelled of alcohol, staggered, and had slurred speech and that he believed defendant was intoxicated. Officer Donald Russell also testified that defendant smelled strongly of alcohol, was staggering, and had slurred speech. Although defendant testified that he was limping because of a sore knee, Officer Russell stated that defendant's manner of walking was not consistent with someone who was injured or limping, but was consistent with staggering due to alcohol. Officer Russell also testified that he did not administer a field sobriety test to defendant because defendant had tried to flee once before, and he might try again. Officer Russell stated that the reason a chemical test was not performed on defendant was because he refused the test. Officer Russell believed that defendant had been drinking and was intoxicated.

Defendant argues that Officer Russell's testimony was not credible because it differed at the preliminary examination and trial. However, the discrepancy in Officer Russell's testimony was only in regard to the struggle that occurred when he was handcuffing defendant, in terms of what defendant did with his hands. Officer Russell's testimony regarding the smell of alcohol, the staggering, slurred speech, and hiding behind a tree was consistent. Although defendant attempted to impeach Officer Russell at trial with his prior testimony, the jury was entitled to weigh his credibility and believe his testimony that defendant was intoxicated. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). This Court will not interfere with credibility determinations by the trier of fact. *Id.* Thus, the trial court properly denied defendant's motion for a directed verdict because there was sufficient evidence from which a reasonable jury could determine that defendant was intoxicated at the time of the accident.

Defendant next argues that the enhancement from a misdemeanor to a felony for his OUIL conviction was improper because the prosecutor did not prove defendant's two prior OUIL convictions at trial as elements of OUIL third offense. However, a defendant is not entitled to a jury trial on the issue of his prior convictions given that the OUIL statute establishes a sentence enhancement scheme rather than a separate substantive crime. *People v Weatherholt*, 214 Mich App 507, 512; 543 NW2d 34 (1995).

If a person is convicted of OUIL, MCL 257.625(6)(d); MSA 9.2325(6)(d) provides:

(d) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony, and shall be sentenced to imprisonment for not less than 1 year or more than 5 years, or a fine of not less than \$500.00 or more than \$5,000.00, or both.

MCL 257.625(11) and (12); MSA 9.2325(11) and (12)³ further provide:

(11) If the prosecuting attorney intends to seek an enhanced sentence under subsection (6)(b) or (d) or (10)(b) or (c) based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information filed in district court, circuit court, recorder's court, municipal court, or probate court a statement listing the defendant's prior convictions.

(12) A prior conviction shall be established at sentencing by 1 or more of the following:

(a) An abstract of conviction.

(b) A copy of the defendant's driving record.

(c) An admission by the defendant.

Pursuant to MCL 257.625(11); MSA 9.2325(11), the prosecutor stated in the complaint that he intended to seek an enhanced sentence against defendant based on his having two prior OUIL convictions. Moreover, a certified copy of defendant's driving record was admitted into evidence prior to sentencing, reflecting that defendant had ten drinking and driving offenses. Therefore, the requirements to enhance defendant's sentence from a misdemeanor to a felony for OUIL third offense were met, and defendant's OUIL conviction was properly enhanced.

Defendant asserts that the trial court violated a stipulation that defendant's admission of his two prior OUIL convictions would not waive his challenge to the enhancement pursuant to *People v Fish*, (On Remand), 207 Mich App 486; 525 NW2d 467 (1994). However, *Fish* has been overruled, and defendant was properly convicted of OUIL third offense pursuant to *Weatherholt*, *supra*.

Defendant also argues that his sentence of three to twenty years in prison is disproportionate. The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Prior to his current OUIL conviction, defendant had ten drunk driving offenses. Defendant admitted that he was an alcoholic and had a current problem with alcohol. At the time he had the accident with John Runchey, there was testimony that he smelled of alcohol, was staggering, and had slurred speech. Both Runchey and Officer Russell believed that defendant was intoxicated. In addition, defendant was driving with a suspended license. Thus, there was evidence that defendant was a substantial hazard due to his driving while intoxicated. Considering the serious risk posed by defendant's history of drunk driving, his sentence was not disproportionate to the circumstances of the offense or offender.

Defendant also argues that the court ignored the effect of the consecutive sentence for his parole violation and the instant offense. However, in determining the proportionality of an individual sentence, the cumulative effect of consecutive sentences need not be considered. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Accordingly, the trial court did not abuse its discretion in sentencing defendant.

In reviewing the lower court record in this case, we noticed an error in the judgment of sentence. The sentencing transcript reveals that defendant was sentenced to three to twenty years' imprisonment for the fourth habitual offender conviction and one year for the DWLS conviction. The judgment of sentence incorrectly states that defendant was sentenced to one year for the habitual offender conviction and three to twenty years for the DWLS offense. We remand for a correction of the judgment of sentence.

We affirm, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Meyer Warshawsky

¹The statute was amended in 1994, so that the section that was previously MCL 257.625(6)(d) is currently MCL 257.625(7)(d), which provides that if a person is convicted of OUIL within ten years of two or more prior convictions, then that person is guilty of a felony. Although the section numbers changed after defendant's arrest, the relevant provisions that were applied to defendant's case were effective at the time of his arrest.

²Defendant addressed the denial of his motion for a directed verdict and the sufficiency of the evidence as separate issues, presumably because the standard of review for a directed verdict focuses on the evidence up to the time defendant moved for a directed verdict. However, the standard of review for sufficiency of the evidence is the same. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). Moreover, even considering the testimony offered on defendant's behalf, there was sufficient evidence from which a rational trier of fact could find that the essential elements of OUIL were proven beyond a reasonable doubt.

³ Subsections 11 and 12 are now subsections 14 and 16. The substance of the subsections remains unchanged.