No. SC92491

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JASON REECE PETERSON,

Respondent.

Appeal from Carroll County Circuit Court
Eighth Judicial Circuit
The Honorable Kevin L. Walden, Judge

APPELLANT'S AMENDED REPLY BRIEF

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ARGUMENT

The trial court erred in dismissing the felony indictment filed against Respondent Jason Reece Peterson because the statute under which Peterson was charged, section 566.150, 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 566.150, 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.

1. Plain language of article I, section 13 does not compel a finding that ban on laws retrospective in their operation extends to criminal statutes.

Peterson argues that because the ban on laws retrospective in their operation does not explicitly limit that prohibition to civil rights and remedies, the ban must necessarily extend to criminal statutes. What that argument ignores is that article I, section 13 also includes a ban on *ex post facto* laws that does not explicitly limit that prohibition to criminal laws. Yet the ban on *ex post facto* laws has always been recognized as being limited to criminal laws. *See*, *e.g.*, *Ex parte Bethurum*, 66 Mo. 545, 548-49 (1877); *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006). That recognition is consistent with the principle that terms that have acquired a technical meaning under

the law shall be understood according to that meaning. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. banc 2012). That rule of construction is a long-recognized limitation on the plain and ordinary meaning rule upon which Peterson relies. *Rathjen v. Reorganized Sch. Dist. R-II*, 365 Mo. 518, 529, 284 S.W.2d 516, 523 (1955). It is also consistent with the codified rule for statutory interpretation. § 1.090, RSMo 2000.

Furthermore, this Court has stated that "**[t]he fundamental purpose** in construing a constitutional provision is to ascertain and give effect to the intent of the framers and the people who adopted it." *Rathjen*, 365 Mo. at 529, 284 S.W.2d at 524 (emphasis added, internal quotation marks and citations omitted). While Peterson cites to a single case that questioned the use of constitutional convention debates to provide meaning to a constitutional provision,[1] there are many cases where this Court has cited to the constitutional convention proceedings in trying to ascertain the meaning of a particular term or provision. *See*, *e.g.*, *Rathjen*, 365 Mo. at 531, 284 S.W.2d at 530 (citing committee reports of 1943-1944 Constitutional Convention to construe the scope of the term "school purposes"); *Phillips*, 194 S.W.3d at 850 and *R.L. v. Dep't. of Corrs.*, 245 S.W.3d 236, 237 (Mo. banc

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[1] *Independence Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007).

2008)(quoting debates of the 1875 Constitutional Convention to explain the scope of the ban on retrospective laws);[2] *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 869-70 (Mo. banc 2006) (citing debates of the 1875 Constitutional Convention in addressing the history and purpose behind the constitutional ban on special legislation); *Brown v. Carnahan*, 370 S.W.3d 637, 651-52 (Mo. banc 2012) (citing debates of the 1943-1944 Constitutional Convention to construe state auditor's authority to prepare fiscal notes and fiscal note summaries of initiative petitions).

A particularly apt case is *Missouri Health Care Ass'n v. Holden*. The Court in that case cited the remarks of a delegate to the 1943-1944 Constitutional Convention to support a statement that the constitution does not permit the State to spend money that it does not have, even though the constitution does not explicitly refer to a "balanced budget." *Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 507 and n.2 (Mo. banc 2002). *Holden*

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[2] The portion of the debate quoted in *Phillips* and repeated in *R.L.* is a statement made by the proponent of an unsuccessful attempt to remove from the constitution the specific bans on *ex post facto* laws and laws impairing contracts. As explained in the State's opening brief, the failure of that proposal demonstrates that the convention delegates understood the ban on retrospective laws to be limited to civil rights and remedies.

thus demonstrates the relevance of the constitutional convention debates in ascertaining the understood scope and purpose behind constitutional provisions.

Even more important than the remarks of delegates are the actions taken by them. What the State wishes to emphasize about the proceedings of the 1875 Constitutional Convention that are referenced in the opening brief are the votes taken to adopt or reject various measures – in particular the rejection of the proposal to remove the references to *ex post facto* laws and laws impairing contracts on the theory that those prohibitions were redundant to the prohibition against laws retrospective in their operation. The debate remarks cited in the opening brief give context to those proposals, but it is the votes themselves that are the best evidence of the delegates' understanding of what the ban on retrospective laws was designed to accomplish.

2. Additional canons of construction cited by Peterson actually demonstrate limited scope of ban on retrospective laws.

Peterson first argues that because article I, section 13 specifically bans laws impairing the obligations of contracts, the ban on retrospective laws would be rendered redundant if it were limited to civil rights and remedies. But as noted above, the same redundancy exists if the retrospective ban is

extended to crimes and criminal procedure, given the specific prohibition against *ex post facto* laws, which are explicitly limited to criminal laws.

3. Case law subsequent to *Ex parte Bethurum* does not demonstrate a widely or long held belief that the ban on retrospective laws applies to crimes and criminal procedure.

Peterson states that the limitation on the ban on retrospective laws to civil rights and remedies can only be found in dicta in *Ex parte Bethurum* and in two other cases cited in the State's opening brief: *State v. Kyle*, 166 Mo., 65 S.W. 763 (1901) and *State v. Johnson*, 81 Mo. 60 (1883). Aside from those cases, Peterson says that he can find no others that interpret the ban on retrospective laws as applying to civil rights and remedies alone.[3] That is hardly surprising since all of the cases known to the State between *Ex parte Bethurum* and *R.L. v. Dep't. of Corr.*, *supra*, that applied the ban on retrospective laws involved civil laws. There was therefore no need to restate the scope of the ban since those cases fell within that scope.

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[3] The State did, however, on page 25 of its opening brief cite to cases handed down between 1982 and 2010 that recognized, albeit in dicta, that *ex post facto* laws are limited to crimes and punishment and criminal procedure, while the ban on retrospective laws is limited to civil rights and remedies.

Peterson goes on to argue that *R.L.* and *F.R. v. St. Charles County Sheriff's Dep't.*, 301 S.W.3d 56 (Mo. banc 2010) effectively overruled *Ex parte Bethurum* when the ban on retrospective laws was used to invalidate criminal statutes in those cases. As explained in the State's opening brief, those cases were decided without any consideration or discussion of *Ex parte Bethurum*. While *R.L.* and *F.R.* could be viewed as implicitly 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 implication.

4. Peterson's policy argument asks this Court to substitute its judgment for that of the legislature.

Peterson raises arguments about the wisdom and efficacy of the statute under which he was charged. Those arguments ignore the well-settled proposition that, "[i]n determining the validity of statutes enacted under the police power, however, courts must disregard all matters relating to the wisdom, adequacy, propriety, expediency or policy of the act in question." *State v. Ewing*, 518 S.W.2d 643, 648 (Mo. 1975), *see also*, *Budding v. SSM*

Healthcare Sys., 19 S.W.3d 678, 682 (Mo. banc 2000) (stating that courts must defer to legislature's determinations of public policy). Furthermore, Peterson relies on recidivism statistics based on subsquent convictions, while experts in the field have noted that subsequent convictions, and even subsequent arrests, understate the actual amount of reoffending because they do not account for undetected offenses. *See*, *e.g.*, *Turner v. State*, 341 S.W.3d 750, 753 (Mo. App. S.D. 2011) (recounting expert testimony in Sexually Violent Predator commitment trial).

5. Peterson's arguments about the retrospective effect of section 566.150, RSMo misstates the requirements of the statute.

Peterson presents arguments about why section 566.150, RSMo is retrospective as applied to him. In doing so, he misstates what the statute prohibits and what it requires. The statute does not prohibit Peterson or any other person subject to the statute from ever venturing within 500 feet of any public park or swimming pool. First of all, the restriction as it relates to parks covers only parks that have playground equipment. § 566.150.1, RSMo Cum. Supp. 2009. The restriction is further limited to being "present within" or "loitering" within 500 feet of such a park. *Id.* The statute thus does not prohibit residing within 500 feet of a qualifying park or swimming pool, or entering a business establishment located within 500 feet of a qualifying park or swimming pool, or carrying on any other legitimate activity within 500 feet

(but not inside) of a qualifying park or swimming pool. To the extent that Peterson argues that "loitering" is a vague term, that is a different challenge for a different case, since Peterson was charged with being present within a park containing playground equipment, and not with loitering within 500 feet of such a park. (L.F. 26-27).

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing the felony indictment filed against Respondent Jason Reece Peterson should be reversed, and the case should be remanded to the trial court for reinstatement of the indictment 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 1,978 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 17th day of June, 2013, to:

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