

No. SC87652

**IN THE
SUPREME COURT OF THE
STATE OF MISSOURI**

GARVIS DUDLEY,

Respondent,

v.

DENIS AGNIEL

and

GARY KEMPKER

Appellants.

APPELLANTS' SUBSTITUTE REPLY BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704**

**P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
mike.spillane@ago.mo.gov
Attorneys for Appellants**

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JURISDICTIONAL STATEMENT

This is a declaratory judgment action in which the Circuit Court of Cole County, Missouri held that §559.115.7, RSMo Supp. 2003 must be applied retroactively to reduce the prior commitment count and mandatory-minimum prison term for an offense that occurred before the effective date of the statute. A panel of the Missouri Court of Appeals Western District affirmed. On May 2, 2006 a majority of the judges constituting the Missouri Court of Appeals Western District en banc voted to transfer the case to this court post-opinion.

This Court has jurisdiction under Article V Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.02.

STATEMENT OF FACTS

The facts of the case are set out in Appellant's Substitute Brief. There are no disputed issues of material fact. The only issue in the case is whether §559.115.7, RSMo Supp. 2003 should be applied retroactively to reduce the mandatory-minimum prison term on a sentence imposed before the effective date of the statute.

POINT RELIED ON

The Circuit Court of Cole County erred in granting declaratory judgment for the plaintiff on the issue of whether §559.115.7, RSMo Supp. 2003 should be applied retroactively to reduce plaintiff’s number of prior prison commitments and thereby reduce his mandatory-minimum prison term, because that holding is contrary to §1.160, RSMo 2000 which bars the retroactive application of laws that reduce punishments and general Missouri law principles ban retrospective laws that retroactively affect substantive rights. absent a clearly manifested intent by the legislature for retroactive application, in that §559.115.7, RSMo Supp. 2003 is controlled by the ban on reduction in punishment in §1.160, RSMo. and even if it were not, it is a law that changes substantive rights that the legislature has not manifested a clear intent should be applied retroactively.

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988)

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974)

State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991)

Star v. Burgess, 160 S.W.2d 376 (Mo. banc 2005)

§1.160, RSMo 2000

ARGUMENT

Respondent Dudley's principle argument in his substitute brief is that §559.115.7, RSMo 2003 Supp. is procedural in that it does not affect "vested rights," and that therefore, the statute may be applied retroactively without violating the ban on retrospective laws in Article I, §13 of the Missouri Constitution or the ban on retroactive reductions in penalties in §1.160, RSMo 2000 (Respondent's Substitute Brief at 10-19). Dudley also appears to argue that *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) does not dictate that changes in mandatory-minimum prison terms are substantive (Respondent's Substitute Brief at 13-19). Finally Dudley argues that §1.160, RSMo 2000 does not apply to his case (Respondent's Substitute Brief at 17-19).

Dudley's argument is not supported by the facts of this case. There is no dispute that the effect of applying §559.115.7, RSMo 2003 Supp. to Dudley's prison term is to retroactively reduce the mandatory-minimum prison term on his eight year sentence imposed on March 7, 2001 from eighty percent of the eight-year sentence to fifty percent of the eight-year sentence (L.F. 34, 39-44, 57). This is a substantive reduction in punishment.

DUDLEY'S "VESTED RIGHTS" ANALYSIS

Dudley's "vested rights" analysis fails. The impairment of vested rights may or may not be necessary for a law to be substantive as opposed to procedural. But applying §559.115.7, RSMo 2003 Supp. does impair vested rights.

Dudley's authority for the proposition that a law must impair vested rights in order labeled to be "substantive" appears to be *State ex rel. St. Louis-San Francisco Railway Co.*

v. Buder, 515 S.W.2d 409, 410 (Mo. banc 1974) and *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005) (Respondent’s Brief at 10-11).

In *Buder*, this Court defined “substantive”: “Those rights which are substantive are those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty or attach a new disability in respect to transactions or considerations already passed.” *State ex rel. St. Louis San Francisco Railway Co. v. Buder*, 515 S.W.2d at 410. More recently in *Jaco* this Court defined the distinction between substantive and procedural laws as follows:

Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights.[Citation omitted]. The distinction is that substantive law relates to rights and duties giving rise to a cause of action, while procedural law is the machinery for carrying on the suit.

State v. Jaco, 156 S.W.3d at 781

Reducing Dudley’s mandatory-minimum prison term from 6.4 years to 4.0 years creates new obligations and duties, and rights and impairs a vested right. Dudley seeks the right four years into his sentence to have the Board consider him eligible for parole release and the Board would have the duty and obligation to consider him eligible for release on that date, although it retains the almost unlimited discretion to decide whether to release Dudley.

These rights, duties and obligations would be created by retroactive application of §559.115.7, RSMo 2003 Supp.

But a vested right has been impaired in this case¹. So it is not necessary to determine in this case whether impairment of a vested right is needed for a law to be substantive. The people of the State of Missouri represented by the prosecutor and the sentencing court made charging and sentencing decisions based on the then-known fact that Dudley would have to serve a mandatory-minimum prison term of eighty-percent making Dudley ineligible for release until December, 2006 (See L.F. at 43, Judgment of Conviction and Sentence lists the prison commitments and notes that Dudley must serve an eighty percent mandatory minimum that will be completed on December 13, 1996). The sentencing court and the people of Missouri had a vested right in having an habitual felon with previous commitments for

¹ Dudley was conditionally released on November 17, 2005, after the Circuit Court's April 12, 2005 decision. It is illogical to argue that Dudley has received no substantive benefit from retroactive application of the statute in light of the fact that but for the retroactive application he would not yet be eligible for release. Back-dating the start of Dudley's sentence to take into account jail-time credit, he will complete eighty percent on December 21, 2006 (calculation start date of July 18, 2000 + six years 146 days = December 21, 2006). The sentencing court apparently calculated the mandatory-minimum term as ending on December 13, 2006 when it imposed sentence (L.F. 43). This difference has no impact on the outcome of the case.

assault, felonious restraint, and burglary, serve the 6.4 years that everyone thought he would be required to serve for his most recent assault conviction. That vested right was taken away by the retroactive application of §559.115.7, RSMo Supp. 2003, a statute that did not exist when Dudley was sentenced.

Dudley's vested right analysis focuses on the assertion that an inmate does not have a vested right to parole release when he becomes eligible for consideration (Respondent's Substitute Brief at 11-12). While true, that misses the point. The sentencing court and the people of Missouri had a vested right in having a habitual offender actually serve the mandatory-minimum prison term that was required by law at the time of sentencing. That right was taken away and replaced by Dudley's right to be considered for parole.

LAWHORN IS ON POINT

Dudley also argues, based on his "vested right" analysis, that *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1980), does not hold that changes in mandatory-minimum prison terms are substantive as opposed to procedural changes (Respondent's Substitute Brief at 13-16). A plain reading of *Lawhorn* is sufficient to rebut Dudley's argument.

In *Lawhorn*, this Court specifically rejected the argument that an "appellant cannot be deprived of a substantive right when the right to parole is entirely within the discretion of the parole board." 762 S.W.2d at 826. This Court found the argument to be "not supported by the cases" and cited cases for the propositions "that parole eligibility is an element of a criminal sentence," and "parole eligibility is part of the punishment for a crime." *Id.* at 826. The Missouri Court of Appeals Western District in *Carlyle v. Missouri Department of*

Corrections in finding that §559.115.7, RSMo 2003 Supp. is procedural acknowledged that *Lawhorn* held that changes in mandatory-minimum prison terms are substantive, but opined that *Lawhorn* had been silently overruled *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d 76, 79 (Mo. App. W.D. 2005). *Lawhorn* says what it plainly appears to say, that changes in mandatory-minimum prison terms are substantive, not procedural changes. Dudley's argument to the contrary is mistaken. For the reasons set out in the main brief *Lawhorn* does not conflict with, and was not silently overruled by *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004) (Appellant's Substitute Brief at 17-22).

§1.160, RSMo IS APPLICABLE

Dudley argues that 1.160, RSMo 2000 does not forbid the retroactive application of §559.115.7, RSMo Supp. 2003 because a reduction in a mandatory-minimum prison term is procedural and is not a reduction in a penalty, and because §559.115.7 is a new, as opposed to an amended law.

Dudley's arguments concerning the allegedly procedural and non-penal nature of mandatory-minimum prison terms were rejected by this Court in *Lawhorn*. See 762 S.W.2d at 826. Dudley's view that adding a paragraph to §559.115, RSMo makes the provision "new" as opposed to an amended law is conflict with this Court's teaching in *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991) (holding that new statutes that were part of a comprehensive alteration of the drug laws were in actuality an amendment of the old provisions and therefore controlled by §1.160 RSMo). But see *State ex rel. Nixon v. Russell*, 129 S.W.3d at 870.

CONCLUSION

Appellants pray that the judgment of the Circuit Court of Cole County, Missouri be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
mike.spillane@ago.mo.gov
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 1,960 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 12th day of October, 2006, to:

J. Justin Johnston
1000 Walnut, Suite 1600
Kansas City, Missouri 64106
816-221-0080

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
mike.spillane@ago.mo.gov
Attorneys for Appellants