

Summary of SC92152, *Roy Garozzo v. Missouri Department of Insurance, Financial Institutions & Professional Registration, Division of Finance*

Appeal from the St. Louis County circuit court, Judge Joseph L. Walsh
Argued and submitted Sept. 12, 2012; opinion issued Jan. 29, 2013

Attorneys: The division was represented by James R. McAdams and James W. Gallaher of the Missouri Department of Insurance, Financial Institutions & Professional Registration in Jefferson City, (573) 751-2545; and Garozzo was represented by Erwin O. Switzer III and Jennifer Mann Bortnick of Greensfelder, Hemker & Gale PC in St. Louis, (314) 241-9090.

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: The director of finance appeals a trial court's determination that a man must be given a license as a mortgage loan originator because the statute under which the director had denied the license application is unconstitutional as applied to the man. In a 6-0 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri reverses the circuit court's judgment, holding that the residential mortgage board correctly denied the license application because the statute is not unconstitutional. It is not an impermissible bill of attainder, it does not violate the state constitutional ban on retrospective laws, and the denial of the license did not deprive the man of procedural or substantive due process under the federal constitution.

Facts: Roy Garozzo began working as a mortgage loan originator in 1985. At that time, there were no licensing requirements for such persons.

In 2008, Congress enacted the Secure and Fair Enforcement Mortgage Licensing Act (federal SAFE act), establishing a nationwide licensing requirement for mortgage loan originators and providing that national licensing will apply in any state that declines to adopt its own licensing and registration law that complies with the minimum requirements of the federal SAFE act. In 2010, the Missouri legislature enacted the Missouri Secure and Fair Enforcement Mortgage Licensing Act (state SAFE act). As required by the federal act, the Missouri act provides that no individual shall engage in the business of a mortgage loan originator without first obtaining and maintaining a license from the division of finance. The state act also prohibits the director of the division of finance from issuing such a license to an applicant who has pleaded guilty to a felony within seven years before the date of the application.

In 2006, Garozzo pleaded guilty to a class C felony of possession of a controlled substance. He received a suspended imposition of sentence and completed the conditions of his sentence. In July 2010, Garozzo submitted an application for a mortgage loan originator license. The director denied the application pursuant to section 443.713(2)(a), RSMo, because Garozzo had pleaded guilty to a felony in 2006. Garozzo appealed to the residential mortgage board, which determined after a hearing that section 443.713(2)(a) required the board to deny the license application. He then sought review in the circuit court, which issued a declaratory judgment finding that section 443.713(2)(a) was unconstitutional as applied to Garozzo and ordering the director to issue Garozzo a license. The director appeals.

REVERSED.

Court en banc holds: When a contested case is decided by an agency and reviewed by the circuit court, this Court reviews the findings and decision of the agency rather than the court. Because the residential mortgage board correctly denied Garozzo's license, the circuit court's judgment is reversed. Section 443.713(2)(a) is not unconstitutional as applied to Garozzo.

(1) The statute is not a bill of attainder in violation of article I, section 10 of the federal constitution or article I, section 30 of the state constitution. A bill of attainder is a legislative enactment that inflicts punishment on a specific person or group without trial or judicial action. Section 443.713(2)(a), however, does not inflict punishment. Whether a challenged statute inflicts punishment is determined by whether: it falls within the historical meaning of legislative punishment; when viewed in light of the severity of burdens it imposes, it reasonably can be said to advance a non-punitive legislative purpose; and the legislative record discloses an intent to punish. Although a number of cases indicate a historical trend of treating bans on employment as punishment, history is not dispositive because the second and third factors more directly analyze the particular aspects of the challenged statute to determine whether it is punitive in practice and by design. Section 443.713(2)(a) advances the non-punitive purpose of assuring that professional services are provided by law-abiding individuals. The non-punitive nature of the statute further is demonstrated by the fact that an applicant is barred from licensure for a maximum of seven years. In addition, section 443.713(2)(a) is a licensing statute, and Missouri courts have held consistently that the purpose behind licensing statutes is to protect the public rather than punish the licensed professional. Finally, the legislative record indicates no intent to punish. The stated goals of the federal SAFE act are to enhance consumer protection, reduce fraud, provide for comprehensive licensing, and provide for increased accountability and tracking of loan originators, and the state SAFE act was enacted to comply with the requirements of the federal SAFE act. Although the temporary license restriction imposed by the statute imposes an obvious hardship on Garozzo, it is – in design and practice – a valid business and economic regulation and not an invalid bill of attainder.

(2) The statute does not violate the ban on retrospective laws in article I, section 13 of the state constitution. Retrospective laws take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect to past transactions or considerations. Because Missouri courts consistently have held that a professional license is a privilege and not a vested right, Garozzo has no vested right to a mortgage loan originator license. In addition, section 443.713(2)(a) does not impose a new obligation, duty or disability on Garozzo based solely on past conduct. Its licensing requirements apply to Garozzo only because he has decided that he wants to continue to serve as a mortgage loan originator. The statute does not require any action by Garozzo but rather places the regulatory obligation on the director, temporarily preventing the director from issuing Garozzo a license. The ban on retrospective laws does not prohibit the state from considering past conduct in determining future licensure eligibility.

(3) The statute does not violate Garozzo's rights to procedural or substantive due process.

(a) For purposes of the 14th Amendment to the federal constitution, professional licenses are "property" of which a person cannot be deprived without first receiving procedural due process. There is no such thing, however, as a "de facto" license. There also is no right for the law to remain unchanged or for a prior guilty plea to be free from further collateral consequences. The enactment of section 443.713(2)(a) did not deprive Garozzo of any property interest without due process. His right to due process was triggered by the denial of his license application and was satisfied by the review process that led to this appeal.

(b) The substantive due process component of the 14th Amendment protects individual liberty against certain governmental actions regardless of the fairness of the procedures used to implement them. To prove a substantive due process violation, a person must demonstrate that the state's conduct shocks the conscience and violates one or more fundamental rights. Garozzo cites no case supporting the proposition that the denial of a professional license to one who has pleaded guilty to a felony violates a deeply rooted fundamental right implicit in the concept of ordered liberty.