IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC90839**
	)	
FARON R. COLLINS,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF DOUGLAS COUNTY, MISSOURI
FORTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE ROBERT C. CARTER, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

Craig A. Johnston, MOBar #32191
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 882-9855
Fax: (573) 884-4793
Email: Craig.Johnston@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

***CASES*:**

***STATUTES*:**

JURISDICTIONAL STATEMENT

Appellant incorporates by reference the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Appellant incorporates by reference the Statement of Facts from his opening brief.

ARGUMENT

The State of Missouri has conceded error in this case by admitting that the trial court erred in finding beyond a reasonable doubt that Appellant is a chronic offender as defined by § 577.023.1(2) because the State's evidence was silent about whether Appellant had been represented by counsel or had waived his right to counsel in his alleged previous intoxication-related traffic offenses. Contrary to the State's argument, however, the remedy for such error is that Appellant's judgment must be vacated and the case remanded for re-sentencing as a class B misdemeanor, which is consistent with the number of priors proven in the first instance, because allowing the presentation of additional evidence would violate the timing requirement in § 577.023.9 that the proof of such facts be done "prior to sentencing," which has already occurred.

The State of Missouri has conceded error in this case by admitting: "The trial court erred in finding beyond a reasonable doubt that Collins was a chronic offender as defined by ***§ 577.023.1(2)*** because the evidence presented by the State was silent about whether Collins had been represented by counsel or had waived

his right to counsel in his previous cases." (Resp. Br. at 10).[1] Thus, the issue has been narrowed in this case to the appropriate remedy for such an error.

The State contends that the appropriate remedy "is to remand for resentencing with instructions that the State may present additional evidence at the sentencing hearing to prove Collins's status as a chronic offender." (Resp. Br. at 10). In contrast, Appellant contends that the remedy is that Appellant's judgment must be vacated and the case remanded for resentencing consistent with the number of priors the State proved in the first instance – in other words, for the trial court to sentence Appellant for DWI as a class B misdemeanor under ***§ 577.010.2***.

It is also conceded by the State of Missouri that this Court has "established the following exception to the general rule [allowing the State to offer additional evidence of the defendant's repeat-offender status on remand]: the state will not be permitted to adduce additional evidence to prove a defendant's repeat-offender status for sentencing enhancement purposes if allowing the presentation of additional evidence would violate the timing requirement expressed in the enhancement statute." (Resp. Br. at 23-24), *citing* ***State v. Emery***, 95 S.W.3d 98 (Mo. banc 2003), ***State v. Teer***, 275 S.W.3d 258 (Mo. banc 2009), and ***State v. Severe***, 307 S.W.3d 640 (Mo. banc 2010).

[1] All references to § 577.023 are to RSMo (Supp. 2006), and all other statutory references are to RSMo 2000.

Thus the issue is further narrowed to: Would allowing the presentation of additional evidence violate the timing requirement set forth in ***§ 577.023***? That statute requires that the evidence must establish beyond a reasonable doubt that the defendant is a prior, persistent, aggravated, or chronic offender, ***§ 577.023.7(2)***, and, in a court-trial, although the trial court can "defer the proof in findings of such facts" to after the trial, it still must be done "prior to sentencing." ***§ 577.023.9***.

Respondent cites ***Calvin v. Missouri Dept. of Corrections***, 277 S.W.3d 282, 288 (Mo. App. W.D. 2009), ***Hubbs v. Hubbs***, 870 S.W.2d 901, 905-06 (Mo. App. S.D. 1994), and ***Ex parte Lange***, 85 U.S. 163, 189-90 (1873) (Clifford, J., dissenting) in support of its position that when a court vacates a sentence, "the sentence is to be treated as though it never existed." (Resp. Br. at 25). Respondent then argues that "if this Court vacates Collins's sentence, as both Collins and the State agree that it should, then legally Collins will not yet have been sentenced." (Resp. Br. at 25). Respondent concludes that the State could then "present additional evidence of [Appellant's] prior-offender status without violating the timing requirements of the statute." (Resp. Br. at 25-26).[2]

[2] Under Respondent's argument, if upon remand the trial court again errs in finding Appellant to be a chronic offender and Appellant is successful on yet another appeal, then the State could adduce even more evidence at yet another re-sentencing hearing. There would be no end.

While it might be true that if this Court vacates Appellant's five-year prison sentence it will no longer exist, that does not change the fact that Appellant's original sentencing has already occurred, and the State failed to meet its burden of proving Appellant's priors before sentencing. If this case is remanded by this Court for re-sentencing it is too late to have such facts be proven "prior to sentencing." As of this moment, sentencing has already occurred, and the State has conceded that the State's evidence was insufficient to prove that Appellant is a chronic offender (Resp. Br. 21). And the proof in findings of such facts had to be done "prior to sentencing," which has already occurred. ***§ 577.023.9***. As this Court held in ***Severe***, "there is no opportunity for the state to have a twice-bitten apple." 307 S.W.3d at 641. The State already took a bite out of the apple prior to original sentencing, as required by ***§ 577.023.9***, and it should not now be allowed a second bite after sentencing has already occurred once. There is no rational basis on which to provide a different remedy in court- versus a jury-tried case. Once the appellate court has determined that a manifest injustice has occurred because the State failed in its burden of proving the requisite prior DWI offenses, the case must be remanded for re-sentencing based upon the number of prior offense the State *did* prove. ***§ 577.023*** does *not* allow the State to present additional proof -- not only after *sentencing*, but also after an appeal has been filed and decided against the State. Here, the State concedes that it failed to prove that Appellant had been represented by counsel or had waived his right to counsel in

his previous cases; therefore the case must be remanded for re-sentencing as a Class B misdemeanor.

CONCLUSION

For the reasons presented, this Court must vacate Appellant's judgment and remand the case to the trial court to sentence Appellant for DWI as a class B misdemeanor under ***§ 577.010.2***.

Respectfully submitted,

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 882-9855
Fax: (573) 875-2594
Email: Craig.Johnston@mspd.mo.gov

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached substitute 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. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,187 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec Endpoint Protection, which was updated on August 19, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached substitute brief and a floppy disk containing a copy of this brief were hand-delivered this _____ day of August, 2010, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 882-9855
Fax: (573) 875-2594
Email: Craig.Johnston@mspd.mo.gov