

**IN THE
SUPREME COURT OF MISSOURI**

No. SC84703

MATTHEW LEVINSON,

Appellant,

vs.

STATE OF MISSOURI, et al.,

Respondents.

**Appeal from the Circuit Court of St. Louis City, Missouri
Twenty-Second Judicial Circuit
The Honorable Thomas C. Grady, Judge**

RESPONDENTS' BRIEF, STATEMENT AND ARGUMENT

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JURISDICTIONAL STATEMENT

The Appellant filed a petition in the Circuit Court of St. Louis City, Missouri, challenging the constitutionality of § 311.060, RSMo, dealing with the licensing of liquor establishments. On June 25, 2002, the Circuit Court dismissed Appellant's petition and he appealed. Because this appeal involves a challenge to the constitutionality of a statute of Missouri, jurisdiction of this appeal is vested in the Missouri Supreme Court. Article V, Section 3, Missouri Constitution (as amended effective 1982).

STATEMENT OF FACTS

The Appellant filed a petition in the Circuit Court of the City of St. Louis, Missouri, asking the Court to declare § 311.060, RSMo, to be unconstitutional, and also asserting that it was repealed by implication (L.F. 9-16, 36-37).¹ Appellant pled guilty to the federal felony of using a false social security number in the United States District Court for the Eastern District of Missouri on June 23, 2000 (L.F. 16, 91). Appellant apparently did so to conceal his bad credit history (L.F. 71).

Following his conviction, Appellant was advised by his federal probation officer that he would have to cease his employment as a bartender because to continue in that occupation would be a violation of his federal probation (L.F. 10, 82-83).² Appellant then filed this lawsuit.

On January 30, 2002, the case was submitted to the Circuit Court, the Honorable Thomas C. Grady, for decision based on stipulated facts and the pleadings (L.F. 81). On June 25, 2002, the Court issued its order finding that § 311.060 was neither unconstitutional nor repealed by implication by any other Missouri statute (L.F. 91-97) and dismissing the petition. Appellant then filed this timely appeal to this Court (L.F. 89-90).

¹Somehow the petition is out of sequence in the Legal File submitted.

²The parties stipulated to certain facts contained in Appellant's amended petition (L.F. 80).

POINTS RELIED ON

I.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO DECLARE SECTION 311.060, RSMo, REPEALED BY IMPLICATION BECAUSE SECTION 561.016, RSMo, DOES NOT EXPLICITLY OR IMPLICITLY REPEAL SECTION 311.060. THE LAW STRONGLY DISFAVORS THE NOTION THAT LAWS CAN BE REPEALED “BY IMPLICATION.” THE RULES OF STATUTORY CONSTRUCTION ALSO STATE THAT TO THE EXTENT TWO STATUTES MAY BE INCONSISTENT, THE SPECIFIC TAKES PRECEDENT OVER THE GENERAL. ADDITIONALLY, THE PLAIN LANGUAGE OF SECTION 561.016 INDICATES THAT IT DOES NOT ACT TO REPEAL SECTION 311.060. THUS, THE GENERAL STATUTE, SECTION 561.016, CANNOT REPEAL BY IMPLICATION THE SPECIFIC, SECTION 311.060, RSMo.

County of Jefferson v. Quiktrip, 912 S.W.2d 487 (Mo. banc 1995);

Suffian v. Usher, 19 S.W.3d 130 (Mo. banc 2000);

St. Charles County v. Director of Revenue, 961 S.W.2d 44 (Mo. banc 1998).

II.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO DECLARE SECTION 311.060, RSMo, UNCONSTITUTIONAL BECAUSE PROHIBITING A CONVICTED FELON FROM WORKING AS A BARTENDER DOES NOT DENY THE FELON ANY FUNDAMENTAL RIGHT WHATSOEVER SINCE THERE ARE INNUMERABLE OTHER JOBS OR FORMS OF EMPLOYMENT AVAILABLE TO THE FELON, AND IT IS NOT A DENIAL OF EQUAL PROTECTION TO PROHIBIT APPELLANT, AND OTHER CONVICTED FELONS, FROM BEING DIRECTLY INVOLVED IN THE SALE OF LIQUOR.

Berdella v. Pender, 821 S.W.2d 846 (Mo. banc 1991);

Suffian v. Usher, 19 S.W.3d 130, 134 (Mo. banc 2000);

Linton v. Missouri Veterinary Medical Board, 988 S.W.2d 513 (Mo. banc 1999).

ARGUMENTS

I.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO DECLARE SECTION 311.060, RSMo, REPEALED BY IMPLICATION BECAUSE SECTION 561.016, RSMo, DOES NOT EXPLICITLY OR IMPLICITLY REPEAL SECTION 311.060. THE LAW STRONGLY DISFAVORS THE NOTION THAT LAWS CAN BE REPEALED “BY IMPLICATION.” THE RULES OF STATUTORY CONSTRUCTION ALSO STATE THAT TO THE EXTENT TWO STATUTES MAY BE INCONSISTENT, THE SPECIFIC TAKES PRECEDENT OVER THE GENERAL. ADDITIONALLY, THE PLAIN LANGUAGE OF SECTION 561.016 INDICATES THAT IT DOES NOT ACT TO REPEAL SECTION 311.060. THUS, THE GENERAL STATUTE, SECTION 561.016, CANNOT REPEAL BY IMPLICATION THE SPECIFIC, SECTION 311.060, RSMo.

In arguing that the Circuit Court should have declared § 311.060, RSMo, invalid, the Appellant asks this Court to ignore both common sense and the well-established rules of statutory construction. The Appellant sets forth no legal basis in his brief for concluding that the liquor statute at issue has been repealed, by implication or otherwise. Instead, Missouri law supports the conclusion of the Circuit Court that the statute is valid.

The relevant language in § 311.060.2(2) is

No license issued under this chapter or chapter 312, RSMo, shall be denied, suspended, revoked or otherwise affected solely on the fact that an employee of the licensee has been

convicted of a felony unrelated to the manufacture or sale of intoxicating liquor so long as any such employee does not directly participate in retail sales of intoxicating liquor.

Appellant never does explain how this statute would cause him to be in violation of his probation,³ since the statute does not create any criminal liability. The statute simply states that convicted felons will not directly participate in the retail sale of liquor in licensed establishments. Nevertheless, Appellant asks that this Court assume that the statute was repealed by implication. Appellant's arguments are contrary to the well-established rules of statutory construction.

The duty of Missouri courts is to attempt to reconcile two statutes, even if they may appear inconsistent. *County of Jefferson v. Quiktrip*, 912 S.W.2d 487, 490 (Mo. banc 1995). Appellant does not want this Court to reconcile the statutes, but to invalidate the specific statute that predates the general statute.

Section 311.060, RSMo, has been in effect since 1939. Section 561.016 was enacted in 1977 as part of Missouri's Criminal Code. The Legislature is presumed to have knowledge of existing law when it enacts later legislation. *Id.*; *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000).

We presume that, if the Legislature wanted to repeal § 311.060, it would have done so.

³The Circuit Court noted this deficiency in its opinion, but Appellant fails to clarify this significant "standing" problem in his brief (L.F. 92, fn. 2).

It is for this reason that “[r]epeal by implication is disfavored, and if two statutes can be reconciled then both should be given effect.” *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 47 (Mo. banc 1998); *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986).

The two laws are not inconsistent. The general proposition that prior convictions do not disqualify persons is, itself, qualified by the following express language:

unless the disqualification or disability involves the deprivation
of a right or privilege which is

* * *

(4) Provided by the judgment, order or regulation of a
court, agency . . .

§ 561.016, RSMo (emphasis added).

Section 311.060 expressly authorizes, and requires, the exclusion of convicted felons from direct involvement in retail sales of liquor. As the Circuit Court noted, 11 CSR 70-2.140(11) is a properly enacted regulation which mirrors the prohibition set forth in § 311.060, RSMo (L.F. 96-97). Thus, consistent with the language of § 561.016, there is a regulation of an agency setting forth the prohibition.

Finally, even if Appellant had been able to establish an inconsistency between the two statutes, the rules of statutory construction would not allow him to prevail. Once again, the law is clear that if an inconsistency exists, the general law must give way to the specific. *O’Flaherty v. State Tax Comm.*, 680 S.W.2d 153, 154 (Mo. banc 1984). The rule is “that where one statute deals with a particular subject in a general way, and a second statute treats

a part of the same subject in a more detailed way, the more general should give way to the more specific.” *Id.* While § 561.016, deals generally with the collateral consequences of a conviction, § 311.060, deals specifically with the effect of that conviction in a licensed retail liquor setting.

The prohibition does not prohibit Appellant from working in a liquor establishment, or any countless other occupations. The statute simply prohibits him from working in a position where he is directly involved in retail sales.

We start with the proposition that the liquor business stands on a different plane than other commercial operations. It is placed under the ban of the law and is differentiated from all other occupations, and no person has the natural or inherent right to engage therein. Those who engage in the business of liquor have no legal rights save those expressly granted by license and the statute. The state may impose such conditions, burdens and regulations as it may deem wise and proper. In the eyes of the law the liquor business stands on a different plane from other pursuits and is separated or removed from the natural rights, privileges and immunities of the ordinary citizen.

Kehr v. Garrett, 512 S.W.2d 186, 189 (Mo.App., St.L.D. 1974); *Schneider v. Stewart*, 575 S.W.2d 904, 911 (Mo.App., K.C.D. 1978). In fact, it has long been recognized that the Supervisor has the exclusive authority to determine who may sell liquor. *State ex rel. Floyd*

v. Philpot, 266 S.W.2d 704 (Mo. 1954); *Hacienda v. Smarr*, 841 S.W.2d 807, 810 (Mo.App., E.D. 1992).

None of the cases cited by Appellant offer any support for his argument. *Magruder v. Petre*, 690 S.W.2d 830 (Mo.App., W.D. 1985), does not state there was an “implicit repeal,” as Appellant argues. The court refused to address the issue. Nor does *Foxworth v. Foxworth*, 732 S.W.2d 931 (Mo.App., S.D. 1987), do anything more than quote the commentary accompanying the Criminal Code.⁴ Finally, *Mager v. City of St. Louis*, 699 S.W.2d 68 (Mo.App., E.D. 1985), does not support his position since that case dealt with a city ordinance being superceded by state law, not a pre-existing specific state statute.

There is simply no basis for the Appellant to assert that § 311.060 is implicitly repealed.

⁴Appellant states in his brief that the Circuit Court “disregarded” these cases, but there is no indication that Appellant ever directed the Circuit Court to any of these cases.

II.

THE CIRCUIT COURT DID NOT ERR IN REFUSING TO DECLARE SECTION 311.060, RSMo, UNCONSTITUTIONAL BECAUSE PROHIBITING A CONVICTED FELON FROM WORKING AS A BARTENDER DOES NOT DENY THE FELON ANY FUNDAMENTAL RIGHT WHATSOEVER SINCE THERE ARE INNUMERABLE OTHER JOBS OR FORMS OF EMPLOYMENT AVAILABLE TO THE FELON, AND IT IS NOT A DENIAL OF EQUAL PROTECTION TO PROHIBIT APPELLANT, AND OTHER CONVICTED FELONS, FROM BEING DIRECTLY INVOLVED IN THE SALE OF LIQUOR.

Appellant's second point asserts that the statutory prohibition against him directly participating in the retail sale of liquor violates his right to "the enjoyment of the gains of his own industry" as provided in Article I, Section 2, of the Missouri Constitution. Appellant seems to argue that because selling liquor is legal in Missouri, Appellant, individually, has an unlimited right to do so.

The State submits that the Appellant has no constitutional right to sell liquor, or to any other particular occupation. By its plain language, Article I, Section 2, is intended to protect against involuntary servitude and cannot reasonably be interpreted in the manner Appellant asserts. The right Appellant asserts is non-existent.

"Statutes are presumed to be constitutional and will be found unconstitutional only if they clearly violated a constitutional provision . . . ; any doubt is to be resolved in favor of the law's validity." *Berdella v. Pender*, 821 S.W.2d 846, 850 (Mo. banc 1991). The "burden to prove a statute unconstitutional rests upon the party bringing the challenge." *Suffian v. Usher*,

19 S.W.3d 130, 134 (Mo. banc 2000). In this case, Appellant has the burden to demonstrate that “this legislatively created classification does not have a rational basis.” *Linton v. Missouri Veterinary Medical Board*, 988 S.W.2d 513, 515 (Mo. banc 1999). Appellant must also show that he is treated different from those similarly situated. *McKinley Iron, Inc. v. Director of Revenue*, 888 S.W.2d 705, 709 (Mo. banc 1994); *Bd. of Healing Arts v. Boston*, 72 S.W.3d 260, 264 (Mo.App., W.D. 2002). Appellant has completely failed to establish any constitutional right violated by § 311.060, RSMo.

There are a number of restrictions that arise as a result of Appellant’s status as a convicted felon. He may not purchase a handgun, § 571.090, RSMo; he may never serve on a jury, § 561.026 (3), RSMo; he may not be certified as a peace officer, §§ 590.080 and 590.090, RSMo; he may not obtain a gaming license, § 313.035.1(1), RSMo. And Missouri recognizes that the existence of a conviction can, regardless of the passage of time, reflect on the credibility of the person convicted. § 491.050. Thus, the assertion that § 311.060 is “totally arbitrary” because it “treats felons who desire employment in retail liquor service and sale differently than any other employment, profession, trade, or calling” (Appellant’s Brief, p. 31) is completely inaccurate.

Once again, it has long been recognized that the liquor industry is highly regulated and “stands on a different plane than other commercial operations.” *Kehr v. Garrett*, 512 S.W.2d 186, 189 (Mo.App., St.L.D. 1974); *Schneider v. Stewart*, 575 S.W.2d 904, 911 (Mo.App., K.C.D. 1978). “Those who engage in the business of liquor have no legal rights save those expressly granted by license and the statute.” *Kehr, supra*.

Additionally, the law has also long recognized the State's legitimate interest in keeping the liquor business from those with criminal pasts or who are of bad moral character. *Mandocina v. Liquor Control Board of Kansas City*, 599 S.W.2d 240, 243 (Mo.App., W.D. 1980). The State has a strong interest in the regulation of the liquor industry. *High Life Sales v. Brown-Forman Corp.*, 823 S.W.2d 493, 497 (Mo. banc 1992); *Spradling v. Supervisor of Liquor Control*, 824 S.W.2d 906, 908 (Mo. banc 1992). In fact, Missouri's express public policy is to strictly regulate the sale of intoxicating liquor. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo.App., E.D. 2000).

Appellant has, of course, completely failed to cite any authority for the proposition that convicted felons are a distinct or protected class. Nor has he sustained his "extremely heavy burden," *Consolidated School Dist. v. Jackson County*, 936 S.W.2d 102 (Mo. banc 1996), to prove there is no rational basis for the statute.

Just as the Legislature has determined that felons are not as trustworthy as witnesses as nonfelons, § 491.050, RSMo, it is permissible for the Legislature to conclude that felons are not as trustworthy to distribute liquor in the manner proscribed by law. Given the highly-regulated nature of the industry and the State's interest involved, such a conclusion is not irrational.

Appellant obviously disagrees with that policy and spends an inordinate amount of time in his brief arguing that the policy should be otherwise. Such arguments serve no purpose whatsoever in resolving the issue raised on appeal—is the statute constitutional.

Finally, Appellant asserts that the statutory provision of § 561.016 that causes it to reconcile with § 311.060, namely subdivision 4, is not applicable because the provision states that the agency must be “exercising a jurisdiction conferred by law.” (Appellant’s Brief, pp. 31-32.) Appellant argues that because the Supervisor of Liquor Control indicated he had no jurisdiction over the Appellant (*i.e.*, Appellant himself is not licensed), this was an admission that there is no “jurisdiction.”

The argument is strained and borders on the absurd. It is clear and obvious that subsection 4 of § 561.016.1, does not refer to “personal jurisdiction” but, instead, requires that regulation promulgated by an agency be within the agency’s “jurisdiction conferred by law.” The statute cannot reasonably be interpreted to be limited to situations in which the “jurisdiction” is only “personal jurisdiction.”

CONCLUSION

Section 311.060, RSMo, is neither unconstitutional nor repealed by any other legislation. The statute is reasonably related to the State's very strong interest in regulating the liquor industry.

The decision of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains 2,979 words, excluding the cover, and this certification, as determined by WordPerfect 9 software; and
2. That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this 21st day of January, 2003, to:

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