

Reversed and Remanded in Part and Affirmed in part Opinion filed November 2, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00649-CR

JARVIS WAYNE PIPER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 796,932**

OPINION

The trial court convicted Appellant, Jarvis Wayne Piper, of possession of a controlled substance. Punishment, enhanced by two prior convictions for possession of controlled substances, was assessed at 25 years confinement. On appeal Piper argues that the trial court erred in enhancing his punishment. In its brief, the State concedes the merit of Appellant's claim. We reverse and remand the case for resentencing.

Sentence Enhancement

In his sole point of error, Appellant argues that the trial court erred in enhancing his punishment as the evidence adduced at trial was insufficient to sustain the enhancement allegations in the indictment. Specifically, Appellant contends that the admissions made by Appellant, upon which the court relied for enhancement, were insufficient to sustain a finding that the State had proven the enhancement allegations beyond a reasonable doubt. We agree.

Upon conviction for multiple felony offenses, the Texas Penal Code provides several scenarios under which the trier may enhance a defendant's punishment range. TEX. PEN. CODE ANN. § 12.42 (Vernon Supp. 2000). Section 12.42(d), the applicable provision in the instant case, provides that:

[i]f it is shown on the trial of a felony offense . . . that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment . . . for life, or for any term or not more than 99 years or less than 25 years.

Id. at §12.42(d). Proof as to prior convictions alleged for enhancement of punishment rest with the State, with the standard of such proof being beyond a reasonable doubt. *Ex parte Augusta*, 639 S.W.2d 481, 484 (Tex. Crim. App. 1982), *overruled on other grounds*, *Bell v. State*, 994 S.W.2d 173 (Tex. Crim. App. 1999). This burden includes proof that the date of the offense which led to the second felony conviction was subsequent to the date the first felony conviction became final. *Id.* If the hearing was before the trial court, and there was error, then the defendant will only be entitled to a new punishment hearing. TEX. CODE CRIM. PROC. ANN. Art. 44.29(b) (Vernon Supp. 2000); *Bell*, 994 S.W.2d at 175 (holding that it would not violate federal double jeopardy to allow the State a second chance to present its proof of prior convictions and overruling any cases to the contrary).

In the instant case, the evidence shows that on January 6, 1999 Appellant was indicted for the offense of possession of a controlled substance weighing more than 4 grams and less than 200 grams. The two enhancement paragraphs of the indictment alleged that the Appellant had two prior Harris County convictions for possession of controlled substance offenses, the first occurring on October 15, 1992 in

cause number 562582 and the second on June 8, 1994 in cause number 9413241. The indictment stated that the offense in June 1994 occurred after the offense in 1992 became final. During the guilt/innocence phase of Appellant's trial, the State adduced the following proof of Appellant's prior convictions:

Prosecutor: You're not exactly law abiding, would you agree with that? You have been to the pen out of this Court back in 1992 and that was for possession of cocaine, right?

Appellant: Yes.

Prosecutor: You did four years T.D.C?

Appellant: Yes, ma'am.

Prosecutor: Then you went a second time in 1994 out of the 263rd District Court and at that time it was for delivery of a controlled substance, right?

Appellant: Yes, ma'am.

Prosecutor: You did eight years that time?

Appellant: Yes.

Prosecutor: You're on parole for that charge currently?

Appellant: Yes.

After eliciting this testimony, both sides rested. The trial court subsequently found Appellant guilty and proceeded to the punishment phase where the State reoffered all evidence adduced at trial with emphasis placed on the fact that Appellant admitted to his prior convictions. Based on this evidence, the court found the enhancement allegations in the indictment to be true and sentenced Appellant to 25 years confinement.

Based on this evidence, we find that the State failed to prove beyond a reasonable doubt that the date of the offense which led to Appellant's second felony conviction was subsequent to the date his first felony conviction became final. Because the State failed to meet its burden of proof, the trial court erred in finding the enhancement allegations in the indictment to be true. Pursuant to article 44.29(b) and the Court of Criminal Appeals holding in *Bell*, we reverse and remand the case to the trial court with instructions to conduct a new sentencing hearing.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei, and Hudson.

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