No. SC90585

In the
Supreme Court of Missouri

DAMON FELDHAUS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit, Division Seven
The Honorable Daniel Pelikan, Judge

APPELLANT'S REPLY BRIEF

Gwenda Reneé Robinson
Missouri Bar No. 43213
District Defender, Office B/Area 68
415 South 18th Street
Suite 300
St. Louis, MO 63103-2237
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3-5

JURISDICTIONAL STATEMENT 6

STATEMENT OF FACTS..... 6

REPLY POINT 7

REPLY ARGUMENT.....8-17

A. Appellant's claim is reviewable, as it is a jurisdictional claim and Appellant preserved it by raising it in his *pro se* and amended motions. 8-15

B. Section 577.023 is unconstitutionally vague.....15-17

CONCLUSION..... 18

CERTIFICATE OF SERVICE AND COMPLIANCE..... 19

-

TABLE OF AUTHORITIES

Authority **Page**

Cases

Blackledge v. Perry, 417 U.S. 21 (1974) 11

Brown v. State, 452 S.W.2d 176 (Mo. 1970).....15

Dorsey v. State, 115 S.W.3d 842 (Mo. banc 2003).....12

Ex Parte Siebold, 100 U.S. 371 (1879) 10

Ex Parte Smith, 36 S.W. 628 (Mo. 1896) 14

Ex Parte Yarbrough, 110 U.S. 651 (1884).....10

Johnson v. State, 103 S.W.3d 182 (Mo. App. W.D. 2003).....15

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 14

Melton v. State, 260 S.W.3d 882 (Mo. App. E.D. 2008) 11

Menna v. New York, 423 U.S. 61 (1975) 11

Moore v. State, 288 S.W.3d 810 (Mo. App. S.D. 2009) 8-10

Sodders v. Parratt, 693 F.2d 811 (8th Cir. 1982) 11

State v. Anderson, 16 P.3d 214 (Ariz. Ct. App. 2000).....17

State v. Baker, 359 So.2d 110 (La. 1978).....17

State v. Evans, 567 S.W.2d 359 (Mo. App. St.L.D. 1978).....12

State v. Mitchell, 563 S.W.2d 18 (Mo. banc 1978) 12

State v. Ondo, 232 S.W.3d 622 (Mo. App. S.D. 2007) 15-17

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1992) 15

State v. Young, 695 S.W.2d 882 (Mo. banc 1985) 14

Stidham v. State, 963 S.W.2d 351 (Mo. App. W.D. 1998) 15

St. Louis County v. Kienzle, 844 S.W.2d 118 (Mo. App. E.D. 1992) 14

United States v. Batchelder, 442 U.S. 114 (1979) 16-17

United States v. Bell, 70 F.3d 495 (7th Cir. 1995) 11

United States v. Broce, 488 U.S. 563 (1989) 11

United States v. Caperell, 938 F.2d 975 (9th Cir. 1991) 11

United States v. Evans, 333 U.S. 483 (1948) 17

United States v. Morgan, 230 F.3d 1067 (8th Cir. 2000) 11

United States v. Skinner, 25 F.3d 1314 (6th Cir. 1994) 12

Webb ex rel. J.C.W. v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009) 13

Statutes

§ 577.023 ..... 9, 16-17

Rules

Rule 83.01 6

Constitutional Provisions

Mo. Const., Art. I, § 10 14

Mo. Const., Art. V, § 3 6

Mo. Const., Art. V, § 11 6

U.S. Const., Amend. V 14

U.S. Const., Amend. XIV 14

JURISDICTIONAL STATEMENT

Appellant Damon Feldhaus adopts the first four paragraphs of the jurisdictional statement set out in Appellant's Brief, Statement and Argument, filed on December 16, 2009, in the Missouri Court of Appeals, Eastern District in appeal no. ED93024. To his initial jurisdictional statement, Mr. Feldhaus adds that the Missouri Court of Appeals, Eastern District transferred this case to this Court prior to opinion because Mr. Feldhaus made a real and substantial challenge to the validity of a state statute and consequently, this Court has exclusive jurisdiction over Mr. Feldhaus' appeal. Mo. Const., Art. V, § 3; Mo. Const., Art. V, § 11; Rule 83.01.

STATEMENT OF FACTS

Appellant Damon Feldhaus also adopts the statement of facts set out in Appellant's Brief, Statement and Argument, filed on December 16, 2009, in the Missouri Court of Appeals, Eastern District in appeal no. ED93024. Appellant Mr. Feldhaus will cite to the record on appeal as follows: Legal File, "(L.F)"; Guilty Plea and Sentencing Transcript, "(Tr.)"; Appellant's Brief (SC90585), "(App. Br.)"; and, Respondent's Brief (SC90585), "(Resp. Br.)."

REPLY POINT

Appellant Feldhaus' claim is reviewable, as it is a jurisdictional claim and Appellant preserved it by raising it in his *pro se* and amended motions. The motion court clearly erred in denying Appellant's claim because § 577.023 is unconstitutionally vague for failing to state with sufficient clarity the penalty for driving while intoxicated for those persons with four or more convictions for prior intoxication-related offenses. Specifically, the inclusion of the "or more" language in subsections (1)(a), (2)(a), and (4)(a) of § 557.023 permits the same conduct of having four or more convictions for prior intoxication-related offenses to be punishable as a class B, C, or D felony, and this inherent ambiguity within the statute results in state-sanctioned arbitrary and discriminatory enforcement of the law.

United States v. Evans, 333 U.S. 483 (1948);

State v. Mitchell, 563 S.W.2d 18 (Mo. banc 1978);

Ex parte Smith, 36 S.W. 628 (Mo. 1896);

State v. Anderson, 16 P.3d 214 (Ariz. Ct. App. 2000);

U.S. Const., Amends V and XIV;

Mo. Const., Art. I, § 10; § 577.023.

REPLY ARGUMENT

Appellant Feldhaus' claim is reviewable, as it is a jurisdictional claim and Appellant preserved it by raising it in his *pro se* and amended motions. The motion court clearly erred in denying Appellant's claim because § 577.023 is unconstitutionally vague for failing to state with sufficient clarity the penalty for driving while intoxicated for those persons with four or more convictions for prior intoxication-related offenses. Specifically, the inclusion of the "or more" language in subsections (1)(a), (2)(a), and (4)(a) of § 557.023 permits the same conduct of having four or more convictions for prior intoxication-related offenses to be punishable as a class B, C, or D felony, and this inherent ambiguity within the statute results in state-sanctioned arbitrary and discriminatory enforcement of the law.

A. Appellant Feldhaus' claim is reviewable, as it is a jurisdictional claim and Appellant preserved it by raising it in his *pro se* and amended motions.

In its brief, respondent primarily relies on *Moore v. State*, 288 S.W.3d 810, 812 (Mo. App. S.D. 2009) in arguing that Appellant Feldhaus' challenge to the constitutionality of section 577.023 is an unreviewable, non-jurisdictional claim that he waived through entry of his guilty plea (Resp. Br. 14-19). *Moore*,

however, is neither dispositive of whether Appellant Feldhaus' constitutional challenge is a jurisdictional question, nor whether Appellant Feldhaus waived his constitutional challenge. *Moore* was wrongly decided, and is distinguishable.

As respondent argued, the Rule 24.035 post-conviction movant in *Moore* challenged the constitutionality of section 577.023 on the same void-for-vagueness grounds that Appellant Feldhaus espoused (Resp. Br. 15-16). 288 S.W.3d at 812. The movant in *Moore* argued that the "or more" language in subsections (1)(a), (2)(a), and (4)(a) could be arbitrarily applied, and that as a consequence, section 577.023 was unconstitutional and void for vagueness. *Id*.

Respondent overlooked, however, that lack of standing, rather than waiver, chiefly motivated the Southern District's rejection of movant's constitutional challenge in *Moore*. *Id*. The Southern District noted that unless the statute, which the litigant challenges, adversely affects him, he has no standing to challenge it on constitutional grounds. *Id*. In *Moore*, the Southern District held movant was not adversely affected by the provisions of section 577.023 that he argued could be arbitrarily applied because the trial court found movant to be a chronic offender under subsection (2)(c) of section 577.023, and not under subsection (1)(a), (2)(a), or (4)(a). *Id*. As distinguished from the movant in *Moore*, Appellant Feldhaus is

adversely affected by the provisions of section 577.023 about which he has complained because the trial court found Appellant Feldhaus a chronic offender under subsection (4)(a) (Tr. 10, 20-22; L.F. 5-6, 23-24).

Moreover, though the Southern District additionally held that movant's constitutional challenge in *Moore* was non-jurisdictional and waived through entry of movant's guilty plea, this holding is contrary to the weight of federal and state authority holding that a guilty plea does not foreclose the right of an accused to bring a facial constitutional attack on the statute underlying his conviction. *See*, *Moore*, 288 S.W.3d at 812. Over 100 years ago, the United States Supreme Court stated, "If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." *Ex Parte Yarbrough*, 110 U.S. 651, 654 (1884). In *Ex Parte Siebold*, 100 U.S. 371, 376- 377 (1879), the United States Supreme Court held that "if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes," and that a conviction under an unconstitutional law is not merely erroneous, but illegal and void. The Court indicated that such a jurisdictional defect, "affects the foundation of the whole proceedings." *Siebold*, 100 U.S. at 376.

As a consequence, the Court and federal circuit courts have permitted defendants to challenge the constitutionality of the statute under which the government charged them, despite the entry of their guilty pleas. *United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991); *United States v. Bell*, 70 F.3d 495, 497 (7th Cir. 1995) (discussing federal circuit court holdings after *United States v. Broce*, 488 U.S. 563, 575 (1989)). In doing so, those courts rely on United States Supreme Court precedent holding that a guilty plea does not preclude a defendant from raising a collateral attack challenging the State's authority to "bring any indictment at all," hale the defendant into court on the charge, "constitutionally prosecute" the charge, and enter a conviction and sentence, even if the plea was counseled. *Broce*, 488 U.S. at 575; *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (holding guilty plea did not preclude double jeopardy claim); *Menna v. New York*, 423 U.S. 61, 62-63 n. 2 (1975) (same). Courts deem such challenges to be jurisdictional, as opposed to non-jurisdictional, and a guilty plea notably waives only non-jurisdictional defects. *United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000); *Sodders v. Parratt*, 693 F.2d 811, 812 (8th Cir. 1982); *Melton v. State*, 260 S.W.3d 882, 885 (Mo. App. E.D. 2008).

More specifically, federal and Missouri courts have held that vagueness challenges like those made here are a jurisdictional defect, and that void-for-

vagueness challenges to the constitutionality of a statute are not waived by the defendant's entry of his guilty plea. *United States v. Skinner*, 25 F.3d 1314, 1316 (6th Cir. 1994); *Dorsey v. State*, 115 S.W.3d 843, 844 n. 2 (Mo. banc 2003); *see also State v. Evans*, 567 S.W.2d 359, 360 (Mo. App. St.L.D. 1978). In holding that the defendant's entry of his guilty plea in *State v. Mitchell*, 563 S.W.2d 18, 23 (Mo. banc 1978) had not waived his objections to the facial constitutionality of the statute under which the court convicted him, this Court noted:

> This state is thoroughly committed to the proposition that the unconstitutionality of an ordinance or statute on which a prosecution is based cannot be waived. The invalidity of such an act on constitutional grounds goes to the subject matter of the prosecution and may be raised at any stage of the proceedings, even by a collateral attack after conviction [citations omitted.]

Consistent with this proposition, Appellant Feldhaus argued in his brief that his challenge to the constitutionality of section 577.023 was jurisdictional, and that he had not waived his challenge (App. Br. 29). In its brief, Respondent maintained, however, that Appellant Feldhaus' categorization of his constitutional challenge as

jurisdictional is flawed in light of this Court's recent opinion in *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) (Resp. Br. 17-19). Respondent's interpretation of *Webb* is incorrect.

In *Webb*, this Court stated:

> Missouri courts recognize two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction. These two kinds of jurisdiction - and there are only two for the circuit courts – are based upon constitutional principles.

Webb, 275 S.W.3d at 252.

This Court noted, "Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case." *Id*. at 253. This Court further directed that statutory restrictions do not infringe upon the subject matter jurisdiction of Missouri courts and that "courts of this state should confine their discussions of circuit court jurisdiction to *constitutionally recognized* doctrines of . . . subject matter jurisdiction." *Id*. at 253-254 [emphasis added.]

The void-for-vagueness doctrine is one type of *constitutionally recognized* doctrine of subject matter jurisdiction to which *Webb* refers. The vagueness doctrine

is based upon principles of due process found in the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution." *St. Louis County v. Kienzle*, 844 S.W.2d 118, 122 (Mo. App. E.D. 1992); *see also State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985). It is well-established that the Fourteenth Amendment to the United States Constitution, which guarantees that no state shall "deprive any person of life, liberty or property, without due process of law," U.S. Const. amend. XIV, § 1, ensures that the individual need not "speculate as to the meaning of penal statutes" and is "entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). If the terms of a state statute are so "vague, indefinite, and uncertain" as to violate the defendant's right to due process of law, then the trial court has no authority to enter a judgment or declare punishment for violation of that statute. *Id*. at 458; *Ex parte Smith*, 36 S.W. 628, 630 (Mo. 1896) (stating that "if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction"). This Court's opinion in *Webb* leaves this fundamental law unchanged.

Because Appellant Feldhaus' claim is a jurisdictional claim he may raise it for the first time on appeal. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992).

Subject matter jurisdiction can be raised at any point. *Stidham v. State*, 963 S.W.2d 351, 353 (Mo. App. W.D. 1998); *Brown v. State*, 452 S.W.2d 176, 179 (Mo. 1970).

In addition, even if this Court finds that Appellant Feldhaus' claim is non-jurisdictional, this Court should find that Appellant Feldhaus preserved his claim by raising it in his *pro se* and amended motions (L.F. 42-43, 51-55; App. Br. 28-29). *Cf. Johnson v. State*, 103 S.W.3d 182, 187 n. 5, 188 (Mo. App. W.D. 2003) (declining review of Rule 24.035 movant's constitutional challenge because he failed to assert it in his motion).

B. Section 577.023 is unconstitutionally vague.

In its brief, Respondent relied on *State v. Ondo*, 232 S.W.3d 622, 629 (Mo. App. S.D. 2007), in stating: "The legislature's grant of prosecutorial discretion . . . does not amount to unconstitutional ambiguity or arbitrariness. The fact that *another section or statute* proscribes the same conduct does not create ambiguity . . . " (Resp. Br. 24) [emphasis added].

Appellant Feldhaus acknowledges that prosecutors have discretion in charging defendants, and may choose to charge a defendant under one or more different statutes that proscribe the same conduct. *United States v. Batchelder*, 442 U.S. 114, 125-126 (1979). Appellant Feldhaus maintains, however, that *Ondo* may

not reasonably be interpreted to stand for the proposition that a statute that proscribes different penalties for identical conduct under separate subsections of the very same statute is not unconstitutionally ambiguous. *Ondo* involved two different statutes, one proscribing second-degree domestic assault for attempting to cause physical injury by choking and the other proscribing third-degree assault for attempting to cause physical injury. 232 S.W.3d at 627. The elements under these two different statutes were not the same, as one proscribed the act of choking and the other did not. *Id*. at 629. And, in *Ondo*, the defendant did not challenge the unconstitutional vagueness of the statutes, but argued the ambiguity in the statutes and the rule of lenity required the trial court to have instructed the jury on third-degree domestic assault only. *Id*. at 627-630.

As distinguished from the defendant in *Ondo*, Appellant Feldhaus is challenging the unconstitutional vagueness of one statute. Appellant Feldhaus argues that § 577.023 is unconstitutionally vague for failing to state with sufficient clarity the penalty for driving while intoxicated for those persons with four or more convictions for prior intoxication-related offenses. Specifically, Appellant Feldhaus argues that the inclusion of the "or more" language in subsections (1)(a), (2)(a), and (4)(a) of § 557.023 permits the same conduct of having four or more convictions for

prior intoxication-related offenses to be punishable as a class B, C, or D felony, and that this inherent ambiguity within the statute results in state-sanctioned arbitrary and discriminatory enforcement of the law (App. Br. 36-37). *Cf. Batchelder*, 442 U.S. at 123 (noting that the two statutes at issue, 18 U.S.C. § 922(h) and 18 U.S.C. § 1202(a), "unambiguously" specified the activity proscribed and the penalties available upon conviction).

Notably, the portion of a statute that pertains to the class or grade of the offense and defines punishment may be so vague that it offends due process. *State v. Baker*, 359 So.2d 110, 113 (La. 1978); *United States v. Evans*, 333 U.S. 483, 488-495 (1948). For example, in *State v. Anderson*, 16 P.3d 214, 218-220 (Ariz. Ct. App. 2000), an Arizona appellate court held its stalking statute was unconstitutionally vague in designating the same proscribed conduct as both a class 3 felony and class 5 felony. Missouri's section 577.023 is similarly unconstitutionally vague.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Statement, Brief, and Argument, filed on December 16, 2009, and on the arguments in this Reply Brief, Appellant Damon Feldhaus requests that the Court reverse the motion court's judgment, and vacate his convictions and sentences.

Respectfully submitted,

_____

Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
415 S. 18th Street, Suite 300
St. Louis, Missouri 63103-2237
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06, I hereby certify that on Tuesday, February 16, 2010, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Assistant Attorney General, Robert J. (Jeff) Bartholomew, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Palatino Linotype 13 point font. The word-processing software identified that this brief contains _____words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

_____

Gwenda Reneé Robinson, #43213
District Defender, Office B/Area 68
Missouri State Public Defender
Eastern Appellate/Post-conviction
415 S. 18th Street, Suite 300
St. Louis, Missouri 63103-2237
314.340.7662 (telephone)
314.340.7685 (facsimile)
Gwenda.Robinson@mspd.mo.gov