

Summary of SC94526, *State of Missouri v. Christopher C. Claycomb*

Appeal from the Clinton County circuit court, Judge J. Bartley Spear Jr.

Argued and submitted February 3, 2015; opinion issued June 30, 2015, and modified on the Court's own motion August 4, 2015

Attorneys: Claycomb was represented by Damien De Loyola of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Gregory L. Barnes of the attorney general's office in Jefferson City, (573) 751-3321.

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: A father found guilty of felony criminal nonsupport appeals, challenging the sufficiency of the evidence to support his conviction. In a decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the circuit court's judgment. All seven judges agree that claims that the evidence was insufficient to support a conviction always are preserved for review, and to the extent certain cases say sufficiency claims will be reviewed only for plain error (very clear error) if not properly preserved, they are overruled. Four judges agree that the evidence that the father made no direct monetary payments to the mother and failed to make court-ordered child support payments was sufficient to make a prima facie (facially sufficient) case that the father failed to provide adequate support for his child. The state did not also have to prove a negative – that the father did not offer in-kind food, clothing and housing sufficient to meet his legal obligations.

Judge Patricia Breckenridge wrote a separate opinion. She agrees with the principal opinion's holdings that the father's claim of insufficiency of the evidence supporting his conviction is preserved on appeal even if not raised timely in the circuit court and that appellate courts are not required to find that insufficiency of the evidence constitutes plain error. She disagrees, however, that there is sufficient evidence to prove the father is guilty of felony nonsupport. The crime of felony nonsupport requires the state to prove the failure to provide support of "food, clothing, lodging, and medical or surgical attention," but the record is devoid of such proof.

Facts: When Christopher Claycomb and his ex-wife dissolved their marriage in 2004, the judgment of dissolution required Claycomb to pay \$247 per month in child support for the son the couple had together. In 2009, the state charged Claycomb with felony criminal nonsupport under section 568.040, RSMo, because he failed to pay any child support in each of six individual months within the 12-month time period from August 2005 through July 2006. At Claycomb's bench trial (before a judge rather than a jury), the state presented evidence that Claycomb stopped making payments from October 2005 until September 2006. Claycomb's ex-wife also testified that Claycomb did not make any direct payments to her during that time. Claycomb testified in his own defense and admitted that he had missed making his payments during the relevant time period. Claycomb was not asked by the prosecution or by his own counsel whether he provided in-kind support, and the record is devoid of evidence that he did so. The circuit court found Claycomb guilty of the class D felony of criminal nonsupport. It

sentenced Claycomb to four years in prison, suspended execution of the sentence and placed Claycomb on five years probation. Claycomb appeals.

AFFIRMED.

Court en banc holds: (1) Although Claycomb did not file a motion for new trial or otherwise raise his sufficiency claim below, Rule 29.11(e)(2)(C) provides that a motion for a new trial need not be filed in a court-tried, criminal case to preserve for appeal a claim that the evidence was insufficient to support the judgment. Furthermore, when conducting such review, courts must consider a sufficiency claim on the merits, not as plain error. To the extent that prior cases utilize a plain error analysis, they are no longer to be followed.

(2) The state presented evidence that Claycomb provided no direct monetary support, nor did he pay support into court for his child during the relevant time period although subject to a child support order. Missouri law is well-settled that a complete failure to pay child support is evidence of failure to pay adequate support. Although a child support order is not conclusive regarding what constitutes adequate support, it is some evidence of what constitutes adequate support.

(3) The state was not required to present evidence of a lack of in-kind support to make a prima facie case of criminal nonsupport. Claycomb cites no authority for the proposition that the state must prove a negative, and to so hold would be inconsistent with the long-settled principle that the state need not negate every inference of innocence in order to make a prima facie case. While Claycomb was free to present evidence of adequate in-kind support, he presented no evidence that he provided any in-kind support, much less adequate in-kind support.

Opinion concurring in part and dissenting in part by Judge Breckenridge: The author agrees with the principal opinion's holding that Claycomb's claim of insufficiency of the evidence supporting his conviction is preserved on appeal even if not raised timely in the circuit court. The author further agrees that appellate courts are not required to find that insufficiency of the evidence constitutes plain error.

The author disagrees, however, with the principal opinion's holding that there is sufficient evidence to prove Claycomb is guilty of felony nonsupport. The author further disagrees that the state is not required to show the defendant failed to provide in-kind support. The statute does not limit "support" to direct monetary payments, and the statutory definition of "support" includes "food, clothing, lodging, and medical or surgical attention." The crime of felony nonsupport requires the state to prove a negative – the failure to provide support. The state showed Claycomb failed to provide monetary support, and it likely could have proved Claycomb failed to provide in-kind support by asking questions of his ex-wife. But the record is devoid of evidence showing Claycomb failed to provide any in-kind support.