

SC97631

In the Supreme Court of Missouri

GARY MITCHELL,

Appellant,

v.

KENNY JONES, CHAIRMAN OF THE MISSOURI BOARD OF
PROBATION AND PAROLE,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Circuit Judge

SUBSTITUTE RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This case concerns a prisoner's challenge to his parole eligibility date. Appellant Gary Mitchell sued Respondent Kenny Jones, Chairman of the Missouri Board of Probation and Parole, for declaratory judgment in the Cole County Circuit Court seeking a declaration that he was eligible for parole. The circuit court granted Respondent's motion to dismiss and entered judgment against Mitchell. A circuit court's grant of a motion to dismiss like this judgment is a final, appealable judgment on the merits. *Stone v. Missouri Bd. of Prob. and Parole*, 313 S.W.3d 158, 160 (Mo. App. W.D. 2010).

On appeal, the Missouri Court of Appeals affirmed. After opinion, the Court of Appeals granted transfer to this Court pursuant to 83.02 because the case involves an issue of general interest and importance. Mo. Const. Art. V, § 10. This Court is the highest court in Missouri and "[i]ts jurisdiction shall be coextensive with the state." Mo. Const. Art. V, § 3. The Constitution thus vests this Court with "[s]upervisory authority over all courts." Mo. Const. Art. V, § 4.1.

INTRODUCTION

The Cole County Circuit Court correctly denied Gary Mitchell's petition for declaratory judgment because he cannot challenge the validity of his sentence in a declaratory judgment action. The Cole County Circuit Court also correctly denied Mitchell's motion for declaratory judgment on the merits, holding that Mo. Rev. Stat. § 1.160 bars the retroactive application of amendments to criminal statutes.

This Court should affirm the Cole County Circuit Court's decision. Mo. Rev. Stat. § 1.160 bars the retroactive application of the amendment to the criminal statute in Mitchell's case because the legislature repealed the statutes that governed Mitchell's offense and sentence and the statute that replaced it affected Mitchell's punishment.

STATEMENT OF FACTS

After a jury trial, Gary Mitchell was found guilty of the class A felony of drug trafficking in the second degree, *see* Mo. Rev. Stat. § 195.223, for which he received a sentence of ten years' imprisonment without probation or parole from the Jasper County Circuit Court (L.F. 4), *see State v. Mitchell*, 442 S.W.3d 923 (Mo. App. S.D. 1992). Because Mitchell was a prior drug offender, the court was required to sentence him to a term to be served without probation or parole. Mo. Rev. Stat. § 195.295.3 (2000) (repealed). Mitchell challenged his conviction under Rule 29.15, and that action is currently pending. *See Gary Mitchell v. State of Missouri*, 15AO-CC00023-01.¹

Effective January 1, 2017, the General Assembly repealed the statutes governing drug offenses in Missouri Statute Chapter 195 and passed new laws governing several drug offenses in Chapter 579. Under the new criminal code, convictions for second-degree drug trafficking carry a lighter sentence that can be served with eligibility for parole. Mo. Rev. Stat. § 579.068 (2017).

On May 11, 2017, Mitchell filed a petition for declaratory judgment in the Cole County Circuit Court (L.F. 3). Mitchell alleged that the Legislature's repeal of Section 195.295 removed the "no-parole" provision of his sentence.

¹ On August 31, 2017, the Court of Appeals reversed and remanded the Rule 29.15 motion for an abandonment inquiry.

Accordingly, he argued, the Missouri Board of Probation and Parole should treat him as eligible for parole (L.F. 4).

Respondent filed a motion to dismiss (L.F. 8) because Mitchell was effectively challenging his sentence (L.F. 9). Respondent also alleged that Mitchell failed to state a claim on which relief could be granted. Missouri law specifically prohibits the retroactive application of amendments to criminal statutes. Mo. Rev. Stat. § 1.160 (“[N]o offense committed and no . . . penalty or forfeiture incurred. . . shall be affected by the [subsequent] repeal or amendment” of the statutory provision governing the offense.). Under the law in effect at the time of Mitchell’s conviction and sentence, the trial court was required to sentence him to “the authorized term of imprisonment for a class A felony, which term shall be served without probation or parole.” Mo. Rev. Stat. § 195.295.3 (2000) (repealed). The circuit court dismissed the petition on August 14, 2017 (L.F. 12).

On September 5, 2017, Mitchell filed a notice of appeal in the Court of Appeals (L.F. 2). After argument, the Court of Appeals, affirmed the circuit court’s ruling, holding that Mo. Rev. Stat. § 1.160 barred the retroactive application of the amendment to the prior drug offender statute. Nevertheless, pursuant to Rule 83.02, the Court of Appeals transferred the case to this Court on its own motion.

ARGUMENT

I. The Cole County Circuit Court properly dismissed Mitchell’s petition for declaratory judgment because the 2017 amendment to the criminal code did not affect Mitchell’s parole eligibility, in that section 1.160 bars the retroactive application of amendments to criminal statutes that affect the penalty of an offense. –Responds to Point I.

In point one, Mitchell asserts that the Cole County Circuit Court erred in holding that the legislature’s repeal of the prior drug offender statute does not apply retroactively (App. Br. 5). This is not so. *State ex rel. Nixon v. Russell*, 129 S.W.3d 867,870-87 (Mo. 2004), provides that changes to a statute do not apply retroactively if there has been a repeal or amendment to a previously existing statutory provision, and that repealed or amended provision affects the prosecution, penalty, or punishment of the offense at issue.

Standard of Review

“The standard of review for a trial court’s grant of a motion to dismiss is de novo.” *Ward v. West County Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. 2013) (citing *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. 2009)). “When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are assumed true and construed in favor of the plaintiffs.” *Id.* “If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim.” *Id.*

Analysis

The Cole County Circuit Court did not err in granting the motion to dismiss because it could not retroactively apply the amendments to Chapters 195 and 597 to make Mitchell immediately eligible for parole. Missouri law requires Mitchell to be sentenced under the law in effect at the time of his offense. *See* Mo. Rev. Stat. § 1.160; *see also Edwards v. State*, 215 S.W.3d 292, 294 (Mo. App. S.D. 2007). Section 1.160 states that:

No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing procedural laws.

Mo. Rev. Stat. § 1.160. The statute provides that neither Mitchell's offense, nor the penalty for his offense can be affected by subsequent repeal or amendment of the relevant statutory provisions. *See also Prapotnik v. Crowe*, 55 S.W.3d 914, 918 (Mo. App. W.D. 2001) (holding that Section 1.160 is designed to have an "*ex post facto*" effect on behalf of the State avoid claims that an offender is entitled to the benefit of changes in the law after the date of the offense).

Mitchell was convicted of second-degree drug trafficking. Mo. Rev. Stat. § 195.223 (2000) (repealed). Because Mitchell was a prior drug offender, his

sentence was governed by Section 195.295.3 (2000) (repealed). The General Assembly has since repealed the statutes governing both the offense and the sentence and replaced them with new statutes. However, Mitchell cannot receive the lighter punishment provided by the new criminal code because those laws were not in effect at the time of his offense. Mo. Rev. Stat. § 1.160.

Citing *Russell*, 129 S.W.3d at 867, and *Irvn v. Kempker*, 152 S.W.3d 358 (Mo. App. W.D. 2004), Mitchell argues that the provisions of the new criminal code can apply retroactively to him (App. Br. 7). Yet those cases are inapposite for two reasons. First, *Russell* and *Irvn* apply only to laws that do not repeal or amend a previously existing statute. Second, those cases do not apply to changes in laws creating offenses and defining sentencing.

In *Russell*, this Court found that section 558.016.8, allowing certain prisoners to petition for parole, applied retroactively to inmates already in prison. *Russell*, 129 S.W.3d at 870. The Court found that retroactive application of section 558.016.8 was not barred by § 1.160 because § 558.016.8 “is a new statutory provision; it does not repeal or amend any previously existing statute.” *Id.* at 870; *see also Irvn*, 152 S.W.3d at 362. That reasoning does not apply here. The General Assembly’s changes to the criminal code in 2017 completely repealed the statutes governing Mitchell’s offenses and enacted new statutes redefining the offense, the applicable punishment, and the applicable sentencing enhancements. *See* Mo. Rev. Stat. §§ 579.068,

579.223, 195.295 (2000) (repealed); Mo. Rev. Stat. §§ 579.068, 579.170 (2017). Mitchell cannot argue that the overhaul of the criminal code created a new statutory provision that affected only his parole eligibility; rather, the new criminal code repealed and redefined the offense of second-degree drug trafficking. The laws governing that new offense do not apply to Mitchell. Mo. Rev. Stat. § 1.160.

The *Russell* court also based its decision on the fact that § 558.016.8 did not alter the inmate's crime or sentence, but affected only his ability to petition for parole. *Russell*, 129 S.W.3d at 870 (“The granting of parole does not reduce the sentence imposed.”); *see also Irvin*, 152 S.W.2d at 362. However, that holding does not apply to this case because the new statutes that Mitchell seeks to apply to his offenses altered the offense itself and the sentence imposed. Mo. Rev. Stat. §§ 195.223, 195.275, 195.295 (2000) (repealed); §§ 579.068, 579.170 (2017).

The Court of Appeals decision in *Christopher Fields v. Missouri Bd. of Prob. and Parole*, 559 S.W.3d 12 (Mo. App. W.D. 2018), is persuasive in determining whether parole eligibility affects one's sentence. In 2012, Christopher Fields was convicted of involuntary manslaughter and received a nine-year sentence. *Id* at 14. Fields was required to serve eighty-five percent of his sentence. *Id*. In 2017, the legislature enacted new law, which removed the eighty-five percent rule, replacing the statute in which Fields was

convicted. *Id.* at 15. In asserting the claim that he no longer had to serve eighty-five percent of his sentence due to the change in the law, Fields attempted to rely on *Russell*. *Id.* at 17. But the Court of Appeals held that Fields' parole eligibility did affect his punishment and that Mo. Rev. Stat. § 1.160 barred the retroactive application of the repealed and replaced criminal statute. *Id.* at 18.

Here, like in *Fields*, there was a repeal of the criminal statute, and the repeal affected the punishment of the offense.² Mitchell argues that *Fields* cannot be reconciled with this Court's decision in *Russell* (App. Br. 10). But, the *Fields* decision is not contrary to this Court's decision in *Russell*. Rather, *Fields* relies on *Russell* and further addresses whether parole ineligibility language within the statute that defines the offense affects an offender's punishment. *Id.* at 18–19.

Mitchell also argues that Mo. Rev. Stat. § 1.160 does not apply in his case because the repeal of Mo. Rev. Stat. § 195.295 did not involve a change to the substantive law governing his offense (App. Br. 10). When determining whether a law is substantive or procedural, this Court has explained that:

² In *Fields*, the parole ineligibility language was found in the statute that defined the offense. *Id.* at 14. Here, the parole ineligibility language is found in the statute defining the authorized term of imprisonment for the offense. The statute defining the term of imprisonment expressly referenced the offense of second-degree drug trafficking, and specifically required that the sentence be served without the eligibility of parole.

Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action while procedural law is the machinery used for carrying on the suit.

Wilkes v. Missouri Highway and Transp. Comm'n, 762 S.W.2d 27, 28 (Mo. 1988). There is no question that the statute defining second-degree drug trafficking (Mo. Rev. Stat. § 195.223) and the prior drug offender statute (Mo. Rev. Stat. § 195.295.3), “define and regulate” Mitchell’s rights; these statutes create the offense of which Mitchell stands convicted and mandate the punishment for that offense. Accordingly, these laws are substantive and the plain language of Mo. Rev. Stat. § 1.160 bars Mitchell’s claim.

Mitchell suggests that “it is beyond dispute” that the legislature intended to have the amendments to the criminal code apply retroactively (App. Br. 13). However, this Court has emphasized that there is no need to resort to statutory construction when the legislature’s intent can be ascertained by the plain language of the statute. *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. 2010) (“[C]ourts must . . . refrain from applying rules of construction unless there is some ambiguity.”); *see also State v. Vaughan*, 366 S.W.3d 513, 518 (Mo. 2012) (“Courts cannot add words to a statute under the auspice of statutory construction. (citation omitted)). Here, there is no ambiguity to warrant the need to consider the legislative intent because the

plain language of Mo. Rev. Stat. § 1.160 clearly provides that laws affecting the penalty of an offense are not to be applied retroactively.

The Cole County Circuit Court did not err in granting Respondent's motion to dismiss.

II. The Cole County Circuit Court properly dismissed Mitchell's petition for declaratory judgment because Mitchell cannot challenge the validity of his conviction and sentence in an action for declaratory judgment. –Responds to Point I.

Standard of Review

“The standard of review for a trial court's grant of a motion to dismiss is de novo.” *Ward*, 403 S.W.3d at 84; (citing *Lynch*, 260 S.W.3d at 836). “When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are assumed true and construed in favor of the plaintiffs.” *Id.* “If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim.” *Id.*

Analysis

The Cole County Circuit Court properly declined to change the terms of the Jasper County Circuit Court's judgment and sentence. The Jasper County Circuit Court determined that Mitchell was a prior drug offender and sentenced him to fifteen years' imprisonment without probation or parole. *State v. Mitchell*, 442 S.W.3d 923 (Mo. App. S.D. 2017). An offender cannot file a petition for declaratory judgment to challenge a conviction or sentence. *See*

Charron v. State, 257 S.W.3d 147, 151-3 (Mo. App. W.D. 2008). Moreover, an offender cannot circumvent his direct appeal or his post-conviction remedy by filing a declaratory judgment action. *Cooper v. State*, 818 S.W.2d 653, 654 (Mo. App. W.D. 1991). In the present case, the Jasper County Circuit Court determined that Mitchell was ineligible for parole as part of its sentence and judgment. A challenge to that determination should occur in a Rule 29.15 motion against the State, not a declaratory judgment action against the Parole Board. The Board was only following the order of the Jasper County Circuit Court. The Cole County Circuit Court properly dismissed the suit.

The Cole County Circuit Court did not err in granting Respondent's motion to dismiss.

CONCLUSION

For these reasons, the Court should affirm the circuit court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the Case.Net system and thereby served to counsel for Petitioner, this 5th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,016 words, excluding the cover, and certification, as determined by Microsoft Word 2010 software.

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