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publication in the New York Reports.

No. 100
The People &c.,
 Appellant-Respondent,
 v.
Daniel J. Ballman,
 Respondent-Appellant.

Catherine A. Walsh, for appellant-respondent.
Shirley A. Gorman, for respondent-appellant.

LIPPMAN, Chief Judge:

 This appeal raises the issue whether Vehicle and
Traffic Law § 1192 (8) allows an out-of-state conviction
occurring prior to November 1, 2006 to be considered for purposes
of elevating a charge of driving while intoxicated from a
misdemeanor to a felony. We hold that it does not.

Defendant was indicted for driving while intoxicated as a felony (Vehicle and Traffic Law § 1192 [3]) and for obstructing governmental administration in the second degree (Penal Law 195.05) for acts committed on February 22, 2007. As the basis for elevating defendant's driving while intoxicated charge to a felony, the People filed a special information charging that defendant had a 1999 conviction for driving with an unlawful alcohol concentration in the state of Georgia (OCGA § 40-6-391), which would have been a violation of Vehicle and Traffic Law § 1192 (2) had it occurred in New York.

Defendant moved to dismiss the indictment raising several arguments, including that the date of the Georgia conviction rendered it ineligible to serve as a predicate for elevating the charge to driving while intoxicated as a felony. Supreme Court denied the motion, finding that the legislative intent behind Vehicle and Traffic Law § 1192 (8) was to treat prior out-of-state convictions as if they were prior convictions for the same actions occurring in New York State. The same court denied defendant's motion to suppress the evidence against him and defendant ultimately pleaded guilty to driving while intoxicated as a felony in full satisfaction of the indictment.

The Appellate Division reversed, vacated the plea, dismissed the first count of the indictment for felony driving while intoxicated without prejudice to the People to re-present appropriate charges, reinstated the second count of the

indictment for obstructing governmental administration and remitted to County Court for further proceedings on that second count (64 AD3d 9 [4th Dept 2009]). The Court determined that, based on the language of the 2006 amendment to Vehicle and Traffic Law § 1192 (8) and its enabling language, convictions occurring prior to the November 1, 2006 effective date of the statute, including defendant's 1999 Georgia conviction, could not be used to raise a driving while intoxicated (DWI) offense from a misdemeanor to a felony. The Court, however, upheld Supreme Court's suppression ruling. A Judge of this Court granted both parties leave to appeal. We now affirm.

At issue here is the interpretation of Vehicle and Traffic Law § 1192 (8), as amended in 2006. The statute reads as follows:

"A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section . . . provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section"

(Vehicle and Traffic Law § 1192 [8]). The subdivision further provides that, if the out-of-state conduct would have been a violation of § 1192 had it occurred in-state, but would not have constituted a misdemeanor or a felony, the conduct will be deemed a prior conviction of driving while ability impaired for purposes of determining the appropriate penalties (see Vehicle and Traffic

Law § 1192 [8]).

The enabling language accompanying the amendment specifies that "[t]he provisions of [Vehicle and Traffic Law § 1192 (8)], as it existed prior to the amendment made by . . . this act, shall apply only to convictions occurring on or after November 29, 1985 through and including October 31, 2006 and provided, further, that the provisions of [Vehicle and Traffic Law § 1192 (8)] as amended by . . . this act shall apply only to convictions occurring on or after November 1, 2006" (L 2006, ch 231, § 2). The amendment took effect on November 1, 2006 (L 2006, ch 231, § 3).

The dispute centers on the meaning of the term "convictions" in the enabling language -- whether it applies to domestic or prior out-of-state convictions. "When presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006] [internal quotation marks and citation omitted]). Although the text itself is generally the best evidence of legislative intent, where "the language is ambiguous, we may examine the statute's legislative history" (Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 286 [2009]). Here, the enabling language presents such an ambiguity.

In order to best understand the 2006 amendments, it is helpful to trace the evolution of this subdivision. The initial

version of this provision, Vehicle and Traffic Law § 1192 (7), was enacted in 1985 to allow prior out-of-state convictions for driving under the influence of drugs or alcohol to be considered when determining appropriate penalties for subsequent New York offenses (L 1985, ch 694, § 1). Until that time, prior out-of-state convictions had not been considered for penalty purposes (see Mem in Support, Bill Jacket, L 1985, ch 694). Under § 1192 (7), all such prior out-of-state convictions were treated as traffic infractions, rather than misdemeanors or felonies, regardless of the level of the crime in the other state or the degree of any equivalent violation in New York (L 1985, ch 694, § 1). The enabling language of the legislation provided that the "act shall take effect on the one hundred twentieth day next succeeding the date on which it shall have become a law and shall apply to out-of-state convictions occurring on or after such date" (L 1985, ch 694, § 2). Since the statute was enacted August 1, 1985, its effective date was therefore November 29, 1985.

When this provision was renumbered from subdivision seven to Vehicle and Traffic Law § 1192 (6) in 1988, the statutory language remained largely the same. However, the bulk of the enabling language was incorporated into the body of the statute -- providing that the subdivision would only be applicable to convictions occurring after November 29, 1985 (L 1988, ch 47, § 18). The primary difference in the statutory

language was the omission of the term "out-of-state." The subdivision was again renumbered to Vehicle and Traffic Law § 1192 (8) (L 1990, ch 173, § 62), where it appears today.

As noted above, the 2006 amendments ended the practice of treating all prior out-of-state convictions as mere traffic infractions under New York law. Rather, for purposes of determining penalties, a prior out-of-state conviction is now treated as a conviction of the equivalent conduct under New York law. In addition, the amendment again moved the date restrictions, this time from the statute to the enabling language.

This history reflects that the Legislature recognized the harsher penalties that had been applied when a person had a prior in-state conviction, as opposed to a prior out-of-state conviction, and intended to remedy that discrepancy. "This bill would eliminate one of the loopholes that allows repeat DWI offenders to face lesser penalties simply because prior convictions occurred out of state" (Assembly Mem in Support, Bill Jacket, L 2006, ch 231). The stated purpose of the amendment was "[t]o ensure that a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction for the same action as if it had occurred in New York State" (Assembly Mem in Support, Bill Jacket, L 2006, ch 231).

Although the legislative history does not specifically

discuss a time limitation, it is significant that the Legislature chose to continue applying the November 29, 1985 date originally used to allow for consideration of out-of-state convictions. The most sensible interpretation of the enabling language is that the Legislature chose to remedy this differential treatment going forward, by continuing to apply the previous statutory scheme to out-of-state convictions occurring prior to November 1, 2006, and applying the statute as amended to out-of-state convictions occurring after that date. The People's argument that "convictions" in the enabling language refers to current New York convictions is belied by the use of that November 29, 1985 to October 31, 2006 time frame. In addition, if "convictions occurring on or after November 1, 2006," was meant to refer to current New York convictions, the enabling language establishing the effective date of the statute as November 1, 2006 (L 2006, ch 231, § 3) would be redundant. Treating "convictions" as prior out-of-state convictions also avoids any potential ex post facto problem arising from the People's proposed interpretation of the statute.

The enabling language of the 2006 amendments should be interpreted consistently with the language of the statute itself. The subdivision is entitled "Effect of prior out-of-state conviction" and throughout the subdivision the only references are to prior convictions - when a prior out-of-state conviction will be deemed a prior conviction under New York law. Moreover,

use of the prior out-of-state convictions is necessary at the inception of the case, for charging purposes, in order to make the initial determination of whether a defendant can be indicted for misdemeanor or felony DWI. Based upon all of the above considerations, the most reasonable interpretation of the statute and its enabling language is that out-of-state convictions from prior to November 1, 2006 cannot be used to elevate a DWI offense to a felony.

In light of this disposition, it is not necessary to address defendant's argument concerning whether the conduct underlying his Georgia conviction would have been the equivalent of a misdemeanor under Vehicle and Traffic Law § 1192. In addition, defendant's cross appeal is dismissed, since he was not adversely affected by the Appellate Division order within the meaning of CPL 450.90 (1).

Accordingly, on the People's appeal, the order of the Appellate Division should be affirmed. Defendant's appeal should be dismissed upon the ground that the order from which the appeal is taken is not adverse or partially adverse within the meaning of CPL 450.90 (1) (see People v Edwards, 96 NY2d 445, 451 n 2 [2001]).

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On the People's appeal, order affirmed. Defendant's appeal dismissed upon the ground that the order from which the appeal is taken is not adverse or partially adverse within the meaning of CPL 450.90(1) (see People v Edwards, 96 NY2d 445, 451 n 2 [2001]). Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 10, 2010