IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE

BERRY LIVINGSTON,

Respondent,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant.

DOCKET NUMBER WD81789

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: July 28, 2020

APPEAL FROM

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

JUDGES

Division One: Newton, P.J., and Pfeiffer and Ardini, JJ. CONCURRING.

ATTORNEYS

Katie Curry, Assistant State Public Defender, Columbia, MO, Attorney for Respondent.

Eric S. Schmitt, Attorney General, and Andrew J. Crane, Assistant Attorney General, Jefferson City, MO, Attorneys for Appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BERRY LIVINGSTON, Respondent,
v.
MISSOURI DEPARTMENT OF CORRECTIONS, Appellant.

WD81789 **Cole County**

Before Division One Judges: Thomas H. Newton, Presiding Judge, and Mark D. Pfeiffer and Edward R. Ardini, Jr., Judges

The Missouri Department of Corrections ("MDOC") appeals from the judgment of the Circuit Court of Cole County, Missouri ("circuit court"), granting Mr. Berry Livingston's ("Livingston") motion for judgment on the pleadings in his declaratory judgment action.

In February of 2017, Livingston was convicted of possessing a controlled substance with intent to distribute in violation of section 195.211.3, RSMo, and unlawful use of drug paraphernalia in violation of section 195.233.2, RSMo, for offenses Livingston committed December 9, 2013. Subsequently, the General Assembly repealed Section 195.291, RSMo, effective January 1, 2017. As a result, the requirement that an offender found guilty of possessing a controlled substance with intent to distribute in violation of section 195.211 must be sentenced to the authorized term of imprisonment for a class A felony without probation or parole if the court finds the defendant is a persistent drug offender was eliminated.

In April of 2017, the court found Livingston was a persistent drug offender, and accordingly sentenced him for the possession conviction to fifteen years without probation or parole pursuant to section 195.291.2, and one year in county jail for the unlawful use of drug paraphernalia, to be served concurrently. Livingston appealed his convictions, which the Eastern District of this Court affirmed. *State v. Livingston*, 547 S.W.3d 606, 607 (Mo. App. E.D. 2018).

On November 29, 2017, Livingston filed a Petition for Declaratory Judgment in the circuit court. Livingston asked the circuit court to declare him parole eligible. Thereafter, Livingston filed a Motion for Judgment on the Pleadings. After filing an answer denying that Livingston was entitled to a declaratory judgment, the MDOC filed a Cross-Motion for Judgment on the Pleadings on May 14, 2018. On the same day, the circuit court entered its Judgment, granting Livingston's request for declaratory judgment, concluding that section 195.291 was not applicable to determining parole eligibility, and ordering the MDOC to apply existing laws concerning Livingston's parole eligibility. The MDOC timely appealed.

REVERSED; JUDGMENT ENTERED IN FAVOR OF MDOC PURSUANT TO RULE 84.14.

Division One holds:

The Missouri Supreme Court's recent opinions in *Mitchell v. Phillips*, 596 S.W.3d 120 (Mo. banc 2020), and *Woods v. Missouri Dep't of Corr.*, 595 S.W.3d 504 (Mo. banc 2020), govern our disposition of this appeal. In *Mitchell* and *Woods*, the Court considered the applicability of section 1.160, the retroactive effect of the repeal of a statute (§ 195.295) requiring an offender to be sentenced to the authorized term of imprisonment without probation or parole, and whether parole ineligibility under that section is a condition of an offender's sentence. The Court concluded that section 1.160 is a general savings statute that is limited in scope. The statute authorizes a defendant to move for a reduction of sentence if the penalty for his offense of conviction has been reduced subsequent to the commission of the offense *but before the conviction becomes final*. Accordingly, section 1.160 is inapplicable to sentences in final judgments.

Livingston's parole ineligibility was mandated as part of the punishment within the particular statutes designating the permissible penalty for his offenses. Therefore, parole ineligibility is part of his sentence. To apply the repeal of section 195.291 to Livingston retroactively would change his sentence. Consequently, the repeal of section 195.291 can have no effect on Livingston's parole eligibility, and he remains ineligible for parole in accordance with the terms of his sentences. Accordingly, the circuit court erred in granting Livingston's motion for judgment on the pleadings.

Opinion by: Mark D. Pfeiffer, Judge July 28, 2020

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THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.