

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 AMENDED BRIEF

Margaret M. Johnston, MOBar #45913
Attorney for Respondent
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 882-9855, ext. 324
FAX (573) 884-4793
E-mail: Maggie.Johnston@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	2
STATEMENT OF FACTS	4
ARGUMENT	5
CONCLUSION	19

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Calder v. Bull</i> , 3 U.S. (Dall.) 386 (1798)	11
<i>De Cordova v. The City of Galveston</i> , 4 Tex. 470 (1849)	11
<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006)	5-7, 9, 12, 13, 15, 16, 18
<i>Ex Parte Bethurum</i> , 66 Mo. 545 (1877).....	9-13, 15
<i>F.R. v. St. Charles County Sheriff's Dept.</i> , 301 S.W.3d 56 (Mo. banc 2010)	5-8, 17, 18
<i>In re R.W. v. Sanders</i> , 168 S.W.3d 65 (Mo. banc 2005)	13
<i>Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgt. Commn.</i> , 702 S.W.2d 77 (Mo. banc 1986)	16
<i>La-Z-Boy Chair Co. v. Dir. Of Econ. Dev.</i> , 983 S.W.2d 523 (Mo. banc 1999)	16
<i>R.L. v. Department of Corrections</i> , 245 S.W.3d 236 (Mo. banc 2008)	5, 6, 8
<i>Squaw Creek Drainage Dist. V. Turney</i> , 138 S.W.12 (1911).....	12, 16, 18
<i>State v. Brookshire</i> , 325 S.W.2d 497 (Mo. 1959).....	15, 16
<i>State v. Johnson</i> , 81 Mo. 60, 1883 WL 9566 (Mo. 1883).....	13

	<u>Page</u>
<i>State v. Justus</i> , 205 S.W.3d 872 (Mo. banc 2006).....	5
<i>State v. Kyle</i> , 65 S.W. 763 (Mo. 1901)	13, 14

CONSTITUTIONAL PROVISIONS:

Mo. Const., Art. I, Sec. 13.....	5-10
Mo. Const., Art. I, Sec. 23.....	4, 17

STATUTES:

§ 571.070, RSMo 2000	<i>passim</i>
§ 571.070, RSMo Supp. 2008	4, 5, 17
§ 571.070, RSMo Supp. 2010	15, 16, 17
§ 589.400, et seq., RSMo 1994	13

OTHER:

<i>Debates of the Missouri Constitutional Convention, 1875,</i>	
Vol. IV, 95 (Isidor Loeb & Floyd C. Shoemaker eds.,	
State Historical Soc’y of Mo. 1938).....	
	9, 10

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). 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.

Here, the state challenges 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 supersedes its more recent pronouncements on the applicability of article I, § 13 (Ap. Brief 11-13). But Missouri lawyers of the time of *Bethurum* recognized the breadth of the phrase "retrospective" as used in our constitution. One lawyer noted that the term "retrospective legislation" is a general term which includes "ex post facto laws which are 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

¹ *Ex Parte Bethurum*, 66 Mo. 545, 1877 WL 8778 (1877).

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.

Moreover, in this Court’s more recent opinions, it analyzed more thoroughly the question of the applicability of article I, § 13 than the *Bethurum* Court. In *Bethurum*, at issue was a law providing:

No person shall be entitled to the benefit of the provisions of the *habeas corpus* act, for the reason that the judgment, by virtue of which such person is confined, was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court, or officer, before whom such relief is sought, to sentence such person to the proper place of confinement, and for the proper length of time, from and after the date of the original sentence, and to cause the

officer, or other person having such prisoner in charge, to convey him forthwith to such designated place of imprisonment.

Bethurum, 1877 WL at *1. *Bethurum* challenged the law as both *ex post facto* and retrospective. *Id.* Analyzing the law using four factors set out in *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), this Court found that it was not *ex post facto* because it merely provided a procedure for resentencing an improperly-sentenced defendant. *Id.* at *2.

In its discussion of what is “retrospective,” this Court quoted “the opinion of the learned judge” Hemphill in *De Cordova v. The City of Galveston*, 4 Tex. 470 (1849):

Ex post facto laws, and such as impair the obligation of contracts, are retrospective; but there may be retrospective laws which are not necessarily *ex post facto*, or which do not impair the obligation of contracts; and by the use of the term ‘retrospective,’ cases were, doubtless, intended to be included, not within the purview of the two former classes of laws.

Bethurum, 1877 WL at *3. In other words, there could be a criminal law that is retrospective, but which is not necessarily *ex post facto*. Judge Hemphill described retrospective laws as those which are “generally unjust.” *Id.* The *Bethurum* Court concluded that the act at issue was not

retrospective because it did not work an injustice upon Bethurum or deprive him of a substantial right. Although the procedure for doing so was changed, Bethurum was still permitted to have his sentence reduced from the improperly-imposed term of eight years to the statutorily-authorized term of seven years. *Id.* at *5.

The *Bethurum* Court's discussion of whether the term "retrospective" as used in our Constitution should be given a "technical" or a "literal" interpretation is simply dicta. The Court said itself, "It is a less difficult task to determine whether the act of 1877 is a retrospective law, or not, than to lay down a rule aptly and exactly to govern all cases, and we shall make no such attempt." *Id.* at *4. The Court no doubt recognized that it was engaging in significant speculation about what the framers of the Constitution meant by the term "retrospective" as the Court used language such as: "*surely* the framers of that instrument did not use the phrase...," "[i]t was *evidently* supposed...," and "[i]t is scarcely to be presumed..." *Id.* at *4 (emphasis added).

By contrast, this Court in *Phillips, supra*, directly addressed the issue of the "retrospective" clause's applicability to punitive (i.e. criminal) statutes. 194 S.W.3d at 850. The Court relied on established Missouri law²

² *Squaw Creek Drainage Dist. V. Turney*, 138 S.W.12 (1911).

interpreting the breadth of the reach of Missouri's retrospective laws ban, and **unanimously** concluded that a criminal law operated unconstitutionally retrospectively. 194 S.W.3d at 152; § 589.400 *et seq.*, *RSMo 1994*. See also *In re R.W. v. Sanders*, 168 S.W.3d 65 (Mo. banc 2005) (criminal statute analyzed for retrospective, punitive effect by unanimous court).

Appellant argues that in *State v. Johnson* and *State v. Kyle*, this Court "reaffirmed" the *Bethurum* position that "retrospective" only applies to "civil" laws (Ap. Br. at 13-14). In *Johnson*, without further analysis, the Court summarily dismissed Johnson's retrospective challenge to a criminal law by stating, "The principle involved, in the opinion of the court, is covered by the decision in *Ex parte Bethrum*, 66 Mo. 545. Following that adjudication, the objection in question must be overruled." *Johnson*, 1883 WL 9566, *1 (Mo. 1883). Appellant notes, "While the Court did not further explain its holding, it appears to conclude..." (Ap. Br. at 13-14). Appellant's speculation of what the Court "appeared to conclude" should be ignored as the *Johnson* Court did not explain itself further.

Appellant's summary of *State v. Kyle* is incomplete (Ap. Br. at 14). Appellant states, "the Court found that the constitutional amendment in question was not an *ex post facto* law, and did not consider whether the

amendment could be invalidated as a law retrospective in its operation.” (Ap. Br. at 14). What Appellant omits is the *Kyle* Court’s discussion of criminal statutes in the context of “retrospective:”

The legislature may abolish courts, and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it **cannot lawfully**, we think, in so doing, **dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.** Statutes giving the *government* additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, *and in its operation working no injustice to the defendant, and depriving him of no substantial right.*

65 S.W. at 768 (emphasis added; internal citations and quotations omitted).

The *Kyle* Court was saying that if a statute (or, at issue in *Kyle*, a constitutional amendment) is retrospective in its operation but does not work an injustice on the defendant or deprive him of a substantial right, then it is lawful. The Court’s discussion demonstrates that the Court did contemplate that a criminal statute *could be* unlawfully retrospective if it

works an injustice upon the defendant or deprives him of a substantial right.

In *Bethurum*, the act at issue was upheld because it did not “work an injustice” upon the defendant or deprive him of a “substantial right.” The act simply eliminated *habeas corpus* as a mechanism for correcting an unlawfully-imposed sentence. But rather than foreclose the defendant from being properly sentenced, it also created a mechanism to correct the sentence by granting a court the authority to properly sentence him. In that respect, the *Bethurum* decision is consistent with this Court’s more recent logic in *Phillips* and the cases that followed it, and *Bethurum*’s dicta (without supporting authority) that a retrospective law relates exclusively to civil rights and remedies can be ignored. This Court should follow the *Bethurum* Court’s caution that its comments on this issue were not meant “to lay down a rule aptly and exactly to govern all cases.” *Bethurum*, 1877 WL at *4.

*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,

/s/ Margaret M. Johnston

Margaret M. Johnston, MOBar #45913
Attorney for Respondent
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Telephone: (573) 882-9855, ext. 324
FAX: (573) 884-4793
E-mail: Maggie.Johnston@mspd.mo.gov

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 3,283 words, which does not exceed the 27,900 words allowed for a respondent's brief.

On this 10th day of May, 2013, electronic copies of Respondent's Amended Brief and Respondent's Amended 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