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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1225**

State of Minnesota,
Respondent,

vs.

Jesse Richard McGinnis,
Appellant.

**Filed May 13, 2019
Affirmed
Stauber, Judge***

Anoka County District Court
File No. 02-CR-16-996

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County
Attorney, Anoka, Minnesota (for respondent)

Rory Patrick Durkin, Giancola-Durkin, P.A., Anoka, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and
Stauber, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

In this appeal from a judgment of conviction, appellant challenges the district court's pretrial rulings, arguing that the provision governing the calculation of prior qualified driving incidents under the felony driving-while-intoxicated statute is unconstitutionally vague and the rule of lenity should apply to resolve any ambiguity. We affirm.

FACTS

On February 11, 2016, appellant Jesse Richard McGinnis was charged with first-degree driving while impaired while under the influence of alcohol with three or more prior violations within the last ten years under Minn. Stat. §169A.20, subd. 1(1) (2014), and first-degree driving while impaired with an alcohol concentration over 0.08 with three or more prior violations under Minn. Stat. §169A.20, subd. 1(5) (2014). McGinnis's prior impaired driving offenses occurred on February 9, 2014, December 9, 2013, and September 19, 2005. He was convicted of the September offense in March 2006. Thus, the license revocation on September 19, 2005, falls outside of the ten-year look-back period for enhancing McGinnis's offense to a first-degree felony, while his March 2006 conviction for the same conduct falls within the look-back period.

At a hearing held on September 18, 2017, McGinnis asked the court to find his prior offense from September 2005 ineligible for enhancing his offense and argued that Minn.

Stat. §§ 169A.24 (2018) and 169A.09 (2018) were unconstitutionally vague.¹ Additionally, McGinnis requested that the rule of lenity be applied and the court use the September 2005 license revocation date instead of the March 2006 conviction date when calculating his prior offenses. The district court denied McGinnis’s motion and McGinnis agreed to a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 4. The district court found that McGinnis had three qualifying driving-while-impaired incidents in the ten years preceding his current offense and found him guilty of both counts. This appeal follows.

D E C I S I O N

McGinnis’s driving-while-impaired offenses were enhanced to felonies because he had three prior qualified driving incidents within the last ten years. Minnesota Statutes sections 169A.24 and 169.09 provide parameters for the ten-year look-back period. McGinnis argues on appeal that his current offenses should not have been enhanced to felonies. He contends that the felony driving-while-intoxicated statute’s provision governing the calculation of prior qualified driving incidents is unconstitutionally vague because: (1) it is not readily discernible to ordinary people; and (2) it permits arbitrary and discriminatory enforcement because it allows multiple “look-back” dates. McGinnis additionally argues that the rule of lenity should apply to resolve any ambiguity.

¹ Relevant portions of Minn. Stat. §§ 169A.24 (2018) and 169A.09 (2018) have not substantially changed since McGinnis’s offense date.

I. The statutory provisions governing the calculation of prior qualified driving incidents are not unconstitutionally vague as applied to appellant.

Constitutional challenges to a statute are questions of law which this court reviews de novo. *State v. Bussmann*, 741 N.W.2d 79, 82 (Minn. 2007). “Minnesota statutes are presumed to be constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.” *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

“[T]he right to due process includes the right to not be convicted and punished based on an unconstitutionally vague statute.” *State v. Phipps*, 820 N.W.2d 282, 285 (Minn. App. 2012). The void-for-vagueness doctrine requires that “a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983). Additionally, statutes imposing criminal penalties are subjected to a higher standard of certainty regarding their meaning. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). Otherwise, the statute may “permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender*, 461 U.S. at 358, 103 S. Ct. at 1858 (quotation omitted).

Here, McGinnis argues that Minnesota Statutes sections 169A.24 and 169.09 violate both requirements of the void-for-vagueness doctrine: (1) that the statutes do not define the offense with sufficient definiteness for an ordinary person to understand; and (2) that the statutes encourage arbitrary and discriminatory behavior. McGinnis, therefore, argues that

his prior offense from September 2005 was ineligible for enhancing his current offenses to felonies.

Understandable to Ordinary People

McGinnis contends that the look-back dates in Minnesota Statutes sections 169A.24 and 169A.09 are not readily discernible to ordinary people and conflict. Minn. Stat. § 169A.24, subd. 1, provides:

A person who violates section 169A.20 (driving while impaired) is guilty of first-degree driving while impaired if the person:

- (1) commits the violation within ten years of the first of three or more qualified prior impaired driving incidents[.]

A qualified impaired driving incident includes both prior impaired driving convictions and prior impaired driving-related losses of license. Minn. Stat. § 169A.09. “When a person has a prior impaired driving conviction and a prior impaired driving-related loss of license based on the same course of conduct, either the conviction or the loss of license may be considered a qualified prior impaired driving incident, but not both.” *Id.*

Under the plain language of the statutes, the meaning is readily discernable. Ordinary people are not “left to guess at the meaning . . . nor differ as to its application.” *Newstrom*, 371 N.W.2d at 528 (holding that a statute was vague because an essential term was not defined and was ambiguous). The statutes are straightforward and provide sufficient definiteness to avoid any void-for-vagueness challenge.

Additionally, contrary to McGinnis’s argument, the language in Minnesota Statutes sections 169A.24 and 169A.09 does not conflict. McGinnis contends that the statutes

conflict because section 169A.24, subdivision 1, sets a specific deadline of ten years, while section 169A.09 gives two different look-back dates, without regard to time limitations. This means, McGinnis argues, that because a license revocation can happen outside of the ten-year period, while a conviction can happen within the ten-year period, punishment may extend beyond the specific ten-year deadline. However, it is unclear where the alleged conflict lies. Section 169A.24 provides a clear rule regarding the use of prior impaired driving incidents and section 169A.09 provides the definition and instructions for calculation. These statutes work in harmony and do not conflict.

Arbitrary and Discriminatory Enforcement

McGinnis next argues that the look-back dates encourage arbitrary and discriminatory enforcement because law enforcement officers may “pursue their personal predilections” when choosing a look-back date. McGinnis provides the following example to illustrate his point:

A defendant could have violated § 169.24 in 2014, been subject to conditions of release for two years, and been convicted of the matter in 2016. . . . This defendant could have remained law abiding and then received a DUI in 2026. Based solely on which incident the prosecuting attorney deemed desirable, this particular defendant could still be subject to enhancement.

On the opposite end, an individual may have committed a DUI in Nov. 2002, been convicted in Jan. 2004, and committed a new DUI in Dec. 2012. The prosecutor could take those dates, and not enhance the charge by using the date of the violation (date of loss of license).

First and foremost, “[i]t is well-settled that vagueness challenges that do not involve First Amendment freedoms must be examined in light of the facts at hand.” *State v. Becker*, 351 N.W.2d 923, 925 (Minn. 1984). Therefore, McGinnis’s example is unpersuasive.

Moreover prosecutors are afforded great discretion in their charging decisions and their decisions to charge do not necessarily affect the vagueness analysis. *State v. Campbell*, 756 N.W.2d 263, 275 (Minn. App. 2008) (noting that allegations of prosecutorial wrongdoing “are not relevant to the question of whether the statute itself provides judges, attorneys, law enforcement, and jurors with fixed legal standards for determining whether particular conduct is prohibited in a given case”), *review denied* (Minn. Dec. 23, 2008). A statute may lead to arbitrary and discriminatory enforcement “when it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” *Id.* (quotation omitted). Not only do these statutes offer legally fixed standards, but there are also safeguards to prevent any discriminatory charging, as the state can only use one look-back date (the license revocation or the conviction); the prior misdemeanor and gross misdemeanor impaired driving offenses used to enhance cannot be used in calculating the offender’s criminal-history score; and the prosecutorial burden of proof “greatly minimizes the risk of discriminatory and arbitrary investigation and enforcement.” *Id.*; *see also* Minn. Sent. Guidelines 2.B.6.

The statutes do not give rise to arbitrary and discriminatory enforcement. McGinnis’s conviction falls within the ten-year period and it is clear under the statute that his conviction may still be considered as a prior impaired driving incident. *See* Minn. Stat. §169A.09. Because Minnesota Statutes sections 169A.24 and 169A.09 are not void for vagueness, McGinnis’s due process rights were not violated.

II. The rule of lenity does not apply.

McGinnis argues that the rule of lenity should apply and his loss of license should be the reference date for the look-back period. Under the rule of lenity, if a criminal statute is ambiguous, the ambiguity should be construed in defendant's favor. *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011). However, McGinnis makes no argument on appeal regarding how Minnesota Statutes sections 169A.24 and 169A.09 are ambiguous.

Moreover, this court has previously held that section 169A.24 is not ambiguous. *State v. Miller*, 689 N.W.2d 177, 179 (Minn. App. 2004), *review denied* (Minn. Jan. 26, 2005) (holding that section 169A.24 was not ambiguous and under the plain meaning of the statute, the district court did not err by relying on the date of conviction to enhance the offense). Because McGinnis offers no argument as to how the statutes are ambiguous, and this court has previously held that section 169A.24 is not ambiguous, the rule of lenity does not apply.

McGinnis had three qualified prior impaired driving incidents, which were correctly used to enhance his current offenses to felonies. Because Minnesota Statutes sections 169A.24 and 169A.09 are not unconstitutionally vague and the rule of lenity does not apply, the district court did not err in denying McGinnis's pretrial motion.

Affirmed.