No. 89832

In the
Missouri Supreme Court

STATE OF MISSOURI,

Appellant,

v.

JOHN L. RICHARD,

Respondent.

Appeal from Mississippi County Circuit Court
The Honorable William H. Winchester, III, Judge

RESPONDENT'S REPLY BRIEF

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I.

The trial court erred in dismissing the state's information on the grounds that §571.030.1(5) is unconstitutional, because the statute does not run afoul of the Second Amendment of the United States Constitution or of Article I, Section 23 of the Missouri Constitution in that the statute is not facially unconstitutional because it is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens; and the statute was not unconstitutional as applied to respondent in that he was intoxicated and in possession of a loaded firearm, had threatened himself and others, and was not using the gun in self-defense.

A. Issue presented.

The issue presented is not, as respondent states, whether the constitutional right to keep and bear arms allows a gun owner to take prescribed medication or consume alcohol inside his own home without first removing his firearms (Resp.Br. 9). The issue is whether the state may take steps to keep firearms out of the actual possession of those who are *intoxicated*, and therefore, cannot be trusted to handle firearms responsibly.

Respondent, in crafting the issue, has he does, would have this Court believe that §558.030.1(5), the law in question, applies to anyone who has an alcoholic drink or anyone who takes a prescription drug and has a gun in his or her home. Respondent would have the Court believe that §558.030.1(5) renders it impossible for persons who drink alcohol or who are on prescribed medication to possess guns for defense of themselves and their homes.

But, as discussed below, §558.030.1(5) does not do any of these things and is not as broadly applicable as respondent suggests. Rather, as shall be demonstrated, §558.030.1(5) is narrowly tailored to keep guns out of the hands only of those who are substantially impaired physically or mentally as the result of alcohol or drug use.

B. The Overbreadth Doctrine.

Respondent argues that the overbreadth doctrine should be applied to this case (Resp.Br. 13-20). He is incorrect. There is no basis for application of the overbreadth doctrine in this case.

The United States Supreme Court has not recognized the "overbreadth" doctrine outside the limited context of the First Amendment. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). The overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression. *City of Chicago v. Morales*, 527 U.S. 41, 78, 119 S.Ct. 1849, 1870, n. 2 (1999). Indeed, the United States Supreme Court refers to the doctrine expressly as "the First Amendment overbreadth doctrine." *New York v. Ferber*, 458 U.S. 747, 768, 102 S.Ct. 3348, 3360 (1982).

The traditional rule is that 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. *New York v. Ferber*, 458 U.S. at 767. This rule recognizes two principles of constitutional order: the personal nature of constitutional rights and prudential limitations on constitutional adjudication. *Id.* It is undesirable for the courts to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. *Id.* at 768. By focusing on the

factual situation before the court, the courts face genuine legal problems with data relevant and adequate to an informed judgment. *Id.* This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by weighty countervailing policies. *Id.* The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 634 L.Ed.2d 73 (1980). The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. *Ferber*, 458 U.S. at 769. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, courts have insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face. *Id.* And of course, if the courts are able to cure the invalid reach of the law, there is no longer reason for proscribing the statute's application to unprotected conduct.

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure

> speech' toward conduct and that conduct-even if expressive-falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Ferber at 770, *citing Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2917 (1973).

Respondent cites to this court's opinion in *State v. Beine*, 162 S.W.3d 483 (2005), as authority for applying the overbreadth doctrine (Resp.Br. 14-15). *Beine* applied the overbreadth doctrine despite the fact that no First Amendment rights were implicated and despite the fact that there was no need to engage in any constitutional analysis because this Court had already determined that there was insufficient evidence to support the verdict. *Id.* at 486.

In any event, the majority opinion noted, and the dissenting opinion agreed, that an overbreadth argument is normally cognizable only where a person claims that First Amendment free speech rights are infringed or chilled. *Id.* at 487, *dissent* at 492. The majority in *Beine*, however, asserted that Missouri courts have applied the overbreadth doctrine to non-first amendment cases, citing *City of St. Louis v. Burton*, 478 S.W.2d 320, 323 (Mo. 1972) and *Christian v. Kansas City*, 710 S.W.2d 11, 12-14 (Mo.App.W.D. 1986). *Christian*, however, *was* a First Amendment case; the plaintiff asserted that the loitering ordinance in question jeopardized his freedom of speech and association rights. *Christian*, 710 S.W.2d at 12. And while *Burton* does not explicitly state whether First Amendment principles are at issue, it too addressed a loitering statute, which could implicate First

Amendment principles. In addition, *Burton* found the statute unconstitutionally void for vagueness, which is not a problem in the present case. Nor did *Burton* address the issue of whether the overbreadth doctrine was appropriately applied.

Since there is no basis for applying the First Amendment overbreadth doctrine to the Second Amendment right to keep and bear arms, there is no basis for allowing respondent to challenge the constitutionality of the statute because it might infringe upon conduct that respondent, in fact, was not engaged in.

As it happens, respondent's argument is actually that the statute infringes upon conduct that he was engaged in, since he maintains that he had taken prescription medication, and his case "involves a gun owner's right to drink alcohol or take prescribed medication in his or her own home." (Resp.Br. 15). But appellant is not aware of a constitutional right to drink alcohol. And while for many people it is certainly necessary that they take prescription medication, the statute here does not affect that "right." The fact is that one cannot be charged under §571.030.1(5) merely because one possesses a gun and one has imbibed alcohol or taken prescription medication. The statute is violated only when a person has rendered themselves "intoxicated," which, under Chapter 571, means that the person has "substantially impaired mental or physical capacity resulting from introduction of any substance into the body." §571.010(9). The statute applies to people who are "substantially impaired." Thus, the gun owner who has taken his or her prescription medication responsibly, as prescribed, or those gun owners who drink responsibly, and not to the point where they are substantially impaired physically or mentally, are not subject to the proscriptions of §571.030.1(5). In short, the "rights" of Missouri residents to drink alcohol

or take medication are not at issue. Rather, at issue is whether someone who is substantially impaired physically or mentally should be in possession of a firearm.

Respondent adopts as his argument the same arguments made below to Judge Winchester at the trial court (Resp.Br. 16-17). He is concerned about the person who goes out for a few drinks and is in constructive possession of a gun at home (Resp.Br. 16-17). But as appellant demonstrated in appellant's opening brief, the statute is narrowly drafted in that §571.030.1(5) does not apply if the weapon is not readily accessible (App.Br. 16).

Respondent, however, argues that that exception only applies "when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state." (Resp.Br. 17). But respondent misreads the statute.

The language at issue reads, in pertinent part, as follows:

> Subdivision[] 5 do[es] not apply *when* the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible *or when* such weapons are not readily accessible.

§571.030.3 (emphasis added).

The sentence contains two subordinate clauses modifying when Subdivision 5 does not apply: "when the actor is transporting such weapons" or "when such weapons are not readily accessible." This is the proper way to read the statute because the grammatical rule of parallelism requires that the coordinating conjunction "or" connect two similar grammatical units, i.e., words, phrases, or clauses. To read the sentence respondent's way would violate this rule because it would be read as follows:

> Subdivision (5) does not apply

1) when the actor is transporting such weapons in a nonfunctioning state **(subordinate clause)**

or 2) in an unloaded state when ammunition is not readily accessible **(prepositional phrase (modified by a subordinate clause)**;

or 3) when such weapons are not readily accessible **(subordinate clause)**.

This reading is incorrect because the coordinating conjunctions are not joining similar grammatical units.

Nor can the statute be read joining the clauses "when ammunition is not readily accessible" with "when such weapons are not readily accessible." The clause regarding ammunition modifies "a weapon in an unloaded state." There is no need to require that a weapon in an unloaded state is also not readily accessible, and so the final subordinate clause cannot be read as modifying the phrase "in an unloaded state." Thus, the statute can only be sensibly read as stating that Subdivision (5) does not apply 1) when the actor is transporting such weapons or 2) when such weapons are not readily accessible.

Additionally, such a reading narrowly construes the statute and prevents it from applying to persons who become intoxicated but who do not have actual possession of the gun. Thus, even if appellant's reading of the statute were feasible, it should not be the reading adopted by this Court. When a constitutional and unconstitutional reading of a statute are equally possible, the court must choose the constitutional one. *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo.banc 1996). "This Court is bound to adopt any reasonable reading of the statute that will allow its validity and to resolve any doubts in favor of

constitutionality." *State v. Burns*, 978 S.W.2d 759, 760 (Mo.banc 1998). "When alternative readings of a statute are possible, we must choose the reading that is constitutional." *The Stroh Brewery Co. v. State*, 954 S.W.2d 323, 326 (Mo.banc 1997).

Respondent is also concerned that the statute does not protect the rights of persons who merely keep arms in their home in anticipation of the need to defend themselves. But inasmuch as a defendant cannot be found guilty unless he or she is intoxicated and the weapon is readily accessible (which is essentially the same as actual construction: "has the object on his or her person or within easy reach and convenient control."), citizens can certainly keep their arms in their home in anticipation of the need to defend themselves. And, of course, if the need for self-defense arises, a person – even an intoxicated one -- can use arms to defend themselves.

Respondent acknowledges that the legislature can enact laws in regard to the manner in which arms are kept and borne, but then observes that this Court has said:

> 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.

(Resp.Br. at 19, *citing State v. Wilforth*, 74 Mo. 528 (Mo. 1881)). The United States Supreme Court in *Heller* found the law at issue unconstitutional because it essentially eviscerated the ability to keep and bear arms for self-defense. But the statute at issue here does not destroy the right to bear arms, nor does it render them wholly useless for the purpose of defense. It merely seeks to keep guns out of the hands of those persons whose judgment is impaired by alcohol or drugs. And even those who are substantially impaired

may still use weapons for self-defense. This statute does not essentially act as an absolute ban on the possession of firearms for self-defense, as the statute at issue in ***Heller*** did.

C. Unconstitutional as applied to Respondent.

Respondent argues that the statute was unconstitutional as applied to him because 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." (Resp.Br. 20). But the issue isn't whether respondent had a right to take prescribed medication. Respondent was free to take his medication. The issue is whether respondent had a right to have actual possession of a deadly weapon while in an intoxicated – that is, a "substantially impaired" state[1] -- and thereby put himself, his family, his neighbors, and law enforcement at risk. This is the type of risk to public health, safety, and welfare that the state's police power, and this statute in particular, is designed to address.

D. Conclusion.

In sum, the trial court erred in finding §571.030.1(5) unconstitutional and dismissing the state's information on those grounds, because the statute is not facially unconstitutional or unconstitutional as applied to respondent. Rather, §571.030.1(5) is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens.

[1] The record before the Court does not demonstrate whether respondent took his prescription medication as prescribed and whether a prescribed dose would, by necessity, render him intoxicated.

CONCLUSION

In view of the foregoing, the dismissal of the state's information should be reversed and the charge reinstated.

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 _____ words, excluding the cover, certification and appendix, as determined by Microsoft 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 this _____ day of September, 2009, to:

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