

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
JEFFREY L. STARNES**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD69573
DATE: June 15, 2010

Appeal From:

Clay County Circuit Court
The Honorable Michael J. Maloney, Judge

Appellate Judges:

Division Three: James M. Smart, Jr., Presiding Judge, Joseph M. Ellis and Gary D. Witt, Judges

Attorneys:

Shaun L. Mackelprang and Jayne T. Woods, Jefferson City, MO, for respondent.

Craig A. Johnston, Columbia, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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STATE OF MISSOURI,

RESPONDENT,

v.

JEFFREY L. STARNES,

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No. WD69573

Clay County

Before Division Three Judges: James M. Smart, Jr., Presiding Judge, Joseph M. Ellis and Gary D. Witt, Judges

Jeffrey Starnes was charged in the Circuit Court of Clay County with DWI for events occurring on July 27, 2007, in violation of § 577.010. The substitute information alleged that Starnes was a “chronic offender” under § 577.023 because he had been convicted of four or more prior “intoxication-related traffic offenses.”

Beginning on January 14, 2008, the case was tried before a jury. It is not disputed that the State introduced conclusive evidence of *three* of Starnes's prior intoxication-related traffic offenses during its case in chief, but outside of the hearing of the jury.

The fourth intoxication-related traffic offense was a conviction from Kansas City Municipal Court in 1997. At a hearing outside the presence of the jury, the trial court noted that, among other things, the relevant exhibit failed to prove that Starnes was represented by counsel or waived the right to counsel in writing when found guilty of the 1997 municipal offense. Because this evidentiary hearing took place during the State's case in chief, the trial court ruled that the State would be allowed further time during the course of the trial to rectify these evidentiary problems.

After the jury returned a guilty verdict, the trial court immediately held a hearing pertaining to the State's evidence on this fourth prior conviction. The trial court further ruled that “the proof and argument's still open to the fourth intoxication-related offense, and the one you have pleaded *that in my view you haven't proven* is the one that starts out, on or about December 15th, 1997.” At the end of the hearing on January 15, 2008, the trial court did not make a ruling as to whether Starnes was a chronic offender; instead, the trial court continued the matter to allow the State to gather additional evidence on the issue of Starnes's conviction in municipal court on December 15, 1997.

After various evidentiary hearings on this matter, the trial court concluded on February 1, 2008, that it was “firmly convinced that the defendant was represented by counsel when he entered his plea to reduced charge on December 15th, 1997,” and that therefore Starnes would be

"sentenced on a Class B Felony" as a chronic offender. On April 3, 2008, the trial court sentenced Starnes to ten years in the Missouri Department of Corrections.

Starnes now appeals.

SENTENCE VACATED; REMANDED FOR RESENTENCING.

Division Three holds:

In his sole Point Relied On, Starnes argues that the trial court erred "in finding Appellant to be a chronic DWI offender under Section 577.023" because the State failed to prove beyond a reasonable doubt that Starnes was a chronic offender prior to the case being submitted to the jury as required by Section 577.023.

Section 577.023.8 specifies that, "[i]n a jury trial, the facts [establishing chronic offender status] *shall be pleaded, established and found prior* to submission to the jury outside of its hearing." (Emphasis added.) Section 577.023.16 similarly provides that "[e]vidence of prior convictions *shall be heard and determined by the trial court out of the hearing of the jury prior to the submission* of the case to the jury" and "[a]fter hearing the evidence, the court shall enter its findings thereon." (Emphasis added.)

The Supreme Court of Missouri has repeatedly made it clear that the statutory timing requirements for the State to present evidence to the trial court of prior, aggravating offenses are mandatory and not discretionary.

Because the trial court failed to hear evidence and make a finding that Starnes had four or more intoxicated related offenses prior to the case being submitted to the jury in violation of Section 577.023, the trial court erred in sentencing him as a "chronic offender" instead of as an "aggravated offender." This constituted plain error resulting in manifest injustice because Starnes was sentenced to a punishment greater than the maximum allowable sentence as a matter of law. We vacate the sentence and remand for resentencing.

Opinion by: Gary D. Witt, Judge

June 15, 2010

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