STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MUGRIDGE,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 166827
LC No. 92-002082-FC

Before: Saad, P.J. and McDonald and Chrzanowski,* JJ

PER CURIAM.

The jury convicted defendant of operating a vehicle while under the influence of intoxicating liquor, third offense (OUIL-3). He now appeals: finding no error, we affirm.

I

Defendant first argues that the trial court erred in permitting the information to be amended to charge him with a third offense *after* the jury had convicted him of OUIL. The original felony information was filed on July 8, 1992. This information charged as count I, OUIL or in the alternative UBAL, and as to count II, a third offense notice, which informed defendant that plaintiff intended to seek an enhanced sentence. On August 10, 1992, an amended felony information was filed, consisting of one count, OUIL on one page. On the first day of trial, May 5, 1993, plaintiff moved to amend this information to change the location of the offense, and this motion was granted. When this amended felony information was filed on May 11, 1993, after defendant had been found guilty of OUIL, it consisted of two pages with count I, OUIL, on page one, and as count II on page two, a third offense notice.

According to MCL 767.45(1); MSA 28.985(1), an information must contain "the nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged," the time of the offense, and a statement that the offense occurred within the jurisdiction of the court. At

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

the time of trial, MCL 257.625(11); MSA 9.2325(11) required that if the prosecuting attorney intended to seek an enhanced sentence on the basis of one or more prior OUIL convictions, such notice must be presented in the complaint and information.

The test for sufficiency of an information requires that the information notify an accused of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and permit the court to pronounce judgment. *People v Adams*, 389 Mich 222, 243; 205 NW2d 415 (1973); *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994). On review, no judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096.

Under the circumstances of this case, it cannot be said that any error in the information resulted in a miscarriage of justice or that defendant was unable to prepare his defense. Defendant was placed on notice by the original information that plaintiff intended to seek an enhanced penalty. Both the original information, and the final amended information, satisfy then-effective MCL 257.625(11); MSA 9.2325(11), which required that the information include a statement that the prosecutor intends to seek an enhanced penalty. Also, the trial court's statements regarding what occurred at settlement conferences and in chambers prior to jury selection made clear that the defense was aware of plaintiff's intent to seek an enhanced penalty. Even assuming that defendant did believe (on the basis of the first amended information) that he was defending only against OUIL, his defense was not prejudiced. As discussed later in this opinion, prior OUIL offenses are not an issue at trial, and are only used as a penalty enhancement at sentencing. Therefore, the charge to be defended at trial is the same, whether plaintiff is seeking an enhanced penalty or not. *People v Weatherholt*, 214 Mich App 507; 543 NW2d 35 (1995).

Because the information was sufficient to enable defendant to defend the charge against him and any error in the information did not result in a miscarriage of justice, reversal is not required.

II

Defendant also asserts that there was insufficient evidence presented to support a conviction of OUIL-3. In particular, defendant argues that the prosecution was required to present evidence of defendant's prior OUIL convictions as a required element of its case-in-chief in order for defendant to be convicted of OUIL-3.

In *People v Fish (On Remand)*, 207 Mich App 486, 489; 525 NW2d 467 (1994), criticized by *People v Weatherholt*, 214 Mich App 507; 543 NW2d 35 (1995), this Court held that OUIL-3 is a separate offense from OUIL, and that as a result, the prosecution must prove, beyond a reasonable doubt, all the elements of the crime, including prior convictions. In support of its holding, *Fish* cited *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991), and stated that although the statute had

been amended since *Bewersdorf*, because the definition of OUIL-3 remained the same, the Legislature's silence suggested agreement with such judicial interpretations. *Fish*, 207 Mich App at 489; 525 NW2d 467.

The amendments to the statute mentioned by the *Fish* panel, and also applicable in the instant case, 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 . . . 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. [MCL 257.625(11),(12); MSA 9.2325(11),(12), amended by PA 1994, No. 211.]

In *People v Weatherholt*, 209 Mich App 801; 536 NW2d 544 (1995) vacated by order entered May 5, 1995, another panel of this Court followed *Fish*, pursuant to Administrative Order 1994-4, but disagreed with the decision, stating that the amendments to the statute clearly provide for the prosecution to seek an enhanced sentence by establishing prior convictions at sentencing. As a result, a special panel was convened to resolve the conflict regarding the propriety of the *Fish* decision. *Id.*

In *People v Weatherholt*, 214 Mich App 507; 543 NW2d 35 (1995), the special panel resolved the conflict by holding that *Fish* erroneously relied on the pre-amendment *Bewersdorf* decision, and that subsections 11 and 12 of MCL 257.625; MSA 9.2325 create a sentence enhancement, not a separate crime. *Weatherholt*, 214 Mich at 511; 543 NW2d 35. As a result, proof of a defendant's prior convictions can be established at sentencing, and need not be introduced as part of the prosecution's case-in-chief. *Id.*, 214 Mich App at 511-512; 543 NW2d 35.

Therefore, the prosecution here was not required to prove at trial that defendant had two prior OUIL convictions. According to the sentencing transcript, evidence of a 1987 OUIL conviction and a 1991 conviction was presented to the trial court. Therefore, proof of defendant's prior OUIL convictions was properly submitted and defendant's conviction must be affirmed. *Weatherholt*, 214 Mich App at 511-512; 543 NW2d 35.

Affirmed.

/s/ Henry William Saad
/s/ Gary R. McDonald
/s/ Mary A. Chrzanowski