SC89130

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JOHN DOE,
Relator,

v.

THE HONORABLE STANLEY MOORE,
Respondent.

RESPONDENT'S BREIF

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Case Summary

This is a case about the power of circuit courts to impose reasonable probation conditions meant to rehabilitate offenders and protect the public during that rehabilitation. Doe pled guilty to endangering the welfare of a child by engaging in sexual conduct with that child and received a suspended imposition of sentence and five years probation.

During the course of the probation, on the recommendation of probation officials, the circuit court supervising Doe's probation added the special conditions of probation that Doe be examined by a physician acceptable to probation officials, that Doe be supervised as probation officials supervise sex offenders, and that Doe complete sex offender treatment, with a therapist acceptable to probation officials. Doe finds these to be unacceptable[1]. He argues that on June 5, 2006, after his offense and plea but before his sentencing, changes in Missouri law required sex offender registration for persons convicted of endangering the welfare of child by engaging in sexual conduct with that child and banned such individuals from living within 1,000 feet of schools or being present within 500 feet of schools. He argues that these changes effectively defined his crime as a sex offense although it is not in Chapter 566 RSMo which deals with sexual offenses, and that treating him as a sexual offender, as

[1] The record refutes the assertion that Doe had a plea bargain limiting the conditions of his probation (See Resp. Exh. 1, Petition to Enter Plea of Guilty).

the special conditions of probation do, therefore violates the ban on retrospective and ex post facto laws.

Doe does not argue that the supervising court is under the illusion that the June 5, 2006 changes in the law apply to Doe, or that the court believed that these changes compelled the court to impose the special conditions of probation. Such an argument would not be supported by the record.

Rather, the premise of Doe's argument is that despite the sexual nature of his offense the supervising court could not have ordered sex offender treatment, nor examination by a physician, nor supervision under a sex offender supervision protocol under the law as it is existed at the time of his offense, and that therefore his supervision conditions are necessarily dependent on changes in the law. This premise is simply wrong.

The supervising court had the power to recognize the sexual nature of the offense of endangering the welfare of a child by engaging in sexual conduct with a child and to impose probation conditions taking into account the nature of the offense. This was well within the discretionary power of the court to set probation conditions meant to rehabilitate offenders while protecting the public. This power is not abrogated because the legislature subsequently placed the offense within the category of offenses requiring sex offender registration and subject to residency and avoidance requirements as a part of the criminal law. That change has nothing to do with the

supervising court's pre-existing power to impose reasonable conditions of probation, which is unchanged by the modifications in the statute.

This is not really a case about a law being retrospectively applied. This is a case about a supervising court exercising its discretion to impose reasonable conditions of probation, and Doe is attempting to use the ban on retrospective laws as a sword to prevent conduct that is not dependent on the new law, rather than as a shield.

Statement of Facts

Section 568.045.1 (2) RSMo 2000, the law in effect at the time of the offense in this case, criminalizes as endangering the welfare of a child in the first degree, the act committed when a person charged with the care and custody of child engages in sexual conduct with that child. On March 6, 2006, in the Circuit Court of Moniteau County, John Doe pled guilty to having committed this offense on February 16, 2003 (Respondent's Exhibit 1 at 3, Petition to Enter Plea of Guilty). Doe described his offense as follows:" During a church event, I allowed myself to be alone with [victim's name redacted] and engaged in physical contact through clothing which was inappropriate given her and my age" (*Id.*).

The petition to plead guilty stated the plea bargain as follows "I understand the plea bargain agreement to be: SIS, 5 years felony probation with specific conditions on limits of contact with minors and other such recommendations made by probation and parole" (*Id.* at 5). The petition also states "If anyone else made any promises or suggestions, except as stated in this paragraph I know that he/she had no authority to do it" (*Id.* at 5).

On July 3, 2006, the Circuit Court of Moniteau County, the Honorable Judge Peggy Richardson, suspended imposition of sentence and placed Doe on five years probation (Resp. Exh. 1, Sentencing Memorandum). The circuit court imposed

sixteen special conditions of probation (Resp. Exh. 1 July 3, 2006, Order Imposing Special Conditions of Probation). These include a condition that Doe take something called "anti-abuse" if directed by his probation officer and he was medically able, a condition that Doe attend counseling programs and successfully complete a halfway house and impatient programs or attend a prison tour as directed by his probation officer, a condition that Doe complete the "over the walls program", and a condition that Doe not be alone with a child under seventeen to whom he was not related (*Id*.).

Effective June 5, 2006, §589.400.1(2) RSMo was modified to include endangering the welfare of a child among the offenses requiring sex offender registration if the endangerment was sexual in nature. Effective on June 5, 2006 §589.042 RSMo authorized access to the home computers of persons required to register as sex offenders. Effective June 5, 2006 §566.147 RSMo banned offenders convicted under §568.045.1 (2) RSMo from residing within 1,000 feet of a school or child care facility and §566.149 RSMo banned them from being present within 500 feet of a school.

These changes became effective between Doe's guilty plea and his sentencing. There is no evidence in the record, and Doe does not allege, that the conditions of probation imposed on July 3, 2006 were in any way affected by the changes in law which occurred on June 5, 2006.

Based on correspondence from the probation and parole office dated August 17, 2006 and an attached investigation report, dated August 15, 2006, the Circuit Court of Moniteau County , through Judge Moore, ordered that Doe be examined by a doctor chosen by probation and parole officials and that Doe "shall be supervised as a sex offender" (Petitioners Appendix at A4). The court gave Doe thirty days to file motions related to the new conditions (*Id.*). On March 15, 2007 after reconsidering the matter, the circuit court removed these two additional conditions of probation. (Petitioner's Appendix A6).

On May 7, 2007, at the request of probation and parole officials the Honorable Judge Moore again added the conditions that Doe be supervised as a sexual offender and that he be examined by a physician "at the direction of probation and parole" (Petitioner's Appendix at A7). On December 13, 2007 as a result of a December 7 2007 investigative report from probation and parole Judge Moore ordered Doe to complete sex offender treatment with a state approved and licensed provider approved by Probation and Parole officials (*Id.* at 7-8)[2].

The Department of Corrections "Orange Book", *Rules and Regulations Governing the Conditions of Probation Parole and Conditional Release for Sex*

[2] Doe is not required to register as a sex offender. The sex offender supervision agreement he signed states "I will comply with registration requirements *that apply to me*" (Petitioner's Appendix A21, emphasis added).

Offenders, provides that at the direction of the court an offender not being supervised as a result of a conviction for a sex offense may be supervised as a sexual offender (Resp. Exh. 2 “Orange Book” section 9, paragraph 2).

Doe seeks a writ of prohibition from this Court invalidating the amended conditions of probation added in the orders of May 7, 2007 and December 13, 2007 directing that Doe be supervised as sexual offender, that he be examined by a physician acceptable to probation and parole officials and that he complete treatment with a therapist approved by probation and parole officials, be held invalid as violations of the bans on retrospective laws and ex post facto laws and an order directing that Doe’s conditions of supervision be limited to those imposed on July 3, 2006.

Standard of Review

The writ of prohibition is only appropriate to prevent the usurpation of judicial power by a court lacking jurisdiction, to remedy an act in excess of jurisdiction, or to prevent irreparable harm from a trial court's order. *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc 2003).

Argument

Doe pled guilty to endangering the welfare of a child by knowingly engaging in sexual conduct with the child in violation of §568.045.1(2) RSMo. The Circuit Court of Moniteau County acted within its jurisdiction when, on the recommendation of probation officials, it placed reasonable conditions on Doe's probation calculated to rehabilitate Doe and protect the public. As the circuit court had the power to impose these conditions under the law as it existed at the time of Doe's offense the bans on ex post facto and retrospective laws have not been violated.

(Addresses Arguments I and II).

The Power to Set Probation Conditions

The key statutes authorizing the conditions of probation that Doe now complains about were already in effect at the time of his offense. Section 559.021.1 RSMo 2000 provides that a court may impose conditions of probation that the court in its discretion deems reasonably necessary to ensure that the defendant will not again violate the law. Section 559.021.4 RSMo 2000 provides that the court may modify or enlarge the conditions of probation at any time prior to the expiration of probation. Similarly §559.100.2 RSMo 2000 states that the circuit shall determine any conditions of probation it deems necessary to ensure the successful completion of probation.

This Court has stated that the most important purpose of probation is the rehabilitation of the offender without sentencing him to incarceration and that also of importance is protecting the public from the type of conduct that led to the offender being placed on probation. *State ex rel. Nixon v. Campbell*, 906 S.W.2d 369, 372 (Mo. banc 1995). In *Campbell* an offender pled guilty to the rape and abuse of a fourteen year-old and was placed on probation with the special condition of attending a specific sex offender treatment program. The program was cancelled, and the offender was violated. This Court held that protection of the public and rehabilitation of the offender justified revocation, even though the violation was not the offender's fault. *Id.* at 380-372.

This Court has stated that the liberty given to a person on probation "is subject to all conditions which are not illegal, immoral or impossible of performance." *Nicholson v. State*, 524 S.W.2d 106, 110 (Mo. banc 1975). This Court has recognized that because probation by its nature and definition means opportunity to rehabilitate one's self without confinement, it would be inconsistent to impose incarceration as a condition of probation absent specific statutory authority *State ex rel. St. Louis County v. Stussie*, 556 S.W.2d 186, 189 (Mo. banc 1977). But in finding that unauthorized incarceration is inconsistent with probation, this Court confirmed that "[t]rial courts have wide discretion in imposing certain conditions on a probationer." *Id.* at 189.

Section 217.705.3 RSMo provides that at any time a probation officer may recommend modification of the terms of probation and that the court may at any time modify the conditions of probation. In *State ex rel Nixon v. McCondichie*, 132 S.W.3d 238, 240 (Mo. banc 2004) this Court noted that probation officers under §217.705.3 RSMo may recommend changes in conditions of probation, which courts may then order, and that the statute has no provision for a hearing on such modifications. This Court noted in *McCondichie* that imposing unnecessary constraints on release conditions may provide an incentive for the continued incarceration of offenders who might otherwise be deemed suitable for release. *Id.* at 240.

The Challenged Conditions Placed on Doe's Probation are Well Within the Circuit Court's Authority to Impose Probation Conditions meant to rehabilitate Doe while Protecting the Public.

Doe pled guilty to violating §568.045.1(2) RSMo which criminalizes endangering the welfare of a child by engaging in sexual conduct with that child (See Resp. Exh. 1, Petition to Enter Plea of Guilty). Doe asserts in the guilty plea petition that he allowed himself to be alone with the victim then had inappropriate physical contact with the victim through her clothing (*Id.*). Doe agreed in his own handwriting in the petition that he is to be subject to specific conditions on limits of contact with minors and "other such recommendation made by probation and parole." And the petition disavows the existence of any promise not in the petition (*Id.* at 5). The special conditions on probation imposed on July 3, 2006, which Doe

does not challenge, include as condition number eight that "Defendant shall attend counseling programs successfully complete halfway house or in-patient programs or attend a prison tour as directed by the probation officer." (Resp. Exh. 1 Special Conditions of Probation Order, condition 8). The original probation conditions were imposed by the Honorable Peggy Richardson. (*Id.*)

After taking over supervision of the case, Respondent, the Honorable Stanley Moore, on May 7, 2007 added the amended condition of probation that Doe by supervised as a sexual offender and that Doe be evaluated by a physician at the direction of Probation and Parole (Petitioner's Appendix A-24, Amended Conditions of Probation). This additional condition had originally been imposed previously, as a result of a probation and parole investigation report (Petitioner's Appendix A-4). But the court removed the amended condition of the physician's examination on December 4, 2006 and both amended conditions on March 15, 2007, before reinstating both conditions on May 7, 2007, apparently at the insistance of probation officials (*Id.* at A4-A7). On December 13, 2007 the Honorable Judge Moore as a result of a probation and parole investigation report ordered that successfully complete sex offender treatment (Petitioner's Appendix at A7-A8).

Doe's offense, endangering the welfare of a child by engaging in sexual conduct with that child, is by its nature an offense for which rehabilitation and protection of the public may be reasonably facilitated by examination by a physician, sex offender treatment and supervision according to a protocol designed for supervising sex offenders. Authority to impose these conditions exists under §559.021.1 RSMo, §559.100.2 RSMo and §217.705.3 RSMo and existed on the date of Doe's offense, for a crime of the nature Doe committed.

See State ex rel Nixon v. Campbell, 906 S.W.2d 369, 372 (Mo. banc 2002) (this Court stresses sex offender treatment as a condition of probation facilitated rehabilitation and protection of the public). The orders of May 7, 2006 and December 13, 2007 contained no conditions that could not have been imposed on a similar offender on the date of Doe's offense.

The fact that the offense is listed in Chapter 568 RSMo, as opposed to Chapter 566, does not change its nature as a sexual offense or limit the power of the supervising court to recognize the nature of the offense in designing probation conditions. The changes in §589.400, §566.147 and §566.149 are irrelevant to the supervising court's power to impose the reasonable probation conditions imposed in this case. That power already existed. The new requirement for sex offender registration under §589.400 RSMo is not necessary for the supervising court to recognize the sexual nature of the offense, regardless of which chapter of the criminal code criminalizes the offense[3]. In short this case is about the discretionary imposition of probation conditions not really a case about the retrospective applications of law.

[3] Doe's offense is a "sex offense" in the ordinary use of the term. But even if it were not, Probation and Parole Rules on use of the sex offender supervision protocol recognize that it may be appropriate for an offender who is not being supervised for a sex offense to be supervised under the protocol, and that this may be ordered by the supervising court (Resp. Exh. 2 "Orange Book" Section 9 Paragraph 2).

The underlying premise of Doe's brief is that at the time of his plea Doe's crime was not a "sex offense", that he could not have been considered a "sex offender", and that "supervision requirements for supervision as a sex offender simply could not have applied to him" (Relator's Brief at 28). As discussed above that premise is simply wrong. Therefore Doe's citation of cases discussing the ban on retrospective and ex post facto laws is irrelevant to the real issue in this case, as no law which became effective after Doe's offense is necessary to support the legality of the amended conditions of probation.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006) cited by Doe is not helpful to him. *Phillips* stands for the unremarkable proposition that it is a retrospective application of law to require sex offender registration under pain of a criminal, penalty when no requirement for such registration existed at the time of the offender's crime. *Doe v. Blunt*, 225 S.W.3d 421 (Mo. banc 2007) is another sex offender registration case. *RL v. Missouri Department of Corrections*, 245 S.W.3d 236(Mo. banc 2008) is a case in which the Department of Corrections determined that it was a felony under §566.147 RSMo for a convicted sex offender to continue reside within 1,000 feet of a school, even thought the law criminalizing that conduct became effective after the offender's guilty plea to attempted enticement of a child. This Court pointed out that the Department of Corrections was mistaken in finding §566.147 RSMo required the offender under pain of a criminal sanction to change his residence.

Those cases are all distinguishable from the current case in that the offender was arguing against the retroactive applicability of new duties backed by criminal penalties. Even in *RL*, the source of the direction to RL to move was the mistaken belief that not doing

so would be a crime, not a reliance on pre-existing authority to impose conditions of probation. In the present case the supervising court is not relying on a change in the law to support new conditions of probation. Rather, the court is imposing reasonable conditions of probation tailored to help rehabilitate Doe while protecting the public and doing so under authority that existed on the date of the offense. The cases cited by Doe are therefore distinguishable. *State ex rel St. Louis County v, Stussie*, 556 S.W.2d 186, (Mo. banc 1977) cited by Doe is also not helpful to Doe (See Relator's Brief at 27). *Stussie* holds that because probation is by its definition a system of rehabilitation without incarceration, incarceration may not be condition of incarceration absent statutory authority *Stussie* does not contradict the long established principle that supervising courts have broad discretion to impose conditions of probation meant to rehabilitate the offender while protecting the public.

In short, Doe's argument is based on the premise that until June 5, 2006, the supervising court could not have imposed the conditions that Doe be examined by a physician, supervised as a sex offender, and complete sex offender treatment, and that the authority to imposed those conditions only existed after the effective date of H.B. 1698. That premise is simply wrong and Doe's retrospective application of laws argument therefore necessarily fails.

Doe also argues that he is being subjected to an ex post facto law because the punishment for his underlying crime is being increased by the application of H.B. 1698 to his case (Relator's Brief 41-49). This claim fails for the same reason as the retrospective application claim. No new statute in being applied, nor need be applied to Doe in connection with the reasonable probation conditions imposed on May 7, 2007 and December 13, 2007.

See State ex rel. Cavallaro v. Groose, 908 S.W.3d 133, 136 (Mo. banc 1995) (new parole statute did not disadvantage offender when parole could be denied for the same reason under old statute). Additionally, requiring Doe to be examined by a physician, receive treatment, and be supervised as sex offender is not a punishment. It is an attempt to rehabilitate him while protecting the public *See Kelly v. Gammon*, 903 S.W.2d 248, 250-251 (Mo. App. E.D. 1995) (statute, requiring completion of sex offender treatment prior to parole release, did not violate the Ex Post Facto Clause both because such treatment is rehabilitative as opposed to punitive, and because the authority to impose this requirement existed by regulation and practice before the requirement was explicitly placed in the statute).

Doe argues that the conditions added to his probation on May 7, 2007 and December 13, 2007 are analogous to retroactively increasing the mandatory-minimum prison term an inmate must serve and cites a line of cases holding that such an increase violates the Ex Post Facto Clause (Relator's Brief 47-48). This line of cases is distinguishable for two reasons. First no new statute was required or relied on to modify Doe's probation conditions. Second, increasing the time a defendant must serve in prison for a crime is punitive, changing his probation conditions to help him rehabilitate is not.

Even if the Discretionary Decision to Modify Conditions of Probation Was Inspired By the New Law That Would Not Make the Decision Improper

Assuming for the sake of argument that probation officials were to some extent inspired by new statutory approaches to supervising offenders, who have committed the

same crime as Doe, in recommending Doe for a sex offender treatment protocol, that inspiration does not make either the discretionary recommendation, or the court's discretionary decision to follow the recommendation improper. Recent research prepared for the Missouri Sentencing Advisory Commission by the University of Missouri praises the use of special probation supervision regimes for sex offenders by the State of Washington and some counties in Illinois and Arizona as being an effective method of promoting rehabilitation while maintaining public safety. *See, Sex Offender Missouri and Community Corrections Options*,(Prepared for the Missouri Sentencing Advisory Commission by the Institute of Public Policy Truman School of Public Affairs University of Columbia). Probation officials and the supervising court should not have their power to do their best to help Doe limited because the regime they have in their discretion put in place to help Doe is now mandated for later offenders. The regime is mandated for Doe only by the supervising court's pre-existing discretion to impose reasonable probation conditions not by new statutory law. Once Doe completes his probation, the conditions Doe complains about vanish. But the power of the court to supervise Doe should not be cut back beyond what it was on the day of his offense by legislation that only affects other offenders, and is at most recognition that what the court is now doing for Doe is viewed as a good idea by the legislature. The ban on retrospective laws is a shield, not a sword to strip courts of discretion that existed long before a particular law became effective.

CONCLUSION

Respondent prays that this Court quash the preliminary writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 4346 words, as determined by Microsoft Office Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 29th day of April, 2008, to:

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