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JURISDICTIONAL STATEMENT

This is an appeal by the State of Missouri, pursuant to § 547.200.2, RSMo 2000, of a decision of the Circuit Court of Lafayette County, Missouri, 15th Judicial Circuit, dismissing a criminal case for failure to prosecute (L.F. 1). Jurisdiction of this appeal originally was vested in the Missouri Court of Appeals, Western District, pursuant to Art. V, § 3 of the Constitution of Missouri. However, on April 16, 2002, following an opinion by the Court of Appeals, dismissing the appeal for lack of final appealable judgment, this Court, on August 27, 2002, sustained the appellant's application to transfer and ordered this case transferred from the Court of Appeals to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Art. V, § 10, of the Constitution of Missouri and Rule 83.03.

STATEMENT OF FACTS

A. Procedural History

On December 9, 1997, Benjamin Thomas Honeycutt allegedly committed the offenses of "failure to drive on right half of the roadway when the roadway was of sufficient width" and "driving while intoxicated" (L.F. 1, 5, 8). On December 22, 1997, Jennifer May, an assistant prosecuting attorney for Lafayette County, 15th Judicial Circuit, filed charges on both matters as separate cases (L.F. 1, 5, 8). A typewritten Information was filed on the DWI case (Tr. 13), but the failure to drive on the right half of the roadway charge was filed by Ms. May signing the Uniform Complaint and Summons (L.F. 8) and filing that document as an Information (L.F. 5).

John B. Neher, the attorney for the respondent, filed an entry of appearance in both cases, and, on March 24, 1998, he requested a jury trial on the cases (L.F. 1-2, 5). A trial date of April 27, 1998, was set for the two cases (L.F. 1-2, 5-6). However, for some reason that does not appear in the record, only the DWI case was formally called on the record on April 27, 1998 (Tr. 3-5). At that time, the DWI case was assigned to Judge John Miller, who originally had been assigned both of the cases (L.F. 1, 3, 5, Tr. 3). Since the failure to drive or the right half of the roadway case was not formally called, the docket sheet merely showed it being continued generally (L.F. 7).

Subsequently, the DWI case proceeded to trial by jury on October 22, 1998 (L.F. 3-4). The respondent was acquitted on that charge (L.F. 4).

After the Honorable Dennis A. Rolf became the new Circuit Judge for the 15th Judicial Circuit on January 1, 2001, Judge Rolf observed that the failure to drive on the right side of the roadway case was still pending and the matter was scheduled for March 19, 2001 (L.F. 7). No record was made on that date (Tr. 1), and the case was continued until April 30, 2001 (L.F. 7).

On April 30, 2001, Mr. Neher made an oral motion to dismiss, claiming a violation of the statute of limitations and "res judicata" (L.F. 7; Tr. 6-9). Since there was nothing formally pending before the court at that time, the State requested that the case be set for trial (Tr. 6). Judge Rolf did not rule on Mr. Neher's oral motion at that time, but continued the case to May 14, 2001, and stated that he would review "the cases" (L.F. 7; Tr. 8).

Subsequently, Mr. Neher filed a formal motion, seeking to dismiss the case on the basis of the violation of the statute of limitations (LF. 7, 9, 10). The State filed a formal response, noting that the signing of the Uniform Complaint and Summons by Ms. May transformed that document into an Information that was filed prior to the expiration of the statute of limitations (L.F. 11-14).

On May 14, 2001, Mr. Neher's motions were heard by Judge Rolf (L.F. 7; Tr. 11-14). After hearing arguments, the judge stated that the "fact that the ticket was signed by the Assistant Prosecutor does make this an Information" (Tr. 12). When the judge asked why the failure to drive on the right side of the roadway case had not been consolidated with the DWI case, Mr. Neher indicated that he did not know why, but

that he had intentionally ignored the failure to drive on the right side of the roadway case to avoid bringing it to the State's attention (L.F. 7; Tr. 13-14).

Judge Rolf then dismissed the case for lack of prosecution (L.F. 7; Tr. 13-14). At the time of this ruling, the respondent had not filed a motion to dismiss because of lack of prosecution, no notice had been given to the State that the Court was considering dismissing the case for lack of prosecution, no request for a speedy trial had been filed, and the State was not given the opportunity to explain why the case had not been tried earlier (L.F. 7; Tr. 11-14).

On April 16, 2002, a three-judge panel of the Missouri Court of Appeals, Western District, issued an opinion, dismissing the case for lack of final appealable judgment. ***State v. Honeycutt*, No. WD60010 (Mo.App. W.D. April 16, 2002).** The court construed Judge Rolf's order as a dismissal without prejudice, and concluded that a trial judge has the inherent authority to dismiss a criminal case for lack of prosecution, albeit without prejudice, meaning that the case can be refiled.

The appellant's alternative motion for rehearing or transfer was denied by the Court of Appeals on May 28, 2002, but on August 27, 2002, this Court sustained the appellant's application to transfer and ordered the case transferred to this Court pursuant to Rule 83.03.

POINT RELIED ON

I.

THE TRIAL COURT ERRED IN DISMISSING THE CHARGES AGAINST THE APPELLANT BECAUSE OF THE STATE'S ALLEGED "FAILURE TO PROSECUTE," BECAUSE § 545.780, RSMo 2000, EXPRESSLY PROVIDES THAT THE "STATE'S FAILURE TO PROSECUTE SHALL [NOT] BE GROUNDS FOR THE DISMISSAL OF THE INDICTMENT OR INFORMATION UNLESS THE COURT ALSO FINDS THAT THE DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL," AND THE TRIAL JUDGE DID NOT FIND THAT THE APPELLANT'S SPEEDY TRIAL RIGHTS HAD BEEN VIOLATED.

***State v. Werner*, 9 S.W.3d 590 (Mo. banc 2000);**

***State v. Mullenix*, 73 S.W.3d 32 (Mo.App. W.D. 2002);**

***State v. Knox*, 697 S.W.2d 261 (Mo.App. W.D. 1985);**

***State ex rel. Griffin v. Smith*, 258 S.W.2d 590 (Mo. banc 1953);**

§ 545.780, RSMo 2000.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING THE CHARGES AGAINST THE APPELLANT BECAUSE OF THE STATE'S ALLEGED "FAILURE TO PROSECUTE," BECAUSE § 545.780, RSMo 2000, EXPRESSLY PROVIDES THAT THE "STATE'S FAILURE TO PROSECUTE SHALL [NOT] BE GROUNDS FOR THE DISMISSAL OF THE INDICTMENT OR INFORMATION UNLESS THE COURT ALSO FINDS THAT THE DEFENDANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL," AND THE TRIAL JUDGE DID NOT FIND THAT THE APPELLANT'S SPEEDY TRIAL RIGHTS HAD BEEN VIOLATED.

In this case, the trial judge, acting *sua sponte*, dismissed an information charging the respondent with the failure to drive on the right side of the roadway, in violation of what is now § 304.015.2, RSMo 2000, because of the State's alleged failure to prosecute (L.F. 7; Tr. 13-14). The respondent did not allege, nor did the judge find, that the respondent had been denied his state or federal constitutional rights to a speedy trial.

As emphasized in the State's application to transfer, the issue presented by this appeal is whether a Missouri trial judge has the inherent or statutory authority to dismiss a criminal case, with or without prejudice, for "failure to prosecute," absent a finding that the defendant has been denied his constitutional rights to a speedy trial.

Although the Court of Appeals held otherwise, it is clear that, in view of the express, unequivocal language contained in § 545.780, RSMo 2000, the answer to this question is a resounding "no."

A. Standard of Review

Although, on direct appeal, an appellate court defers to the trial court's factual findings and credibility determinations, the issue presented by this case involves solely a matter of law, and this Court examines questions of law *de novo*. *State v. Werner*, 9 S.W.3d 590, 595[6] (Mo. banc 2000). Here, the question of whether the trial judge had the power or authority to dismiss the case for lack of prosecution is strictly a matter of law. *See State v. Mullenix*, 73 S.W.3d 32, 34[1] (Mo.App. W.D. 2002).

B. Discussion

In this case, the respondent sought dismissal of the prosecution, but solely on the grounds that it was barred by the statute of limitations and principles of *res judicata*; at no time did he assert that dismissal was warranted because of the State's failure to prosecute, or because his constitutional rights to a speedy trial had been violated (L.F. 7; Tr. 6-9).

Nevertheless, the trial judge, without ruling on either aspect of the respondent's motion to dismiss, decided to dismiss the case for a reason that was never presented to him: the State's supposed failure to prosecute. As previously emphasized, the trial judge did not make a finding that the respondent's constitutional rights to a speedy trial had been violated, nor did the respondent even raise such a claim.

So, the question presented by this appeal is whether a trial judge may dismiss a criminal prosecution, with or without prejudice, absent an express finding that the defendant's constitutional rights to a speedy trial have been infringed. That is to say, does a trial judge have the inherent authority to dismiss a criminal prosecution simply because he or she believes the charges have grown stale?

This is, or at least should be, an extremely simple issue. After all, subsection 2 of § 545.780 states that "[n]either the failure to comply with this section *nor the state's failure to prosecute* shall be grounds for the dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial" (emphasis added).

Under the express terms of this statute, then, a trial judge's authority to dismiss an information or indictment for failure to prosecute depends upon a finding that the accused has been denied his constitutional rights to a speedy trial--a finding which was not made in the present case.[1]

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[1]In stating that "the State, **for the first time, asserts that if a dismissal was warranted, it should have been for a violation of the Act," the Court of Appeals' opinion simply got this issue backwards. Slip op. at 9. The State's contention on appeal was that the case could only be dismissed if there was a speedy trial violation, but further argued that there was no speedy trial violation. The provisions of the Speedy Trial Act were first raised on appeal because the State was not given any**

But the Court of Appeals, despite quoting from the statute, somehow came to the bizarre and unsupportable conclusion that a trial judge *does* have such authority! The Court found that, notwithstanding the plain language of the statute, the statute did not apply, and that trial judges in Missouri have the inherent authority to dismiss criminal charges without prejudice because of the State's failure to prosecute.

In effect, the Court judicially rewrote § 545.780 to read that "[n]either the failure to comply with this section nor the state's failure to prosecute shall be grounds for the dismissal of the indictment or information *with prejudice* unless the court also finds that the defendant has been denied his constitutional right to a speedy trial." However, the italicized words "with prejudice" do not appear in this provision, nor was the Court of Appeals at liberty to read or write them into this enactment, or find that, despite this statute, a trial judge has the inherent authority to dismiss a criminal prosecution for failure to prosecute.

The statute on its face is clear and unambiguous: Absent a finding that an accused has been denied a speedy trial, a trial judge is *not* empowered to dismiss an information or indictment because of the State's failure to prosecute. The legislature could not have stated this any more clearly or more forcefully when it amended the statute in 1986.

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opportunity to file suggestions prior to the trial court's abrupt dismissal for failure to prosecute.

In support of its conclusion that a trial judge may dismiss an information or indictment *without prejudice*, the Court of Appeals cited only a single case as supposedly being directly on point,[2] *State v. Knox*, 697 S.W.2d 261 (Mo.App. W.D. 1985), a case which involved a dismissal *with prejudice*.

Although the opinion does not use the words "prejudice" or "with prejudice" to characterize the dismissal, the State appealed the decision pursuant to what is now § 547.200.2, RSMo 2000, *Knox*, 697 S.W.2d at 262, and, if the dismissal had not been with prejudice, it would not have been a final, appealable judgment, and the State could not have appealed the dismissal. Nor would it have needed to: It could simply

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[2] **In a footnote, the Court cited two cases where a judge dismissed a case without reference to § 545.780. Slip op. at 8 n. 4. As the footnote reflects, however, both dismissals were reversed on other grounds without considering the provisions of § 545.780. Consequently, neither case supports the proposition that a trial court has the inherent authority to dismiss a criminal case for failure to prosecute.**

have refiled the case, a result that would have been wholly inconsistent with the *Knox* holding that the remedy of dismissal was necessary to avoid rendering the statute "futile and meaningless." *Knox*, 697 S.W.2d at 263[1].

***Knox*, then, clearly involved the dismissal *with prejudice* of an information that charged the defendant with stealing based upon the State's alleged violation of the prior version of § 545.780, which merely provided that "[i]f defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall *set the case for trial* as soon as reasonably possible thereafter" (emphasis added).**

In *Knox*, the trial judge, in apparent compliance with the statue, *set* the case for trial as soon as reasonably possible, but the case was never reached and thus was not actually tried on the scheduled trial date. The Court of Appeals, in upholding the trial judge's dismissal of the information, apparently misinterpreted the words "set the case for trial," to mean "tried," and found that the court's failure to dispose of (not "set") the case as soon as reasonably possible constituted a violation of the statute.

Then the Court of Appeals, in deciding the appropriate remedy for this supposed "violation," acknowledged that the statute did not contain any sanctions for noncompliance, but concluded that "the statutory requirement for a reasonably prompt trial setting" must necessarily include the "inherent power of dismissal" because otherwise "the statute itself would be futile and meaningless." *Knox*, 697 S.W.2d at 263.

The Court of Appeals also stated in *Knox* that "[i]t has previously been held in civil cases that courts have inherent authority to dismiss a case for failure to prosecute with due diligence," and that "[n]o valid reason is suggested as to why that inherent authority does not extend to criminal cases." *Knox*, *id.*

It was against this backdrop that the Missouri Legislature almost immediately amended § 545.780 in early 1986. This amendment, which was drafted and introduced as House Bill No. 1158 by State Representative Chris Kelly with the assistance of the Missouri Attorney General's Office, was designed to specifically overrule *Knox*, insofar as it held that a trial judge has the "inherent authority" to dismiss a criminal prosecution for the failure to prosecute.

This 1986 amendment added a new subsection to the statute, which reads, in full, as follows:

> **2. The provisions of this section shall be enforceable by mandamus. Neither the failure to comply with this section *nor the state's failure to prosecute* shall be grounds for dismissal of the indictment or information unless the court also finds that the defendant has been denied his constitutional right to a speedy trial. (Emphasis supplied.)**

The obvious, unmistakable intent of this amendment was to preclude a trial judge from dismissing a *criminal* case because of the State's "failure to prosecute," whether with or without prejudice, in the absence of proof of a constitutional speedy trial violation.

Therefore, it simply made no sense for the Court of Appeals to state, as it did in its opinion, that "[t]he law is murky as to whether such an inherent right exists in a criminal case." What is murky about a statutory enactment that expressly provides that a trial judge cannot dismiss a criminal prosecution for "failure to prosecute" unless the defendant's constitutional right to a speedy trial has been violated? There is no ambiguity in the statute, and, thus, the rules of construction clearly required the Court of Appeals to apply the plain language of the statute without the need for further interpretation or construction.

The Court of Appeals ultimately held, citing only *Knox* as controlling authority, that a trial judge *may* "dismiss an information without prejudice based solely on the non-constitutional grounds of prosecutorial inaction" (court's emphasis). But, as previously emphasized, *Knox* held that a trial judge had the "inherent authority" to dismiss a charge *with* prejudice for failure to prosecute, without proof of a constitutional speedy trial violation, a result that is now expressly foreclosed by *§* 545.780.2, which was specifically enacted in response to *Knox*, and which was clearly designed to *overrule* and *nullify Knox*.

If *Knox* is still good law--which it clearly is not--it would stand for the proposition that a trial judge has the inherent authority to dismiss a charge *with* prejudice (the result in *Knox*), yet the Court of Appeals, citing only *Knox*, held that a trial judge does not have the inherent power to dismiss *with* prejudice. This makes absolutely no sense.

The Court of Appeals, by citing *State ex rel. Griffin v. Smith*, 258 S.W.2d 590, 593 (Mo. banc 1953), preceded by a "*But see*," seemed to

implicitly acknowledge, as it must, that its holding cannot be squared with *Smith*. In that case, this Court upheld a prosecutor's unfettered discretion to file a *nolle prosequi* in a criminal case, regardless of the reason. The opinion by the Court of Appeals in this case held, in effect, that a *trial judge* can file a *nolle prosequi*, over the prosecution's objections, because of the State's failure to prosecute. This is exactly the *opposite* of what *Smith* holds.

Moreover, in *Smith*, this Court, in reaching its conclusion, cited with approval a Texas case which had held that "a judge had no power to enter a *nolle prosequi*, or dismissal of a case pending, against the objection of the district attorney." *Smith*, 258 S.W.2d at 593. *Smith*, then, provides further authority for the proposition that only the prosecutor, not the trial judge, has the power to enter a *nolle prosequi* for any reason, including the "failure to prosecute." Obviously, the Court of Appeals was bound by controlling decisions of this Court and had no authority to disregard or overrule them.

Similarly, in *State v. Morton*, 971 S.W.2d 339, 340[11] (Mo.App. E.D. 1998), the Eastern District of the Court of Appeals held that "[o]nly the prosecutor possesses the power to voluntarily dismiss or nolle prosequi" a criminal charge.

Despite what the Court of Appeals held in its opinion of April 16, 2002, there is nothing "murky" about a Missouri judge's right to dismiss a criminal case for the failure to prosecute where, as here, a defendant's constitutional rights to a speedy trial have not been violated. Rather, the Missouri Legislature addressed that very issue when it amended

§ 545.780 in response to the *Knox* decision. That amendment makes it clear that a trial judge has no such authority, inherent or statutory, absent a constitutional speedy trial violation.

It is more than a little ironic that the Court of Appeals suggested in a footnote that "[t]he legislature . . . is encouraged to . . . explore measures to allow judges to take other action on moribund informations and indictments," less they "sit for years with no court intervention." Again, this footnote, like the body of the Court of Appeals' opinion, gives a blind eye to the unassailable fact that the legislature *did* address this issue when it amended § 545.780 in 1986 in response to the *Knox* decision, and decided that it did not wish to grant trial judges the inherent and essentially unrestrained authority to dismiss criminal charges for failure to prosecute.

Furthermore, there is no merit to the notion that a statutory amendment is needed to allow a trial judge to control its docket, less informations and indictments "sit for years with no intervention." All a trial judge needs to do to dispose of "moribund informations and indictments" is to set them for trial. Once the case is set for trial, the prosecution has only two options: try the case or enter a *nolle prosequi*. In either event, the case will be removed from the court's docket.

In enacting the amendment to § 545.780, the Missouri Legislature obviously meant to overrule *Knox* and restore the law to its pre-*Knox* state, which was that only the prosecutor had the power and authority to *nolle prosequi* a case for any reason, and that trial judges could not

dismiss criminal cases, with or without prejudice, for "failure to prosecute."

This statute, as amended, is clear, straightforward and unambiguous: Trial judges in Missouri do not have the inherent or statutory authority to dismiss a criminal charge for failure to prosecute, with or without prejudice, "unless the court also finds that the defendant has been denied his constitutional right to a speedy trial." § 545.780.2.

What is unclear, or "murky" about this provision? The only possible conclusion that can be drawn from the Court of Appeals' opinion is that it disagreed with this policy determination, and therefore refused to enforce the statute as written. But, as the Court of Appeals ultimately conceded in its opinion, that policy decision rests exclusively in the discretion of the legislature, not the appellate courts of this state.

In holding that, notwithstanding § 545.780.2, a trial judge *does* have the authority to dismiss a criminal case for the State's "failure to prosecute," the opinion by the Court of Appeals turned the statute on its head, since the statute was amended in 1986 to expressly provide that a trial judge does *not* have such authority, unless the court also finds that the defendant was denied his or her constitutional right to a speedy trial.

If the opinion issued by the Court of Appeals were to be adopted by this Court, the effect would be to "overrule" § 545.780.2, and render the 1986 amendment a nullity. Unquestionably, neither this Court nor the Court of Appeals possesses the authority to overrule or ignore a

state statute, even if it disagrees with the legislature's motives or judgment in enacting the statute.

The opinion by the Court of Appeals also is contrary to, and inconsistent with, *Smith* and its progeny, which hold that only the prosecutor has the inherent and unlimited discretion to enter a *nolle prosequi* in a criminal case. The opinion by the Court of Appeals, if adopted by this Court, would now allow the *trial judge* to enter a *nolle prosequi*, over the prosecution's objections, if it believes that the State has failed to aggressively prosecute the case.

This Court should enforce the statute as written, and hold that the trial judge did not have the authority to dismiss the charges against the respondent, with or without prejudice, absent substantial evidence of, and an express finding that, the respondent's constitutional rights to a speedy trial had been violated. Since the respondent did not allege, and the trial judge did not find, that the respondent's constitutional rights to a speedy trial had been violated, the judge erred in dismissing the charge. That ruling was in excess of his jurisdiction and must be reversed.

CONCLUSION

For the reasons presented under Point I, *supra*, of this brief, the order of the trial judge, dismissing the charge against the respondent because of the State's alleged failure to prosecute, without finding that the respondent's constitutional rights to a speedy trial had been violated, was clearly erroneous and must be reversed, with directions that the charge against the respondent **be reinstated.**

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,113 words, excluding the cover, this certification, the signature block and the appendices, as determined by WordPerfect 6.1 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 4th day of October, 2002, to:

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