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

RESPONDENT'S BRIEF

JAMES D. BARDING
Missouri Bar No. 46302

609 E. High Street
Jefferson City, Missouri 65101
Telephone: 573/619-3231
Facsimile: 573/634-8447
dogbarking@mchsi.com

Attorney for Respondent

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JURISDICTIONAL STATEMENT

This is an original proceeding in prohibition. Relator is seeking a writ of prohibition to bar Respondent from reducing the sentences imposed against Larry Welch in Case No. 07AC-CR03648-01. This Court has granted a preliminary writ of prohibition. As the Missouri Supreme Court has original jurisdiction, jurisdiction lies in the Missouri Supreme Court. MO. CONST. ART. V, §3.

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 two counts of Involuntary Manslaughter in the First Degree (§565.024.1(3)(a)) and two counts of Assault in the Second Degree (§565.060.1(4)) for events occurring on November 4, 2007, resulting in the deaths of two people and the injuries to two other persons, all occupants of an automobile which was struck by Mr. Welch's vehicle which he was operating while in an intoxicated condition. Mr. Welch subsequently plead guilty to all four counts on July 29, 2008.

On August 5, 2008, Circuit Judge Richard Callahan sentenced Mr. Welch to terms of 15 years in the Missouri Department of Corrections on each of the manslaughter counts, and 5 years on each of the Assault counts. The manslaughter counts were to be served concurrently with each other but consecutively to the assault counts which were to run concurrently to each other, for a total sentence of 20 years in the Missouri Department of Corrections.

In July, 2014, Mr. Welch filed a Motion to Reduce Sentence pursuant to §558.046, RSMo. On August 13, 2014, an evidentiary hearing was held and on December 19, 2014, the Circuit Court found that all the provisions of §558.046, RSMo, had been met and reduced the previously ordered sentences in Case No: 07AC-CR03648-01. Relator filed a writ of prohibition in the Western District Court of Appeals, on December 23, 2014. Relator's petition was ultimately denied, but the Appellate Court stayed the order and Relator filed his petition

for writ of prohibition with this Court within that stay. This Court entered it's order in preliminary prohibition on January 12, 2015.

POINT RELIED ON

Relator's petition for writ of prohibition should be denied because Respondent's actions were within the jurisdictional authority conferred upon a sentencing court, in that the sentencing court did not abuse it's discretion when it determined that the statutory requirements of §558.046, RSMo, were satisfied because Mr. Welch was convicted for crimes that did not involve violence or the threat of violence.

State ex rel. City of Jennings v. Riley, 236 S.W. 3d 630, 631 (Mo. Banc 2007)

§558.046, RSMo.

ARGUMENT

Relator's petition for writ of prohibition should be denied because Respondent's actions were within the jurisdictional authority conferred upon a sentencing court, in that the sentencing court did not abuse it's discretion when it determined that the statutory requirements of §558.046, RSMo, were satisfied because Mr. Welch was convicted for crimes that did not involve 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

Respondent's authority to reduce the sentences previously imposed on Mr. Welch derives from the sentencing court's exercise of discretion conferred on it by §558.046, RSMo. Convictions for Involuntary Manslaughter in the First Degree (§565.024) and Assault in the Second Degree (§565.060) are crimes that "do not involve violence or the threat of violence." §558.046(1)(a). Because the crimes for which Mr. Welch was convicted do not involve violence or the threat of violence, Respondent did not fail to follow applicable statutes nor abuse it's discretion in ordering the reduction of the previously imposed sentences.

§558.046, RSMo. states 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:

(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."

Relator cites *State ex rel. Moore v. Sweeney*, 32 S.W.3d 212 (Mo. App. S.D. 2000) for the proposition that a petitioner under §558.046 must demonstrate the crime of which he was convicted was "a crime that did not involve violence or the threat of violence." *Sweeney* is a Southern District case from 2000 which held that Robbery Second Degree was a crime involving violence for purposes of §558.046. Unlike here, *Sweeney* involved interpreting §569.030(1), a statute containing an element with a clear definition found in §569.010. Relator fails to point out that the Court's reasoning in *Sweeney* hinged on the fact that the crime of Robbery Second Degree contained the element "Forcibly Steals" which was so clearly defined

in §569.010(1) that any suggestion Robbery Second Degree did not involve violence or the threat of violence bordered on frivolity. *Id.*, at 216. The Court's analysis focused on **the use of purposeful** force directed against a victim:

> "This court therefore concludes section 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 threat of physical force against the victim (or someone else). The record before this court establishes that Inmate used physical force against the victim for the purpose of preventing the victim from resisting the taking of his property." *Id.*, at 216.

As Mr. Welch was not convicted of a crime involving the use of purposeful force against a victim, Sweeney seems to answer a question not before this Court.

Relator, citing *State v. Kinder*, 942 S.W.2d 313, 332 (Mo. Banc 1996) and *State v. Whitfield*, 939 S.W. 2d 361 (1997), states that "Involuntary Manslaughter and Assault in the Second Degree have been found to be serious assaultive offenses in Missouri cases." Whether a crime is characterized as a serious assaultive offense or otherwise, does not answer the question of whether these crimes involve violence. That Involuntary Manslaughter and Assault in the Second Degree are felonies and are therefore considered serious assaultive offenses for purposes of statutory aggravating circumstances, begs the question as to whether they are crimes involving violence. The defendant in *Kinder* knowingly caused physical injury by means of a dangerous instrument. Relator ignores the distinction between knowingly causing injury and recklessly or negligently causing injury.

Relator points out that Missouri's Sentencing Advisory Commission User Guide, Appendix D, lists both Involuntary Manslaughter and Assault 2nd Degree to be violent felonies. When one considers that this same User Guide lists as non-violent offenses, Burglary 1st Degree, Arson (not causing death); Stealing; Threatening to place bomb or explosive at or near a bus or terminal; Unlawful use of a weapon (subsec 1 – 4); Unlawful use of weapon motivated by discrimination; Discharging a firearm or weapon at a railroad train or rail- mounted equipment; Possessing or discharging a loaded firearm/projectile weapon while intoxicated; Unlawful use of a loaded firearm/projectile weapon by an intoxicated person (subsection 5); Escape or attempted escape from custody while under arrest for felony; Escape or attempted escape from the DOC; Escape or attempted escape from confinement; Resisting/interfering with arrest for a felony; Resisting arrest by fleeing-creating a substantial risk of serious injury/death to any person; and Disarming a peace officer or correctional officer while performing official duty, the distinction appears arbitrary if not random. Missouri's Sentencing Advisory Commission User Guide, Appendix D (2012-2013).

Relator suggests that the language in §558.046(1)(a) is much different than the term "crime of violence" used in 18 U.S.C. §16. He appears to suggest that because the federal statutes define "crime of violence" in terms of "use of violence" on another, it is not relevant to the question of what constitutes a crime "involving violence or the threat of violence" under §558.046(1)(a) RSMo. He seems to have forgotten his citation to *Sweeney*:

> "This court therefore concludes section 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 threat of physical force against the victim (or someone else)." *State ex rel. Moore v. Sweeney*, 32 S.W.3d 212,216 (Mo. App. S.D. 2000).

Relator cites to several federal cases and the United States Sentencing Guidelines Manual for the proposition that manslaughter is a crime involving violence ("crimes of violence"). In his original suggestions in support filed in the Court of Appeals, Relator cited, *U.S. v. Newton*, 259 F.3d 964 (8th Cir. 2001). He fails to cite *Newton* here but now cites *Leocal v. Ashcroft*, 543 U.S. 1(2004), *U.S. v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005) and *U.S. v. Gonzales-Lopez*, 335 F.3d 793, 799 (8th Cir. 2003) for similar purposes.

All of these cases, in varying degrees, address the issue of whether an involuntary manslaughter conviction constitutes a crime of violence for the purposes of federal sentencing. As they were all decided before *Begay v. United States*, 553 U.S. 137 S. Ct. (2008), it is difficult to see what light they have to shed on the question before this Court.

In *Begay*, the Court interpreted the residual clause of 18 U.S.C. §924(e)(2)(B)(ii) which defines a violent felony as any crime that "involves conduct that presents a serious potential risk of physical injury to another." The Court emphasized that qualifying crimes must demonstrate a defendant's propensity towards "purposeful, violent, and aggressive conduct." The Court held that New Mexico's crime of DUI, despite being a crime that "presents a serious potential risk of physical injury to another" (*Id., at* 141), lacked as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). As such, it lacked the "purposeful, violent, and aggressive conduct" (*Id., at*

145) associated with the example crimes listed in 18 U.S.C. §924(e)(2)(B)(i) and therefore "falls outside the scope of the Armed Career Criminal Act's clause (ii) 'violent felony' definition." *Id., at* 148.

Here, as in *Begay*, the crimes at issue do not require as an element, "violence or the threat of violence." §558.046(1)(a). Neither Involuntary Manslaughter First Degree nor Assault Second Degree have as an element, "violence or the threat of violence." §558.046(1)(a). As in *Begay,* these crimes criminalize "conduct in respect to which the offender need not have had any criminal intent at all." *Id., at* 145.

In *U.S. v. Ossana,* 638 F.3d 895 (8th Cir. 2011), the 8th Circuit, applying the rule as set forth by the U.S. Supreme Court in *Begay*, was unable to determine the particular subpart of the Arizona aggravated assault statute the defendant violated and therefore could not determine whether his conviction for aggravated assault constituted a violent felony for purposes of 18 U.S.C. §924(e)(2)(B)(ii). However, the court held "that a conviction pursuant to Ariz.Rev. Stat. §§ 13-1203 & 1204 involving merely reckless use of a vehicle is not a crime of violence pursuant to the residual clause of U.S.S.G. §4B1.2(a)(2)." They remanded the case for resentencing. Additionally, the court noted that "in at least one reported case, the government withdrew its argument that 'reckless conduct, standing alone' could qualify as a crime of violence pursuant to the residual clause . . . and that "we have identified, no circuit-level cases post *Begay* in which a court found an offense qualified as a violent felony or crime of violence where the *mens rea* for the offense was mere recklessness and where there were no further qualifications to suggest purposeful, violent, or aggressive conduct." *Id*., at 901.

Relator's argument expands the application of §558.046(1)(a) such that all manner of seemingly non-violent conduct transforms into violent crime if injury or damage to property results. Relator's argument is that any resulting injury caused by any criminal act renders the criminal act a crime involving violence. Thus, any crime, no matter how minor, any act, however non-violent, if it results in injury to another, becomes an invalidating crime under §558.046(1)(a). The possibilities under this interpretation are limitless.

It does not seem reasonable that such was the intent of the Legislature. Relator suggests that it is unreasonable to believe that the Legislature wanted those who have "killed and maimed" to be eligible for a sentence reduction. How difficult would it have been for the Legislature to express such an intent. They seem not to have done so. Yet the Legislature grants broad discretion to the sentencing court under §559.115 to release from prison those sentenced to lengthy prison terms after only 120 days of incarceration.

To accept Relator's argument one would have to apply the most expansive possible meaning to §558.046(1)(a) "Convicted of a crime that did not involve violence." In this context, where a determination as to whether a particular class of offender is subject to the remedies afforded under §558.046, the statute should not be given such a broad construction as that suggested by Relator. A narrower construction is more appropriate, where as here, the statute penalizes those who commit crimes involving violence or the threat of violence. Certainly those acting negligently, without purpose or intent are in a different category from those who act intentionally and purposefully to harm others. §558.046 is intended to grant broad discretion to the sentencing court. *State v. Stout*, 960 S.W. 2nd 535 (Mo.App.E.D. 1998).

This purpose is better advanced by a narrower construction than that suggested by Relator.

CONCLUSION

The crimes for which Mr. Welch was convicted, do not require as elements, violence or the threat of violence. They are not included in Missouri's list of dangerous felonies, and they have never been held to be violent crimes for purposes of §558.046. They involve "conduct in respect to which the offender need not have had any criminal intent at all." *Begay., at* 145. "Drunk driving is a crime of negligence or recklessness, rather than violence or aggression . . ." *Id*, at 146. "(R)eckless use of a vehicle is not a crime of violence . . ." *Ossana*, at 901. To the extent that recent federal caselaw shines light on this question, it seems clear that these courts are hesitant to ignore the distinction between purposeful, directed, or aggressive conduct, and accidental, negligent or reckless conduct. This Court too should be hesitant to expand the reach of language such as that found in §558.046. For these reasons, the Court should deny the Writ of Prohibition sought by Relator, and allow the Circuit Court's Order dated December 19, 2014, to take effect.

Respectfully submitted,

/s/ James D. Barding

James D. Barding #46302
609 E. High Street
Jefferson City, Missouri 65101
Telephone: 573/619-3231
Facsimile: 573/634-8447
Email: dogbarking@mchsi.com

Attorney for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. The Respondent'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 New Times Roman, size 13-point font.

4. As reported by the undersigned's copy of Microsoft Word, the word count is 2979.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2015, an electronic copy of Respondent's Brief was delivered via the Missouri e-Filing System, to Mark A. Richardson, Relator, at mricharsdson@colecopa.com.

/s/ James D. Barding
James D. Barding #46302
609 E. High Street
Jefferson City, Missouri 65101
Telephone: 573/619-3231
Facsimile: 573/634-8447
Email: dogbarking@mchsi.com