No. SC92786

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

EDWIN CAREY,

Respondent.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Calvin R. Holden, Judge

APPELLANT'S REPLY BRIEF

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The trial court erred in dismissing the felony information filed against Respondent Edwin Carey because the statute under which Carey 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. Adopting Carey's plain language argument would result in an inconsistent construction of different provisions contained in article I, section 13.

Carey argues that this Court must apply the plain language of the ban on retrospective laws found in article I, section 13, and that the plain language of that provision does not explicitly limit the ban to civil rights and remedies. The principle that terms that have acquired a technical meaning under the law shall be understood according to that meaning is a long-recognized limitation on the plain and ordinary meaning rule upon which Carey relies. *Rathjen v. Reorganized Sch. Dist. R-II*, 365 Mo. 518, 529, 284 S.W.2d 516, 523 (1955). The Court is thus not compelled to apply a plain language construction to the ban on retrospective laws.

A plain language application is particularly inappropriate in this case, given that article I, section 13 also includes a ban on *ex post facto* laws that has always been construed in its technical sense as being limited to criminal laws, even though the plain language of that provision does not contain that limitation. *See*, *e.g.*, *Ex parte Bethurum*, 66 Mo. 545, 548-49 (1877); *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006). Accordingly, if this Court were to adopt Carey's plain language argument, the result would be that one provision of article I, section 13 – the ban on retrospective laws – would be given a plain language construction while a different provision of article I, section 13 – the ban on *ex post facto* laws – would be given a technical construction. That approach would conflict with the rule that constitutional provisions are to be construed in harmony with related provisions. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991); *State ex rel. Kowats v. Arnold*, 356 Mo. 661, 671, 204 S.W.2d 254, 259 (1947).

2. Constitutional convention proceedings have frequently been used to construe constitutional provisions.

This Court has stated that "**The 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 Carey 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 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.

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

[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.

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* 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.

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.

Carey states that he can find no case since *Ex parte Bethurum* that has explicitly limited the ban on retrospective laws to civil rights and remedies. 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.* 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.

Carey 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 mere implication.

Carey cites to *State v. Kyle*, 166 Mo. 287, 65 S.W. 763 (1901) as a case that demonstrates that the ban on retrospective laws was intended to encompass criminal proceedings. The State discussed *Kyle* in its opening brief as a case that actually supports the proposition that criminal cases are not subject to the ban on retrospective laws. *See* (Appellant's Amend. Brf., pp 13-14).

3. Carey's arguments about the retrospective effect of section 566.150, RSMo misstate the requirements of the statute.

Carey 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 Carey or any other person subject to the statute from ever venturing within 500 feet of every public park. First of all, the restriction as it relates to parks covers only parks that have playground equipment or a public swimming pool. § 566.150.1, RSMo Cum. Supp. 2009. The restriction is further limited to being "present in" 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

entering a business establishment located within 500 feet of a qualifying park, or carrying on any other legitimate activity within 500 feet (but not inside of) a qualifying park.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing the felony information filed against Respondent Edwin Carey 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 1,709 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 2nd day of August, 2013, to:

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