

**Affirmed in Part, and Reversed and Remanded in Part, and Opinion filed May 3, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-98-00159-CR**  
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**WILBERT CAMPBELL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court  
Harris County, Texas  
Trial Court Cause No. 760,447**

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**MEMORANDUM OPINION ON REMAND**

Appellant was convicted by a jury of the offense of possession of less than one gram of cocaine with the intent to deliver, an unaggravated state jail felony punishable under section 12.35(a) of the Texas Penal Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (b) (Vernon Supp. 2000). After appellant pled true to allegations of two prior state-jail felony convictions, the jury assessed punishment at confinement for eight years in the Institutional Division of the Texas Department of Criminal Justice.

On appeal, appellant complained that the trial court erred by instructing the jury that, under subsection 12.42(a) of the Texas Penal Code, the range of punishment for an unaggravated state

jail felony punishable under subsection 12.35(a) with two prior sequential state-jail felony convictions is confinement for two to twenty years, a second-degree felony, rather than two to ten years, a third-degree felony.<sup>1</sup> This court affirmed appellant’s conviction, finding that the term “felonies,” as used in subsection (a)(2) of section 12.42, includes state jail felonies. *Campbell v. State*, 2 S.W.3d 729, 733 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999). On petition for discretionary review, the Court of Criminal Appeals determined that the clear and unambiguous language of subsection 12.42(a) indicates that subsection (a) sets out how the punishment for an offense punishable under section 12.35, entitled “State Jail Felony Punishment,” may be increased. *Campbell v. State*, No. 2031-99, slip op. at 4, 2001 WL219145, at \*2 (Tex. Crim. App. March

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<sup>1</sup> Section 12.42 provides:

- (a)(1) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two state jail felonies, on conviction the defendant shall be punished for a third-degree felony.
- (a)(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.
- (a)(3) If it is shown on the trial of a state jail felony punishable under Section 12.35(c) or on the trial of a third-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony.
- . . . .
- (e) A previous conviction for a state jail felony punished under Section 12.35(a) may not be used for enhancement purposes under Subsection (b), (c), or (d).

Section 12.35 provides:

- (a) Except as provided in Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
- . . . .
- (c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:
  - (1) a deadly weapon as defined in Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission to the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or
  - (2) the individual has previously been finally convicted of any felony:
    - (A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or
    - (B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

7, 2001). Subsection 12.42(a)(1) governs when the offender is charged with an unaggravated state jail felony under subsection 12.35(a) and has multiple prior convictions for only state jail felonies. *Id.* Under subsection (a)(1), the state must prove that there are two prior final convictions for state jail felonies, but it is not required to prove that the prior convictions occurred sequentially, as it must under subsection (a)(2). *Id.*

The Court of Criminal Appeals held that, as used in subsection 12.42(a), the terms “felony” and “state jail felony” are mutually exclusive; a defendant charged under subsection 12.35(a) who has previously acquired only state-jail felony convictions, whether sequential or non-sequential, must be punished for a third-degree felony under subsection 12.42(a)(1), rather than a second-degree felony under subsection 12.42(a)(2). *Id.* at 7, \*4.

The Court of Criminal Appeals remanded the cause to this court for proceedings consistent with its opinion. Accordingly, we affirm appellant’s conviction, but remand for a new punishment hearing.

PER CURIAM

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Justices Hudson, Edelman, and Wittig.

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