



# Missouri Court of Appeals

Southern District

Division Two

STATE OF MISSOURI, )  
)  
Plaintiff-Respondent, )  
)  
vs. ) No. SD29516  
)  
FARON ROSS COLLINS, ) Filed December 22, 2009  
)  
Defendant-Appellant. )

APPEAL FROM THE CIRCUIT COURT OF DOUGLAS COUNTY

Honorable Robert C. Carter, Associate Circuit Judge

## SENTENCE VACATED; REMANDED WITH INSTRUCTIONS

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,<sup>1</sup> and sentenced on December 2, 2008, to five years in prison as an intoxication-related chronic offender in accordance with section 577.023.<sup>2</sup> He appeals, contending that the trial court erred in relying upon any of his eight prior driving-while-intoxicated or driving-with-excessive-blood-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,

<sup>1</sup> References to section 577.010 are to RSMo 2000.

<sup>2</sup> 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."

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.<sup>3</sup> 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.<sup>4</sup> Accordingly, we vacate and set aside Defendant's sentence and remand for re-sentencing.<sup>5</sup>

### **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, which included court convictions on driving-related offenses; eight of which were prior convictions for driving while intoxicated or for driving with excessive blood alcohol content. This document was offered into evidence during the State's case and was admitted after defense counsel announced, "No objection."

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<sup>3</sup> 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[.]"

<sup>4</sup> References to rules are to Missouri Court Rules (2009), unless otherwise indicated.

<sup>5</sup> We do not address any of Defendant's other arguments, as they may not arise or may be resolved upon remand and resentencing.

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). Plain error review has previously been found appropriate in cases where it appears that a defendant has been improperly sentenced as a repeat offender. *State v. Cain*, 287 S.W.3d 699, 707 (Mo.App. 2009).

"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. We find that such error based upon a complete lack of any evidentiary support is evident, obvious, and clear, thereby satisfying the first step of plain error review.

We next turn to whether a miscarriage of justice or manifest injustice will result if the error is left uncorrected. Where, as here, the error involves a finding regarding Defendant's status as a prior offender, Defendant must establish that he suffered prejudice, *Cain*, 287 S.W.3d at 707 (citing *State v. Madison*, 997 S.W.2d 16, 22 (Mo. banc 1999)), and that the error was outcome determinative, *State v. Moore*, 252 S.W.3d 272, 275 (Mo.App. 2008).

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,<sup>6</sup> 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 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 offenses, as defined in section 577.023.1(3), and as required by section 577.023.1(2)(a). We find that Defendant has established outcome-determinative prejudice, i.e., a miscarriage of justice or manifest injustice, if this error is left uncorrected.

#### **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 Defendant for the class B misdemeanor of driving while intoxicated, pursuant to section 577.010. Defendant contends that further support for this procedure is found in *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).

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<sup>6</sup> References to section 558.011 are to RSMo Cum.Supp. 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, the State cites to *State v. Bizzell*, 265 S.W.3d 892 (Mo.App. 2008); *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.

Both Defendant and the State agree, and we concur, that Defendant's sentence should be vacated. 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). 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 express language 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).

*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 chosen to do so, to present any additional evidence it had bearing upon the defendant's alleged intoxication-related traffic offenses. *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.

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

Finally, neither *Rose* nor *Gibson* provide any guidance on this issue or support for Defendant's position, because in both cases, the defendant was tried by a jury. *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 both **Rose**, 169 S.W.3d at 136-37, and **Gibson**, 121 S.W.3d at 131, 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. Because the instant case is not governed by section 577.023.8, but rather, section 577.023.9, which allows the presentation of section 577.023 evidence at any time prior to sentencing, **Rose** and **Gibson** have no applicability and 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 prior intoxication-related traffic offenses under section 577.023, as otherwise allowed or provided by law to be taken prior to sentencing, and then to resentence Defendant accordingly.

Gary W. Lynch, Presiding Judge

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

Division II

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