No. SC86072

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. LONNIE MATTHEWS

Relator

v.

THE HONORABLE MICHAEL MALONEY

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This action is an original proceeding in prohibition challenging the May 13, 2004 order of the Clay County Circuit Court, the Honorable Michael Maloney, in State of Missouri v. Lonnie Matthews, Case No. CR101-4993FX. The Respondent, in the challenged order, refused to request a report and recommendation from the Department of Corrections concerning Matthews behavior while in custody pursuant to § 558.016(8) RSMo. 2003. This Court issued its preliminary writ of mandamus on August 24, 2004. This Court has jurisdiction to determine original writs pursuant to Article V, § 4, of the Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Relator, the Defendant in the underlying criminal case, no. CR101-4993 FX, pleaded guilty to the crime of attempted assault in the second degree, a class D felony, on Septmeber 10, 2004. (Appendix, p 1-7). He testified at the plea hearing that he "attempted to operate a motor vehicle while under the influence of alcohol and acted with criminal negligence in that defendant was driving northbound in the southbound lanes of US Highway 169 and caused physical injury to Candace Crawford by colliding with a vehicle in which she was an occupant, and such conduct was a substantial step towards the commission of the crime of assault in the second degree, and was done for the purpose of committing such assault in the second degree" (Appendix , p 8). The Defendant was sentenced to a term of five (5) years in the Missouri Department of Corrections on October 31, 2002 (Appendix, p 9-10).

On April 22, 2004, Relator filed a petition for release pursuant to § 558.016(8) RSMo. 2003 because he was eligible in that he had been convicted of a non-violent class C or D felony, he had no prior prison commitments, and he had served more than 120 days of his sentence (Appendix, p 11-25). On May 13, 2004, the Respondent

refused to obtain the Department of Corrections' Report and Recommendation concerning Relator's behavior while in custody because Respondent ruled that Relator was ineligible for relief under § 558.016(8) RSMo. 2003 because the underlying conviction was for a violent felony (Appendix, p 26).

Relator filed a petition for mandamus in the Court of Appeals for the Western District on July 14, 2004. On June 17, 2004 the Court Appeals denied the relief in mandamus, Judges Holliger and Howard concurring. The petition for mandamus was filed in this Court on June 21, 2004. The Court granted its preliminary writ of mandamus against Respondent on August 23, 2004. The Respondent filed his return to the writ of mandamus on September 23, 2004.

POINT RELIED UPON

RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS FROM THIS COURT, DIRECTING THE RESPONDENT TO ORDER THE REPORT AND RECOMMENDATION FROM THE DEPARTMENT OF CORRECTIONS, PURSUANT TO § 558.016(8) RSMO 2003, AS TO RELATOR'S BEHAVIOR WHILE IN CUSTODY, BECAUSE MANDAMUS IS AN APPROPRIATE REMEDY WHEN THE DUTY TO BE PERFORMED IS MINISTERIAL AND IMPOSED BY LAW IN THAT THE CRIME RELATOR WAS CONVICTED OF WAS A NON-VIOLENT OFFENSE.

Case Law

American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 90 (Mo. banc 2000)

Boecker v. Aetna Cas. & Sur. Co., 281 S.W.2d 561, 564 (Mo. App. 1955)

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Statutes

§ 558.016(8) RSMo. 2003

§217.010.11 RSMo 2003

18 USCA § 924(c)(3)
§ 565.060(4) R.S.Mo 2003

18 USCA § 3621(e)(2)(B)

ARGUMENT

RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS FROM THIS COURT, DIRECTING THE RESPONDENT TO ORDER THE REPORT AND RECOMMENDATION FROM THE DEPARTMENT OF CORRECTIONS, PURSUANT TO § 558.016(8) RSMO 2003, AS TO RELATOR'S BEHAVIOR WHILE IN CUSTODY, BECAUSE MANDAMUS IS AN APPROPRIATE REMEDY WHEN THE DUTY TO BE PERFORMED IS MINISTERIAL AND IMPOSED BY LAW IN THAT THE CRIME RELATOR WAS CONVICTED OF WAS A NON-VIOLENT OFFENSE.

STANDARD OF REVIEW FOR MANDAMUS

Mandamus is an appropriate remedy in cases where the ministerial duties sought to be coerced are simple and definite, arising under conditions admitted or proved and imposed by the law. State ex rel. Bunker v. Meehan, 782 S.W.2d 381, 389 (Mo. banc

1990).

LEGAL AUTHORITY

The issue before this Court is whether the class D felony of attempted assault in the second degree predicated upon negligence is a nonviolent crime. If this Court finds in the affirmative, then it would be proper for this Court to order the Respondent to obtain the Department of Correction's report and recommendation pursuant to § 558.016(8) as to Relator's behavior while in custody. After a review of relevant legislation in this state, legislation by Congress, and case law, this Court will conclude that assault in the second degree predicated upon negligence is a non-violent crime.

The Defendant was convicted of the lesser included offense of attempted assault in the second degree pursuant to § 565.060(4) RSMo 2003. This section states a person commits the crime of assault in the second degree if he:

> While in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause physical injury to any other person than himself. Id.

In this case, Defendant was convicted of attempt to commit assault in the second degree. § 564.011 RSMo. provides that:

> A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the

commission of the offense. A **"substantial step"** is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

If the offense is a class "C" felony, the lesser included charge of attempt would be a class "D" felony. Id.

A person convicted of attempted assault in the second degree, predicated upon negligence, is a nonviolent offender. The Missouri Legislature has stated that:

> As used in this chapter and chapter, 558, RSMo., unless the context clearly indicates otherwise, the following terms shall mean:
>
> (11) "Nonviolent offender", any offender who is convicted of a crime other than murder in the first or second degree, involuntary manslaughter, kidnapping (sic), forcible rape, forcible sodomy, robbery in the first degree or assault in the first degree.... §217.010.11 RSMo.

Criminal negligence is defined by our legislature as "failing to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016(5) RSMo 2003. Unless the context indicates otherwise, attempted assault in the second degree predicated upon negligent

intent is a non-violent offense.

In matters of statutory construction, this Court looks to the plain and ordinary meaning of the words in the statute. American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 90 (Mo. banc 2000). This Court has repeatedly stated that in ascertaining the intent of the legislature from the language it used, the Court will consider words in their plain and ordinary meaning and will not use rules of construction if the statute contains no ambiguity. Kerperian v. Lumberman's Mut. Cas. Co., 100 S.W.3d 778, 781 (Mo. banc 2003).

§217.010.11 RSMo. contains no ambiguities and is in clear plain language for all to under stand. It begins by informing us that "unless the context clearly indicates otherwise" in Chapter 217 ***and 558*** the term "Nonviolent offender", means any offender who is convicted of a crime ***other than murder in the first or second degree, involuntary manslaughter, kidnapping (sic), forcible rape, forcible sodomy, robbery in the first degree or assault in the first degree*** (§217.010.11 RSMo 2003, emphasis added). Relator is applying for relief under Chapter 558, § 558.016(8) to be more specific. There is nothing to indicate otherwise in this chapter that someone convicted of assault in the second degree is a violent offender and the legislature has expressly excluded a person so convicted as being a violent offender. It naturally

follows from this logic that assault in the second degree under the legislative scheme is not a violent crime nor a crime of violence.

The Respondent incorrectly argued in his response to this Court's preliminary writ of mandamus that the definition of nonviolent offender contained in §217.010.11 (RSMo 2003) is "far different from the term at issue in § 558.016.8" in that §217.010.11 doesn't control the meaning of a "nonviolent class C or D felony." The Respondent further argues that the offenses listed in §217.010.11 are all class A, class B, or unclassified felonies and an attempt to compare the definition in question to the definition to nonviolent class C or D felonies would be like "comparing apples and oranges" (See Respondent's return to writ of mandamus, p. 5 footnote 1). Respondent's argument is flawed and plain wrong for many reasons. First, the crimes mentioned in §217.010.11 (RSMo 2003) are not all class A, B, or unclassified felonies. The crime of involuntary manslaughter pursuant to § 565.024 RSMo is either a Class C or a Class D felony depending upon the element of negligence. Respondent's statement that all of the crimes mentioned in § 217.010.11 are not class C or D felonies is therefore, incorrect, and the §217.010.11 definition of nonviolent offender applies to C and D felonies. Secondly, the definitions in § 217.010.11applies to chapter 558 which means that the definition of nonviolent offender in § 217.010.11does control in this case where a petition for release pursuant to § 558.016(8) has been filed. Lastly, the legislature did not expressly state that the

definition in § 217.010.11as to nonviolent offender is applied differently to class A, B, C, D, or unclassified felonies. The language in the statute was clear, unambiguous and easily understood. Assault in the second degree predicated on purposeful or negligent intent is not a violent offense nor is it a crime of violence.

The Respondent has found one instance in Missouri where assault in the second Degree is classified as a crime of violence in his response to the writ of mandamus. In June 2004, the Missouri Sentencing Advisory Commission published its *Report on Recommended Sentencing*. The commission categorized assault in the second degree as a violent crime on page 22 of its report. The classifications used by the Commission in its report as to categories of crimes are the same classifications used by the Board of Probation and Parole (*Report on Recommended Sentencing*, p. 4). However, the legislature has already defined by statute what is and what is not a crime of violence or who is a violent offender in § 217.010.11RSMo. The Board of Probation and Parole has no authority to supercede what the legislature has proscribed. The *Report on Recommended Sentencing* was written with the goal "to achieve a system of sentencing that is fair, protects the public and uses corrections resources wisely (*Report on Recommended Sentencing*, p. 4). The Committee's report has been taken out of context by Respondent to support his incorrect statement of law.

Relator's conclusion that assault in the second degree, based upon negligence, is not a violent felony is supported by various legislation enacted by Congress. Congress has defined the term "part 1 violent crime" to mean "murder and nonnegligent

manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports.[1] 42 USCA § 13701(2). This section enacted by Congress concerns the Violent Offender Incarceration and Truth-in-sentencing Incentive Grants. The language used in this section is probably what everyone thinks of when they hear the term "violent crime"- rape, murder, assaults in which someone is shot, stabbed or intentionally harmed, and robbery. These are the types of crimes the FBI reports in its Violent Crime Index. Assault in the second degree based upon negligence is not a violent crime as defined by Congress and the FBI.

Congress has also defined the term "crime of violence" as:

> an offense that is a felony and (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 USCA § 924(c)(3). In comparison of this statute to attempted assault in the second

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[1]the FBI Violent Crime Index states that "Violent Crime is composed of four offenses: murder an nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. All violent crimes involve force or threat of force." FBI Violent Crime Index 1999.

degree pursuant to § 565.060(4) R.S.Mo., based upon negligence, § 565.060(4) would not qualify as a crime of violence as defined by Congress.

Similar to Missouri's scheme for permitting early release from custody of the Department of Corrections in § 558.016(8) and § 558.046 is the Federal Bureau of Prison's authority, granted it by Congress, to allow certain offenders to receive one year of their sentences if they complete residential drug treatment and meet other eligibility requirements. See 18 USCA § 3621(e)(1). Congress stated that an offender is eligible if that offender was convicted of a nonviolent offense. 18 USCA § 3621(e)(2)(B). Congress did not define the term "convicted of a nonviolent offense" in the statute, but the legislative history of the statute indicated Congress intended the Bureau of Prisons to develop such additional criteria. H.R. Rep. No. 103-320, at 7, 1993 WL 537335 (1993). The Bureau of Prisons promulgated a regulation to exclude from eligibility inmates whose current offense is "a crime of violence" as defined by Congress in 18 USCA § 924(c)(3). See 28 CFR § 550.58 (1995). The Missouri legislative scheme differs from Congress in the area of early release in that the Missouri Legislature did not grant the Parole Board or any other agency the authority to determine what constitutes a violent offender or a violent crime. However, the Missouri Legislature already defined what is a violent offender for chapter 558 purposes. In any event, the crime of assault in the second degree predicated upon negligence is not a

crime of violence under Missouri law, federal legislation, or federal regulations.

Although counsel believes that § 217.010.11 (RSMo 2003) clearly determines the issue as to what is a crime of violence or a violent crime with respect to an inmate who is eligible for early release pursuant to § 558.016(8), Relator asks this court to examine other statutes concerning early release similar in nature to § 558.016(8). In State ex rel. Darrell Moore v. Sweeney, 32 S.W.3d 212 (Mo. App. S.D. 2000), the appellate court was asked to determine whether the crime of robbery in the second degree was a non-violent or violent act. In so deciding, the court looked at the definition of physical force in Black's Law Dictionary which states physical force "is force consisting in a physical act, especially a violent act." Id. at 216. The defendant in this case had filed a petition pursuant to § 558.046 for early release. As in § 558.016(8), crime of violence or violent act is not defined. The court concluded that § 558.046, in referring to a crime that did not involve violence or the threat of violence, is referring to a crime that did not involve the use of physical force or the threat of physical force against the victim. Id. The court held that the defendant in this case used physical force when he struck the victim for the purpose of taking his property; struck the victim with a baseball bat on the leg; and hog-tied someone with wire and placed a couch on him. The court stated that the defendant acted purposefully. Id. This is opposite of the Relator's action in the present case because he did not act purposefully to harm the

victim.

The Respondent advances the position in his return to the preliminary writ of mandamus that Relator was convicted of a violent crime because the victim "suffered substantial physical injury through a violent act of physical force (Respondent's Return, p. 8)." He further advances this argument with statements such as Relator's crime "was violent under the standard dictionary definition (Respondents's Return, p.8)." Reliance on the dictionary definition of violence or violent in determining whether a crime is considered a "violent crime" leads to a flawed result.

The proper analysis in this case is to define the term "violent crime" or "crime of violence" as a whole to reach the correct result that assault in the second degree is not a crime of violence or a violent crime. For instance, Respondent informs the Court that the Missouri Court of Appeals defined violence as "the exertion of any physical force considered with reference to its effect on another than the agent." Boecker v. Aetna Cas. & Sur. Co., 281 S.W.2d 561, 564 (Mo. App. 1955), citing *Webster's New International Dictionary, 2nd Ed.* The problem with this definition is that it does not discuss the actor's intent in the action which led to the violence. The term "violence" in Boecker was a relative term the court stated in that "no particular degree of force is required to constitute violence." Id. The "violent act" described in this case was a car striking against a tree sufficient to constitute a collision. Id. There was no inference

that the person driving the car intentionally struck the tree to cause the damage to the car. The violence was caused by a negligent act. In the Sweeney case, the violent act was caused by the purposeful intent of the actor to cause damage. The result is just exactly what the actor intended. In the present case, Relator did not intend to cause the damage to the victim in this case. Relator was guilty of being criminally negligent with respect to the injuries sustained to the victim. Therefore, his conviction was not a violent crime nor was it a crime of violence. Respondent must be compelled to order the report and recommendation from the Department of Corrections.

CONCLUSION

Relator prays that this Court issue its writ of mandamus ordering Respondent to request the report and recommendation as to the conduct of Relator while in the custody of the Department of Corrections.

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 an Appellant's Brief in that it contains 3,515 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 22nd day of October, 2004

_____
Michael J. Gunter