

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1790-2014
	:
vs.	:
	:
	: Defendant's Motion to Determine
JUSTIN KIESS,	: Offense Number
Defendant	:

OPINION AND ORDER

On October 6, 2015, Defendant pled guilty to Count 1 of his Information, operating a watercraft under the influence of alcohol (general impairment) in violation of 30 PA. CONS. STAT. ANN. § 5502 (a) (1), graded at the time as a misdemeanor of the first degree, as well as Count 2, operating a watercraft under the influence of alcohol (high rate of alcohol) in violation of 30 PA. CONS. STAT. ANN. § 5502 (a.1), which also was graded as a misdemeanor of the first degree.

Defendant admitted to operating a watercraft on July 4, 2014 while under the influence of alcohol to the degree, which rendered him incapable of safe operation of that watercraft. As well, within two hours of the time that he was operating the watercraft, the amount of alcohol by weight in his blood was .145%.

Prior to pleading guilty, Defendant filed a motion to schedule a hearing to determine the offense number. The court decided to defer a ruling on said motion until after Defendant pled guilty. The parties dispute the grading of the offenses and the negotiated plea agreement is dependent on this court's ruling with respect to the grading.

The determinative count is Count 2, operating a watercraft with a high rate of alcohol in violation of 30 PA. CONS. STAT. ANN. § 5502 (a.1), because Count 1 would

merge with Count 2 for sentencing purposes.

The underlying facts with respect to the grading issue are not in dispute. On May 7, 2005, Defendant was convicted of violating 75 PA. CONS. STAT. ANN. § 3802 (a) (1), driving under the influence of alcohol (general impairment) an ungraded misdemeanor. On April 26, 2007, Defendant was convicted of violating 75 PA. CONS. STAT. ANN. § 3802 (c), driving under the influence of alcohol with the highest rate of alcohol, also an ungraded misdemeanor. The present operating a watercraft under the influence occurred on July 5, 2014.

While Defendant concedes that prior DUI convictions shall be considered as prior offenses for grading purposes, Defendant argues by implication that there should be either a seven or ten year lookback period. Accordingly, Defendant argues that because his sentencing in this case will take place in January of 2016, possibly none of the prior offenses should be included.

When the watercraft (BUI) statute was amended in 2011, it included language that required the courts to consider prior convictions under the driving under the influence statute, 75 PA. CONS. STAT. ANN. § 3802, to be considered as prior convictions for the purposes of computing whether a subsequent conviction of the BUI law was a second, third or “subsequent conviction.” 30 PA. CONS. STAT. ANN. § 5502 (d). Indeed, the principal of defense counsel’s law firm, Justin McShane, Esquire of the McShane Law Firm, LLC published an article on July 15, 2011 noting that under “the new bill, someone arrested for boating under the influence will be charged as a repeat offender if they have prior DUI convictions on their record.” McShane, J., *Pennsylvania Changes Boating Under the*

Influence (BUI) Law, <http://www.paduiblog.com/pa-dui/pennsylvania-changes-boating-under-the-influence-bui-laws/> (July 15, 2011).

Defendant argues, however, that this court must imply either a seven or ten year lookback period in considering prior offenses. Defendant argues that the legislature “could not contend that two substantially similar statutes could have two dramatically different results dealing with a similar situation.” Defendant further argues that “having a boating under the influence statute far more harsh than its DUI cousin certainly leads to absurd and unintended results.”

As well, Defendant argues that the lookback period should be seven years and not ten years as set forth in the DUI statute because of the language set forth in 30 PA. CONS. STAT. ANN. § 5502 (b.2) (1). Defendant asserts that it “is illogical for the legislature to allow ARD after seven years but have an unlimited lookback period for determining offense number for the determination of punishment.”

Both sides agree that a determination of this issue rests on statutory interpretation of the BUI statute.

“In matters of statutory interpretation, the General Assembly’s intent is paramount.” *Commonwealth v. Hacker*, 15 A.3d 333, 335 (Pa. 2011)(citing 1 PA. CONS. STAT. ANN. § 1921 (a)). Generally, such intent “is best expressed through the plain language of the statute.” *Commonwealth v. Hart*, 28 A.3d 898, 908 (Pa. 2011). Thus, “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 PA. CONS. STAT. ANN. § 1921 (b).

The BUI statute does not define a prior offense. It does, however, describe

how convictions are to be counted as follows:

Subsequent conviction. – Acceptance of Accelerated Rehabilitative Disposition, an adjudication of delinquency or a consent decree under 42 Pa. C.S. Ch. 63 or any other form of preliminary disposition of any charge brought under this section or a conviction or guilty plea under 75 Pa. C.S. §3802 (relating to driving under the influence of alcohol or controlled substances) shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third or subsequent conviction.

30 PA. CONS. STAT. ANN. §5502(d). Noticeably absent from this paragraph is any lookback period or other time limitation regarding the convictions that are to be considered.

Defendant’s argument that it differs from the DUI statute would require the court to disregard the clear language of the BUI statute and speculate as to what the legislature may have intended. There are a myriad of reasons why the legislature may have decided not to limit the lookback period in a BUI case while deciding to do so in a DUI case.¹ It is not this court’s role to guess what reasons, if any, were considered.

Defendant argues, however, that if the statute is looked at as a whole, there is an ambiguity that must be considered and ultimately resolved by the court. Specifically, Defendant argues that Accelerated Rehabilitative Disposition (ARD) is not authorized under the BUI statute if the Defendant had been found guilty of or accepted ARD of a charge brought under this section with seven years of the date of the current offense.

Despite Defendant’s argument, the court again sees no ambiguity. Statutes are “subdivided into subsections, paragraphs, subparagraphs, and other such minor subdivisions as may be required for clarity of expression and uniformity of style.” *Commonwealth v.*

¹ The United States Coast Guard notes: “Alcohol is even more hazardous on the water than on land. The marine environment – motion, vibration, engine noise, sun, wind and spray – accelerates a drinker’s impairment.” BUI Initiatives, <http://www.uscgboating.org/recreations-boaters/bouting-under-the-influence.php>. An additional risk

Farabaugh, 2015 Pa. LEXIS 2989, *10 (December 21, 2015)(citing 1 PA. CONS. STAT. ANN. § 301 (c)). Clearly, the legislature decided that if an individual was previously found guilty or accepted ARD in connection with a BUI charge (“this section”) within seven years, they would not be entitled to ARD again. The legislature did not put any limitation in paragraph (d). Defendant’s argument that it would be illogical for the legislature to allow ARD after seven years but have an unlimited lookback period for determining offense number for the determination of punishment, ignores the fact that the BUI statute allows an unlimited lookback period with respect to both DUI and BUI convictions but a seven year lookback period for ARD purposes only with respect to BUI convictions.

If the legislature had intended the BUI statute to parallel the DUI statute as argued by Defendant, it would have increased the lookback period for ARD to ten years as it did in 75 PA. CONS. STAT. ANN. §3807(a)(2)(i). Just as the court would lack the authority to disregard the plain language of section 5502(b.2)(1) and re-write the ARD provision to a ten year period to be consistent with the DUI statute, the court lacks the authority to re-write subsection (d) to incorporate the lookback period and definition of a prior offense contained in 75 PA. CONS. STAT. ANN. §3806.

If the lack of a lookback period was the result of legislative oversight, the legislature is free to amend the statute accordingly. The court’s role, however, is to interpret the statute passed by the legislature. The court cannot act as a super-legislature and correct the alleged mistakes or omissions argued by Defendant. See *Mt. Lebanon v. County Board of Elections*, 470 Pa. 317, 368 A.2d 648, 649-650 (1977)(“it is too often forgotten that under

of BUI is the risk of drowning from the boat capsizing or individuals falling overboard.

our basic form and system of a Constitutional Government the power and duty of [a court] is interpretative, not legislative. We are not a Supreme or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be.”)(quoting *Cali v. Philadelphia*, 406 Pa. 290, 312, 177 A.2d 824, 835 (1962)).

ORDER

AND NOW, this 11th day of January 2016, the court **DENIES** Defendant’s motion to hold that the present BUI offenses are ungraded misdemeanors or misdemeanors of the second degree. Because Defendant has more than one prior DUI conviction, both Counts 1 and 2 are misdemeanors of the first degree. Because this is Defendant’s third offense, he faces a penalty of imprisonment of not less than ninety days and a fine of not less than \$1,500.00.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
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Gary Weber, Esquire (Lycoming Reporter)
Work file