IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant	)	
	)	
vs.	)	No. SC94668
	)	
DENNIS E. MEACHAM,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
23rd JUDICIALCIRCUIT
THE HONORABLE TROY CARDONA, JUDGE

RESPONDENT'S BRIEF

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ARGUMENT

The trial court did not err in granting Respondent's motion to dismiss and in declaring Section 568.040 unconstitutional because that statute violates the Due Process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and Section 562.011, in that it shifts the burden of proof on a required element - criminal intent – from the State to the defendant, and creates a mandatory presumption that the defendant has the ability to provide adequate support, yet the purpose of the statute "is to compel *recalcitrant* parents" and a parent cannot be found guilty of such offense unless his criminal liability is based on an omission to perform an act of which he is physically capable, and it remains the State's burden to prove that the omission – the failure to provide adequate support - was an act that Respondent had the ability to perform, without shifting the burden of proof to Respondent to establish his lack of criminal intent through proof that his failure to provide support was for "good cause."

In its Judgment, the trial court determined that the Legislature's removal of the "without good cause" language from Section 568.040.1 effectively eliminated any criminal intent element from the statute (LF 23; App. A3). The trial court also found that by leaving the "inability to provide support for good cause" language in subsections 3 and 4 as an affirmative defense, the Legislature had created a

mandatory presumption regarding criminal intent – that the defendant had the ability to provide support and that his knowing failure to pay was "without good cause" – unless the defendant is able to rebut such presumption (LF 23; App. A3). The court concluded that the current version of the statute, requiring the defendant to prove that he did not have the ability to provide support, creates a mandatory presumption in a criminal statute, which violates due process of law and renders the statute unconstitutional (LF 23). The trial court's reasoning is correct.

Standard of Review

A statute is presumed constitutional and will not be held otherwise unless it clearly and undoubtedly violates some constitutional provision. ***State v. Stokely***, 842 S.W.2d 77, 79 (Mo. banc 1992). The rules of construction demand that this Court "adopt any reasonable reading of the statute that will allow its validity and ... resolve any doubts in favor of constitutionality." ***State v. Ellison***, 239 S.W.3d 603, 606 (Mo. banc 2007) (quoting ***State v. Burns***, 978 S.W.2d 759, 760 (Mo. banc 1998).

In construing a statute, this Court is guided by the principle that criminal statutes must be construed strictly against the State and liberally in favor of the defendant. ***Goings v. Mo. Dep't of Corr.***, 6 S.W.3d 906, 908 (Mo. banc 1999). Strict construction of criminal statutes both as to the charge and the proof, guarantees that no one shall be made subject to such statutes by implication. ***State v. Bartley***, 304 Mo. 58, 263 S.W. 95, 96 (Mo. 1924). Strict construction also ensures that criminal statutes will not be extended or enlarged by judicial

construction so as to embrace offenses and persons not plainly within their terms. ***State v. Reid***, 125 Mo. 43, 28 S.W. 172, 173 (Mo. 1894). A statute is to be given that interpretation which corresponds with the legislative objective and, where necessary, the strict letter of the statute must yield to the manifest intent of the legislature. ***BCI Corp. v. Charlebois Const. Co.***, 673 S.W.2d 774, 780 (Mo. banc 1984).

Finally, when the statutory language is ambiguous, or when it leads to an illogical result, courts may look past the plain and ordinary meaning of a statute. ***State ex rel. Md. Heights, etc. v. Campbell***, 736 S.W.2d 383, 387 (Mo. banc 1987). "Where there is genuine uncertainty concerning the application of a statute, it is fitting that [this Court] consider the statute's history, surrounding circumstances, and examine the problem in society to which the legislature addressed itself." ***State v. Haskins***, 950 S.W.2d 613, 616 (Mo. App. S.D. 1997).

Analysis

Keeping in mind that the intent of the Legislature should govern the analysis of whether a statute is constitutional, this Court has long noted that Section 568.040's purpose "is to compel *recalcitrant* parents to fulfill their obligations of care and support; the purpose is not to enforce court-ordered child support obligations." ***State v. Claycomb***, No. SC 94526, 2015 WL 3979728, at *4 (Mo. banc June 30, 2015) (quoting ***State v. Reed***, 181 S.W.3d 567, 570 (Mo. banc 2006) (emphasis added). This focus on the *recalcitrant* parent makes sense under

a *criminal* statutory scheme, since criminal intent is an essential predicate of criminal liability. The Missouri criminal code requires both criminal responsibility for conduct and a culpable mental state for all offenses. ***State v. Logan***, 645 S.W.2d 60, 64-65 (Mo. App. W.D. 1982). "It has been held that, as a general rule, a statute defining a crime is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required, and that before a statute will be construed so as to eliminate guilty knowledge or intent as an element of an offense, the legislative intent to do so must be clearly apparent." ***State v. McLarty***, 414 S.W.2d 315, 318 (Mo. 1967).

As indicated, in 2011, the Legislature amended Section 568.040.1, to remove the "without good cause" language from the statutory elements, making it a crime if a "parent knowingly fails to provide adequate support which such parent is legally obligated to provide for his or her child… ." Focusing solely on the *mens rea* of "knowingly," Appellant wholly fails to acknowledge that, under general principles of liability, a person cannot be guilty of an offense unless his liability is based on conduct which includes a voluntary act. Section 562.011.1; ***State v. Beishir***, 646 S.W.2d 74, 76 (Mo. 1983) ("A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.") Further, when the "voluntary act" is premised on an omission to perform an act – such as the allegation of failing to provide adequate support here – the person must by physically capable of performing such act. Section 562.011.2(2).

The burden of establishing the voluntariness of the *actus reus*,[1] a required element of criminal liability, necessarily falls upon the State. This makes sense, for it is not the "knowing failure to support" that invokes criminal liability, but rather the "knowing failure coupled with *the ability* to support" that addresses the *recalcitrant* parent, whom the legislature sought to punish. It is the wrongful, voluntary choice in failing to perform an act of which the parent is capable, that constitutes the criminality of the act. *See* ***Morissette v. United States***, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

Here, the "ability to support," while not denominated as an element, is nevertheless a necessary, required element for conviction. *See* ***McMillan v. Pennsylvania***, 477 U.S. 79, 89 (1986) (discussing "the specter ... of [s]tates restructuring existing crimes in order to 'evade' the [reasonable doubt

[1] "A crime generally consists of two elements: the physical, wrongful deed (the *actus reus*) and the guilty mind that produces the act (the *mens rea*)." ***Smith v. Pace***, 313 S.W.3d 124, 136 (Mo. banc 2010) (quoting ***State v. Roberts***, 948 S.W.2d 577, 587 (Mo. banc 1997).

requirement]"); and ***Patterson v. New York***, 432 U.S. 197 (1977) ("in certain limited circumstances ... [the] reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged."). Contrary to Appellant's assertion, the "ability to provide support" remains a presumed element of the offense based on the Legislative purpose behind the statute – to compel the *recalcitrant* parent. This element is also clear in the reading of Section 568.040 and Section 562.011 together. Because the presumed ability to provide support is the basis for criminal intent in failing to provide such support, requiring the defendant to rebut this presumption of "ability" by requiring him to show good cause for his "inability" to provide adequate support, violates Due Process. In other words, the statute unconstitutionally requires the defendant to rebut a mandatory presumption of "ability to provide support" in order to avoid criminal liability. To withstand constitutional scrutiny, this burden cannot be shifted to the defendant; rather, the burden of proving an ability to support, by showing that the defendant knowingly failed to support without good cause, necessarily must remain with State.

It is a fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. ***Hicks v. Feiock***, 485 U.S. 624, 632 (1988). The prosecution alone must prove all elements of the offense beyond a reasonable doubt. ***Mullaney v.Wilbur***, 421 U.S. 684, 701–702 (1975); ***In re Winship***,

397 U.S. 358, 364 (1970). The shift in the burden on the criminal responsibility issue cannot be applied to the question of intent or knowledge without relieving the State of its responsibility to establish this element of the offense. *See* ***Sandstrom v. Montana***, 442 U.S. 510, 524 (1979) (jury instruction that had the effect of placing the burden on the defendant to disprove that he had the requisite mental state violates due process). The Government, either through the Legislature by statute or the prosecution at trial, is prohibited from shifting the burden of proof to the defendant by means of a presumption. ***Mullaney***,*supra;* ***Winship***, *supra;* ***Patterson***, *supra*.

Indeed, the Due Process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. ***Tot v. United States***, 319 U.S. 463, 467 (1943). The United States Supreme Court recognized that this conclusion could "permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," and warned that "there are obviously constitutional limits beyond which the [s]tates may not go in this regard." ***Patterson***, 432 U.S. at 210. Here, by reallocating the burden of proof to establish "good cause" to the defendant as an affirmative defense, Section 568.040 shifts the burden to the defendant to rebut the inferred statutory presumption of criminal intent – i.e., that he possessed an ability to provide support and knowingly did not do so. This is constitutionally impermissible.

Under the Maine murder statute at issue in ***Mullaney***, *supra*, malice, in the sense of the absence of provocation, was part of the definition of that crime, as the statute had been construed by the Maine Supreme Judicial Court. 421 U.S. 687-688. Yet this element of criminal intent was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. *Id.* The United States Supreme Court held that, once the state had chosen to treat malice as a criminal intent element of the crime of murder, malice could not be presumed. The state cannot rely on a presumption of implied malice and require the defendant to rebut such presumption to avoid conviction. *Id.*

In ***Tot v. United States***, the United States Supreme Court struck down a section of the Federal Firearms Act as violating Due Process. Congress had declared that, from a prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, a mandatory presumption was created (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to the effective date of the statute.

The defendants asserted that the statute violated due process because there was no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant. *Id.* The Court held that a statutory presumption cannot be sustained if there is no

rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. *Id.* at 467-468. Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. *Id.*

In ***Tot***, the Government sought to support the statutory presumption by a showing that, in most states, laws forbid the acquisition of firearms without a record of the transaction or require registration of ownership. From these circumstances it was argued that mere possession tends strongly to indicate that acquisition must have been in an interstate transaction. *Id.* The Court disagreed, holding that such a conclusion does not rationally follow. *Id.* Aside from the fact that a number of states have no such laws, there is no presumption that a firearm must have been lawfully acquired or that it was not transferred interstate prior to the adoption of state regulation. *Id.* Even less basis existed for the inference from mere possession that acquisition occurred subsequent to the effective date of the statute. *Id.*

Further, the fact that the defendant might have the better means of information, standing alone, does not justify the creation of such a presumption. *Id.* at 469. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. *Id.* It might, therefore, be argued that to place upon all defendants in criminal cases

the burden of going forward with the evidence would be proper. *Id.* But this is not constitutionally permissible. *Id.*

Here, the current incarnation of Section 568.040 creates a presumption that a parent possesses the ability to provide support at the time the parent knowingly fails to provide support, and it then shifts the burden to the parent to rebut this presumption by showing that he had good cause in failing to provide adequate support. Yet, the necessary statutory presumption that a parent has the ability to provide support cannot be sustained upon proof that the parent knowingly did not provide support. There is no rational connection between the fact proved and the element presumed. Simply because a parent knowingly does not support does not support a reasonable inference that the parent had the ability to provide such support. Such conclusion does not rationally follow. As in ***Tot***, the Missouri defendant is forced to rebut a mandatory presumption that he possessed criminal intent, which violates Due Process in a criminal case.

If Section 568.040 is to pass constitutional muster, it must be interpreted to require the State to continue to bear the burden of proof that the defendant possessed the ability to support when he allegedly knowingly failed to do so. Despite Appellant's protestations to the contrary, never before has the State found it difficult to fulfill its burden "of proving a negative," and in fact, Missouri Courts have routinely that "[t]his is not an unacceptable burden in criminal nonsupport cases;" such burden has been "recognized and approved." *See e.g.* ***State v. Nichols***, 725 S.W.2d 927, 929 (Mo. App. S.D. 1987); ***State v. Arnett***, 370 S.W.2d

169, 173 (Mo. App. 1963); ***State v. Hobbs***, 220 Mo. App. 632, 291 S.W. 184, 186 (1927). It has always been the well-settled rule that the State, in order to authorize a conviction in a prosecution of this character, must prove not only the failure of defendant to provide the child with the necessary food, clothing and lodging, but must also prove *the ability of the accused to so provide*. ***State v. Barcikowsky***, 143 S.W.2d 341, 342 (Mo. App. 1940) (citing numerous cases).

In ***Hicks v. Feiock***, the State of California brought a contempt proceeding against the Respondent for failing to pay child support. 485 U.S. at 637-638. The California statute upon which the contempt proceeding was based was similar to Missouri's current nonsupport statute. The California statute provided that when a court enters a child support order, proof that the parent was aware of the order and had not complied with it, was prima facie evidence of contempt. *Id.* It also required the Respondent to carry the burden of persuasion to show his inability to comply with the court's order to make the required payments. *Id.*

Most importantly, as to the statute's requirement that the parent carry the burden of persuasion on an element of the offense, by showing his inability to comply with the court's order to make the required payments, the Court held that "if applied in a criminal proceeding, such a statute would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt. *Id. citing* ***Mullaney v. Wilbur***, 421 U.S. at 701-702; ***Ulster County Court v. Allen***, 442 U.S. 140, 167 (1979) (mandatory presumptions are impermissible unless "the fact proved is sufficient to support the inference of guilt

beyond a reasonable doubt"). The distinction between civil contempt and criminal statutes that the Court delineated in ***Hicks v. Feiock*** is important. Section 568.040 is a criminal statute, and shifting the burden to the defendant to prove lack of criminal intent violates Due Process.

Even in Missouri civil contempt actions for failure to comply with an order for child support, a party can be incarcerated only after a showing of the debtor's *intentional failure to pay despite the ability to do so*, or the deliberate creation of circumstances by the debtor resulting in his or her inability to pay. ***State ex rel. Nessor v. Pennoyer***, 887 S.W.2d 394, 396 (Mo. banc 1994). Certainly, this is the minimal standard that the State should be required to show to obtain a criminal conviction and incarceration of a parent charged with failing to provide adequate support, especially when nonsupport prosecutions need not be based on an existing order of support. Indeed, a parent can be prosecuted for criminal nonsupport despite the absence of such an order. *See* ***State v. Watkins***, 130 S.W.3d 598, 600 (Mo. App. W.D. 2004), making proof of an ability to pay all the more critical.

And the difference between the two situations – civil contempt versus criminal prosecution – is that, in the criminal context, the State bears the burden of proving *criminal* intent –i.e., that such failure to provide adequate support is a voluntary act knowingly done while possessing the ability to provide such support. After all, this is the only way to satisfy the basic purpose of the statute, which is to compel the *recalcitrant* parent to provide support. ***Claycomb***, *supra*.

Wherefore, this Court should uphold the trial court's dismissal of the Information and its finding that Section 568.040 is unconstitutional in that it creates a mandatory presumption of criminal intent while shifting the burden of proof to the defendant to show that he lacked such criminal intent by proving that he did not have the ability to provide support. Alternatively, this Court should construe the statute with its legislative purpose and with Section 562.011, to require an implied element that the State must prove criminal responsibility by a showing that the parent committed a voluntary omission, in that he had the ability to provide support and knowingly failed to do so.

CONCLUSION

Respondent respectfully requests that this Court uphold the trial court's actions in dismissing his case and in declaring Missouri's criminal nonsupport statute, Section 568.040, unconstitutional, or read "ability to provide support" as a required element on which the State must bear the burden of proof.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certificate of compliance and service, the brief contains **3,762** words.

On this 17th day of July, 2015, electronic copies of Respondent's Brief was placed for delivery through the Missouri e-Filing System to Gregory L. Barnes, Assistant Attorney General, at Greg.Barnes@ago.mo.gov.

/s/ Amy M. Bartholow

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