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No. SC94716

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI, ex rel.
MARK A. RICHARDSON

Relator,

v.

THE HONORABLE DANIEL R. GREEN,

Respondent.

Original Proceeding in Prohibition from the Cole County Circuit Court
19th Judicial Circuit
The Honorable Daniel R. Green, Judge

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition. The relator is seeking a writ of prohibition to bar the Circuit Court Judge from reducing the sentences imposed against Larry Welch. This Court has granted a preliminary writ of prohibition. The Missouri Supreme Court has original jurisdiction. Therefore, jurisdiction lies in the Missouri Supreme Court. MO. CONST. Art. V, § 3.

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STATEMENT OF FACTS

The facts pertinent to this petition for writ of prohibition are as follows:

On November 5, 2007, Larry Welch was charged with involuntary manslaughter (two counts) in the November 4, 2007, deaths of Jean Olsen and son Tobias Olsen and assault in the second degree (two counts) in the injuries to Eric Olsen (Jean's surviving husband) and daughter Johanna Olsen in a car crash caused by defendant while he was intoxicated. Welch pleaded guilty to all four counts on July 29, 2008.

The charges Welch pleaded guilty to alleged in the two Involuntary Manslaughter counts that he, while under the influence of alcohol caused the deaths of Jean Olsen and Tobias Olsen by colliding with a vehicle in which Jean Olsen and Tobias Olsen were occupants when operating a motor vehicle with criminal negligence in that Welch was driving on the wrong side of the road and Jean Olsen and Tobias Olsen were not passengers in the vehicle operated by the defendant. The two Assault in the Second Degree counts alleged that Welch while under the influence of alcohol caused physical injury to Eric Olsen and Johanna Olsen by colliding with a vehicle in which Eric Olsen and Johanna Olsen were occupants when operating a motor vehicle with criminal negligence in that Welch was driving on the wrong side of the road.

On August 5, 2008, Circuit Judge Richard Callahan sentenced Welch to twenty years' imprisonment consisting of two concurrent sentences of fifteen years' imprisonment for the class B felonies of Involuntary Manslaughter and two concurrent sentences of five years' imprisonment for the class C felonies of Assault in the Second Degree with the sentences on the assaults ordered to run consecutive to the sentences on

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the manslaughters. Welch later appealed the denial of his post-conviction relief motion to the Court of Appeals, Western District which affirmed the denial of that motion.[1]

On August 13, 2014, Respondent Circuit Judge Daniel Green heard evidence on Welch's motion to reduce his sentences pursuant to § 558.046, RSMo. At that hearing the State opposed any reduction in sentence as not being allowed under the statute. The Court on December 19, 2014 ordered the sentences for the involuntary manslaughters be reduced to two concurrent seven year sentences. Moreover, the Court further rescinded the two five year sentences on the Assault in the second degree counts and ordered

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[1] In the Appellate Court's opinion the following facts were related: "During his guilty plea hearing, Welch admitted that, on the morning of November 4, 2007, he was driving his truck on Route C in Cole County. Although Welch was traveling east, he was driving in the westbound lane. A car, occupied by Eric and Jean Olsen and their two children, Tobias and Johanna, approached. The Olsens were traveling west in the westbound lane. To avoid Welch's truck, Eric Olsen, who was driving, swerved into the eastbound lane. At the same time, Welch swerved into the eastbound lane and hit the passenger side of the Olsens' car. The collision killed Jean and Tobias Olsen. Eric and Johanna Olsen survived the crash but suffered permanent injuries. Welch admitted that his negligence caused the collision and that his blood alcohol content at the time was 'in excess of what the law presumes to be impaired.'" *Welch v. State*, 326 S.W.3d 916 (Mo. App., W.D. 2010).

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Suspended Imposition of Sentences. Defendant was then due to be released from prison under Judge Green's order.

The Relator filed his petition for prohibition in the Court of Appeals, Western District on December 23, 2014. The Court of Appeals issued its stop order preventing the sentence reduction ordered by Respondent. Relator's petition was denied, but the Appellate Court stayed the order. Within that stay, the relator filed his petition for prohibition in this Supreme Court on January 8, 2015. This Court entered its order in preliminary prohibition on January 12, 2015.

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POINT RELIED ON

Relator is entitled to an order prohibiting Respondent from reducing the sentence of Welch, because Respondent's actions were outside the jurisdictional authority conferred upon the sentencing court, in that the sentencing court only retains jurisdiction to reduce a sentence if the statutory requirements of section 558.046, RSMo, are satisfied and Welch does not satisfy these requirements because he was convicted of crimes that involved violence or the threat of violence.

State ex rel. Moore v. Sweeney, 32 S.W.3d 212 (Mo. App. S.D. 2000)

§558.046, RSMo.

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ARGUMENT

Relator is entitled to an order prohibiting Respondent from reducing the sentence of Welch, because Respondent's actions were outside the jurisdictional authority conferred upon the sentencing court, in that the sentencing court only retains jurisdiction to reduce a sentence if the statutory requirements of section 558.046, RSMo, are satisfied and Welch does not satisfy these requirements because he was convicted of crimes that involved violence or the threat of violence.

Standard of Review

This is an original proceeding in prohibition. The standard of review for writs of mandamus and prohibition is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes. *State ex rel. City of Jennings v. Riley,* 236 S.W.3d 630, 631 (Mo. banc 2007).

Discussion

Relator asserts the Respondent had no authority to reduce Welch's sentences as they were not convictions "that did not involve violence." Relator further asserts the crimes of Involuntary Manslaughter in the First Degree and Assault in the Second Degree by their respective required elements of death and physical injuries caused by any defendant are crimes that involved violence.

§558.046, RSMo. provides in pertinent part as follows:

"The sentencing court may, upon petition, reduce any term of sentence ... pronounced by the court ... if the court determines that:

(1) The convicted person was:

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(a) Convicted of a crime that did not involve violence or the threat of violence; and

(b) Convicted of a crime that involved alcohol or illegal drugs; and

(2) Since the commission of such crime, the convicted person has successfully completed a detoxification and rehabilitation program; and

(3) The convicted person is not:

(a) A prior offender, a persistent offender, a dangerous offender or a persistent misdemeanor offender as defined by section 558.016; or

(b) A persistent sexual offender as defined in section 558.018; or

(c) A prior offender, a persistent offender or a class X offender as defined in section 558.019."

This statute was interpreted by the Missouri Appellate Court, Southern District, in *State ex rel. Moore v. Sweeney*, 32 S.W.3d 212 (Mo. App. S.D. 2000). In that case the appellate court stated: "This court therefore concludes §558.046(1)(a), in referring to "a crime that did not involve violence or the threat of violence," is referring, *inter alia,* to a crime that did not involve the use of physical force or the threat of physical force against the victim (or someone else)." The Court stated one of the requirements for a sentence reduction under that statute is that the convicted person be convicted of "a crime that did not involve violence or the threat of violence." §558.046(1)(a), RSMo 1994. The Court noted that §558.046 supplies no definition of "a crime that did not involve violence or the threat of violence, . . ." It then turned to the statute that the defendant had been convicted under, §569.030, RSMo 1994, and determined that statute by its very wording included

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violence as the statute required the threat of violence as an element of the crime. The court held the inmate was ineligible for a sentence reduction in that he did not meet the requirement of §558.046(1)(a), RSMo 1994, as he could not demonstrate the crime of which he was convicted was "a crime that did not involve violence or the threat of violence." The Court then stated: "It follows that § 558.046 confers no authority on Respondent to reduce Inmate's sentence."

Here, turning to the crimes Welch committed, Involuntary Manslaughter in the First Degree requires as an element that defendant caused the death of another person while driving intoxicated with criminal negligence. Welch pleaded guilty to two counts of Involuntary Manslaughter in the First Degree. Missouri's statute provides in pertinent part:

"§565.024. 1. A person commits the crime of involuntary manslaughter in the first degree if he or she:

"(3) While in an intoxicated condition operates a motor vehicle or vessel in this state, and, when so operating, acts with criminal negligence to:

(a) Cause the death of any person not a passenger in the vehicle or vessel operated by the defendant. . ."

Welch also pleaded guilty to two counts of Assault in the Second Degree. The statute provides:

"§565.060. 1. A person commits the crime of assault in the second degree if he:

(4) While in an intoxicated condition or under the influence of controlled substances or drugs, operates a motor vehicle in this state and, when so operating,

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acts with criminal negligence to cause physical injury to any other person than himself;"

For Respondent to have authority to reduce Welch's sentences under the statute, Welch would have to show that the crimes he committed did not involve violence. By definition Welch's crimes involved violence as he caused the deaths of two people and physical injury to two people not passengers in his car by driving while intoxicated with criminal negligence.

Involuntary Manslaughter and Assault in the Second Degree have been found to be "serious assaultive offenses" in Missouri cases. Neither of the cases discussed here though involved the driving while intoxicated crimes. In the context of statutory aggravating circumstances, it has been determined that the line between serious assaultive offenses and other assaultive offenses is the line between felonies and misdemeanors. *State v. Kinder,* 942 S.W.2d 313, 332 (Mo. banc 1996). Manslaughter, whether voluntary or involuntary, is a felony offense. §§ 565.023, 565.024, RSMo 1994. Therefore, manslaughter is properly considered a serious assaultive offense for purposes of § 565.032.2(1). *State v Whitfield*, 939 S.W.2d 361, (1997). As to the issue of the Assault in the Second Degree crimes committed by Welch, the Court has ruled Assault in the Second Degree even with only physical injury qualified as a serious assaultive conviction. In *Kinder*, the defendant argued that there was no basis for finding that his felony conviction for second degree assault, knowingly causing physical injury by means of a dangerous instrument, was for a serious assaultive offense. In *Kinder*, defendant argued that a necessary element of a serious assaultive offense would require a "serious

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physical injury." He claimed because his second degree assault conviction was for having caused only "physical injury" it could not be a serious assault. The Court disagreed finding the Assault in the Second Degree was a serious assaultive conviction.

Missouri's Sentencing Advisory Commission lists in its User Guide 2012-2013, Appendix D, Involuntary Manslaughter and Assault 2d degree as violent C and D felonies. Here, the Involuntary Manslaughter charges were class B felonies as the victims were in a separate vehicle than the defendant's. Welch, while intoxicated and driving in the wrong lane collided with the victims' vehicle. The violent deaths and injuries to the victims that resulted were caused by the force of defendant's vehicle which he operated with criminal negligence and while intoxicated in violation of Missouri statutes.

Moreover, under the new criminal code which becomes effective January 1, 2017, the crimes of involuntary manslaughter, like the ones Welch committed, would each be considered a "dangerous felony." §556.061(19); §577.001 (10) RSMo. 2017.

The language in §558.046(1)(a) "did not involve violence" is much different than the term "crime of violence" as used in the federal immigration statute 18 U.S.C. §16. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the United States Supreme Court in the context of the federal immigration statutes found a Florida driving while intoxicated with injuries crime was not a "crime of violence" justifying deportation. In doing so, the Court noted both that the federal statute defined "crime of violence" in terms of "use of violence" on another and that another immigration statute contained a provision which specifically addressed driving while intoxicated with injuries cases. There is no such concern with

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the interpretation of §558.046(1)(a) RSMo. as it does not define "involved violence" in terms of "use of violence." Also, there is no further specific statute addressing involuntary manslaughter by driving while intoxicated with criminal negligence to cause the death of another person as a crime of violence or not. Also, and in contrast to the opinion in *Leocal*, the federal courts have considered "crime of violence" in regard to sentencing. The United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2): (Nov. 2003) in the context of a career-offender sentencing enhancement, defined "crime of violence" as meaning, inter alia, "conduct that presents a serious potential risk of physical injury to another." Specifically federal courts have refused to extend the interpretation in *Leocal* to the federal guidelines. The commentary to §4B1.2(a)(2) specifically provides that "crimes of violence" includes manslaughter. *U.S. v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005) (holding that *Leocal* has no impact on its finding that involuntary manslaughter is a crime of violence for sentencing purposes). *U.S. v. Gonzales-Lopez*, 335 F.3d 793, 799 (8th Cir. 2003) (holding that vehicular homicide is a crime of violence under §2L1.2 of the United States Sentencing Guidelines).

It follows that §558.046 confers no authority on Respondent to reduce Welch's sentence. The test set out by the Appellate Court in *Sweeney* was stated as follows: "as he cannot demonstrate the crime of which he was convicted was 'a crime that did not involve violence or the threat of violence.'. . ."

Stated another way, can Welch demonstrate that his crime did not involve violence? How so when he pleaded guilty to statutes that require him to have caused

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death and physical injury to persons not in his vehicle by operating a vehicle while intoxicated with criminal negligence. Welch cannot so demonstrate. Thus, he is ineligible for a reduction of sentence under § 558.046. As he is ineligible for a reduction, then Respondent had no authority under that statute to reduce his sentence.

The focus of §558.046 is on a crime that did not involve violence. It is certainly reasonable for a statute to permit only those who have not caused violence to be eligible for a sentence reduction. Stated another way, it would be unreasonable to believe the Legislature wanted those who have killed and maimed to be eligible for a sentence reduction. Because Welch cannot demonstrate that he was convicted of "a crime that did not involve violence," §558.046 confers no authority on Respondent to reduce Welch's sentences.

In this case the conclusion ought to be the same whether the focus is on the intrinsic nature of the offense or the circumstances of the violation. Application of either approach leads to the same answer and that is that Welch's crimes were crimes that involved violence to the victims. Section 558.046, RSMo does not by its language require that Welch intended to commit violence on the victims. Also it does not require that the conviction be for a crime involving the specific use of violence on a person. It simply provides that to be eligible for a sentence reduction, the conviction be for a crime "that did not involve violence." The violence caused by drunk drivers has been recognized in terms of slaughter and mutilation.[2]

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[2] "No one can seriously dispute the magnitude of the drunken driving problem or

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The Legislature's use of the words "Convicted of a crime that did not involve violence" does not equate to a requirement that Welch had to commit a crime of intended violence. Also, by its plain language the statute does not require that Welch had to intentionally "use" violence against another. Instead the clear and plain language says he cannot receive a reduction of sentence if his crime involved violence.

The Court ought to prohibit the sentence reductions by Respondent.

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the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage." 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), p. 71 (2d ed. 1987). For decades, this Court has "repeatedly lamented the tragedy." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983); *see*, *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield")." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990).

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CONCLUSION

The trial court should be permanently prohibited from reducing the sentences of the defendant Welch.

Respectfully submitted,

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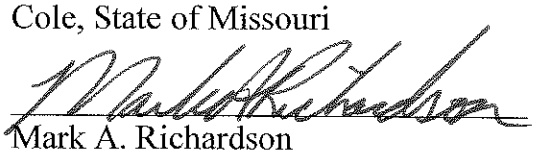
Prosecuting Attorney for the County of
Cole, State of Missouri



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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. The Relator's Brief, as submitted in the above-styled cause, includes the information required by Rule 55.03.

2. The brief submitted complies with the limitations contained in Supreme Court Rule 84.06(b).

3. The brief was completed using Microsoft Word, in Times New Roman, size 13-point font.

4. As reported by the undersigned's copy of Microsoft Word, the word count is 2,995.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2015, an electronic copy of Relator's Brief was delivered through the Missouri e-Filing System, to James D. Barding, attorney for Respondent, at dogbarking@mchsi.com.

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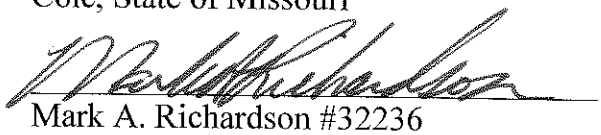
Cole, State of Missouri



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