

No. SC87898

IN THE
MISSOURI SUPREME COURT

JAMES F. FUREY,

Respondent/Petitioner,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant/Respondent.

Appeal from the Grant of Summary Judgment in a Declaratory Judgment Action in
The Circuit Court of Cole County, Missouri
The Honorable Thomas J. Brown, III, Judge

APPELLANT'S SUBSTITUTE BRIEF
AFTER TRANSFER FROM THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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JURISDICTIONAL STATEMENT

This court has jurisdiction as a timely notice of appeal was filed from a declaratory

judgment by the Cole County Circuit Court, a circuit court within the geographical jurisdiction of the Missouri Court of Appeals, Western District which transferred the case after opinion to this Court. Missouri Constitution Article V, §3 (as amended in 1982).

STANDARD OF REVIEW

The decision of the circuit court in the declaratory judgment action is evaluated on whether there is substantial evidence to support the decision, whether the decision is supported by the weight of the evidence, and whether the decision correctly declares and applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Questions of law are reserved for the independent judgment of the appellate court without deference to the trial court's determination. *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d 176 (Mo. App. W.D. 2005).

There are no disputed material facts in this case. The case is, therefore, subject to *de novo* review of whether the circuit court decision correctly declares and applies the law.

STATEMENT OF FACTS

This case is about whether James Furey's first 120-day incarceration in the Department of Corrections should count as a prior commitment requiring Furey to serve a fifty percent mandatory minimum prison term on his current sentences with the Missouri Department of Corrections as opposed to a forty percent mandatory-minimum if the commitment for the first 120-day program is retroactively removed by applying §559.115.7, RSMo 2003 (Cum. Supp.) retroactively.

Furey received a commitment to the Department of Corrections in 1989 (LF, pages 7, 10, 50). This commitment is not a matter of controversy (LF, page 8, paragraph 12).

In addition to the 1989 commitment (LF, pages 50-51), the Department received Furey on July 3, 2001 (LF, page 50) to serve shock time for four concurrent four-year sentences for possession of cocaine base, second degree burglary, second degree burglary and stealing over \$750 under §559.115, RSMo (LF, page 35). The sentencing court placed him on probation on October 31, 2001 (LF, page 15). Furey violated probation by committing new offenses (LF, pages 17, 18). He returned to the Department on August 28, 2002 (LF, pages 15, 17, 18). He also received new concurrent seven year sentences for second degree burglary, first degree tampering and possession of a controlled substance (LF, page 16). The Department considers Furey ineligible for parole until he has served fifty percent of these seven year sentences due to two prior commitments. Section 558.019.2, RSMo. 2005 (Cum. Supp) (LF, page 16).

Furey filed a "Petition for Declaratory Judgment With Brief in Support" in the Circuit

Court of Cole County on February 28, 2005, arguing that his mandatory minimum prison term should be forty percent instead of fifty percent because he had one prior commitment instead of two under §558.019, RSMo. (LF, page 4). Furey filed a motion for summary judgment (LF, page 25) and the Department filed a motion for judgment on the pleadings (LF, page 52). The circuit court denied Department's motion and granted Furey's motion (LF, pages 55-56 citing *Irvin v. Kempker*, 152 S.W.3d 358 (Mo. App. W.D. 2005).) for the proposition that §559.115.7, RSMo 2003 (Cum. Supp) requires the retroactive removal of the commitment Furey received for his initial 120-day shock incarceration. The Department of Corrections filed a timely notice of appeal (LF, page 57). Following opinion the Missouri Court of Appeals Western District transferred the case to the Missouri Supreme Court.

POINT RELIED ON

The Circuit Court of Cole County erred in applying §559.115.7, RSMo 2003 (Cum. Supp.) retroactively to reduce Furey's mandatory-minimum prison term on sentences imposed before the effective date of §559.115.7, RSMo, because a reduction in a mandatory-minimum prison term is substantive and is a reduction in punishment, in that Article I, §13 of the Missouri Constitution prohibits the retroactive application of laws that change substantive rights absent a clear indication by the legislature of its intention that the law be applied retroactively and §1.160, RSMo bars the retroactive application of laws that reduce punishments, and §559.115.7, RSMo should be read in pari materia with §558.019.9, RSMo which specifically bars retroactive application.

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988);

State ex rel. St. Louis-San Francisco Ry v. Buder, 515 S.W.2d 409 (Mo. banc 1974);

State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991);

State v. Tivis, 948 S.W.2d 690 (Mo. App. W.D. 1997).

ARGUMENT

The Circuit Court of Cole County erred in applying §559.115.7, RSMo 2003 (Cum. Supp.) retroactively to reduce Furey’s mandatory-minimum prison term on sentences imposed before the effective date of §559.115.7, RSMo, because a reduction in a mandatory-minimum prison term is substantive and is a reduction in punishment, in that Article I, §13 of the Missouri Constitution prohibits the retroactive application of laws that change substantive rights absent a clear indication by the legislature of its intention that the law be applied retroactively and §1.160, RSMo bars the retroactive application of laws that reduce punishments, and §559.115.7, RSMo should be read in pari materia with §558.019.9, RSMo which specifically bars retroactive application.

This case is about whether §559.115.7, RSMo 2003 (Cum. Supp.) should be applied retroactively to reduce the mandatory-minimum prison terms Furey must serve on his current 2002 sentences for second degree burglary and first degree tampering. The Department of Corrections calculates that Furey has two prior commitments on those sentences and therefore he must serve a mandatory-minimum prison term of fifty percent of those sentences (L.F. 16). But the Circuit Court of Cole County applied §559.115.7, RSMo 2003 (Cum. Supp.), which became effective at the earliest on June 27, 2003,¹ retroactively to reduce

¹ If one reads §559.115.7, RSMo 2003 (Cum. Supp.) which excludes a first receipt for a 120-day program in pari materia with §558.019, RSMo 2003 (Cum. Supp.), the statute on commitments and mandatory-minimum prison terms, the effective date of §559.115.7, RSMo

Furey's mandatory-minimum prison terms from fifty percent of his sentences to forty percent of his sentences (L.F. 55-56).

There is no debate and can be no debate that under the law as it existed prior to June 27, 2003 receipts for 120-day treatment programs under §559.115, RSMo were as a matter of law to be counted as commitments requiring increased mandatory-minimum prison terms on subsequent receipts by the Department of Corrections. *Star v. Burgess*, 160 S.W.2d 376, 378 (Mo. banc 2005). Although this Court in *Star* declined to apply §559.115.7, RSMo 2003 (Cum. Supp) to retroactively reduce an inmate's mandatory-minimum prison term this Court was careful to point out that due to inmate's failure to preserve the retroactivity issue this Court was applying the pre-2003 law without holding that §559.115.7, RSMo 2003 (Cum. Supp) did or did not apply retroactively *Id.* In short, in *Star* the court made clear that under the old law initial receipts under §559.115, RSMo are commitments, but did not address whether the new law should be applied retroactively to remove pre-existing commitments that resulted from an initial 120-day incarceration under §559.115, RSMo before the new law

2003 (Cum. Supp) is August 28, 2003. *See* §558.019.9, RSMo 2003 (Cum. Supp.) (limiting the statute's applicability to offenses committed after August 28, 2003). *See State v. Tivis*, 948 S.W.2d 690, 696-697 (Mo. App. W.D. 1997) (reading a statute removing burglaries from the list of dangerous felonies in pari materia with the effective date language of §558.019.7, RSMo 1994 so as not to retroactively eliminate an inmate's mandatory-minimum prison term).

was effective.

Therefore this case turns on the issue of whether §559.115.7, RSMo 2003 (Cum. Supp) may be applied retroactively to remove one of Furey's existing commitments from his record and therefore reduce the mandatory-minimum prison terms on his current sentences for which he was sentenced prior to the effective date of §559.115.7, RSMo 2003 (Cum. Supp.). There are three very good reasons why the statute should not be applied retroactively. First, a reduction in a mandatory-minimum prison term is a substantive change in rights that may not be accomplished retroactively without violating the ban on retrospect laws in Article I, §13 of the Missouri Constitution. Second, reducing a mandatory-minimum prison term although not a reduction in a sentence is a reduction in punishment and falls with the bar on reductions in punishment in §1.160, RSMo 2000. Third, §559.115.7, RSMo 2003 (Cum. Supp) should be read in pari materia with section 558.019, RSMo 2003 (Cum. Supp.) which deals with defining commitments and mandatory-minimum prison terms and explicitly states in §558.019.9, RSMo 2003 (Cum. Supp.) that the statute should only be applied to offenses committed after August 28, 2003. The public policy of providing certainty in criminal punishments for habitual offenders is furthered by §1.160, RSMo, Article I, §13 of the Missouri Constitution and §558.019.9, RSMo 2003 (Cum. Supp) and declining to apply §559.115.7, RSMo 2003 (Cum. Supp) retroactively furthers that policy.

RETROACTIVE APPLICATION OF §559.115.7, RSMO 2003 (CUM. SUPP.) AND

THE BAN ON RETROSPECTIVE LAWS

This Court has construed the ban on retrospective laws in Article I, §13 of the Missouri Constitution to mean that changes in the law that affect substantive rights may not be applied retroactively absent a manifestation of a clear intent by the legislature that the law is to have retroactive application. *State ex rel. St. Louis -San Francisco Ry Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974). In *State v. Hillis*, 748 S.W.2d 694, 697-698 (Mo. App. E.D. 1988) the Missouri Court of Appeals held that a statutory change that had the effect of creating a mandatory-minimum prison term on existing sentences could not be applied retroactively because the creation of a mandatory-minimum prison term was an increase in punishment even though it did not technically change the length of the sentence, and this change affected substantive rights. The Court of Appeals in *Hillis* relied on *Lindsey v. Washington*, 30 U.S. 397 (1937) in which the United States Supreme Court found a law increasing the minimum term an inmate must serve from six months to fifteen years substantially disadvantaged the inmate and could not be applied retroactively.

This Court in *State v. Lawhorn*, 762 S.W.2d 820, 824-826 (Mo. banc 1988) relying on *Hillis* and precedents of the United States Supreme Court and United States Court of Appeals held that a law that increased mandatory-minimum prison terms that must be served prior to parole eligibility was substantive and could not be applied retroactively to existing sentences. Although §559.115.7, RSMo 2003 (Cum. Supp.) has the effect of decreasing, as opposed to increasing, a mandatory-minimum prison term, the change does not cease to be substantive solely because a number goes down rather than up.

Therefore, absent a clear intent expressed by the legislature that §559.115.7, RSMo 2003 (Cum. Supp) is to be applied retroactively it may not be applied retroactively. No such intention is clear in the statute. Further, §558.019.9, RSMo 2003(Cum. Supp.) explicitly states that §558.019, RSMo 2003 (Cum. Supp.), the new version of the statute dealing with mandatory-minimum prison terms and commitment counts, is to apply only to offenses committed after August 28, 2003. Similarly, §1.160, RSMo 2000 expresses legislature's intent that punishments not be reduced by retroactive application changes. These provisions, even if not considered as independent reasons for not applying §559.115.7, RSMo 2003 (Cum. Supp.) retroactively, which they are, present strong evidence of the legislature's lack of manifest intent that the provision be applied retroactively.

As §559.115.7, RSMo 2003 (Cum. Supp) creates a substantive change in Furey's punishment and the legislature has not expressed a clear intent that the statute apply retroactively it does not apply retroactively. *State ex rel. St. Louis-San Francisco Ry v. Buder*, 515 S.W.2d at 410. Therefore the decision of the Circuit Court retroactively applying §559.115.7, RSMo 2003 (Cum. Supp) is incorrect as a matter of law and should be reversed.

**RETROACTIVE APPLICATION OF §559.115.7 AND THE BAN ON
REDUCTIONS IN PUNISHMENT IN §1.160, RSMO 2000**

Section 1.160, RSMo 2000 bars the reduction of a penalty or punishment by the repeal or amendment of a statute, with the provision that proceedings shall be conducted according

to existing procedural laws.² Although reducing Furey's mandatory-minimum prison term does not reduce his total sentence it does reduce the amount of time he is required by law to spend in prison and thus decreases his punishment. *See State v. Hillis*, 748 S.W.2d at 697-698. The addition of paragraph 7 to Section 559.115, RSMo is an amendment of that statute, which excludes initial receipts for 120-day programs under §559.115, RSMo from being counted as prison commitments. *See State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991) (holding that a reorganization of the drug laws which involved the passage of entirely new statutes dealing with the punishment for narcotics offenses was an amendment within the meaning of §1.160 because the legislature was amending the statutory scheme for punishing narcotics offenses and laws are often amended by the passage of an entirely new statute); *but see State ex rel. Nixon v. Russell*, 129 S.W.2d 867, 870 (Mo. banc 2004) (appearing to indicate the addition of a paragraph to a statute is not an amendment to a statute for purposes of §1.160).³

² Section 1.160, RSMo 2000 permits the reduction of a penalty or punishment if the reduction results from a change in the law creating the offense that occurred before the original sentencing.

That exception has nothing to do with this case. The exception was removed in 2005. See §1.160, RSMo 2005 (Cum. Supp.). But that is not relevant as the exception does not apply to the facts of this case.

³ *Sumlin* and *Russell* only appear to conflict. The cases may be harmonized by

Because the retroactive application of §559.115.7, RSMo 2003 (Cum. Supp) to reduce Furey’s mandatory-minimum prison term on a sentence that had already been imposed is a reduction in punishment by an amended law, it is contrary to §1.160, RSMo 2000. Therefore the trial court erred for this reason also in declaring that §559.115.7, RSMo 2003 (Cum. Supp.) should be applied retroactively.

THE RETROACTIVE APPLICATION OF §559.115.7, RSMo 2003 (Cum. Supp.) IS PROHIBITED BY §558.019.9, RSMo 2003 (Cum. Supp.) AS THE STATUTES SHOULD BE READ IN PARI MATERIA

Section 559.115.7, RSMo 2003 (Cum. Supp) serves no other function than modifying the general definition of “commitment” in §558.019, RSMo, the statute which defines commitments and their effects on mandatory-minimum prison terms. Without §558.019, RSMo, §559.115.7, RSMo has no effect. The two statutes were passed at the same time as a part of the same bill, S.B. 5 2003.

Because §559.115.7, RSMo and §558.019, RSMo deal with the same subject matter, the calculation of commitments resulting in mandatory-minimum prison terms, and were passed at the same time as part of the same bill the provisions should be read together, in pari materia, in order to follow the legislature’s intent. *See State v. Tivis*, 948 S.W.2d 690, 696-

recognizing that the broad reading of the definition of amendment in *Sumlin* was necessary to the decision and a holding, but the narrow reading of the meaning of amendment in *Russell* was not necessary to the decision and was *dicta*.

697 (Mo. App. W.D. 1997). Section 558.019.9, RSMo 2003 (Cum. Supp.) explicitly states that the new version of §558.019, RSMo is to be applied only to offenses committed after August 28, 2003. This section as well as showing of lack of legislative intent that §559.115.7, RSMo 2003 (Cum. Supp.) be applied retroactively for analysis under Article I, §13 of the Missouri Constitution also provides an independent legal reason for not applying §559.115.7, RSMo to Furey, whose offenses conviction and sentence occurred long before August 28, 2003.

In 1994 both 558.019, RSMo and the statute defining dangerous offenses that had a mandatory-minimum prison term, §556.061(8) were changed by the legislature. Tivis, an inmate whose crime of burglary had been removed from the list of dangerous felonies in §556.061 in the 1994 version of that statute argued that his mandatory-minimum prison term should be removed. The Missouri Court of Appeals disagreed holding that §558.019, RSMo 1994 and §556.061(8), RSMo 1994 must be read in pari materia and that §558.019.7, RSMo 1994 which held that §558.019, RSMo 1994 only applied to offenses committed after August 28, 1994 prevented the retroactive application of §556.061(8), RSMo 1994. *State v. Tivis*, 948 S.W.2d 690, 696-697 (MO. App. W.D. 1997). The reasoning of *Tivis* is on point. Just as in the case of the 1994 statutory change, the provisions changed in 2003 which affect Furey are part of the same statutory scheme on calculating mandatory-minimum prison terms and should be read together.

PUBLIC POLICY

The provisions of Article I, §13 of the Missouri Constitution, §1.160, RSMo 2000 and

§558.019.9, RSMo 2003 (Cum. Supp.) all serve the same public policy purpose. That purpose is allowing the legal system to operate effectively by enhancing the predictability of results and assuring that the substantive results already achieved through the legal process are not retroactively changed by legislation. The second purpose is really a subclass of the first, as protecting the results already achieved builds confidence in the finality of future judicial results.

In the specific context of mandatory-minimum prison terms, if the provisions listed above apply, then plea bargaining parties and sentencing courts can have a firm idea of the minimum time that must be served by habitual criminals and dangerous offenders on a particular sentence. If not, such offenders may be subjected to windfall reductions in their punishments that were never contemplated by the parties or the courts that imposed sentence. That is because at some future date legislation not intended to change the results in cases that have already been litigated may nevertheless reduce the punishments already imposed.⁴ The natural reaction to such a state of uncertainty would be for prosecutors and courts to increase the length of sentences for habitual and dangerous offenders due to lack of confidence that mandatory-minimum prison terms will necessarily be enforced. Not only would this be inefficient, but it would defeat the specific purpose of §559.115.7, RSMo which appears to have been to prospectively reduce prison populations by reducing the punishment of a narrow class of offenders in future proceedings.

⁴ Of course the legislature can always express its clear intent in a provision that the provision be applied retroactively. That did not occur in this case.

This Case is Not Controlled by State ex rel. Nixon v. Russell

In a series of decisions the Missouri Court of Appeals has held that §559.115.7, RSMo 2003 (Cum. Supp) should be applied retroactively to reduce mandatory-minimum prison terms on sentences already imposed before §559.115.7, RSMo became effective on June 27, 2003. See e.g. *Irvin v. Kempker*, 152 S.W.3d 358 (Mo. App. W.D. 2004); *Powell v. Missouri Department of Corrections*, 152 S.W.3d 372 (Mo. App. W.D. 2004); *Nieuwendaal v. Missouri Department of Corrections*, 181 S.W.3d 153 (Mo. App. W.D. 2005); *Carlyle v. Missouri Department of Corrections*, 184 S.W.2d 176 (Mo. App. W.D. 2005).

The Court of Appeals acknowledged in *Nieuwendaal* that there is no indication that the legislature intended §559.115.7, RSMo to apply retroactively. The Court of Appeals in *Carlyle* acknowledged that this Court had held in *Lawhorn* that changes in mandatory-minimum prison terms are substantive. But the Court of Appeals nevertheless held in *Carlyle* that §559.115.7, RSMo should be applied retroactively because this Court *sub silentio* overruled *Lawhorn* in its decision in *State ex rel Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004).

Respondent respectfully disagrees with that analysis because *Russell* is distinguishable from mandatory-minimum prison term cases. In *Russell* this Court permitted retroactive application of a statute that gave a limited class of inmates access to the possibility of judicial as well as administrative parole consideration.⁵ The statute §558.016.8, RSMo 2003 (Cum.

⁵ The statute, §558.016.8, RSMo 2003 (Cum. Supp.), has been repealed by the

Supp.) allowed a sentencing judge to grant judicial parole to nonviolent C and D felons without prior commitments after the inmates had served 120-days in the Department of Corrections. *State ex rel. Nixon v. Russell*, 129 S.W.3d at 870-871. Inmates considered for judicial parole under that statute necessarily had no prior prison commitments and no mandatory-minimum prison terms. Therefore the inmates could in theory have been paroled by the Parole Board at any time after arrival at the Department of Corrections. *See Gettings v. Missouri Department of Corrections*, 950 S.W.2d 7 (Mo. App. W.D. 1997) (noting that the Parole Board need not follow regulatory guidelines for the range in which an inmate is to be paroled because these are necessarily merely an aid to the Board and cannot not limit the Board's almost unlimited statutory discretion to decide when and if parole is to be granted).

Therefore the inmates affected by the decision in *Russell* received nothing more than an additional decision maker and an additional procedure through which they could receive parole. Unlike the inmate in *Lawhorn*, and Furey in this case, the change in law in the *Russell* case involved no change in mandatory-minimum prison terms. In short, the change in law in *Russell* was procedural but the change in law in *Lawhorn* and this case is substantive. *Russell* did overrule *Lawhorn sub silentio*. The two cases fit together harmoniously, and this case is controlled by *Lawhorn*.

Therefore the trial court erred in applying §559.115.7, RSMo 2003 (Cum. Supp.),

legislature.

retroactively to reduce the mandatory-minimum prison term on sentences that predate the statute, for the three reasons set forth above. The decision in *Russell* should not be read to silently overrule the precedents of this Court dictating that §559.115.7, RSMo 2003 (Cum. Supp.) may not be retroactively applied to reduce mandatory-minimum prison terms on existing sentences.

CONCLUSION

The decision of the Circuit Court of Cole County should be reversed and the case remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 4,093 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of August, 2006.

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