S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2005
v	No. 249022 Oakland Circuit Court
JEFFREY LEE BERNDT, Defendant-Appellant.	LC No. 02-184227-FH

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1), and driving while license suspended (DWLS), second offense, MCL 257.904. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to imprisonment for ten months to twenty years for the OUIL conviction and for one year for the DWLS conviction. We affirm.

On March 22, 2001, defendant was socializing at his friend Robert Riddell's home. While at Riddell's home, defendant consumed a quantity of beer. A blood alcohol test revealed that defendant's blood alcohol level was .11. At about 9:00 p.m., Riddell asked defendant to move a pickup truck that was parked in Riddell's driveway because it was blocking Riddell's wife from leaving for work. Defendant attempted to back the pickup out of the driveway, but the pickup ended up in a ditch. Riddell claimed that defendant backed the pickup into the ditch. Robert Graves, who works for the Livingston County Sheriff's Department and is also a volunteer firefighter with the North Oakland County Fire Authority, was paged to respond to the scene of a personal injury accident at Riddell's residence.[1] When Graves arrived at the scene only two minutes after receiving the page, he observed a pickup truck in the ditch. Defendant was in the driver's seat of the truck, and the truck's engine was running. Graves observed that the front end of the pickup truck was in the ditch and that the back end of the pickup truck was on the road and partially blocking the road.

[1] Although Graves was paged to respond to the scene of a personal injury accident, in fact, nobody was injured in defendant's mishap.

Allen Siterlet, then a trooper for the Michigan State Police and an expert in accident investigation, observed the pickup truck in the ditch. Siterlet stated that the truck's front tires were in the ditch and that the front tire on the driver's side was down deep, while the front tire on the passenger's side was up higher. The truck's rear tires were on the northbound, paved lane of Fish Lake Road, which is a north/south road. Based on the position of the pickup in the ditch, Siterlet did not believe that defendant had backed the pickup into the ditch from the driveway, because if he had, the truck's rear wheels would have been in the ditch. Defendant told Siterlet that he backed out of the driveway and that he missed the driveway and drove into the ditch as he pulled back into the driveway. According to Siterlet, the damage to the front of the pickup was consistent with defendant's story, and the tire tracks leading from the roadway also indicated that the pickup entered the ditch from Fish Lake Road.

On appeal, defendant argues that the trial court erred in denying his motion to quash the information based on defendant's claim that a private residential driveway is not an area that is "generally accessible to motor vehicles" under MCL 257.625(1) and MCL 257.904(1). We decline to address this issue because the evidence presented at trial indicated that defendant did not confine his driving of the pickup truck to Riddell's driveway, but had, in fact, driven the pickup truck on a paved portion of Fish Lake Road. Both Robert Graves and Allen Siterlet testified that the pickup truck defendant was driving was at least partially in the roadway of Fish Lake Road. Defendant does not dispute that Fish Lake Road, which is a paved road, is "a highway or other place open to the general public or generally accessible to motor vehicles[.]" MCL 257.625(1); MCL 257.904(1). We therefore decline to address the issue as presented by defendant because the facts simply do not support defendant's claim that his operation of the pickup was confined to his friend's private residential driveway.

Defendant next argues that the statutory language, "generally accessible to motor vehicles," which is contained in both MCL 257.625(1) and MCL 257.904(1), is void for vagueness, and therefore unconstitutional. Defendant failed to preserve this issue for appellate review because he did not challenge the constitutionality of the statutes below. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). We review unpreserved constitutional errors for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Statutes are presumed to be constitutional and are construed so unless their unconstitutionality is readily apparent. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The party challenging a statute has the burden of proving that the statute is unconstitutional. *Sands*, *supra* at 160. A statute may be challenged for vagueness on three grounds: (1) that it is overbroad and impinges on First Amendment freedoms, (2) that it does not provide fair notice of the conduct proscribed, and (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. *People v Hayes*, 421 Mich 271, 283; 364 NW2d 635 (1984); *id.* at 161.

Defendant asserts that the OUIL and DWLS statutes are unconstitutionally vague because they do not provide fair notice of the conduct proscribed which can lead to selective and arbitrary prosecution. Since defendant's vagueness challenge does not involve First Amendment freedoms, it must be examined in light of the facts of the particular case. *Burns v Detroit (On Remand)*, 253 Mich App 608, 625; 660 NW2d 85 (2002), mod 468 Mich 881 (2003). The

challenged portion of the statute must be construed with reference to the entire statute to determine whether the requisite certainty exists. *Hayes*, *supra* at 284.

A statute provides fair notice if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required. *Id.* A statute cannot use terms which require persons of ordinary intelligence to speculate regarding its meaning and differ about its application. *Sands*, *supra* at 161. However, a statute is sufficiently definite if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of the words. *People v Lueth*, 253 Mich App 670, 676; 660 NW2d 322 (2002). To be sufficiently definite, a word need not have only one meaning. *Dep't of State v Michigan Education Ass'n-NEA*, 251 Mich App 110, 120; 650 NW2d 120 (2002). The inclusion of a reasonable person standard is sufficient to give fair notice of the conduct proscribed and serves to prevent arbitrary enforcement. *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 201; 600 NW2d 380 (1999).

Defendant contends that MCL 257.625(1) and MCL 257.904(1) are vague on their face because the phrase "a place generally accessible to motor vehicles" does not clearly define what places fall within their reach. We disagree. Defendant's argument is unpersuasive because the evidence indicated that he was driving the pickup truck on a public roadway. Because the evidence presented demonstrated that defendant entered onto a public roadway, the statutes in question provided defendant with sufficient notice of the conduct proscribed. Thus, defendant has failed to meet his burden of demonstrating an unconstitutional application of the statutes in question.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff