

SC89501, *State of Missouri v. Michael Teer*

Appeal from the St. Charles County circuit court, Judge William T. Lohmar.

Attorneys: Teer was represented by Lisa M. Stroup of the public defender's office in St. Louis; and the state was represented by Karen L. Kramer of the attorney general's office in Jefferson City.

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: This appeal involves a defendant who was charged with, found to be and sentenced as a prior offender after his case was submitted to the jury. In a 4-3 decision, the Supreme Court of Missouri reverses the man's sentence and remands the case for sentencing consistent with the jury's recommendation and free from the enhancement given to a prior offender. In his opinion, Judge Richard B. Teitelman notes the statute that governs requires that the facts establishing a defendant's status as a prior offender "shall be pleaded, established and found prior to submission to the jury." The process followed in the trial here, however, violated the plain language of that statute. The violation prejudiced the defendant, who was sentenced – as a prior offender – to 20 years in prison rather than the four years in the county jail that the jury recommended. In a separate opinion, Judge Zel M. Fisher concurs in the result, but he contends the prejudice involves the defendant's inability to know who will be involved in the sentencing determination. He also would overrule six appellate cases that failed to follow the statute's clear legislative mandate. Judge Mary R. Russell dissents because she does not believe the defendant showed he suffered substantive prejudice requiring reversal.

Facts: Michael Teer was tried for his involvement in a 1994 automobile accident in which four people died and another was injured. Before the trial ended, the state moved to amend the information to charge Teer as a prior offender due to a previous felony stealing conviction. The court originally overruled the motion but later granted it – after the case was submitted to the jury but before the verdict. When the jury returned its verdict finding Teer guilty of four counts of involuntary manslaughter and one count of second-degree assault, it recommended Teer serve 10 months in the county jail for the involuntary manslaughter convictions and eight months in the county jail for the assault conviction. The circuit court, however, found Teer to be a prior offender and sentenced him to consecutive terms of four years in prison for each of the five convictions. Teer appeals.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The court erred in determining that Teer was a prior offender after the case was submitted to the jury. Section 558.021.2, RSMo 1994, unequivocally

provides that facts establishing a defendant's status as a prior offender "shall be pleaded, established and found prior to submission to the jury." The absence of a penalty provision does not necessarily mean that compliance with the statute is merely directory, rather than mandatory. This section is one of the statutes that provides a means for enhancing sentences based on prior offenses. As such, it implicates a defendant's liberty and, like other criminal statutes, must be construed strictly against the state and in favor of the defendant. Here, there is no dispute that Teer's status as a prior offender was not pleaded and proven until after the case was submitted to the jury – a procedure that violated the plain language of section 558.021.2.

(2) It is section 558.021.2 – not Rule 23.08 – that governs this case. Rule 23.08 simply provides a procedural mechanism for filing an amended information; it does not authorize a court to make factual findings in violation of the specific directive of the statute.

(3) Although a number of cases under section 558.021 have held that it is not reversible error when a defendant is found to be a prior or persistent offender after the case is submitted to the jury, each of these cases leaves open the possibility that reversible error would exist if the defendant established actual prejudice. Here, Teer was prejudiced because the jury recommended a maximum sentence of four years in the county jail rather than the court's sentence of 20 years in prison. Consequently, the court's error was prejudicial and requires that his sentence be reversed and his case remanded for sentencing consistent with the jury's recommendation and free from the sentence enhancement that would result if Teer were a prior or persistent offender. In all other respects, the judgment is affirmed.

Concurring opinion by Judge Fischer: The author concurs in the result but writes separately to encourage courts to refrain from judicial emasculation of legislative direction. Section 558.021 unambiguously requires that prior offender status "shall be pleaded, established and found prior to submission to the jury." Removing jury sentencing by amending the pleadings and presenting proof after submission to the jury implicitly prejudices the defendant by changing the rules after the game is over. Teer's defense counsel stated, in his objection to the state's late motion to amend the information, that he would have used a different trial strategy had he known there would not be jury sentencing. The author notes the dissent mischaracterizes *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003), regarding the mandatory pleading and proof requirements of section 558.021.2. In this case and in *Emery*, it is undisputed there was no evidence of prior convictions before the case was submitted to the jury, which is the operative requirement of the statute. This Court in *Emery* did not remand the case for the defendant to be sentenced by the jury but rather remanded the case to the trial court to sentence the defendant on what was pleaded and established before the case was submitted to the jury. The legislature decided to remove jury sentencing from prior and persistent offenders only where this status has been pleaded and proven before submitting the case to the jury, and the courts should declare the law accordingly. The author, therefore, would defer to

the legislature and specifically would overturn six decisions of the Missouri Court of Appeals that failed to follow the clear legislative mandate of section 558.021.

Dissenting opinion by Judge Russell: The author does not believe Teer has shown he suffered substantive prejudice requiring reversal and, therefore, would affirm his sentences. The provisions of section 558.021.2 are not mandatory, as nothing in the statute provides a remedy for a defendant who is sentenced as a prior offender after a trial court error related to the statute. The trial court's failure to adhere to its directives, therefore, does not equate to an automatic reversible error unless prejudice occurs, which does not happen unless the error prejudiced the defendant's substantive rights. Teer essentially invited the alleged error about which he now complains because he urged the trial court not to allow the state to amend its information before the case was submitted to the jury. Nothing in section 558.021.2 indicates that prior offender status must be pleaded and proven before any evidence is introduced at trial; rather, it requires that the offender's status should be established before the case is submitted to the jury. There is no reason to overturn the numerous Missouri cases that have determined it is harmless error to permit the state to prove, belatedly, prior or persistent offender status under section 558.021.2. The legislature cannot have intended its scheme of enhanced sentences for prior offenders to be rendered a nullity by trial court mistakes that do not prejudice the defendant. Teer cannot assert, persuasively, that he was sentenced unfairly because his sentence ultimately was imposed by the court rather than the jury as he had no right to be sentenced by a jury.