

**IN THE
MISSOURI SUPREME COURT**

No. SC89322

STATE OF MISSOURI,

Respondent,

v.

ROBERT LATALL, JR.,

Appellant.

On Appeal From
The Circuit Court of Cole County,
The Hon. Thomas Sodergren, Associate Circuit Judge

SUBSTITUTE BRIEF OF APPELLANT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This appeal arises from the sentence and judgment of the Circuit Court of Cole County (the Hon. Thomas Sodergren, Associate Circuit Judge) in which it found the appellant guilty, after a bench trial, of the class A misdemeanor of criminal nonsupport in violation of §568.040 and sentenced him to 90 days in jail, suspended.

This appeal does not fall within any of the categories of cases reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. This Court has jurisdiction over the appeal.

STATEMENT OF FACTS

The Prosecuting Attorney of Cole County charged Appellant Robert Latall, Jr., DOB 06-26-55 (LF 1), with criminal nonsupport for failing to make child support payments from November 1, 2004, through May 1, 2005.

At trial on December 8, 2005 (LF 5), the state presented evidence, not disputed by appellant, that, pursuant to a paternity judgment, appellant was required to pay \$948 per month in support for one child (Tr. 3-4); and that the only support received during that time period was from intercepted tax returns. (Tr. 6-7). The state further presented evidence that the child's mother had become aware, via the business's Web site, that defendant operated a bar and restaurant business that "looked like a very nice establishment" (Tr. 7-10). On cross examination, the child's mother indicated that she did not have knowledge as to whether the business was making a profit (Tr. 10-11), nor whether appellant had deliberately put himself in a position to be unable to pay support (Tr. 11); she further acknowledged receipt of \$58,878.56 in child support payments since entry of the support order in February, 2000 (Tr. 11).

Appellant testified that he left his job near Jefferson City on which the support amount was based for a similar job in Kansas City (Tr. 13-14), which employment he chose over two other offers (Tr. 15). He further testified that, shortly after the company loaned him money to buy a home in Kansas City, the

company closed the division for which he worked, and he lost the job (Tr. 14). He re-contacted the previous job offers, which were both filled (Tr. 15), and then applied at “every place I could up there” and could not find work in his field (Tr. 15). He took a job doing trim carpentry for \$10 per hour (Tr. 15). He continued to pay support when he had the money (Tr. 16).

Finding no work in the sheetmetal field for which he was trained, appellant took the dwindling remainder of his 401k(K) money and invested in a bar and restaurant business in Grain Valley in September, 2004 (Tr. 16-17). Soon after, a competing bar and restaurant, well-funded, opened up, “taking all my business from me” (Tr. 17-18). Appellant’s bar and restaurant was “not making any money” and was “barely keeping alive,” causing appellant to receive shut-off notices for gas and electric (Tr. 17). Appellant was able to pay part of a \$3219 gas and electric bill in November, 2005, (shortly before trial) to keep the utilities from being disconnected (Tr. 18).

Appellant testified that he had owned his home in Grain Valley at the time of purchasing the business but had sold that home and purchased a smaller one because of his business troubles (Tr. 19). The smaller house was then repossessed and sold on the courthouse steps (Tr. 20). Appellant still owes his former employer \$40,000 for the transition loan (Tr. 19), and still owes more than \$30,000 on the bar business in addition to his initial investment (Tr. 19). Appellant testified

that he planned to move into the backroom of his business, along with his approximately \$1500 worth of furniture (Tr. 20). Appellant's only vehicle was a \$600 truck (Tr. 21); he made the trip to Jefferson City in a borrowed vehicle (Tr. 21). He still owes \$2900 for a previous vehicle that was repossessed (Tr. 33).

Appellant testified that he has no other assets or income, and gets by by eating at the bar (Tr. 21). He stated that he works about 17 hours a day, is open from 10:30 a.m. until 3:00 a.m., and often was unable to afford to pay anyone else to work (Tr. 21-22). He testified that he pays his four current employees daily so as not to get behind with them (Tr. 22). While \$500 to \$600 in daily receipts is needed to make ends meet, over the past summer there were many days of less than \$200 in receipts, "\$74 lots of days" (Tr. 22). His main source for promotion, the Web site, costs about \$10 per month (Tr. 23).

Appellant indicated that he had not been extravagant in operating the business (Tr. 23), and that he in fact prefers to work himself because he cannot afford to pay employees and is concerned about employee theft if he is not present (Tr. 24). He holds out at least some hope that he can make the business a success eventually (Tr. 24), but testified that he was currently fighting to keep the business open on a day-to-day basis, and had considered bankruptcy (Tr. 24).

The state's cross-examination of appellant established that he had paid \$100,000 for the bar business and equipment, but did not own the building (Tr.

26), and that, at the time of making approximately \$72,000 in withdrawals from his 401(K), he was current in his child support (Tr. 25). Further, on cross examination, appellant testified that he had considered looking for other employment, but opted to keep his business overhead down and prevent employee theft by working himself (Tr. 30).

The court overruled defendant's motions for judgment of acquittal and found appellant guilty on February 2, 2006 (Tr. 35, LF 3), stating that appellant "needs to walk away from that investment and still be employed in the field for which he's trained" (Tr. 38, Appendix A6). Appellant received a suspended imposition of sentence (LF 3), and was revoked and given a 90 day suspended sentence on November 7, 2006, after failing to make all support payments under his original probation order (LF 3). This appeal followed (LF 11).

Added facts may appear in the argument of the point or points to which they relate.

POINT RELIED ON

The trial court erred in finding defendant guilty, because the court impermissibly allocated to the defendant the burden of persuasion, as the state did not offer proof to overcome appellant's injection of the issue of inability to pay support due to having no income or available assets, in that defendant offered substantial proof that, after losing his job due to company cutbacks, he invested his retirement savings in a business which is not yet making money, the state offered no evidence to refute appellant's assertions, and the trial court indicated that it believed appellant's assertions that his business was not yet profitable.

Calvin v. State, 204 S.W.3d 220, 224 (Mo.App.W.D.2006)

State v. Fincher, 655 S.W.2d 54 (Mo.App.WD.1983)

State v. Lewis, 124 S.W.3d 325 (Mo.App.S.D.2004)

State v. Strubberg, 616 S.W.2d 809 (Mo., 1981)

Section 556.051, RSMo

Section 568.040, RSMo

ARGUMENT

The trial court erred in finding defendant guilty, because the court impermissibly allocated to the defendant the burden of persuasion, as the state did not offer proof to overcome appellant's injection of the issue of inability to pay support due to having no income or available assets, in that defendant offered substantial proof that, after losing his job due to company cutbacks, he invested his retirement savings in a business which is not yet making money, the state offered no evidence to refute appellant's assertions, and the trial court indicated that it believed appellant's assertions that his business was not yet profitable.

Section 568.040, under which appellant stands convicted, provides that it is a crime for a parent to fail to provide adequate support which the parent is legally obligated to provide for a child *without good cause*.

“Good cause” is then defined in the statute as any substantial reason why the defendant is unable to provide adequate support, but precludes a finding of good cause if the defendant purposely maintains such inability. §568.040.2(2).

Though §568.040.3 provides that the defendant has the burden of injecting the issue of good cause, the burden is on the state to prove the absence of good cause beyond a reasonable doubt. Other examples of defenses which require only that the defendant “inject the issue” are: entrapment, §562.066(4); and justification for use of force in defense of persons, §563.031.

The respective burden of proof required under “diminished capacity” versus “not guilty by reason of insanity” is illuminating in this case. Pursuant to §552.015.2(8) evidence of the defendant’s mental disease or defect is admissible to prove that the defendant did or did not have the state of mind which is an element of the defense. *State v. Lewis*, 188 S.W.3d 483, 488 (Mo.App.W.D.2006). As in this case, the defendant merely has the burden of production or the burden of injecting the issue of diminished mental capacity (here, “good cause”) into the case. § 556.051; *State v. Strubberg*, 616 S.W.2d 809, 816 (Mo.1981).

In contrast, if the defendant chooses to plead not guilty by reason of mental disease or defect excluding responsibility, the defendant has both the burden of production and the burden of persuasion. *Id*; *See also* §556.056. In this case, the court plainly erred by allocating to the defendant the burdens of production and persuasion, directly contravening §568.040, which expressly allocates to defendant only the burden to inject the issue, i.e. burden of production.

Standard of Review

On review, plain errors affecting substantial rights are in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom. Mo Sup. Ct. Rule 29.12(b). The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. *State v. Moland*, 626 S.W.2d 368, 370 (Mo.1982).

In determining whether a defendant has carried his burden of injecting the issue of self-defense, it is well settled that the trial court must view evidence in a light most favorable to the defendant. *State v. Avery*, 120 S.W.3d 196, 200 (Mo.2003); See also *Vogel v. State*, 31 S.W.3d 130, 141 (Mo.App.2000) (relying on *State v. Houcks*, 954 S.W.2d 636, 638 (Mo.App.1997) (citing *State v. Weems*, 840 S.W.2d 222, 226 (Mo. banc 1992))). Logically, the same standard would apply in any case involving the "burden of injecting the issue;" otherwise, despite the definition of that concept applying equally throughout the criminal code, pursuant to §556.051, its actual application would be different from case to case.

I. The Western District erred by reviewing the trial court's decision under the standard set forth in *State v. Pettry*, accepting all evidence and reasonable inferences for guilt and ignoring all contrary evidence. *Pettry*, 179 S.W.3d 295, 296 (Mo.App.S.D.2005). Shortly thereafter, the court cites *State v. DeGraffenreid*, for the proposition that defendant's burden is "not an easy one to meet." *State v. Latall* 2008 WL 564619, 2 (Mo.App.W.D.2008) (relying on *DeGraffenreid*, 877 S.W.2d 210, 213 (Mo.App.S.D.1994)). In so doing, the court seems to confuse the general distinction between the burden of injecting an issue, applicable here, for the more onerous burden of persuasion.

The Western District, again, relies on *DeGraffenreid*, now for the specific proposition that in addition to showing insufficient income, the defendant must prove lack of substantial assets. *Latall*, at 2. (relying on *DeGraffenreid*, at 214). In that case, the defendant offered some proof of his efforts at securing employment, but was found not to have injected the issue of good cause because he failed to address the issue of whether he had sufficient assets to meet support obligations. *Id.* at 213-214. Furthermore, there, the state offered evidence to show the defendant lacked good cause to justify his nonsupport; his former wife testified that, while separated, the defendant flatly declared "I'll never pay child support." *Id.* at 212.

Here, unlike there, appellant offered substantial evidence that, through no fault of his own, he lost his job (Tr. 14), was unable to find another in his field (Tr. 15-17), and bought a business (Tr. 16-17) only to face increasingly adverse conditions and losses (Tr. 17-18), but that he had gone substantially in debt (Tr. 18-21), had lost his home and his vehicle (Tr. 20-21), planned to live in the back of his business (Tr. 20), and had no other assets from which to pay support (Tr. 21). In response, the state offered no evidence to suggest that appellant had any income or independent assets.

Defendant is entitled to the benefit of any evidence presented by the State. *State v. Achter*, 448 S.W.2d 898, 899 (Mo.1970). Further, in *State v. Fincher*, the Western District held that evidence, from any source, was sufficient to inject the issue of self defense and thereby place the burden on the state to prove otherwise beyond a reasonable doubt. *Fincher*, 655 S.W.2d 54, 54 (Mo.App.WD.1983).

Here, the state's only witness, appellant's former wife, injected the issue of, and demonstrated good cause for, appellant's inability to pay. On cross examination, appellant's former wife conceded that she knew of nothing to indicate appellant's business was making money, and similarly admitted that she had no knowledge or belief to suggest that that appellant had deliberately placed himself in a position to not make money. (Tr. 11).

This case is like *Calvin v. State*, 204 S.W.3d 220, 224 (Mo.App.W.D.2006).

There, appellant testified during his post-conviction hearing that his assets consisted of clothing and a few personal items. He owned no real property; he owned no other personal property; he had no savings account. When he found a job in the construction industry he was only able to earn \$7 an hour. The *Calvin* court reversed the appellant's conviction, holding the defendant need only inject *some* evidence of the defense of inability to pay in order to shift the burden to the state. *Id.* at 224.

In *State v. Lewis*, 124 S.W.3d 325 (Mo.App.S.D.2004), the defendant failed to inject the issue of good cause by arguing an inconsistent theory at trial. *Id.* at 326. In this case, good cause was appellant's sole defense.

In *State v. Pettry*, the defendant offered proof of an injury, but no direct proof of inability to work, and no actual proof as to his physical status during the relevant time period. *Supra* at 297. In this case, appellant is not unwilling to work, rather he puts in approximately 17 hours a day trying to make his business a success (Tr. 21-22). His testimony about business losses and lack of income cover exactly the period relevant to the charges (Tr. 16-17).

In 1979, Missouri revised the statute governing criminal nonsupport, by shifting the initial burden to inject to the defendant. Thus, cases decided under the previous law are unavailing and intentionally excluded.

There are two kinds of remedies in Missouri for failure to pay child support—civil and criminal. Appellant is still liable for back support under civil law. But a criminal conviction for failure to pay child support requires more, namely, proof that there is not a good reason why a defendant failed to pay *at the proper time*.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes. To this end, it is incumbent upon this court to supply some reasonable meaning to the “good cause” provision of §568.040. Under the trial court’s regime, later adopted by the appellate court, the definition of “good cause” is interpreted so narrowly as to strip it of any meaning. That is, when the trial court acknowledged appellant is factually unable to pay support, but nonetheless declines to find “good cause,” this Court must apply some common sense to save this statute.

To this end, we must contemplate some scenario under which a defendant can qualify for that exception.

In this case, appellant, 50 years old at the time of trial (LF 1), lost a job under circumstances familiar to many—his division closed, and he was laid off (Tr. 14). As with many his age, he was unable to find employment at his level (Tr. 15). The state offered not as much as a hint that defendant willingly put himself in this position.

Finding only menial carpentry work (Tr. 15), he decided to take his shrinking retirement money and invest in a bar and restaurant business (Tr. 16-17). Unanticipated competition contributed to a dismal business situation (Tr. 17-18), but again the state advanced no contention whatsoever that appellant was deliberately putting himself in a position to avoid paying support.

Appellant, at the time of trial, testified that he continued to hope for eventual success and profit in the business (Tr. 24). Nonetheless, the court accepted the state's argument that appellant should find work in his field (although the state offered no evidence to refute appellant's testimony that none was available), even "[i]f it means letting his business go under" (Tr. 35).

With all due respect, the trial court's ruling that appellant "needs to walk away" from the investment of his life savings (Tr. 38), while hope of success exists, seems to overreach. Nonetheless, in so stating, the trial court acknowledges that appellant is currently unable to generate enough income for support payments, or, at the very least, that the state has not proven otherwise beyond a reasonable doubt and has therefore not met its burden of proof.

The child who lacks monetary support at this point still has a civil remedy to get that support. But to label his father a criminal for making what, in the short term, and perhaps the long also, was a less-than-lucrative business investment, is beyond what §568.040 should do.

CONCLUSION

WHEREFORE, the appellant prays the Court for its order that the judgment of the court below be vacated, and the cause remanded with instructions to enter a judgment of acquittal.

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Certificate of Compliance

I certify that (1) the foregoing brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3486 words, excluding the cover, this certification, the certificate of service, and the signature block, as determined by Microsoft Word 11.0; and (2) the CD-ROM filed with this brief, containing a copy of this brief, has been scanned for viruses and that it is virus-free.

Attorney for Appellant

Certificate of Service

I hereby certify that two (2) true and correct copies of the foregoing, as well as an electronic copy, were deposited in the mails, first-class postage prepaid, this 28th day of July, 2008, to:

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