No. SC91670

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

DANNY VAUGHN,

Respondent.

Appeal from Scott County Circuit Court
Thirty-Third Judicial Circuit
The Honorable J. Scott Thomsen, Judge

APPELLANT'S REPLY BRIEF

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The trial court erred in dismissing Count I against Respondent Danny Vaughn because section 565.090.1(6) is neither substantially overbroad nor void for vagueness under the First Amendment to the United States Constitution or Article 1, § 8 of the Missouri Constitution in that it proscribes harmful behavior in objective terms that are sufficiently clear to give adequate notice of what is proscribed and to prevent seriously discriminatory enforcement.

In response to the State's opening brief, Defendant relies on cases which find statutes containing proscribing conduct which "annoys"—a word which the United States Supreme Court has found to be vague—to argue that § 565.090.1(6), RSMo. Cum. Supp. 2010, is unconstitutionally vague. Because the word "annoy" is not in § 565.090.1(6), these cases are unhelpful to Defendant. Defendant also asserts that § 565.090.1(6) is void for vagueness as applied to his case. This Court should not consider his as-applied claim, since he raises it for the first time on appeal.

A. Cases which find the word "annoy" to be unconstitutionally vague are not applicable to the analysis of § 565.090.1(6).

Citing *State v. Bryan,* 910 P.2d 212 (Kan. 1996), Defendant compares § 565.090.1(6), to Kansas's stalking statute to argue that Missouri's stalking statute is unconstitutionally vague. But *Bryan* is unhelpful to him because the *Bryan* court's central concern was the prescription of certain kinds of conduct which "alarms" or "annoys" another person, words which are not contained in Missouri's stalking statute. *Id.* at 215. The *Bryan* court found that the words "alarm" and "annoy" were vague and that other portions of the statute were insufficient to limit the application of the statute to constitutionally proscribable conduct. *Id.* at 218, 220.

Moreover, the *Bryan* court considered the 1994 version of the statute. *Id.* at 146. Later, in *State v. Rucker,* 987 P.2d 1080 (Kan. 1999), the Kansas Supreme Court found that the 1995 version of the statute not to be unconstitutionally vague. Moreover, the court rejected a specific request that it find unconstitutionally vague a portion of the statute which limits proscribed conduct to that which serves "no legitimate purpose," much like the limitation of § 565.090.1(6) to conduct that is done "without good cause." *Id.*

People v. Norman, 703 P.2d. 1261 (Colo. banc 1985), is also unhelpful to him. The Colorado statute considered proscribed acts committed with the intent

to "alarm" or "annoy," terms which courts have often found to be so broad that they fail to inform a reasonable person of what conduct is prohibited. *Id.* (citing *Bolles v. People,* 541 P.2d. 80 (Colo. 1975)); *Bryan,* 910 P.2d at 215 (*citing Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971) (word "annoying" injected unconstitutional vagueness into statute). Again, § 565.090.1(6), does not contain the words "alarm" or "annoy," and therefore, *Norman,* has limited application to Defendant's case.

Defendant also cites *Norman* favorably because the *Norman* court seemed to conflate vagueness challenges to statutes proscribing speech (and which therefore implicate the First Amendment) with those that proscribe merely conduct. *Id.* To the extent that the *Norman* court's opinion can be read to mean that whether a statute prescribes only conduct is irrelevant to vagueness analysis, it should not be followed. *Id.* Only in First Amendment cases has the United States Supreme Court relaxed its standing requirements to permit a litigant to make a facial vagueness challenge to a statute rather than requiring a demonstration that the statute is vague as applied to the defendant's conduct. *U.S. v. Williams,* 553 U.S. 285, 292 (2008).

B. This Court should not consider Defendant's as-applied challenge to the statute which he raises for the first time on appeal.

In his motion to dismiss the charges, Defendant made only facial challenges to the subpart based on the First Amendment. (L.F. 6-17). Moreover, the trial court's order dismissing the information did not address whether the statute was unconstitutionally vague as applied to the facts of Defendant's case.

Defendant's attempt to effectively raise an as-applied challenge at this late date should be disregarded because constitutional claims must be raised at the earliest possible moment. *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008) (citation omitted). "An attack on the constitutionality of a statute is a matter of such dignity and importance that the issues should be fully developed at trial and not as an afterthought on appeal." *State v. Rader,* 334 S.W.3d 467, 468 (Mo. App. S.D. 2009) (*quoting Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996)); *McGathey v. Davis*, 281 S.W.3d 312, 318 (Mo. App. W.D. 2009).

Defendant's case can be compared to *Callier v. Director of Revenue,* 780 S.W.2d 639, 640 (Mo. banc 1989), where the driver raised certain constitutional claims in a petition for review of the director's decision to revoke his driving privileges. *Id.* On appeal, the driver, who had prevailed in the circuit court, argued for the first time on appeal that the statute violated equal protection, a

claim that was not addressed by the circuit court. *Id.* at 643. In reversing the circuit court's judgment granting the driver's petition, this Court declined to consider the newly raised equal protection argument as a basis to affirm the court's decision because it had not been raised in the circuit court. *Id.*

Likewise, Defendant's as-applied challenge to § 565.090.1(6), should not be considered by this Court as an independent basis to support the trial court's judgment. Because Defendant did not raise it below, the trial court had no opportunity to rule on the issue. Moreover, in light of Defendant's facial challenges, the parties did not develop the record with sufficient facts regarding the charged conduct to resolve as-applied challenges.

Even if the as-applied challenge is considered on its merits, Defendant has failed to establish that the statute was unconstitutionally vague as applied to the facts of his case. Defendant offered no testimony that he was confused or misled by the statute, and therefore, his challenge is merely a hypothetical one for which he lacks standing. *See State v. State v. Self,* 155 S.W.3d 756, 761 (Mo. banc 2005). There is nothing in the record to support a conclusion that Defendant was confused as to whether he could—after having been repeatedly instructed to stay away—unlawfully enter and then lie in wait inside his ex-wife's home in order to frighten her when she arrived there unaware of his presence. Moreover, in support of his as-applied argument, Defendant cites to a single case from this Court, *State v. Young,* 695 S.W.2d 882, 885 (Mo. banc

1985), which dealt only with a facial void-for-vagueness challenge. *Id.* Consequently, Defendant's reliance on *Young* is misplaced.

CONCLUSION

The trial court's judgment dismissing the information should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1114 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. The undersigned counsel hereby certifies that a copy of this notification was sent through the eFiling system on December 2, 2011, to:

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