

THE MISSOURI SUPREME COURT

F. R.,

Appellant,

v.

ST. CHARLES COUNTY SHERIFF'S DEPARTMENT,

Respondent.

NO. SC 89834

**Appeal from the Circuit Court of St. Charles County
Honorable Ted House, Circuit Judge**

RESPONDENT'S BRIEF

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POINTS RELIED ON

I.

The Circuit Court ruled correctly that Section 566.147, RSMo, is not unconstitutionally retrospective because F. R. had no vested right to live at a particular prospective residence, the statute imposed no obligation upon F. R. to ascertain the presence of schools or child-care facilities in proximity to any prospective residence or to obtain a measurement of the distance between a school or a facility and the residence.

Doe v. Miller, 405 F.3d 700 (8th Cir. 2005)

State v. Gonzales, 253 S.W.3d 86 (Mo.App. E.D. 2008)

Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006)

Missouri Constitution Article I, Section 13

II.

The Circuit Court ruled correctly that Section 566.147, RSMo, was not unconstitutionally vague in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments because the statute afforded people of ordinary intelligence a reasonable opportunity to understand the prohibition of a sex offender residing within one thousand feet of a school or child-care facility and did not authorize or encourage arbitrary or discriminatory enforcement.

Crum v. Vincent, 493 F.3d 988 (8th Cir. 2007)

Missouri Constitution Article I, Section 10

III.

The Circuit Court correctly applied the rules of statutory construction in concluding that the Section 566.147.1 language “shall not reside within one thousand feet of any public school ... or any private school ... or child-care facility” contemplates a measurement from the property line of a sex offender’s residence to the property line of a school or child-care facility, which renders inapplicable the rule of lenity.

State v. Schleiermacher, 924 S.W.2d 269 (Mo. banc 1996)

State v. Turner, 245 S.W.3d 826 (Mo. banc 2008)

ARGUMENT

I.

The Circuit Court ruled correctly that Section 566.147, RSMo, is not unconstitutionally retrospective because F. R. had no vested right to live at a particular prospective residence and the statute imposed no obligation upon F. R. to ascertain the presence of schools or child-care facilities in proximity to any prospective residence or to obtain a measurement of the distance between a school or a facility and the residence.

Appellant contends that enforcing the prohibition contained in Section 566.147.1, RSMo (2008 Supp.), that restricts Appellant from residing at 305 Abingdon Court, O'Fallon, Missouri, within one thousand feet of the Kid's Academy child-care facility, based on Appellant's March 5, 1999, guilty plea to several qualifying sex offenses will violate the Missouri constitutional prohibition of enactment of a law "retrospective in its operation" as the Section 566.147.1 prohibition was not enacted and effective until 2004. Legal File 4-10; Appellant's Brief 14-15. Appellant argues that Section 566.147.1 operates retrospectively because it: (1) takes away or disables Appellant's previously vested right to choose where to live based on his status a person convicted of qualifying sex offenses; and (2) imposes new obligations on Appellant to ascertain the presence of schools or child-care facilities in proximity to any prospective residence and to obtain a distance measurement. Appellant's Brief 14-15. Appellant's contentions are incorrect.

“That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” Mo. Const. art. I, § 13.

Retrospective or retroactive laws have been defined as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past. A statute is not retrospective or retroactive, however, because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation.

Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Com’n, 702 S.W.2d 77, 81 (Mo. banc 1986) (Internal quotations and citations omitted).

Appellant has not identified any vested right which has been affected or disabled by the operation of Section 566.147.1 upon him. In attempting to find such a “right,” Appellant cites Meyer v. Nebraska, 262 U. S. 390, 399-400 (1923), for the proposition that “‘the right of the individual to ... establish a home’ [is] one of ‘those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’” Appellant’s Brief 18. But Meyer concerned a liberty interest under the 14th Amendment to teach in the German language and to teach German to children below the eighth grade, not a “right” to establish a home. Moreover, there is no constitutional right to reside in a certain place, i.e., with family members. Weems v. Little Rock Police Dep’t, 453 F.3d 1010, 1015 (8th Cir. 2006). Nor is there a fundamental right “to live where you want.” Doe v. Miller, 405 F.3d 700, 713 (8th Cir.), cert. denied, 546 U.S. 1034 (2005).

Appellant compares to the instant case this Court's decision in R. L. v. State of Missouri Dep't of Corrections, 245 S.W.3d 236 (Mo. banc 2008), that Section 566.147 was unconstitutionally retrospective when applied to a convicted sex offender who lived in a residence within one thousand feet of a school. Appellant's Brief 19. Appellant's situation, however, is unlike that of the plaintiff in R. L., who had resided in his home since 1997 within one thousand feet of a school built in 1988. R. L. plead guilty in December 2005 to a sex offense which was not added to the residency restrictions in Section 566.147 until June 2006, after which the department of corrections informed R. L. that he needed to relocate or be subject to prosecution. This Court held that the amendment imposed a new obligation upon R.L. by requiring him to change his residence based solely upon offenses committed prior to the enactment of the statute. R. L., 245 S.W.3d at 236.

In the instant case Section 566.147 does not impose a new obligation upon Appellant to abandon a longstanding residence, but rather prevents Appellant from moving into a new residence. Moreover, there is no indication that Appellant has any vested right in the residence at 305 Abingdon Court.

Appellant also maintains that Section 566.147.1 imposes new obligations on Appellant to ascertain the presence of schools or child-care facilities in proximity to any prospective residence and to obtain a distance measurement. Appellant's Brief 20. Section 566.147.1 does neither. Section 566.147.1 simply prohibits Appellant from residing within one thousand feet of any public school, private school having grades not higher than the twelfth, or child-care facility. Section 566.147.1 does not explicitly

require Appellant to ascertain the presence of schools or child-care facilities; nor does it require Appellant to make any measurements whatsoever.

The case of State v. Gonzales, 253 S.W.3d 86 (Mo.App. E.D. 2008), illustrates the practical application of finding a criminal violation of the Section 566.147.1 residency prohibition. Gonzales appealed a jury verdict finding him guilty of violating Section 566.147.1, RSMo (2004 Supp.). Id., 253 S.W.3d at 87. Gonzales argued there was insufficient evidence to prove beyond a reasonable doubt that Gonzales knew his residence was within one thousand feet of a school. Id., 253 S.W.3d at 89. The court rejected this argument, as well as whether a Section 566.147.1 violation required a culpable mental state, holding that by instructing the jury that it had to find Gonzales “acted knowingly,” the jury had to be presented with sufficient evidence to support an inference that Gonzales knew that he established residency within one thousand feet of a school. Id., 253 S.W.3d at 90. The state established that inference by showing that Gonzales knew there were a school and its playgrounds nearby his residence because he could see them from the residence and because Gonzales passed directly by the school on his way to and from work. Id., 253 S.W.3d at 90-91. Distance was established through the testimony of an employee of the Hannibal City Engineer’s Office who maintained scale maps showing the distance from Gonzales’s residence to the school. Id., 253 S.W.3d at 90.

Nothing in the Gonzales case indicated that Gonzales had to ascertain independently the location of the school or obtain his own measurement of the distance

between his residence and the school. Similarly in the instant case Appellant did not need to ascertain the location of the Kids Academy child-care facility or obtain surveys.

What did occur in this case is that Appellant notified the St. Charles County Sheriff's Department three days after moving to 305 Abingdon Court, as required by Section 589.400, RSMo. Legal File 28-29. This notification was done independently of Section 566.147.1 and did not involve Appellant having to take any action to determine Kids Academy's location or distance from 305 Abingdon Court. After receiving the Section 589.400 notification, the Sheriff's Department notified Appellant of the Kids Academy's location and distance from 305 Abingdon Court. Legal File 29-30. Appellant did not have to take any affirmative steps other than his pre-existing duty to register his move pursuant to Section 589.400 with the Sheriff's Department. As Section 566.147.1 did not require Appellant to take any affirmative action to ascertain the Kids' Academy's location and distance, it did not impose any obligation on him retrospectively based on his 1999 convictions. This Court should therefore affirm the ruling of the circuit court.

II.

The Circuit Court ruled correctly that Section 566.147, RSMo, was not unconstitutionally vague in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments because the statute afforded people of ordinary intelligence a reasonable opportunity to understand the prohibition of a sex offender residing within one thousand feet of a

school or child-care facility and did not authorize or encourage arbitrary or discriminatory enforcement.

Appellant contends Section 566.147.1, RSMo, violates the Due Process Clauses of Article 1, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments in that the language of Section 566.147.1 that certain sex offenders “shall not reside within one thousand feet of any public school ... private school ... or child-care facility” is vague on its face and must be construed in Appellant’s favor “to mean a measurement from his bedroom to the structure of the public school, private school, or child-care facility.” Legal File 7-8, 10-11.

A statute is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or authorizes or even encourages arbitrary and discriminatory enforcement. Crum v. Vincent, 493 F.3d 988, 994 (8th Cir. 2007) (citations omitted).

The operative language of Section 566.147 is that a sex offender “shall not reside within one thousand feet of any public school ... or any private school ... or child-care facility ... which is in existence at the time the individual begins to reside at the location.” § 566.147.1, RSMo (2008 Supp.). Additionally, for purposes of Section 566.147, “**resides**’ means sleeps in a residence, which may include more than one location and may be mobile or transitory.” § 566.147.3, RSMo (2008 Supp.). This statutory language is easily understandable to people of ordinary intelligence and affords

them the opportunity to understand what conduct is prohibited, i.e., residing within one thousand feet of a school or child-care facility.

Appellant actually challenges the method used by Respondent to measure the one thousand foot distance. Respondent measures from the property line of the residence to the property line of the school or child-care facility. Legal File 41. Appellant contends that the measurement should be from his bedroom to the school or child-care facility structure, Legal File 8, 11, or from the entryway or building corner of the residential structure to the school or child-care facility's entryway or building corner. See Legal File 30. Appellant's contentions are misplaced and unsupported by the language of Section 566.147.

Section 566.147 speaks not solely of "reside" and "residence," but of residing "at the location." See § 566.147.1, RSMo (2008 Supp.). The statutory definition of "resides" also states that a residence "may include more than one location." See § 566.147.3, RSMo (2008 Supp.). As a common meaning of "location" is "position in space; place where a factory, house, etc. is or is to be; situation," Webster's New World College Dictionary 793 (1997), the use of the word "location" with "reside" or "residence" strongly suggests that residence includes more than just the bedroom or residential structure as urged by Appellant. A reasonable interpretation is that utilized by Respondent: the residential property itself, especially as Appellant would have access to the entire residential property, not just the dwelling or a bedroom within the dwelling. See State ex rel. Casey's Gen'l Stores, Inc. v. Kissinger, 926 S.W.2d 191 (Mo.App. S.D. 1996) (For purposes of liquor licensure, measurement of minimum 300-foot distance

between licensee premises and church is from the licensee's property to the church as liquor could be sold on entire premises of licensee).

Respondent's interpretation finds additional support in State v. Gonzales, *supra*, which included school playgrounds within the concept of "school" for the purpose of establishing whether a sex offender acted knowingly in establishing his residency within one thousand feet of the school. Based on the language of Section 566.147.1 itself, Respondent's measuring of the one thousand foot distance from property line to property line is neither arbitrary nor capricious and Appellant's vagueness challenge must fail.

III.

The Circuit Court correctly applied the rules of statutory construction in concluding that the Section 566.147.1 language "shall not reside within one thousand feet of any public school ... or any private school ... or child-care facility" contemplates a measurement from the property line of a sex offender's residence to the property line of a school or child-care facility, which renders inapplicable the rule of lenity.

Appellant argues that the phrase "shall not reside within one thousand feet of any public school ... or any private school ... or child-care facility" used in Section 566.147.1 is ambiguous because it may contemplate measurement from property line to property line or from structure to structure. Appellant's Brief 28-29. Appellant has also previously argued that the phrase should be interpreted to mean a measurement from the

entry ways of each structure, Legal File 7, 30, 46, or from Appellant's bedroom to the school or child-care facility structure, Legal File 8, 11, 46, or even from the building corners of each structure. Legal File 30, 46.

Applying the rules of statutory construction to the use of the words "reside" and "residence" within the context of Section 566.147, the circuit court interpreted the phrase to include the entire residential property, and therefore measurement from property line to property line. Legal File 46. Appellant maintains, however, that the phrase is still ambiguous and the circuit court erred by not recognizing the ambiguity and applying the rule of lenity in Appellant's favor to conclude that the measurement must be from structure to structure. Appellant's Brief 30. Appellant's argument misses the mark.

The rule of lenity is a default rule which should only be used when other canons of statutory construction are inapplicable. State v. Turner, 245 S.W.3d 826 (Mo. banc 2008). Here the circuit court applied another rule of statutory construction: that in determining what the legislature intended, courts are constrained to take the statutory words in their plain, ordinary and usual sense, and if subject to more than one meaning to give the words a reasonable reading rather than an absurd or strained reading. State v. Schleiermacher, 924 S.W.2d 269, 275-276 (Mo. banc 1996). See Point II, supra. Consequently the rule of lenity is inapplicable and this Court should affirm the judgment of the circuit court.

CONCLUSION

WHEREFORE, the St. Charles County Sheriff's Department respectfully requests that this honorable Court affirm the judgment of the circuit court in all its aspects.

Respectfully submitted,

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RULE 84.06(b) CERTIFICATE

I certify that this brief complies with Rule 84.06(b), as effective July 1, 2008, and that this brief contains [2,639] words according to the word processing system used to prepare it, exclusive of the cover, Table of Contents, Table of Authorities, signature block, this certificate page, and the following certificate page. Further, I certify that the floppy disk served with the brief has been scanned for viruses using Computer Associates eTrust InoculateIT and, according to that software, is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Respondent's Brief were served this 30th day of June, 2009, by first-class mail, postage prepaid, upon:

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