No. SC85725

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON,

Relator,

v.

THE HONORABLE DAVID RUSSELL,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

This action is an original proceeding in prohibition challenging the November 7, 2003, and December 10, 2003, orders of the Clay County Circuit Court, the Honorable David Russell, in State of Missouri v. Harold Estes, case no. CR198-1116F, releasing Harold Estes on judicial parole pursuant to §558.016.8, RSMo Cum.Supp. 2003. This Court issued a preliminary writ of prohibition on December 23, 2003. This Court has jurisdiction to determine original writs pursuant to Article V, §4, of the Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Harold Estes, the defendant in the underlying criminal case, no. CR198-1116F, pled guilty to ten counts of unlawful merchandising practices in the Clay County Circuit Court, the Honorable David Russell presiding, and was sentenced to five `years in the custody of the Missouri Department of Corrections on each count on January 15, 1999. Rel.App. at A1-A3. The sentences were aligned so that the total sentence was ten years in the custody of the Missouri Department of Corrections. Id.

On September 9, 2003, Estes filed a "Motion for Reduction of Sentence or Alternative Sentencing" in the trial court pursuant to §558.016.8, RSMo Cum. Supp. 2003. Rel.App. at A4-A9. On November 7, 2003, Judge Russell, the respondent, ordered that the Department of Corrections release Estes on administrative parole pursuant to §558.016.8, RSMo Cum. Supp. 2003.[1] Rel.App. at A10-A11.

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[1]§558.016.8 does not require that a circuit court give notice or an opportunity to be heard to a prosecutor prior to ordering an inmate's release on probation or parole. Thus, relator became aware of respondent's order only after it was issued.

On November 24, 2003, relator Nixon filed a motion to reconsider and set aside respondent's November 7, 2003, order, arguing that respondent was without jurisdiction to retroactively apply §558.016.8 to Estes' case. Rel.App. at A12-A22. Relator filed a petition for writ of prohibition in the Missouri Court of Appeals, Western District, on December 5, 2003. The Court of Appeals summarily denied relators's petition on December 8, 2003. Respondent then denied relator Nixon's motion to reconsider on December 10, 2003. RelApp. at A23. Respondent ordered that Estes be released on judicial parole on December 12, 2003. Id.

Relator filed a petition for writ of prohibition in this Court on December 11, 2003, and also moved for an emergency stay. Estes was released on judicial parole on December 12, 2003. This Court denied relator's motion for emergency stay on December 12, 2003, but issued a preliminary writ of prohibition on December 23, 2003. Respondent filed an answer to this Court's preliminary writ on January 22, 2003.

POINT RELIED ON

Relator is entitled to an order prohibiting respondent from ordering that Harold Estes be released on judicial parole in Clay County case no. CR198-1116F pursuant to §558.016.8, RSMo Cum. Supp. 2003, because the 2003 amendments to §558.016 do not apply to Estes' case in that respondent lacked authority to release Estes on parole under the law at the time of Estes' offenses, the 2003 amendments to §558.016 are not retroactive on their face, and §1.160, RSMo 2000, does not require that the 2003 amendments to §558.016 apply to Estes' 1999 sentences.

McCulley v. State, 486 S.W.2d 419 (Mo. 1972)

State ex rel. Nixon v. Kelly, 58 S.W.3d 513 (Mo. banc 2001)

State ex rel. Director of Revenue v. Mobley, 49 S.W.3d 178 (Mo. banc 2001)

State v. Larson, 79 S.W.3d 891, 893 (Mo. banc 2002)

§556.016.8, RSMo Cum.Supp. 2003

§1.160, RSMo 2000

ARGUMENT

Relator is entitled to an order prohibiting respondent from ordering that Harold Estes be released on judicial parole in Clay County case no. CR198-1116F pursuant to §558.016.8, RSMo Cum. Supp. 2003, because the 2003 amendments to §558.016 do not apply to Estes' case in that respondent lacked authority to release Estes on parole under the law at the time of Estes' offenses, the 2003 amendments to §558.016 are not retroactive on their face, and §1.160, RSMo 2000, does not require that the 2003 amendments to §558.016 apply to Estes' 1999 sentences.

Prohibition is an available remedy:

> 1) where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction; 2) where there exists a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated; or 3) where there is no adequate remedy by appeal.

State ex rel. Director of Revenue v. Mobley, 49 S.W.3d 178, 179 (Mo. banc 2001).

This case fits into the second class of cases because respondent lacked the authority to apply §558.016.8, RSMo Cum.Supp. 2003, to Harold Estes' 1999

sentences. Further, relator cannot appeal the grant of parole because a grant of parole is not a final judgment and because relator lacks the statutory authority to appeal. This case therefore fits into the third class of cases as well.

A. Respondent lacked jurisdiction to apply §558.016.8 to Estes' case

No statute or rule in force at the time of Estes' sentencing or at the time of his offenses permitted respondent to take any action in Estes' case following Estes' 1999 sentencing.

Harold Estes committed the charged crimes between April of 1995 and August of 1997. Resp. Ex. A. Estes pled guilty to ten counts of unlawful merchandising practices in the Circuit Court of Clay County. Resp. Ex. A. Respondent sentenced Estes on January 15, 1999. Id. Estes did not take a direct appeal from his plea of guilty, and did not file a post-conviction relief motion under Supreme Court Rule 24.035 challenging his guilty pleas and sentences. Estes' convictions therefore became final on January 15, 1999, the date of his sentencing. Supreme Court Rule 30.01(d); State v. Eisenhouer, 40 S.W.3d 916, 918 (Mo. banc 2002).

The trial court's jurisdiction, and thus its power to take action, in a criminal case ended on January 15, 1999, when the trial court entered judgment and sentence. As this Court has specifically held, "once judgment and sentencing

occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule." State ex rel. Simmons v. White, 866 S.W.2d 443, 445 (Mo. banc 1993); State ex rel. Wagner v. Ruddy, 582 S.W.2d 692, 695 (Mo. banc 1979). The law at the time of the offense controls the sentence unless the law creating the offense is altered to the defendant's benefit prior to original sentencing. State ex rel. Nixon v. Kelly, 58 S.W.3d 513, 518 (Mo. banc 2001). Respondent apparently believed that he could assert jurisdiction and modify Estes' 1999 sentences based on the 2003 amendment to §558.016. The law that respondent relied on to order Estes' release on judicial parole, however, did not become effective until four years after Estes was sentenced. For respondent to have jurisdiction to reopen and modify its sentence, respondent had to find the authority in a statute or rule in force at the time of Estes' 1996 offenses or in a statute expressly made retroactive. Neither source was available to respondent here.

1. Respondent lacked authority under any pre-2003 statute or rule to modify Estes' sentences

No statute or rule in force prior to 2003 granted respondent the power to place Estes on parole after respondent sentenced Estes. Estes did not file a motion

invoking this Court's Rule 24.035, which allows the sentencing court to set aside a conviction and sentence. Estes also was not sentenced under §559.115, RSMo Supp. 1996, §217.378, RSMo 1994, or §217.362, RSMo Cum.Supp. 1998, all of which allow a trial court to retain jurisdiction for either one hundred twenty days, §§559.115 and 217.378, or two years, §217.362, in which time the court may place an inmate on probation. Under the law in effect at the time of Estes' offenses and the law in effect at the time of Estes' sentencing, respondent lacked authority to take any action in Estes' case.[2] Respondent therefore acted in excess of his jurisdiction when he issued his order releasing Estes on judicial parole.

2. §558.016.8, does not give a circuit court authority to retroactively reopen and change sentences

Rather than rely on any law that existed in 1996 at the time of Estes' offenses, or even a law that existed in 1999 when Estes was sentenced, Estes sought, and respondent granted, relief in the form of judicial parole under §558.016.8, RSMo

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[2]The sentencing court also may correct clerical mistakes in the record at any time through a *nunc pro tunc* order. Supreme Court Rule 29.12(c). The relief that Estes sought from respondent is not a clerical error.

Cum.Supp. 2003. Section 558.016.8, RSMo Cum.Supp. 2003, does not permit retroactive changes in sentences.

The text of subsection 8 was included for the first time in Senate Bill 5, passed in the first general session of the 92nd General Assembly. *See* Mo.Legis.Serv. S.B. 5 (Vernon's 2003); *compare with* §558.016, RSMo 2000 (repealed 2003). The bill was signed into law by Governor Robert Holden on June 27, 2003, and became effective as of that date because the bill contained an emergency clause. Mo.Legis.Serv. S.B. 5, *supra*. Section 558.016.8, RSMo Cum.Supp. 2003, allows a circuit court, under certain circumstances, to grant inmates release on probation, parole, or other alternative sentences as follows:

> 8. An offender convicted of a nonviolent class C or class D felony with no prior prison commitments, after serving one hundred twenty days of his or her sentence, may, in writing, petition the court to serve the remainder of his or her sentence on probation, parole, or other court-approved alternative sentence. No hearing shall be conducted unless the court deems it necessary. Upon the offender petitioning the court, the department of corrections shall submit a report to the sentencing court which evaluates the conduct of the offender while in custody, alternative custodial methods available to the

offender, and shall recommend whether the offender be released or remain in custody. If the report issued by the department is favorable and recommends probation, parole, or other alternative sentence, the court shall follow the recommendations of the department if the court deems it appropriate. Any placement of an offender pursuant to section 559.115, RSMo, shall be excluded from the provisions of this subsection.

Nothing in the new §558.016.8 suggests that it applies to inmates in the Department of Corrections who were sentenced prior to the statute's effective date.

The statute does not contain any express language stating that its effect is retroactive, nor is there anything in the statute compelling such a reading. This Court has held that "[s]tatutes are generally presumed to operate prospectively, 'unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication.'" Casey's Marketing Co. v. Land Clearance for Redevelopment Authority of Independence, Mo., 101 S.W.3d 23, 28 (Mo.App., W.D. 2003), *quoting* Dep't of Soc. Serv. v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. banc 1985), *quoting* Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 34 (Mo. banc 1982). Because the language of §558.016.8, as well as the overall language of Senate Bill

5, contains neither express nor implicit language making §558.016.8 retroactive, *see* §558.016.8 *and* Mo.Legis.Serv. S.B. 5 (Vernon's 2003), Senate Bill 5, including the new §558.016.8, therefore is not retroactive.

Further, there are important policy reasons why §558.016.8 should not be applied retroactively. Retroactive application of §558.016 would arbitrarily deny relief to many inmates who may have benefitted from its application if they had known about it. Inmates in the Department of Corrections who refused to accept plea bargains to Class C or D felonies and would have accepted those plea bargains had they known about the provisions of §558.016.8. A criminal defendant's eligibility for early release is "a significant factor" in a defendant's decision to plead guilty. Weaver v. Graham, 450 U.S. 24, 32, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); State v. Lawhorn, 762 S.W.2d 820, 825 (Mo. banc 1988). The inmates currently serving time for a Class A or B felony would not be eligible for relief under §558.016.8 for the sole reasons that they did not foresee that the General Assembly would pass a statute like §558.016.8. A retrospective application of §558.016.8 would therefore not achieve any benefit to inmates who would have benefitted had the statute existed at the time of their guilty pleas. This outcome results in an even more arbitrary application of the sentencing provisions.

A holding that §558.016 is retroactive would also interfere with prosecutorial discretion and create an unlevel playing field for prosecutors. A criminal sentence is based, at least in part, on a prosecutor's discretion to charge higher-class crimes. A prosecutor making a decision about how to charge a defendant prior to the effective date of Senate Bill 5 may have decided to charge a Class C felony or a Class D felony in his discretion because the prosecutor felt that the prison time for that offense was appropriate. The prosecutor also may have allowed a defendant to plead guilty to a lesser offense that was a Class C or D felony. Prior to the effective date of Senate Bill 5, the prosecutor also may have chosen, as part of a plea bargain, not to charge the defendant as a prior offender, a prior misdemeanor offender, a persistent offender, or a dangerous offender under §558.016.1, RSMo 2000 (repealed 2003), in order to restrict the range of punishment that the defendant might receive and ensure that the defendant would spend a specific amount of time in the penitentiary.

Section 558.016.8 changes that equation for the prosecutors. A prosecutor, knowing about the terms of §558.016.8, may choose to charge a Class A or B felony conviction so that a defendant is ineligible for relief under §558.016.8. A prosecutor also might choose not to allow a defendant to plead down to a Class C

or D felony so that a defendant could not take advantage of the provisions of §558.016.8. A prosecutor further may, as part of a plea bargain, require that a defendant consent to serve a certain portion of his sentence in prison and waive relief under §558.016.8 during that time.

Prosecutors could not foresee these changes prior to June 27, 2003, when §558.016.8 became law. Allowing retroactive application of §556.016.8 would alter the balance for prosecutors because the prosecutor's basis for his prior charging and pleading decisions may now be incorrect in that a defendant might gain relief under §558.016.8. The new §558.016.8 alters the entire sentencing calculus, and perhaps the entire calculus of a criminal case, in the prosecutor's eyes. Changing the rules, and effectively pulling the rug out from under the prosecutor's feet, is not fair to the prosecutor. Allowing §558.016.8 to be applied retroactively provides a windfall for some defendants, who agreed with the prosecutor to plead to a less serious offense, received a light sentence in accordance with the prosecutor's recommendation, and now are challenging the prison time they agreed to serve and that the prosecutor believed that they would serve in prison. At the same time, other defendants receive a double whammy by refusing a plea deal, being convicted of a Class A or B felony, and being ineligible

for relief under §558.016.8. These situations are fundamentally unfair.

However, if this Court recognizes that §558.016.8 applies only to sentences for crimes committed after the effective date of the Senate Bill 5, all of these concerns disappear. This Court's declaration that §558.016.8 cannot be applied to offenses committed before its effective date maintains the level playing field that existed prior to Senate Bill 5 and the new §558.016.8. The well-established rule that sentences and parole consideration are governed by the law in effect at the time of the offense prevents §558.016.8 from creating arbitrary and disparate results. Thus, §558.016.8 should apply only prospectively.

3. Section 1.160 does not permit application of §558.016.8 to Estes' case

The General Assembly has enacted a general rule for retroactivity for penal statutes in §1.160, RSMo 2000. Section 1.160 does not make §558.016.8 retroactive. Section 1.160 provides for retroactive application solely for changes in the "law creating the offense":

> No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the

recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:

(1) That all such proceedings shall be conducted according to existing procedural laws; and

(2) That if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law.

This Court has held that §1.160, RSMo 2000, means "as it states on its face, that a defendant will be sentenced as prescribed by the law in effect **at the time of the offense** unless a lesser punishment is required by a change in **the law that created the offense**." State ex rel. Nixon v. Kelly, 58 S.W.3d 513, 518 (Mo. banc 2001)(emphasis in original). A criminal defendant's sentence thus is governed by the law in effect at the time of his offense unless the law defining the offense is changed to the defendant's benefit prior to original sentencing. *See* §1.160(2), RSMo 2000. As discussed above, the laws in effect at the time of Estes' offenses did not allow for respondent's action.

This Court in Kelly examined the retroactive application of an amendment to

the jail-time credit law, §558.036, RSMo Cum.Supp. 1996. The respondent in Kelly argued that the 1995 amendments to the jail-time credit statute, §558.031, RSMo, lessened the punishment for the inmate's offense, and that §1.160 mandated that the 1995 amendments to §558.031 apply to the jail-time credit calculation for the inmate's 1994 convictions and sentences.

This Court rejected that argument:

> While it is true, as Respondent notes, that section 558.031, governing the time of commencement of a sentence of imprisonment and credit for jail, prison or custody time, was amended in 1995, section 558.031 is not the law that created the offense of which Mr. Haldeman was convicted. Therefore, the fact that section 558.031 was changed after Mr. Haldeman committed his crimes but before his sentencing is irrelevant and does not provide him with the right to be sentenced according to the version of section 558.031 in effect at the time of sentencing.

Kelly, 58 S.W.3d at 517. Thus, §1.160 applies only to the statute creating the criminal offense, and it applies only if the statute creating the offense is altered to decrease punishment.

Here, Estes was convicted of ten counts of unlawful merchandising practices in

1999. The felony of unlawful merchandising practices was created by §407.020, RSMo 1994. Estes did not allege that his sentence should be lessened because of any change to §407.020. Respondent did not lessen Estes' sentence because of any change to §407.020. Rather, Estes requested and received parole under §558.016.8, a statute enacted for the first time in 2003. The amendments to §558.016 did not change the law that created the offense that Estes was convicted of: §407.020, unlawful merchandising practices. Therefore, under Kelly, §1.160 does not make the amendments to §558.016.8 retroactive to cases like Estes' in which the offenses were committed prior to June 27, 2003, the effective date for §558.016.8. Section 1.160 therefore does not transform the new §1.160 into a grant of jurisdiction to permit circuit courts to retroactively modify sentences.

Additionally, §1.160 does not apply in this case because §1.160 applies only when the alteration of the law occurs prior to original sentencing. *See* §1.160(2). In this case, respondent sentenced Estes in 1999. The amendments to §558.016 were passed in 2003, four years after Estes' original sentencing. Therefore, §1.160 cannot make the statute retroactive because §558.016 was not altered prior to Estes' original sentencing. Respondent exceeded his jurisdiction in releasing Estes on judicial parole under §558.016.8.

B. Prohibition is relator's only avenue to challenge respondent's orders

Relator has no remedy under Missouri law other than prohibition because relator cannot appeal respondent's orders releasing Estes on judicial parole.

The right to appeal is based solely on statutory authority. State v. Larson, 79 S.W.3d 891, 893 (Mo. banc 2002); State v. Williams, 871 S.W.2d 450, 452 (Mo. banc 1994). Missouri statutes and rules allow only for appeals from final judgments in criminal cases. §547.070, RSMo 2000; Supreme Court Rule 30.01(a). This Court's jurisprudence likewise is well-established that an appeal may be taken only from a final judgment. Larson, *supra*; Gibson v. Brewer, 952 S.W.2d 239, 244 (Mo. banc 1997); Boley v. Knowles, 905 S.W.2d 86, 88 (Mo. banc 1995); Committee for Educ. Equality v. State, 878 S.W.2d 446, 450 (Mo. banc 1994). An appeal that is taken from a judgment that is not final must be dismissed. Gibson, *supra*; Boley, *supra*.

This Court has definitively declared that "[i]n a criminal case, a final judgment occurs only when a sentence is entered." Larson, *supra*. *See also* State v. Eisenhouer, 40 S.W.3d 916, 918 (Mo. banc 2002)("A criminal judgment is final when the sentence and judgment finally dispose of all issues in the criminal proceeding, leaving no questions to the future judgment of the court"); State v.

Burns, 994 S.W.2d 941, 942 (Mo. banc 1999)("The most common instance in which a judgment is final in a criminal case is when sentence is entered").[3] Therefore, a final judgment in a criminal case occurs when sentence is entered, and an appeal is properly taken only at that time.

The orders at issue in this case are not sentences. A "sentence" under Missouri law is "punishment that comes within the particular statute designating the permissible penalty for the particular offense." McCulley v. State, 486 S.W.2d 419, 423 (Mo. 1972). This Court stated that "it is clear that the sentence is the penalty--the confinement for a period of time or the fine--and does not include as part of its definition such conditional orders as the court makes for the amelioration of the punishment--probation or parole." Id. Thus, "probation or parole is not part of the sentence imposed upon a defendant." Id. Respondent sentenced Estes on January 15, 1999. The November and December 2003 orders at issue merely grant

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[3]This Court also held in Burns that a criminal judgment is final when a trial court enters an order effectively foreclosing the prosecution of a defendant and discharging the defendant. Burns, 994 S.W.2d at 942. The case at bar does not fit into this exception.

Estes release on judicial parole and are not sentences. Because the orders are not sentences, they are not final judgments and are not appealable.

Finally, even assuming that the respondent's orders constituted a final judgment, relator could not appeal. The State is permitted to appeal a circuit court's order or judgment in a criminal case in only a very narrow range of cases. State v. Burns, 994 S.W.2d 941, 942 (Mo. banc 1999). The State's right to appeal is purely statutory, and the State cannot take an appeal without statutory authority. Id. Sections 547.200 and 547.210, RSMo 2000, govern the State's right to appeal in a criminal case. Section 547.200, RSMo 2000, allows the State to take an appeal when a circuit court's order quashes an arrest warrant, determines that a defendant lacks the mental capacity to be tried, suppresses evidence, or suppresses a confession. Section 547.210, RSMo 2000, allows for the State to take an appeal when the circuit court, "upon demurrer or exception," finds that the information or indictment is insufficient and the appellate court grants an appeal.

Neither §547.200 nor §547.210 allows for the State to take an appeal from a circuit court's decision to grant or deny parole. As the right to appeal is purely statutory, the State therefore lacks the statutory authority to appeal respondent's grant of parole, even assuming that respondent's order constitutes a final judgment.

The State therefore cannot appeal from respondent's order releasing Estes on judicial parole, leaving prohibition as the appropriate remedy.

CONCLUSION

For the above reasons, relator prays that this Court make its preliminary writ of prohibition absolute and hold that respondent's orders of November 7, 2003, and December 10, 2003, were in excess of respondent's jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and 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 ___ day of _____, 2004, to:

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