

**Affirmed and Opinion filed December 14, 2000.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-00819-CR**  
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**LILLIAN MOORE SMITH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 803139**

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**OPINION**

In the underlying case, appellant was convicted of a third degree felony. Under the enhancement statute, because of an earlier conviction for a state jail felony, she was punished for a second degree felony. Appellant's single issue argues that her sentence was improperly enhanced because a state jail felony is not the same as a felony for purposes of enhancement. We disagree and therefore affirm.

**Background and Discussion**

In 1996, appellant was convicted of the state jail felony of forgery, *See* TEX. PEN. CODE ANN. § 32.21, with punishment of eight months confinement. Her punishment was assessed pursuant to section 12.44(a) of the penal code, which states:

[a] court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.

TEX. PEN. CODE ANN. § 12.44(a).

In 1999, appellant was convicted of possessing an unlawful telecommunications device, a third degree felony. *See* TEX. PEN. CODE ANN. § 33A.03. The penal code states: “[i]f it is shown . . . 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.” TEX. PEN. CODE ANN. § 12.42(a)(3). Under this procedure, the trial court used appellant’s 1996 conviction to enhance punishment under the conviction as a second degree felony and sentenced her to ten years confinement.

Appellant complains her sentence was improperly enhanced because “there is no provision which provides for enhancement of a third-degree felony to a second-degree felony based on upon a prior state jail felony conviction or a prior state jail felony, punished as a Class A misdemeanor.” We disagree. As this court recently held, the plain language of the enhancement statute, coupled with the definition of felony, indicate the use of the term “felonies” includes state jail felonies. *See Campbell v. State*, 2 S.W.3d 729, 733 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999, pet. granted); *see also Adger v. State*, 7 S.W.3d 899, 903 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, no pet. h.); *Waits v. State*, 9 S.W.3d 904, 908 (Tex. App.—Fort Worth 2000, pet. filed).

Additionally, we disagree with appellant’s proposition, for which she cites no authority, that because her prior state jail felony was punished as a Class A misdemeanor, it no longer

qualifies as a felony under the enhancement statute. While, apparently due to mitigating factors, appellant was punished under a more lenient scheme, she was nonetheless still convicted of a felony. *See* TEX. PEN. CODE ANN. § 32.21 (provisions outlining offense of forgery). We see no provision in the code that the more lenient punishment she received somehow altered the character of her offense from a felony to a misdemeanor. In fact, section 12.44(a), which provided for lesser punishment of her conviction of a felony, expressly refers to the offense as “the felony.” *See* TEX. PEN. CODE ANN. § 12.44(a).

We therefore overrule appellant’s issue. The judgment of the trial court is affirmed.

/s/ Don Wittig  
Justice

Judgment rendered and Opinion filed December 14, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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