

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-04-00638-CR**

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**The State of Texas, Appellant**

**v.**

**Jose Arredondo, Appellee**

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**FROM THE DISTRICT COURT OF CALDWELL COUNTY, 22ND JUDICIAL DISTRICT  
NO. 2004-055, HONORABLE JACK H. ROBISON, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

The State appeals from an order granting appellee Jose Arredondo's motion to transfer this cause to a court having misdemeanor jurisdiction. The question presented is whether the indictment alleges a felony driving while intoxicated offense. We hold that it does not and affirm the district court's order.

Arredondo urges that this is an interlocutory appeal over which we have no jurisdiction. The State appeals pursuant to article 44.01(a)(1), which permits the State to appeal an order dismissing an indictment. Tex. Code Crim. Proc. Ann. art. 44.01(a)(1) (West Supp. 2004-05). This statute has been construed to permit the State to appeal any order that effectively terminates a prosecution in favor of the defendant. *State v. Moreno*, 807 S.W.2d 327, 332 (Tex. Crim. App. 1991). The order at issue effectively terminates Arredondo's felony prosecution in district court. The order does not merely construe the indictment while permitting the district court prosecution to

proceed. *State v. Morgan*, cited by Arredondo, does not apply. 160 S.W.3d 1, 5 (Tex. Crim. App. 2004).

The indictment accuses Arredondo of driving while intoxicated on October 19, 2003. The two previous DWI convictions alleged to elevate the offense to a felony were on January 31, 1983, and June 10, 1999. *See* Tex. Pen. Code Ann. § 49.09(b)(2) (West Supp. 2004-05). Because the two previous convictions are more than ten years apart, the 1983 conviction cannot be used to enhance the 2003 offense to a felony. *Id.* § 49.09(e); *Getts v. State*, 155 S.W.3d 153, 156-57 (Tex. Crim. App. 2005).<sup>1</sup> Thus, the indictment does not allege a felony offense.

The order transferring the cause to misdemeanor court is affirmed.

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Bea Ann Smith, Justice

Before Chief Justice Law, Justices B. A. Smith and Pemberton

Affirmed

Filed: September 22, 2005

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<sup>1</sup> In the chart appended to the *Getts* opinion, the indictment in this cause is example D.