No. SC92229

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JOEY D. HONEYCUTT,

Respondent.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Jason Brown, Judge

APPELLANT'S BRIEF

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitution

Other Authority

JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of Greene County dismissing Count III of a felony complaint that charged Respondent Joey D.Honeycutt with unlawful possession of a firearm in violation of section 571.070, RSMo Cum. Supp. 2010, on the basis that application of the statute to the Respondent violated the prohibition contained in article I, section 13 of the Missouri Constitution on the enactment of laws that are restrospective in their operation. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004). Although the dismissal was not denominated as being either with or without prejudice, refiling the charge would be a futile act given the reasons underlying the trial court's ruling. The dismissal thus had the practical effect of terminating the litigation and constituted a final and appealable judgment. *State v. Smothers*, 297 S.W.3d 626, 630-31 (Mo. App. W.D. 2009). This appeal involves the validity of a state statute, section 571.070, RSMo Cum. Supp. 2010. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Joey D. Honeycutt was charged as a prior and persistent offender in a complaint filed in Greene County Circuit Court with two counts of the class C felony of stealing a firearm (Counts I and II), section 570.030, RSMo Cum. Supp. 2009; and one count of the class C felony of unlawful possession of a firearm (Count III), section 571.070, RSMo Cum. Supp. 2010. (L.F. 6-8). The complaint alleged as to Count III that between November 22, 2010 and March 31, 2011, Honeycutt knowingly possessed a Mossberg .410 shotgun, a firearm, and that Honeycutt had been convicted in Greene County Circuit Court on September 27, 2002 of the felony of possession of a controlled substance. (L.F. 7).

Honeycutt filed a "Motion to Dismiss Count III and Declare Section 571.070 Unconstitutional as it Applies to Defendant." (L.F. 3, 10-13). The motion alleged that at the time Honeycutt was convicted of possession of a controlled substance, that conviction did not prohibit him from owning a firearm, since the version of section 571.070 in effect at the time of that conviction only made it a crime for persons convicted of dangerous felonies to possess a concealable firearm.[1] (L.F. 10-11). The motion went on to allege

[1] The State concedes Honeycutt's assertion that possession of a controlled substance has never been defined as a dangerous felony. (L.F. 11).

that section 571.070 was amended in 2008 to make it a crime for a person convicted of any felony to possess a firearm. (L.F. 11). The motion contended that the 2008 amendment to the statute, as applied to Honeycutt, violated the ban on retrospective laws contained in Article I, section 13 of the Missouri Constitution because it imposed a new duty or obligation upon him. (L.F. 10-12).

The State filed Suggestions in Opposition to the Motion. (L.F. 3, 14-23). The State argued that, based on this Court's precedent in *Ex parte Bethurum*, 66 Mo. 545 (1877), the constitutional ban on retrospective laws is limited exclusively to civil rights and remedies and has no application to crimes and punishment. (L.F. 15-23).

The trial court conducted a hearing on the motion on November 30, 2011, in which it heard arguments on the motion and took it under submission. (L.F. 3; Tr. 2-12). The court issued an order by docket sheet entry on December 5, 2011, in which it found that section 571.070 was unconstitutional as applied to Honeycutt and as charged in Count III of the complaint. (L.F. 4). The court dismissed Count III. (L.F. 4). The State filed a Notice of Appeal in the Circuit Court on December 13, 2011. (L.F. 5, 30-32).

POINT RELIED ON

The trial court erred in dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt because the statute under which Honeycutt was charged, section 571.070, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 571.070, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

Ex parte Bethurum, 66 Mo. 545 (1877).

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006).

Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942).

State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

Mo. Const. art. I, § 13 (1945).

Mo. Const. art. II, § 15 (1875).

Mo. Const. art. I, § 28 (1865).

Mo. Const. art. XIII, § 17 (1820).

Section 571.070, RSMo Cum. Supp. 2010.

ARGUMENT

The trial court erred in dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt because the statute under which Honeycutt was charged, section 571.070, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 571.070, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

The trial court dismissed the felony complaint filed against Respondent Honeycutt on the grounds that section 571.070, RSMo was retrospective as applied to him, in that the statute changed the effect of his prior conviction for possession of a controlled substance by prohibiting Honeycutt from possession of a firearm when such a prohibition did not exist when he was convicted of the drug charge in 2002. But the trial court erred in applying the constitutional ban against retrospective laws to the criminal statute under which Honeycutt was charged because the ban on retrospective laws relates exclusively to civil statutes and has no application to criminal statutes.

A. Standard of Review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed to be valid and will not be found unconstitutional unless it clearly contravenes a constitutional provision. *Id.* The person challenging the statute's validity bears the burden of proving that the act clearly and undoubtedly violates the constitution. *Id.*

B. Analysis.

The prohibition against retrospective laws is contained in article I, section 13 of the Missouri Constitution, which states:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grants of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13 (1945). A similar provision has been a part of Missouri law since this State adopted its first constitution in 1820.[2] *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

---

[2] *See* Mo. Const. art. XIII, § 17 (1820); Mo. Const. art. I, § 28 (1865); Mo. Const. art. II, § 15 (1875).

A. This Court has construed the ban on retrospective laws as being limited to civil rights and remedies.

The term "retrospective" that appears in each of Missouri's constitutions, including article I, section 13 of the present constitution, had acquired a definite, legal meaning long before the adoption of Missouri's first constitution. *Ex parte Bethurum*, 66 Mo.at 548. When a constitution employs words that have long had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense, unless there is something to show that they were employed in a different sense. *Id.*

The Court noted in *Ex parte Bethurum* that the prohibition against *ex post facto* laws served to prevent the retrospective application of criminal laws, while the phrase "law retrospective in its operation" related to civil rights and proceedings in civil causes. *Id.* at 550. Applying the technical meaning of retrospective that existed when the constitution was adopted, this Court stated, "A retrospective law, as the phrase is employed in our constitution, is one which relates exclusively to civil rights and remedies." *Id.* at 550. And the Court found that the phrase retained that same meaning in both the 1865 and 1875 constitutions. *Id.* at 552. The Court went on to conclude, "[W]e think there can be no doubt that the phrase 'law retrospective

in its operation,' as used in the bill of rights, has no application to crimes and punishments, or criminal procedure . . . ." *Id.* at 552-53.

Despite that limitation, this Court has recently declared criminal statutes unconstitutional as violating the constitutional ban on retrospective laws. In *R.L. v. Department of Corrections*, the Court applied the ban on retrospective laws to section 566.147, RSMo Cum. Supp. 2006, a statute making it a felony for certain sex offenders to reside within one-thousand feet of a school or a child care facility. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237, 238 (Mo. banc 2008). In *F.R. v. St. Charles County Sheriff's Dept.*, the Court again declared that section 566.147, RSMo was retrospective. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 65-66 (Mo. banc 2010). The Court also applied the ban on retrospective laws to uphold the dismissal of misdmeanor charges filed for a violation of section 589.426, RSMo Cum. Supp. 2008, a statute that required registered sex offenders to comply with certain requirements on Halloween. *Id.* The trial court in the present case relied on those recent precedents to dismiss the felony charge of unlawful possession of a firearm filed against Respondent Honeycutt, on the basis that section 571.070, RSMo was retrospective as applied to him. (L.F. 4).

Appellant respectfully suggests that *R.L.* and *F.R.* are contrary to this Court's precedents, to the intent of the drafters of the constitution and the

voters who approved it, and to the standards that this Court uses to construe the constitution. Those decisions, as well as any other decisions which have applied to criminal statutes the ban on retrospective application of laws that is contained in article I, section 13, should thus no longer be followed.

B. The construction adopted in *Ex Parte Bethurum* is consistent with the intent of the drafters.

Adopted by a vote of the people, the Missouri Constitution is a direct expression of the public will. Accordingly, "It is the duty of this Court to be faithful to the constitution. '[I]t cannot ascribe to it a meaning that is contrary to that clearly intended by the drafters. Rather, a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.'" *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 872 (Mo. banc 2006) (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)).

Ex Parte Bethurum was issued just two years after the adoption of the 1875 Constitution, and the judges who joined in the unanimous opinion were contemporaries of the delegates to the constitutional convention and almost certainly voted on the adoption of that constitution when it was presented to the public. The Court in *Ex Parte Bethurum* would have been well-attuned to the thinking of its fellow citizens who drafted and adopted the constitution. And the debates of the 1875 Constitutional Convention demonstrate that the

Court accurately captured the intended scope of the prohibition on laws retrospective in their operation.

a. Debates of the relevant constitutional conventions demonstrate the drafters' understanding that the ban on retrospective laws did not apply to criminal statutes.

As originally introduced at the convention, the proposed article II, section 15 prohibited retrospective legislation but did not expressly include *ex post facto* laws and those impairing the obligation of contracts, both of which had been incorporated into the constitutions of 1820 and 1865. Debates of the Missouri Constitutional Convention, 1875, Vol. II, p. 10 (Isidor Loeb & Floyd C. Shoemaker eds., State Historical Soc'y of Mo. 1938). A substitute was introduced that added those provisions and also prohibited any irrevocable grants of special privileges or immunities. *Id.* During debate on the substitute provision, a delegate named Gantt argued for the original proposal, which simply read, "no law retrospective in its operation shall be passed by the General Assembly." *Id.* at 405. Delegate Gantt argued that adding a ban on *ex post facto* laws was unnecessary because an *ex post facto* law is a retrospective criminal law and would necessarily be included in a ban on laws retrospective in their operation. *Id.* at 405-10. That argument was challenged by another delegate, who questioned why the 1820 Constitution would have banned both retrospective laws and *ex post facto*

laws if the two terms really meant the same thing. *Id.* at 410. Despite Delegate Gantt's arguments, the convention adopted the substitute provision that banned both *ex post facto* laws and laws retrospective in their operation. *Id.* at 447-48.

During debate on the final adoption of section II, article 15, Delegate Gantt repeated his argument that the ban on retrospective laws was broad enough to encompass *ex post facto* laws and laws impairing obligations of contracts. *Id.* at Vol. IV, pp. 94-95. He offered an amendment so that the section would read: "That no law retrospective in its operation or making any irrevocable grants of special privileges or immunities can be passed by the General Assembly." *Id.* at 95. That amendment was defeated and the convention adopted article II, section 15 with the prohibitions on *ex post facto* laws and laws impairing the obligation of contracts. *Id.* at 95. The full context of the debate shows that Gantt's opinion was the minority view, and that the majority of the delegates believed that analysis of the retrospective effect of new criminal statutes should be confined to the boundaries of the *Ex Post Facto* Clause.

The present article I, section 13 was adopted at the constitutional convention of 1943-1944. Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, *at* http://digital.library.

umsystem.edu. The only discussion prior to the vote approving the amendment was to note that the new amendment was identical to article II, section 15 of the 1875 Constitution. *Id.* Both the delegates to the 1943-1944 convention and the voters who adopted the constitution in 1945 are presumed to have known of the construction that this Court had placed on the term "retrospective" when they approved the present article I, section 13. *Moore v. Brown*, 350 Mo. 256, 266-67, 165 S.W.2d 657, 662 (1942). And because the term "retrospective" has been retained in the same context in every version of the Missouri Constitution since *Ex parte Bethurum*, it is presumed to retain the original meaning ascribed by the Court. *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991).

When the rules that this Court has established for construing constitutional provisions are applied to article I, section 13, the term "retrospective" must be construed as applying exclusively to civil rights and remedies because that is how the term was understood by the convention that adopted that provision and by the voters who approved it. And since the passage of the present constitution, both this Court and the Court of Appeals have continued to expressly recognize the distinction that *ex post facto* laws as described in article I, section 13 are limited to crimes and punishment and criminal procedure, while retrospective laws as described in that same provision are limited to civil rights and remedies. *See, e.g.*, *Lincoln Credit Co.*

v. Peach, 636 S.W.2d 31, 34-35 (Mo. banc 1982); *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010); *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. W.D. 1989); *State v. Thomaston*, 726 S.W.2d 448, 459, 460 (Mo. App. W.D. 1987).

Even in *R.L.*, the Court noted that, "The constitutional bar on retrospective **civil** laws has been a part of Missouri law since this State adopted its first constitution in 1820." *R.L.*, 245 S.W.3d at 237 (emphasis added). But despite that acknowledgement of the limited scope of the ban on retrospective laws, the Court applied that ban to invalidate a felony statute barring certain sex offenders from residing within one-thousand feet of a school or a child care facility. *Id.* at 237, 238. That holding relied on the Court's previous opinion in *Doe v. Phillips*, where the Court held that a statute requiring registration as a sex offender for crimes committed before the effective date of the registration law imposed new obligations on the offender, and was thus retrospective as applied to those offenders. *Id.* at 237 (citing *Phillips*, 194 S.W.3d at 850). But the Court stated in *Phillips* that "'the thrust of the registration and notification requirements are civil and

regulatory in nature.'" *Phillips*, 194 S.W.3d at 842 (quoting *In re R.W.*, 168 S.W.3d 65, 70 (Mo. banc 2005)).[3]

b. Recent decisions extending the ban on retrospective laws to criminal statutes are inconsistent with the intent of the drafters and this Court's precedent in Ex Parte Bethurum.

The Court correctly applied the ban on retrospective laws to the sex offender registration statute in *Phillips* since the statute was one that involved civil rights and remedies.[4] In *R.L.*, the Court appears to have extended *Phillips* to the school residency statute simply because both laws

---

[3] The Court also rejected a claim that the registration requirement was an *ex post facto* law on the basis that the bar on *ex post facto* laws applied only to criminal laws. *Phillips*, 194 S.W.3d at 842. That limitation on *ex post facto* laws is also found in *Ex Parte Bethurum*, 66 Mo. at 550.

[4] While the registration statute at issue in *Phillips* authorized criminal penalties for failure to comply, the Court found that provision was unimportant to the retrospective law analysis. *Phillips*, 194 S.W.3d at 852. Indeed, were a litigant to challenge enforcement of that criminal penalty under article I, section 13, the claim would have to be brought as an alleged *ex post facto* violation, not as a retrospective law. *Ex parte Bethurum*, 66 Mo. at 550.

involved restrictions placed on persons convicted of sexual offenses. *See R.L.*, 245 S.W.3d at 237. In *F.R.* the Court in turn relied on *R.L.* and *Phillips* to again declare as retrospective the criminal statute prohibiting convicted sex offenders from living within one-thousand feet of a school or child care facility, and to also invalidate as retrospective criminal charges filed under the statute creating a misdemeanor offense when registered sex offenders fail to comply with certain requirements on Halloween. *F.R.*, 301 S.W.3d at 65-66.

Undersigned counsel has reviewed the briefs filed in *R.L.* and *F.R.*, and none of them address whether article I, section 13 can be applied to criminal statutes. Instead, the parties seemed to assume that since the ban on retrospective laws was applied in *Phillips* to the statute requiring sex offender registration, it would equally apply to any statute restricting the activities of sex offenders. The Court thus was not asked to consider the long-standing construction of article I, section 13, and the majority extended *Phillips* to the statutes being challenged in *R.L.* and *F.R.*[5] But in doing so,

[5] The dissent did discuss the 1875 Constitutional Convention and noted that the chief concern expressed in the debates over the prohibition against retrospective laws was to prevent the legislature from passing a retrospective law that would tread on citizens' financial or property interests. *F.R.*, 301

the Court construed article I, section 13 in a manner that was contrary to the meaning of "retrospective" as understood when that provision was adopted.

Rather than continue down that path, Appellant respectfully suggests that this Court should, consistent with the intent of the drafters of the constitution and the voters who approved it, reaffirm that article I, section 13's ban on retrospective laws is limited to civil rights and remedies, and that it does not apply to criminal statutes like section 571.070, RSMo.

C. Excluding criminal statutes from the ban on retrospective laws advances the purposes behind the criminal laws.

In addition to honoring the intent of the Constitution's drafters, there are other sound reasons why the ban on retrospective laws should not extend to criminal laws and punishments. The concern motivating the ban on retrospective laws is to prevent situations where a person cannot avoid liability because all of the events necessary to impose liability have already occurred before the law's passage. Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62 Okla. L. Rev. 273, 305 (2010).

S.W.3d at 68-69 (Russell, J., dissenting). But the dissent did not discuss this Court's previous construction limiting the application of that prohibition to civil rights and remedies.

Applying the ban on retrospective laws to a civil obligation like sex offender registration comports with the purpose behind the ban because once a person is convicted of a qualifying offense there is no way to avoid the civil registration requirement.

But the same is not true of criminal statutes like section 571.070, RSMo. The concern that motivates the ban on retrospective laws is already addressed in the criminal law through the ban on *ex post facto* laws, which operates to prevent the legislature from retrospectively criminalizing conduct that was not criminal at the time it was committed. *In re R.W.*, 168 S.W.3d at 68. Criminal statutes are thus forward looking. Section 571.070, RSMo, in particular, does not attempt to punish or adjudicate behavior that occurred prior to its effective date. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1986). It instead uses a person's prior convictions for felony offenses to fix that person's status as one who is subject to the statutory restrictions and is liable for knowingly violating those restrictions. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1255, 232 S.W.2d 897, 901 (1950), *overruled on other grounds by*, *State ex rel. North v. Kirtley*, 327 S.W.2d 166, 167 ((Mo. banc 1959). That is something that even the ban on retrospective laws permits. *Id.*; *Phillips*, 194 S.W.3d at 851. In *Phillips* this Court suggested that prior criminal convictions could be used to bar certain future conduct by the offender. *Id.* at 852. That is precisely what

section 571.070, RSMo does. And unlike the civil registration requirement that was found to be retrospective in *Phillips*, a prior felony offender can avoid criminal liability under section 571.070, RSMo simply by refraining from the activities prohibited under the statute.

But this Court has broadly applied the ban on retrospective laws to invalidate statutes that impose criminal liability for activity that occurs after the statute's effective date. *R.L.*, 245 S.W.3d at 236, 237; *F.R.*, 301 S.W.3d at 65-66. Applying the ban on retrospective laws in that manner unduly restricts the legislature's ability to enact legislation that furthers the purpose of the criminal laws, which is "to protect and vindicate the interests of the public as a whole, to punish the offender and deter others." *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993). In enacting laws to fulfill that purpose, the legislature is free to recognize degrees of harm. *Sweezer*, 360 Mo. at 1255, 232 S.W.2d at 901. The wisdom of that determination is not subject to judicial second-guessing. *Id.* Section 571.070, RSMo seeks to prevent future harm by providing a deterrent that will keep firearms out of the hands of persons with a history of committing serious criminal offenses.

The legislature's duty to promote public safety requires it to do more than just punish people who commit crimes. It also requires the enactment of laws designed to prevent crimes from happening in the first place. That duty is thwarted if the legislature cannot use a person's prior criminal history

to fix that person's status under a statute prohibiting activity that is reasonably seen as increasing the risk of that person committing future crimes. Extending the ban on retrospective laws to criminal statutes cripples the legislature's ability to assess degrees of harm and take reasonable steps to decrease those risks. The concern over retrospective application of criminal statutes is adequately addressed by the prohibition against *ex post facto* laws. This Court should therefore reaffirm the long-standing construction placed on article I, section 13 and find that the trial court erred in dismissing the charge against Respondent.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt should be reversed and the case should be remanded to the trial court for reinstatement of Count III and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 4,398 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 10th day of May, 2012, to:

Margaret M. Johnston
Office of the State Public Defender
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, MO 65203

/s/ Daniel N. McPherson
DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI