

No. SC85725

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON

Relator

v.

THE HONORABLE DAVID RUSSELL

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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§ 558.016 RSMo 2003

II. RESPONDENT LAWFULLY RELEASED HAROLD ESTES FROM CUSTODY PURSUANT TO § 558.016 RSMo CUM. SUPP. 2003 BECAUSE THE NEW AMENDMENT TO THE STATUTE, SECTION EIGHT, IS A PROCEDURAL LAW IN THAT IT DOES NOT CHANGE OR MODIFY ESTES SENTENCE

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§ 1.160 (RSMo. 2000)

§ 217.650(RSMo. 1999).

§ 217.690(RSMo. Cum. Supp. 2003)

§ 549.261 (RSMo. 1959, repealed)

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ARGUMENT

I. THE PETITION BEFORE THIS COURT IS MOOT BECAUSE THE ACT TO BE PROHIBITED HAS ALREADY OCCURRED IN THAT HAROLD ESTES HAS BEEN RELEASED FROM CUSTODY AND PLACED ON PAROLE TO WHICH

HE NOW HAS A VESTED LIBERTY INTEREST.

Prohibition is an independent action to prevent judicial proceedings that lack jurisdiction. State ex rel. Raack v. Kohn, 720 S.W.2d 941, 943 (Mo. banc 1986). The basic purpose of prohibition is to confine an inferior court to its proper jurisdiction. State ex rel. McColloch v. Schiff, 852 S.W.2d 392, 394 (Mo. App. 1994). Because a writ of prohibition is preventive in nature, the writ will issue to restrain the commission of a future act. Id. The “future act” in this controversy is the Respondent’s order to release Harold Estes from the custody of the Department of Corrections and place him on parole with the Department of Probation and Parole pursuant to § 558.016(8) RSMo 2003. Mr. Estes was released on December 12, 2003, prior to the Court’s preliminary writ of prohibition against Respondent.

The Relator asks this Court to decide an issue which was moot when Mr. Estes was released from custody and placed on parole. A case is moot if a judgment rendered has no practical effect upon an existent controversy. State ex. rel. Chastain v. City of Kansas City, 968 S.W.2d 232, 237 (Mo. App. W.D. 1998). When an event occurs that makes a decision unnecessary or makes it impossible for the appellate court to grant effectual relief, the controversy is moot and generally should be dismissed.

State ex rel. Mansanto Co. v. Public Service Comm'n of Missouri, 716 S.W.2d 791, 793 (Mo. banc. 1986). Chastain, 968 S.W.2d at 237. The Chastain court relied upon the

Missouri Supreme Court case of State ex rel. Donnell v. Searcy, 347 Mo. 1052, 152 S.W.2d 8 (banc 1941) in deciding whether the controversy before it was moot. Donnelly held:

Where a situation so changes that no relief may be granted because it has already been obtained, the Court will not go through the empty formality of determining whether or not the relief asked for might have been granted (citations omitted). Id. at 347 Mo. at 1059. 152 S.W.2d at 10.

Defendant has been released from the Department of Corrections on parole and has a liberty interest in remaining on parole. See Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed. 2d 484 (1972). Absent a violation of his parole, this Court, nor any other court or agency, can place him back in confinement even if the Court finds Respondent acted without authority to release Estes.

The exception to the mootness doctrine is that courts in Missouri may review a moot case when the case presents an unsettled legal issue of public interest and the importance of a recurring nature that will escape review unless the court exercises its discretionary jurisdiction. Chastain, 968 S.W.2d at 237. This “public interest” exception does not apply if the issue presented in the moot case is likely to be present in a future live controversy practically capable of appellate review. Id. The issue presented in this case has been raised in several other cases in which the controversy is still “live” because

the Relator timely obtained writs

preventing release of other inmates seeking relief pursuant to § 558.016(8). The public interest exception does not apply and this court must dissolve the preliminary rule in prohibition because there is no live controversy before it.

II. RESPONDENT LAWFULLY RELEASED HAROLD ESTES FROM CUSTODY PURSUANT TO § 558.016 RSMo CUM. SUPP. 2003 BECAUSE THE NEW AMENDMENT TO THE STATUTE, SECTION EIGHT, IS A PROCEDURAL LAW IN THAT IT DOES NOT CHANGE OR MODIFY ESTES SENTENCE

Relator's argument is that Respondent lacked authority to release Estes from custody pursuant to § 558.016(8) because this amendment was not in effect when Estes was sentenced; and the amendment did not contain an express provision to apply it

retroactively to the date he was sentenced by Respondent. This position is based upon the presumptions that Estes motion for release was a request for Respondent to reopen and modify Estes' sentence, and that Respondent's order of release from custody lessened and reduced Estes sentence. The argument advanced by Relator fails because the relief afforded Estes was parole.

Prior to the enactment of the new amendments to § 558.016, the Parole Board had exclusive jurisdiction to grant parole to eligible offenders serving time in the Department of Corrections. See § 217.690(1) (RSMo. Cum. Supp. 2003). § 558.016(8) now gives sentencing courts discretion to parole eligible offenders described below. This authority is concurrent with the authority the Parole Board has over these same inmate offenders in parole considerations.

§558.016(8) in relevant part permits the sentencing court to place an inmate in custody on probation, parole, or any other court approved alternative sentence provided the inmate offender was convicted of a non-violent class C or D felony, has served at least 120 days of his sentence, and has no prior prison commitments. Estes filed a motion pursuant to the new amendment and the Respondent granted relief by granting Estes parole.

Parole is defined by the legislature in § 217.650 as:

The release of an offender to the community by the court or the state board of probation and parole prior to the expiration of his term, subject to conditions

imposed by the court or the board and to its supervision. § 217.650(4) (RSMo. 1999).

The legislature has taken the position that parole is not as an award of clemency and “shall not be considered a reduction of sentence.” § 217.690(2) (RSMo. Cum. Supp. 2003). The clear meaning of parole is that it is not a modification of sentence, a reduction of sentence, nor does it lessen a sentence. The premises advocated by Relator are contrary to the legislature’s definition of parole.

The Relator claims that it is a well established rule that parole considerations are governed by the law in effect at the time of the offense (Relator’s brief, page 17). After a thorough review of Relator’s brief, this statement appears to mean that an inmate’s parole is determined according to the law in effect at the time he was sentenced. This statement is contrary to the position Relator has successfully argued before this and other courts as discussed below.

In 1982, the legislature repealed § 549.261 (RSMo. 1959) and replaced it with § 217.690 (RSMo. 1982). § 549.261 provided that:

When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. Id.

Based upon this language, the Eighth Circuit Court of Appeals in 1981 held that the mandatory word “shall” created a justifiable expectation of release, “a liberty interest”, if the statutory criteria are satisfied. Williams v. Missouri Board of Probation and Parole, 661 F.2d 697, 698-699 (8th. Cir. 1981), cert. denied 455 U.S. 993, 102 S.Ct. 1621 (1982).

In response to the Williams decision, the legislature repealed § 549.261 (RSMo. 1959), substituting § 217.690. The word “shall” became “may in its discretion”. The new law gave the board discretion to release inmates on parole and extinguished the continuing liberty interest in the use of the old statute. There have been many challenges by inmates to prevent the Department of Probation and Parole, represented by Relator in many instances, from applying § 217.690 to parole hearings of inmates sentenced prior to the enactment of the new parole statute.

In 1995, an inmate asserted that he had a continuing right to parole hearings governed by the old statute in effect at the time of his crimes. State ex. rel Cavallaro v. Goose, 908 S.W.2d 133, 135 (Mo. banc 1995). The inmate had been convicted in 1969 of first and second-degree murder for two homicides. He was denied parole in 1994 by the Parole board. This Court found that he had no continuing liberty interest in the use of the old parole statute because the liberty interest had been extinguished by enactment of the new law. Id. at 136. The court found that:

The proper inquiry was whether conducting Cavallaro’s parole hearing under the

current statute violated the prohibition against ex post facto laws (citations omitted). The ex post facto clause is aimed at laws that are retroactive and that either alter the definition of crimes or increase the punishment for criminal acts already committed (citations omitted). Id. Missouri's current parole law is retroactive to the extent that it alters the consequences attached to a crime for which a prisoner had already been sentenced (citations omitted). However, this does not end the inquiry. Cavallaro must also establish that the change in Missouri's parole law either alters the definition or increases his punishment. Since the new parole statute clearly does not re-define any crime, the only issue is whether it increases Cavallaro's punishment. Id.

The court found that use of the new statute did not increase Cavallaro's punishment and did not violate the ex post facto clause. Id. Cavallaro also unsuccessfully argued that the change in law from a three person to five person board to determine his parole eligibility also constituted an ex post facto violation. Id. The court held that the ex post facto clause is triggered by a change in law which increases the penalty by which a crime is punishable. Id., quoting California Department of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 1602 n. 3 (1995). Denial of parole clearly does not increase the penalty of any crime, for parole is merely the early release of an offender prior to the end of his sentence as defined by the legislature.

Several other decisions in Missouri have adopted the position in Cavallaro in finding that parole hearings could be conducted under the statute in effect at the time of the parole hearing as opposed to the time of sentencing. See Wheat v. Board of Probation and Parole, 932 S.W.2d 835 (Mo. App W.D. 1996); See also Epperson v. Board v. Missouri Board of Probation and Parole, 81 S.W.2d 540 (Mo. App. W.D. 2002). Likewise, the Eighth Circuit Court of Appeals of the United States has consistently applied the “new” parole statute to prisoners who committed their offenses before the new statute’s enactment and were sentenced before the statute was enacted. See Cavallaro, 908 S.W.2d at 138, Footnote 1.

The correct statement of law in the State of Missouri is that all proceedings are conducted according to the existing procedural laws. See § 1.160(1) RSMo. 2000. Parole is a procedure to allow individuals to be released from custody prior to their sentences expiration. § 558.016(8) is a procedural law that allows an offender to petition the court for early release on parole. “Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit.” Shepard v. Consumers Cooperative Assc., 384 S.W.2d 635, 640 (Mo. banc 1964); Robinson v. Heath, 633 S.W.2d 205 (Mo. App. 1982). Respondent utilized a procedural statute, § 558.016(8), to place Estes on parole

for the balance of his sentence. Proceedings in this state are governed by the procedural rules in effect at the time.

The Relator relies upon § 1.160 RSMo. to show this Court that Respondent did not have authority to release Estes from custody and place him on parole. This argument is successful if this Court concludes that Respondent's actions modified Estes original sentence by lessening or reducing it. A review of this statute will prove to the Court that Relator's statements misstate the nature of Respondent's actions.

§ 1.160 provides for retroactive applications for changes in the substantive law creating an offense. This section provides:

No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:

(1) That all such proceedings shall be conducted according to existing procedural laws; and

(2) that if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law.

§ 1.160 (RSMo). This Court, as Relator provides on page 18 of his brief, holds that this statute means “as it states on its face, that a defendant will be sentenced as prescribed by the law in effect at the time of offense unless a lesser punishment is required by a change in the law that created the offense.” State ex. rel. Nixon v. Kelly, 58 S.W.3d 513, 518 (Mo. banc 2001).

In Kelly, the jail time credit statute was amended after a defendant had been charged but before he had been sentenced to a certain crime. The trial court granted the defendant’s habeas corpus petition by giving the defendant credit for time served prior to his sentence being pronounced. Id. at 515. This court quashed the writ of habeas corpus and held that because the jail time credit statute was not the statute that created the criminal offense to which the defendant had been convicted, the defendant could not have his penalty or punishment lessened or altered by the new jail-time credit statute . Id. at 517. Had Respondent been successful in this case, defendant’s maximum release date would have been some eight months prior to the Department of Corrections calculations. Id. at n. 2, p. 515. Thus, defendant’s sentence would have been lessened or shortened. In the present case, the Respondent did not shorten or lessen Estes’ punishment. As already stated above, parole is not a reduction of the sentence imposed; nor is it a modification of the sentence imposed. See McCulley v. State, 486 S.W.2d 419, 423 (Mo. 1972).

CONCLUSION

Respondent requests that this Court dissolve its preliminary writ of prohibition because the issue has become moot. It became moot when Estes was released from custody and placed on parole. Should this court find that it has discretionary authority to review this moot case, this writ must be dissolved. Respondent paroled Estes from custody under a “procedural” law, § 558.016. Respondent has not changed nor altered Estes sentence; nor has he reduced or lessened his sentence or punishment. Respondent has acted within his authority to release Estes from custody and place him on parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Gunter hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. This brief was completed using Word Perfect 2000 ed., in Times New Roman, size 14 font. The brief does not exceed the requirements for words allowed for a Respondent's Brief in that it contains 3,357 words.
2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using Norton Anti-Virus software. According to that program, the disk is virus-free.
3. Two true and correct copies of this brief as well as a floppy disk were mailed to:

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on the ___ day of _____, 2004

Michael J. Gunter