STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0412

State of Minnesota,
Respondent,

vs.

Scott Garrett Wertheimer,
Appellant.

Filed April 7, 2009
Affirmed
Halbrooks, Judge

Anoka County District Court
File No. 02-CR-07-5389

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Max A. Keller, Keller Law Offices, 1690 The Interchange Tower, 600 Highway 169 South, Minneapolis, MN 55426 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

On appeal from his conviction of first-degree driving while impaired (DWI), appellant argues that his May 12, 1997 prior DWI conviction is not within ten years of his May 12, 2007 arrest date for the current offense, thereby precluding a finding that he has three prior qualified driving-related offenses required for a conviction of first-degree DWI. Because we conclude that appellant's May 12, 2007 arrest date is within ten years of his May 12, 1997 conviction, we affirm.

FACTS

Appellant Scott Garrett Wertheimer was arrested for DWI on May 12, 2007. Before that arrest, appellant had three times been convicted of DWI. These convictions occurred on May 12, 1997, December 15, 1998, and March 23, 2004. Following his arrest on May 12, 2007, appellant was charged with two counts of first-degree DWI for allegedly committing the current offense within ten years of three prior qualified driving-related offenses and one count of violation of a restricted license, in violation of Minn. Stat. §§ 169A.20, subds. 1(1)–2, .24, subds. 1(1)-2, .276, subd. 1(a), 171.09, subd. 1(d)(1), 609.03, 609.101 (2006).

Prior to trial, appellant moved the district court to dismiss the first-degree DWI charges, arguing that his May 12, 1997 conviction and May 12, 2007 arrest are not within ten years of each other. The district court denied appellant's motion, citing the time-computation method described in Minn. Stat. § 645.15 (2006), and finding that the May 12, 2007 arrest was within ten years of the May 12, 1997 conviction.

The state subsequently dismissed one of the first-degree DWI counts and the count for violation of a restricted license. Following a *Lothenbach* proceeding, the district court found appellant guilty of first-degree DWI. This appeal follows.

D E C I S I O N

Appellant argues that his May 12, 2007 arrest is not within ten years of his May 12, 1997 conviction. "Whether a statute has been properly construed is a question of law to be reviewed de novo by this court." *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

To be convicted of first-degree DWI, a defendant must have violated Minn. Stat. § 169A.20 (2006) and "commit[ted] the violation within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. § 169A.24, subd. 1(1). To compute time, Minnesota law provides:

> Where the performance or doing of any act, duty, matter, payment, or thing is ordered or directed, and the period of time or duration for the performance or doing thereof is prescribed and fixed by law, the time, except as otherwise provided in sections 645.13 and 645.14, shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time. When the last day of the period falls on Saturday, Sunday, or a legal holiday, that day shall be omitted from the computation.

Minn. Stat. § 645.15. Although the first-degree DWI statute is characterized as a "look-back" statute, *State v. Miller*, 689 N.W.2d 177, 179 (Minn. App. 2004), *review denied* (Minn. Jan. 26, 2005), and section 645.15 is typically used to calculate future performance dates, the supreme court has clearly stated that section 645.15 "applies 'uniformly to all questions of time computation unless the terms of a statute affirmatively

specify another method of computation.'" *Jorgensen v. Knutson*, 662 N.W.2d 893, 899 (Minn. 2003) (quoting *Kokesh v. City of Hopkins*, 307 Minn. 159, 163, 238 N.W.2d 882, 885 (1976)). Appellant concedes that the DWI statute does not specify another method of time computation.

In *Jorgensen*, the supreme court considered arguments as to whether section 645.15 applied to a statutory notice provision requiring "at least ten days' notice" before cancellation of an insurance policy would be effective. *Id.* at 898-99. The supreme court concluded that because there was no language specifying another method of computing time such as "working" days, "business" days, or "calendar" days, the time-computation method of section 645.15 applied. *Id.* at 899. Further, the supreme court stated that its "survey of the varied fields of statutory law listing general requirements such as 'within 30 days'" indicated that it had "consistently applied the computation statute." *Id.* at 899 & n.4 ("We have applied the computation statute to subject areas as varied as property redemption, criminal appeals, city negligence, appointment of guardians, and employment law."). In applying section 645.15 broadly, the supreme court has also noted:

> Inasmuch as the certainty of a rule is of more importance than the reason of it, we think the legislature intended by section [645.15] to put an end to all this confusion and uncertainty by adopting a uniform rule for the computation of time alike applicable to matters of mere practice and to the construction of statutes.

Spencer v. Haug, 45 Minn. 231, 233, 47 N.W. 794, 795 (1891) (interpreting a previous version of the computation statute).

To calculate the actual period for this case using the method of time computation in section 645.15, the first day is excluded and the last day is included. Because appellant's earliest conviction occurred on May 12, 1997, the first day is excluded, and the period begins on May 13, 1997. Because the last day is included, the period expires at the end of the day on May 12, 2007. Accordingly, appellant's May 12, 1997 conviction can be used to convict appellant of first-degree DWI.

Although appellant asserts that the "within ten years" language is unambiguous, he makes an alternative argument that if the phrase is ambiguous, the rule of lenity should apply. *See State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) ("[W]hen the language of a criminal law is ambiguous, we construe it narrowly according to the rule of lenity."). But neither section 169A.24, subdivision 1(1), nor section 645.15 is ambiguous. Thus, the rule of lenity does not afford appellant relief.

Furthermore, while not a basis for this decision, the public policy underlying the DWI statutes is consistent with this statutory interpretation. "Laws prohibiting DWI are 'remedial statutes. Consequently, such laws are liberally interpreted in favor of the public interest and against the private interests of the drivers involved.'" *Young v. Comm'r of Pub. Safety*, 420 N.W.2d 585, 586 (Minn. 1988) (quoting *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 319 (Minn. 1981)).

Affirmed.