No. SC92229

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JOEY D. HONEYCUTT,

Respondent.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Jason Brown, Judge

APPELLANT'S AMENDED REPLY BRIEF

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The trial court erred in dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt because the statute under which Honeycutt was charged, section 571.070, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 571.070, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

Respondent Honeycutt argues that the question of whether the ban on retrospective laws contained in article I, section 13 of the Missouri Constitution applies to criminal statutes was answered by this Court's decisions in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006); *R.L. v. Dep't of Corrs.*, 245 S.W.3d 236 (Mo. banc 2008); and *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010). As noted in the State's opening brief, those cases were decided without reference to the Court's decision in *Ex parte Bethurum*, which declared that the constitutional prohibition on retrospective laws related exclusively to civil rights and remedies. *Ex parte Bethurum*, 66 Mo. 548, 550 (1877). While the more recent decisions cited above might be viewed as implicity overruling *Ex parte*

Bethurum, "[u]nder the doctrine of *stare decisis*, a decision of this court should not be lightly overturned, particularly where, as here, the opinion has remained unchanged for many years." *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002). The rule of *stare decisis* does not prevent this Court from overruling *Ex parte Bethurum* should it find that decision to be clearly erroneous and manifestly wrong. *Id.* at 390-91. But such a finding should be made explicitly and not by mere implication.

Honeycutt cites to *Phillips* for the proposition that the prohibition on retrospective laws contained in article I, section 13 is "of a more comprehensive nature than is found in any of the constitutions of but three other states in the Union." (Resp.'s Amend. Brf., p. 7). That phrase appears in *Phillips* as part of a quotation from an argument presented during the 1875 Constitutional Convention debates. *Phillips*, 194 S.W.3d at 850. Honeycutt goes on to argue that the use of the above-quoted phrase in *Phillips*, and later in *R.L.*, supports the conclusion that the ban on retrospective laws applies to all statutes, criminal and civil. But as noted in the State's opening brief, and conceded by Honeycutt, the debate remarks quoted in *Phillips* were made in support of an unsuccessful attempt to remove the ban on *ex post facto* laws from the Constitution, on the theory

that a ban on retrospective laws was broad enough to cover *ex post facto* criminal statutes.

Honeycutt contends that the argument quoted in *Phillips* shows that the ban on retrospective laws was understood to encompass criminal statutes. But the meaning of a constitutional provision is not derived by looking to provisions that were not passed or to the views held by opponents of the provision that was adopted. *District of Columbia v. Heller*, 554 U.S. 570, 590 and n.12 (2008). Honeycutt's further argument that the delegate's unsuccessful argument foreshadowed the opinions in *Phillips*, *R.L.*, and *F.R.* amounts to an assertion that the Court is free to substitute its own understanding of the meaning of a term for the meaning that it was understood to have at the time of adoption as reflected by the votes of the majority of the delegates. That position is contrary to the Court's established rules for construing constitutional provisions. *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 872 (Mo. banc 2006); *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002).

When this Court quoted that portion of the 1875 Convention debate in *Phillips*, it did not do so for the proposition that the ban on retrospective laws covered criminal statutes. To the contrary, the entirety of the *Phillips* opinion was that because the sex offender registration statute at issue was civil in nature and not criminal it was not subject to the prohibition against

ex post facto laws, but was subject to the prohibition against retrospective laws. *Phillips*, 194 S.W.3d at 842, 852. And while the Court summarized that portion of *Phillips* in applying the ban on retrospective laws to a criminal statute in *R.L.*, it did so without any discussion about whether the ban on retrospective laws was understood to apply to criminal statutes at the time it was adopted, and without any acknowledgement that the ban had previously been construed as being limited to civil rights and remedies.

The actions of the delegates who adopted the predecessor to the current article I, section 13, and the contemporaneous interpretation of that provision by this Court in *Ex parte Bethurum* make clear that the phrase "laws retrospective in their operation," was understood to mean civil laws and did not encompass criminal statutes, which were instead subject only to the prohibition against *ex post facto* laws.

Honeycutt misconstrues this Court's opinions in *Ex parte Bethurum* and in *State v. Kyle* in arguing that the Court recognized that criminal laws could be encompassed within the ban on laws retrospective in their operation. *See* (Resp.'s Amend. Brf., pp. 11-12, 13-14). Honeycutt claims that the Court in *Ex parte Bethurum* found that the challenged law was not retrospective because it did not work an injustice upon Bethurum or deprive him of a substantial right. The opinion says nothing of the sort. The Court first considered whether the law was *ex post facto* and concluded that it was not

because it did not meet the criteria for an *ex post facto* law as defined by the United States Supreme Court in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). *Ex parte Bethurum*, 66 Mo. at 548-49. The Court next turned to the question of whether the law was retrospective. *Id.* at 549. After stating in no uncertain terms that "the phrase 'law retrospective in its operation,' as used in the bill of rights, has no application to crimes and punishment, or criminal procedure," the Court concluded that the challenged law "is neither an *ex post facto* law nor a law retrospective in its operation." *Id.* at 552-53. What the Court was saying was that the law was not *ex post facto* because it did not fall under the *Calder v. Bull* criteria and that it was not retrospective in its operation because it concerned crimes and punishment, placing it outside the scope of the ban on laws retrospective in their operation.

Honeycutt also quotes a passage from the subsequent opinion of *State v. Kyle* that he says demonstrates the Court's contemplation that a criminal statute could be unlawfully retrospective. But the phrase that Appellant quotes comes in the context of a discussion about whether the challenged constitutional provision violated the ban against *ex post facto* laws. *State v. Kyle*, 166 Mo. 287, 305-06, 65 S.W. 763, 768 (1901). The Court found that the provision concerned a mode of procedure, and that a change in a mode of procedure that did not infringe a substantial right of the defendant would not fall within the prohibition against *ex post facto* laws. *Id.*, 166 Mo. at 306, 65

S.W. at 768. The discussion, when read in its entirety, does not suggest that a criminal statute that does not violate the ban against *ex post facto* laws can nevertheless be invalidated under the separate ban on laws retrospective in their operation that is contained in article I, section 13 of the Constitution.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt should be reversed and the case should be remanded to the trial court for reinstatement of Count III and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 1,507 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 28th day of May, 2013, to:

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