

No. SC89948

**In the
Missouri Supreme Court**

STATE OF MISSOURI,

Respondent,

v.

VANESSA SEVERE,

Appellant.

**Appeal from the Circuit Court of Gentry County
Fourth Judicial Circuit, Division 1
The Honorable Roger M. Prokes, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for felony driving while intoxicated, § 577.010, RSMo 2000, obtained in the Circuit Court of Gentry County, and for which appellant was sentenced as a persistent intoxication-related traffic offender to three years in the custody of the Department of Corrections. The Missouri Court of Appeals, Eastern District, reversed and remanded for sentencing for misdemeanor driving while intoxicated. *State of Missouri v. Vanessa Severe*, WD69162 (Mo. App., W.D. November 25, 2008). On March 31, 2009, this Court sustained respondent's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Vanessa Severe, was charged by amended information as a persistent DWI offender with one count of driving while intoxicated (L.F. 5). This cause went to a trial by jury in the Circuit Court of Gentry County on October 31, 2007, the Honorable Roger M. Prokes presiding (L.F. 3; Tr. 5).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: On the evening of January 12, 2007, Albany resident Jeff Pile and his wife were returning home from running an errand (Tr. 62-63). While on Highway 136 going through an area called the “Hall Bottom,” they saw a man standing on the side of the road with his car flashers on and holding a flashlight (Tr. 63). The man told them that there was a car upside down in the bottom of the ditch next to the road and that people were trapped inside (Tr. 63). Mr. Pile and his wife got out and went down to the bottom of the ditch, finding the overturned vehicle, one end of which was partially submerged in water (Tr. 63-65). They were able to get a door of the car open, after which a dog, a man named Steve Gabriel, and appellant got out (Tr. 65-66). Mr. Pile smelled beer coming from the car and noticed beer cans on the ceiling of the car (Tr. 66, 72). Mr. Pile and his wife had Gabriel and appellant get into their vehicle to wait for the Highway Patrol to arrive (Tr. 67).

As they were waiting, Mrs. Pile was watching appellant, who was pale and bleeding from the head (Tr. 67). She suggested that they go to the hospital, so Mr. Pile started to drive to the hospital (Tr. 67). While in the Piles’ vehicle, one of the Piles asked who was

driving the car, and Gabriel said, “Vanessa was,” to which appellant made no reply (Tr. 68). Gabriel was obviously “completely intoxicated” (Tr. 70). After driving a couple of miles, they passed a trooper traveling towards the accident site, so they turned around and followed him (Tr. 67).

At the intersection of Route F and Highway 136, Trooper Jason Cross pulled over into a “truck park” where a deputy was waiting, about ¼ to ½ mile away from the accident site (Tr. 82). The Piles, Gabriel, and appellant also met up with the trooper there (Tr. 82). An ambulance arrived, but appellant refused treatment from the paramedics (Tr. 69, 82, 86). Trooper Cross spoke with appellant, who said that she was the driver and that she had swerved to miss a deer (Tr. 85). He noticed a strong odor of intoxicants coming from Gabriel and appellant, so he had her step out of the vehicle (Tr. 86). Once out of the vehicle, appellant insisted that she needed medical treatment, even though she had already refused it from the paramedics on the scene (Tr. 86). Mr. Pile told the trooper they would take her to the hospital in Albany, and he said he would meet up with them in a few minutes (Tr. 86-87). After the Piles left with appellant, Trooper Cross went to check the accident site, and then headed to the hospital (Tr. 86-87).

Neither Gabriel nor appellant drank any alcoholic beverage during any of the time they were with the Piles (Tr. 71). On the way to the hospital, appellant told Mr. Pile that she wanted to go home (Tr. 70). He replied that they had told the trooper that they were going to the hospital, so that was where they were going (Tr. 70). When they arrived at the hospital,

Mrs. Pile went in to find out where to take appellant (Tr. 71). While the rest were waiting in the vehicle, Trooper Cross arrived (Tr. 71).

Trooper Cross had appellant get into his patrol car to get some information from her (Tr. 87). He noticed that a strong odor of intoxicants was coming from her, that her eyes were bloodshot, and that her speech was mumbling and extremely slurred (Tr. 87-88). She said that she had only had two drinks and that she had “just consumed those at home” (Tr. 88). He conducted some field sobriety tests in the car with her (Tr. 88-99). He had her recite the alphabet, which took her three tries (with pauses each time) to complete (Tr. 89-90). He had her count backwards from 64-48, a test designed to have her think about a couple of different things at the same time (Tr. 90-91). She counted “64, 63, 63, 62, 62, 61, 60” and stopped (Tr. 91). He conducted a horizontal gaze nystagmus test, which indicated that she was intoxicated (Tr. 99). He had her get out of the car and stand under the awning of the hospital door to take the one-leg stand test and the walk-and-turn test (Tr. 101-106). She failed both tests, and actually walked into the outside wall of the hospital during the walk-and-turn test (Tr. 103-106). Trooper Cross then placed her under arrest (Tr. 106).

During questioning prior to taking a breath test, appellant told Cross that she had had two beers at a friend’s house several hours earlier, stopping all drinking at 1:00 p.m. that afternoon (Tr. 107). This conflicted with her earlier story of just having consumed the beer at her home prior to speaking with the trooper (Tr. 106-107). She agreed to take the breath test, but then gave two invalid samples, purposely giving a sample too small for the machine to make a measurement (Tr. 113).

Outside the presence of the jury, and prior to the submission of the case to the jury, the State presented evidence that appellant had two prior alcohol-related traffic offenses, one of which included an Albany municipal “conviction” for driving while intoxicated for which it appeared that she received a suspended imposition of sentence (Tr. 76-77; St. Exh. 7).

Appellant presented no evidence in her defense (Tr. 135-139).

Appellant was found guilty of driving while intoxicated (L.F. 15; Tr. 158). The court sentenced appellant as a persistent DWI offender to three years imprisonment (L.F. 21-23; Tr. 177). This appeal follows.

ARGUMENT

Under this Court's decision in *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), appellant is entitled to a remand for a new sentencing hearing because the evidence presented showing that appellant was a persistent DWI offender, while sufficient at the time of trial, is no longer sufficient in that one of appellant's prior offenses used for enhancement was a municipal "conviction" for which she was given a suspended imposition of sentence, which now may not be used for enhancement. On remand, the State should be given the opportunity to present additional evidence of prior alcohol-related traffic offense convictions because there was no prosecutorial laxity or trial court error in the presentation of this evidence at the time of trial in that, under the controlling law at the time of trial, the State had presented evidence that was sufficient to support the enhanced sentence.

Appellant claims that the trial court plainly erred in finding appellant was a persistent DWI offender and in convicting her of a class D felony because one of the prior intoxication-related traffic offenses used to find that she was a persistent offender was a municipal finding of guilt followed by the suspended imposition of sentence, which may no longer be used for enhancement under the Missouri Supreme Court's decision in *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008) (App.Br. 11-14). Appellant also argues that the required remedy is a remand for resentencing as a prior DWI offender (App.Br. 14-28). Respondent agrees that *Turner* requires a remand for resentencing in this case, but, due to the fact that the State's proof and trial court's finding was sufficient to prove appellant's persistent offender status

under the controlling law at the time of trial, the State should be given the opportunity on remand to present additional evidence to prove that appellant is a persistent offender.

A. Standard of Review

Due to appellant's failure to object to being sentenced as a persistent offender, review is available only for plain error (Tr. 76-78). Being sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in a manifest injustice. *See State v. Kimes*, 234 S.W.3d 584, 590 (Mo.App., S.D. 2007).

B. Appellant is Entitled to Resentencing

The version of § 577.023, the DWI enhancement statute, in effect at the time of appellant's crime, defined a "persistent offender," in relevant part, as follows:

A person who has *pleaded guilty to or has been found guilty of* two or more intoxication-related traffic offenses, where such two or more offenses occurred within ten years of the occurrence of the intoxication-related traffic offense for which the person is charged;

§ 577.023.1(2)(a), RSMo Cum. Supp. 2007 (emphasis added). "Intoxication related traffic offense" was defined by that same statute as follows:

An "intoxication-related traffic offense" is *driving while intoxicated*, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) of subsection 1 of section 565.024, RSMo, assault in the second

degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (3) of subsection 1 of sections 565.082, RSMo, or driving under the influence of alcohol or drugs *in violation of state law or county or municipal ordinance*, where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney in writing[.]

§ 577.023.1(1), RSMo Cum. Supp. 2007 (emphasis added). The plain language of this statute clearly permitted the use of pleas of guilty to a municipal ordinance violation of driving under the influence of alcohol to be used for enhancement, even where the imposition of sentence was suspended. Also present in the enhancement statute, however, was language in subsection 16 stating the following:

A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, probation or parole or any combination thereof in a state court shall be treated *as a prior conviction*.

§ 577.023.16, RSMo Cum. Supp. 2007. Prior to 2008, and thus at the time of appellant's crime and trial, Missouri courts had found that these two sections could be considered

ambiguous, but resolved that ambiguity in favor of allowing municipal adjudications with suspended impositions of sentence to be used for enhancement, finding that the legislature's action in broadening the offenses included in the definition of "intoxication related traffic offenses" was "designed to deter prior DWI or BAC offenders, whether the prior offenses be in violation of municipal ordinance or state law, from repeating the offense and "to severely punish those who ignore the deterrent message." *State v. Meggs*, 950 S.W.2d 608, 612 (Mo.App., S.D. 1997). Thus, the "strong indication of legislative intent and policy overrides the rule that penal statutes are to be strictly construed." *Id.* at 613.

In *Turner*, however, this Court overruled the holding in *Meggs* (although not explicitly), finding that, due to the ambiguity in these two subsections,¹ the intent of the legislature could not be discerned, and found that the rule of lenity required the ambiguity to be resolved in favor of not permitting municipal adjudications with suspended impositions of sentence to be used for enhancement. *Turner*, 245 S.W.3d at 827-29. Thus, in the present case, although the trial court was correct under the law at the time of appellant's trial and sentencing, under *Turner*, that decision cannot stand, as appellant's direct appeal was pending at the time *Turner* was handed down. *State v. Whitfield*, 107 S.W.3d 263, 267 (Mo. banc 2003). Therefore, appellant is entitled to be resentenced without reference to the Albany municipal court adjudication to enhance her sentence.

¹In *Turner*, the discussion refers to subsection 16 as subsection 14. These refer to the same subsection; amendments between the time of *Turner's* crime and appellant's crime added subsections to the statute, making subsection 14 now subsection 16.

C. Additional Persistent Offender Evidence Should Be Permitted

Appellant, however, should not be automatically resentenced as a prior offender to a class A misdemeanor on remand. Because the “error” at issue was not due to any prosecutorial laxity or actual error by the court, as the prosecutor and court were following the law in effect at the time of trial, the State should be permitted on remand to attempt to prove that appellant has another prior conviction which would satisfy the new requirements under *Turner*. Appellant argues for an application of the rule in *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003), which held that the State will not be permitted to present evidence of prior convictions on remand where it failed to present any evidence of prior convictions before the submission of the case to the jury (App.Br. 22-28). *Id.* at 101-02. But this Court, consistent with language from *Emery* distinguishing *State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994), and the purpose of the DWI enhancement statutes, should hold that an exception to *Emery* exists 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.

In *Cobb*, this Court faced a factual scenario almost identical to this case. The defendant in *Cobb* was found to be a persistent DWI offender upon proof of two prior intoxication-related traffic offenses committed within a ten-year period and sentenced to four years imprisonment. *Cobb*, 875 S.W.2d at 534. While that case was pending on appeal, however, this Court decided *State v. Stewart*, 832 S.W.2d 911 (Mo. banc 1992), in which it held that the statutory definition of a persistent offender required proof of three convictions

instead of two, contrary to this Court’s approved charge form. *Cobb*, 875 S.W.2d at 534; *Stewart*, 832 S.W.2d at 913-14. Thus, the holding of *Stewart* applied to *Cobb*, and the State’s proof of only two prior convictions was insufficient to support the enhanced sentence. *Cobb*, 875 S.W.2d at 534. In reversing and remanding for a new sentencing hearing, this Court rejected the defendant’s argument that additional proof of prior offenses would constitute double jeopardy and instructed the trial court to “permit the state to present whatever evidence it has to establish defendant’s status as a persistent offender.” *Cobb*, 875 S.W.3d at 534-37.

In *Emery*, a case evaluating the general sentence enhancement statute, the prosecution failed to present any evidence whatsoever, during either trial or sentencing, of the defendant’s prior convictions. *Emery*, 95 S.W.3d at 100. This Court held that it would violate the timing portion of the enhancement statute, which required evidence of prior offenses to be presented prior to submission to the jury, to permit the State to present evidence of prior offenses at the sentencing hearing on remand. *Id.* at 101-02; § 558.021.2, RSMo 2000. As the language of the timing provision of the DWI enhancement statute is identical to that in the general enhancement statute, this Court analyzed cases applying that statute, including *Cobb*. *Id.* at 101-02; § 577.023.6, RSMo 2000; *see also State v. Cullen*, 39S.W.3d 899 (Mo.App., E.D. 2001). In deciding not to follow *Cobb*, this Court did not find that its remedy in *Cobb*—to permit additional evidence of prior evidence—violated the timing requirements of the statute in that case, but instead distinguished it as follows:

In support of its assertion that the proper remedy in the present case is remand for resentencing, the state relies in part on *[Cobb]*. *Unlike Cullen, there was no prosecutorial laxity in Cobb, which is distinguishable from the present case.* At trial in *Cobb*, the state, in accordance with previous interpretation of the applicable statute, proved two prior intoxication-related offenses to establish persistent DWI offender status. While the case was pending before the appellate court, this Court in *[Stewart]* determined that Missouri's persistent DWI offender statute, section 577.023, required proof of three prior convictions. This Court held that *Stewart* applied to all cases then pending appellate review. *Cobb* contended that remanding for sentencing violated his double jeopardy right. No issue was raised as to the timing required by statute. This Court rejected the double jeopardy argument and remanded for resentencing to provide the state an opportunity to comply with *Stewart*. *As the court of appeals noted in Cullen, the state in Cobb had timely proved at trial that the defendant was a persistent DWI offender.* 39 S.W.3d at 902. See *Cobb*, 875 S.W.2d at 534, 537. *In the present case, unlike Cobb, the prosecution has not even attempted to do what the statute requires.*

Emery, 95 S.W.3d 101-02 (emphasis added). Thus, in finding that *Emery* prohibited further evidence of prior offenses on remand, this Court did not rule that *Cobb* was incorrect in permitting such evidence on remand, but instead distinguished the result based on the fault of the prosecutor. Therefore, by not overruling *Cobb* in *Emery*, this Court implicitly endorsed a remedy based on the efforts of the State to comply with the statute: where the State had not complied with the timing portion of the statute at trial, presenting such evidence on remand would essentially be permitting the State to present the evidence out of order, violating the statute; where the State had complied with the timing statute but, due to a subsequent reinterpretation of the law, the evidence presented was no longer sufficient to support the enhancement, further evidence would be allowed on remand.²

Appellant attempts to minimize this Court's distinguishing of *Cobb* in *Emery* by arguing that *Cobb* was distinguished solely because the defendant in *Cobb* only raised an objection based on double jeopardy, not on the timing statute (App.Br. 21). Appellant's argument is both incomplete and misleading. It is incomplete because, even though *Emery* did discuss the fact that the objection was based on double jeopardy and not the timing statute, this was not the only distinguishing factor pointed out – the above language from

² It was this apparent endorsement which the Eastern District of the Court of Appeals relied on in *State v. Bizzell*, 265 S.W.3d 892 (Mo.App., E.D. 2008), a case essentially identical to this one, in remanding that case with instructions to permit the State the opportunity to present other evidence of prior convictions. *Id.* at 894.

Emery discussing *Cobb*, which both started and ended with references to the absence of prosecutorial laxity, certainly used that absence as a reason to distinguish *Cobb*. Second, it is misleading because it suggests that this Court would have overlooked plain error in the application of the enhancement statute if it believed such error existed simply because the defendant did not raise the argument. Notably, *Stewart* shows that this Court would not have overlooked such error.

In *Stewart*, the issue of how many prior offenses were necessary for enhancement was not even the issue raised by either party on appeal; the issue raised was whether the date of the commission of the offense or the date of conviction should control in determining whether the priors could be used for enhancement. *Stewart*, 832 S.W.3d at 912-13. In taking up the issue of the number of priors necessary for enhancement, this Court stated:

The commission v. conviction dispute is overshadowed by a far more serious question as to the state's burden to prove prior and persistent intoxication-related offender status. It would be an abdication of this Court's duty to overlook a fundamental problem with determining who may be sentenced as a persistent offender and found guilty of a Class D felony under § 577.023.

Stewart, 832 S.W.3d at 913. This Court was aware of *Stewart* when deciding both *Cobb* and *Emery*, as *Stewart* is cited in both of those cases. Thus, under *Stewart*, this Court in *Cobb* would have considered the timing issue if that issue controlled in that situation, i.e., if the timing requirements of the statute mandated that no further evidence of prior offenses could

be presented on remand. Otherwise, in *Emery*, this Court would have noted that the Court in *Cobb* had engaged in “an abdication of this Court’s duty to overlook a fundamental problem with who may be sentenced as a persistent offender” by failing to consider the timing requirements, and thus would have overruled *Cobb*. *Stewart*, 832 S.W.3d at 913. The fact that this Court did neither of these things suggests that *Emery* and *Cobb* can be reconciled based on the primary distinguishing factor mentioned in *Emery*: the lack of prosecutorial laxity in proving the prior offenses.

Based on that difference between *Emery* and *Cobb*, this Court should declare that *Cobb* maintains an exception to *Emery*’s rule prohibiting further evidence of prior offenses on remand where the prosecutor presented evidence that was sufficient to prove the prior offenses at the time of trial but that are subsequently declared to be insufficient by reinterpretation of law. Such an interpretation of *Cobb* and *Emery* does no violence to the statutory scheme. The timing provision of the DWI enhancement statute in effect at the time of appellant’s trial required that the evidence of prior offenses be pleaded, established, and found prior to submission to the jury. § 577.023.8, RSMo Cum. Supp. 2007. That was done in this case: the State presented evidence that, under the law as it existed at the time of trial, was sufficient to establish that appellant was a persistent offender (Tr. 76-77; St. Exh. 7). The statute is silent as to what should happen in a situation such as occurred here—where the law defining the prior offenses was reinterpreted, causing the evidence that had been presented at trial to no longer be sufficient. As the statute is silent as to the remedy in such a situation, and thus unclear, this Court should interpret the statute in a manner giving effect to

the legislative intent behind the statute. *State v. Johnson*, 968 S.W.2d 123, 132 (Mo. banc 1998). “Clearly, the purpose of this Prior/Persistent Offender statute is to deter persons who have previously been convicted of driving while intoxicated from repeating their unlawful acts and to severely punish those who ignore the deterrent message.” *A.B. v. Frank*, 657 S.W.2d 625, 628 (Mo. banc 1983). Further, the “rule of lenity” does not require this Court to hold the absence of a remedial provision against the State, as that rule is a “default rule” that is only relied on after employing other measures to determine legislative intent. *Turner*, 245 S.W.3d at 828. Here, the silence of the legislature on remedy coupled with the strong legislative intent to punish recidivists resolves any ambiguity in favor of the legislative intent. Thus, default to the rule of lenity is not called for. By permitting the presentation of additional evidence of prior offenses on remand where the State complied with the enhancement statute as it was interpreted at the time of trial, this Court would preserve the statutory intent of the entire enhancement scheme and not violate any specific provision of the statute.

Further, the recognition of this exception does no violence to an additional rationale behind *Emery* and this Court’s subsequent holding in *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009): to discourage prosecutorial laxity and prevent “judicial emasculation of legislative direction.” *Teer*, 275 S.W.3d at 263 (Fischer, J., concurring). Both *Emery* and *Teer* premised part of their rationales regarding the proof of prior offenses at any time after the submission of the case to the jury on preventing prosecutors from failing to fulfill their obligations under the enhancement statutes and on discouraging courts from tacitly

approving of this laxity by allowing any failures to be corrected after the fact in contravention of the statute's timing requirements. *Emery*, 95 S.W.3d at 101-02; *Teer*, 275 S.W.3d at 262 (“However, as a number of courts have recognized, ‘[i]f the courts continue to indulge the laxity which has characterized so many cases of extended term sentencing, a judicial emasculation of the legislative direction will be the accepted procedural norm.’ [citations omitted]”). Here, there was no prosecutorial laxity. The prosecutor presented evidence prior to submission to the jury that appellant had two prior intoxication-related traffic offenses, and the court found that the evidence presented was sufficient to find that appellant was a persistent offender (Tr. 76-78). At the time of trial, that was true. Therefore, punishing the State by not allowing it to present additional evidence of prior convictions in this case does not deter prosecutorial laxity or judicial indifference, as neither of those things were present in this case.

Permitting additional evidence of prior convictions on remand also preserves respect for the holdings of the appellate courts of our State. The prosecutor and the trial court complied with the statute as that statute had been interpreted in *Meggs*. This Court did not accept *Meggs* for transfer, and the holding of that case permitting municipal SIS findings to be used for enhancement remained unquestioned by the courts for over ten years until *Turner*. *Meggs*, 950 S.W.2d at 608. Appellant made no challenge to that interpretation of § 577.023 at the trial court (Tr. 76-78). Thus, there was nothing to inform the prosecutor or the trial court that its reliance on that precedent of the appellate courts was wrong. The doctrine of *stare decisis* promotes stability in the law by encouraging courts to adhere to

precedents. *Medicine Shoppe Intern., Inc. v. Director of Revenue*, 156 S.W.3d 333, 334-35 (Mo. banc 2005). It is true that the doctrine is not absolute and that the passage of time and experience in enforcing a statute may reveal a compelling case for changing course. *Id.* at 335. In *Turner*, this Court, which was not bound by *Meggs* in the first place, saw such a need and resolved the question of ambiguity differently than the Southern District in *Meggs*. That substantive law announced in *Turner* must apply to appellant's case despite the prosecutor and trial court following the existing law and despite her failure to raise this issue prior to appeal. But, by allowing the State the opportunity to present any existing evidence of prior convictions on remand, this Court strikes an appropriate balance between ensuring proper application of the substantive law in "pending" cases and in not punishing the parties for following what appeared to be valid precedent interpreting the law. To hold otherwise is to proclaim to trial courts that the precedents cannot be relied on and to punish them for having so relied.

Respondent is aware of older precedent of this Court stating 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" in applying new interpretations of law retroactively. *Shepherd v. Consumer's Co-op, Ass'n*, 384 S.W.2d 635, 640 (Mo. banc 1964), quoting *Koebel v. Tieman Coal & Material Co.*, 85 S.W.2d 519, 524 (Mo. 1935). Respondent believes that these cases are merely setting out the rule that substantive holdings will apply retroactively to pending cases, which, as already noted, is still applicable law. Respondent does not believe that this language should be read

as to refuse to acknowledge that a subsequent case providing a new interpretation of law actually constituted a change in the law that existed prior to the new case. More contemporary cases by this Court recognize that opinions reinterpreting the law actually announce “new standards” of law. *See Whitfield*, 253 S.W.3d at 264-71. Thus, the application of *Turner* to appellant’s case does not require this Court to ignore that the prosecutor’s and trial court’s actions were proper under the interpretation of the law at the time of trial and that the lack of any fault by either the prosecutor or trial court should permit a remedy which does not punish them for following the applicable law.

Finally, appellant concedes that it “may appear” to be “a simple issue of fairness to allow the State to remedy the insufficiency of its pleading and proof when its failure to do so before submission to the jury was no fault of its own.” Respondent believes that this language should be even stronger: 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 showing that the defendant was a persistent offender and the trial court relied on that law in making its findings. Appellant argues that allowing this remedy will “be a reversion to the time when the procedures mandated in § 577.023 could be ignored because prosecutors knew that trial courts and appellate courts would allow them to ‘fix’ any deficiencies after appeal” (App.Br. 28). This simply is not true. Respondent’s position does not advocate the weakening or elimination of this Court’s rulings in *Emery* and *Teer*, as this is not a situation where the prosecutor and trial court “ignored” the mandates of § 577.023 on the belief that an error could be fixed

later; the prosecutor and trial court complied with the timing mandates of the statute. Thus, respondent only seeks the recognition that *Cobb* permits a limited exception to those holdings for those situations where the State and trial court complied with the timing provisions of the statutes and presented evidence which, through no fault of either, is later found to have been insufficient due to a change in the law. Therefore, this Court should remand this case to the trial court for resentencing with instructions to allow the State to present any evidence it has to show that appellant is a persistent offender.

CONCLUSION

In view of the foregoing, this case should be remanded for resentencing with instructions to permit the State the opportunity to present evidence that appellant is a persistent DWI offender.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 18th day of May, 2008, to:

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APPENDIX

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