IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0734-17

EX PARTE RUSSELL BOYD RAE, Appellant

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SIXTH COURT OF APPEALS MARION COUNTY

HERVEY, J., delivered the opinion of the Court in which KEASLER, ALCALA, RICHARDSON, NEWELL, and WALKER, JJ., joined. KELLER, P.J., filed a dissenting opinion in which YEARY and KEEL, JJ., joined.

O P I N I O N

In 1985, Rae was convicted of driving while intoxicated. In 1993, he was convicted of boating while intoxicated. In 2001, Rae was arrested for DWI again. The State indicted him, using his prior intoxication convictions to prove up felony DWI, and it alleged a prior possession-of-a-controlled-substance conviction to enhance the offense from a third-degree felony to a second-degree felony.[1] Rae pled guilty and true to the enhancement. He was sentenced to ten years' imprisonment. He did not appeal his

[1] In 1994, Rae was convicted of possessing cocaine.

conviction. In 2003, Rae filed an application for a post-conviction writ of habeas corpus, arguing that his trial attorney was ineffective because he did not investigate Rae's prior intoxication convictions. Had counsel done so, he would have discovered that one of his convictions was not available as a predicate offense to prove up the felony DWI. *Ex parte Rae*, No. 74840, 2003 WL 22855432 (Tex. Crim. App. Dec. 3, 2003) (per curiam, not designated for publication). We granted relief and vacated his 2001 conviction for felony DWI. *Id.* A review of that case file shows that the predicate offense to which we referred was Rae's BWI conviction.

In 2015, the State arrested Rae for DWI and again alleged the BWI conviction to prove up felony DWI.[2] Rae was convicted of the offense and was placed on community supervision. The State later filed a motion to revoke, and Rae filed an application for a pretrial writ of habeas corpus. The trial court denied relief, and the court of appeals affirmed the judgment of the trial court. *Ex parte Rae*, No. 06-17-00063-CR, 2017 WL 2562786 (Tex. App.—Texarkana June 13, 2017) (mem. op., not designated for publication).

He now argues, again, that his BWI conviction cannot be used as a predicate offense to prove up felony DWI. We agree and reverse the judgment of the court of appeals. The cause is remanded to the trial court to reform the judgment of conviction in cause number F14-689-A in the 276th District Court to reflect that Rae was convicted of

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[2]It is not clear from the record if the State re-prosecuted Rae after we vacated his 2001 conviction, and if so, why it did not allege that conviction as a predicate offense.

Class A misdemeanor DWI and to conduct a new punishment hearing. *Bowen v. State*, 374 S.W.3d 427, 431–32 (Tex. Crim. App. 2012).

Delivered: March 21, 2018

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