

Summary of SC90839, *State of Missouri v. Faron Ross Collins*

Appeal from the Douglas County circuit court, Judge Robert C. Carter
Argued and submitted Sept. 8, 2010; opinion issued Jan. 11, 2011

Attorneys: Collins was represented by Craig A. Johnston of the public defender's office in Columbia, (573) 882-9855, and the state was represented by James B. Farnsworth of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of felony driving while intoxicated appeals, challenging the finding that he is a chronic offender. In a unanimous per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri vacates the man's felony sentence and remands (sends back) the case for him to be re-sentenced for misdemeanor driving while intoxicated. The state failed to prove the man was a chronic offender warranting the conviction for a felony rather than a misdemeanor. The applicable statute, which later was amended, and this Court's precedent require the state to prove – prior to sentencing – that a chronic offender was represented by or waived the right to an attorney during the proceedings resulting in previous convictions for intoxication-related offenses, but no such evidence was presented here.

Facts: In September 2006, Faron Ross Collins was arrested for driving while intoxicated and subsequently was charged with one count of driving while intoxicated as a chronic offender and one count of driving while suspended. He pleaded guilty to driving while suspended. During a trial to a judge rather than a jury on the remaining charge, the state offered – without objection from Collins – a certified copy of Collins' driving record as evidence that he had eight prior convictions for DWI or driving with excessive blood-alcohol content. The exhibit did not specify whether Collins was represented by counsel or waived his right to counsel during any of these previous proceedings in which he was convicted. The trial court found that Collins was guilty of driving while intoxicated and that he was a chronic offender. Under section 577.010.2, RSMo Supp. 2006, driving while intoxicated is a class B misdemeanor. Under section 577.023.5, RSMo Supp. 2006, however, a person found guilty of violating section 577.010 who is alleged and proven to be a chronic offender is guilty of a class B felony. In accord with this statute, the court sentenced Collins in December 2008 to five years in prison, the minimum sentence for a class B felony. For the driving while suspended conviction, the court sentenced Collins to one year in the county jail, to run concurrently with his five-year prison sentence. Collins appeals.

AFFIRMED.

Court en banc holds: Because the state failed to present, prior to sentencing, the necessary evidence to prove Collins is a chronic DWI offender, the trial court erroneously found Collins guilty of the class B felony of DWI and sentenced him to a term of imprisonment authorized for that offense. Under section 577.023, the evidence must establish sufficient facts to warrant a finding beyond a reasonable doubt that the defendant is a chronic offender. To be a chronic offender, the statute further requires that the prior convictions or guilty pleas be made when the

defendant was represented by or waived, in writing, the right to an attorney. Here, the state failed to prove facts essential to proving Collins was a chronic offender because, it concedes, there was no evidence at trial that Collins was represented by or waived the right to an attorney for his prior intoxication-related offenses. Accordingly, Collins' sentence is vacated, and the case is remanded for re-sentencing.

The statute and this Court's prior holdings require that such proof be offered before sentencing. As such, the state is precluded from offering any additional evidence at re-sentencing. On remand, the trial court shall re-sentence Collins for the class B misdemeanor of DWI, which under section 558.011.1, RSMo Supp. 2006, may not exceed six months in prison. Because Collins already has served more than six months in prison, he is ordered released from his sentence on this DWI offense and, if otherwise eligible for release, is ordered released on his own recognizance pending re-sentencing.