

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,)	
)	
)	
)	
vs.)	No. WD65099
)	
DAVID SALAZAR,)	
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)	
)	
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)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION FIVE
THE HONORABLE KEITH MARQUART, JUDGE

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

MERLE K. TURNER
MObar # 53566
Attorney for Appellant
Office of State Public Defender
120 South 5th Street, 2nd Floor
St. Joseph, Missouri 64501
Telephone (816) 387-2026
FAX (816) 387-2786

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	4
STATEMENT OF FACTS.....	5
POINTS RELIED ON	6
ARGUMENT	9
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

State v. Brownbridge, 753 S.W.2d 715 (1962)..... 8, 15, 16

State v. Campbell, 936 S.W.2d 585 (Mo.App., E.D. 1996) 6, 10

State v. Carlton, 733 S.W.2d 23 (Mo.App., S.D. 1987)..... 8, 15

State v. Dennis, 153 S.W.3d 910 (Mo.App., W.D. 2005)..... 7, 13

State v. Mubarak, 163 S.W.3d 634 (Mo.App., S.D. 2005)..... 8, 16

State v. Salmon, 89 S.W.3d 540 (Mo.App., W.D. 2002)..... 7, 12

State v. Williams, 887 S.W.2d 769 (Mo.App., S.D. 1994)..... 6, 11

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V 6, 7, 9, 10, 12

U.S. Const., Amend. VIII 8, 15, 16

U.S. Const., Amend. XIV 6, 7, 9, 10, 12

Mo. Const., Art. I, Sec. 10..... 6, 7, 9, 10, 12

Mo. Const., Art. I, Sec. 11..... 8, 15, 16

Mo. Const., Art. I, Sec. 21..... 8, 15, 16

Mo. Const., Art. I, Sec. 31..... 8, 15, 16

Mo. Const., Art. V, Sec. 3 4

STATUTES:

Section 210.822, RSMo..... 6, 8, 9, 10, 11, 15
Section 477.070, RSMo..... 4
Section 568.040, RSMo..... 6, 7, 8, 9, 11

RULES:

.....

OTHER:

American Heritage Dictionary of the English Language, 4th Edition 2000 8, 16

JURISDICTIONAL STATEMENT

Appellant was convicted following a court trial in the Associate Circuit Court of Buchanan County, Missouri of non-support, Section 568.040, RSMo 2000. The Honorable Keith Marquart sentenced Appellant to 28 days in the Buchanan County Jail. As the appeal involves none of the issues reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const. (as amended 1982); Section 477.070, RSMo 2000.

STATEMENT OF FACTS

Appellant and Shannon McClure were married on June 17, 2000 (Tr. 5) in Grundy County, Missouri. They separated in September of 2000 (Tr. 11). Neither Appellant nor Shannon McClure is able to afford to file for dissolution of their marriage (Tr. 21-23, 13-14).

Shannon gave birth to a daughter, Angelea, on November 29, 2001 (Tr. 12), fourteen months after her and Appellant had separated. Appellant and Shannon had not had any sexual relations with each other for fourteen months prior to the child's birth. Normal human gestation is 280 days or about nine months. However, a clerk at the hospital where Angelea was born insisted that Appellant's name be placed on the birth certificate (Tr. 13).

Shannon and Angelea lived in Buchanan County, Missouri, in October and November of 2003 (Tr. 5-6). Because Shannon filed for public assistance in Buchanan County, the Buchanan County Prosecutor's Office charged Appellant with Non-Support, a class A Misdemeanor on January 2, 2004 (L.F. 5).

A court trial was held on November 29, 2004. Following strict application of the laws of this State, Judge Keith Marquart found Appellant guilty. Appellant was subsequently sentenced on February 7, 2005 to 28 days in the Buchanan County Jail (L.F. 11-12).

POINTS RELIED ON

I.

The trial court erred in finding Appellant guilty beyond a reasonable doubt when a critical portion of the evidence that Appellant was responsible for child support came only from an administrative finding that the child had been “legitimated by legal process” which deprived Appellant of his constitutional right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that this determination was made outside a court of law.

State v. Campbell, 936 S.W.2d 585 (Mo.App., E.D. 1996);

State v. Williams, 887 S.W.2d 769 (Mo.App., S.D. 1994);

United States Constitution, Amendments V and XIV;

Missouri Constitution, Article I, Section 10;

Section 210.822; and

Section 568.040.

POINTS RELIED ON

II.

The trial court erred in finding Appellant guilty because of the potential for dangerous problems for the state to use an archaic rule to impose “fatherhood” and the obligations therewith, in violation of Appellant’s right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state recognizes the value of DNA testing in criminal cases generally and has even established a program to use DNA sampling in other criminal cases.

State v. Dennis, 153 S.W.3d 910 (Mo.App., W.D. 2005);

State v. Salmon, 89 S.W.3d 540 (Mo.App., W.D. 2002);

United States Constitution, Amendments V and XIV;

Missouri Constitution, Article I, Section 10; and

Section 568.040.

POINTS RELIED ON

III.

The trial court erred in sentencing Appellant to 28 days in the Buchanan County Jail because the sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Sections 11, 21 and 31 of the Missouri Constitution, in that the sentence is disproportionate to the wrongful act allegedly committed by Appellant.

State v. Brownbridge, 753 S.W.2d 715 (1962);

State v. Carlton, 733 S.W.2d 23 (Mo.App., S.D. 1987);

State v. Mubarak, 163 S.W.3d 634 (Mo.App., S.D. 2005);

United States Constitution, Amendment VIII;

Missouri Constitution, Article I, Sections 11, 21 and 31;

Section 210.822;

Section 568.040; and

The American Heritage Dictionary of the English Language.

ARGUMENT

I.

The trial court erred in finding Appellant guilty beyond a reasonable doubt when a critical portion of the evidence that Appellant was responsible for child support came only from an administrative finding that the child had been “legitimated by legal process” which deprived Appellant of his constitutional right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that this determination was made outside a court of law.

According to RSMo 568.040.2 (1), Child “means any biological or adoptive child, or any child *legitimated by legal process*, or any child whose relationship to the defendant has been determined, by a court of law in a proceeding for dissolution or legal separation, to be that of child to parent” (emphasis added).

Missouri’s code of statutes automatically makes a child born during a marriage the legal responsibility of the husband (RSMo 210.822.1). This is a codification of Lord Mansfield’s Rule in English common law. While the law helps children to avoid what was once considered a terrible stigma of illegitimacy, it has also been used to supply a critical element of “proof” in a criminal non-

support cases, as to creating the husband's obligation for support. Such is the case here.

Common sense and common knowledge refute the consistent accuracy of the rule and statute, yet the result of the antiquated law was considered absolute by the Judge in Appellant's case in showing Appellant's obligation to support wife's child. Even while distinguishing between a biological child and a child "legitimated by legal process" (Tr. 30-31), the Court insisted that the rule codified in RSMo 210.822.1(1) was conclusive proof. The Court further insisted that once the child was legitimated by legal process, Appellant knew he had an obligation to support the child (Tr. 31).

In fact, Appellant was "trapped" by what the Court called "attendant circumstances" (Tr. 31). It is a deprivation of constitutional rights to due process to use no more than a technical definition or clerical formality as evidence of a critical element to support a criminal conviction (Tr. 13, 20-22). Appellant had not been afforded any opportunity to challenge the entry of his name on the child's birth certificate (Tr. 19-22).

State v. Campbell, 936 S.W.2d 585 (Mo.App., E.D. 1996), points out the possibility of using a dissolution decree to establish a parent-child relationship. Dissolutions come from circuit courts where both husbands and wives have rights to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. When a mother and putative father are not wed at the time of a child's birth, a paternity

case is initiated in a circuit court, and again the putative father has due process rights, *State v. Williams*, 887 S.W.2d 769 (Mo.App., S.D. 1994). However, the Appellant has not been able to file for dissolution. The Appellant does not have the funds (Tr. 21-23), nor does his estranged wife, who was hoping to eventually get a free divorce through Legal Aid of Western Missouri (Tr. 13-14). Because Appellant and Shannon were officially husband and wife at the time of Angelea's birth, no circuit court paternity action was used to establish his fatherhood. Other means attempted by Appellant to challenge placement of his name on the birth certificate have similarly failed (Tr. 20, 24). Although both Appellant and Shannon told administrative officials that Appellant was not the child's biological father, no change was made in the clerical determination made at the hospital when Angelea was born (Tr. 14, 15, 20). With only a seventh grade education and very limited financial resources, Appellant has been unsuccessful in challenging the administrative order (Tr. 24, 25).

Thus, only the presumption of paternity statute, RSMo 210.822.1(1), was used to "bootstrap" a support obligation and then the criminal offense of non-support, RSMo 568.040, for Appellant.

ARGUMENT

II.

The trial court erred in finding Appellant guilty because of the potential for dangerous problems for the state to use an archaic rule to impose “fatherhood” and the obligations therewith, in violation of Appellant’s right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the state recognizes the value of DNA testing in criminal cases generally and has even established a program to use DNA sampling in other criminal cases.

Lord Mansfield’s Rule, established in 18th Century England, was a shortcut means to spare children the shame of being bastardized. Accepted yet today in England and the United States, it is an anachronism. In Missouri, where failure to pay child support can result in misdemeanor, and even felony convictions and long incarcerations, the State’s refusal to use simple, respected DNA testing in situations such as that of Appellant’s is inexcusable, *State v. Salmon*, 89 S.W.3d 540 (Mo.App., W.D. 2002).

Having no name listed on the birth certificate for “father” has diminished in recent years as a source of embarrassment. Indeed, newspaper announcements of recent births at local hospitals regularly do not list a father. Single women can

legally be inseminated with semen they procure at a sperm bank. For better or worse, absence of a named father in a child's life is no longer considered vital.

If Appellant had been charged with rape or any other sexual offense, DNA testing could be used to establish his non-participation and innocence, *State v. Dennis*, 153 S.W.3d 910 (Mo. App., W.D. 2005). That would occur even if the assault "victim" thought he might be her assailant. In the case at bar, both Appellant and his legal wife Shannon said they did not have sexual relations for over a year before the birth of Angelea (Tr. 11, 19). Both said they know who the biological father is (Tr. 10, 37), yet the State has elected to use an old adage, almost a superstition, or "old wives tale" in Lord Mansfield's Rule rather than utilize accepted modern science to assign responsibility. The State has elected to gain a conviction by trapping Appellant. Ironically, the State would have been willing to depend upon the science of DNA if the parties were not married and Appellant was only a "possible" father.

Appellant cannot compel the actual father of Angelea to provide a DNA sample. The State seems more concerned with a wrongful conviction for non-support than with honest justice.

The incarceration of Appellant will cost him whatever current employment and income he enjoys. It will cost the three children he acknowledges fathering his economic support and cost them his companionship and care. It will cost Buchanan County, Missouri a bed space in an already overcrowded jail. It will do nothing to provide financial support for Angelea, nor will it give her a relationship

with a “father”. And, because the State shows no interest in the relatively simple actions of scientifically determining the real biological father, the biological father can shun his financial obligations and responsibilities.

ARGUMENT

III.

The trial court erred in sentencing Appellant to 28 days in the Buchanan County Jail because the sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I Sections 11, 21 and 31 of the Missouri Constitution, in that the sentence is disproportionate to the wrongful act allegedly committed by Appellant.

The sentence of 28 days meted out to Appellant is so disproportionate to his crime as to “shock the moral sense of reasonable men”, *State v. Carlton*, 733 S.W.2d 23 (Mo.App., S.D. 1987); *State v. Brownbridge*, 753 S.W.2d 715 (1962). Even if the sentence is well within the one year maximum sentence for the class A misdemeanor non-support, evidence showed Appellant had affirmatively done nothing at all wrong or illegal; Appellant married Shannon and then separated from her three months later (Tr. 12). That Appellant could not afford a divorce is unfortunate, but not illegal. That Appellant’s very limited education kept him from earning much money is again unfortunate, but not illegal. That Appellant’s estranged wife committed adultery and became pregnant after their separation is not something Appellant should be held accountable for. It is Missouri law, RSMo 210.822.1(1), not his own actions that made him the presumed “father” of a child born fourteen months after his separation from Shannon. That an

administrative law judge subsequently set a child support obligation for him when Shannon sought public assistance for Angelea was not Appellant's action. That Appellant's inability to keep a job which paid him a regular and sufficient income to pay the child support ordered by the administrative law judge is, yet again, unfortunate, but not illegal. The Eighth Amendment to the United States Constitution and Article I, Section 21 of the Missouri Constitution precludes cruel and unusual punishment, and though the sentence in this case is not capital punishment or even lengthy incarceration, even a penalty equal to but a small part of the maximum is disproportionate to Appellant's alleged offensive act, for there are none, *State v. Brownbridge*, 753 S.W.2d 715 (1962); *State v. Mubarak*, 163 S.W.3d 624 (Mo.App., S.D. 2005).

Article I, Section 11 of the Missouri Constitution states that "no person shall be imprisoned for debt, except for nonpayment of **finances and penalties imposed by law**", (emphasis added). Essentially, Appellant was sentenced to 28 days in jail because of a debt. The term "debt" has never been defined statutorily, therefore, the term should be given its ordinary dictionary meaning. The American Heritage Dictionary of the English Language defines debt as "(1) Something owed, such as money, goods, or services; (2) a. An obligation or liability to pay or render something to someone else." Child support would seem to fit under this ordinary definition of "debt."

Furthermore, Article I, Section 31 of the Missouri Constitution states that "no law shall delegate to any commission, bureau, board or other **administrative**

agency authority to make any rule fixing a fine or *imprisonment as punishment for its violation*”, (emphasis added). Appellant is being imprisoned for violation of an administrative order, issued by an administrative law judge.

CONCLUSION

For the reasons presented, Appellant respectfully request that this Court reverse Appellant's conviction of non-support and discharge him from his sentence.

Respectfully submitted,

Merle K. Turner, MOBar # 53566
Attorney for Appellant
120 South 5th Street, 2nd Floor
St. Joseph, Missouri 64501
Telephone (816) 387-2026
FAX (816) 387-2786

Certificate of Compliance and Service

I, Merle K. Turner, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,580 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using the McAfee VirusScan Enterprise 7.1.0 program, which was updated on September 5, 2005. According to that program, the disks provided to this Court and to the Buchanan County Prosecuting Attorney are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of _____, 2005, to Laura B. Donaldson, Assistant Prosecuting Attorney, 310 North 4th Street, St. Joseph, Missouri 64501.

Merle K. Turner

APPENDIX

TABLE OF CONTENTS TO APPENDIX

	<u>Page</u>
SENTENCE AND JUDGMENT	A-1 to A-2
SECTION 210.822, RSMO.....	A-3 TO A-4
SECTION 477.070, RSMO.....	A-5
SECTION 568.040, RSMO.....	A-6 to A-7