



Missouri Court of Appeals

Southern District

Division Two

STATE OF MISSOURI,)
)
Plaintiff-Respondent,)
)
vs.) No. SD29516
)
FARON ROSS COLLINS,) Filed March 29, 2010
)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF DOUGLAS COUNTY

Honorable Robert C. Carter, Associate Circuit Judge

SENTENCE VACATED; REMANDED WITH INSTRUCTIONS¹

Following a court trial on September 25, 2008, Faron Ross Collins ("Defendant") was found guilty of driving while intoxicated on September 3, 2006, pursuant to section 577.010,² and sentenced on December 2, 2008, to five years in prison as an intoxication-related chronic offender in accordance with section 577.023.³ He appeals, contending that the trial court erred in relying upon any of his eight prior driving-while-intoxicated or driving-with-excessive-blood-

¹ This court initially issued its opinion in this case on December 22, 2009. The cause was thereafter transferred to the Supreme Court, which on March 2, 2010, retransferred it to this court "for reconsideration in light of *State v. Severe*, SC89948, decided January 12, 2010." Following retransfer, the parties, as invited by this court, filed suggestions related to such reconsideration.

² References to section 577.010 are to RSMo 2000.

³ References to section 577.023 are to RSMo Cum.Supp. 2006. Section 577.023.1(2)(a) provides that a chronic offender is "[a] person who has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses."

alcohol-content convictions to enhance the penalty on his current offense from a class B misdemeanor to a class B felony. This is so, Defendant argues, because, among other reasons, there was no evidence before the trial court that he was represented by or waived the right to an attorney in writing on any of his prior convictions, as required for such convictions to each qualify as an "intoxication-related traffic offense," as defined in section 577.023.1(3), and as required by section 577.023.1(2)(a), to enhance his punishment.⁴ The State concedes such error but claims that Defendant failed to preserve his claim for appellate review. While we agree that it was not properly preserved for appellate review, we find that such error constituted plain error under Rule 30.20.⁵ Accordingly, we vacate and set aside Defendant's sentence and remand for re-sentencing.⁶

Factual Background

Defendant does not challenge the sufficiency of the evidence to prove the charge of driving while intoxicated. Rather, Defendant challenges the sufficiency of the evidence presented by the State and considered by the trial court in sentencing Defendant as a chronic offender. In that context, we need only consider the evidence presented on that issue, which consisted solely of a certified copy of the Department of Revenue's Missouri Driver Record for Defendant. This record included court convictions on driving-related offenses, eight of which were prior convictions for driving while intoxicated or for driving with excessive blood alcohol

⁴ Section 577.023.1(3) provides:

An "**intoxication-related traffic offense**" is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo.; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing[.]

⁵ References to rules are to Missouri Court Rules (2009), unless otherwise indicated.

⁶ We do not address any of Defendant's other arguments, as they may not arise or may be resolved upon remand and re-sentencing.

content. This document was offered into evidence during the State's case and was admitted after defense counsel announced, "No objection."

Defendant points out on appeal, and the State agrees, that Defendant's driving record contains no information as to whether Defendant was represented by or waived counsel in writing on any of his prior convictions, as required by section 577.023.1(3).

Preservation of Error

Nevertheless, the State contends that Defendant never brought this deficiency to the attention of the trial court at any time prior to sentencing and thus failed to preserve this error for appellate review. A review of the record confirms that Defendant did not raise this issue to the trial court in any manner before sentencing.

Errors in sentencing should be brought to the sentencing court's attention during the sentencing hearing to preserve them for review. *State v. Cowan*, 247 S.W.3d 617, 619 (Mo.App. 2008) (citing *State v. Olney*, 954 S.W.2d 698, 700 (Mo.App. 1997)). Because Defendant did not object to his sentence at any time prior to this appeal, his claim of error was not properly preserved for review on appeal. See *State v. Rowan*, 165 S.W.3d 552, 554 (Mo.App. 2005); *State v. Polson*, 145 S.W.3d 881, 897 (Mo.App. 2004). Here, review, if any, is available only for plain error, pursuant to Rule 30.20.

Plain Error Review

Rule 30.20 provides that this court may exercise its discretion to review plain errors affecting substantial rights, "whether briefed or not," upon a finding that manifest injustice or miscarriage of justice has resulted therefrom. "Plain errors are evident, obvious, and clear, and we determine whether such errors exist based on the facts and circumstances of each case." *State v. Johnson*, 150 S.W.3d 132, 136 (Mo.App. 2004). "Being sentenced to a punishment

greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice." *State v. Severe*, No. SC89948, 2010 WL 97997, at *2 (Mo. banc January 12, 2010).

"Prior convictions are the basis for enhanced punishment or procedural differences, and the State is required not only to prove the fact of prior convictions, but to do so in conformity with applicable statutory requirements." *State v. Cullen*, 39 S.W.3d 899, 906 (Mo.App. 2001).

"Representation by counsel or waiver thereof cannot be presumed from a silent record."

Mayfield v. State, 136 S.W.3d 130, 132 (Mo.App. 2004). Furthermore, "[w]hen the State relies on a previous conviction of an accused to impose a more severe punishment, that conviction must be proved beyond a reasonable doubt." *State v. Johnson*, 160 S.W.3d 839, 841 (Mo.App. 2005). A trial court cannot sentence a defendant as a repeat offender without sufficient evidence of his prior convictions. *Johnson*, 150 S.W.3d at 136-37; *Dudley v. State*, 903 S.W.2d 263, 267 (Mo.App. 1995).

Here, the State concedes the complete failure of proof that Defendant was represented by counsel or waived such representation in writing for each prior conviction used to enhance Defendant's punishment. The State also concedes that it was error for the trial court to sentence Defendant as a chronic offender.

Section 577.010.2 provides that "[d]riving while intoxicated is *for the first offense* a class B misdemeanor." (Emphasis added). Pursuant to section 558.011.1,⁷ the authorized term of imprisonment for a class B misdemeanor is "a term not to exceed six months." In addition, section 560.016.1(2), RSMo 2000, provides that upon a conviction of a class B misdemeanor, a person "may be sentenced to pay a fine which does not exceed . . . five hundred dollars."

Any person found guilty of a violation of section 577.010, however, "who is alleged and proved to be a chronic offender shall be guilty of a class B felony." Section 577.023.5. The

⁷ References to section 558.011 are to RSMo Cum.Supp. 2003.

authorized term of imprisonment for a class B felony is "a term not less than five years and not to exceed fifteen years[.]" Section 558.011.1(2). Thus, a finding that Defendant was a chronic offender served to enhance a term of imprisonment on a DWI conviction to "a term not less than five years and not to exceed fifteen years."

The trial court sentenced Defendant to five years' imprisonment on the DWI conviction, which exceeded the maximum term allowed for a class B misdemeanor. It did so in the absence of any evidence that Defendant had any intoxication-related traffic convictions, as defined in section 577.023.1(3), and as required by section 577.023.1(2)(a). In this respect, the trial court plainly erred.

Correction of Plain Error

Citing *State v. Craig*, 287 S.W.3d 676 (Mo. banc 2009), Defendant argues that this court must order vacation of the judgment and remand for conviction and sentencing of Defendant for the class B misdemeanor of driving while intoxicated, pursuant to section 577.010. Defendant now contends that further support for this procedure is found in *Severe*, 2010 WL 97997; *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008); *State v. Rose*, 169 S.W.3d 132 (Mo.App. 2005); and *State v. Gibson*, 122 S.W.3d 121 (Mo.App. 2003).

The State, however, contends that this court should vacate Defendant's sentence and remand with directions that the State be permitted to present additional evidence prior to re-sentencing to support its allegation that Defendant is a chronic offender. In addition to the clear directive found in section 577.023.9, that proof of prior offenses may be taken by the trial court at any time prior to sentencing, the State cites to *State v. Girdley*, 957 S.W.2d 520 (Mo.App. 1997) and *State v. Russ*, 945 S.W.2d 633 (Mo.App. 1997), where the courts of appeal ordered

remand for re-sentencing with instructions to permit the state to present additional evidence of the defendant's status as a persistent offender.⁸

When a court vacates a sentence, the sentence is to be treated as though it never existed. *See Calvin v. Mo. Dept. of Corrections*, 277 S.W.3d 282, 288 (Mo.App. 2009) (when the plaintiff's conviction was vacated, "it was a declaration that the sentence was to be regarded as though it had never existed."); *Hubbs v. Hubbs*, 870 S.W.2d 901, 905-06 (Mo.App. 1994) ("When an order is set aside or vacated the result is the destruction of the order in its entirety, its effectiveness is ended, the previously existing status is restored, and the effect is the same as though such order had never existed.") (citation omitted).

Here, Defendant waived his right to a jury trial and was tried by the court. Section 577.023.9 provides: "In a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time, *but prior to sentencing*." (Emphasis added). "[T]he 'clear words of the statute govern interpretation.'" *Severe*, 2010 WL 97997, at *3 (quoting *State v. Stewart*, 832 S.W.2d 911, 913 (Mo. banc 1992)). When we vacate Defendant's sentence and remand the case to the trial court, its posture at that time before the trial court is "prior to sentencing." Therefore, pursuant to the clear words in section 577.023.9, we find it appropriate to instruct the trial court to allow the State to present additional evidence on the issue of Defendant's repeat offender status. *See also State v. Cobb*, 875 S.W.2d 533, 537 (Mo. banc 1994); *State v. Monroe*, 18 S.W.3d 455, 459 (Mo.App. 2000); *State v. Anders*, 975 S.W.2d 462, 467 (Mo.App. 1998).

⁸ The State also cited *State v. Bizzell*, 265 S.W.3d 892 (Mo.App. 2008) in its respondent's brief. In *Bizzell*, the defendant was convicted following a jury trial of DWI and was sentenced by the trial court as a persistent offender. *Id.* at 893. The Supreme Court in *Severe* overruled *Bizzell* to the extent that it allowed the State to present new evidence on remand. *Severe*, 2010 WL 97997, at *9 n.9.

Craig, relied upon by Defendant, is distinguishable in two respects. First, the issue of whether the State was allowed to present additional evidence upon remand was not addressed by the Court. *Craig*, 287 S.W.3d at 682. Second, even if it stands for the proposition that the State cannot present such additional evidence, as argued by Defendant, the defendant in *Craig* properly preserved the evidentiary issue for appellate review by bringing the alleged deficiency to the trial court's attention, thereby giving the State an opportunity, if it had so chosen, to present any additional evidence it had bearing upon the defendant's alleged intoxication-related traffic convictions. *Id.* at 680. Here, unlike in *Craig*, Defendant's failure to timely raise this issue in the trial court not only precluded the State and the trial court from considering this alleged deficiency, but also denied the State the opportunity to present any additional evidence to cure such deficiency. While plain error is employed to shield a defendant from a manifest injustice, we should not employ it in such a manner as to allow a defendant to perpetrate a miscarriage of justice by using it to sandbag the trial court and, thereby, preclude the trial court and the State from a fair opportunity to correct the alleged error. Allowing the State to present additional evidence upon remand not only complies with the clear words of the statute, but also strikes an appropriate balance between these competing interests in crafting a remedy for the plain error.⁹

Turner, likewise, does not support Defendant's position. Just as in *Craig*, the issue of whether the State was allowed to present additional evidence upon re-sentencing was not addressed by the Court. *Turner*, 245 S.W.3d at 829. The Supreme Court in *Turner* merely reversed and remanded the trial court's judgment denying Turner's motion for post-conviction relief with no specific directions or instructions other than stating that "the use of prior municipal

⁹ The balancing of competing interests differs, however, when determining a plain error remedy in a jury-tried case because the defendant may have been denied his statutory right to have his sentence determined by the jury. *See* 557.036.2; 577.023.15; *State v. Teer*, 275 S.W.3d 258, 263 (Mo. banc 2009) (Fischer, J., concurring opinion).

offenses resulting in an SIS cannot be used to enhance punishment under section 577.023." *Turner*, 245 S.W.3d at 829.

Finally, *Severe*, *Rose*, and *Gibson* do not support Defendant's position because in those cases, the defendant was tried by a jury. *Severe*, 2010 WL 97997; *Rose*, 169 S.W.3d 134; *Gibson*, 121 S.W.3d 123. Section 577.023.8 provides that "[i]n a jury trial, the facts shall be pleaded, established and found *prior to submission to the jury* outside of its hearing." (Emphasis added). As noted in *Severe*, 2010 WL 97997, at *4, *Rose*, 169 S.W.3d at 136-37, and *Gibson*, 121 S.W.3d at 131, all relying upon *State v. Emery*, 95 S.W.3d 98, 103 (Mo. banc 2003), such a statutory timing requirement precludes the reopening and taking of additional evidence on the section 577.023 sentencing issue upon remand.¹⁰ The Supreme Court in *Severe* referred to this statutory timing issue as being "dispositive" in that case. *Severe*, 2010 WL 97997, at *4. Because the instant case is not governed by section 577.023.8, but rather, section 577.023.9, which allows by its clear words and plain meaning the presentation of section 577.023 evidence at any time prior to sentencing, *Severe*, *Rose*, and *Gibson* are distinguishable.

Decision

Defendant's sentence is vacated, and the case is remanded to the trial court with instructions to allow the State to present evidence or take any other actions related to Defendant's

¹⁰ *Emery* and *Teer*, cited in footnote 9,

dealt with section 558.021.2, whereas this case deals with 577.023. Section 577.023 provides for extended prison sentences for those who are prior or persistent offenders of intoxication-related offenses. Section 558.021 provides for sentence enhancement for those who are prior or persistent offenders of other offenses. Both statutes contain identical language that requires presentation of such evidence prior to the case's submission to the jury.

Severe, 2010 WL 97997, at *9 n.4 (Breckenridge, J., dissenting opinion). Both statutes also contain identical language deferring proof of prior convictions in a court-tried case "to a later time, but prior to sentencing." Compare 558.021.3; 577.023.9.

prior intoxication-related traffic convictions under section 577.023, as otherwise allowed or provided by law to be taken prior to sentencing, and then to re-sentence Defendant accordingly.

Gary W. Lynch, Presiding Judge

Scott, C.J., and Rahmeyer, J., concur.

Division II

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