

**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 REPLY BRIEF AND ARGUMENT

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TABLE OF AUTHORITIES

CASES

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State v. Hoy, 742 S.W.2nd 206 (Mo. App. W.D. 1987)

State ex rel. Dally v Copeland, 986 S.W.2d 943 (Mo. App. 1999).

State ex rel., State of Missouri v. Campbell, 936 S.W.2d 585 (Mo.App.1982)

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES

§568.040.2(1) RSMo 2000

JURISDICTIONAL STATEMENT

Relator's Jurisdictional Statement is contained in Relator's Brief.

STATEMENT OF FACTS

Relator's Statement of Facts is contained in Relator's Brief.

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 v. Hoy, 742 S.W.2nd 206 (Mo. App. W.D. 1987)

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

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

Statutes

§568.040.2(1) RSMo 2000

ARGUMENT

STANDARD OF REVIEW

The Standard of Review is contained in Relator's Brief.

ARGUMENT

Respondent argues that use of a Judgment of Paternity to establish that the child at issue is the child of the defendant as defined in the nonsupport statute (§568.040.2(1) RSMo 2000) would somehow violate defendant's due process rights. This was specifically addressed by the Court in *State ex rel., State of Missouri v. Campbell*, 936 SW2d 585 (Mo.App.1982). In that case, the Court distinguished *State V. Hoy*, 742 S.W.2nd 206 (Mo. App. W. D. 1987), because in *Hoy* the State was attempting to use the decree of dissolution to actually prove that the child was the biological child of defendant rather than that the child was legitimated by legal process. *Id.*, 587-588. *Hoy* held that the Decree of Dissolution did not prove that the child was the biological child of the Defendant and therefore, biological paternity or non-paternity was relevant and the defendant was entitled to discovery on that issue. *Id.* As a result, the Legislature amended the statute to include in the definition of "child" one "whose relationship to the defendant has been determined, by a court of law in a proceeding for dissolution of legal separation, to be that of child to parent." §568.040.2(1) RSMo 2000. Thus, Respondent's reliance on *Hoy* is misguided in the instant case since *Hoy* actually held only that the defendant should be allowed discovery

as to biological paternity when the State was actually attempting to prove biological paternity.

This case does not involve this definition of child pursuant to the statute. In the instant case, the state is not attempting to prove that the child is the biological child of the defendant. The state is attempting to prove that the child was legitimated by legal process. “Because the state is not attempting to establish paternity as it did in *Hoy*, the biological parentage of the children is irrelevant to the charges against Defendant.” *Campbell*, supra, 588. Evidence as to the biological parentage of the child would have no logical or evidentiary relevance to whether or not the child was legitimated by legal process. In order to prove that element, the state must only prove beyond a reasonable doubt the existence of an order establishing that the defendant has been declared to be the legal father of the child, thus legitimating the child by legal process.

The question of whether allowing the State to establish the element of the offense by proving the existence of a civil order somehow violated the defendant’s right to due process was also specifically addressed by the Court in *Campbell* when it stated:

The issues decided by the two courts are different. The determination made in the dissolution court is whether a parent-child relationship existed. The determination made in the criminal proceeding is whether a dissolution court found that a parent-child relationship existed. Rather than replacing the State’s obligation to prove a criminal element beyond a reasonable doubt with a civil standard, the amendment to §568.040 merely is another example of the

legislature making the violation of a civil court order a criminal offense. *Id.*

At 588.

Respondent also misrepresents the holdings in *Campbell* and *Copeland* when asserting that neither case dealt with legitimation. An adjudication of paternity through a Judgment of Paternity is directly analogous to that of a decree of dissolution in that they both result in legitimation by legal process; the only difference being the marital status of the parents. A determination by a court in a dissolution proceeding is, in effect, simply another method of legitimation by legal process. Therefore, the amendment to §568.040 in response to the Hoy decision was basically superfluous, in that the added definition is redundant. The statute as it was previously worded would have allowed the State to prove a parent-child relationship as determined by a court in a dissolution proceeding just as it could by any other manner of determination of legitimacy by legal process.

Defendant's right to due process is not violated by allowing the State to prove that the child in question is the defendant's child by virtue of the Judgment of Paternity as defined in the statute. The State may prove the element that the child is that of the defendant by proving beyond a reasonable doubt that a Judgment of Paternity has been entered which determines that the defendant is the father of the child. Defendant's right to due process would only be impacted in a case where the State was attempting to prove that the child is the biological child of the defendant and the defendant is seeking discovery of evidence to the contrary. In the instant case, biological paternity is not at issue and the

defendant has no due process right to discovery on that issue. DNA is simply not relevant and the mother should not be compelled to submit herself and the child for DNA testing.

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,
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I hereby certify that two true and correct copies of the foregoing were mailed,
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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 1,396 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
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APPENDIX

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All pertinent exhibits were filed with Relator's brief.