

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR GREGG HALE,

Defendant-Appellant.

UNPUBLISHED

April 23, 2009

No. 282687

Oakland Circuit Court

LC No. 2007-214241-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for operating a motor vehicle while under the influence of intoxicating liquor, third offense (“OUIL 3rd”), MCL 257.625(1); MCL 257.625(9). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 2 to 20 years’ imprisonment for the OUIL 3rd conviction. Because the instant offense occurred after the effective date of the amended MCL 257.625, a conviction over ten years old can be used to enhance a sentence for a conviction under MCL 257.625 without violating ex post facto, the principles of statutory construction, or procedural due process, and, because a juvenile disposition can be used to enhance a sentence for a conviction under MCL 257.625, we affirm.

Defendant first argues that his conviction under MCL 257.625, as amended by 2006 PA 564 that removed the ten-year limitation on the use of prior offenses, violates the ex post facto clauses of the United States and Michigan Constitutions, is an improper retroactive application of the statute, as amended, and could implicate due process concerns if enforced.

In order to preserve a constitutional challenge for appellate review, a defendant is required to have first raised the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Defendant failed to raise his arguments, that the trial court’s application of MCL 257.625 violated the ex post facto clauses of the United States and Michigan Constitutions, and deprived defendant of his procedural due process rights, before the trial court; therefore, these arguments are not preserved on appeal. *Id.* To preserve a challenge to a trial court’s interpretation or application of a statute, defendant must first raise the argument before the trial court. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant failed to argue that the trial court improperly applied MCL 257.625 retroactively; therefore, this argument is not preserved on appeal. This Court reviews unpreserved claims for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An unpreserved challenge to a trial court’s interpretation or application of a statute is also

reviewed for plain error affecting defendant's substantial rights. *Id.* See also, *Kimble, supra* at 312. To overcome forfeiture of an issue under the plain error rule, a defendant bears the burden of persuasion to demonstrate that: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Even if a defendant can show that a plain error affected a substantial right, reversal is appropriate only where "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 763 (internal quotations omitted.)

Defendant's position, that a prior conviction more than ten years old may not be used to obtain a conviction for OUIL 3rd under MCL 257.625, as amended, consists of a three-part argument. First, defendant contends that a prior conviction more than ten years old cannot be used to enhance a conviction for OUIL 3rd under MCL 257.625 without violating the ex post facto clauses of the Michigan and United States Constitutions. Second, defendant argues that the use of such prior convictions violates the principles of statutory construction. Third, defendant argues that the use of prior convictions more than ten years old to obtain a conviction for OUIL 3rd could deprive a defendant of his procedural due process rights.

With respect to defendant's first argument, this Court has recently held that a defendant may, without offending the ex post facto clauses of the United States and Michigan Constitutions, be prosecuted for OUIL 3rd, under the amendment to MCL 257.625, on the basis of prior convictions that occurred more than ten years before the January 3, 2007, amendment. *People v Perkins*, 280 Mich App 244, 246; 760 NW2d 669 (2008). The *Perkins* Court held specifically that, "for offenses occurring after the effective date of amended MCL 257.625, the state may properly charge defendants on the basis of prior convictions that occurred more than 10 years before the date of the amendment." *Id.* Accordingly, to the extent that defendant argues that the use of convictions over ten years old in order to obtain a conviction under MCL 257.625 violates the ex post facto clauses of the United States and Michigan Constitutions his argument fails.

Defendant next argues that the use of a conviction more than ten years old cannot be used to enhance a conviction under MCL 257.625, as amended, without violating the principles of statutory construction. In particular, defendant contends that the use of his conviction that was more than ten years old at the time MCL 257.625 was amended was an improper retroactive application of the statute. As the *Perkins* Court observed, with regard to the amendment of MCL 257.625(9)(c):

2006 PA 564 amended the governing statute in this case. Before the amendment, a defendant was guilty of a felony rather than a misdemeanor for violating the statute only if he or she had been convicted of two or more drunken driving offenses within the previous 10 years. The amendment eliminated the 10-year window and added language permitting the use of any previous conviction in enhanced sentencing, regardless of the time that elapsed between it and the defendant's current offense. The statute now provides, in pertinent part, "If a person is convicted of violating subsection (1) or (8)" and "the violation occurs after 2 or more prior convictions, regardless of the number of years that have

elapsed since any prior conviction, the person is guilty of a felony” [*Perkins*, *supra* at 250-251 (internal citations and footnotes omitted).]

The amendment to MCL 257.625 was to become effective on January 3, 2007, and the amendment is also known as “Heidi’s Law.” 2006 PA 564.

In *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992), our Supreme Court observed that, “[t]he general rule of statutory construction in Michigan is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect.” Further, “[t]here is no vested right in the running of a statute of limitations except when it has completely run and the action is barred.” *Id.* In *Russo*, the Court explained that, with respect to statutes of limitation, “[e]xtending the length of time allowed to bring a criminal prosecution that is not time-barred is a procedural change and fails to alter either the rights of a defendant or any substantive elements of the crime charged.” *Id.* at 595.

Defendant contends that the Legislature’s removal of the ten-year limitation period for the use of prior convictions for purposes of prosecutions under MCL 257.625, as applied in this case, constituted a retroactive elimination of a statute of limitations that had elapsed. However, as this Court recognized in *Perkins*, “this analysis ignores the fact that defendant[] [is] not being prosecuted for the prior offenses.” *Perkins*, *supra* at 252. Rather, in *Perkins*, as well as here, “the amended statute did not attach legal consequences to defendant’s prior impaired-driving conviction, but attached legal consequences to defendant’s future conduct.” *Id.* at 251-252, quoting *People v Callon*, 256 Mich App 312, 318; 662 NW2d 501 (2003).

Defendant does not dispute that the charge for which he was convicted in this case arose from his act of operating a motor vehicle while under the influence of intoxicating liquor that occurred on April 10, 2007. Defendant also does not dispute that the amendment to MCL 257.625 took effect on January 3, 2007, and defendant’s conviction in this case arises from events that occurred after the date MCL 257.625 was amended. Accordingly, because defendant was convicted under MCL 257.625 for conduct that occurred after MCL 257.625 was amended, the statute was applied prospectively, and not retroactively. Defendant was punished, albeit more severely, solely for his conduct relating to this case, and not for his prior convictions.

Defendant contends that the Legislature intended to delay the effective date of the amendment to MCL 257.625 because the Legislature provided that an amendment to MCL 257.208 was effective on October 31, 2010. 2006 PA 565 amended MCL 257.208(2), which sets forth time periods after which the Secretary of State may destroy its records. Its current version reads as follows:

Except as otherwise provided in this section, records of convictions of any offense for which points are provided under section 320a(1)(a), (b), (c), or (g) or section 320a(8) may be destroyed after being maintained on file for 10 years.

The amended version that is to take effect on October 31, 2010 will provide:

Except as otherwise provided in this section, records of convictions of any offense for which points are provided under section 320a(1)(a), (b), (c), or (g) or section

320a(8) may be destroyed after being maintained on file for 10 years. However, if a person is convicted of violating section 625, the record of that conviction shall be maintained for the life of the person.

That the Legislature intended to delay the effective date of MCL 257.208(2) until October 31, 2010 is reflected in the plain and explicit language of the act that will amend the statute. 2006 PA 565. If the Legislature intended to delay the effective date of the amendment to MCL 257.625, it would similarly have expressed such intent in the statutory language. Instead, 2006 PA 564 specifically provides in plain and unambiguous language that: “This amendatory act takes effect January 1, 2007.” Accordingly, defendant’s argument, that the Legislature intended to delay the effective date of the amendment of MCL 257.625, fails.

Defendant’s final argument is that the application of the amendment of MCL 257.625 “raises serious due process concerns . . . because due process will require that more hearings be held to determine whether those convictions [over ten years old] were constitutionally valid.” Defendant does not argue that his right to procedural due process was violated by the application of the amendment to MCL 257.625. Rather, he argues that in hypothetical cases, an additional hearing would be required where the defendant claims that a prior conviction violated his Constitutional rights. Defendant’s argument offers the solution to the hypothetical problem it presents. In other words, where a defendant claims that a prior conviction was constitutionally infirm, and as such, cannot be used for purposes of sentence enhancement, the defendant should challenge the information regarding his prior conviction on this basis at his sentencing. As our Supreme Court observed, in the context of sentence enhancement for prior convictions for felony-firearm, “due process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information.” *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997), quoting *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). MCL 257.625(15) provides:

If the prosecuting attorney intends to seek an enhanced sentence under this section or a sanction under section 625n based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information, or an amended complaint and information, filed in district court, circuit court, municipal court, or family division of circuit court, a statement listing the defendant's prior convictions.

Under defendant’s hypothetical scenario, if one or more of a defendant’s convictions was obtained unconstitutionally, where the defendant has a full and fair opportunity to challenge the information regarding the prior conviction at sentencing, due process is satisfied. *Miles, supra* at 100.

Further, this Court has concluded that in the context of a challenge to Michigan’s habitual offender statute, MCL 769.13, there is “no valid reason why convictions over ten years old . . . may not be used by a trial court in determining a proper sentence.” *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996), quoting *People v Line*, 145 Mich App 567, 571-572; 378 NW2d 781 (1985). Moreover, as this Court observed in *People v Haynes*, 256 Mich App 341, 349; 664 NW2d 225 (2003), with reference to the 1998 amendment to MCL 750.625, that “defendant had been placed on constructive notice . . . that his prior conviction would subject him to enhanced punishment for any future OUIL convictions.” Defendant’s articulation of

potential due process concerns does not entitle him to relief. All of defendant's arguments relating to this issue fail.

Defendant next argues that a juvenile disposition did not constitute a prior conviction for purposes of his conviction for OUIL 3rd. "Statutory interpretation is a question of law that is reviewed by this Court de novo." *People v Derror*, 475 Mich 316, 324; 715 NW2d 822 (2006). "[T]he goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature." *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). This Court first examines the plain language of the statute, and where the statutory language is clear, "no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). However, "if the statute defines a given term, that definition is controlling." *People v Giovannini*, 271 Mich App 409, 413; 722 NW2d 237 (2006).

Here, defendant argues that a provision in the Michigan Probate Code precludes the use of a juvenile disposition for sentencing purposes. In support of its position, defendant relies upon MCL 712A.23, which states:

Evidence regarding the disposition of a juvenile under this chapter and evidence obtained in a dispositional proceeding under this chapter shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under this chapter. This section does not apply to a criminal conviction under this chapter.

However, the prosecution argues that the motor vehicle code specifically 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 for a criminal law violation or a juvenile adjudication, probate court disposition, or juvenile disposition for a violation that if committed by an adult would be a crime, regardless of whether the penalty is rebated or suspended. [MCL 257.8a.]

MCL 257.625(25) provides in pertinent part:

[A]s used in this section, "prior conviction" means a conviction for any of the following, whether under a law of this state, a local ordinance substantially corresponding to a law of this state, a law of the United States substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state:

(a) Except as provided in subsection (26), a violation or attempted violation of any of the following:

(i) This section, except a violation of subsection (2), or a violation of any prior enactment of this section in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.

Because the motor vehicle code specifically includes juvenile adjudications within the definition of what constitutes a “conviction,” defendant’s argument that a juvenile disposition cannot be used to obtain a conviction for OUIL 3rd lacks merit. *Giovannini, supra* at 412-413. Further, this Court, in *People v Weatherholt*, 214 Mich App 507, 512; 543 NW2d 35 (1995), held that the version of MCL 257.625 in force at that time set forth a sentencing enhancement scheme based on prior convictions, and did not define OUIL 3rd as a distinct offense. Our Supreme Court, in *People v Smith*, 437 Mich 293, 298-299; 470 NW2d 70 (1991), reaffirmed the principle, set forth in *People v McFarlin*, 389 Mich 557, 575; 208 NW2d 504 (1973), that MCL 712A.23 does not foreclose a sentencing court from considering a juvenile disposition in imposing a sentence for an adult conviction. Defendant does not contest that his juvenile disposition arose from a violation of MCL 257.625. Hence, defendant’s argument that an OUIL 3rd conviction may not be obtained on the basis of a juvenile disposition relating to an alcohol-related traffic violation fails.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio