

No. 92648

In The Supreme Court of Missouri

STATE OF MISSOURI,

RESPONDENT,

VS.

JOSEPH N. HOLMES,

APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY, MISSOURI,
ASSOCIATE DIVISION

THE HONORABLE JOHN S. WATERS, JUDGE

CASE NO. 11CT-CR01267

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The defendant, Joseph N. Holmes, was convicted of criminal nonsupport pursuant to section 568.040, R.S.Mo. The statute places the burden on the defendant to prove his innocence, which unquestionably violates the due process clause of the Fourteenth Amendment to the United States Constitution. The Missouri legislature has chosen to make the inability to pay child support an affirmative defense to the charge of criminal nonsupport. The statute expressly states that a defendant must prove a good cause for not paying by the preponderance of the evidence. The state is relieved of the burden of proving each element of the crime beyond a reasonable doubt. This appeal directly challenges the constitutionality of a state statute—section 568.040. This Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

John N. Holmes was subject to an administrative order entered December 7, 2010 (L.F. 22-25). The order required Mr. Holmes to pay child support in the amount of \$428.00 per month for the benefit of his minor child, John K. Holmes. Mr. Holmes did not pay the child support of the month of March, April and May, 2011. On August 19, 2011, an information was filed in Christian County charging Mr. Holmes with a Class A misdemeanor (L.F. 47) for failure to pay child support for the months indicated.

At trial, the State proved that Mr. Holmes did not make the payments. The State, however, put on no evidence of Mr. Holmes' ability to pay the support during the three month period. The State, instead, relied upon section 548.040 to shift the burden to Mr. Holmes to prove his inability to pay. Mr. Holmes did not testify.

POINT RELIED UPON

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATUTE UNDER WHICH MR. HOLMES WAS CHARGED IS UNCONSTITUTIONAL IN THAT IT IMPERSSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME – I.E. ABILITY TO PAY.

SECTION 568.040, R.S.Mo.

Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 9 L.Ed2d 721 (1988).

ARGUMENT

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATUTE UNDER WHICH MR. HOLMES WAS CHARGED IS UNCONSTITUTIONAL IN THAT IT IMPERSSIBLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME – I.E. ABILITY TO PAY.

Mr. Holmes was charged and convicted under section 568.040, which reads, in pertinent part, as follows:

1. A person commits the crime of nonsupport if such person knowingly fails to provide, without good cause, adequate support for his or her spouse; a parent commits the crime of nonsupport if such parent is legally obligated to provide for his or her child or stepchild who is not otherwise emancipated by operation of law.
2. Inability to provide support for good cause shall be an affirmative defense under this section. A person who raises such affirmative defense has the burden of proving the defense by a preponderance of the evidence.

This case has been decided. The United States Supreme Court addressed an identical issue in *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988). The state, in a criminal proceeding, must prove each element of the crime beyond a reasonable doubt. The due process clause to the Fourteenth Amendment demands no less. A statute which shifts the burden on any element of a crime runs afoul of the Fourteenth Amendment.

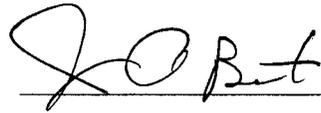
The only real issue in *Hicks* was whether the statute in question was a civil or criminal contempt. If the latter, then the state could not be relieved of the burden of proof. There is no question that 568.040 is a criminal statute – it’s labeled “criminal nonsupport”. There is no provision in the statute for early release for early parment – a characteristic of a civil contempt statute. The keys are not in the hands of the defendant.

The state, in this instance, case made no attempt to show Mr. Holmes’ ability to pay. No tax returns, no bank statements, no work records, no asset check. None of this evidence was brought forward. The state clearly relied upon the presumption created by the statute that Mr. Holmes had the means to pay but refused to pay. Section 568.040 clearly violates the due process slause of the Fourteenth Amendment. The State has failed to carry its burden that Mr. Holmes failed to provide adequate support for his son without good cause.

CONCLUSION

Section 568.040 is unconstitutional in that it shifts the burden to the defendant to prove his innocence. Due process requires the State to prove each element of a crime beyond a reasonable doubt. The statute relieves the State of this burden. Mr. Holmes’ conviction shold be reversed and he should be acquitted of all charges.

Respectfully submitted,



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Certification of Compliance,

I hereby certify that the Appellant's Brief has 803 words.



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v)
) S.C. No 92648
JOSEPH N. HOLMES)
)
Appellant,)
)

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellants' Brief were served upon counsel for respondent via U.S. Mail to the respective office designated below, this 20th day of December, 2012.

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