

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Appellant,)	
)	
vs.)	No. SC 92229
)	
JOEY D. HONEYCUTT,)	
)	
Respondent.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE JASON BROWN, JUDGE

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In addition to the Statement of Facts set forth in Appellant's brief, Respondent notes:

In his Motion to Dismiss, Mr. Honeycutt alleged that at the time of his 2002 conviction for drug possession, he had the right under section 23 of the Missouri Constitution to keep and bear arms in defense of his home, person, and property (LF 10). Yet through the 2008 amendment to section 571.070, that right was taken away from him due to his 2002 conviction committed prior to the statute's amendment (LF 12).

ARGUMENT

Count III of the felony complaint filed against Mr. Honeycutt was properly dismissed because this Court, in *Phillips, R.L.*, and *F.R.*, determined that the plain language of the article I, § 13 prohibition against the enactment of retrospective laws applies to crimes and punishments as well as civil rights and remedies, and prohibits the impairment of a vested right or the application of a new obligation in respect to a past transaction. And because the 2008 amendment to section 571.070 impaired Mr. Honeycutt's vested right to possess a firearm and created a new obligation, imposed a new duty, and attached a new disability on him to not possess firearms based on a past transaction, his 2002 conviction for drug possession, that law was unconstitutionally retrospective as applied to Mr. Honeycutt.

Standard of Review

This Court reviews issues of law *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 61

(Mo. banc 2010). The burden of proving that a statute is unconstitutional rests on the person challenging the statute's validity. *Id.*

Introduction

The sole issue raised by Appellant is that the ban on retrospective laws in article I, § 13 of the Missouri Constitution applies exclusively to civil statutes and has no application to criminal statutes (Ap. Brief 8-9). Therefore, Appellant argues, the trial court erred in its application of that constitutional provision to dismiss criminal charges against Mr. Honeycutt.

Appellant's argument raises a question already answered by this Court in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), *R.L. v. Department of Corrections*, 245 S.W.3d 236 (Mo. banc 2008), and *F.R. supra*. Appellant asserts that those cases were incorrectly decided by this Court, are contrary to this Court's precedent and the intent of those who wrote the Missouri Constitution, and should no longer be followed (Ap. Brief 12-13). The basis of Appellant's challenge is Appellant's personal interpretation of the rejection of the minority rhetoric of one delegate during the constitutional debates of 1875 (Ap. Brief 13-15). Such use of legislative history has been strongly criticized as irrelevant in the

interpretation of plain and unambiguous language found in statutes.

Zedner v. U.S., 547 U.S. 489, 509-511 (2006) (Scalia, J., concurring). This Court has already held that nothing in the language of article I, § 13 limits the application of the prohibition against retrospective laws to civil cases. Therefore, the trial court did not err in applying that provision to Mr. Honeycutt's case and dismissing the charges against him. The trial court's judgment should be affirmed.

Missouri's prohibition of retrospective legislation applies to criminal statutes.

In *Phillips*, this Court recognized that Missouri's prohibition on retrospective legislation contained in article I, § 13 provides a more extensive prohibition of a more comprehensive nature than is found in any of the constitutions of but three other states in the Union. 194 S.W.3d at 850. The Court commented that the constitution's prohibition against enacting retrospective laws "rendered it nearly superfluous to add the prohibition of an *ex post facto* law." *Id.* In other words, the prohibition on retrospective legislation covers retrospective legislation of *any kind*, without distinction between criminal and civil laws. This Court's decisions in two recent cases illustrate this concept.

F.R. concerned the application of two new statutory obligations imposed on sex offenders solely as a result of their past criminal acts. 301 S.W.3d 56. One statute prohibited *F.R.* from residing within 1,000 feet of any school or child-care facility, and another imposed upon Charles Raynor several duties and restrictions each Halloween. *Id.* at 58-60. This Court applied Missouri’s article I, § 13 constitutional provision prohibiting laws retrospective in operation, and ruled that both laws operated retrospectively. *Id.* at 61. The Court noted that its analysis was complete under the “retrospective” provision, and it “need not reach the...*ex post facto*” claim. *Id.*, n. 9. Article I, § 13 is violated by a subsequent law that imposes upon a person with a prior criminal conviction a new obligation or duty based solely on the prior conviction, whether the new obligation is a criminal penalty or the imposition of a civil obligation. *Id.* at 62-63, n. 12.

In *R.L.*, this Court considered another residence restriction imposed on a sex offender who was convicted prior to the effective date of the statute imposing the restriction. 245 S.W.3d 236. Although the trial court held that the residency restriction constituted an invalid *ex post facto* law, this Court only addressed the trial court’s alternative finding that the law violated article I, § 13’s prohibition of retrospective legislation. *Id.* at 237, n. 1. “The 1875 constitutional debates note the constitutional bar on

retrospective laws is broader than the ex post facto bars in other states.”

Id. at 237. Applying article I, § 13, this Court held that the new obligations attached via statute to the defendant’s past conduct violated Missouri’s constitutional bar on retrospective laws. *Id.* at 237-238.

Last year, in *State v. Davis*, the state challenged this Court’s application of article I, § 13 to criminal statutes. 348 S.W.3d 768, 770 (Mo. banc 2011). But because that issue was not raised in the trial court, it was not preserved for appellate review, and this Court did not consider the issue on appeal. *Id.*

This year, however, the state has preserved and renewed its challenge to this Court’s recent opinions applying the retrospective laws ban to criminal statutes. The state argues that this Court’s 1877 decision in *Ex Parte Bethurum*¹ supercedes its more recent pronouncements on article I, § 13 (Ap. Brief 11-13). But as noted by Appellant, Missouri lawyers of the time of *Bethurum* recognized the breadth of the phrase “retrospective” as used in our constitution (Ap. Brief 14). One lawyer, foreshadowing this Court’s more recent opinions, noted that the term “retrospective legislation” is a general term which includes “*ex post facto* laws which are

¹ *Ex Parte Bethurum*, 66 Mo. 545 (1877).

retrospective criminal laws.” *Phillips*, 194 S.W.3d at 850, quoting *Debates of the Missouri Constitutional Convention, 1875*, Vol. IV, 95 (Isidor Loeb & Floyd C. Shoemaker eds., State Historical Soc’y of Mo. 1938)[hereinafter *Debates*]. That lawyer stated of the phrase “retrospective legislation:”

That it included laws impairing obligations of contracts. That it included laws impairing vested rights and that the prohibition of retrospective legislation or forbidding the General Assembly to pass a law retrospective in its character did at one breath accomplish the prohibition of a more extensive kind of a more comprehensive nature than was to be found in any of the constitutions of but three states in the Union. So that the prohibition of an act retrospective in its operation in the Constitution of 1820 rendered it nearly superfluous to add the prohibition of an *ex post facto* law or of a law impairing the obligation of contracts, or of a law impairing vested rights.

Debates at Vol. IV, 95. Although this attorney delegate to the Constitutional Convention of 1875 did not persuade his colleagues to remove all but the “retrospective” language from article I, § 13, this Court has pronounced its agreement with his argument. Despite the language in *Bethurum*, this Court has more recently, and on more than one occasion as

noted above, declared its position on the application of the prohibition against retrospective legislation to criminal statutes.

*Section 571.070, RSMo Supp. 2010 is a retrospective law
as applied to Mr. Honeycutt.*

The questions for decision on appeal are those stated in the points relied on. *State v. Brookshire*, 325 S.W.2d 497, 500 (Mo. 1959). A question not presented in the points relied on is considered to be abandoned on appeal and no longer an issue. *Id.* Appellant has not preserved for this Court's review an objection to the trial court's ruling that Section 571.070 is a retrospective law as applied to Mr. Honeycutt, yet caution compels Mr. Honeycutt to request this Court's affirmance of the trial court's ruling on the merits.

A retrospective law takes away or impairs a vested right acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgt. Commn.*, 702 S.W.2d 77, 81 (Mo. banc 1986). "It must give to something already done a different effect from that which it had when it transpired." *Phillips*, 194 S.W.3d at 850, quoting *Squaw Creek Drainage Dist. V. Turney*, 138 S.W.12, 16 (1911).

A vested right is one to which there is a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. *La-Z-Boy Chair Co. v. Dir. Of Econ. Dev.*, 983 S.W.2d 523, 525 (Mo. banc 1999). A right that is vested is “fixed, accrued, settled or absolute.” *Id.* “A right is *not* vested if it is based merely on an expectation that the law will not change, because no one has a vested right that the law will remain unchanged.” *F.R.*, 301 S.W.3d at 69 (Russell, J. dissenting).

Article I, § 23 of the Missouri Constitution states, in part, “[t]hat the right of every citizen to keep and bear arms in defense of his home, person and property...shall not be questioned.” When Mr. Honeycutt was convicted of possessing drugs in 2002, he retained his right to possess a firearm despite that conviction because, at that time, his conviction did not dispossess him of that constitutional right. *§ 571.070, RSMo 2000* (Appellant’s Appendix, A2). His right to bear arms was “vested;” it was not based merely on an expectation that the law would not change. *F.R.*, 301 S.W.3d at 69 (Russell, J. dissenting).

However, the law did change. Section 571.070 was amended in 2008 and 2010. *§ 571.070, RSMo Supp. 2008* (Respondent’s Appendix, A-1);

§ 571.070, *RSMo Supp. 2010* (Appellant's Appendix, A3). Certainly, any felony conviction obtained by Mr. Honeycutt after the effective date of either statute would result in the loss of his right to keep and bear arms under article I, § 23. But here, the state charged Mr. Honeycutt with a new felony – a violation of § 571.070 based on his 2002 conviction. The 2008 change to § 571.070 did not merely impose an additional “collateral consequence” to Mr. Honeycutt’s prior conviction for drug possession. *Id.* at 70. It imposed upon him, six years later, a new penalty for his 2002 conviction, and took away his right to possess a firearm granted by the Missouri constitution. It gave “to something already done a different effect from that which it had when it transpired.” *Phillips*, 194 S.W.3d at 850, quoting *Turney*, 138 S.W. at 16.

As applied to Mr. Honeycutt here, § 571.070 is a retrospective law that attached a new disability upon him based on his prior conviction, impairing his vested right to bear arms. It creates a new obligation and imposes a new duty to dispossess himself of any firearms in his possession based solely on a transaction already past, his 2002 conviction. The trial court did not err in finding that § 571.070 operated as an unconstitutional retrospective law with respect to Mr. Honeycutt. The court’s dismissal of count III should be affirmed.

CONCLUSION

For the reasons presented, Mr. Honeycutt respectfully requests that this Court affirm the trial court's dismissal of count III, unlawful possession of a firearm under § 571.070, RSMo Supp. 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, 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 Book Antiqua size 13 point font, which is no smaller than 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 2,240 words, which does not exceed the 27,900 words allowed for a respondent's brief.

On this 25th day of July, 2012, electronic copies of Respondent's Brief and Respondent's Brief Appendix were placed for delivery through the Missouri e-Filing System to Daniel McPherson, Assistant Attorney General, at Dan.McPherson@ago.mo.gov.

/s/ Margaret M. Johnston

Margaret M. Johnston