

In the Supreme Court of Missouri

STATE EX REL. KENDRICK TIPLER,

Relator,

vs.

THE HONORABLE MICHAEL GARDNER,

Respondent.

Original Writ Proceeding from the
Circuit Court of Cape Girardeau County, Missouri
The Honorable Michael Gardner, Circuit Judge

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

On July 25, 2005, Kendrick Tipler endangered the welfare of a child by having sexual contact with a child younger than seventeen years old. Tipler pled guilty to this offense (Supp. L.F., p. 2–3)¹, although he was originally charged with first-degree statutory rape for having sexual intercourse with the same child (Supp. L.F., p. 7). That child’s initials are B.B. (Supp. L.F., p. 39). In exchange for his plea of guilty, the State offered Tipler a reduced charge with less prison time, which Tipler’s attorney described as a “sweetheart deal.” (Supp. L.F., p. 24–25). During his guilty plea, Tipler admitted to the factual basis of his crime, specifically that he “created a problem for [B.B.] a girl under the age of seventeen.” (Supp. L.F., p. 39). Tipler is a registered sex offender because of his guilty plea. (Supp. L.F., p. 21).

Then, between September 1, 2013 and December 31, 2013, Tipler is alleged to have committed attempted first-degree statutory sodomy, in that

¹ Judge Gardner abbreviates the Supplemental Legal File as “Supp. L.F.” This Court granted Respondent’s request to file a Supplemental Legal File on July 19, 2016.

Tipler touched his penis to his daughter's genitals (Exhibits, p. 3)². Tipler's daughter's initials are L.T. (Exhibits, p. 1). At that time, Tipler's daughter was younger than twelve (Exhibits, p. 3). The Cape Girardeau County Prosecutor's Office charged Tipler with that offense, and indicated that Tipler was a prior offender because of his conviction for endangering the welfare of a B.B. (Exhibits, p. 3). Tipler is a prior and persistent offender because he was convicted of endangering the welfare of a child, and of felony possession of a controlled substance (Exhibits, p. 6).³

The Honorable Michael Gardner presided over the trial where Tipler was charged with attempted first-degree statutory sodomy against L.T. The

² Judge Gardner cites to the exhibits filed by Tipler as "Exhibits" followed by the page number. All exhibits filed by Tipler were filed in an exhibit index, each exhibit was given a letter designation, and each page of the index was numbered. For the Court's convenience, Respondent cites to the page number of the Exhibit index.

³ Relator's Exhibit A (Exhibits, p. 1) is the amended information filed by the State on March 25, 2015. A second amended information charging Tipler as a prior and persistent offender was filed by the State on December 2, 2015 (Exhibits, p. 6). Respondent found Tipler to be a prior and persistent offender on December 8, 2015.

two-day jury trial was held on December 8, 2015 and December 9, 2015 (Exhibits, p. 6). After six-and-a-half hours, the jury announced it was unable to reach a verdict, and Judge Gardner declared a mistrial at Tipler's request (Exhibits, p. 6). Judge Gardner then set the case for re-trial beginning May 4, 2016 (Exhibits, p. 5).

The State filed its Notice of Intent that the State would seek to admit Tipler's conviction for endangering the welfare of a B.B. by having sexual relations with that child (Exhibits, p. 24). The State offered this evidence for the purpose of corroborating the testimony of the attempted first-degree statutory sodomy victim (Exhibits, p. 24). The State also offered the evidence for the purpose of demonstrating Tipler's propensity to commit sex crimes against children (Exhibits, p. 24).

Tipler briefed the issue (Exhibits, p. 11–22). The State briefed the issue (Exhibits, p. 23–42). Judge Gardner heard arguments on the motion (Supp. L.F., p. 10–28). Judge Gardner found the evidence was admissible under Article I, § 18(c) of the Missouri Constitution, and found that “the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice,” and then entered his pre-trial order allowing the evidence (Exhibits, p. 44).

Then, Tipler filed a motion asking Judge Gardner to reconsider his ruling (Exhibits, p. 45–51). The State filed a brief in response (Exhibits, p.

55–60). Judge Gardner again heard arguments (Supp. L.F., p. 29–34). Judge Gardner denied the motion to reconsider (Exhibits, p. 1). Tipler sought a writ from the Missouri Court of Appeals, Eastern District, which was denied. Tipler then sought and received a preliminary writ from this Court.

SUMMARY OF THE ARGUMENT

The People of Missouri enacted a constitutional amendment in 2014 establishing a rule of evidence in trials for “crimes of a sexual nature involving a victim under eighteen years of age.” MO. CONST., art. I, § 18(c). The amendment applies to relator Tipler’s upcoming 2016 trial.

Under Article I, Section 18(c) “relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim’s testimony or demonstrating the defendant’s propensity to commit the crime with which he or she is presently charged.”

This Court’s precedents mandate that Article I, Section 18(c) apply to any trial that takes place *after* the provision was adopted. That includes Tipler’s future trial. The cases teach that constitutional amendments are not retroactively applied when the triggering event occurs *after* the amendment’s adoption. Because Article I, Section 18(c) is a rule of evidence, the triggering event is Tipler’s upcoming criminal trial.

Moreover, Article I, Section 18(c) is a rule of evidence, and this Court has held for over a century that the rules of evidence in effect at the time of trial govern. Therefore, this Court should quash its preliminary writ.

ARGUMENT

Standard of Review

Writs of mandamus and prohibition are extraordinary remedies and are not appropriate to correct every alleged trial court error. *State ex rel. Chassing v. Mummert*, 887 S.W.2d 573, 576–77 (Mo. banc 1994). Trial courts are given “broad leeway in choosing to admit evidence; therefore, an exercise of this discretion will not be disturbed unless it is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration.” *Mitchell v. Kardesh*, 313 S.W.3d 667, 674–75 (Mo. banc 2010).

Mandamus will not issue to compel the performance of a discretionary duty—a duty that requires “the exercise of reason in determining how or whether the act should be done.” *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). The purpose of mandamus is to execute, not adjudicate. *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 879 (Mo. banc 1977). Mandamus cannot be used to establish a legal right. *Chassing*, 887 S.W.2d at 576.

Similarly, prohibition “is not appropriate” when “the error is one of law, and reviewable on appeal....” *Id.* at 577, citing *State ex rel. Morasch v. Kimberlin*, 654 S.W.2d 889, 892 (Mo. banc 1983).

I. It is not a retroactive application of law to apply Article I, Section 18(c) to a future trial. – Responding to Relator’s Point I.

Respondent correctly decided to allow the State to present evidence of Tipler’s prior conviction for endangering the welfare of a child by having sex with that child. The evidence will be presented in the *future* trial, so there is no retrospective application of Article I, Section 18(c) in this case.

In November 2014, the Missouri Constitution was amended to include a new provision, Article I, Section 18(c). It reads, in part, as follows:

Notwithstanding the provisions of section 17 and 18(a) of this article to the contrary, in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim’s testimony or demonstrating the defendant’s propensity to commit the crime with which he or she is presently charged. The court may exclude relevant evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

MO. CONST. art. I, § 18(c). Despite Tipler's arguments, applying Article I, § 18(c) in the trial for Tipler's crime is not retroactive because the crime was committed before the effective date of the amendment. *See* Rel. Br. at 10–11. Instead, as this Court's cases make clear, retrospective application of a constitutional amendment occurs when a constitutional amendment changes the significance of an act that occurred *before* the amendment was passed.

This Court was confronted with a similar issue in *State ex rel. Scott v. Dircks*, 111 S.W. 1 (Mo. banc 1908) and *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396 (Mo. banc 1972). The rule *Scott* and *Hall* requires that this Court deny the petition for mandamus or prohibition.

In *Scott*, the relator was the current sheriff of Cole County. *Scott*, 111 S.W. at 1. The relator was elected in the November 1906 election for a two-year term beginning on January 1, 1907. *Id.* At the November 1906 election, the People approved an amendment to the Missouri constitution that provided that there would be a new election held in 1908 for all sheriffs, that the term of office was four years, and that a candidate for sheriff could only be eligible "only four years in any one period." *Id.* at 2. The circuit clerk refused to place the relator on the ballot because relator was the current sheriff. *Id.*

This Court granted a writ of mandamus directing that the circuit clerk place the relator on the ballot. *Id.* at 3. This Court explained that the 1906

amendment—which changed the eligibility requirements—must be applied prospectively. *Id.* at 3. This Court reasoned that the amendment was in existence, but had no “actual operation and practical effect until the election in 1908, the first time when an election for sheriff was to be held under its provisions.” *Id.* In other words, this Court explained that preventing the relator from standing for election for sheriff would require applying the 1906 amendment to the relator’s prior term of service.

In *Hall*, this Court confronted a similar situation. There, the relator was a circuit judge in the Sixteenth Judicial Circuit. *Hall*, 483 S.W.2d at 396. The relator was retained as circuit judge for a six-year term in the general election held November, 1970. *Id.* at 397. During the relator’s term, the People approved an amendment to the constitution that required court-plan judges to retire at the age of seventy. *Id.* Relator turned seventy before his six-year term expired. *Id.* Relator sought mandamus for salary denied him after he reached age seventy.

This Court granted a writ of mandamus, directing that the relator be provided his salary. *Id.* at 400. This Court’s rationale was straight forward: prospective application of the amendment meant that it only applied to terms filled after the amendment was adopted. Put another way, because the amendment limited the term of office, prospective application required that the amendment only apply to court-plan judges whose terms started after the

amendment was adopted. *Id.* at 399. Importantly, this Court considered the intent of the People as well. *Id.* at 399–400.

In *Scott* and *Hall*, the relevant event was the first election *after* the amendment was adopted. In *Scott*, the Court would have retroactively applied the amendment if it prevented the sheriff from standing for election because that would have required applying the sheriff's current term against the eligibility requirements of the future term. In *Hall*, limiting the judge's current term would have been a retroactive application because it would have required applying the amendment to an election that had already occurred.

Scott and *Hall* demonstrate that the relevant event in this case is not the crime, but the date of the trial. In other words, this Court held that applying the amendments to previous elections would have been a retroactive application. Conversely, this Court held that it was proper to apply the amendments to future elections because the amendments governed the terms of office.

In this case, prospective application of Article I, Section 18(c) includes Tipler's upcoming trial because the amendment governs the admissibility of evidence. Article I, Section 18(c) does not change the admissibility of evidence at Tipler's prior trials, just like the amendments in *Scott* and *Hall* did not impact the terms of office that resulted from prior elections. This Court held in *Scott* and *Hall* that the amendments applied to future terms conferred by

elections that took place after those amendments were adopted. So, this Court should hold that Article I, Section 18(c) applies to evidence presented at trials held after it was adopted.

Tipler's first argument, that the date of the charged conduct controls what version of the constitution applies, is refuted by another of this Court's precedents. In *State v. Kyle*, 65 S.W. 763 (Mo. banc 1901), the defendant committed first-degree robbery on November 16, 1900. *Kyle*, 65 S.W. at 763. On November 8, 1900, the People adopted an amendment to the Missouri constitution that authorized the State to proceed by either an indictment or information. *Id.* at 764. Before the amendment, the State could only proceed on a felony by an indictment. The votes on the amendment were canvassed and reported on December 19, 1900. *Id.* The State filed its information in the January Term, 1901. *Id.*

The defendant asserted that the State could not prosecute him by information because the offense occurred *before* the votes were canvassed. This Court held that the State could proceed by way of information because the constitutional amendment took effect from the time of the canvass of the vote on the amendment. *Id.* at 767; *see also State v. Brown*, 79 S.W. 1111, 1119 (Mo. Div. 2, 1904). If the *Kyle* case was governed by the version of the constitution in effect at the time the defendant committed his crime, then the State would not have been able to proceed by way of information.

Under *Kyle*, the relevant act was the filing of the information or indictment. Because the information was filed *after* the amendment was adopted, it was proper for the State to proceed by way of information. Applying that rule to this case, because the relevant act is the presentation of evidence at trial, and because the trial will take place *after* Article I, Section 18(c) was adopted, it is proper for the State to admit propensity evidence.

Tipler disagrees, and argues that Article I, Section 18(c) cannot apply at his future trial because of *State v. McCoy*, 468 S.W.3d 892 (Mo. banc 2015). Tipler's argument fails for two reasons. First, Tipler never explains why he believes the relevant event in his case is the date of the crime, not the date of the trial. As Respondent has demonstrated, the relevant date is the date of the trial. Second, *McCoy* is factually distinct from *Scott*, *Hall*, and this case. The factual differences in *McCoy* require this Court to reach a different result.

In *McCoy*, the defendant was "caught possessing a pistol on or about June 23, 2012." *McCoy*, 468 S.W.3d at 894. The defendant was tried and convicted by a jury of being a felon in possession in a firearm. *Id.* After the defendant filed his appeal, the voters approved an amendment to Article I, Section 23 of the Missouri constitution. *Id.* The defendant then sought the "benefit" of that amendment on direct appeal, and argued that the amendment should be applied retroactively to cases on direct appeal. *Id.* at

895. The defendant in *McCoy* had to ask for retroactive application because his trial had already occurred by the time the People amended the constitution. In other words, the defendant in *McCoy* was asking this Court to overturn his trial because the law changed *after the trial was concluded*. Not so here. The respondent in *Scott* was asking this Court to limit a term of office because the constitution was amended *after* the election for that office took place. In this case, Tipler has asked this Court to limit the evidence at trial *despite* the fact that trial takes place after the constitution was amended.

Respondent Gardner is not applying Article I, Section 18(c) retroactively because unlike *Scott*, *Hall*, and *McCoy*, this case is concerned with an event (the trial) that takes place *after* the amendment was passed, not before. This is the situation in the *Kyle* case, where the event (filing an information) was permissible because it occurred after the authorizing amendment was passed.

Respondent Gardner applied Article I, Section 18(c) prospectively by recognizing that the amendment applies to future trials. This Court should quash the preliminary writ because Respondent Gardner's order is not a retroactive application of Article I, Section 18(c).

II. Article I, Section 18(c) is a rule of evidence and therefore applies to all trials, but even if it did not, the General Assembly and the People intended the amendment to apply immediately.

– Responding to Relator’s Point II.

Article I, Section 18(c) is a rule of evidence. Over 100 years ago, this Court said that the rules of evidence apply at the time of trial. *State v. Thompson*, 42 S.W. 949, 951 (Mo. banc 1897) (*Thompson II*). This year, this Court said “there is no question that the rules of evidence in effect at the time of trial govern.” *Stiers v. Director of Revenue*, 477 S.W.3d 611, 618 (Mo. banc 2016).

This has been the long settled rule in Missouri, even when a statute changes during the prosecution. In *Thompson I*, the defendant was convicted of murder, but his conviction was reversed on appeal. *State v. Thompson*, 34 S.W. 31 (Mo. Div. 2, 1896) (*Thompson I*). In *Thompson I*, the State had charged the defendant with murdering the victim by poisoning the church sexton’s cheese with strychnine. *Thompson I*, 34 S.W. at 31. During the State’s case, the prosecutor produced a letter to the town druggist requesting strychnine. *Id.* at 33–34. The druggist testified that he provided the strychnine in response to the letter. *Id.* at 34. During the State’s case, the prosecutor also produced a letter to the church organist, which was written by the defendant. *Id.* The prosecutor then produced an expert and asked him

to compare the handwriting in the letters. *Id.* at 35. The expert testified the handwriting was the same. *Id.* The prosecutor then moved all the exhibits into evidence “for the purpose of comparison.” *Id.* This Court reversed the conviction because Missouri did not have a statute that allowed admitting writings for the purpose of proving the handwriting of a party. *Id.* at 38. This Court remanded the case for re-trial.

After the first trial, the General Assembly passed a new statute, providing that “comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of genuineness or otherwise of the writing in dispute.” *Thompson II*, 42 S.W. at 951 (*Thompson II*), quoting Sess. Laws Mo. 1895, p. 284. The same exhibits were again admitted, and the defendant was convicted. He again appealed, and asserted that his re-trial should have occurred under the evidentiary law in effect at the time of the crime.

The *Thompson II* court rejected this argument. *Thompson II*, 42 S.W. at 952. The *Thompson II* court also recognized that the Missouri Supreme Court, Division 1, had previously held that “laws which change the rules of evidence relate to the remedy only, and may be applied to existing causes of action” without being retrospective. *Thompson II*, 42 S.W. at 952, citing

O'Bryan v. Allen, 18 S.W.892 (Mo. Div. 1, 1891). The *Thompson II* court agreed with a legal scholar who wrote "...it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose." *Thompson II*, 42 S.W. at 952. The *Thompson II* court also explained that, "as to all trials occurring after its enactment, it was prospective, and not retroactive." *Id.* at 953.

Under *Thompson I* and *Thompson II*, Respondent Gardner made the correct legal ruling, and this Court should quash the preliminary writ. In this case, like *Thompson II*, the rules of evidence have changed between the first and the second trial.⁴ And, like *Thompson I* and *Thompson II*, the circuit court correctly held that the current rules of evidence governed the retrial.

Recently, this Court has considered another case about the rules of evidence: *Stiers v. Director of Revenue*, 477 S.W.3d 611 (Mo. banc 2016). In

⁴ It is true that the rule of evidence in *Thompson I* and *Thompson II* was a statute replacing the common law, while in this case it is an amendment to the Missouri constitution. But that cannot be a meaningful difference. To hold otherwise would suggest that the General Assembly can change rules of evidence applicable to existing charges, but that the ultimate sovereign – the People – cannot. That is not the case.

Stiers, the Director appealed a circuit court’s decision finding insufficient evidence that a driver had a blood alcohol concentration of above .08. *Stiers*, 477 S.W.3d at 612–13. This Court affirmed the circuit court. This Court explained that the rules of evidence in effect at the time of trial govern the trial. *Id.* at 618. However, this Court correctly pointed out that the rule of evidence at issue—Section 576.037, RSMo.—required the breath test be validly performed under DHSS regulations. *Id.* If the breath test was not properly calibrated at the time of the test, then it was not validly performed under DHSS regulations. *Id.* This Court explained that changing the regulations did not turn improperly calibrated tests into properly calibrated tests. *Id.* Accordingly, the breath test was not admissible in that case because only the regulation *and not* the rule of evidence had changed. *Id.* at 619–20.

The Director’s problem in *Stiers* is not present in this case for two reasons. First, the Director was unsuccessful in *Stiers* because the DHSS regulation *was not* a rule of evidence but Section 576.037 was. In this case, unlike in *Stiers*, the actual rule of evidence *has* changed. Before the amendment, this Court had held that evidence of prior convictions was not admissible. *State v. Ellison*, 239 S.W.3d 603, 607–08 (Mo. banc 2007). Article I, Section 18(c) now expressly allows that evidence to be admitted. Because “there is no question” that the rules of evidence in effect at the time of trial

govern the trial, *Stiers*, 477 S.W.3d at 618. Article I, Section 18(c) will govern the upcoming trial in this case.

Second, in *Stiers*, the relevant act was the calibration of the breathalyzer, not the admission of the breathalyzer results at trial. In Tipler's case, the relevant act is the admission of evidence during trial, not Tipler's criminal conduct.

Article I, Section 18(c) is a rule of evidence. The amendment says it is a rule of evidence. The amendment's terms affect the admissibility of evidence. And under this Court's precedents ranging from *Thompson II*, issued in 1897, to *Stiers*, issued in 2016, the rules of evidence in effect at the time of trial govern. Accordingly, Respondent Gardner correctly determined that Article I, Section 18(c) governs the re-trial, and this Court should quash its preliminary writ.

CONCLUSION

For the foregoing reasons, this Court should quash its preliminary writ, allow the circuit court's evidentiary ruling to stand, and allow the criminal trial to proceed in the ordinary course.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri Case.Net on August 2nd, 2016 to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,169 words.

/s/ Gregory M. Goodwin
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