

IN THE SUPREME COURT OF THE STATE OF NEVADA

MALINA PICKETT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37722

FILED

JUL 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Seal*
CHIEF DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving a motor vehicle with 0.10 percent or more by weight of alcohol in the blood within two (2) hours of driving, a violation of NRS 484.379 and 484.3792(1)(c). The district court sentenced appellant to serve 12 to 36 months in prison.

Appellant's sole contention is that the State failed to produce sufficient evidence that appellant had convictions for two prior DUI offenses within the requisite seven-year period. In particular, appellant points out that the State failed to present any evidence of the prior convictions at, or before, sentencing. Accordingly, appellant argues that the district court erred in sentencing her for a felony offense. We agree.

In Phipps v. State,¹ a case involving enhancement of a DUI offense, this court explained that the State has the burden of proving each element of a sentence enhancement beyond a reasonable doubt.² The State must meet this burden unless the defendant stipulates to or waives proof of the

¹111 Nev. 1276, 903 P.2d 820 (1995).

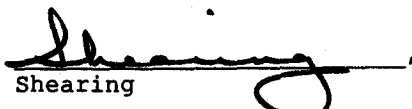
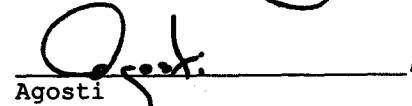

²Id. at 1280, 903 P.2d at 823.

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prior convictions.³ Absent such a stipulation or waiver, the State must meet its burden by presenting evidence of the prior offenses at the time of sentencing or in a hearing prior to sentencing.⁴ We have held that the State's failure to present proof of the prior offenses warrants reversal of the judgment of conviction and remand for sentencing as a first offense.⁵

Here, the State failed to present any evidence of the prior offenses before or at sentencing, and appellant did not stipulate to or waive proof of the prior convictions. In fact, there was no mention of the prior offenses at the sentencing hearing or in the judgment of conviction. Under the circumstances, we conclude that the State failed to present sufficient evidence of the prior offenses to support enhancement of the instant offense to a felony. On remand, the district court may only sentence appellant for a first offense. Accordingly, we

ORDER the judgment of conviction VACATED AND REMAND this matter to the district court for proceedings consistent with this order.


Shearing, J.

Agosti, J.

Rose, J.

³Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000).

⁴Ronning v. State, 116 Nev. 32, 33-34, 992 P.2d 260, 261 (2000); see also NRS 484.3792(2).

⁵See Robertson v. State, 109 Nev. 1086, 1089, 863 P.2d 1040, 1042 (1993), overruled on other grounds by Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000).

cc: Hon. Archie E. Blake, District Judge
Attorney General
Storey County District Attorney
Loren Graham
William B. Cole, Jr.
Storey County Clerk