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SUPREME COURT OF MISSOURI

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JUSTIN D. O'BRIEN

Petitioner/Appellant,

vs.

SANDY KARSTEN
Director, Department of Public Safety

Respondent.

.....

Case No. SC97656

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APPELLANT'S REPLY BRIEF

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ARGUMENT

Introduction:

It is always a privilege to have the opportunity to have one's arguments on behalf of a client sharpened by extraordinary insight of counsel who serve in the Attorney General's Office. As required by Rule 84.04(g), Appellant does not again argue the issues he raised in his principle brief, but responds to the arguments posed in Respondent's brief, with a single exception.

That exception has to do with the standard of review. The parties appear to be in complete agreement as to the standard of review, but because this case raises a constitutional issue there is a fine point to be made. As to the constitutional issue alone, this Court reviews the findings of the Circuit Court. Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d 955 (Mo. banc 1999). This is because the Administrative Hearing Commission lacks authority to consider such issues. In all other respects, as suggested by the parties, the Court reviews the combined decisions of the Administrative Hearing Commission and the Director. § 621.145 RSMo.

Although counsel failed to note this point in Appellant's principle brief, it was brought to the attention of the Director's counsel in private correspondence on April 15, 2019.

Point I:

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O’Brien, because an administrative agency’s determination that an individual committed a criminal offense violates the Separation of Powers provisions of the Missouri Constitution (Article II, §1), reviewable under § 536.140.2(1) RSMo., in that the determination of culpability for a criminal offense must be conducted before the judiciary and not administrative agencies.

Argument

The Director responded to O’Brien’s first point by arguing that because the purpose of discipline in a professional licensing case is not to punish, but rather to protect the public, the reliance upon an administrative fact finder to determine that a criminal law has been violated is not unconstitutional. But the three cases she relies on, when closely examined, support O’Brien’s complaint.

In Younge v. State Board of Registration for the Healing Arts, 451 S.W.2d 346, 347 (Mo. 1969), the issue was whether the license of a physician who had performed an unlawful abortion was subject to discipline after he was acquitted criminally for the same conduct. Notably, the criminal indictment occurred after the filing of the disciplinary complaint. Id. And, unsurprisingly, the acquittal preceded the administrative hearing.¹

¹ Ordinarily, to protect the Constitutional rights of the criminally accused, administrative proceedings are stayed pending disposition of a criminal case.

Id. The critical detail is that the administrative proceeding was not premised on the criminal charge at all. Although the Supreme Court did not set out the disciplinary statute in its decision, unlawful abortions were specifically proscribed in it.

§ 334.100.1(3) RSMo. (as adopted by L. 1963, pp. 429-31; Reply App. A3).

Likewise, this Court was unimpressed with the fact that the criminal prosecution had not ended in conviction for an attorney who had surrendered his license rather than face a disciplinary hearing. In re: Sympson, 322 S.W.2d 808 (Mo. banc 1959). Again, although the Court did not see fit to set out the different authorities, the rules of this Court do not attempt to incorporate the criminal law. Cf. § 590.080.1(2) RSMo., upon which the case against O'Brien is premised, that specifically does.

Similarly, Lewis v. Frick, 233 U.S. 291 (1914) demonstrates that the government of the United States does not combine its criminal and immigration laws. The facts underlying the criminal and administrative case may be the same, but there is no hint in the decision that the criminal statute was incorporated by the administrative (immigration) law. Id. at 300.

In this case the legislature has purported to empower the Administrative Hearing Commission to examine conduct in light of the criminal law. § 590.080.1(2) RSMo. This is exactly what the city council did in City of Springfield v. Belt, 307 S.W.3d 649 (Mo. banc 2010). Springfield had the authority, and had in fact, established a municipal court. But it chose to handle cases alleging disobedience to red lights by motor vehicle operators as an administrative action. This Court rebuffed that attempt, holding that the determination of mere traffic violations was the peculiar responsibility of the courts.

As argued at length in O'Brien's principle brief, this is the same situation as occurred in State Tax Com'n v. Administrative Hearing Com'n, 641 S.W.2d 69, 76-77 (Mo. banc 1982), where this Court held that the legislature has no authority to create another tribunal and invest it with judicial power (in that case, to issue declaratory decisions).

The Director's reliance on Schumer v. Lee, 404 S.W.3d 443 (Mo. App. W.D. 2013), is misplaced for a single reason: the court of appeals lacks authority to determine the constitutionality of a statute. Art. V § 3 Mo. Const. Schumer had the unusual feature that the administrative decision had been reversed by the circuit court, thus the Director filed the appeal in the court her predecessor chose. If this Court were to take notice of its own records in Case No. SC93145, it will observe that Schumer sought transfer by writ before the decision was issued. Additionally, the court of appeals decided Schumer on due process grounds, a different issue than the constitutionality of the forum issue raised here. Schumer, 404 S.W.3d at 447. The constitutional issue of the Administrative Hearing Commission considering whether a person has violated the criminal law (without a finding of guilt by a judge) is one of first impression.

O'Brien agrees that the Administrative Hearing Commission has a proper and salutary rule in the administrative processes of this state. See Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission, 37 Mo. L. Rev. 410 (1972), available at: <http://scholarship.law.missouri.edu/mlr/vol37/iss3/3> (last visited May 12, 2019). Properly constrained, it can follow court decisions in criminal matters. And it can certainly determine licensing matters that are parallel to the criminal

law, as set out in the principle brief. But the legislature has gone too far in allowing it to independently determine that the criminal law has been violated

Point II:

The Director of the Department of Public Safety erred in revoking the Peace Officer license of Justin O'Brien, because the decision is unsupported by competent and substantial evidence upon the whole record, reviewable under § 536.140.2(3) RSMo., in that professional discipline is not punishment and there is uncontroverted evidence in the record that O'Brien's prior service, psychological rehabilitation, and knowledge, skills and abilities make him fit to continue in the profession.

Argument

The Director opens her argument on this point with the proposition that she had to revoke O'Brien's license to protect the public from his violent tendencies. But the record is absolutely bereft of evidence that any violent tendencies O'Brien might have are a danger to the public.

As set out in the principle brief, the record in this case includes a letter of support from a police chief averring familiarity with the circumstances the Director was evaluating yet advising he had no question regarding O'Brien's values, morals or integrity and that he intended to employ him as a police officer. L.F. Doc. 14, p. 15; L.F. Doc 5., p. 2. It also has the testimony of a veteran peace officer who was O'Brien's field training officer, and later his supervisor, who testified that the circumstances that led to

the proceedings were absolutely not typical of O'Brien and opining that he had no concerns regarding O'Brien remaining a police officer. L.F. Doc. 14, pp. 17-20. O'Brien himself testified about his post-incident treatment for war-related psychological trauma and his return to law enforcement as a dispatcher. L.F. 14, pp. 8-15.

In her decision the Director did not set out any reason for discrediting the undisputed testimony. She may or might not agree with her counsel's position on the evidence on appeal. But she did not give the parties or this Court the benefit of her view, contrary to the authorities cited in the principle brief. And there is absolutely no evidence that O'Brien's conduct in his professional capacity has ever even been questioned.

O'Brien offers no defense to his underlying conduct. To his embarrassment he engaged in a physical fight with his wife and he recognizes that his conduct was unbecoming to one with the state's imprimatur of approval. But in a case where the Western District considered evidence of rehabilitation, en banc, a physician who murdered his wife and served a decade in prison was granted his license. State Bd. of Registration for Healing Arts v. Finch, 514 S.W.2d 608 (Mo. App. W.D. 1974). The criminal justice system in this case reached the conclusion that O'Brien had breached the peace by fighting, yet saw fit to suspended imposition of sentence. Deciding that the conduct was more egregious, the Administrative Hearing Commission concluded that he had committed a domestic assault. But it is impossible to reconcile the revocation decision in this case with Finch.

On this record, and considering Finch and the cited in the principle brief, the decision to permanently revoke O'Brien's license was an abuse of discretion.

CONCLUSION

For each and every of the foregoing reasons the Judgment of the Circuit Court should be reversed and the cause remanded for entry of judgment setting aside the decision of the Director of the Department of Public Safety and the associated decision of the Administrative Hearing Commission, with leave to conduct further proceedings in accordance with this Court's Opinion.

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned counsel certifies that this brief complies in all respects with Rule 84.06, in that he has signed it, above, in accordance with Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b), to wit: according to MS Word it contains 1,957 words.

Respectfully submitted,

David F. Barrett

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CERTIFICATE OF SERVICE

A copy of this brief (including the Appendix thereto) was served upon Director's counsel, Assistant Attorney General Ross Keeling, through the Court's e-filing system on May 12, 2019.

Respectfully submitted,

David F. Barrett

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