IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC89832**
	)	
JOHN L. RICHARD,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MISSISSIPPI COUNTY, MISSOURI
THIRTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE WILLIAM H. WINCHESTER, III, JUDGE

RESPONDENT RICHARD'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal by the State of Missouri, Appellant, after the trial court granted Respondent's motion to dismiss, which alleged that § 571.030.1(5) (Cum.Supp. 2006) (possession of a firearm while intoxicated) violated Respondent's right to possess a firearm within his own home, as guaranteed under both the Second Amendment to the United States Constitution and Article I, § 23 of the Missouri Constitution. The trial court ruled that §571.030.1(5) (Cum.Supp. 2006) is "unconstitutional to the extent that it prevents a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she may be legally intoxicated" (LF 23). This Court has original jurisdiction because it raises an issue as to the constitutional validity of a Missouri statute. Article V, Sections 3 and 10, Mo. Const. (as amended 1982).

STATEMENT OF FACTS

A complaint was filed charging Respondent with the class D felony of possessing a loaded firearm while intoxicated, ***§ 571.030 (Cum.Supp. 2006)*** (LF 5-6). Deputy Dane Stausing's probable cause affidavit read, in pertinent part:

> On 11/12/2006, Richard's wife told him that she was leaving him and Richard stated to her that he was going to kill himself by blowing his head off and if she called the police that he would go outside with a gun and make the cop shoot him. Richard then took an amount unknown of morphine pills and an unknown amount of the pill, antitripalean. Richard was sitting in a chair in the residence in an unconscious state upon my arrival at the residence. Located in his lap was a fully loaded Beretta 9mm semi-auto handgun and Richard was also wearing a shoulder holster containing a fully loaded spare clip for the Beretta 9MM handgun.

(LF 6-7).

On March 30, 2007, an information was filed in Scott County, Missouri, charging Respondent with the class D felony of possessing a loaded firearm while intoxicated, ***§ 571.030 (Cum.Supp. 2006)*** (LF 5-6). It alleged that "on or about November 12, 2006, … the defendant, while in an intoxicated condition, a drug morphine, possessed a loaded Beretta 9 mm semi automatic handgun." (LF 8). A change of venue was granted to Mississippi County, Missouri (LF 1).

Respondent filed a "Motion to Dismiss: Violation of Defendant's Second Amendment Rights," alleging a violation of his right to possess a firearm within

his own home guaranteed under both the Second Amendment to the United States Constitution and Article I, § 23 of the Missouri Constitution (LF 15-17). Respondent noted that his alleged illegal possession of a firearm occurred within his own home and for the legitimate purpose of self-defense (LF 15-16). He argued that ***§ 571.030.1(5) (Cum.Supp. 2006)***, effectively bans the possession of firearms in the home by anyone who is present in their home while intoxicated, and that laws that ban the possession of handguns in the home violate the Second Amendment (LF 16).

The memorandum in support of the motion to dismiss noted that on November 12, 2006, Respondent was in his home in Benton, Missouri with his wife (LF 18). Respondent became unconscious due to his use of a prescribed medication (LF 18). Respondent's wife called 911 (LF 18). When Deputy Stausing arrived on the scene, he saw that Respondent was unconscious while in possession of a loaded black Beretta 9mm handgun (LF 19). In the motion to dismiss and accompanying memorandum, Respondent cited ***District of Columbia v. Heller***, --- U.S. ---, 128 S.Ct. 2783 (2008), which had held that the Second Amendment prohibits statutes that (1) ban the possession of a handgun in the home, and (2) require firearms in the home to be inoperable (LF 19).

Respondent noted that because of the way Missouri defines possession, in terms of both actual or constructive possession, the following examples would make a person guilty of ***§ 571.030.1(5) (Cum.Supp. 2006)***:

> Thus, a person out on the town with family who has a loaded firearm in a lockbox in their closet at home is in possession of that firearm [because the defendant has the power and intention to exercise dominion or control over the object]. If that person happens to drink a few cocktails, he/she is guilty of a felony. A person sitting out on his/her deck reminiscing with friends about the good old times who has a loaded rifle locked up in a gun safe is in possession of that rifle. If that person happens to drink a few beers with his/her friends, he/she is guilty of a felony. A person out at happy hour with a loaded handgun in his/her bedside table drawer is in possession of that handgun. If that person orders a few too many intoxicating beverages at happy hour, he/she is guilty of a felony. The possibilities are endless.

(LF 20).

Respondent argued, "[c]riminalizing the possession of a firearm while intoxicated makes it impossible for an entire class of people (those who lawfully choose to becomes intoxicated) to possess any firearm for self-defense." (LF 21).

After a hearing was held on the motion (Tr. 1-11), the trial court issued an order and judgment:

1. The Court finds that the 2nd Amendment to the United States Constitution and Article I Section 23 of the Missouri Constitution grants all citizens the right to possess and bear arms in defense of his home, person and property and the 2nd Amendment states the right of citizens to keep and bear arms shall not be infringed.

2. The Court finds that Mo. Rev. Stat. 571.030.1(5) is unconstitutional to the extent that it prevents a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she may be legally intoxicated.

(LF 23).

Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

ARGUMENT

The trial court did not err in dismissing the State's information on the grounds that § 571.030.1(5) (possession of a firearm while intoxicated) is unconstitutional, because the statute violated Respondent's rights under the Second Amendment of the United States Constitution and Article I, § 23 of the Missouri Constitution, in that § 571.030.1(5) is unconstitutionally overbroad and unconstitutional as applied to Respondent, who was asleep in his home while holding a firearm after taking some prescribed medication.

ISSUE PRESENTED:

§ 571.030.1(5) (Cum.Supp. 2006) forbids a person to actually or constructively possess a firearm while substantially impaired, either mentally or physically, as the result of the consumption of any substance.

Does the constitutional right to keep and bear arms trump this statute and allow a gun owner to take prescribed medicine or consume alcohol inside his own home without having to first remove his firearms from his home?

Standard of Review

A challenge to the constitutionality of a statue is a legal issue that is reviewed *de novo*. ***Baldwin v. Dir. of Revenue***, 38 S.W.3d 401, 405 (Mo. banc 2001). A statute will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. ***Bd. of Educ. of St. Louis v. State***, 47 S.W.3d 366, 368-69 (Mo.

banc 2001). Doubts concerning a statute's constitutionality are resolved in favor of its validity. ***Murrell v. State***, 215 S.W.3d 96, 102 (Mo. banc 2008).

Constitutional provisions and statutes involved

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1]

Similarly, Article I, § 23 of the Missouri Constitution provides: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."

§ 571.030.1(5) (Cum.Supp. 2006) provides: "A person commits the crime of unlawful use of weapons if he or she knowingly …. [p]ossesses or discharges a firearm or projectile weapons while intoxicated …."

§ 571.010(1) defines "intoxicated" as, "substantially impaired mental or physical capacity resulting from introduction of any substance into the body."

§ 556.061(22) (Cum.Supp. 2006) provides that "possess" or "possessed" means:

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[1] The United States Supreme Court has held that the text of this Amendment guarantees an individual the right to possess and carry weapons in case of confrontation. ***District of Columbia v. Heller***, --- U.S. ---, 128 S.Ct. 2783, 2797 (2008)

> … having actual or constructive possession of an object with knowledge of its presence. A person has actual possession if such person has the object on his or her person or within easy reach and convenient control. A person has constructive possession if such person has the power and the intention at a given time to exercise dominion or control over the object either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of an object, possession is sole. If two or more persons share possession of an object, possession is joint;

Id.

Incorporation issue

Appellant criticizes the trial court for failing to engage in any analysis as to whether the Second Amendment is applicable to the states (App. Br. at 12). But the State of Missouri made no argument in the trial court that the Second Amendment was not applicable to the states, so understandably the trial court did not address this issue, which is raised by Appellant for the first time on appeal.

It is unclear whether the Second Amendment applies to the states. It is true, as Appellant's argument notes (App. Br. at 10-12), that United States Supreme Court as thus far refused to apply the Second Amendment to the states through direct application of the Privileges or Immunities Clause. E.g., ***Miller v. Texas***,

153 U.S. 535, 538 (1894).[2] *In accord*, ***State v. Shelby***, 90 Mo. 302, 2 S.W. 468, 469 (Mo. 1886), where this Court held that the Second Amendment "is a restriction upon the powers of the national government only, and is not a restriction upon state legislation." *Cf*. ***District of Columbia v. Heller***, --- U.S. ---, 128 S.Ct. 2783, 2813 n. 23 (2008) (noting that the case did not present the question of whether the Second Amendment applies to the states). But at least two cases are pending possible grants of *certiorari* on whether the rule announced in ***Heller*** reaches the state and local level too. ***National Rifle Association v. Chicago*** (08-1497); and ***Maloney v. Rice*** (08-1592).[3]

Further, just recently, a panel of the Ninth Circuit Court of Appeals concluded that the United States Supreme Court decision in ***Heller*** now compels the opposite result.

In ***Nordyke v. King***, 563 F.3d 439, 457 (9th Cir. 2009) a three judge panel of the Ninth Circuit Court of Appeals held that (based on ***Heller***) the Second

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[2] Judges and academics have criticized the United State's Supreme Court decisions concerning the Privileges and Immunities Clause. E.g., ***Saenz v. Roe***, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (stating he would be open to reevaluating its meaning in an appropriate case); ***id***. at 522 n. 1 (collecting academic sources).

[3] *See*, ***National Rifle Association of America v. City of Chicago, Illinois***, 567 F.3d 856 (7th Cir. 2009); ***Maloney v. Cuomo***, 554 F.3d 56 (2nd Cir. 2009).

Amendment protects a fundamental liberty interest and therefore "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments." Thus, ***Nordyke*** applied the Second Amendment to the states, but held that local governments could exclude weapons from public buildings and parks because the ordinance in question did not meaningfully impede the ability of individuals to defend themselves in their homes with useable firearms, the core of the right as ***Heller*** analyzed it. ***Nordyke***, 563 F.3d at 460. Respondent acknowledges, however, that the Ninth Circuit has ordered that case be reheard *en banc*, possibly during the week of September 21, 2009. ***Nordyke v. King***, --- F.3d --, 2009 WL 2383875 (July 29, 2009).

But even if the Second Amendment is ultimately held not to apply to the states, the analysis would be the same under the Missouri Constitution.

The Overbreadth Doctrine

Generally, a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. ***United States v. Raines***, 362 U.S. 17, 21 (1960). However, this general rule is not without its exceptions. An enactment may be overbroad if in its reach it prohibits constitutionally protected conduct. ***Grayned v. City of Rockford***, 408 U.S. 104, 114 (1972). If a statute is overbroad on its face and deters otherwise privileged activity, an aggrieved party has standing to raise such a challenge even if the statute has not punished protected activity as applied to him. ***Id***. The crucial

question is whether the statute "sweeps within its prohibitions what may not be punished" under the Constitution. ***Grayned***, 408 U.S. at 114-15.

Moreover, "criminal statutes must be scrutinized with particular care, ...; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." ***State v. Carpenter***, 736 S.W.2d 406, 407 (Mo. banc 1987) (this Court struck down a "disturbing the peace" statute as being overbroad).

As this Court noted in ***State v. Beine***, 162 S.W.3d 483, 487 (Mo. banc 2005), under the doctrine of overbreadth, a person may contest the constitutionality of a statute even if he was not engaging in constitutionally protected conduct. ***Id***. at 487. This is true even when a case involves a non-speech-related constitutional attack. ***Id***. *Also see*, ***City of St. Louis v. Burton***, 478 S.W.2d 320, 323 (Mo.1972), where this Court extended the overbreadth doctrine to strike down a loitering ordinance despite the fact that no first amendment claims were made; and ***Christian v. Kansas City***, 710 S.W.2d 11, 12-14 (Mo. App. W.D. 1986), where the appellate court relied on ***Burton*** to extend the overbreadth doctrine and strike down a solicitation ordinance even when there was no first amendment issue. The overbreadth doctrine has been held to be applicable to legislative enactments that threaten the exercise of fundamental or express constitutional rights, such as the right to bear arms. ***City of Lakewood v. Pillow***, 180 Colo. 20, 501 P.2d 744 (1972) (the Colorado supreme court found unconstitutional an ordinance that prohibited the possession of weapons outside

the home, reasoning that the ordinance was overbroad; "Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ***Id***. at 745).

In ***Beine***, this Court found an indecent exposure statute unconstitutionally overbroad because it reached beyond conduct that was calculated to harm and could be used to punish conduct which was essentially innocent. ***Beine***, 162 S.W.3d at 486-88.

As this Court noted in ***Beine***, "The purpose of the overbreadth doctrine is to ensure that a statute does not punish innocent conduct." That case involved "a person's right to use public restrooms," which was noted by this Court to be "about as fundamental a right as one can imagine, probably equal to or more fundamental than speech rights," and thus the overbreadth doctrine was extended to permit Beine to contest the statute even if he had no right to engage in the conduct he engaged in. ***Id***. at 487. This Court allowed Beine to contest the constitutionality of the statute by arguing that it prohibited conduct to which he was constitutionally entitled to engage in. ***Id***.

Respondent's case involves a gun owner's right to drink alcohol or take prescribed medication in his or her own home. That right should be at least on par with the "right to use public restrooms."

As noted above, ***§ 571.030.1(5) (Cum.Supp. 2006)*** prohibits a person from possessing while intoxicated. But both definitions of "possess" and intoxicated"

are far-reaching. ***§ 571.010(1)*** defines "intoxicated" as, "substantially impaired mental or physical capacity resulting from introduction of any substance into the body." Thus, many people who drink or take prescribed medicines while in their home would be "intoxicated," i.e., their mental or physical capacity would be "substantially impaired."

And, because the definition of "possess" includes "having actual or constructive possession of an object with knowledge of its presence," ***§ 556.061(22) (Cum.Supp. 2006)***, a gun owner who became impaired by alcohol or prescribed drugs would be guilty under ***§ 571.030.1(5) (Cum.Supp. 2006)***, unless they removed the guns from their home before becoming impaired. Similarly, if a gun owner became impaired before arriving home they would have to wait until they were no longer impaired to enter their residence otherwise risk being guilty of a felony. As Respondent noted in the trial court,

> Thus, a person out on the town with family who has a loaded firearm in a lockbox in their closet at home is in possession of that firearm [because the defendant has the power and intention to exercise dominion or control over the object]. If that person happens to drink a few cocktails, he/she is guilty of a felony. A person sitting out on his/her deck reminiscing with friends about the good old times who has a loaded rifle locked up in a gun safe is in possession of that rifle. If that person happens to drink a few beers with his/her friends, he/she is guilty of a felony. A person out at happy hour with a loaded handgun in his/her bedside table drawer is in possession of

that handgun. If that person orders a few too many intoxicating beverages at happy hour, he/she is guilty of a felony. The possibilities are endless. (LF 20).

As a result, "[c]riminalizing the possession of a firearm while intoxicated makes it impossible for an entire class of people (those who lawfully choose to becomes intoxicated [or take prescribed drugs]) to possess any firearm for self-defense." (LF 21).

As such, ***§ 571.030.1(5) (Cum.Supp. 2006)*** "prohibits two types of conduct: some of which a person has no right to engage in and the other of which a person has a right to engage in. When a statute prohibits conduct a person has no right to engage in and conduct a person has a right to engage in, the statute is unconstitutionally overbroad." ***Beine***, 162 S.W.3d at 486.

In addressing the hypothetical scenarios mentioned by Respondent and the trial court, Appellant argues that under the hypotheticals the "gun owner would not be guilty under the statute." (App. Br. 16).

For instance, Appellant argues, that ***§ 571.030.1(5) (Cum.Supp. 2006)*** does not apply if the weapon is not readily accessible, citing ***§ 571.030.3 (Cum.Supp. 2006)***. But that exception only applies "when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state." So, it only concerns the transportation of a nonfunctioning or unloaded weapon – not a weapon at home that is functioning or loaded.

Further, the other exception mentioned by Appellant (App. Br. at 16),

§ 571.030.5 (Cum.Supp. 2006), only applies to persons "who are *engaged* in a lawful act of defense pursuant to section 563.031." Because by its terms it only applies to a person already *engaged* in defending themselves, this exception would not provide a defense to a defendant's constitutional right to *keep* their arms in their home in contemplation or anticipation of the need to defend themselves, their family, and their home. It also would not provide a defense to a defendant engaged in their right to defend their premises or property under ***§§ 563.031*** and ***563.041***.

Respondent recognizes that the Eastern District Court of Appeals in ***State v. Davis***, 685 S.W.2d 907, 911-12 (Mo. App. E.D. 1984) held that an earlier version of a statute criminalizing possession of a weapon while intoxicated was not unconstitutionally overbroad. Of course, it is this Court's duty, not the Eastern District's, to decide whether or not a statute is constitutional. Further, it appears that the ***Davis*** court applied a rational basis review. ***Id***. at 911-12. But the United States Supreme Court in ***Heller*** said that a rational basis review would be an insufficient protection for the right to keep and bear arms, holding, "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." ***Heller***, 128 S.Ct. at 2817 n. 27.

Respondent also recognizes that in 1886, this Court decided ***State v. Shelby***, where the defendant was charged with carrying a firearm upon or about

his person when under the influence of alcohol. ***Shelby***, 2 S.W. at 469. The defendant argued that the statute under which he was charged conflicted with his state constitutional right to bear arms, and this Court rejected this argument on the basis that it was a reasonable regulation on the right to bear arms, and stated that a "citizen must yield" to such legislation. ***Id***. at 469. This reasonableness standard appears to be no longer sufficient after ***Heller***. Further, the facts of that case show that the intoxicated defendant was carrying the weapon, while also concealed, at a hotel, in contrast to Respondent's case where he was sleeping at his home under the influence of a prescribed medication.

While it is true that the legislature can enact laws in regard to the manner in which arms are kept and borne, even this Court has noted,

> We do not desire to be understood as maintaining that in regulating the manner of bearing arms the authority of the legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so born as to render them wholly useless for purpose of defense would be clearly unconstitutional.

State v. Wilforth, 74 Mo. 528, 1881 WL 10279 (Mo. 1881), *quoting* ***State v. Reid***, 1 Ala 612, 616-17 (1840), which also was quoted by ***Heller***, 128 S.Ct. at 2818.

Further, the United States Supreme Court opinion in ***Heller*** also recognized that there are limits to what the legislature can prohibit when dealing with the right to possess and bear arms. There, the legislature's requirement that firearms in the

home must be rendered and kept inoperable at all times made it "impossible for citizens to use them for the core lawful purpose of self-defense, and hence it was unconstitutional." ***Id***. at 2818. The ***Heller*** court also cited with approval an 1846 Georgia decision which struck down a ban on carrying pistols openly as being unconstitutional. ***Id***. at 2809, 2818, *citing* ***Nunn v. State***, 1 Ga. 243, 251 (1846), again indicating that the legislature does not have unlimited discretion when legislating the manner in which arms are kept and borne.

Unconstitutional as applied to Respondent

Appellant argues that Respondent did not expressly make an argument that ***§ 571.030.1(5) (Cum.Supp. 2006)*** was unconstitutional as applied to him (App. Br. at 19). But in Respondent's memorandum in support of his motion to dismiss he specially stated that the issue was whether that statute "as applied to defendant" violated his right to possess a firearm within his home for the legitimate purpose of self-defense (LF 18).

Here, at the time that Respondent was found to have possessed the gun, he was asleep in his chair, in his own home, after having taken prescribed medicine (LF 6-7, 18-19). He had a right to take prescribed medicine and that right should not have removed his constitutional right to keep and bear arms while in his own home.

Conclusion

This Court should affirm the trial court's ruling and find that ***§ 571.030.1(5) (Cum.Supp. 2006)*** is unconstitutional as applied to Respondent and because it is

unconstitutionally overbroad. The constitutional right to keep and bear arms trumps this statute and allows a gun owner to take prescribed medicine or consume alcohol inside his own home without having to first remove his firearms from his home.

CONCLUSION

The constitutional right to keep and bear arms allows a gun owner to drink alcohol or take prescribed medicine in his home without having to first remove his guns should he become substantially impaired from the alcohol or medicine. This Court should affirm the trial court's ruling and find that ***§ 571.030.1(5) (Cum.Supp. 2006)*** is unconstitutional as applied to Respondent and because it is overbroad.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, 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 2009, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,432 words.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan, which was updated on August 27, 2009. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this _____ day of August, 2009, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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