

No. 87127

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE COMPETENCY OF
STEVEN PARKUS.

Appeal from the Circuit Court of Washington County, Missouri
The Honorable Robert C. Stillwell, Judge

ATTORNEY GENERAL'S REPLY BRIEF

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POINT RELIED ON

This appeal should not be dismissed because the appellate court has jurisdiction over this civil appeal under §510.020, RSMo. in that the litigation before the circuit court was civil litigation and the Attorney General filed a timely notice of appeal.

ARGUMENT

This appeal should not be dismissed because the appellate court has jurisdiction over this civil appeal under §510.020, RSMo. in that the litigation before the circuit court was civil litigation and the Attorney General filed a timely notice of appeal.

Parkus contends that the Attorney General's appeal should be dismissed because the appellate court does not have jurisdiction (Parkus Brief, pages 38-48). Petitioner's theory is that there is no statutory authority for the state to appeal a criminal judgment under §547.200, RSMo. 2000 (Parkus Brief, page 42). And, in particular, an appeal under §547.200.2, RSMo. 2000 would be inappropriate because, if the state prevails, then Parkus' rights under the Double Jeopardy Clause would be violated (Parkus Brief, pages 44-48). Parkus' contention is erroneous.

The premise of Parkus' theory is unfounded. That premise, that this appeal involves the "state's" appeal in a criminal case has no factual basis. The circuit court treated the litigation as a civil litigation. The cause was not styled "State v. Offender." Instead, the cause was styled "In the Matter of the Competency of Steven Parkus, an inmate condemned to death" (LF, page 8). The litigation began with a "Petition for Inquiry," not a criminal complaint, an indictment, an information, an arrest warrant or the like (LF, page 8). The Washington County Circuit Court gave the cause a civil case number, No. CV1000-325CC (LF, page 8). The circuit court's September 28, 2005 "Judgment and Order" does not purport to be a criminal judgment (LF, page 247). Nor does the Circuit Court of Washington County order that any action be taken with regard to the sentence of death previously imposed by the

Cape Girardeau County Circuit Court. This appeal involves a civil inquiry under §552.060, RSMo. 2000; thus, appellate jurisdiction arises from §510.020, RSMo. 2000. And the October 7, 2005 notice of appeal is timely (LF, page 258).

Even if appellate jurisdiction were grounded in §547.200, RSMo., then jurisdiction exists under §547.200.2, RSMo. 2000 for a state appeal. Parkus suggests that requiring him to relitigate the issue of mental retardation would violate his rights under the Double Jeopardy Clause (Parkus Brief, page 48); thus, there is no appellate jurisdiction under §547.200.2. Again, the premise of Parkus' contention is erroneous because Parkus' double jeopardy rights are not violated.

The premise of petitioner's claim is that he has been "acquitted" of capital punishment; thus, a retrial on whether he should received capital punishment is barred under the double jeopardy principles in Bullington v. Missouri, 451 U.S. 430 (1981). The premise, Parkus' acquittal, is false. Parkus is under sentence of death from the Cape Girardeau County Circuit Court. That sentence has not been vacated, set aside, modified or amended by a court of competent jurisdiction. Given that Parkus is under a sentence of death, he cannot legitimately claim that he is acquitted of the death sentence.

Further, the concept of acquittal of a capital sentence seems to equate the non-presence of mental retardation to an element of the actual offense. There is no Supreme Court or Missouri Supreme Court precedent to that effect. Whether a capital offender is over the age of eighteen, Roper v. Simmons, 543 U.S. 551 (2005) or same at the time of execution, Ford v. Wainwright, 477 U.S. 399 (1986), are not "elements" of an offense.

And if Parkus contended that he was “acquitted” by the circuit court’s September 28, 2005 order, he cites no authority for that proposition (Parkus Brief, pages 44-48). And to the contrary, he referred the court to Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003) where the appellate court, in an exercise of appellate court jurisdiction in considering a Rule 29.15 appeal, ordered that Rule 29.15 relief be granted, the death sentence set aside due to the appellate court’s finding of mental retardation and a new penalty phase take place. Similarly, in State ex rel. Johns v. Kays, 181 S.W.3d 565, 565 (Mo. banc 2006), the Missouri Supreme Court noted the state’s failure to appeal the circuit court’s granting of Rule 29.15 relief on the basis of a finding that Mr. Johns was mentally retarded. See Atkins v. Virginia, 536 U.S. 304 (2002). The Missouri Supreme Court’s observation suggests the state’s ability to appeal a Rule 29.15 circuit court’s determination of mental retardation.

This conclusion is consistent with precedent from the United States Supreme Court on the topic of double jeopardy. The courts allow a government appeal of a trial court’s order acquitting a defendant notwithstanding the verdict because if the government prevails, no retrial before a new jury is necessary. The jury’s original verdict would simply be reinstated. E.g. United States v. Duncan, 164 F.3d 239, 242 (5th Cir. 1999); United States v. Wilson, 420 U.S. 332, 337 (1975). Similarly, if the Attorney General were to prevail on appeal with either Point I, II or III of appellant’s brief, no retrial before a jury would be warranted. Parkus’ rights under the Double Jeopardy Clause are not implicated.

This court has appellate jurisdiction under §510.020, RSMo. 2000. Although not necessary to reach the issue, the court also has appellate jurisdiction under §547.200.2,

RSMo. 2000.

CONCLUSION

WHEREFORE, for the reasons herein stated, the Attorney General prays the court reverse the September 28, 2005 judgment of the Washington County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 1077 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 2 day of January, 2007.

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