IN THE SUPREME COURT
OF THE STATE OF MISSOURI

Case No. SC87652

GARVIS DUDLEY,

Respondent,

v.

DENIS AGNIEL
and
GARY KEMPKER,

Appellants.

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondent hereby adopts by reference as through fully set forth herein the Jurisdictional Statement as set forth in Appellants' Substitute Brief.

STATEMENT OF FACTS

I. Introduction

Respondent Garvis Dudley is currently in the custody of the Missouri Department of Corrections, serving an eight-year prison sentence as a result of his plea of guilty on March 27, 2001, to a charge of second degree assault on March 27, 2001. (L.F. at 34).[1] This appeal arises out of Mr. Dudley's Petition for Declaratory Judgment filed in the Circuit Court of Cole County, Missouri, wherein Dudley sought relief from the Missouri Department of Corrections's determination that he must serve eighty percent of the eight year sentence, prior to be being eligible for parole. (L.F. at 48). Mr. Dudley prevailed on his claims for declaratory judgment before the Circuit Court of Cole County (L.F. at 11-12), and also successfully defended an appeal by the Department of Corrections before the Missouri Court of Appeals, Western District. (*Dudley v. Agniel*, WD 65507, Memorandum Opinion). By a majority of the judges constituting the Court en banc of the Missouri Court of Appeals, Western District, this case was transferred after opinion to this Court pursuant to Missouri Supreme Court Rule 83.02.

The narrow issue before this Court is whether Section 559.115.7, RSMo 2003 must be retroactively applied to govern the procedure by which the Department of Corrections calculates an inmate's minimum parole eligibility under Section 558.019 RSMo.

II. Factual Background

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[1]References to the legal file will be by page number, designated "(L.F. at ***)."

Mr. Dudley entered a plea of guilt to second degree assault on March 27, 2001, before the Circuit Court of Saint Louis County, Missouri. (L.F. at 34). Upon his plea, the trial court convicted Mr. Dudley and sentenced him to eight years in prison, after which he was committed to the custody Missouri Department of Corrections ("DOC"). (L.F. at 34).

Thereafter, the DOC reviewed Mr. Dudley's prior criminal record, and made a determination that because Mr. Dudley had three "previous prison commitments," he was required to serve a minimum of eighty percent of his eight-year sentence prior to being eligible for parole. (L.F. at 34). This determination, however, was predicated upon the DOC's treatment of Mr. Dudley's previous commitment under 559.115 to a 120 day "callback program" as a "previous prison commitment" for purposes of Section 558.019. (L.F. at 57).

Subsequently, in 2003, the Missouri Legislature enacted Section 559.115.7, which provides as follows:

> An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo.

Section 559.115.7 RSMo 2003.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN RULING THAT SECTION 559.115.7 SHOULD BE APPLIED RETROACTIVELY TO GOVERN THE METHOD BY WHICH THE MISSOURI DEPARTMENT OF CORRECTIONS CALCULATES AN INMATE'S MINIMUM PAROLE ELIGIBILITY UNDER SECTION 558.019 RSMo, BECAUSE SECTION 559.115.7 IS A SOLELY PROCEDURAL STATUTE, IN THAT IT DOES NOT CREATE, DEFINE, OR REGULATE A VESTED SUBSTANTIVE RIGHT, BUT RATHER IT MERELY PRESCRIBES PART OF THE PROCESS BY WHICH AN INDIVIDUAL'S PAROLE ELIGIBILITY IS DETERMINED.

State ex rel. Saint Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974)

Nieuwendaal v. Missouri Department of Corrections, 181 S.W.3d 153 (Mo. App. W.D. 2005)

Bantle v. Dwyer, 195 S.W.3d 428 (Mo. App. S.D. 2006)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN RULING THAT SECTION 559.115.7 SHOULD BE APPLIED RETROACTIVELY TO GOVERN THE METHOD BY WHICH THE MISSOURI DEPARTMENT OF CORRECTIONS CALCULATES AN INMATE'S MINIMUM PAROLE ELIGIBILITY UNDER SECTION 558.019 RSMo, BECAUSE SECTION 559.115.7 IS A SOLELY PROCEDURAL STATUTE, IN THAT IT DOES NOT CREATE, DEFINE, OR REGULATE A VESTED SUBSTANTIVE RIGHT, BUT RATHER IT MERELY PRESCRIBES PART OF THE PROCESS BY WHICH AN INDIVIDUAL'S PAROLE ELIGIBILITY IS DETERMINED.

A. Standard of Review

A trial court's judgment will be affirmed regarding issues of fact unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *See Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Questions of law are reviewed *de novo*. *Id.*

In the case at bar, it would appear that the facts are undisputed. Accordingly, this Court reviews *de novo* the trial court's conclusion of law that Section 559.115.7 RSMo applies retroactively to govern the method by which the Missouri Department of Corrections calculates minimum parole eligibility under Section 558.019 RSMo.

B. Discussion

1. Section 559.115.7 Applies Retroactively, Because It Is Procedural, Rather Than Substantive.

The trial court correctly granted declaratory judgment in favor of Mr. Dudley, ruling that Section 559.115.7 RSMo applies retroactively to govern the method by which the Missouri Department of Corrections calculates an inmate's minimum parole eligibility under Section 558.019 RSMo, because Section 559.115.7 is a solely procedural statute. While there is a general presumption against the retrospective application of newly enacted laws, *see* Article I, Section 13 of the Missouri Constitution, there are two recognized exceptions to this general rule. First, a law may apply retroactively "where the legislature manifests a clear intent that it do so." *See State ex rel. Saint Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974). The second exception – of particular moment to the case at bar – applies "when the statute is solely procedural and does not affect any substantive right of the parties." *Id.*

A statute "affects a party's substantive rights" if it "take[s] away or impair[s] vested rights acquired under existing laws, or create[s] a new obligation, impose[s] a new duty, or attach[es] a new disability in respect to transactions or considerations already passed." *Id.* Alternatively, a merely procedural law does not create, define or regulate vested rights, but rather "is the machinery used for carrying on the suit," and prescribes a method of enforcing rights or obtaining redress for their invasion. *See State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005).

While such esoteric principles resist easy application in praxis, a simple reading of the plain language of Section 559.115.7 favors a conclusion that the statute prescribes procedure, rather than that it creates a vested right, duty or obligation. The statute provides as follows:

> An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019 RSMo.

This statutory provision, in and of itself, creates no right to parole consideration, nor does it otherwise alter the mandatory minimum parole eligibility structure created by Section 558.019. Rather, Section 559.115.7 merely operates to govern the <u>process</u> by which the DOC ascertains how many "previous prison commitments" an individual has had, which informs the ultimate determination of that individual's minimum parole eligibility.

Indeed, in considering the question of whether Section 559.115.7 affects any substantive or "vested" right, one must clearly understand what "right," if any, it purportedly affords an inmate. Assuming that Section 559.115.7 is applied by the DOC in counting an inmate's previous prison commitments, what results is a mere determination of the inmate's minimum parole eligibility. *See* Section 558.019.5 ("For purposes of this section, the term "minimum prison term" shall mean time required to be served by the offender before he or she is eligible for parole, conditional release or other early release by the department of corrections."). But, critically, once the inmate's minimum parole eligibility is calculated, he

or she does not then enjoy a vested right to immediate release upon the arrival of the minimum parole eligibility date. Indeed, the cases are legion holding that the DOC retains nearly unfettered discretion in determining whether the inmate should be released at any time prior to the completion of his or her sentence. *See, e.g., State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995) ("The [parole] statute creates no justifiable expectation of release, giving the Board 'almost unlimited discretion' in whether to grant parole release.").

Thus, because it is well-settled that inmates have no "vested right" to parole, the application of Section 559.115.7 does not – as the DOC blithely suggests in its briefing – result in a "reduced penalty" for inmates whose prior commitments to 120-day treatment programs do not count as "previous prison commitments." Regardless of when an inmate is first eligible for parole, his or her penalty – a sentence to a term of years – remains the same.

The Missouri Courts of Appeals, Western District employed precisely this reasoning in ruling that Section 559.115.7 is purely procedural, as opposed to substantive, in nature. *See Nieuwendaal v. Missouri Department of Corrections*, 181 S.W.3d 153, 155 (Mo. App. W.D. 2005) (holding that Section 559.115.7 is retroactively applicable, because it "clarifies the procedure by which minimum prison terms are determined," and because it "does not increase the length of an offender's sentence or affect substantive rights.").

Similarly, in its recent opinion in *Bantle v. Dwyer*, 195 S.W.3d 428 (Mo. App. S.D. 2006), the Missouri Court of Appeals, Southern District considered the retroactive

applicability of a provision contained in Section 217.362.5, which is identical in substance to Section 559.115.7. *Id.* at 430. The Southern District held that Section 217.362.5 – like Section 559.115.7 – should be applied retroactively, not only because it was procedural, in that it "clarifies the procedure by which minimum prison terms are determined under Section 558.019," *id.* at 433, but also because "[a]s a statute affecting an offender's parole eligibility, neither does it lengthen or shorten an offender's sentence." *Id.*

Thus, because Section 559.115.7 is purely procedural in nature, and because it affects no "vested" substantive right of any party, the trial court did not err in ruling that it applies retroactively to govern the method by which the Missouri Department of Corrections calculates minimum parole eligibility under Section 558.019 RSMo.

2. This Court's Opinion In State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988) Does Not Forbid Retroactive Application Of Section 559.115.7.

The Department of Corrections argues that this Court's opinion in *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) forbids retroactive application of a statute which has an impact upon minimum parole eligibility, because such a change is "substantive" rather than "procedural." But, closely read, the opinion in *Lawhorn* does not paint with so broad a stroke.

In *Lawhorn*, this Court addressed the question of whether an application of the minimum parole eligibility requirements of Section 558.019 – which became effective approximately one month after the appellant's offense occurred – violated the protections against *ex post facto* laws found in Article I, Section 10 of the United States Constitution and

Article I, Section 13 of the Missouri Constitution. *Lawhorn*, 762 S.W.2d at 824. In holding that such application is indeed forbidden by the *ex post facto* clauses, this Court expressly observed that while the appellant had no vested right to a defined time period for parole eligibility, "a law need not impair a vested right to violate the *ex post facto* clause." *Id.* at 825 (emphasis added) (citing *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964 (1981)). Thus, this Court made clear in *Lawhorn* that legislation which did not impact a "substantive" or "vested" right – as such term is defined in *Buder*, 515 S.W.2d at 410 – may still violate the *ex post facto* clause, so long as such legislation "disadvantage[s] the offender affected by it." *Lawhorn*, 762 S.W.2d at 824.

Indeed, the United States Supreme Court, in *Weaver*, drew an express distinction between retroactivity analysis in cases involving the *ex post facto* clause and other cases:

> In using the concept of vested rights . . . the [lower] court apparently drew on the test for evaluating retrospective laws in a civil context. . . . Discussion of vested rights has seldom appeared in *ex post facto* analysis, as in identifying whether the challenged change is substantive rather than procedural. . . . When a court engages in *ex post facto* analysis, which is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred, it is irrelevant whether the statutory change touches any vested rights.

Weaver, 450 U.S. at 30, n. 13.

Thus, the Department of Corrections is incorrect in concluding that simply because this Court refused, in *Lawhorn*, to retroactively apply the parole requirements of Section 558.019 RSMo to the disadvantage of an inmate, any legislative change to parole statutes – even if they operate to an inmate's advantage – necessarily involve "substantive" or "vested" rights, thereby foreclosing the retroactive application of such statutes. *Lawhorn* cannot and should not be read so broadly. Indeed, in its opinion in *Bantle v. Dwyer*, 195 S.W.3d 428 (Mo.App.S.D. 2006), the Southern District expressly noted that *Lawhorn* did not compel such conclusion:

> The State argues that *Lawhorn* prohibits the retroactive application of a statute which increases or increases the mandatory minimum prison term, because such a change is substantive rather than procedural. We disagree. Simply put, Section 217.362.5 is not a law which disadvantages an offender, and therefore, *Lawhorn* does not control its application. While we recognize that "adverse changes in the time at which a prisoner becomes eligible for parole consideration may violate the *ex post facto* clause . . . as long as [a] new statute does not increase the length of an offender's sentence, the changes it makes are a fit subject for legislation.

Id. at 434.

Respondent respectfully urges that the Southern District's reading of *Lawhorn* is correct: *Lawhorn*, closely read, does not compel the conclusion that any legislation impacting parole eligibility necessarily involves a "substantive" rather than a "procedural" matter.

Indeed, given the express observation in *Lawhorn* that "a law need not impair a vested right to violate the *ex post facto* clause," Respondent respectfully disagrees with the Missouri Court of Appeals, Western District's conclusion in its opinion below that "*Lawhorn* held that a new law mandating a minimum prison term could not be retroactively applied because it adversely affected the offender's substantive rights by enlarging his minimum prison term," and that therefore this Court's opinion in *State ex rel Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004) "overruled *Lawhorn* sub silentio." Rather, in Respondent's estimation, *Lawhorn*, *Russell*, and the opinion of the Western District below can be easily harmonized: statutes which impact minimum parole eligibility may offend the *ex post facto* provisions of the Due Process Clause due to the fact that they disadvantage an offender, even though they do not "take away or impair vested rights acquired under existing laws." *See Buder*, 515 S.W.2d at 410. Thus, this Court need not expressly overrule *Lawhorn* in order to conclude that Section 559.115.7 is purely procedural, and therefore retroactively applicable.

3. Section 1.160 RSMo Does Not Forbid Retroactive Application Of Section 559.115.7.

The Department of Corrections also argues that Section 559.115.7 may not be applied retrospectively, because Section 1.160 RSMo, by its terms, forbids it. But, Section 1.160 has no application to Section 559.115.7, for three reasons: (1) by its terms, Section 1.160 applies only to "repealed or amended" statutes, and Section 559.115.7 was a newly enacted statute which did not repeal or amend a previous statute; (2) by its terms, Section 1.160 only forbids the retrospective alteration of "penalties," and Section 559.115.7 does nothing to shorten a

defendant's sentence, or alter the law creating the offense; and (3) by its terms, Section 1.160 excepts from its prohibitions "existing procedural laws," and Section 559.115.7 is a purely procedural provision.

Section 1.160 RSMo 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 that all such proceedings shall be conducted according to existing procedural laws.

Section 1.160 RSMo 2005.

Plainly read, this provision has no application to the case at bar. First, on its face, Section 1.160 applies only to "repeals" or "amendments." New statutory provisions, such as Section 559.115.7, are not impacted by Section 1.160. *See, e.g., State ex rel. Nixon v. Russell*, 129 S.W.3d 867, 870 (Mo. banc 2004) (holding that Section 1.160 has no application to Section 558.016.8, because it "is a new statutory provision," not a "repeal or amendment."); *Irvin v. Kempker*, 152 S.W.3d 358, 362 (Mo. App. W.D. 2005) (Section 1.160 does not apply to Section 559.115.7, because it is a new statute).

Similarly, Section 1.160 does not apply to Section 559.115.7, because it does not in fact shorten Mr. Dudley's sentence or alter the law creating the offense. *See Russell*, 129

S.W.3d at 870; *Niewendaal*, 181 S.W.3d at 155. As noted in Section B.1 *supra*, even assuming that Section 559.115.7 is applied by the DOC in counting an inmate's previous prison commitments, what results is a mere determination of the inmate's minimum parole eligibility. *See* Section 558.019.5. Once the inmate's minimum parole eligibility is calculated, he or she does not then enjoy a vested right to immediate release upon the arrival of the minimum parole eligibility date. *See, e.g., State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995) ("The [parole] statute creates no justifiable expectation of release, giving the Board 'almost unlimited discretion' in whether to grant parole release.").

Thus, because it is well-settled that no inmate has a "vested right" to parole, the application of Section 559.115.7 does not result in a "reduced penalty" for inmates whose prior commitments to 120-day treatment programs do not count as "previous prison commitments." Regardless of when an inmate is first eligible for parole, his or her penalty – a sentence to a term of years, remains the same.

Finally, by its very terms, Section 1.160 excepts from its operation "existing procedural laws." As fully briefed in Section B.1 *supra*, Section 559.115.7 is a purely procedural law, governing the method by which the DOC calculates minimum parole eligibility. Accordingly, even if this Court determines that Section 1.160 has any application whatsoever to the case at bar, by its terms, it excepts laws such as Section 559.115.7. Therefore, the DOC's position should be rejected.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Respondent respectfully prays that the judgment of the Circuit Court of Cole County be AFFIRMED.

Respectfully submitted,

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I hereby certify that two copies of the foregoing were mailed this 4th day of October, 2006, to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Substitute Brief of Respondent in the above-captioned matter complies with Rule 55.03 of the Missouri Rules of Civil Procedure. More specifically, this brief was prepared using WordPerfect 9, printed in 13-point Times New Roman proportionally-spaced type font. I further certify that, in conformity with the requirements of Rule 84.06(b), the above brief contains 3,407 words. I further certify that the computer diskette submitted herewith was new out of the box and that after the brief was copied thereon, the diskette was scanned for viruses using Trend OfficeScan WinNT 7.2 and no viruses were detected.

_____

Attorney for Appellant

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