

Summary of

SC89834, *F.R. v. St. Charles County Sheriff's Department*

Appeal from the St. Charles County circuit court, Judge Ted House

Argued and submitted Sept. 29, 2009.

consolidated with

SC90164, *State of Missouri v. Charles A. Raynor*

Appeal from the Audrain County circuit court, Judge Linda R. Hamlett

Argued and submitted Dec. 2, 2009.

Consolidated opinion issued Jan. 12, 2010

Attorneys: In Case No. SC89834: F.R. was represented by Michael A. Gross of The Law Offices of Michael A. Gross in St. Louis, (314) 727-4910, and Matthew Fry of Rosenblum Schwartz Rogers & Glass in Clayton, (314) 862-4332; and the sheriff's department was represented by Robert E. Hoeynck Jr. of the St. Charles County counselor's office in St. Charles, (636) 949-7540; St. Charles County Prosecutor Jack Banas in St. Charles, (636) 949-7355; The attorney general, who filed a brief as a friend of the Court, was represented by Ryan Bertels of the attorney general's office in Jefferson City, (573) 751-3321.

In Case No. SC90164: The state was represented by Jacob W. Shellabarger, Regina Faulkenberry and Jason H. Lamb of the Audrain County prosecuting attorney's office in Mexico, (573) 473-5860; and Raynor was represented by Ellen H. Flotman of the public defender's office in Columbia, (573) 882-9855. The American Civil Liberties Union, which filed a brief as a friend of the Court, was represented by Anthony E. Rothert of the ACLU in St. Louis, (314) 652-3114, and David C. Nelson of Nelson and Nelson in Bellevue, Ill., (618) 277-4000.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: In two cases, previously convicted sex offenders challenged statutes enacted after their convictions. As to the statute prohibiting a sex offender from living within 1,000 feet of a school or child-care facility, the trial court found the new statute was constitutional as applied to the sex offender. As to the statute imposing certain conduct restrictions on Halloween night, the trial court found the new statute was unconstitutionally retrospective as applied to the sex offender. In a 4-3 decision written by Judge Michael A. Wolff, the Supreme Court finds that both statutes are unconstitutionally retrospective as applied to the sex offenders, reversing the trial court's decision in the first case and affirming the decision in the second case. In both cases, the statutes imposed new duties or obligations on sex offenders solely because of their prior convictions. In a dissenting opinion, Judge Mary R. Russell argues both statutes are constitutional as applied to the sex offenders raising the challenges. She contends neither

imposes an unconstitutionally retrospective new duty or obligation but rather a permissible collateral consequence of their convictions. She would find the legislature enacted both statutes as part of its legitimate exercise of its police power to provide present protections for the public, and especially for children, from individuals convicted of sex offenses against children.

Facts: In Case No. SC89834, F.R. pleaded guilty to five sex offenses in 1999, was sentenced to seven and a half years in prison, and was paroled in February 2004. Six months later, a new statute – section 566.147, RSMo Supp. 2004 – became effective that prohibited sex offenders from residing within 1,000 feet of a school or child-care facility. In June 2008, F.R. sought to move to his fiancée’s home in O’Fallon. He notified the St. Charles County sheriff’s department; he said he was advised the home’s location satisfied the requirements of section 566.147. Two days after he moved in, the sheriff measured the distance from property line to property line, determined the home was only about 913 feet from the child-care facility and informed F.R. he must move. F.R. relocated to a motel and subsequently filed suit, arguing section 566.147 was unconstitutionally retrospective in its application, constituted an *ex post facto* law and was impermissibly vague. The trial court rejected F.R.’s claims; he appeals.

In Case No. SC90164, Charles Raynor was convicted in 1990 in Washington state for indecent liberties with a child younger than 14 years old and subsequently registered as a sex offender in Missouri. In August 2008, a new statute – section 589.426, RSMo Supp. 2008 – became effective that, on Halloween night, prohibits registered sex offenders from having contact with children, requires them to stay inside their residences and requires them to place a sign at the residence stating, “No candy or treats at this address.” On Halloween night in 2008, public safety officers in Mexico, Mo., checked registered sex offenders’ residences for compliance with section 589.426. At Raynor’s registered address, an officer observed a woman passing out candy to children. She told the officer Raynor was inside the house, but they both believed he was in compliance with the statute because he was not handing out the candy. There was no sign posted at the residence. The state charged Raynor with a class A misdemeanor for failing to comply with section 589.426. The trial court sustained Raynor’s motion to dismiss the charge, finding the statute unconstitutionally created new obligations on him with respect to his past actions. The state appeals.

REVERSED AS TO SC89834; AFFIRMED AS TO SC90164

Court en banc holds: The 2004 law’s residency restriction and the 2008 law’s Halloween requirements – enacted years after F.R.’s and Raynor’s convictions – operate retrospectively as applied to them. Article I, section 13 of the Missouri Constitution forbids enactment of a law that is retrospective in its operation. For nearly a century – since its opinion in *Squaw Creek Drainage District v. Turney*, 138 S.W. 12, 16 (Mo. 1911) – this Court consistently has held that a retrospective law is one that creates a new

obligation, imposes a new duty, or attaches a new disability with respect to actions in the past. This case is cited and followed in recent cases involving new obligations, duties or disabilities on those whose convictions for sex offenses are past. *See, e.g., Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), and *R.L. v. Missouri Department of Corrections*, 245 S.W.3d 236 (Mo. banc 2008). Here, when F.R. was convicted in 1999, there was no law forbidding him from living within 1,000 feet of a school or child-care facility; similarly, when Raynor was convicted in 1990, there was no law requiring him to put up a sign and forbidding him from going outside, turning on outdoor lights or handing out candy on Halloween. The sole reason for the new obligations is the fact of the prior convictions.

The rights being affected need not be vested. The language of article I, section 13 does not limit its application to vested rights, nor does this Court's precedent in *Jerry-Russell Bliss Inc. v. Hazardous Waste Management Commission*, 702 S.W.2d 77, 81 (Mo. banc 1985) (using the disjunctive "or" in defining retrospective laws as "those which take away or impair vested rights acquired under existing laws," or those that "create a new obligation, or duty or disability"). A new criminal law operates retrospectively if it changes the legal effect of a past conviction. Here, the prior convictions of F.R. and Raynor are the sole basis for the new obligations or duties imposed on them. These are not merely regulations; rather, they carry the prospect of new criminal liability if either F.R. or Raynor fails to comply with the applicable statute.

These cases are not like the regulatory laws in *State ex rel. Koster, et al. v. Olive*, 282 S.W.3d 842 (Mo. banc 2009), which imposed a duty on the owner of a dam to operate it in a safe manner. Here, F.R. and Raynor specifically have served their time and have not been shown to continue to operate as criminals, and recent data show sex offenders generally have lower rates of recidivism than other categories of offenders. The laws challenged here are similar to the registration requirements this Court held, in *Doe*, could not be applied retrospectively to persons convicted of sex offenses before the law's effective date.

As applied to F.R., the residency requirement of section 566.147 is unconstitutional, and the trial court's judgment is reversed. As applied to Raynor, the Halloween requirements of section 589.426 are unconstitutional, and the trial court's judgment is affirmed.

Dissenting opinion by Judge Russell: The author would find that neither law challenged here is unconstitutionally retrospective and would affirm the trial court's declaration, in F.R.'s case, that section 566.147, is constitutional and would reverse the trial court's declaration, in Raynor's case, that section 589.426 is unconstitutional. Both men were convicted of sexual crimes against children, and the legislature enacted both statutes specifically to articulate conduct boundaries that strive to prevent sex offenders from victimizing children. Great deference should be afforded the legislature when reviewing the constitutional validity of statutes in part out of regard for the legislature's role as a

collective representative of community values and protector of public safety. The author would follow the Eighth Circuit's lead from *Weems v. Little Rock Police Department*, 453 F.3d 1010 (8th Cir. 2006), and *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), and uphold the sex offender residency restrictions in section 566.147 and 589.426 as valid exercises of the state's police power to protect children. She further would hold these statutes are constitutional because they do not impact sex offenders' vested or fundamental rights. In Missouri's 1875 constitutional convention, the state's delegates debated the prohibition on retrospective laws at length but chose not to adopt an amendment that would have defined retrospective laws to protect the financial and property interests of Missouri citizens. As such, the "new duty, obligation or disability" standard was a judicial creation of this Court's *Squaw Creek* opinion, which provided no attribution or citation for this standard. In context, the analysis should be whether a law is unconstitutionally retrospective because it treads on vested rights. Here, F.R. has no vested or property right in living at a new residence, and Raynor has no vested right to unrestricted Halloween activities. In addition, the author would hold that the statutes in question impose no new duties, obligations or disabilities on F.R. and Raynor but rather are permissible collateral consequences of their convictions. She would argue that the restrictions imposed on F.R. and Raynor are similar to those in *Olive* because they provide children with "present protection" from the "present situation" of sex offenders' residences in their neighborhoods.