

**IN THE
MISSOURI SUPREME COURT**

SC86955

STATE OF MISSOURI, ex rel.
MICHAEL SANDERS, Prosecuting Attorney,
Jackson County
Relator,

vs.

THE HONORABLE MARGARET SAUER,
Associate Circuit Judge, Jackson County
Division 29
Respondent

PETITION IN PROHIBITION FROM THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, SIXTEENTH JUDICIAL CIRCUIT,
DIVISION NO. 29
Honorable Margaret Sauer, Associate Circuit Judge

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

Michael Sanders
Jackson County Prosecuting Attorney

RAOUL C. STITT
Assistant Prosecuting Attorney
Family Support Division
417 East 13th Street, Suite 200
Kansas City, Missouri 64106
Attorney for Relator

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CASES

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Beckman v. Beckman, 545 S.W.2d 300 (Mo.App.1976)

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State ex rel. Dally v Copeland, 986 SW2d 943 (Mo. App. 1999).

State ex rel. Plank v. Koehr, 831 S. W. 2d 926 (Mo. banc 1992)

State ex rel., State of Missouri v. Campbell, 936 SW2d 585 (Mo.App.1982)

Thummel v. Thummel, 609 S.W.2d 175 (Mo.App.1980)

Westfall v. Enright, 643 S.W.2d 839 (Mo. App. E. D. 1982)

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES

§210.839.5 RSMo. 2000

§474.060.2 RSMo. 2000

§§ 530.010 to 530.090, RSMo. 2000

§568.040.2(1) RSMo 2000

Missouri Constitution, Article V, § 4(1)

Missouri Supreme Court Rules 84.22 to 84.25, inclusive

JURISDICTIONAL STATEMENT

This is a Petition in Prohibition pursuant to Missouri Supreme Court Rules 84.22 to 84.25, inclusive. On May 12, 2005, the Honorable Margaret L. Sauer, Division 29 Associate Circuit Judge for Jackson County, Missouri, issued an order requiring the state to produce the custodial parent, Vychell Rice and her child Vinesha Rice for genetic testing. Exhibit 2, Appendix, A2. A Petition for Prohibition was filed with the Western District Court of Appeals of Missouri on June 13, 2005. On June 28, 2005, the Western District Court of Appeals of Missouri issued its order denying the petition. Exhibit 4 Appendix, A6.

This Court has jurisdiction under the Missouri Constitution, Article V, § 4(1) and Missouri Supreme Court Rule 84, as well as §§ 530.010 to 530.090, RSMo. 2000, to hear and decide whether respondent Judge Sauer's issuance of the order requiring the state to produce the custodial parent and her child for genetic testing exceeded her jurisdiction. Upon the denial of the writ by the Western District, the appropriate remedy is to file a Petition in Prohibition with the Missouri Supreme Court. §530.020, RSMo. 2000.

STATEMENT OF FACTS

Relator represents the State in State of Missouri v. Montae Perkins, Jackson County criminal case number 04CR201731. Respondent is the Honorable Margaret L. Sauer, Judge, 16th Circuit Court of Jackson County, Missouri, Division 29, which is in the jurisdiction of the Missouri Court of Appeals Western District.

On September 27, 1990, a Petition for Declaration of Paternity was filed in the Circuit Court of Jackson County in case number DR90-9938, alleging Montae Perkins to be the father of Vinesha v. Rice. Defendant signed a Stipulation Regarding Blood Tests as well as an entry of appearance and waiver of service on July 16, 1990. Defendant was sent Notice of Scheduled Blood Test on November 15 and December 4, 1990, as well as January 22 and July 5, 1991. Defendant failed to appear at any of these scheduled appointments.

On October 21, 1991, an order was entered by default in the Circuit Court of Jackson County, whereby defendant Montae Perkins was determined by the Court to be the father of Vinesha Vychell Rice. Exhibit 1, Appendix, A1.

Relator filed charge a of Nonsupport, a class A misdemeanor, pursuant to Section 568.040, Revised Statutes of Missouri, on July 14, 2004, alleging that the defendant, Montae Perkins, between February 1, 2004, and June 30, 2004, failed to provide, without good cause, adequate support for Vinesha V. Rice, his minor child, for whom defendant was legally obligated to provide support.

On April 12, 2005, defendant filed his Motion for Disclosure of DNA of Custodial Parent and her Child for Good Cause Shown Pursuant to Supreme Court Rule 25.04.

Exhibit 3. On May 12, 2005, Respondent entered an order requiring the State to produce the child and the custodial parent for DNA testing. Exhibit 2, Appendix, A2.

On June 13, 2005, Relator filed a Petition in Prohibition with the Missouri Court of Appeals, Western District. On June 28, 2005, the Court of Appeals issued an order denying the Writ of Prohibition, stating that “Relator has not shown a clear right to the relief requested.” Exhibit 4, Appendix, A6.

This Petition in Prohibition follows.

POINT RELIED ON AND AUTHORITIES

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ORDERING THE STATE TO PRODUCE THE CUSTODIAL PARENT, VYCHELL RICE, AND HER CHILD, VINESHA RICE, FOR GENETIC TESTING BECAUSE THE RESPONDENT ABUSED HER DISCRETION AND THUS EXCEEDED HER JURISDICTION IN GRANTING THE DEFENDANT'S MOTION FOR DISCLOSURE OF DNA OF CUSTODIAL PARENT AND HER CHILD, IN THAT THE FACT THAT THE CHILD MAY NOT BE THE BIOLOGICAL CHILD OF THE DEFENDANT IS IRRELEVANT AND IMMATERIAL TO HIS GUILT OR INNOCENCE WHEN THE CHILD HAS BEEN LEGITIMATED BY LEGAL PROCESS BECAUSE A FINDING OF BIOLOGICAL NON-PATERNITY WOULD NOT PROVIDE A DEFENSE TO THE CRIME OF NONSUPPORT.

Cases

State ex rel. Dally v Copeland, 986 SW2d 943 (Mo. App. 1999).

State ex rel. Plank v. Koehr, 831 S. W. 2d 926 (Mo. banc 1992)

State ex rel., State of Missouri v. Campbell, 936 SW2d 585 (Mo.App.1982)

Westfall v. Enright, 643 S.W.2d 839 (Mo. App. E. D. 1982)

Statutes

§210.839.5 RSMo. 2000

§474.060.2 RSMo. 2000

§568.040.2(1) RSMo 2000

ARGUMENT

STANDARD OF REVIEW

“When a trial court makes an order in discovery proceedings that is an abuse of discretion, prohibition is the proper remedy.” *State ex rel. Plank v. Koehr*, 831 S. W. 2d 926, 927-28 (Mo. banc 1992). Thus, the proper standard of review in this case is abuse of discretion. "An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts or the logical deductions from the facts and circumstances before the court--a judicial act which is untenable and clearly against reason and which works an injustice." *State v. Stubenrouch*, 499 S.W.2d 824, 826[4-6] (Mo.App.1973). *Beckman v. Beckman*, 545 S.W.2d 300, 301[1] (Mo.App.1976); see also *Thummel v. Thummel*, 609 S.W.2d 175, 183[12, 13] (Mo.App.1980).

ARGUMENT

No general right to discovery exists for criminal cases in Missouri. *State ex rel., State of Missouri v. Campbell*, 936 SW2d 585, 587 (Mo.App.1996), citing *Westfall v. Enright*, 643 S.W.2d 839, 840 (Mo. App. E. D. 1982). Unless authorized by a statutory provision or rule of court, discovery is not permitted. *Campbell*, 587.

In order to convict defendant of the crime of nonsupport, the state must show that he failed to provide, without good cause, adequate support for his child, whom he was obligated to support. §568.040.2(1) RSMo 2000, states, in pertinent part, that “Child

means any biological or adoptive child, or any child legitimated by legal process or any child whose relationship to the defendant has been determined, by a court of law in a proceeding for dissolution or legal separation, to be that of child to parent...” Thus, since the facts the state must establish in order to prove this element are listed in the alternative, the state need only prove one of four things to prove the element that the child in question is the child of the defendant. The state must show either that the child is the biological child of defendant, the child is the adoptive child of the defendant, the child has been legitimated by legal process as the child of the defendant, or that the child has been determined by a court of law in a dissolution proceeding to be the child of the defendant. §568.040.2(1) RSMo 2000. Therefore, it is enough to show that the child was legitimated by legal process to prove that the child in question is the child of the defendant in order to support a finding of guilt. It is not necessary to show that the child is his biological child. *Campbell*, supra, 585. In the instant case, the child, Vinesha V. Rice, was determined by the Circuit Court of Jackson County in an action for paternity to be the child of defendant. See exhibit 1. By virtue of that order, the child has been legitimated by legal process.

The term “legitimated by legal process” is not specifically defined in §568.040, however another statutory framework provides some guidance on this. For purposes of inheritance, an illegitimate child is legitimated, or deemed to be the child of the father, if either the parents were married before or after the birth of the child or “...paternity is established by an adjudication...” either before or after the death of the father. §474.060.2

RSMo. 2000. So, in order for a child to inherit from a father, an adjudication of paternity will suffice to make a child legitimate.

The Uniform Paternity Act, §§210.817 through 210.852, RSMo. 2000, governs the establishment of orders of paternity by the Family Support Division-Child Support Enforcement. §210.839.5 RSMo. 2000, expressly provides: “If any party fails to file an answer or otherwise appear in response to an action commenced pursuant to §§210.817 through 210.852 within the time prescribed by law or rules of practice of the court, the court shall enter judgment against such party by default.” The order of paternity in this case was obtained through the legal process outlined in the aforementioned sections and the defendant’s child was thus “legitimated by legal process” §568.040.2(1) RSMo 2000. Although there is no specific definition of that term in §568.040, an order was entered by a court of competent jurisdiction in the 16th Circuit Court of Jackson County that determined Montae Perkins to be the natural father of Vinesha Vyshell Rice pursuant to §§210.817 through 210.852. Exhibit 1. As a result, the child now has a father and has been thus legitimated by the legal process of an action to declare paternity pursuant to the laws of the State of Missouri.

The defendant claims that DNA evidence is necessary to provide the defendant with the defense that he is not the biological father of the child. However, such evidence would not provide a defense to the crime. The Missouri Court of Appeals, Southern District, held that “a defendant cannot escape criminal liability in a nonsupport case by proving he is not [the child]’s biological father.” *State ex rel. Dally v Copeland*, 986 SW2d 943, 946 (Mo.

App. 1999). In that case, the trial court granted the defendant's Motion for Blood Tests and the state requested a writ of prohibition be issued. In granting the writ of prohibition, the Court agreed with *Campbell* that a finding by a court that the child is the child of the defendant satisfies the definition of "child" in Sec. 568.040.2(1). *Id.*, at 945.

"Accordingly, the results of a blood test would be irrelevant and immaterial in the underlying case" and as a result, ordering the genetic testing would be an abuse of discretion and thus "prohibition is the proper remedy." *Id.*, 946.

In *Campbell* as well, the defendant filed a motion requesting genetic testing on the children to determine paternity in a nonsupport prosecution and the trial court granted the motion. In that case, the children were born of a marriage and a parent child relationship had been determined in a dissolution proceeding. Thus, "for purposes of this statute, each of the children named in the indictment is Defendant's 'child' regardless of whether or not he is the biological father." *Id.*, at 587. The Court held that, since "biological parentage of the children is irrelevant to the charges," a writ of prohibition should lie to direct the trial court to refrain from enforcing its order authorizing the genetic testing. *Id.*, 588.

Although the two cases cited that deal with the issue of the relevance of biological paternity in a prosecution for nonsupport are cases where the child is the product of a marriage, they still stand for the proposition that biological paternity is not relevant in a prosecution for nonsupport because the state is not required to prove biological parentage and that, as a result, a trial court cannot enter or enforce an order requiring a custodial parent to appear and produce the child for genetic testing. To do so is an abuse of the trial

court's discretion, exceeds the court's jurisdiction, and a writ of prohibition should be entered to prevent the enforcement of such an order.

CONCLUSION

WHEREFORE, Relator prays this court to enter an order prohibiting Respondent from entering or enforcing an order requiring the custodial parent and child to appear for genetic testing.

Respectfully submitted,

Michael Sanders

Prosecuting Attorney, Jackson County

by_____

Raoul Stitt

Assistant Prosecuting Attorney

Missouri Bar # 39334

417 E. 13th Street, Suite 200

Kansas City, Missouri 64106

(816)881-3387

Attorneys for Relator

I hereby certify that two true and correct copies of the foregoing were mailed,
postage prepaid, on this _____ day of September, 2005, to:

Edmund Shine

Assistant Public Defender

Oak Tower, 20th Floor

324 E. 11th Street

Kansas City, MO 64106

(816)889-2089 ext. 241

Hon. Margaret L. Sauer

Division 29

Circuit Court of Jackson County

415 E. 12th Street

Kansas City, MO 64106

Raoul Stitt

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned counsel hereby certifies that this brief complies with Rule 55.03 and the type-volume limitation, in that this brief was prepared with Microsoft Word 2003 (Times New Roman 13 point font) and contains 2,344 words as identified by the word-processing software, excluding the cover page, signature block and certificates of service and of compliance. In addition, the undersigned counsel hereby certifies that the enclosed diskette has been scanned for viruses with Norton Anti-Virus software and found virus-free.

Raoul Stitt

Assistant Prosecuting Attorney

Missouri Bar # 39334

APPENDIX

Exhibit #	page #
1. Order of Paternity	A1
2. Order granting defendant's motion	A2
3. Defendant's motion for DNA testing	A3
4. Western District's Order denying writ	A6
5. §568.040	A8