

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. SC 89948
)
VANESSA SEVERE,)
)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GENTRY COUNTY, MISSOURI
4th JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE ROGER M. PROKES, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INDEX

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES..... | 2 |
| JURISDICTIONAL STATEMENT..... | 3 |
| STATEMENT OF FACTS..... | 4 |
| POINT RELIED ON | 5 |
| ARGUMENT | 6 |
| CONCLUSION | 14 |
| CERTIFICATE OF SERVICE AND COMPLIANCE..... | 15 |

TABLE OF AUTHORITIES

Page

CASES:

Shepherd v. Consumer’s Co-op, Ass’n, 384 S.W.2d 635 (Mo. banc 1964)..... 12

State v. Cobb, 875 S.W.2d 533 (Mo. banc 1994)..... 8, 9, 10

State v. Cullen, 39 S.W.3d 899 (Mo. App. E.D. 2001) 9

State v. Emery, 95 S.W.3d 98 (Mo. banc 2003) 6, 8, 9

State v. Harris, 315 S.W.2d 849 (Mo. App. 1958) 6

State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998) 9

State v. Stewart, 832 S.W.2d 911 (Mo. banc 1992) 10, 11

Turner v. State, 245 S.W.3d 826 (Mo. banc 2008) 7, 10, 12

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Amendment XIV 6

Missouri Constitution, Article I, §10..... 6

STATUTES:

§577.023 6, 7, 9, 11, 12

JURISDICTIONAL STATEMENT

Appellant, Vanessa Severe, incorporates by reference the Jurisdictional Statement found on Page 6 of her Substitute brief.

STATEMENT OF FACTS

Appellant Vanessa Severe incorporates by reference the Statement of Facts found on Pages 7 and 8 of her Substitute Brief.

POINT RELIED ON

The trial court plainly erred in finding Ms. Severe a persistent offender under §577.023.1(2)(a) and enhancing her punishment from a class A misdemeanor to a class D felony because those actions violated Ms. Severe’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution, in that Ms. Severe was sentenced in excess of the maximum sentence authorized by law because her 1999 prior intoxication-related traffic conviction, which was one of the two prior convictions used to find her a persistent offender, was a municipal offense that resulted in a suspended imposition of sentence and therefore could not be used to enhance her punishment.

State v. Emery, 95 S.W.3d 98 (Mo. banc 2003);

State v. Cullen, 39 S.W.3d 899 (Mo. App., E.D. 2001);

State v. Harris, 315 S.W.2d 849 (Mo. App. 1958);

U.S. Constitution, Amendment XIV;

Mo. Constitution, Article I, §10; and

§577.023.

ARGUMENT

The trial court plainly erred in finding Ms. Severe a persistent offender under §577.023.1(2)(a) and enhancing her punishment from a class A misdemeanor to a class D felony because those actions violated Ms. Severe’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution, in that Ms. Severe was sentenced in excess of the maximum sentence authorized by law because her 1999 prior intoxicated-related traffic conviction, which was one of the two prior convictions used to find her a persistent offender, was a municipal offense that resulted in a suspended imposition of sentence and therefore could not be used to enhance her punishment.

The State is requesting that this Court create an exception to *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003) where there is no prosecutorial laxity in the presentation of evidence of prior offenses, valid at the time of trial and sufficiently establishing the enhancement status, that would permit proof of additional prior offenses on remand. Resp.br. 13. What the State is actually requesting is for this Court to carve out exceptions, not to the *Emery* decision, but to the timing requirements of §577.023, and by implication the other enhancement statutes. But under our system of government, the Court’s function “is to declare, apply and enforce the law as [you] find it, not to legislate by judicial fiat.” *State v. Harris*, 315 S.W.2d 849, 852 (Mo. App. 1958) (citations omitted). The timing

requirement of the DWI enhancement statute is clear and unambiguous. The facts establishing a defendant's prior or persistent offender status "shall be pleaded, established and found prior to submission to the jury outside of its hearing." §577.023.6 RSMo 2000. There is no basis in the law to carve out exceptions to these simple requirements.

Respondent argues that because there was no prosecutorial laxity or actual error by the trial court in this case, the State should be given the opportunity on remand to meet the new requirement under *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008). Resp. br. 12. But in *Turner* there was no suggestion of prosecutorial laxity or trial court error. The State had filed an indictment which included the allegation that Turner was a persistent DWI offender, the State introduced evidence in support of that allegation, and the trial court found Turner to be a persistent DWI offender. *Id.* at 826. On transfer from the Western District Court of Appeals, this Court found that "the use of prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023." *Id.* at 829. This Court did not remand the case with directions that the State be given an opportunity to prove that Turner had another alcohol-related prior conviction, instead, the judgment was reversed, and the case remanded without any instructions.

The State fails to suggest a valid reason why it should be given another opportunity to prove Ms. Severe is a persistent DWI offender, when that remedy was not given to Turner.

The State argues that Appellant attempts to minimize this Court's distinguishing of *State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994) in *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003). The Respondent asserts that Ms. Severe's statement that "[t]he *Emery* Court distinguished *Cobb* since the issue in *Cobb* was whether double jeopardy prevented a remand for resentencing" App.br.21 is both incomplete and misleading." Resp. br.16.

In *Cobb*, this Court took transfer because "of the general interest and importance of the double jeopardy issue." *Id.* at 534. The issue was framed as follows:

. . .state asks us to remand the case to allow the state the opportunity to prove a third prior conviction. In response, Cobb asserts that the remand for this purpose would violate his Fifth Amendment right to be free from double jeopardy.

Id.

This Court engaged in a detailed examination of the double jeopardy clause and whether it applied to noncapital sentencing schemes. *Id.* at 534-537. The Court ended its discussion by holding that, "[i]n sum, double jeopardy is no obstacle in this noncapital proceeding to permitting the state to present whatever evidence it may have at a resentencing to establish the defendant is, as he was charged and sentenced the first time, a persistent offender." *Id.* at 537. This Court's decision in *Cobb* was limited to a discussion of the effect of the double jeopardy clause on noncapital sentencing. The timing requirements of the

enhancement statutes were not discussed and prosecutorial laxity was never mentioned. The primary distinguishing feature between *Emery* and *Cobb* has to be double jeopardy since no other issues were discussed.

Respondent also overlooks the fact that in *Emery* this Court found that *Cobb* was not dispositive. 95 S.W.3d at 102 n.5. The Court in *Emery* cites *State v. Cullen*, 39 S.W.3d 899 (Mo. App. E.D. 2001), with approval, noting that “[t]hough the posture of

this case is different from *Cullen*, the principle is the same. This case should be remanded for resentencing, but will not be remanded for further error.” 95 S.W.3d at 102.

Respondent asserts that because the enhancement statute is silent as to what remedy should be employed when the state meets the timing requirements of the statute but then, because of a change in the law, finds that its proof was insufficient, this Court should interpret the statute in a manner giving effect to the legislative intent behind the statute. Resp.br. 18-19. In support of this proposition, the State cites *State v. Johnson*, 968 S.W.2d 123 (Mo. banc 1998). In *Johnson* there was ambiguity in the statute whether an alternate juror could replace a regular juror in the penalty phase deliberations of a capital case. This Court noted that “[s]uch ambiguities must be resolved by reference to legislative intent, as reflected in the language used in the statute.” *Id.* at 132. There is no such ambiguity in the DWI enhancement statute. The statute plainly states that “the

facts shall be pleaded, established and found prior to submission to the jury outside of its hearing.” §577.023.6 RSMo 2000. The remedy for a violation of the timing statute is clear, the defendant may not be sentenced as a prior or persistent offender. There is no need for a remedial provision. And there is no need for this Court to engage in statutory construction.

Respondent characterizes strict compliance with the timing requirements as “punishing the State.” Resp.br. 20. That characterization is overblown. As Ms. Severe noted in her Substitute Brief, she has found only two cases in which a change in the law

resulted in the State’s proof for enhancement being insufficient, *Cobb* and this case. *State v. Stewart*, 832 S.W.2d 911 (Mo. banc 1992), rendered the State’s proof in *Cobb* inadequate. *Turner*, the case that rendered the State’s proof inadequate in Ms. Severe’s case, was decided in 2008. So there have been two cases in sixteen years. This Court remanded *Cobb* to give the State another chance to prove his persistent offender status. Not allowing the State a second chance to prove persistent DWI offender status in a single case in sixteen years simply cannot be characterized as punishment. This is especially true if this Court considers the number of defendants who have been wrongfully sentenced to enhanced terms of imprisonment in cases in which the State failed to obey the timing requirements of the enhancement statutes but were nonetheless allowed to make that showing after submission of the case to the jury.

The same is true of Respondent's concern that the doctrine of stare decisis will be harmed if this Court holds that the State's proof that Ms. Severe was a persistent DWI offender was insufficient given the holding in *Turner*. Respondent asserts that if this Court refuses the State's request for another opportunity to prove Ms. Severe's persistent DWI offender status, it will "proclaim to trial courts that [] precedents cannot be relied on and [] punish them for having so relied." Resp.br. 21. That is an exaggeration. Trial courts will not be cast adrift if this Court holds that the timing requirements of the enhancement statutes are to be strictly enforced. "It is an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government or parties seeking

to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed." *Stewart*, 832 S.W.2d at 913.

And contrary to Respondent's efforts to make it seem so, this is not the only area of the law where this Court has reinterpreted statutes or overruled a lower court's decision resulting in relief for a defendant.

Respondent argues that "it should be a simple issue of fundamental fairness to allow further evidence of prior offenses on remand when the State presented evidence that was sufficient under the law existing at the time of trial. . ." Resp.br 22. Respondent overlooks the fact that the government does not have a

constitutional right to due process. That right and the protection it provides belong to Ms. Severe.

This Court should decline Respondent's request to carve out an exception to the timing requirements of the enhancement statutes. §577.023 is clear and unambiguous. If the State wants to enhance the possible punishment a defendant faces, the statute outlines exactly what must be done. To begin creating exceptions to the statutes would lead to confusion and more litigation. If the State pleads and proves the requisite number of prior convictions, and the court finds the defendant to be a persistent DWI offender prior to submission to the jury, should the State have a chance on remand to present further evidence if one of the convictions used is vacated? Should the State have a second chance to prove persistent DWI offender status when it used every means at its disposal but could not get proof of a foreign conviction in time for trial? Such scenarios are endless.

Respondent acknowledges its awareness of cases holding that, "when former decisions are found to have 'approved an incorrect law' and are then overruled, future cases are decided as if those decisions 'never were the law' and 'had never been written.'" Resp.br. 21. Respondent characterizes such cases as "older precedent," but the case Respondent cites, *Shepherd v. Consumer's Co-op, Ass'n*, 384 S.W.2d 635, 640 (Mo. banc 1964) has not been overruled and is still good law. Ms. Severe is unable to discern the difference Respondent makes between a case which overrules an earlier case and a case that declares "new

standards” of law. Resp.br.at 22. For example, in *Turner*, this Court reached the decision that a municipal court violation resulting in an SIS could not be used to enhance a DWI offender’s punishment. 245 S.W.3d at 829. This was done by reading the statute and applying rules of statutory construction. In that way, this Court established “new standards” for finding a defendant a persistent DWI offender and the previous interpretation of §577.023 is treated as if it was never the law. This does not provide legal support for the State’s request that Ms. Severe’s case be remanded to give the State an opportunity to prove that she is a persistent offender.

This Court should hold that the enhancement timing statutes are to be strictly applied as written, without exception, and remand Ms. Severe’s case with instructions that she be sentenced as a prior DWI offender within the range of punishment for an A misdemeanor.

CONCLUSION

For the reasons stated herein, Appellant Vanessa Severe respectfully requests that this Court reverse her sentence and remand her case to the trial court with instructions that she be sentenced within the range of a class A misdemeanor.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,313 words, which does not exceed the 7.750 words allowed for an appellant's substitute reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, updated in May, 2009. According to that program, these disks are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 2nd day of June, 2009, to Richard Starnes, Assistant Attorney General, Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Nancy A. McKerrow