

No. SC88651

**IN THE
MISSOURI SUPREME COURT**

REGINALD A. TURNER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Denial of Postconviction Relief
from the Circuit Court of Lafayette County, Missouri
15th Judicial Circuit, Division I
The Honorable Dennis A. Rolf, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

S. KATHLEEN WEBBER, #49431
Assistant Appellate Defender
Office of the Public Defender
Western Appellate/PCR Division
818 Grand Blvd., Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Fax: (816) 889-2088

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 2

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 5

POINT ON APPEAL 6

ARGUMENT ON APPEAL 7

*Conflicting Subsections of §577.023 RSMo Are Not “Saved” by Reference to
Definition of “Intoxication-Related” Driving Offense* 8

*Statutory Construction Principles Should Be Used Only to Determine if a Genuine
Ambiguity Exists* 9

CONCLUSION..... 18

CERTIFICATE OF SERVICE AND COMPLIANCE 19

TABLE OF AUTHORITIES

Cases

Callanan v. United States, 364 U.S. 587 (1961)..... 12

Chapman v. United States, 500 U.S. 453 (1991)..... 12

Fainter v. State, 174 S.W.3d 718 (Mo. App. W.D. 2005) 13

Hagen v. Utah, 510 U.S. 399 (1994)..... 16

Lincoln County Stone Co., Inc. v. Koenig, 21 S.W.3d 142 (Mo. App. E.D. 2000)
..... 16

Moskol v. United States, 498 U.S. 103 (1990)..... 11

Rodriguez v. U.S., 480 U.S. 522 (1987)..... 15

State ex rel. Kauble v. Hartenbach, 216 S.W.3d 158 (Mo. banc 2007)..... 9

State ex rel. McNary v. Stussie, 518 S.W.2d 630 (Mo. banc 1974) 16

State v. Knapp, 843 S.W.2d 345 (Mo. banc 1992)..... 13

State v. Meggs, 950 S.W.2d 608 (Mo. App. S.D. 1997) 9, 14

State v. Wilson, 55 S.W.3d 851 (Mo. App. W.D. 2001) 15

U.S. v. Aguilar, 515 U.S. 593 (1995) 15

Woods v. State, 176 S.W.3d 711 (Mo. banc 2005)..... 14, 16

Statutes

§ 1.205 RSMo 13

§ 565.024 RSMo 13

§ 570.030 RSMo 13

§ 577.023 RSMo 6, 7, 8, 9, 14

Constitutional Provisions

Mo. Const. Art. I, §§ 10, 18(a)..... 6, 7

U.S. Const., Amends. V and XIV 6, 7

Rules

Supreme Court Rule 24.035..... 17

JURISDICTIONAL STATEMENT

Appellant incorporates by reference the Jurisdictional Statement as set forth in his brief on page 4.

STATEMENT OF FACTS

Appellant incorporates by this reference the Statement of Facts as set forth in his brief on pages 5-9.

POINT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING MR. TURNER'S SUPREME COURT RULE 24.035 MOTION AFTER A HEARING, IN VIOLATION OF MR. TURNER'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, BECAUSE THE MOTION COURT IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM SENTENCE AUTHORIZED BY LAW, IN THAT ONE OF THE PRIOR CONVICTIONS USED TO ENHANCE MR. TURNER'S CHARGE TO PERSISTENT DWI OFFENDER STATUS WAS A MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE, AND SUBSECTIONS 1(2)(A) AND 14 OF § 577.023 RSMO ARE CONFLICTING ON THEIR FACE AS TO WHETHER A PRIOR MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE COUNTS AS A "PRIOR INTOXICATION-RELATED TRAFFIC OFFENSE" TO ENHANCE PUNISHMENT. MR. TURNER WAS PREJUDICED BECAUSE THE RULE OF LENITY REQUIRES THAT THE CONFLICTING SUBSECTIONS BE STRICTLY CONSTRUED AGAINST THE STATE TO GIVE THE DEFENDANT THE BENEFIT OF THE LESSER PENALTY, SO THAT THE COURT WAS AUTHORIZED AT MOST TO SENTENCE MR. TURNER TO A CLASS A MISDEMEANOR.

ARGUMENT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING MR. TURNER’S SUPREME COURT RULE 24.035 MOTION AFTER A HEARING, IN VIOLATION OF MR. TURNER’S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, BECAUSE THE MOTION COURT IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM SENTENCE AUTHORIZED BY LAW, IN THAT ONE OF THE PRIOR CONVICTIONS USED TO ENHANCE MR. TURNER’S CHARGE TO PERSISTENT DWI OFFENDER STATUS WAS A MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE, AND SUBSECTIONS 1(2)(A) AND 14 OF § 577.023 RSMO ARE CONFLICTING ON THEIR FACE AS TO WHETHER A PRIOR MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE COUNTS AS A “PRIOR INTOXICATION-RELATED TRAFFIC OFFENSE” TO ENHANCE PUNISHMENT. MR. TURNER WAS PREJUDICED BECAUSE THE RULE OF LENITY REQUIRES THAT THE CONFLICTING SUBSECTIONS BE STRICTLY CONSTRUED AGAINST THE STATE TO GIVE THE DEFENDANT THE BENEFIT OF THE LESSER PENALTY, SO THAT THE COURT WAS AUTHORIZED AT MOST TO SENTENCE MR. TURNER TO A CLASS A MISDEMEANOR.

Respondent argues that a municipal court guilty plea resulting in an SIS¹ where sentence was never imposed can be used to enhance punishment as a persistent DWI offender because: 1. the statute is not conflicting on its face, and 2. principles of statutory construction show that the legislature intended to include such dispositions to enhance punishment for repeat DWI offenders. (Resp. Br. 12, 16).

**Conflicting Subsections of §577.023 RSMo Are Not “Saved” by Reference to
Definition of “Intoxication-Related” Driving Offense**

Respondent argues that, because the statutory definition of “intoxication-related offense” includes “driving while intoxicated [DWI],” and does not expressly *exclude* prior municipal guilty pleas resulting in SIS’s, the legislature clearly intended *all* prior DWI offenses to count for purposes of enhancing punishment. (Resp. Br. 13). While this may show that subsections 1(1) (intoxication-related offense includes DWI) and 1(2)(a) of § 577.023 RSMo (enhancement if there is a prior plea of guilty or conviction of intoxication-related offense) are not facially conflicting, Respondent improperly ignores the conflicting language of subsection 14, which includes circuit court SIS’s as priors, but specifically excludes municipal court SIS’s. § 577.023.14 RSMo. It is fundamental that a section of a statute should not be read in isolation from the

¹ For the sake of brevity, “suspended imposition of sentence” is abbreviated to “SIS” and “driving while intoxicated” is abbreviated to “DWI” in this Reply Brief.

context of the whole act. *State v. Meggs*, 950 S.W.2d 608, 610 (Mo. App. S.D. 1997) (internal citation omitted).

Furthermore, Respondent cites *Meggs* in support of its argument that subsections 1(2)(a) and 14 are not conflicting. (Resp. Br. 13-14). Actually, in *Meggs*, the Court held that subsections 1(2)(a) and 14 *are* conflicting because “[o]n their face those sections cannot be reconciled with the legislature’s failure to list DWI guilty pleas with suspended sentence imposed in municipal court as ‘prior convictions’ under § 577.023.14.” *Id.* at 611 (emphasis added).

Finally, Respondent argues that because subsection 14 prescribes only what will be evidence of “prior convictions,” subsection 14 does not actually conflict with subsections 1(1) and 1(2)(a), which allow not only convictions but also guilty pleas to count as prior intoxication-related offenses. (Resp. Br. at 14-15). However, this ignores the fact that subsection 14 includes circuit court SIS’s, which legally also are not convictions. *See, e.g. State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 160 (Mo. banc 2007); *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993). Respondent’s argument thus further highlights the conflict; it does not dispel it.

Statutory Construction Principles Should Be Used Only to Determine if a

Genuine Ambiguity Exists

Respondent also argues that, even if the subsections of § 577.023 are conflicting, this Court should resolve the conflict by applying principles of statutory construction to determine which version the legislature intended. (Resp.

Br. at 16). Respondent claims that the rule of lenity is a “canon of statutory construction, not a rule of law²,” which the court should apply only if, “after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.” (Resp. Br. 18-19) (citations omitted). While this standard is used to determine if a genuine ambiguity exists in the statutory language in the first place, once the court determines that a genuine ambiguity exists, the court is **required** to apply the rule of lenity to give the defendant the benefit of the lesser penalty. As previously held by this Court:

If statutory language is subject to more than one reasonable interpretation, then the statute is ambiguous. Under the rule of lenity an ambiguity in a penal statute **will** be construed against the government or party seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. . . The

² Respondent cites *United States v. Lanier*, 520 U.S. 259, 266 (1997), for the proposition that the rule of lenity is a “canon of statutory construction, not a rule of law.” (Resp. Br. 18-19). However, *Lanier* states only that the “canon of strict construction” is another name for the rule of lenity. *Lanier*, 520 U.S. at 266. It is the *Meggs* case which holds, without authority, that “[t]he rule that a penal statute should be strictly construed is a rule of construction, not a rule of law.” *Meggs*, 950 S.W. 2d at 612-613.

rule of lenity *requires* this Court to resolve the ambiguity in [the defendant's] favor.

State v. Graham, 204 S.W.3d 655,656, 658 (Mo. banc 2006) (emphasis added).

The test thus contemplates a two-step process: 1. the Court must determine whether or not a genuine ambiguity exists, and 2. once a genuine ambiguity exists, the Court *must* apply the rule of lenity.

The cases cited by Respondent only address the first part of the process, determining whether a genuine ambiguity exists. (Resp. Br. 19-21). For example, in *Moskol*, the United States Supreme Court considered whether a *valid* title that contains fraudulently tendered odometer readings may be a “falsely made security” for purposes of a federal statute that provides criminal penalties for anyone who “with unlawful or fraudulent intent, transports in interstate or foreign commerce any *falsely made*, forged, altered, or counterfeited securities or tax stamps.” *Moskol v. United States*, 498 U.S. 103, 107 (1990) (emphasis added). The Court noted that because the meaning of language is inherently contextual, it has declined to deem a statute “ambiguous” for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government.” *Id.* at 108. Therefore, the Court concluded “that § 2314 unambiguously applies to Moskol’s conduct.” *Id.*

Similarly, in *Chapman*, the Court considered whether the federal statute requiring a mandatory minimum sentence for distributing *more than one gram* of a “mixture or substance containing a detectable amount of [LSD]” is ambiguous as

to whether it includes the weight of “blotter” paper on which a drop of LSD has been placed, so that rule of lenity must be applied. *Chapman v. United States*, 500 U.S. 453, 458, 463 (1991). Noting that the “rule of lenity is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act,” the Court held that a straightforward reading of the statute shows that the phrase “mixture or substance containing a detectable amount of [LSD]” is not ambiguous. *Id.* at 463-464 (internal citations omitted).

In *Callanan*, the defendant was charged with conspiracy to obstruct commerce by extorting money and with obstructing commerce by extortion, both punishable under the Hobbs Anti-Racketeering Act. *Callanan v. United States*, 364 U.S. 587, 588 (1961). He was ultimately sentenced to consecutive terms of 12 years’ imprisonment. *Id.* Callanan argued that he could not be cumulatively punished for both an attempt to extort and a completed act of extortion under the Act, because statutory language showed congressional intent to allow only one punishment for the offense of conspiracy and for the completed crime that is its object. *Id.* at 595-596. The Court held that the “[r]ule of lenity, as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. Here we have no such dubieties within the statute itself.” *Id.* at 596-597.

In *Knapp*, the fourth case cited by Respondent, this Court considered whether causing the death of an unborn child is causing the death of a “person,” as defined by § 1.205 RSMo, for purposes of the involuntary manslaughter statute, § 565.024, RSMo 1986. *State v. Knapp*, 843 S.W.2d 345, 346-347 (Mo. banc 1992). This Court held that §§1.205 and 565.024 are not facially conflicting, and that “[a]ny previous conflict was remedied by the legislature’s prior amendment of § 565.024 to remove the conflicting language.” *Id.* at 348.

Finally, in *Fainter*, the Western District considered whether there was a sufficient factual basis for a defendant’s guilty plea to stealing a “motor vehicle,” as defined by § 570.030.3(3)(a), RSMo 2000, where he stole a riding lawn mower, which was not included in the statutory definition. *Fainter v. State*, 174 S.W.3d 718, 719 (Mo. App. W.D. 2005). The Court held that, because it was left to guess whether the legislature intended to include a riding lawn mower within the term “motor vehicle,” the rule of lenity, and the Supreme Court’s recognition that the primary function of a motor vehicle is to transport people and not to cut grass, required it to find that the legislature did not intend to include a riding lawn mower within the term “motor vehicle” in Section 570.030.3(3)(a). *Id.* at 721.

In each of these cases, the Court examined the legislative history and the purpose of the act to determine *whether or not a genuine ambiguity existed*. It did not, having found the language ambiguous, then apply statutory construction to determine which interpretation the legislature must have meant.

Furthermore, in each case, (except *Fainter*, where the Court did find the statute ambiguous and applied the rule of lenity), the issue was whether a single phrase or clause created an ambiguity. That is not the situation in this case. The statute is not only ambiguous, it contains provisions which, while unambiguous when read separately, conflict when they are read together. *Meggs, supra* at 611. Therefore, the Court *must* construe the ambiguity in the defendant's favor. *Graham, supra* at 656, 658; *Woods v. State*, 176 S.W.3d 711, 712-713 (Mo. banc 2005).

Moreover, even if the Court could properly apply principles of statutory construction to determine which reading of § 577.023 the legislature really intended, these principles would not help clarify the statute. Respondent claims this Court can consider: 1. earlier versions of the law, 2. the evident purpose of the whole act, or 3. the problem the statute was enacted to remedy. (Resp. Br. 16). Respondent claims that examining earlier versions of the law shows that the legislature wanted to broaden the scope of prior offenses which can be used to enhance punishment. (Resp. Br. 17-18). But this argument ignores the legislature's enactment of subsection 14 in the first place. The General Assembly chose to very specifically delineate the types of prior offenses which could constitute evidence of prior convictions. § 577.023.14 RSMo. However, when it amended 1(2)(a), it chose to enact the broad, general definition of prior offenses to include anyone who "has pleaded guilty or has been found guilty" of two or more intoxication-related offenses. It is a rule of statutory construction that a specific

term controls over a more general term when there is a conflict between the two statutes. *State v. Wilson*, 55 S.W.3d 851, 855 (Mo. App. W.D. 2001). Thus in this case, subsection 14, excluding municipal DWI pleas resulting in SIS's, would control over the more general definition of subsection 1(2)(a).

Respondent further argues that the legislature's intent to include prior municipal DWI's resulting in SIS's to enhance punishment is shown by the "statute's purpose in deterring and severely punishment DWI recidivists;" so that including such prior offenses must have been intended by the legislature. (Resp. Br. 19). Again, this ignores the fact that the legislature specifically chose to spell out in detail the types of priors which could be used to enhance punishment in subsection 14 in the first place, and failed to amend subsection 14 when it amended subsection 1(2)(a). As a result, the Court can do no more than guess which interpretation the General Assembly intended to control.

Respondent also claims that subsection 14 was repealed by implication, because subsection 1(2)(a) was amended to broaden the definition of prior offenses to include not only convictions but also guilty pleas after the last amendment to subsection 14. (Resp. Br. 17). It is, however, "a cardinal principle of statutory construction that repeals by implication are not favored." *U.S. v. Aguilar*, 515 U.S. 593, 616 (1995) (internal citations omitted). Repeals by implication will not be found unless an intent to repeal is clear and manifest. *Rodriguez v. U.S.*, 480 U.S. 522, 524 (1987). The doctrine applies only when the two inconsistent statutes each purport to be complete and independent legislation.

State ex rel. McNary v. Stussie, 518 S.W.2d 630, 635 (Mo. banc 1974). The general rule that repeals by implication are disfavored is especially strong where the legislature expressly repeals a statutory provision and could easily have repealed any other part of the statute, if it had intended to do so. *Hagen v. Utah*, 510 U.S. 399, 400 (1994).

In this case, the two conflicting subsections both purport to define what types of prior offenses can be used to enhance punishment; they do not purport to be complete and independent legislation. Furthermore, if the legislature intended all types of prior DWI's to enhance punishment, it could easily have amended subsection 14 when it amended subsection 1(2)(a). Respondent's suggestion that the Court should simply ignore subsection 14 violates the well-known rule that courts presume that the legislature intended that every word, clause, sentence and provision of a statute have effect; conversely, it will be presumed the legislature did not insert idle verbiage or superfluous language in a statute. (Rep. Br. 17); *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142, 146 (Mo. App. E.D. 2000)

Because the statute is ambiguous and conflicting on its face, the Court can do no more than guess which interpretation the legislature intended, and it must apply the rule of lenity to resolve the ambiguity. *See Woods, Graham, supra*. While the legislature may have intended to broaden the scope of enhancement for prior DWI offenses by amending subsection 1(2)(a), it specifically excluded municipal SIS's in subsection 14, possibly in recognition of the goal that

“[w]orthy offenders have a chance to clear their records by demonstrating their value to society through compliance with conditions of probation under the guidance of the court.” *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993). Whichever interpretation was intended by the General Assembly, it is up to that branch of government to clarify. Because, applying the rule of lenity, the sentence imposed was in excess of the maximum sentence authorized by law, this Court should reverse the motion court’s judgment and remand the case for Mr. Turner’s resentencing as a prior DWI offender. *See*, Supreme Court Rule 24.035(a).

CONCLUSION

Because the sentence imposed by the court was in excess of the maximum sentence authorized by law, in that the court was required to apply the rule of lenity to find that he was a prior, not persistent, DWI Offender, Appellant, Reginald A. Turner, respectfully asks this Court to reverse the judgment of the motion court and remand this case for resentencing.

Respectfully submitted,

S. KATHLEEN WEBBER, #49431
Assistant Appellate Defender
Office of the State Public Defender
Western Appellate Division
818 Grand Blvd. Suite 200
Kansas City, Missouri 64106-1910
Tel: (816) 889-7699
Fax: (816) 889-2008

Counsel for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

I, S. Kathleen Webber, hereby certify as follows:

1. The attached reply brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 3,013 words, which does not exceed the 7,750 words allowed for a reply brief.

2. The CD-ROM disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on December 11, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

3. Two true and correct copies of the attached reply brief and a CD ROM disk containing a copy of this reply brief were mailed, postage prepaid on December 11, 2007, to Richard A. Starnes, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, 207 West High Street, Jefferson City, Missouri 65102.

S. KATHLEEN WEBBER, #49431
ASSISTANT APPELLATE DEFENDER
Scarritt Bldg., Suite 200
818 Grand Avenue
Kansas City, Missouri 64106
Telephone (816) 889-7699
FAX (816) 889-2088
e-mail:kate.webber@mspd.mo.gov