No. SC85948

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

MICHAEL HANCOCK,

Appellant.

Appeal from the Circuit Court of Greene County, Missouri
31st Judicial Circuit, Division 5
Honorable Calvin R. Holden, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for felony driving while intoxicated, § 577.010, RSMo 2000, for which appellant was sentenced to a suspended sentence of four years in the custody of the Department of Corrections and placed on five years of probation. Because appellant is challenging the validity of a statute of this state, jurisdiction resides with the Missouri Supreme Court. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Michael Hancock, was charged by information with felony driving while intoxicated (L.F. 9). This cause went to trial by the court on October 22, 2003, in the Circuit Court of Greene County, the Honorable Calvin R. Holden presiding (L.F. 6, Tr. 9).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Deputy Jason Johnson of the Greene County Sheriff's Department was on patrol around 1:30 a.m. on July 15, 2001 near the intersection of Republic Road and Lipscomb in Springfield, Missouri (Tr. 12, 19-20). He saw a car traveling westbound on Republic Road going between 15-20 miles per hour over the posted speed limit of 40 miles per hour (Tr. 21). He used radar to verify that the car was going 61 miles per hour, and then stopped the car (Tr. 21-22).

Johnson approached appellant, the driver of the car, who produced a Missouri driver's license (Tr. 23). Appellant's speech was slurred and mumbling, his eyes were bloodshot, watery and glassy, and there was a strong odor of intoxicants coming from the car and his person (Tr. 23). Johnson had appellant step out of the car so that he could administer field sobriety tests, and noticed that appellant's balance was unsure and that he was swaying from side-to-side (Tr. 24). Prior to starting the field sobriety tests, Johnson asked if appellant had any physical disabilities that would prevent him from doing the tests, and appellant said there were none (Tr. 25).

Johnson first administered the horizontal gaze nystagmus test, in which all six points demonstrating intoxication were present (Tr. 26-28). Next, Johnson had appellant perform the

one-leg stand test, during which appellant swayed, raised his arms to balance, and repeatedly put his foot down early (Tr. 29-31). Finally, Johnson had appellant perform the walk-and-turn test, during which appellant could not maintain his balance while listening to instructions, stepped out of position, started the test early, stopped while walking, did not touch heel to toe on any steps, raised his arms for balance, took an incorrect number of steps, and made an improper turn (Tr. 32-34). Based on appellant's failing performances on each test and his previous observations, Johnson believed appellant was intoxicated, and arrested him for driving while intoxicated (Tr. 35-36). A subsequent search of appellant's car revealed a partially empty beer bottle on the passenger side floorboard in the front seat (Tr. 41).

At the Greene County Jail, appellant admitted that he had consumed six beers prior to the traffic stop (Tr. 37-38). After being advised of the Implied Consent law and his rights, appellant refused to take a breath test (Tr. 39-41).

Appellant testified in his defense, denying that he was intoxicated, and claiming that the arrest was motivated by a prior altercation he had with another Greene County deputy (Tr. 100-109).

At the close of the evidence and arguments of counsel, the court took the case under advisement, and later found appellant guilty of felony DWI (L.F. 6; Tr. 119). The court sentenced appellant to four years in the custody of the Department of Corrections, but suspended execution of the sentence, and placed appellant on five years of probation (L.F. 25-27; Sent.Tr. 3). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN FINDING THAT § 577.023 WAS CONSTITUTIONAL BECAUSE THAT STATUTE'S PROVISION ALLOWING MUNICIPAL CONVICTIONS ADJUDICATED BY JUDGES WHO ARE LAWYERS TO BE USED TO ENHANCE PUNISHMENT FOR PRIOR AND PERSISTENT DWI OFFENDERS BUT NOT THOSE CONVICTIONS ADJUDICATED BY NON-LAWYER JUDGES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES IN THAT THE DISTINCTION BETWEEN THE TWO TYPES OF CONVICTIONS IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST IN ENSURING THAT PRIOR CONVICTIONS WERE FULLY LITIGATED BEFORE LEGALLY-TRAINED JUDGES BEFORE SUBJECTING A DEFENDANT TO INCREASED PUNISHMENT.

Appellant claims that the trial court erred in finding that the sentencing enhancement provisions of § 577.023 constitutional (App.Br. 11). Appellant argues that the statute violates the Equal Protection clauses of the United States and Missouri constitutions because it treats similarly-situated offenders—those who have been convicted of prior municipal ordinance violations for driving while intoxicated—differently, as only those whose municipal convictions were before a lawyer judge could have their sentences enhanced based on the municipal offense (App.Br. 13-18, 25). Appellant contends that there is no rational basis for this distinction, as the "status of the judicial officer" is "wholly unrelated to the behavioral characteristics of the defendant and the crime" (App.Br. 18, 23, 25).

A. Facts

Prior to trial, appellant filed a motion challenging the constitutionality of § 577.023 (L.F. 12-24). Appellant argued that the statute's distinction between those who had been convicted of a municipal alcohol-related driving offense before a lawyer judge and those convicted before a non-lawyer judge "irrationally excludes an entire class of intoxication-related traffic offenders who although committing the same offense as one appearing before a lawyer judge escape the sanction of enhancement upon the occurrence of a subsequent offense" (L.F. 13-14).

At trial, the State introduced a certified copy of a municipal court conviction from Springfield, Missouri, showing that appellant had pled guilty to driving while intoxicated in April 1994 for events occurring in June 2002, and that the municipal judge who accepted the plea was an attorney (Tr. 90-91). Appellant objected to the introduction of the conviction on the same grounds raised in his motion (Tr. 92-99). The court overruled appellant's objection and admitted the copy of the conviction (Tr. 99). The court later found appellant guilty of felony DWI, using the municipal conviction as one of the two prior offenses necessary for enhancement (L.F. 6).

B. Standard of Review

Statutes are strongly presumed to be constitutional. Hoskins v. Business Men's Assur., 79 S.W.3d 901, 904 (Mo. banc 2002). That presumption is overcome only when the statute clearly contradicts a constitutional provision. Ensor v. Department of Revenue, 998 S.W.3d 782, 783 (Mo. banc 1999). Because of the strong presumption of validity, this Court only

inquires as to whether the challenged statute is "clearly and undoubtedly" prohibited. Id. This Court will resolve any doubts in favor of the procedural and substantive validity of an act of the legislature. Hoskins, 79 S.W.3d at 904.

C. Analysis

Section 577.023 governs the enhancement of punishment for driving while intoxicated, making the offense a felony where the defendant is a persistent offender, i.e. has two prior convictions for intoxication-related traffic offenses. § 577.023.1(2)(a), RSMo 2000.[1] Appellant's attack on § 577.023 rests entirely on the definition of an "intoxication-related traffic offense" under that statute, which is contained in § 577.023.1(1). § 577.023.1(1), RSMo 2000. That subsection reads as follows:

> (1) An "intoxication-related traffic offense" is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the

[1]Appellant committed his offense prior to the effective date of the 2001 amendment of § 577.023. § 577.023, RSMo Cum.Supp. 2001. Respondent will cite to the 2000 statute, which was the one in effect at the time of appellant's offense, although the amendment did not affect the provisions at issue in this case.

> second degree pursuant to subdivision (3) of subsection 1 of section 565.082, RSMo, ***or driving under the influence of alcohol or drugs in violation of*** state law or a county or ***municipal ordinance, where the judge in such case was an attorney*** and the defendant was represented by or waived the right to an attorney in writing[.]

§ 577.023.1(1), RSMo 2000 (emphasis added). Therefore, because the statute permits enhancement of punishment for a DWI conviction where the offender has a prior municipal DWI conviction where the judge is a lawyer, but not where the judge is not a lawyer, and because his prior municipal conviction was before a judge, appellant alleges a violation of his equal protection rights (App.Br. 11).

When considering a claim that a statute violates the Equal Protection Clause, the first step is to determine whether the challenged statutory classification operates either to cause a disadvantage for a suspect class or to impinge upon a fundamental right explicitly or implicitly protected by the Constitution. In re Marriage of Kohring, 999 S.W.2d 228, 231-32 (Mo. banc 1999). A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Suspect class designation has traditionally been limited to classifications

based on race, national origin, illegitimacy, and, in some cases, gender. Kohring, 999 S.W.2d at 232. Here, no such suspect class distinction exists, nor does appellant claim one does (App.Br. 13-14). Nor does appellant contend that the definition of intoxication-related traffic offense impinge on some fundamental right (App.Br. 13-14). See State v. Zoellner, 920 S.W.2d 132, 135 (Mo.App., E.D. 1996)(due process attack to using municipal ordinance convictions to enhance DWI punishment did not involve fundamental right). Where there is no suspect class or fundamental right affected by government action, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. Kohring, 999 S.W.2d at 232.

Under the rational relationship analysis, a court will strike down the legislation only if the challenger shows that "the classification does not rest upon any reasonable basis and is purely arbitrary." Miss Kitty's Saloon, Inc. v. Missouri Dept. of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). When using rationality review, this Court will not substitute its judgment for that of the legislature as to the wisdom, social desirability, or economic policy underlying a statute. Kohring, 999 S.W.2d at 233. Under this standard, a classification is constitutional "if any state of facts can be reasonably conceived to justify it." Miss Kitty's Saloon, 41 S.W.3d at 467.

Here, appellant claims that the only State interest involved in this case is the State's interest in "severely punish[ing] the recidivist," and that the statute fails to do so "by excluding an entire community of offenders from the possibility of an enhanced sanction" (App.Br. 16-17). It is true that the State has a legitimate interest in deterring prior DWI offenders from

committing that offense again and in severely punishing "those who ignore the deterrent message." State v. Zoellner, 920 S.W.2d at 135, citing A.B. v. Frank, 657 S.W.2d 625, 628 (Mo. banc 1983). However, this is not the only State interest involved here. By limiting the use of prior municipal convictions for enhancement only to those found by a lawyer judge, the State is balancing its interest in strictly punishing recidivists with a legitimate interest in protecting defendants whose prior cases were not reviewed by a judge fully trained in the law.

In North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1973), the United States Supreme Court found that Kentucky's use of non-lawyer judges for DWI cases was constitutional where there was an opportunity to have review sought in a trial de novo before a lawyer judge. North, 427 U.S. at 329-39. In discussing the concept of non-judicial officers performing judicial acts, the Court cited to Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), which dealt with lay magistrates making probable cause determinations. Id. at 337-38. In Shadwick, the Court upheld that practice, but noted:

> All this is not to imply that a judge or lawyer ***would not normally provide the most desirable review*** of warrant requests. But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached

> and capable of the probable-cause determination required of them.

Id. at 353-54 (emphasis added).

This passage recognizes that, although the Constitution does not require all judicial determinations to be made only by lawyer judges, there is an important and desirable interest in having lawyer judges make such determinations. This interest is heightened when imprisonment is possible, requiring additional safeguards to insure that the non-lawyer judge's rulings are legally accurate. See, e.g., State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 785-88, 791 (Tenn. 1980)(only lawyer judges permitted to conduct juvenile adjudications); State ex rel. Collins v. Bedell, 460 S.E.2d 636, 642-45 (W.Va 1995)(due process permits non-lawyer magistrate to preside over trial so long as there is meaningful review on appeal by a lawyer judge). The legislature's decision to only use lawyer-judge-adjudicated municipal convictions to subject a defendant to greater punishment for a DWI conviction recognizes the important and desirable interest of ensuring that the prior conviction was reviewed by a judge fully trained in the law. That neither the United States nor Missouri Constitutions requires such protection is irrelevant, as "[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires." California v. Ramos, 463 U.S. 992, 1014, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

Because the State has a legitimate interest in ensuring that a defendant's prior convictions were fully litigated before legally-trained judges before enhancing punishment, and because the statute preventing prior municipal convictions before non-lawyer judges from

being used to enhance punishment is rationally related to that interest, § 577.023 does not violate constitutional equal protection provisions. Therefore, the trial court did not err in finding that § 577.023 was constitutional, and appellant's sole point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence should be affirmed.

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) and contains 2635 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 25th day of October, 2004, to:

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APPENDIX