

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH DOUGLAS HALL

Defendant-Appellee.

UNPUBLISHED

December 23, 2008

No. 283871

Wayne Circuit Court

LC No. 07-023770-01

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's orders reducing defendant's operating while intoxicated charge, MCL 257.625(1), third offense, MCL 257.625(9) and (11), to a misdemeanor and remanding the case to the 33rd District Court. We reverse. This case has been decided without oral argument pursuant to MCR 7.214(E).

Defendant moved in the trial court to reduce the felony charge to a misdemeanor on the basis that the use of any operating while intoxicated convictions that occurred before January 3, 1997, to enhance a current charge to a felony, is an ex post facto violation. Specifically, defendant argued that prior to the amendment of MCL 257.625¹, a defendant's charge could be enhanced only if the defendant had two or more prior convictions within a ten-year period, while the amendment eliminated the ten-year period. The trial court agreed. On appeal, the prosecution argues that defendant is being punished for conduct that occurred *after* the effective date of the amendment, and therefore, there is no ex post facto violation. We agree.

Constitutional questions are reviewed de novo. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). "Ex post facto laws are prohibited by both the Michigan Constitution, Const 1963, art 1, § 10 . . . and United States Constitution, US Const, art I, § 10." *People v Callon*, 256 Mich App 312, 316; 662 NW2d 501 (2003). An ex post facto law is one that 1) makes criminal an innocent action done before the passing of the law, and punishes such action; 2) makes a crime a greater offense than it was when committed; 3) imposes a greater punishment than the law did at the time the crime was committed; or 4) alters the legal rules of evidence so

¹ Effective January 3, 2007.

that a defendant can be convicted on lesser evidence. *Id.* at 318, quoting *Calder v Bull*, 3 US 386, 390; 1 L Ed 648; 3 Dall 386 (1798).

MCL 257.625(9)(c), as amended by 2006 PA 564 (also known as “Heidi’s Law”), provides that if a person is convicted of operating a vehicle while intoxicated 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 . . .” (Emphasis added.) In addressing a previous amendment to MCL 257.625 (which added impaired-driving convictions to those convictions that may be used to enhance a charge), this Court held that the statute as amended “did not attach legal consequences to [the] defendant’s prior impaired driving conviction, but attached legal consequences to [the] defendant’s future conduct of driving under the influence or with an unlawful blood alcohol level.” *Callon*, *supra* at 318.

In the recent case of *People v Perkins*, 280 Mich App 244, 246; ___ NW2d ___ (2008), this Court applied *Callon* and held that Heidi’s Law was not an ex post facto law: “[F]or offenses occurring after the effective date of amended MCL 257.625, the state may properly charge defendants based on prior convictions that occurred more than ten years before the date of the amendment.”

In *Perkins*, a consolidated case, one defendant had four prior convictions, including three before January 3, 1997. The other defendant had three prior convictions, all of which occurred before January 3, 1997. *Perkins*, *supra* at 246-247. “Because both defendants had committed two or more prior alcohol-related offenses, they were subject to enhanced sentences under . . . Heidi’s Law.” *Id.* at 247. In the trial court, the *Perkins* defendants argued that Heidi’s law was unconstitutional because 1) it was an ex post facto law, 2) it was not intended to include previously time-barred convictions, and 3) it violated due process. *Id.*

After originally denying the defendant’s motion to reconsider, the trial court granted the motion, ruling that Heidi’s Law “‘does not apply to events that have been neutralized by the prior statute of limitations period without the amendment being ex-post [sic] facto. . . . [Thus,] any conviction that occurred prior to January 3, 1997, is time barred and cannot be considered when Heidi’s Law is being applied to a case.’” *Id.* at 247-248. The trial court cited *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992), believing that it stood for the proposition “that if the Legislature amends a statute of limitations, the ‘amendment does not apply to events that have been neutralized by the prior statute of limitations period without the amendment being ex-post [sic] facto.’” *Id.* at 249. As in the case at bar, the trial court in *Perkins* held the statute unconstitutional as it applied to the defendants before it. *Id.* at 247-248.

This Court disagreed: “Heidi’s Law . . . did not attach legal consequences to [the defendants’] prior offenses, which occurred before the amendment’s effective date. Rather, the amendment made the consequences of their current offenses, which occurred after January 3, 2007, more severe based on defendants’ prior convictions.” *Id.* at 251. Moreover, noting that the trial court treated “the prior ten-year limit on consideration of prior convictions as a statute of limitations that had run[.]” this Court stated, “[T]his analysis ignores the fact that defendants are not being prosecuted for the prior offenses. They are being prosecuted for actions that took place after the amendment took effect. As in *Callon*, the change in the predicate offenses used to raise current conduct to the felony level does not constitute an ex post facto violation.” *Id.* at 252.

In the case at bar, defendant's situation is no different than the defendants' in *Perkins*: he is being punished for conduct that occurred on October 15, 2007 – several months *after* the effective date of the amendment. Defendant's two prior convictions, including one from 1990, were used as the basis of charging him with a third offense, and thus a felony, under MCL 257.625(9)(c). Therefore, *Perkins* controls and the trial court erred in holding the statute unconstitutional as applied to him, dismissing the felony charge, and remanding the case to district court.

Reversed. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder