

No. SC94913

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. ROBERT H. MAMMEN,

Relator,

vs.

THE HONORABLE THOMAS CHAPMAN,

Respondent.

**On a Writ of Mandamus to
the Circuit Court of Livingston County, Missouri
Forty-Third Judicial Circuit**

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Relator Robert Mammen resides at the Ozark Correctional Center in Fordland, Missouri due to the sentence imposed by the Livingston County Circuit Court in *State v. Robert Henry Mammen*, Case No. 13LV-CR00018-01. (Resp. Ex. A at 3; Resp. Ex. B). The State charged Mammen with one count of Driving While Intoxicated (DWI) as a chronic offender under §577.023 RSMo. (Supp. 2012). (Pet. Ex. 2). A jury convicted Mammen of DWI and the court found that he was a chronic offender. (Pet. Ex. 1 at 2–3). On January 14, 2014, the Livingston County Circuit Court sentenced Mammen to ten years and sentenced him under §217.362 RSMo., to the long-term drug treatment program (Resp. Ex. C; Pet. Ex. 3).¹

¹ On February 6, 2014, the court issued an amended sentence to correct two scrivener’s errors on the written sentence and judgment. The original written judgment reflected that Mammen pled guilty, which was incorrect, and did not check the chronic offender (577.023 RSMo) box, even though the court found that he was a chronic offender. Mammen does not dispute the court’s chronic offender finding, nor does he challenge the amended sentence and judgment. The court did not exceed its authority in issuing an amended judgment to correct the written judgment to reflect what actually occurred. *See State ex rel. Poucher v. Vincent*, 258 S.W.3d 62, 65 (Mo. 2008).

The Department of Corrections (“Department”) received Mammen three days later on January 17, 2014. With jail time credit of two-hundred seven days, his sentence start date was June 24, 2013. (Resp. Ex. A). Because Mammen is a chronic offender, he is ineligible for early release until June 24, 2015. Section 557.023.6(4) RSMo. (Supp. 2012).

Mammen successfully completed the long-term drug treatment program. (Resp. Ex. B). The Missouri Board of Probation and Parole (“Board”) notified Respondent of Mammen’s successful completion and advised that Mammen would be eligible for probation release on June 24, 2015, two years after his sentence start date. (Resp. Ex. B). Respondent adopted the Board’s probationary release date and directed Mammen to be released on probation on June 24, 2015. (Resp. Ex. D).

Mammen filed a petition for writ of mandamus in the Missouri Court of Appeals on March 30, 2015. *State ex rel. Mammen v. Champman*, WD78481 (Mo. App. W.D. Apr. 2, 2015). The court denied the writ on April 2, 2015. *Id.*

Mammen filed a petition for writ of mandamus in this Court on April 7, 2015. The Court issued an order directing the parties to brief the matter.

ARGUMENT

Respondent acted within his authority when he issued an order directing Mammen's probation release upon completion of his mandatory-minimum two-year imprisonment.

To receive mandamus, a relator must prove that he has a clear, unequivocal, specific, and positive right to have the requested relief, and the remedy will not lie if the right to this relief is doubtful. *State ex rel. Mo. Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999). To determine whether the relator's right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right. *State ex rel. Dehn v. Schriro*, 935 S.W.2d 641, 644 (Mo. App. W.D. 1996). Because Mammen fails to demonstrate a clear and unequivocal right to relief, the petition for a writ of mandamus should be denied.

A. Under §577.023, Mammen must serve two years imprisonment before he is eligible for early release.

A person found to be a chronic offender under §577.023 is ineligible for early release for two years. Section 577.023.6(4), RSMo. (Supp. 2012). The purpose of §577.023 is to impose enhanced penalties for recidivists who continue to commit intoxication-related traffic offenses, either alone or in combination with other listed offenses. Chronic offenders must serve a

mandatory-minimum term of imprisonment before they are eligible for early release. Specifically, “[n]o chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment.” *Id.*

Mammen was sentenced on January 14, 2014, and was received by the Department on January 17, 2014. (Resp. Ex. A). Mammen received two hundred seven days of jail time credit, resulting in a sentence start date of June 24, 2013. (Resp. Ex. A). Because the court found Mammen was a chronic offender, he is not eligible for probation until June 24, 2015 – after he has completed two years imprisonment. Section 577.023.6(4) RSMo. (Supp. 2012). In compliance with §577.023.6(4), Respondent’s probation order directs Mammen to be released on June 24, 2015, the probationary date proposed by the Board. (Resp. Ex. B; Pet. Ex. 4).

Mammen asserts that he is entitled to *immediate* release on probation, before completion of his two-year mandatory-minimum imprisonment term, because he successfully completed the long-term treatment program under §217.362 RSMo. (Brief at 8, 9–10). Mammen argues that this Court should not enforce the two-year requirement commanded by §577.023.6(4), because §217.362 and §577.023 conflict and that this Court should determine that §217.362 controls. (Brief at 9–10). The Court should reject Mammen’s argument for the following reasons: (1) the statutes when read together do

not create a conflict; (2) even assuming that §577.023 and §217.362 conflict, which they do not, §577.023 is the later enacted specific statute and thus an exception to the general statute of §217.362; and (3) Mammen's interpretation would lead to unreasonable results and would frustrate the purpose of the statutes.

B. Section 217.362 and 577.023 do not conflict.

“The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.” *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. 2008). In determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes *in pari materia* to determine the true meaning and scope of the words. *Id.*

Section 577.023.6(4) sets forth the minimum time a DWI-Chronic Offender must serve before he or she is eligible for early release. It states, “[n]o chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment.” Section 577.023.6(4) RSMo. (Supp. 2012). Section 217.362 governs the Department's long-term treatment program and authorizes the sentencing court to grant or deny probation release to offenders who successfully complete the program. It states in pertinent part:

Upon successful completion of the program, the Board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. If the court determines that probation is not appropriate the court may order the execution of the offender's sentence.

Section 217.362.3 RSMo. (Supp. 2003).

A reading of these two statutes reveals no conflict. Instead, when read together, they demonstrate one consistent legislative policy—that chronic offenders be able to complete the intensive substance abuse treatment they need for rehabilitation and still satisfy the punitive interest of requiring recidivists to serve a longer period of time in custody before they are eligible for early release.

The plain language of §217.362 does not require courts to order an offender's *immediate* probation release after successful completion of the program. Section 217.362 gives the court the option to sentence offenders to a long-term treatment program, and it directs the Board to notify the sentencing court of an offender's probationary release date thirty days before release if an offender successfully completes the program. That is what occurred here.

Upon Mammen's successful completion of the §217.362 program, the Board notified the sentencing court that his probationary release date was

scheduled for June 24, 2015, the date he completed his mandatory-minimum term required by §577.023.6(4) RSMo. (Resp. Ex. B). Respondent adopted the Board's recommendation and issued an order scheduling Mammen's probationary release for that date. (Pet. Ex. 4). In taking the actions described above, the Board and the court complied with and gave effect to both §217.362.3 and §577.023.6(4).

Mammen cites *State ex rel. Salm v. Mennemeyer*, 423 S.W.3d 319 (Mo. App. E.D. 2014) and *State ex rel. Sandknop v. Goldman*, 450 S.W.3d 499 (Mo. App. E.D. 2014) as authority for his argument that he is entitled to immediate probation release under §217.362 upon successful completion of the program. (Brief at 8). He asserts that these two cases support his assertion that §217.362 and §577.023 conflict, and that §217.362 therefore controls in his case. But neither *Salm* nor *Sandknop* directly addressed the question before this Court – whether a sentencing court can grant probation to a chronic offender before he has satisfied the two-year mandatory-minimum term because he successfully completed the §217.362 program.

In *Salm*, the offender pled guilty to stealing and was sentenced to seven years' imprisonment. *Salm*, 423 S.W.3d at 320. The court also ordered that Salm complete the Department's program under §217.362 RSMo. *Id.* Upon Salm's successful completion of the program, the Board informed the sentencing court that Salm's probation release was scheduled for October 15,

2013, but incorrectly stated that the court had the option to “retain jurisdiction of Salm’s case up to twenty-four months” after completion of the program under §217.362 RSMo.² *Id.* Based on this information, the sentencing court rejected Salm’s October 2013 probation release date, and ordered Salm to remain in the Department’s custody for an additional twelve months only to be placed on probation in October 2014. *Id.* The Missouri Court of Appeals held that §217.362 did not authorize the sentencing court to retain jurisdiction for an additional twelve months. *Id.* at 321. The court held “upon an offender’s successful completion of the long-term treatment program, the trial court must: (1) allow the offender to be released on probation; or (2) determine that probation is not appropriate and order the

² The Department’s interpretation in *Salm* appears to have rested on the following statutory language “the court may sentence a person to the program which shall consist of institutional drug or alcohol treatment for a period of at least twelve and no more than twenty-four months.” Section 217.362.2 RSMo. (Supp. 2003) However, in *Salm* the court held that §217.362 authorized and directed the Department, not the court, to determine the duration of the long-term treatment program consistent with the statutory time requirements, and the Department’s program was twelve months. *Salm*, 423 S.W.3d at 321.

execution of the offender's sentence." *Id.* Thus, under §217.362, the sentencing court's only options were to: (1) accept the probation release date proposed by the Board (October 15, 2013); or (2) execute Salm's original sentence. *Id.* at 322.

Unlike Mammen's sentence, Salm was not required to complete any mandatory-minimum term before he was eligible for early release. Thus, Salm's sentence was governed solely by §217.362 and the sentencing court in that case was not authorized under §217.362, or *any other statute*, to reject the Board's probationary release date and set a future probation release date. Accordingly, the Board's probationary release date is June 24, 2015, the date Mammen completes his two-year imprisonment requirement under §577.023.6(4). Because this date is required by §577.023.6(4), and neither *Salm* nor §217.362 prohibit it, the sentencing court properly accepted the June 24, 2015, as Mammen's probation release date in this case.

In *Sandknop*, the Missouri Court of Appeals expressly declined to decide whether §217.362 and §577.023 conflict because the sentencing court's probation order did not invoke either statute. *Sandknop*, 450 S.W.3d at 502 n. 2. Sandknop pled guilty as a chronic offender to one count of driving while intoxicated. *Id.* at 500. The court sentenced Sandknop to ten years in the Department and ordered that he be placed in the long-term treatment program under §217.362. *Id.* at 500–01. After Sandknop successfully

completed the program, the sentencing court, on its own motion, entered an “Amended Order of Probation Pursuant to Section 559.115 RSMO.” *Id.* at 501. The sentencing court’s order, without reference to either §217.362 or §577.023, suspended Sandknop’s sentence pursuant to §559.115, and ordered his probation release at a future date nearly eight months after Sandknop successfully completed the program. *Id.* The appellate court reiterated its previous holding from *Salm* and held that the sentencing court authority under §217.362 is limited to “two alternative actions” when an offender successfully completes the program: “the circuit court must either release the defendant on probation or execute the defendant’s sentence if the court determines that probation is not appropriate.” *Id.* at 502.

Here, Respondent took appropriate action within the constraints of Missouri law. Although Respondent’s order does not expressly invoke §577.023, the order adopts the Board’s probationary release date as set forth in its report, which was calculated according to Mammen’s sentence under §577.023.6(4). In its report, the Board stated:

Subject is scheduled to complete the one-year treatment program on 3-6-2015, but he was sentenced as a chronic offender on Case No. 13LV-CR00018-01 and cannot, by law, be released on probation on that case prior to serving two years incarceration, which said date is 6-24-2015. This is the NOTICE OF

STATUTORY DISCHARGE. Subject will be scheduled for release on the chronic DWI date of 6-24-2015.

(Resp. Ex. B). By adopting this recommendation, Respondent's order grants Mammen probation release within the statutory limits set forth in §577.023 RSMo. Because this date is authorized by §577.023.6(4), and neither *Sandknop* nor §217.362 prohibit it, the sentencing court properly accepted the June 24, 2015, as Mammen's probation release date in this case.

C. Even if the Court were to find that a conflict exists between §217.362 and §577.023, then the statutes can be read harmoniously together, and if that is not possible, then §577.023 controls because it is the later enacted and more specific statute.

Mammen encourages the Court to read conflict into the statutes at issue here and asks the Court to resolve this conflict by disregarding the mandatory-minimum imprisonment term chronic offenders must serve. He suggests that §577.023 is a "general" statute, and it must give way to the "specific" statute of §217.362. (Brief at 9). Because the two statutes can be harmonized together, this Court need not reach the issue of which statute is controlling. However, even assuming there is a conflict between the statutes, which there is not, §577.023 controls because the chronic offender provisions were enacted later and are more specific than §217.362.

When “two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect.” *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. 2009). Only if the statutes cannot be read in harmony, “a chronologically later statute, which functions in a particular way will prevail over an earlier statute of a more general nature, and the latter statute will be regarded as an exception to or qualification of the earlier general statute.” *Id.* “[W]here one statutes deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general.” *State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo. 2014).

If this Court determines that §217.362 and §577.023.6(4) conflict, the statutes can be read harmoniously together and both be given effect as the Board and court have done in this circumstance. When both statutes are given effect, courts would have the sentencing option of §217.362 to order chronic offenders to complete long-term treatment *and* retain discretion to order a successful offender’s probation release on the date they complete their mandatory-minimum term. Chronic offenders benefit from this harmonious reading because they could continue to receive treatment under §217.362 and may receive probation once they’ve completed the program and satisfied their

mandatory-minimum term. The possibility of probation, whether ordered immediately or a few months after completion of the program, still serves as an incentive for chronic offenders to successfully complete the program. This is especially true in light of the alternative – serving a sentence of imprisonment without the possibility of probation. Section 217.362.4 RSMo. (Supp. 2003) (“Failure of an offender to complete the program shall cause the offender to serve the sentence prescribed by the court and void the right to be considered for probation on this sentence.”).

If §217.362 and §577.023.6(4) cannot be read in harmony together, then §577.023.6(4) is controlling because it is the later enacted and more specific statute.

Section 217.362, last amended in 2003, is a general statute that authorizes the Department to develop a long-term treatment program for the treatment of chronic nonviolent offenders with serious substance abuse addictions and permits the courts to sentence qualifying offenders to that program and retain authority to grant probation, if appropriate. This statute designates general duties required by the Department and the courts for offenders who are sentenced to this program. At issue here, this statute vests the court with general discretion to grant probation release to offenders who successfully complete the program.

Section 577.023 applies only to recidivist intoxication-related traffic offenders and establishes their enhanced punishments. The applicable provisions in §577.023 were enacted *after* §217.362. In 2005, the legislature amended §577.023 to include a new category of recidivists – “chronic offender.” Section 577.023.1(2), RSMo. (Supp. 2005). Section 577.023 imposes specific limitations against granting early release. This statute *removes* the court’s authority to grant probation or parole, and the Board’s ability to grant parole, to recidivist offenders until satisfaction of their mandatory-minimum term. In other words, while courts have the option to sentence recidivist intoxication traffic-related offenders to the long-term treatment program under §217.362, the legislature specifically determined that these recidivists must serve a specific minimum imprisonment term before they are eligible for early release, regardless of whether the court opts to place them in treatment or not. These specific exclusions must prevail over the general discretion granted by §217.362.

It is also presumed that the legislature was aware of §217.362 when it amended §577.023 in 2005 to establish chronic offenders’ mandatory-minimum terms. *See Turner v. School District of Clayton*, 318 S.W.3d 660, 667–68 (Mo. 2010). Thus, if the legislature wished to exempt chronic offenders from serving the two-year mandatory minimum imprisonment in cases where the offender successfully completes the long-term program, then

it certainly could have amended either statute to exclude the mandatory-minimum requirement. It did not. Because §577.023.6(4) is the later enacted and more specific statute, it would control in the event this Court finds a conflict between §217.362 and §577.023.

D. Mammen asks this Court to construe the statutes in a way that, if accepted, would lead to unreasonable results.

Mammen’s interpretation of the two statutes would lead to unreasonable results. A reviewing court must use rules of statutory construction that “subserve rather than subvert legislative intent.” *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo. 2004). “All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent.” *Williams v. Nat’l Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004). “Construction of statutes should avoid unreasonable or absurd results.” *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. 2007).

The harmonious reading of §217.362 and §577.023 best effectuates the intent of the General Assembly – that chronic offenders receive the treatment they need with the possibility of probation, but still require recidivists to serve a longer term of imprisonment before being eligible for early release. If §217.362 can be utilized to circumvent §577.023’s mandatory-minimum requirements, then courts may stop ordering long-term treatment to

offenders who most need it, precluding chronic offenders from treatment under §217.362 and precluding them from probation.

Furthermore, compelling the court to decide the issue of whether probation should be granted *before* completion of the legislature's mandatory-minimum term under §577.023.6(4), may not lead to the result Mammen seeks. If this Court adopts Mammen's position that the sentencing court take one of two options upon successful completion of the program: (1) immediate probation release; or (2) execution of the full sentence, many courts may choose to deny probation to offenders who have not satisfied their mandatory minimum term of imprisonment because the offender's early release is prohibited under §577.023.6(4) RSMo. Immediate execution of the sentence would avoid Mammen's manufactured conflict argument because that choice, while disadvantageous to Mammen, would give full effect to both statutes.

CONCLUSION

The Court should deny the petition for a writ of mandamus.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,769 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software, and that a copy of this brief was sent through the electronic filing system on May 12, 2015 to:

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