

Summary of SC89948, *State of Missouri v. Vanessa J. Severe*

Appeal from the Gentry County circuit court, Judge Roger M. Prokes
Argued and submitted Oct. 27, 2009; opinion issued Jan. 12, 2010

Attorneys: Severe was represented by Nancy A. McKerrow of the public defender's office in Columbia, (573) 882-9855; and the state was represented by Richard A. Starnes 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 woman convicted of driving while intoxicated and found to be a persistent DWI offender based on two previous offenses – including one municipal offense resulting in a suspended imposition of sentence – appeals her sentence. In a 5-2 decision written by Judge Michael A. Wolff, the Supreme Court of Missouri reverses the sentence and remands (sends back) the case to the trial court. This Court's decision in *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008) (holding that a prior municipal DWI offense that resulted in a suspended imposition of sentence could not be used to enhance a subsequent offense for driving while intoxicated), requires that the woman be re-sentenced. To be a persistent offender, a person must have two previous offenses sufficient to meet statutory requirements. On remand, the state may not present additional evidence of any other previous offense it alleges support the woman's status as a persistent offender. Allowing the state to do so would violate the timing requirement of the applicable statute.

In a dissenting opinion, Judge Patricia Breckenridge argues the state presented proper and timely evidence that was sufficient to establish the woman as a persistent offender until this Court decided *Turner*. Noting that this case involves not insufficiency of the evidence but rather a trial court's erroneous application of the law regarding the standard of proof for persistent DWI offender status, she would permit the state, on remand, to present additional evidence to meet the standard of proof under *Turner*.

Facts: In January 2007, a vehicle Vanessa Severe was driving in Gentry County flipped into a ditch. Passersby who helped get Severe and her passenger out of the vehicle reported smelling beer and seeing cans of beer in the vehicle. At the hospital, a highway patrol trooper noticed Severe smelled strongly of alcohol, had bloodshot eyes and had slurred speech, and she performed poorly on field sobriety tests he had her take. The state charged Severe as a persistent DWI offender with one count of driving while intoxicated. Before submitting the case to the jury, the trial court found Severe to be a prior and persistent DWI offender based on the state's submission of two prior alcohol-related offenses: a 1999 municipal violation to which Severe pleaded guilty and received a suspended imposition of sentence and a misdemeanor to which Severe pleaded guilty and

received a \$350 fine plus payment of all court costs. Following an October 2007 trial, the jury found Severe guilty of driving while intoxicated, and the court sentenced her as a persistent DWI offender to three years in prison. She appeals.

REVERSED AND REMANDED.

Court en banc holds: While Severe’s appeal was pending, this Court decided *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008), holding that a prior municipal DWI offense that resulted in a suspended imposition of sentence could not be used to enhance a subsequent offense for driving while intoxicated. Accordingly, *Turner* requires that Severe’s sentence be reversed and the case be remanded for re-sentencing. On remand to the trial court, the state may not offer evidence of other alcohol-related offenses that it did not present before the original trial. *Turner* did not make new law; it merely clarified the language of an existing statute, section 577.023, RSMo. At the time of Severe’s trial, section 577.023.16 permitted a guilty plea followed by a suspended imposition of sentence in state court to be treated as a “prior conviction” but did not say the same would apply for a similar municipal division case. As such, the state was on notice by the plain language of the statute that Severe’s guilty plea and suspended imposition of sentence in the municipal division could be treated as a prior conviction. The plain language of section 558.021.2, RSMo, requires that prior or persistent offender status be pleaded and proven before the case is submitted to the jury. Pursuant to section 577.023.1(4)(a), RSMo Supp. 2007, a persistent offender is a person who has pleaded guilty to or been found guilty of two or more intoxication-related offenses. Here, if the state had notice of an additional conviction that would have been treated as a prior conviction under section 558.021.2, it should have offered that prior conviction to the trial court before the case was submitted to the jury. As this Court held in *State v. Emery*, 95 S.W.3d 98, 101 (Mo. banc 2003), and re-emphasized in *State v. Teer*, 275 S.W.3d 258, 262 (Mo. banc 2009), allowing the state to present additional evidence, on remand, of alleged prior or persistent offender status would violate the timing requirement of section 558.012.2. The language of this statute does not provide an exception where evidence sufficient to prove the prior offenses at the time of trial but that later was found to be insufficient, and this Court cannot make such an exception here.

Dissenting opinion by Judge Breckenridge: The author would hold that, both when Severe was charged and when she was tried, a guilty plea to a municipal DWI charge with a suspended imposition of sentence was an “intoxication-related offense” for purposes of section 577.023. Because this case involves not insufficiency of the evidence but rather the erroneous judicial application of the law regarding the standard of proof for persistent DWI offender status, the state should be permitted to present new evidence on remand. The timing requirement of section 577.023.8 is a procedural requirement for trial; its purpose is not contravened by the state having the opportunity to present evidence of a defendant’s previous offenses on remand after a finding of judicial error. The statute contains no language that the legislature intended the procedural requirement

to apply on remand from an appellate court and, accordingly, its procedural requirement should have no application here. Unlike in *Emery* and *Teer*, where the state failed to present evidence of the defendant's persistent offender status prior to submission to the jury, here the state properly and timely offered evidence of Severe's persistent offender status, and she did not assert her municipal offense did not meet the definition of an intoxication-related offense under section 577.023. The evidence the state offered was sufficient to establish Severe as a persistent offender until this Court decided *Turner*, which changed the standard of proof established by *State v. Meggs*, 950 S.W.2d 609, 612 (Mo. App. 1997). On remand, therefore, the state should be permitted to present new evidence to meet the standard of proof under *Turner*.