In The Supreme Court of Missouri

No. SC 090867

State of Missouri ex rel. Scott Fravell,

Relator,

v.

The Honorable William C. Seay,

Respondent.

From the Circuit Court of Crawford County, Missouri
42nd Judicial Circuit, Division 1
Underlying Case No. 07A9-CR00416-01
The Honorable William C. Seay, Presiding

Relator's Brief in Support of Writ of Prohibition

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JURISDICTIONAL STATEMENT

This is an original writ of prohibition proceeding in The Supreme Court of Missouri.

Relator Scott Fravell ("Fravell") is the defendant in *State v. Fravell*, Circuit Court of Crawford County Cause No. 07A9-CR00416-01. Following a guilty plea, Relator was convicted of Statutory Rape in the 1st Degree - Sexual intercourse with a person less than 14 years old, an unclassified felony, in violation of RSMo. § 566.032. On June 3, 2008, Relator was sentenced to ten years incarceration in the Missouri Department of Corrections, suspended execution of sentence, and five years of supervised probation.

A motion to revoke Relator's probation was filed on April 29, 2009. By order of the Circuit Court, the Honorable William C. Seay, Respondent, the issue of "permanent probation" was passed to January 5, 2010, for a ruling. The order also provided that "Defendant need not appear." On January 5th, a case review hearing was held without Relator's appearance. The Respondent Judge ordered that "the provisions regarding lifetime supervision are constitutional herein" and modified Relator's probation to that effect.

The Missouri Court of Appeals, Southern District, by order dated March 15, 2010, denied Relator's Petition for Writ of Prohibition addressing the issues presented herein.

On May 6, 2010, pursuant to Mo. Sup. Ct. Rule 97, Relator filed and served a Petition for Writ of Prohibition in this Court. On June 29, 2010, this Court issued its

Preliminary Writ of Prohibition. Respondent Judge filed his Answer on July 29, 2010, as ordered. This proceeding follows.

The Supreme Court of Missouri has jurisdiction over this proceeding pursuant to its supervisory powers set out in Article V, Section 4 of the Missouri Constitution which grants the Court authority to issue and determine original remedial writs. Hence, the jurisdiction of this Court is invoked.

STATEMENT OF FACTS

Relator Scott Fravell ("Fravell", "Relator") is the defendant in *State v. Fravell*, Circuit Court of Crawford County Cause No. 07A9-CR00416-01. On April 1, 2008, pleaded guilty to and was convicted of Statutory Rape in the 1st Degree - Sexual intercourse with a person less than 14 years old, an unclassified felony, in violation of RSMo. § 566.032. On June 3, 2008, Relator was sentenced to ten years incarceration in the Missouri Department of Corrections, suspended execution of sentence, and five years of supervised probation. Relator had no prior offenses.

On October 28, 2008, the Court was advised by the Prosecuting Attorney of Crawford County that Section 559.106 of the Revised Statutes of Missouri mandated lifetime probation where probation is granted for all offenses listed therein, to include the offense of conviction pertaining to Fravell.

A motion to revoke Relator's probation was filed on April 29, 2009. By order of the Circuit Court, the Honorable William C. Seay, Respondent, the issue of "permanent probation" was passed to January 5, 2010, for a ruling. The order also provided that "Defendant need not appear." On January 5th, a case review hearing was held without Relator's appearance. The Respondent Judge ordered that "the provisions regarding lifetime supervision are constitutional herein" and thereby modified Relator's probation to require lifetime supervision of Fravell, to include electronic monitoring, by the Board of Probation and Parole.

POINTS RELIED ON

I. Section 559.106 is aimed at repeat sexual offenders by a plain reading of the statute and therefore Respondent Judge erred in applying the statute to Relator, a first-time offender.

A. The Respondent Judge's reading of the statute would render an absurd result in that only the probation-eligible offenses, and not Rape and Forcible Sodomy, would be subject to lifetime supervision.

RSMo. § 559.106.1

Neske v. City of St. Louis, 218 S.W.3d 417 (Mo. banc 2007)

United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907 (Mo. banc 2006)

B. The Respondent Judge's reading of the statute conditions its application upon the sentence received, rather than the offense of conviction.

II. Alternatively, any ambiguity must be resolved in favor of the Relator, as required by the Rule of Lenity.

United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907 (Mo. banc 2006)

J.S. v. Beaird, 28 S.W.3d 875 (Mo. banc 2000)

III. Section 559.106 of the Missouri Code is invalid and its application to Relator unconstitutional because it codified an amendment which was unrelated to the original purpose or subject matter of the originating

legislation, in violation of Article III, section 21 of the Missouri Constitution.

Mo. Const. Art. III, § 21.

Mo. Ass'n of Club Executives, Inc. v. State, 208 S.W.3d 885 (Mo. banc 2006)

ARGUMENT

I. Section 559.106 is aimed at repeat sexual offenders by a plain reading of the statute and therefore Respondent Judge erred in applying the statute to Relator, a first-time offender.

A. The Respondent Judge's reading of the statute would render an absurd result in that only the probation-eligible offenses, and not the forcible offenses of Rape and Sodomy, would be subject to lifetime supervision.

Application of section 559.106.1 to a first-time status offender would render the inclusion of the forcible offenses of Rape and Sodomy meaningless, and negate application of lifetime supervision for the forcible offenses. This result is absurd, and avoidable, by a plain reading of the statute which gives effect to all of its parts. The statute contains two groupings of offenses. The first grouping includes the forcible and statutory offenses of rape and sodomy. It is not disputed that the first grouping is modified by a 'probation clause', whereby certain individuals who receive a sentence of probation are subject to lifetime supervision. Rather, the dispute between Relator and Respondent Judge is whether or not a probationer must be a prior sex offender in order for the statute to apply. Relator submits that only one reading of the statute attributes meaning to all of its parts. That reading requires that the 'prior sex offender clause' modifies both groupings of offenses. Because forcible rape and sodomy are never subject to probation, the only way to give meaning to the inclusion of those offenses within the statute is to modify them by the 'prior sex offender clause.' As

such, the statute does not apply to a first-time offender, and therefore, does not apply to Relator.

The terms of the statute are clear and unambiguous. When determining the intent and meaning of a statute, a court must "give meaning and effect to each word, clause, sentence, and section of a statute." *Berra v. Danter*, 299 S.W.3d 690, 696 (Mo.App. E.D. 2010)(*citing Neske v. City of St. Louis*, 218 S.W.3d 417, 424, 426 (Mo. banc 2007). Parts of a statute must not be read in isolation, but in the context of the entire statute. *See Neske v. City of St. Louis*, 218 S.W.3d at 424, 426. It is assumed that the legislature does not enact meaningless provisions. *See Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007). Here, the statute at issue could produce several readings; however, only one is logical and consistent with the statute's apparent purpose.[1] Therefore, an absurd result may be avoided without looking behind the plain and unambiguous terms of the statute. *See United Pharmacal Co. of Mo. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909-910 (Mo. banc 2006).

RSMo. Section 559.106.1 provides:

Lifetime supervision for certain offenders--mandatory electronic monitoring

1. Notwithstanding any statutory provision to the contrary, when a court grants probation to an offender who has pleaded guilty to or has been found guilty of an offense in section 566.030 [Rape], 566.032 [Statutory rape – 1st], 566.060 [Forcible

[1] The undersigned's research indicates that no Missouri Court has passed on the issue of the application of RSMo. § 559.106.

sodomy], or 566.062 [Statutory sodomy – 1st], RSMo, based on an act committed on or after August 28, 2006, or the offender has pleaded guilty to or has been found guilty of an offense under section 566.067 [Child molestation – 1st], 566.083 [Sexual misconduct involving a child], 566.100 [Sexual abuse], 566.151 [Enticement of a child], 566.212 [Sexual trafficking of a child], 566.213 [Sexual trafficking of a child], 568.020 [Incest], 568.080 [Child used in sexual performance], or 568.090 [Promoting sexual performance by a child], RSMo, based on an act committed on or after August 28, 2006, against a victim who was less than fourteen years old and the offender is a prior sex offender as defined in subsection 2 of this section, the court shall order that the offender be supervised by the board of probation and parole for the duration of his or her natural life.

RSMo. § 559.106.1 (2009).

The issue is the relation of qualifying language to certain clauses of the statute. "Where the words of a statute are capable of more than one meaning, the court gives the words a reasonable reading rather than an absurd or strained reading." *State v. Schleiermacher*, 924 S.W.2d 269, 276 (Mo. banc 1996). The Respondent Judge, in determining that lifetime supervision attaches to Relator - a first-time offender, convicted of statutory rape of a victim less than fourteen years old in violation of § 566.032, and granted probation - appears to read the statute this way:

Notwithstanding any statutory provision to the contrary,

- ***when a court grants probation*** to an offender

- who has ***pleaded guilty to*** or has been found guilty of an offense in section 566.030, ***566.032***, 566.060, or 566.062, RSMo, based on an act committed on or after August 28, 2006, ***or***

- the offender has pleaded guilty to or has been found guilty of an offense under section 566.067, 566.083, 566.100, 566.151, 566, 212, 566.213,568.020, 568.080, or 568.090, RSMo, based on an act committed on or after August 28, 2006,
    - against a victim who was less than fourteen years old
    - and the offender is a prior sex offender as defined in subsection 2 of this section,

the court shall order that the offender be supervised by the board of probation and parole for the duration of his or her natural life.

RSMo. Section 559.106.1 (emphasis added; punctuation added for clarity). The consequence of that reading is that a first-time status offense (such as a violation of section 566.032) carries a penalty of lifetime supervision, while an offense of forcible rape or sodomy does not. By this reading, an offender who received *probation* for an offense within the first grouping is subject to lifetime supervision. This reading renders the inclusion of the forcible offenses in the first grouping a nullity, because only the status offenses are eligible for probation. As a consequence of the Respondent Judge's misapplication of the statute, at the State's urging, an individual who commits the forcible offenses of rape or sodomy would not be subject to lifetime supervision - ever. The result is absurd, as the forcible offenses are included in the

statute and the seriousness of forcible rape and sodomy is certainly no less than that of a status offense.

B. The Respondent Judge's reading of the statute conditions its application upon the sentence received, rather than the offense of conviction.

If the statute were to apply to first-time status offenders, the application of lifetime supervision would hinge upon the sentence rather than the *offense*. Among the first grouping of offenses, only two are probation-eligible. Both are status offenses. As explained above, the forcible offenses, that is, the probation-*in*eligible offenses, would be given no effect by the Respondent Judge's reading.[2] Yet, probation[3] is not the only possible sentence for a status offender. So, according to the reading invoked by the Respondent Judge, one convicted of statutory rape, but subject to incarceration for any length of time rather than receiving probation, would not be subject to lifetime supervision. Only the probationer is supervised for life. This result is nonsensical. Lifetime supervision would become untethered from the rationale of

[2] *See* RSMo. § 566.030.4, which provides that "[n]o person found guilty of or pleading guilty to forcible rape or an attempt to commit forcible rape shall be granted a suspended imposition of sentence or suspended execution of sentence"; *and see* RSMo. § 566.060.4.

[3] The term "probation" is used throughout this document to denote instances such as the one at bar, where an offender receives a suspended execution of sentence, and thereby serves a term of probation as an immediate consequence of sentencing.

the sentencing court. Where a grievous crime is charged as a status offense, a sentencing court may dictate a term of incarceration only to find that the offender was thereby exempted from a supervision requirement. It is inconceivable that the legislature intended the statute to apply purely at the discretion of the sentencing court. More bizarre still, lifetime supervision would not attach to those allocated harsher sentences (incarceration), and would effectively undermine judicial discretion at sentencing.

The rationale for applying the 'prior sex offender' modifier to both offense groupings, and not just the second, is illustrated best by a hypothetical. Reading the statute as the Respondent Judge suggests, persons committing an offense in the first offense grouping are subject to lifetime supervision even if they are first-time offenders. Thus, if "Offender F" commits a first-time offense of forcible rape, a probation-*in*eligible offense, he would not be subject to supervision. This result is a function of the 'when a court grants probation' clause which immediately precedes the first grouping. By comparison, "Offender S", an individual who committed a first-time offense of statutory rape would be subject to lifetime supervision if he receives probation. If Offender S is sentenced to incarceration, however, lifetime supervision would not attach. In this way, if first-time offenders are subject to the statute, the only first-time offenders the statute would actually capture are the probationers. Forcible offenders and statutory offenders serving prison terms would be exempted by operation of the probation clause.

Relator submits that a better result, and a reading which gives effect to all parts of the statute, is one where the 'prior sex offender' modifier applies to both offense groupings. For example, under Relator's reading, Offender F (a first-time forcible offender) would not be subject to the statute for that first offense. That result is the same, by either Relator's or Respondent's reading. However, if Offender F's second offense is statutory rape, wherein he receives probation, he would be supervised for life. Relator submits that this is the only way, under the statue as written,[4] to capture the forcible offenders and give effect to the inclusion of the forcible offenses.

[4] Relator submits that the lifetime supervision statute anticipates three categories of repeat offenders, and functions as a stop-gap measure for two of the three. The first category, repeat forcible offenders, would likely be subject to increasing terms of incarceration as a function of discretionary sentencing, which obviates the need for any type supervision. A second category consists of those offenders with a forcible prior, but who receive probation upon a subsequent offense, and thus, would be subject only to limited supervision, without the lifetime supervision statute. The third group, potentially termed "repeat probationers", would be subject to supervision not only during their term of probation, but indefinitely, upon commission of a second probation-eligible offense. It appears that the repeat forcible offenders are not targeted by the statute; rather the statute is a stop-gap measure to administer additional and prolonged supervision for repeat offenders who are not physically incarcerated. The

Thus, in order to avoid the irrational consequence that certain forcible offenses are never subject to lifetime supervision or any other escalated penalty, despite their inclusion in this statute, the "prior sex offender" modifier must apply to all offenses in this statute. Any other result is absurd. Further, in order to give effect to the statute at all times, and not merely by happenstance when a sentencing court denies probation for a probation-eligible offense, the 'prior sex offender' modifier must apply to all offenses in the statute. Relator submits that a logical reading of the statute's first passage would look this way:[5]

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only way for the second category to fall within the statute, however, is if the 'prior sex offender' modifier applies to both groupings.

[5] The statute is certainly not extremely clear, due to the inclusion of Forcible Rape and Sodomy in the first grouping. Because Forcible Rape and Sodomy are never subject to probation, perhaps the only sensible reading of the first passage of the statute is that if someone were previously convicted of Rape or Sodomy of a victim of any age – and then *later* received probation for any offense in the first group (such as a status offense), or any offense in the second group against a victim less than fourteen years old, then lifetime supervision would apply to that offender. While it seems logical, from the viewpoint of elected legislators, to require lifetime registration for anyone who previously committed Rape or Sodomy and then subsequently committed any offense against a child of *any* age; the modifier "against a victim who was less than fourteen" was specifically added to the statute by amendment in 2006. At the same

Notwithstanding any statutory provision to the contrary,

- ***when a court grants probation*** to an offender who has pleaded guilty to or has been found guilty of an offense in section 566.030, 566.032, 566.060, or 566.062, RSMo, based on an act committed on or after August 28, 2006, ***or***
- the offender has pleaded guilty to or has been found guilty of an offense under section 566.067, 566.083, 566.100, 566.151, 566, 212, 566.213,568.020, 568.080, or 568.090, RSMo, based on an act committed on or after August 28, 2006, against a victim who was ***less than fourteen years old***
- ***and*** the offender is a ***prior sex offender*** as defined in subsection 2 of this section,

the court shall order that the offender be supervised by the board of probation and parole for the duration of his or her natural life.

(emphasis added). In this way, the inclusion of forcible offenses would be given effect and repeat offenders of rape and sodomy would not be inexplicably exempt from a supervision requirement that, by the Respondent Judge's reading, snares a first-time status offender. This reading assigns meaning to all portions of the statute.

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time, the first and second groupings were differentiated. If the "against a victim less than fourteen" was to apply to *all* of the listed offenses, there would have been no need to add the disjunctive "or" between the two groupings. *See* Mo. Legis. H.B. 1290 (2006) (Appendix at 8).

Judicial discretion at sentencing would not become a variable in the application of the statute. For these reasons, Relator submits that his first-time status offense does not require lifetime supervision under a logical reading of the statute.

II. Alternatively, any ambiguity must be resolved in favor of the Relator, as required by the Rule of Lenity.

Though Relator submits that the statute is not ambiguous, but rather, potentially confusing in its phrasing, any perceived ambiguity in its application must be resolved in favor of the Relator. The Rule of Lenity requires that "ambiguity in a criminal statute must be resolved against the government." *United Pharmacal*, 208 S.W.3d at 913.

If ambiguity were found, the rule of lenity would apply because the lifetime supervision statute is a penal statute. Under section 575.206, failure to comply with lifetime supervision as imposed by section 559.106, results in the commission of a class C felony.[6] *See* RSMo. § 575.206. As such, the rule of lenity applies. *See J.S. v.*

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[6] Section RSMo. § 575.206, entitled "Violation of condition of lifetime supervision," provides the following:

> 1. A person commits the crime of violating a condition of lifetime supervision if the person knowingly violates a condition of probation, parole, or conditional release when such condition was imposed by an order of a court under section 559.106, RSMo, or an order of the board of probation and parole under section 217.735, RSMo.

Beaird, 28 S.W.3d 875, 877 (Mo. banc 2000)(finding that a statute rendering failure to register as a sex offender as a class A misdemeanor and subsequent offenses as a class D felony amounted to penal consequences).

III. Section 559.106 of the Missouri Code is invalid and its application to Relator unconstitutional because it codified an amendment which was unrelated to the original purpose or subject matter of the originating legislation, in violation of Article III, section 21 of the Missouri Constitution.

Article III, section 21, of the Missouri Constitution requires that "no bill shall be so amended in its passage through either house as to change its original purpose." Mo. Const. Art. III, § 21. Section 559.106 is one of several amendments to legislation originating as House Bill 972. *See* RSMo. 559.106. The original purpose of H.B. 972 was to enact laws relating to intoxication-related traffic offenses. *See Mo. Ass'n of Club Executives, Inc. v. State*, 208 S.W.3d 885, 886-887 (Mo. banc 2006). As such, the amendment codified as section 559.106, for the regulation of sex offenders, is not germane to the purpose of the originating legislation and is void.

In *Missouri Association of Club Executives*, the Court examined amendments attached to H.B. 972 which regulated the adult entertainment industry. The Court found them to be severable and void under Art. III, section 21, of the Missouri Constitution. *See Id*. at 889. The Court noted that H.B. 972 was first introduced in

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2. The crime of violating a condition of lifetime supervision is a class C felony.

2005, with its stated title and purpose as "relating to intoxication-related traffic offenses, with penalty provisions." *Id*. at 887. The bill underwent four revisions. The second and third versions of H.B. 972 maintained the original title. Upon the fourth revision, thirteen amendments were added; six from prior versions of the bill and seven "new and unrelated to traffic or alcohol offenses." *Id*. at 887. Of those seven new amendments, three purported to regulate the adult entertainment industry and were the subject of the suit. The Court noted that the remaining four amendments, of the seven new ones added to H.B. 972 during the fourth round of revisions, "related to the supervision of sex offenders", including "violating lifetime supervision." *Id*. at n.1. The constitutionality of those amendments relating to sex offenses were not before the Court and it declined to consider them.

Defendant submits that even if the Respondent Judge's reading of section 559.106 were the correct one, the statute is unconstitutional, severable, and void, because it is unrelated to the purpose of its originating legislation. The sections relating to lifetime supervision, as noted by the *Mo. Ass'n* Court, were appended during the fourth and final round of revisions to a bill relating to alcohol and traffic offenses. *Id*. Just as the amendments regulating the adult entertainment industry were found to be void as an impermissible change to the bill's original purpose; the accompanying amendments regulating sex offenders are similarly void.

CONCLUSION

In conclusion, Relator prays that a preliminary writ in prohibition be made permanent so that he is not subject to a penalty not intended by the legislature, in

violation of constitutional rights to due process of law, as a result of Respondent Judge's misreading of the statute at issue. Alternatively, Respondent prays that any ambiguity be resolved in his favor or that the statute be found unconstitutional as violative of the Missouri Constitution for failure to relate to the purpose of the originating bill.

Date: August 26, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the

Relator's Brief in Support of Writ of Prohibition

and a disc containing an electronic copy of same were served on the following parties via first-class mail on this 26th day of August, 2010:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type-volume limitation and typeface requirements of Missouri Supreme Court Rule 84.06. This brief contains 4,673 words, excluding the parts of the brief exempted from that calculation by Rule 84.06(b). The brief is set in proportionally spaced typeface, no smaller than 13-point Times New Roman, using Microsoft Word 2003. The undersigned further certifies that the electronic copy provided on disk is virus-free.

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APPENDIX

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