Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone (617) 557-1020, Fax 617-557-1145

Essex Superior Court
Clerk for Criminal Business
56 Federal Street
Salem, MA 01970

RE: Docket No. FAR-28082

COMMONWEALTH
vs.
PETER HURLEY

Essex Superior Court No. 1177CR01351
A.C. No. 2020-P-0502

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on March 11, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: March 11, 2021

To: Catherine L. Semel, A.D.A.
Jon R. Maddox, Esquire
Essex Superior Court

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-502

COMMONWEALTH

vs.

PETER HURLEY.

Pending in the Superior Court for the County of Essex

Ordered, that the following entry be made on the docket:

The finding of guilty of operating a motor vehicle under the influence of intoxicating liquor, fifth offense, is affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date January 26, 2021.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-502

COMMONWEALTH

vs.

PETER HURLEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

At issue is whether the judge, after a bench trial on the subsequent offense portion of operating a motor vehicle under the influence of intoxicating liquor (OUI), properly found that the defendant had four or more previous OUI convictions. We affirm.

The defendant was charged with OUI, as a fifth offense, G. L. c. 90, § 24 (1); resisting arrest, G. L. c. 268, § 32B; threatening to commit a crime, G. L. c. 275, § 2; and operating a motor vehicle with a suspended license, subsequent offense, G. L. c. 90, § 23. After a jury trial, the defendant was convicted of all charges except for that of operating with a suspended license (which had previously been nolle prossed). The subsequent offense portion of the OUI charge, which had been bifurcated, was tried to the judge who found that the defendant

had four or more previous OUI convictions. A panel of this court affirmed the convictions, Commonwealth v. Hurley, 93 Mass. App. Ct. 1116 (2018), but vacated the subsequent offense finding because the defendant had not waived his right to trial by jury and remanded for retrial. After remand, the defendant waived his right to a jury trial, and a trial to a different judge occurred solely on the subsequent portion of the OUI charge. After this retrial, the defendant was again found to have been previously convicted four or more times of OUI. This appeal followed.

On appeal, the defendant does not challenge that -- as a matter of fact -- he has five previous OUI convictions.[1] Instead, he argues that -- as a matter of contract law -- only the three convictions that occurred during the ten years before his 2000 plea can be counted.[2] This argument turns on the defendant's contention that a plea agreement in 2000 pursuant to which he pleaded guilty to OUI, third offense, contained a term limiting the Commonwealth to counting only the two convictions that could be counted under the ten-year look-back period in

---

[1] The defendant acknowledges that he has been previously convicted of OUI in 1982, 1983, 1992 (twice), and 2000.

[2] In his brief, the defendant makes an argument to the same effect under principles of collateral estoppel. At oral argument, however, he acknowledged that collateral estoppel would depend on his contract-based arguments. We accordingly do not address collateral estoppel separately here.

effect at that time. Therefore, the defendant's argument continues, as a matter of contract law, he cannot be deemed to have more than three convictions now (the two earlier ones, plus the one resulting from the 2000 plea).

This argument fails, if for no other reason, because the record does not support it. The only evidence the defendant has produced regarding the 2000 conviction was the docket sheet showing that he pleaded guilty to OUI as a third offense. There is absolutely no indication that that plea was the result of an agreement, or that the Commonwealth made promises or statements regarding the counting of his previous OUI convictions to induce his plea. Contrast Commonwealth v. Cruz, 62 Mass. App. Ct. 610, 611-612 (2004) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled" [citation omitted]). Indeed, there is no information regarding the 2000 conviction other than the naked fact that the defendant chose to plead guilty to OUI as a third offense, and the sentence he received as a result.[3]

The defendant also argues that the statutory ten-year lookback period in existence at the time he tendered his plea in

[3] We rejected the defendant's collateral attack to his two 1992 OUI convictions for similar reasons. See Commonwealth v. Hurley, 91 Mass. App. Ct. 1121 (2017).

2000 became an implicit term of his plea "agreement." Even were we to assume, despite the absence of evidence, that an agreement existed, "[t]here is no merit to the defendant's argument . . . that amendments to G. L. c. 90, § 24(1)(a)(1), enlarging the 'reach back' period for prior offenses, constitute a breach of contract, for the reason (among others) that the statutory amendments had no effect on the plea agreement the defendant entered in[to previously]; instead they affect only the collateral consequences of the defendant's prior convictions on the defendant's subsequent . . . offense." Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 904 n.1 (2010).

Finally, although the defendant suggests as part of his contract argument that applying a subsequent look-back provision may violate constitutional principles regarding ex post facto laws, the Supreme Judicial Court has repeatedly held that the amendments to the look-back provisions pose no such problem. See Commonwealth v. Corbett, 422 Mass. 391, 393-394 (1996), quoting Commonwealth v. Murphy, 389 Mass. 316, 320 (1983) ("[t]he enhanced punishment is imposed for a subsequent violation; it is not retroactive punishment for the first"). See also Commonwealth v. Maloney, 447 Mass. 577, 591 (2006) (repeat offender provision of OUI statute pertains solely to punishment).

The finding of guilty of operating a motor vehicle under the influence of intoxicating liquor, fifth offense, is affirmed.

So ordered.

By the Court (Wolohojian, Henry & Singh, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: January 26, 2021.

[4] The panelists are listed in order of seniority.