

COA Opinion: A conviction under the zero-tolerance provision counts as a prior conviction for driving while impaired for the purpose of the Michigan Sentencing Guidelines

2. December 2010 By Jeanne Long

On November 30, 2010, the Court of Appeals published its opinion in *Michigan v. Bulger*, No. 288312. In *Bulger*, the Court of Appeals held that a defendant's misdemeanor conviction for underage drinking and driving was the proper basis for a sentencing enhancement under Prior Record Variable (PRV) 5 of the Michigan Sentencing Guidelines.

In *Bulger*, the defendant pleaded no contest to one count of operating a motor vehicle while intoxicated causing death and one count of operating a motor vehicle while intoxicated. The State sought to assess the defendant two points under PRV 5 for the defendant's previous violation of Michigan's zero-tolerance provision, which prohibits a minor from operating a motor vehicle with a blood alcohol level over zero. Defendant argued that his prior conviction under the zero-tolerance provision was not a proper basis for the two-point sentencing enhancement because the Guidelines permit enhancement for "prior misdemeanor convictions . . . for operating a motor vehicle . . . while under the influence of or impaired by alcohol . . . ," but the zero-tolerance provision did not require proof that defendant was actually under the influence of alcohol or was impaired by alcohol as an element of the offense. Based on this reasoning, defendant contended that his prior conviction could not be the basis for a sentencing enhancement. The trial court rejected defendant's argument, and it assessed him two points under PRV 5 and sentenced him to 71 months to 15 years in prison. Defendant's minimum sentence recommendation would have been reduced to 29 to 57 months absent the sentencing enhancement.

The Court of Appeals affirmed, concluding that the legislature intended PRV 5 to be construed broadly to include all drunk-driving offenses as defined in MCL 257.625. In support of its conclusion, the Court noted that the drunk-driving statute as a whole uses the phrase "while under the influence" to refer to all crimes related to drunk driving. Further, the Court expressed concern that adopting defendant's argument would lead to the "incongruous situation where a conviction under the zero-tolerance provision would count as a prior conviction for purposes of raising a misdemeanor to a felony, but not for the purposes of a sentencing enhancement."