

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)
)
 Appellant,)
)
 vs.) No. SC 90164
)
 CHARLES A. RAYNOR,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF AUDRAIN COUNTY, MISSOURI
TWELFTH JUDICIAL CIRCUIT
THE HONORABLE LINDA R. HAMLETT, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent was charged with failure to comply with Halloween related restrictions for sex offenders, Section 589.426, RSMo (Cum. Supp. 2008). The Honorable Linda R. Hamlett sustained respondent's motion to dismiss, holding that Section 589.426 violates Article I, Section 13, of the Missouri Constitution. The state appeals. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

Respondent was charged by information filed November 26, 2008, with failure to comply with Halloween related restrictions for sex offenders, Section 589.426, in that he allegedly failed to turn off the porch light at his residence and failed to display a sign stating “no candy or treats at this residence.” (L.F. 48-49).¹ Respondent filed motions to dismiss the first and second amended informations, asserting that the statute is unconstitutional on its face and as applied to respondent (L.F. 21-27, 38-42). The motions alleged in part that the statute violates the Missouri constitutional ban on retrospective laws. Article I, Section 13, Mo. Const. (L.F. 39).

A hearing on the motion to dismiss was held (Tr. 2). Jennifer Maddox testified that she and respondent lived at 808 N. Jefferson in Mexico, Missouri (Tr. 3). On Halloween night, 2008, she was at the house handing out candy (Tr. 3). A person came up and identified himself to her as law enforcement (Tr. 3). He told her they could not hand out candy at the house because respondent was a sex offender (Tr. 4). She stopped (Tr. 4).

¹ The first and amended informations filed actually listed the statute number as 589.425, but that was corrected in the second amended information, filed March 11, 2009 (L.F. 36). The second amended information alleged that respondent’s prior conviction was from 1990 in the State of Washington (L.F. 36).

Detective William Johnson of the Mexico police was checking sex offenders that day for compliance (Tr. 5-6). At 6:30 p.m., he saw respondent's porch light was on and Jennifer Maddox was handing out candy to children (Tr. 6-7). Ms. Maddox is not a sex offender (Tr. 4). There was no sign in the yard (Tr. 7). Ms. Maddox said that respondent was inside, and she knew he was a convicted sex offender (Tr. 7-9). Detective Johnson testified that respondent was current on his registration (Tr. 9). Respondent's prior offense is from 1990 in the State of Washington (Tr. 5).

The court entered an order sustaining respondent's motion to dismiss the second amended information on April 23, 2009, finding that "Section 589.426 RSMo violates article 1, section 13 of the Missouri Constitution." (L.F. 19). Notice of appeal was filed April 28, 2009 (L.F. 16).

ARGUMENT

Section 589.426 is unconstitutional as applied to respondent, who was convicted in 1990 of his prior offense, because it violates Article I, Section 13, of the Missouri Constitution, in that Section 589.426, which took effect August 28, 2008, created a new obligation, imposed a new duty, and attached a new disability with respect to prior convictions since it required convicted sex offenders to avoid all “Halloween-related” contact with children, remain inside their homes on Halloween night, post a special sign in front of their homes, and turn off their porch lights between the hours of 5:00 p.m. and 10:30 p.m.

Standard of review

This Court reviews issues of law *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). Statutes are presumed to be constitutional. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000) (citations omitted). This Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Appellant's brief

Appellant's brief asserts that the statute is constitutional for three reasons: (a) the state has a compelling interest in protecting children; (b) it does not punish behavior on prior Halloweens; and (c) it is not an ex post facto law (App. br. 8). Respondent agrees that protecting children has been held to be a compelling state interest. *In re Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2003). This is relevant only as to equal protection or substantive due process analysis, and is of no matter in this case. *Id.* at 173; *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006). Respondent further agrees that prior Halloweens are not at issue, and that Missouri's registration laws have been held not to violate the ex post facto clauses of the Missouri and United States Constitutions. *Doe v. Phillips*, 194 S.W.3d at 842.

Section 589.426 violates the Missouri constitutional ban on retrospective laws

Section 589.426 is retrospective as it purports to add duties, obligations and restrictions to the conduct of those convicted of sex offenses before its effective date of August 28, 2008. Respondent was convicted of a sex offense in the State of Washington in 1990 (Tr. 5, Ex. A). He was registered as a sex offender in the State of Missouri, and was in full compliance with registration laws (Tr. 9).²

² Interestingly, as respondent was convicted before the effective date of Missouri's Megan's Law, January 1, 1995, he would have been able to have his name taken

Because he was convicted before the effective date of the statute in questions, August 28, 2008, it violated Missouri's ban on retrospective laws to apply its restrictions to him.

In *Doe v. Phillips*, a group of convicted sex offenders sued to prevent enforcement of the sex offender registration requirements, known as "Megan's Law," against them. 194 S.W.3d at 838. This Court rejected the petitioners' arguments that Megan's Law violated their due process and equal protection rights, and that the law violated prohibitions against ex post facto laws, bills of attainder and special laws. *Id.* The Court held, however, that the registration requirements could not be enforced against those whose convictions were before the enactment of Megan's Law in 1995. *Id.* To do so would violate Missouri's constitutional prohibition on laws retrospective in their operation. *Id.*

Article I, Section 13 of the Missouri Constitution states that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation ... can be enacted." While the ex post facto clause has been held to be co-extensive with that in the federal Constitution, there is no similar ban on laws

off the registry after *Doe v. Phillips* came down in 2006, but required to put it back in 2009 when *Doe v. Keithley* was handed down. 290 S.W.3d 719 (Mo. banc 2009). He would not technically have had to register on the 2008 Halloween in question.

retrospective in their operation in the federal Constitution. *Id.* at 841. This Court defined a retrospective law:

one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.

Id. at 850; citing *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911). The Court held that registration itself was a new duty or obligation for those convicted before 1995. *Doe v. Phillips*, 194 S.W.3d at 852.

Section 589.426 requires persons required to register as a sex offender, on October 31, to

- Avoid all Halloween-related contact with children: *a new disability.*
- Remain inside his residence between 5:00 and 10:30 p.m.: *a new duty or obligation.*
- Post a sign stating “No candy or treats at this residence:” *a new duty or obligation.*
- Leave the porch light off: *a new disability.*

It violates Missouri’s ban on retrospective laws. A review of other cases in this area since *Doe v. Phillips* is instructive.

In *Doe v. Blunt*, 225 S.W.3d 421 (Mo. banc 2007), the petitioner had pleaded guilty to an offense in May 2004 that was not made subject to registration

until August 2004. This Court held that the law was retrospective and the petitioner was not obligated to register. *Id.* at 421.

In *R.L. v. Missouri Department of Corrections*, 245 S.W.3d 236 (Mo. banc 2008), the petitioner pleaded guilty to a sex offense in December 2005. In 2006, a new residency requirement for sex offenders was passed by the legislature, which would have required R.L. to move. *Id.* at 237. This Court found that to be a new obligation, duty or disability, and therefore unconstitutional under Article I, Section 13 of the Missouri Constitution. *Id.* at 238. *But see, State v. Gonzales*, 253 S.W.3d 86 (Mo. App., E.D. 2008) (claim that statute was unconstitutional as applied to him was not raised at the earliest possible opportunity and was therefore waived; and Gonzales not compelled to change his residence because the earlier version of the statute containing a grandfather clause applied).

In *Cannon v. Cannon*, 280 S.W.3d 790 (Mo. banc 2009), a wife appealed a trial court's holding a statute unconstitutionally retrospective as applied to her ex-husband which precluded him as a convicted sex offender from unsupervised visitation with his natural children. This Court reversed and found that the statute at issue was not retrospective in its operation as applied to the husband. At the time of the dissolution, the husband had been awarded only supervised visitation. 280 S.W.3d at 81. He had no right to assume that the laws would remain the same between the time of the dissolution and the time he later sought unsupervised visitation. *Id.* Unlike *Doe v. Phillips*, no new disability or obligation was at issue. “[A] statute is not retrospective ... because it [merely] 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 a person for the purpose of its operation.” *Cannon*, 280 S.W.3d at 84, *citation omitted*. Mr. Cannon had no vested right in an unchanged law. The law was not retrospective as applied to him. *Id.* at 85.

Most recently, in *Doe v. Keithley*, 290 S.W.3d 719 (Mo. banc 2009), petitioners sought a judgment declaring that they were not subject to sex offender registration requirements where their misdemeanor convictions were imposed prior to the statute adding those offenses to the registration scheme. Those petitioners, this Court held, did not benefit from *Doe v. Phillips* and the Missouri Constitutional ban on retrospective laws. Their registration requirement did not arise from the enactment of a state law, but rather from the federally mandated requirements of the Sexual Offenders Registration and Notification Act (SORNA). 42 U.S.C. Section 16913. “The independent registration requirement under SORNA operates irrespective of any allegedly retrospective state law that has been enacted and may be subject to the article I, section 13 ban on the enactment of retrospective state laws.” *Doe v. Keithley*, 290 S.W.3d at 720.

Here, there is no independent federal law mandating respondent to refrain from Halloween-related activities; to post a “no candy” sign, or to remain in his home with his porch light off on Halloween night. That new obligation, duty and disability arises out of Section 589.426, which became effective eighteen years after respondent’s conviction. The trial court’s ruling that Section 589.426

violates the Missouri Constitutional restriction on retrospective laws is correct and must be upheld. This case is controlled by *Doe v. Phillips* and should be affirmed.

CONCLUSION

For the reasons presented, respondent respectfully requests that this Court affirm the trial court's dismissal of the charge of violation of Halloween restrictions.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,178 words, which does not exceed the 27,900 words allowed for a respondent's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in October, 2009. According to that program, the disks provided to this Court and to the Prosecuting Attorney are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 6th day of November, 2009, to Jacob Shellabarger, Audrain County Prosecutor, 101 N. Jefferson, Room 306, Mexico, MO 65265.

Ellen H. Flottman

APPENDIX

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