

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 2
THE HONORABLE JOHN S. WATERS, JUDGE
CASE NO. 11CT-CR01267

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

On December 7, 2010 the State of Missouri, Department of Social Services, Family Support Division, entered an Administrative Order that required the Appellant, John N. Holmes to pay support to Montez Meline Holmes in the amount of \$428.00 per month, beginning on November 15, 2010, for the support of the parties' minor child, J.K.H. (L.F. 22-25)¹.

On August 19, 2011, the Christian County Prosecuting Attorney charged Appellant with one count of misdemeanor criminal non-support, a violation of Section 568.040, RSMo (2011). The information alleged that between March 1, 2011 and May 1, 2011, Appellant did knowingly fail to provide adequate support, without good cause, for the minor child, J.K.H., born November 19, 2003, the Appellant's child for whom he had a legal obligation to provide such support. (L.F. 47-50). The statute citation and the language were set forth in the information giving Appellant immediate notice of the statute for which he was charged.

The bench trial was held almost eight months later on April 30, 2012. The major witness for the State was J.K.H.'s mother and custodial parent, Montez Holmes ("Mother.") Mother testified that she had been married to Appellant, was now separated from him, and that Appellant is the father of J.K.H. (Tr 6-7). She stated that she received no financial or material support from Appellant during the months of March, April, and May 2011. (Tr. 9-10). Mother further testified that the Appellant owned rental properties, which were leased during the charging period, and from which Appellant

¹ The record on appeal will be cited as follows: Trial Transcript (Tr.), Legal File (L.F.)

derived income. (Tr. 11-12). She also testified that Appellant had made multiple statements to her that he would “only pay what he wanted, when he wanted, and that he would fight” her efforts to enforce any order. (Tr. 10-11).

The State’s other witness was Katrina Lowe, an employee with the State of Missouri, Family Support Division, who testified that that an Administrative Order had been entered directing Appellant to make support payments, and that the State of Missouri’s records showed that he made no payments during the months of March, April or May 2011. (Tr. 20-24).

At the conclusion of the trial, Appellant filed a Motion for Judgment of Acquittal alleging that §568.040 RSMo. (2011) violates the due process clause of the Fourteenth Amendment of the U.S. Constitution. (L.F. A3-A4). The Court took the matter under advisement.

After the trial, on May 21, 2012, the trial Court heard additional argument on Appellant’s Motion for Judgment of Acquittal. The trial Court then found Appellant guilty of the crime of non-support. (L.F. 3). Appellant filed his Motion for New Trial on May 31, 2012 which was denied on June 5, 2012. (L.F. 3). Appellant filed his appeal on June 12, 2012. (L.F. 4).

Appellant appeals the trial Court’s overruling of his Motion for Judgment of Acquittal filed prior to his trial and the conviction of one count of misdemeanor criminal non-support, Section 568.040, RSMo. (2011). (L.F. 3).

ARGUMENT

I.

APPELLANT’S APPEAL SHOULD BE DENIED BECAUSE HE FAILED TO PROPERLY AND TIMELY PRESERVE A CONSTITUTIONAL CHALLENGE TO THE STATUTE, SECTION 568.040, RSMo. (2011).

Appellant has asserted that Section 568.040, RSMo. (2011) is unconstitutional, in that it violates the right to due process under the Fourteenth Amendment of the United States Constitution, by impermissibly shifting the burden of proof of an essential element of the crime to the defendant.

A. Standard of Review

The standard of review in determining whether a Constitutional issue was properly preserved is that “it must be raised at the earliest time consistent with good pleading and orderly procedure and must be kept alive during the course of the proceedings.” *State v. Wickizer*, 583 S.W.2d 519, 523 (Mo. banc 1979).

B. Discussion

Although the Missouri Supreme Court has exclusive jurisdiction to determine a constitutional challenge to a statute of this state under Article V, §3 of the Missouri Constitution, a party who seeks to raise such a challenge must properly preserve this challenge. Any defenses or objections to a prosecution, indictment or information must be raised by motion, **before** trial, or it shall be considered waived, absent the court sustaining a plea for relief for good cause. Rule 24.04(b) (2)(emphasis added). Therefore, Rule 24.04(b)(2) applies to a challenge of a statute’s constitutionality.

Appellant failed to raise by motion the constitutional challenge to Section 568.040, RSMo (2011), until the end of his trial. At no time in the eight months prior to the beginning of trial did Appellant, in any pre-trial motions, raise this issue of whether Section 568.040, RSMo (2011) violated the Due Process clause of the United States Constitution. Instead, Appellant attempted to raise the issue for the first time in the middle of his criminal trial by offering a verbal ‘proffer.’ (Tr. 17). Appellant made a second attempt, through the filing of a Motion for Judgment of Acquittal at the close of his trial. (Appendix of Appellant’s Brief A-3, A-4). Because the issue was not properly preserved prior to the commencement of the trial according to Missouri Rules, before trial and by motion, and because the Court failed to sustain his motion for good cause at the close of trial, Appellant’s constitutional challenge to the validity of Section 568.040, RSMo (2011) should be considered waived and this appeal should be immediately denied.

II.

IN THE ALTERNATIVE, THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE SECTION 568.040, RSMo. (2011) DOES NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE APPELLANT TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME.

A. Standard of Review

Statutes are presumed constitutional and shall not be held otherwise unless “it clearly and undoubtedly contravenes the constitution.” *State v. Pike*, 162 S.W. 464, 470 (Mo. Banc 2005) citing *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). All doubts are resolved in favor of finding the statute to be constitutional. *Id.* When the sufficiency of evidence is challenged, review is limited to whether or not there is sufficient evidence that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt, and all evidence and inferences therein are to be considered in the light most favorable to the judgment. *Id.*, 473, 474.

B. Discussion

I. Statutory Construction

The Missouri criminal non-support statute, as it read when the Appellant was charged, states that “a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which the parent is legally obligated to provide for his or her child or stepchild who is not otherwise emancipated by operation of

law.” Section 568.040, RSMo. (2011). Additionally, the term ‘adequate support’ is defined in subsection 2(3) of the statute as “food, clothing, lodging, and medical or surgical attention.” *Id.* The phrase ‘good cause’ is defined as “any substantial reason why the defendant is unable to provide adequate support” and that good cause “does not exist if the defendant purposely maintains his inability to support.” Section 568.040.2(2), RSMo. (2011).

The Legislature revised the criminal non-support statute, Section 568.040.3, in 2009 to state that the “inability to provide support for good cause shall be an affirmative defense” to be raised by the defendant and for which the defendant “has the burden of proving the defense by a preponderance of the evidence.”, Section 568.040, RSMo. (2011). However, this revision did not alter the State’s burden to prove defendant acted without good cause.

When a statute uses the phrase ‘affirmative defense,’ Section 556.056 defines this as a defense “(1)...that is not submitted to the trier of fact unless supported by evidence;” and if it is submitted to the trier of fact, “(2)... the defendant has the burden of persuasion that the defense is more probably true than not.” RSMo. 556.056 (2011). The State’s burden is not shifted to the Appellant because put simply, the State first must prove that no substantial reason existed to cause the Appellant to be unable to provide support before the defense may be raised.

The Legislature later deleted the phrase “without good cause” from subsection (1), removing it as essential element required to be proven by the State. Section 568.040, RSMo. (2012).

II. Appellant's inapplicable comparison to civil contempt.

Appellant argues that Section 568.040, RSMo (2011) relieves the State of the burden of proving an essential element of the crime of non-support, that the party acted without good cause, and that the statute impermissibly shifts the burden to Appellant to show that he acted "with good cause." Appellant argues that, as a result of this alleged impermissible shift, the statute violates his rights to substantive due process. Appellant further argues that the State has failed to meet its evidentiary burden to show that defendant is guilty of the crime of non-support beyond a reasonable doubt. In doing so, Appellant erroneously relies on a United States Supreme Court case, *Hicks v. Feiock*, 485 U.S. 624 (1988), that analyzes a California civil contempt statute.

The California statute in *Hicks* was specifically designed to determine whether a party was in contempt of court for failing to comply with an order to provide child support and what consequential action to take for that party's contempt. Under Missouri law, In a civil contempt action for failure to comply with an order for child support, a party can be incarcerated only after a showing of the debtor's intentional failure to pay despite the ability to do so, or the deliberate creation of circumstances by the debtor which result in his or her inability to pay. *State ex rel. Nessor v. Pennoyer*, 887 S.W.2d 394, 396 (Mo. banc 1994). Once failure to pay is shown, the burden does shift to the debtor to demonstrate that his non-compliance is not the result of intentional, willful behavior. *Id.* What may follow is an order of commitment under which the debtor is incarcerated. Once this occurs, the debtor may either "(1) purge himself of the contempt

by complying with the trial court's order, making the case moot and unappealable; or (2) appeal the order, but only after the trial court's order is enforced by incarceration or otherwise.” *Lieurance v. Lieurance*, 111 S.W.3d 445, 446 (Mo.App. E.D. 2003). Therefore, punishment is not for a specific period of incarceration and compliance with the order will always purge the contempt, thus obtaining the debtor’s release from custody.

The Court in *Hicks* held that the California statute, despite the designation as a civil contempt statute, was ‘quasi-criminal’ in nature due to its prescribed penalties and upon deliberation found that the statutory language that required the burden to shift to the payor did violate the due process clause of the 14th Amendment of the United States Constitution. Missouri’s criminal non-support statute is not one that criminalizes contempt, or failure to comply with a court order, but one that has distinct definitions and unique characteristics that distinguish it from the statute analyzed in *Hicks*.

In contrast to the California civil contempt statute in *Hicks*, the Missouri criminal non-support statute is designed to provide a consequence for parents who fail to fulfill their basic obligation to provide care and support for their children. *State v. Reed*, 181 S.W.3d 567, 570 (Mo. Banc. 2006). This obligation exists upon parentage, even in the absence of a court order. *Id.* The Missouri criminal non-support statute is not designed to coerce compliance with a specific court order after a finding of knowledge and the willful failure to pay; instead it is designed to prescribe a punishment for the failure, in a myriad of ways, to support one’s child. Nothing in the statute’s definition mentions a child

support order or a requirement that a defendant parent provide a determinate amount of financial assistance to the other parent for the care of the minor child.

The Appellant argues that the State failed to meet its burden of proof for the element of the crime, Appellant's ability to pay, beyond a reasonable doubt. However, the payment of money or court-ordered support alone is not an element of the crime of non-support. This Court held that in a criminal non-support prosecution, a child support order is not required, but that it may be considered evidence of what constitutes adequate support. *State v. Reed*, 181 S.W.3d at 570 (Mo. Banc. 2006).

In determining whether or not a defendant parent provided 'adequate support' for their minor child, the trier of fact may look at whether the defendant parent paid money pursuant to a child support order that would allow the other parent to provide the necessary accoutrements of life. However, the trier of fact may also consider, in the alternative, whether a defendant parent provided any clothing, shelter, took the child to a physician, paid for any other medical needs of the child, or purchased groceries specifically for the child. Each of these possibilities constitutes the provision of support, either financial or material. If the evidence shows that defendant parent had done any of these things, then the trier of fact could conceivably find that a defendant parent did provide adequate support and find that he or she is not guilty of the crime of non-support.

Further, proving that the defendant acted without good cause requires the State to show that the defendant acted in the negative. In *State v. Coe*, 233 S.W.3d 241 (Mo.App. S.D. 2007), the Court explained that the State may use circumstantial evidence to prove a negative fact such as "without good cause." *Id.* at 250. The Court also noted that the trier

of fact can make their own inferences based upon the evidence presented and may choose to “believe or disbelieve all, part, or none of the testimony of any witness.” *Id.* at 251. Such permissible inferences are ones that do not violate due process requirements, nor impermissibly shift the burden of proof, so long as the conclusion they suggest are reasonable based upon the evidence. *State v. Simpkins*, 304 S.W.3d 250, 251 (Mo.App. S.D. 2010).

The trier of fact, ascertaining from the evidence, may find that there exists an ultimate fact that meets an element of a crime by the use of such permissible inferences as shown by basic, separate facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979). The Court in *Ulster* noted that the test of any evidentiary device is this: “the device must not undermine the fact finder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” *Id.*

In the instant case, the victim mother, Montez Holmes, testified that she had been married to the Appellant for a number of years and during that time had direct knowledge of the Appellant’s work history, his physical ability to work, and the disposition and income propensities of the rental property owned by the Appellant (both those with his sister and those with victim mother). She further testified that the Appellant had made statements to her that he would only pay what he felt he could, that he didn’t want the State involved, and that he would fight any orders made. (Tr. 10-11).

The trier of fact was free to believe or disbelieve her testimony. It was a permissible inference that the trier of fact could find that the testimony regarding the Appellant’s employment during the marriage, his ability to be employed, and the

existence of rental property income was sufficient to show that the Appellant was acting without good cause in failing to provide adequate support. In doing so, the trier of fact is still required to meet his ultimate burden of finding the negative fact: that the Appellant acted without good cause, beyond a reasonable doubt.

CONCLUSION

Defendant failed pursuant to statute to properly preserve his constitutional challenge of Section 568.040, RSMo (2011), and this appeal should be immediately denied.

In the alternative, Appellant's appeal further fails, because his argument that the criminal non-support statute is unconstitutional is erroneous under the law and under the facts. Under the law, the statute does not at any time shift the burden of showing "good cause" to a defendant. Under the facts, the State of Missouri met its burden of proving each essential element of the crime of non-support by showing that: 1) the minor child, J.K.H., is the Appellant's son; 2) that Appellant did not provide adequate support for his child in the year 2011 during the months of March, April and May; 3) that Appellant had a legal obligation support that child; and 4) that Appellant lacked good cause for the failure to support his child. Although Appellant had the opportunity, he failed to present to the trial court the affirmative defense of good cause.

Therefore, for the above arguments, Appellant's appeal should be denied and his conviction in the trial court should be upheld without further review or remand.

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 2,939 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 notification was sent through the eFiling system on this the 16th day of January, 2012 to :

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