

No. SC94096

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

MARCUS MERRITT,

Respondent.

**Appeal from the St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable John F. Garvey, Jr., Judge**

APPELLANT'S AMENDED REPLY BRIEF

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ARGUMENT

I. (section 571.070 passes strict scrutiny review).

Section 571.070 passes strict scrutiny in that it is narrowly tailored to serve the compelling governmental interest of protecting the public safety and reducing the number of firearm-related and violent crimes in the State (Replies to Respondent's Point I and portions of Respondent's Point II).

Defendant argues in Points I and II that the State's argument is not preserved for appeal because the State did not respond in the trial court to Defendant's argument that section 571.070 violates the new version of Article I, Section 23 of the Missouri Constitution. (Resp. Br. 14, 37-38). But the argument raised in Point I of Appellant's brief on appeal could not have been raised at the trial level because the Missouri Constitution was amended after the trial court dismissed the charges underlying the present appeal. As such, this is the first opportunity to present the argument that section 571.070 does not violate the recently amended Missouri Constitution.

Additionally, to the extent Defendant argues that the State's arguments regarding the previous version of Article I, Section 23 of the Missouri Constitution are not preserved, the State's arguments in Points I and II should not be considered unpreserved because the State's arguments

are as to why the statute is constitutional; previous cases determining that arguments are not preserved when not raised for the first time in the trial court have dealt only with claims that a statute is unconstitutional, not arguments for why a statute is constitutional.

Admittedly, this Court has previously refused to consider claims not raised in the trial court. *See State v. Davis*, 348 S.W.3d 768 (Mo. 2011). But in *Davis*, the State asked this Court to reconsider previous case law applying the prohibition against retrospective laws to criminal cases. Because the State did not raise this argument in the trial court, this Court declined to consider it on appeal. *Id.* at 769-70. Here, conversely, the trial court purported to declare section 571.070 unconstitutional for an unspecified reason, and the only precedents that arguably supported the ruling were overruled in *State v. Honeycutt*, 421 S.W.3d 410 (Mo. 2013). There were no prior decisions of this Court finding that this statute was unconstitutional. The constitutionality of section 571.070 in the absence of any guiding precedent warrants the Court's full consideration.

Defendant argues in Points I and II that section 571.070 violates the second amendment of the United States Constitution. There was no indication in the record that the trial court made a ruling on second amendment grounds. In any event, for the same reasons section 571.070 is

not unconstitutional under the Missouri Constitution, it is not unconstitutional under the United States Constitution.

Defendant argues in Point I that the “findings of the studies cited by the Appellant do not apply to the State of Missouri” because the violent crime rate in Missouri has increased since the expansion of section 571.070 to cover all felons for an indefinite period. (Resp. Br. 23-24). Defendant argues that if the statute “aided the State’s compelling interest of protecting the public safety and reducing the incidence of violent gun-related crime, one would expect a decrease in the violent crime rate in Missouri from 2008 . . . to the present.” (Resp. Br. 23-24). Defendant concludes that the increased crime rate “certainly does demonstrate that a complete and lifetime ban on felons possessing any kind of firearm, for any reason, has no real effect on the violent crime rate or the State’s compelling interest in protecting public safety and does not reduce the incidence of violent and firearm-related criminal activity.” (Resp. Br. 24).

But Defendant’s argument presents a logical fallacy in that it attempts to draw a causal correlation that does not necessarily exist. Any number of variables could affect the rate of crime. For instance, population size; demographic shift, including fluctuation in the number of young males in the population; degree of urbanization; economic conditions, including median

income, poverty level, and job availability; divorce rate; climate; and effective strength of law enforcement agencies are all variables that could affect the rate of crime, just to name a few. See Crime in the United States, by State 2012, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2012.xls (last visited Nov. 21, 2014). In short, it could be that numerous factors are responsible for the increased crime in Missouri and that the crime rate would be even higher without section 571.070. The increase in rate of crime makes the need for section 571.070 more compelling in light of the study indicating that felons are at an increased risk of reoffending and committing violent crime.

Additionally, the fact that the rate of violent crime has increased does not reflect whether section 571.070 has been effective in carrying out its intended purpose because there is no indication from the crime rate who has committed the violent crimes; the data does not indicate whether the increased rate is attributable to first-time felons or repeat offenders. Without that additional information, the fact that the crime rate has increased does not demonstrate that section 571.070 has been ineffective in carrying out the State's compelling interest.

Defendant argues in Point I that because the federal felon-in-possession statute and other states' statutes are more narrowly drawn, Missouri's statute is not narrowly tailored and fails strict scrutiny review. (Resp. Br. 24-31). In so arguing, Defendant is suggesting that Missouri's statute must match the other statutes, and the failure of the State to match those statutes results in Missouri's statute failing strict scrutiny review. But just because section 571.070 could be written to exclude more classes of offenders does not mean that, as it is written, it is not sufficiently narrowly tailored to pass strict scrutiny review. Theoretically, the statute could be so narrowly drawn that it only applied to a single type of offender (e.g., convicted murderers), but such narrow tailoring would largely defeat the statute's ability to serve its compelling governmental interest. In fact, the other statutes Defendant cites are more narrowly drawn than necessary in that they exclude some defendants who are likely to commit future violent crimes involving firearms. As it stands, Missouri's statute is narrowly drawn to serve the State's compelling interest, but not so narrowly drawn that it fails to effectively serve that compelling interest.

Additionally, Defendant misconstrues the federal felon-in-possession statute when arguing that the Missouri statute is not "in line" therewith. (Resp. Br. 24-25, 52-53). Defendant construes the federal statute's provision

that felons may not possess “any firearm or ammunition; or . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce,” to mean that the federal statute limits the type of firearms a felon can possess whereas Missouri’s statute prohibits the possession of any firearm. (Resp. Br. 25). But the federal statute has been interpreted liberally to extend to any firearm that has moved in interstate commerce at any point, even when the firearm moved in interstate commerce before the felon’s possession, and this broad interpretation of the statute makes it virtually indistinguishable from Missouri’s statute in that regard. *See Barrett v. United States*, 423 U.S. 212, 224-25 (1976).

Defendant also argues that section 571.070 is constitutionally infirm in that it does not exclude some felonies that are excluded in the federal statute, section 571.070 does not have a time limitation while the federal statute does, and the federal statute does not apply to misdemeanors. (Resp. Br. 25, 27). But again, the relevant question is not whether section 571.070 is narrowly drawn to the same extent the federal statute is; rather, the question is simply whether the statute is narrowly tailored to serve the State’s compelling interest.

In any event, Defendant misconstrues the federal statute in making these arguments. Although the federal statute excludes some felonies related

to “business practices,” it does include several felonies that do not “involve violence.” For example, a conviction for distribution of PCP—such as Defendant’s underlying conviction—would qualify Defendant for dispossession of firearms under the federal statute. Additionally, the federal statute applies without time limitation just as the current version of section 571.070. *See* 18 U.S.C. § 922 (2006). Finally, similarly to the federal statute, section 571.070 does not apply to any misdemeanors.¹

Defendant argues in Points I and II that, despite the fact that Missouri has two available options for the restoration of the right to possess firearms for convicted felons, the statute is unconstitutional as applied to him because neither option is available to him. (Resp. Br. 27, 34, 55). Defendant argues that because his underlying felony conviction was a federal conviction, neither a gubernatorial pardon nor expungement is available to him. (Resp. Br. 34, 55). But, as argued in Appellant’s opening brief, Missouri’s statute does not need a restoration clause to remain constitutional.

¹ It is also noteworthy that while the Missouri statute does not apply to any misdemeanants, the federal statute does apply to some misdemeanants. *See* 18 U.S.C. § 922 (g) (9) (2006).

Further, even though gubernatorial pardon or expungement may not have been available to Defendant because his underlying felony was a federal conviction, Defendant had other options to restore his rights, e.g., presidential clemency instead of gubernatorial clemency. This would also be the case for any conviction from another state—a felon in that situation could apply for gubernatorial clemency or expungement from the state of conviction rather than from Missouri. Thus, even if the constitutionality of the statute rested on an avenue of restoration, such avenues were available to Defendant.

In both points, Defendant argues that the fact that convicted felons (except those whose underlying felonies involved the right of suffrage) can vote and hold public office following the completion of their sentences demonstrates that the felon-in-possession statute is unconstitutional absent a restoration provision. (Resp. Br. 32-33, 53-54). But possessing a firearm can kill or cause serious physical injury to another, while voting, holding a professional license, or holding public office cannot. As such, the legislature could reasonably conclude that while a felon may be trusted to engage in some civic activities, that same felon may not be trusted with a dangerous instrumentality such as a firearm.

Defendant relies on *Britt v. State*, 681 S.E.2d 320 (N.C. 2009), a North Carolina case finding North Carolina's statute prohibiting the possession of firearms by felons violated North Carolina's constitution. (Resp. Br. 31, 52). But the *Britt* case significantly differed from this case. The defendant in *Britt* pled guilty to a drug offense in 1979, and had his right to possess firearms restored to him in 1987 based on the felon-in-possession statute in force at that time. *Britt*, 681 S.E.2d at 322. Seventeen years later the North Carolina legislature amended the felon-in-possession statute, making it a crime for any felon to possess a weapon following a felony conviction for an indefinite period. *Id.* The *Britt* court interpreted North Carolina's constitutional provision that provided an unfettered right to bear arms. *Id.* at 322 ("A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."). The court noted that the defendant had thirty years of law-abiding conduct since his underlying felony, that the defendant willingly divested himself of his firearms once he learned he was presumably violating the newly-amended felon-in-possession statute, and that he had seventeen years of "responsible, lawful firearm possession" before the change in the law. *Id.* The court concluded:

Based on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of [the felon-in-possession statute] is an unreasonable regulation, not fairly related to the preservation of public peace and safety. In particular, it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety.

Id. at 323.

The *Britt* case is factually distinct from the case at bar. The defendant in *Britt* had had his civil rights restored for a number of years before the state changed its statute to then prohibit him from possessing firearms. *Id.* at 322-23. Here, however, Defendant never had his right to possess firearms restored. Additionally, the *Britt* court found the statute unconstitutional as applied to the defendant based in large part on his long history of law-abiding behavior. Defendant, however, has not engaged in the same law-abiding behavior. In fact, when the police discovered Defendant possessing firearms,

he was simultaneously violating the law by illegally possessing heroin. (L.F. 33). As Defendant had not had his right to bear arms restored prior to the change in the law and was not an upstanding and law-abiding citizen like the defendant in *Britt*, Defendant's as-applied challenge should fail.

II. (section 571.070 passes intermediate scrutiny review).

Section 571.070 passes intermediate scrutiny in that prohibiting felons from possessing firearms bears a substantial relationship to the protection of the health, safety, morals, and welfare of the public.

Defendant argues in Point II that *Griffith v. Kentucky*, 479 U.S. 314 (1987), overruled *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396 (Mo. banc 1972), insofar as *Griffith* set a “floor” for the retroactive application of new constitutional rules of criminal procedure to all cases pending at the time of the new decision. (Resp. Br. 40-41). But *Griffith* did not overrule *Hall*. The Court in *Griffith* held that new constitutional rules announced in Supreme Court decisions interpreting the United States Constitution should be given retroactive effect to all cases pending on direct appeal at the time the new rule is announced. *Griffith*, 479 U.S. at 320-22. The Court’s retroactivity analysis in *Griffith* applied only to constitutional rules announced in Court decisions; it did not affect the retroactivity analysis given to new constitutional amendments that were not in effect at the time the criminal conduct was committed. As *Hall* involved the application of a new constitutional amendment, and not a rule derived from an interpretation of the already-existing constitution, *Griffith* had no effect on the holding of *Hall*.

Further, the *Griffith* decision is consistent with the general proposition that the criminality of conduct is assessed under the law as it existed at the time of the conduct. There, the Supreme Court simply interpreted the already-existing constitution, and as it was the same constitution that was in existence at the time of other cases pending on direct review, the newly interpreted rule from the already-existing constitution applied to those cases. In *Hall* and here, conversely, the new rule of criminal procedure came not from an interpretation of the Missouri Constitution as it existed at the time of the criminal conduct in question, but from an amendment to the Missouri Constitution that added entirely new provisions. As the new rule was announced through a constitutional change, and not through an interpretation of the constitution in effect at the time of the criminal conduct, the new rule should not apply to the present case.²

Defendant also argues in Point II that the State's reliance on *Hall* is misplaced because the constitutional provision at issue in that case was "an entirely new constitutional provision; not an amendment to an already existing constitutional provision." (Resp. Br. 41). Although Defendant is correct that that case involved an entirely new constitutional provision, the

² Point II of Appellant's brief was raised in the alternative to Point I.

relevant principle of *Hall* was not reliant on that fact. *Hall* stated that “the general rule is that prospective effect alone is given to provisions of state constitutions.” *Id.* That proposition was not dependent on the provision at issue being an entirely new provision, and the fact that the provision at issue in the present case is an amendment is of no import.

Defendant argues in Point II that other states’ more limited felon-in-possession statutes demonstrate that Missouri’s statute is not a reasonable time, manner, and place restriction on the right to bear arms. (Resp. Br. 48-51). But the mere fact that other states have chosen to limit their felon-in-possession statutes to a smaller group of offenders does not render Missouri’s statute unreasonable. The relevant question is not whether Missouri could have a more limited felon-in-possession statute; the relevant question is whether Missouri’s statute is a reasonable time, manner, and place restriction on the right to bear arms. For the reasons set forth in Appellant’s opening brief, section 571.070 is a reasonable time, manner, and place restriction on the right to bear arms.

In the State’s opening brief, the State distinguished between intoxicated persons temporarily banned from possessing firearms under section 571.030 unless possessing the firearms for purposes of self-defense and felons permanently banned from possessing firearms under section

571.070. The State argued that while intoxicated persons are allowed to possess weapons for purposes of self-defense, convicted felons could not be trusted with the same, even in cases of self-defense, based on the fact that felons had previously disregarded the rule of law whereas intoxicated persons had not. (App. Br. 49-50). Defendant argues in response that alcohol intoxication is not the only form of intoxication, and an intoxicated person could have disregarded the rule of law by becoming intoxicated on illegal substances but still have had the right to possess a firearm in self-defense. (Resp. Br. 57). But presumably the legislature was not consciously carving out exceptions for lawbreakers or condoning *illegal* intoxication in permitting intoxicated persons to possess firearms in self-defense. Rather, it seems more likely that the legislature may not have considered illegal intoxication in drafting section 571.030. To the extent that section 571.030 would permit a person intoxicated on illegal substances to possess a firearm in self-defense, perhaps this may have been an unintended loophole in the statute that needs to be further examined. In any event, the fact that the legislature may have overlooked one type of lawbreaker in restricting access to guns does not mean that section 571.070 is unconstitutional as applied to Defendant. *See, e.g., U.S. v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (stating that intermediate

scrutiny requires “the fit between the challenged regulation and the asserted objective be reasonable, not perfect.”).

Defendant also argues in Point II that section 571.070 violates article I, section 23 of the Missouri constitution as it previously existed because that section “limits only carrying concealed weapons.” (Resp. Br. 45). But this Court has previously found that a statute limiting more than carrying concealed weapons did not violate the constitution. *See State v. Richard*, 298 S.W.3d 529, 532 (Mo. 2009) (holding that section 571.030, which prohibited intoxicated persons from possessing firearms, did not violate article I, section 23 of the Missouri constitution). As this Court has previously held that article I, section 23 does not prohibit all limitations on the possession of firearms other than limitations on carrying concealed weapons, Defendant’s argument is incorrect.

CONCLUSION

The judgment dismissing Counts I, II, and III of the indictment should be reversed, and the case should be remanded to the trial court for reinstatement of these counts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 3,359 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this brief was sent through the eFiling system on this 25th day of November, 2014, to:

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