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STATEMENT OF FACTS

Appellant and Shannon McClure were married on June 17, 2000 (Tr. 5) in Grundy County, Missouri and remained married at the time of trial November 29, 2004. (Tr. 11) Shannon gave birth to a daughter, Angelea, on November 29, 2001 (Tr. 12).

Shannon and Angelea lived in Buchanan County, Missouri, in October and November of 2003 (Tr. 5-6). An administrative order had been entered declaring Appellant to be Angelea's father and requiring him to support Angelea prior to October of 2003. (Tr. 9) Appellant was aware of the order (Tr.20) and admitted he provided no support for Angelea during October and November. (Tr.23)

A court trial was held on November 29, 2004. 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).

ARGUMENT

I.

The trial court did not err in finding Appellant guilty beyond a reasonable doubt because Appellant's responsibility to pay child support was established by administrative order in that the order legitimated Angelea by legal process.

Appellant contends that entry of the administrative order in this case deprived him of his constitutional right to due process. The statutes that provide for entry of such an order clearly indicate otherwise.

The order entered requiring Appellant to pay child support recites the statutory conditions that precede the entry. First, a Notice and Finding of Financial Responsibility was served on Appellant on November 11, 2002, as required by Section 454.470, RsMo. (Exhibit 2) Next, Appellant requested a hearing and one was scheduled, pursuant to Sections 454.470 and 454.475, RSMO. (Exhibit 2) Since Appellant requested the hearing, but failed to appear after notice was sent to his last known address (Exhibit 2), the director was authorized to enter the administrative order. Section 454.475, RSMo.

Appellant received notice of the proposed order and filed a written request for a hearing, availing himself of the statutory process prescribed by the legislature. The statutory scheme is the due process that is accorded to Appellant.

Appellant further contends that his due process rights were violated because the presumption of paternity statute was used to create his support obligation. Appellant misstates the point. Section 568.040.2(1) defines child as any child legitimated by legal process. Angelea is a child that has been legitimated by such legal process. Her relationship to Appellant was established in an order created in conformity with statutes. Once such an order has been entered establishing Angela as the child of the Appellant, biological paternity is irrelevant. State v. Campbell, 936 S.W. 2d 585, 587 (Mo. App. E.D. 1996)

Appellant's first point must fail, as Angelea is his child.

ARGUMENT

II

The trial court did not err in finding Appellant guilty because no law exists requiring genetic testing in this case in that Appellant is the presumed father of Angelea and did not comply with the statutory requirements to secure genetic testing.

Section 210.822, RSMo provides a man is presumed to be the natural father of a child when he and the child's natural mother are married to each other and the child is born during the marriage. Such is the case here.

David and Shannon Salazar married June 17, 2000 (Tr. 5) and remained married at the time of trial, November 29, 2004. (Tr. 2, 5) Angelea was born during the marriage on November 29, 2001. (Tr. 5) and therefore, Appellant is Angelea's presumed father.

Section 454.485, RSMo allows the administrative establishment of paternity of a child when a man is presumed to be the child's father, pursuant to Section 210.822, RSMo. Section 454.485, RSMo gave the director authority to establish paternity in this case. The statute further outlines the conditions for the Director to require genetic testing. The Director shall do genetic testing at the request of a party "if the request is supported by a sworn statement of such party, which...(2) denies paternity and sets forth facts establishing a reasonable

possibility that there was no sexual contact between the parties.” Section 454.485.5(2)

The record indicates that Shannon Salazar sent something to the State telling them the paternity was not correct. (Tr. 14) The record further indicates that David Salazar sent a letter telling “them it wasn’t my child.” (Tr. 20) Neither party makes mention of a sworn statement or of stating any facts establishing a reasonable possibility of no sexual contact. Because neither party complied with the statutory requirements, the State was not required to do genetic testing.

ARGUMENT

III

The trial court did not err in sentencing Appellant to 28 days in the Buchanan County Jail because Appellants did commit the offense of non-support in that he failed to adequately support his child and his sentence is within the range prescribed by statute.

Appellant contends that his 28 day sentence violates the 8th amendment's prohibition against cruel and unusual punishment. He bases this assertion on his claim that his sentence is grossly disproportionate to the wrong he committed, which he claims is none.

Appellant contends he committed no wrong justifying the imposition of a 28 day sentence. To the contrary, Appellant failed to support a child he was legally obligated to support. Appellant knew of the order to support Angelea (Tr. 20) and admits he did nothing to provide for her during the charge period. (Tr. 23) Other than a vague reference to being out of work for some undefined period, (Tr. 20), the evidence would suggest that Appellant was capable of providing for support for Angelea, and simply chose not to do so. In fact, Appellant admits he pays child support on another child that is older than Angelea. (Tr. 20, 21) Failing to provide support for a child Appellant knew he was obligated to provide is the wrong Appellant committed.

“A punishment is not cruel and unusual because of its duration unless so disproportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.” State v. Brownridge, 353 S.W.2d 715, 718 (Mo. 1962)

The punishment prescribed in the non-support statute related to Appellant’s case is a class A misdemeanor. Appellate courts give great deference to the legislature’s prescription of punishment. State v. Mubarak, 163 S.W.3d 624, 630 (Mo. App. S.D. 2005) When the sentence imposed is within the range prescribed by statute, it cannot be excessive. *Id.* The court sentence Appellant for violation of Section 568.040, to time allowed by the statutes. Appellant’s claim that his sentence is grossly disproportionate to the wrong he committed should be denied.

Appellant also contends on this point that his sentence violates Article I, Section II of the Missouri Constitution prohibiting imprisonment for non-payment of debt. He asserts that child support is a debt.

Appellant was found guilty of violating Section 568.040, RSMo. The statute makes it a crime to fail to adequately support a child. “Support” is defined as food, clothing, lodging and medical or surgical attention. The defendant was not found guilty of failing to pay \$275 a month as required by the administrative order. (Exhibit 2). He was found guilty for failing to provide any “support” as that term is legally defined for Angelea.

Finally, Appellant argues that his sentence is cruel and unusual because he was found guilty of violating an administrative order, issued by an administrative

law judge. Article I, Section 31 of the Missouri Constitution does state “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.” Appellant misses the point. He was not found guilty of violating an administrative rule or order, nor does the order or rule fix imprisonment as a punishment. Rather Appellant was found guilty of violating Section 568.040, RSMo. a statute of the State of Missouri. (L.F. 11)

All of Appellants contentions related to this claim are not supported by law, and therefore must fail. Appellant’s point should be denied.

CONCLUSION

Appellant's contentions are not supported by law, and therefore, the State respectfully requests the Court to deny this appeal and affirm Appellant's conviction for Non-Support.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did on this __ day of December, 2005, cause two true and correct copy of this Brief upon the person(s) listed below in the manner noted.

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AND

Western District Court of Appeals
Fax # 816-889-3668

_____ Via hand delivery to the above address

Laura B. Donaldson, #37056

Certificate of Compliance and Service

I, Laura B. Donaldson, 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, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, the brief contains 1711 words, which does not exceed the word allowance for respondent's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using the Symantec Antivirus program, According to that program, the disks provided to this Court and to Merle Turner are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand delivered this ____ day of _____, 2005, to Merle Turner, 120 South 5th Street, St. Joseph, Missouri 64501.

Laura Donaldson