

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI, RESPONDENT,

v.

VANESSA J. SEVERE, APPELLANT.

DOCKET NUMBER WD69162

DATE: November 25, 2008

Appeal From:

GENTRY COUNTY CIRCUIT COURT

THE HONORABLE ROGER MARTIN PROKES, JUDGE

Appellate Judges:

Division Four: Thomas Newton, C.J., Ronald Holliger and Alok Ahuja, JJ.

Attorneys:

Nancy A. McKerrow, Esq., Columbia, MO, **for appellant.**

Shaun J. Mackelprang, Esq. and Richard A. Starnes, Esq., Jefferson City, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS – WESTERN DISTRICT

STATE OF MISSOURI,

RESPONDENT,

V.

VANESSA J. SEVERE,

APPELLANT.

WD69162

Gentry County

Before: Division Four Judges: Thomas Newton, C.J., Ronald Holliger and Alok Ahuja, JJ.

Appellant Vanessa Severe was charged in the Circuit Court of Gentry County with driving while intoxicated. She was charged as a “persistent offender” under § 577.023.1(4)(a) of the Missouri Revised Statutes, which would have the effect of increasing her potential punishment, based on the allegation that she had been convicted of two or more prior “intoxication-related traffic offenses.”

During trial, the State introduced evidence of Severe’s prior convictions during its case in chief, but outside the jury’s presence. Based on this evidence, the trial court concluded that Severe was a “persistent offender” under § 577.023, and, therefore, the charge was punishable as a Class D felony upon conviction.

The jury found Severe guilty as charged, and the trial court subsequently sentenced her to three years in the Missouri Department of Corrections.

Severe appeals her conviction of a class D felony and accompanying sentence on the basis that the State failed to prove that she was a “persistent offender” pursuant to § 577.023.1(4)(a).

REVERSED AND REMANDED FOR RESENTENCING

Division Four holds:

Section 577.023.1(4)(a) states that a “persistent offender” is a person “who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses.” One of the two prior convictions used by the State to prove that Severe was a “persistent offender” was a *municipal* driving while intoxicated offense, for which she received a suspended imposition of sentence (SIS). The Missouri Supreme Court recently held, however, that “prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023.” *Turner v. State*, 245 S.W.3d 826, 829

(Mo. banc 2008). As the State concedes, in light of *Turner* the existing finding that Severe was a “persistent offender” must be vacated.

Division Four concludes, further, that the State may not submit additional evidence on remand to prove that Severe is a “persistent offender.” Section 577.023.8 specifies that, “[i]n a jury trial, the facts [establishing persistent offender status] *shall* be pleaded, established and found *prior* to submission to the jury outside of its hearing.” Interpreting identical statutory language, the Supreme Court of Missouri has held that the State must adhere to the specific procedure mandated by the statute, and that an appellate court may not order a further evidentiary hearing on remand which would violate the statute’s timing requirements. *State v. Emery*, 95 S.W.3d 98, 100-01 (Mo. banc 2003).

At trial, and disregarding the municipal offense which resulted in an SIS, the State proved that Severe had been convicted of one other intoxication-related traffic offense within the prior five years, which renders her a “prior offender.” Therefore, the judgment is reversed, and the case remanded for resentencing consistent with Severe’s status as a “prior offender.”

Opinion by: Alok Ahuja, Judge, in which Thomas Newton, C.J., joins. Judge Ronald Holliger dissents in separate opinion filed.

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CITED.**

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, Respondent

v.

VANESSA J. SEVERE, Appellant

No. WD69162

Gentry County

Dissent Opinion holds:

The decisions supporting the majority's position read *Emery* too broadly, resulting in unintended leniency for criminal defendants. A long line of cases hold that remand for an evidentiary hearing where a conviction was improperly described is the proper relief. The majority's holding on this issue is also in conflict with subsequent Supreme Court precedent. The defendant is not prejudiced by a remand and no constitutional issue is involved. The case should be remanded to allow the state to prove another qualifying DWI conviction to justify felony DWI.

Dissent Opinion by: Ronald R. Holliger, Judge

Date: November 25, 2008

Before: Thomas H. Newton, Chief Judge, Ronald R. Holliger, Judge, and Alok Ahuja, Judge

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