

No. SC87778

IN THE
MISSOURI SUPREME COURT

FRANK JONES,

Appellant / Plaintiff,

v.

GAYE LYNN FIFE, RECORDS OFFICER

Respondent / Defendant.

Appeal from the Circuit Court of Pike County, Missouri
The Honorable Dan Dildine, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

This case is before the Missouri Supreme Court on transfer from the Missouri Court of Appeals Eastern District for a determination of whether or not State ex rel. Nixon v Russell, 129 S.W.3d 867 (Mo. banc 2004) has overruled State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988). (See Jones v. Fife, ___ S.W.3d ___, WL 1605027 page 5 (Mo. App. E.D. June 13, 2006).

STATEMENT OF FACTS

The facts set forth in Appellant's Statement, Brief and Argument and the Respondent's Substitute Brief are correct. However, Appellant would like to make it clear as noted in the decision by the Eastern District Appeals Court that Appellant successfully completed his long-term drug treatment pursuant to Section 217.362 and was subsequently released. (See Jones v. Fife, __ S.W.3d __, WL 1605027 page 1 (Mo. App. E.D. June 13, 2006).

ARGUMENT

I. Every Appellate Court review to date has found § 559.115.7 and § 217.362.5 apply retroactively.

There are two issues to be decided in resolving this case and they are;

1) Does § 559.115.7 apply retroactively to offenders who committed their offenses before the June 27, 2003 effective date; and 2) Does § 217.362.5 apply retroactively to offenders who committed their offenses before the June 27, 2003 effective date. The case law to date says yes, § 559.115.7 and § 217.362.5, are to be applied retroactively because they do not violate §1.160, they are not prohibited by *ex post facto*, *in pari materia*, or public policy.

See Bantle v. Dwyer, 195 S.W.3d 428, (Mo. App. S.D. 2006) handed down May 5, 2006 finding Lawhorn and Russell harmonious and determining § 217.362.5 should be applied retroactively.

See Jones v. Fife, Eastern District, WL 1605027, ED86955 handed down June 13, 2006, adopting the logic of the Western District concerning § 559.115.7 and then transferring to the Missouri Supreme Court to determine if Russell has overruled Lawhorn *sub silentio*.

See Carlyle v. Missouri Department of Corrections, 184 S.W.3d 76 (Mo. App. W.D. 2005), finding no *ex post facto* violation and applying § 559.115.7 retroactively because it is procedural in nature.

See Irvin v. Kemper, 152 S.W. 3d 358 (Mo. App. W.D. 2004), finding § 559.115.7 is retroactive and determining the logic set forth by the Missouri Supreme Court in State ex rel. Nixon v Russell, 129 S.W.3d 867 (Mo. Banc 2004) in finding § 558.016.8 applies retroactively and is controlling.

See Powell v. Missouri Department of Corrections, 152 S.W.3d 363 (Mo. App. W.D. 2004) finding § 559.115.7 applies retroactively.

See Ridinger v. Missouri Bd. of Probation and Parole, Western District, 189 S.W.3d 658 handed down April 25, 2006, finding § 559.115.7 and § 217.362.5 apply retroactively.

See Garvis v. Agniel, WL 1195520, WD65507 finding § 559.115.7 is procedural and applies retroactively and now before the Supreme Court on transfer (SC87652).

See Nieuwendaal v. Missouri Department of Corrections, 181 S.W.3d 153, (Mo. App. W.D. 2005) finding § 559.115.7 is procedural and applies retroactively.

See State ex rel. Nixon v Russell, 129 S.W.3d 867 (Mo. Banc 2004) finding § 558.016.8 applies retroactively to prisoners sentenced prior to June 27, 2003 because it does not shorten the offender's sentence but merely changes the location and circumstances of how it is served out.

See Star v. Burgess, 160 S.W.3d 376 (Mo. Banc 2005) refusing to address the issue of § 559.115.7 because it was not raised to the trial court.

II. Respondent makes four flawed arguments.

Respondent makes four basic arguments against applying § 559.115.7 and § 217.362.5 retroactively. First, retroactive application is barred by § 1.160. Second, since the doctrine of *ex post facto* restrains the legislature from increasing a punishment (Lawhorn), then *ex post facto* bars the legislature from passing any legislation that may reduce the minimum mandatory sentence an offender must serve within the prison walls. Third, *in pari materia* and fourth, public policy.

A) §1.160 does not bar applying § 559.115.7 & § 217.362.5 retroactively.

Twice in his substitute brief the Assistant Attorney General claims Russell determines that § 558.016.8 is retroactive because it is procedural. (See Respondent's Substitute Brief, page 5 stating, “[A]nd *State ex. Rel Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004) which held a provision concerning judicial parole to be procedural and therefore retroactively applicable,” and see Respondent's Substitute Brief, page 19 ¶ 2 stating, “In short the statute applied retroactively in *Russell* was procedural ...” underscores added.) Russell never says that. In fact, Russell never has to

reach the question of whether or not § 558.016.8 is a procedural exception to §1.160 because it decides, “Section 558.016.8 is a new statutory provision; it does not repeal or amend any previously existing statute.” Russell at 870. Russell clearly stands for the proposition that when a new statute does not repeal or amend an existing statute then §1.160 does not block it from being retroactively applied.

Judge Wolff wrote, “The question presented here is whether this 2003 statute applies to offenders sentenced prior to June 27, 2003, the effective date of section 558.016.8,” (underscore added). Russell at 868. The Missouri Supreme Court then declared that § 558.016.8 should be applied retroactively because it did not violate §1.160 in that it, “[D]oes not shorten his sentence ... nor does it alter the law creating the offense ... is a new statutory provision ... [and] it does not repeal or amend any previous existing statute.” Id. at 870.

Like 558.016.8, statutory provision 559.115.7 and 217.362.5 were born in Senate Bill 5, and just like 558.016.8 were meant to reduce the overcrowding in Missouri’s prisons. The first three reasons given by the Supreme Court in Nixon v. Russell apply equally, and without argument to Appellant Jones’ situation. In Appellant Jones’ case, § 559.115.7 and § 217.362.5 do not shorten his sentence, do not alter the law creating his

offense, and plainly are both new statutory provisions. The only arguable point at all is whether § 559.115.7 or § 217.362.5 “repeals or amends any previous statute” in violation of §1.160. Neither 559.115.7 nor 217.362.5 repeals § 558.019.2. Therefore, the only question at issue is whether or not § 559.115.7 or § 217.362.5 “amends” § 558.019.2 in violation of §1.160.

When logically examined, it is apparent § 559.115.7 & § 217.362.5 do not amend § 558.019.2, but simply provide further instruction to the DOC about how the legislature wants the existing statute applied (as the Nieuwendaal Court pointed out). Section 559.115.7 & § 217.362.5 do not abort, repeal, or amend the general rule enacted in § 558.019.2, “For the purposes of this section “prison commitment” means and is the receipt by the department of corrections of an offender after sentencing.” § 558.019.2 RSMo. Section 559.115.7 & § 217.362.5 simply instruct DOC on when not to apply § 558.019.2. Section 559.115.7 & § 217.362.5 carve out safe harbors for offenders participating in § 559.115 120-day shock programs and § 217.362 long-term programs. Therefore, § 559.115.7 & § 217.362.5 can and should be held to be retroactive because like §558.016.8, they do not violate § 1.160.

B) Lawhorn does not prevent the legislature from decreasing minimum time served in prison before parole.

The Respondent's misunderstanding of State v. Lawhorn twist the shield that protects all of us from laws being passed *after the fact* that will disadvantage us into a sword that never let's us benefit from a change in legislation. See State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988). The Respondent believes that since the legislature is forbidden by *ex post facto* from passing laws that increase punishments, that the legislature is likewise forbidden from passing laws that may decrease a minimum prison term and allow the offender to serve out his sentence under different circumstances. That is not logical and not supported by the law.

Ex post facto, as a threshold matter, only becomes an issue when it disadvantages a person. "A law falls within the *ex post facto* prohibition if it is retrospectively applied to the disadvantage of an offender ..." Carlyle at 79, underscore added. Lawhorn itself states, "In order for a law to fall within the *ex post facto* prohibition a law "must be retrospective, that is it must apply to events occurring before its enactment" and "it must disadvantage the offender affected by it." Lawhorn at 824 quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981) (underscore added). By Lawhorn's own standards the case at issue is not *ex post facto*. Granted, the events Jones seeks to apply § 559.115.7 & §

217.362.5 to occurred before their enactment, but Jones is not disadvantaged by their application, therefore *ex post facto* does not apply.

Further, in Storey v. State the Missouri Supreme Court said that an offender has to go beyond “mere disadvantage” and show an increase in punishment, change in ingredients of the offense, or a change in the ultimate facts necessary to establish guilt. See Storey v. State, 175 S.W.3d 116, 132 (Mo. 2005). In this instance, none of those factors apply.

The DOC instead relies on State v. Hillis, Lindsey v. Washington, and Lawhorn for the proposition that changes in parole eligibility automatically trigger *ex post facto* concerns. See State v. Hillis, 748 S.W.2d 694 (Mo. App. E.D. 1988), see Lindsey v Washington, 301 U.S. 397 (1937), and see Lawhorn. What the DOC is overlooking is that in all of these cases the offender was being disadvantaged by the retroactive application of the new statute. Appellant Jones is benefiting, not being disadvantaged by applying § 559.115.7 and § 217.362.5 retroactively, and therefore *ex post facto* does not apply.

Ex post facto is meant by design to be used defensively by offenders as a shield against over-reaching legislators. It is a perversion of the entire historical *ex post facto* doctrine for DOC to try and use *ex post facto* offensively against Jones in this situation.

C) §558.019.9 is not controlling.

The DOC argues that § 559.115.7 and § 217.362.5 must be read *in pari materia* with § 558.019.9 to arrive at the conclusion that § 559.115.7 and § 217.362.5 only apply to offenses occurring after August 28, 2003. “The Western District explicitly rejected this exact argument in Irvin,” because DOC’s reading would ignore the plain language limiting the statute to “this section” meaning only § 558.019. See Jones v. Fife, WL 1605027 page 5.

D) Public Policy favors retroactive application of § 559.115.7 and § 217.362.5.

Failing all rational legal analysis DOC declares, “There is a public policy reason for not retroactively reducing punishments by legislation ... predictability and finality in judicial decisions ...” See Respondent’s Substitute Brief page 20 ¶ 2.

Please, if the determination of this case is going to fall to public policy as its rational then the Court should uphold the right of the legislature to have the bills that it passes and that the governor signs into law promptly implemented by DOC.

The legislative intent is clear in this case. Section B of Senate Bill No. 5 passed by the 92nd General Assembly in its legislative sessions in 2003 and signed by the Governor on June 27, 2003 states, “Because of the need to relieve the overcrowding in the prisons of this state, Section A [where 559.115.7 and 217.362.5 were born] of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.” *Senate Bill No. 5, Section B*, underscore added.

Clearly, the legislature in their independent wisdom sought to reduce the prison population by directing that time spent in 120 shock programs and long-term treatment programs were not to be calculated for purposes of § 558.019.2. However, to date DOC has refused to submit to the will of the legislature and apply the law as it is written. Appellant request this Court uphold the Missouri legislature and order DOC to apply § 559.115.7 and § 217.362.5 retroactively.

CONCLUSION

WHEREFORE, for the reasons set forth, Appellant prays the Missouri Supreme Court affirm the correct judgment of the Missouri Court of Appeals Eastern District, reverse the Circuit Court of Pike County, and grant such further relief as it deems just and proper.

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 Missouri Supreme Court Rule 84.06(b) and contains 2,621 words on 390 lines as counted by Word 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 this brief, and a floppy disk containing a copy of this brief has been mailed via United States Mail first class postage prepaid this 11th day of September, 2006 to:

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APPENDIX

§ 559.115.7

An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo.

§ 217.362.5

An offender's first incarceration in a department of corrections program pursuant to this section prior to release on probation shall not be considered a previous prison commitment for the purposes of determining a minimum prison term pursuant to the provisions of section 558.019, RSMo.