

**IN THE
MISSOURI SUPREME COURT**

RICKY C. ROSS,)	
)	
Appellant,)	
)	
vs.)	No. SC90807
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MICHAEL J. CORDONNIER, JUDGE**

APPELLANT’S BRIEF

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INDEX

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	5
POINT RELIED ON	10
ARGUMENT: Appellant’s second-degree statutory rape conviction is void, because S.B. 693 (1994), which included § 566.034 when it was enacted, violated Appellant’s rights under article III, § 23 of the Missouri constitution, in that S.B. 693 contained multiple subjects in violation of the constitutional requirement that “[n]o bill shall contain more than one subject which shall be clearly expressed in its title	12
CONCLUSION	20
CERTIFICATE OF COMPLIANCE AND SERVICE	21
APPENDIX (SEPARATELY BOUND).....	A-1 to A-35

TABLE OF AUTHORITIES

Page

CASES:

<i>Ex Parte Smith</i> , 135 Mo. 223, 36 S.W. 628 (Mo. 1896).....	10, 18, 19
<i>Hammerschmidt v. Boone County</i> , 877 S.W.2d 98 (Mo. banc 1994)	16, 17
<i>Jackson Co. Sports Complex Authority v. State</i> , 226 S.W.3d 156 (Mo.banc 2007)	4
<i>People v. Cervantes</i> , 189 Ill.2d 80, 723 N.E.2d 265, 243 Ill.Dec. 233 (1999)	10, 18
<i>Rizzo v. State</i> , 189 S.W.3d 576 (Mo. banc 2006).....	10, 16, 17
<i>St. Louis Health Care Network, et al., v. State</i> , 968 S.W.2d 145 (Mo.banc 1998)	10, 18
<i>State ex rel. Bloomquist v. Schneider</i> , 244 S.W.3d 139 (Mo banc 2008)	18
<i>State v. Burgin</i> , 203 S.W.3d 713 (Mo. App. E.D. 2006).....	19
<i>State v. Bradley</i> , 811 S.W.2d 379 (Mo. banc 1991).....	15
<i>State v. Salter</i> , 250 S.W.3d 705 (Mo. banc 2008).....	15

CONSTITUTIONAL PROVISIONS:

Mo. Const., Art III, § 23	10, 11, 12, 13, 15, 16, 17
---------------------------------	----------------------------

STATUTES:

§ 558.016, RSMo (Supp. 2006).....	4, 5
§ 566.034, RSMo (2000)	10, 11, 12, 13, 14, 15, 16, 17, 19

RULES:

Rule 24.035, Missouri Court Rules (2008)	11, 12, 13, 14, 15
--	--------------------

MISCELLANEOUS:

Millard H. Ruud, <i>No Law Shall Embrace More Than One Subject</i> , 42 Minn. L.Rev 389 (1958)	18
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JURISDICTIONAL STATEMENT

Appellant, Ricky C. Ross, pleaded guilty to the class C felony of statutory rape in the second degree, § 566.034, RSMo (2000),¹ which was eligible for sentence enhancement to the maximum sentence for a class B felony because he was alleged and found to be a persistent offender, § 558.016, RSMo (Supp. 2006).

Appellant filed a motion to vacate, set aside, or correct the judgment or sentence under Rule 24.035. Included in that motion was a challenge that the passage of § 566.034 violated article III, § 23 of the Missouri Constitution. The motion court denied the motion after a hearing, finding that the statute was not unconstitutional. Appellant filed a timely notice of appeal from that judgment. Because the Rule 24.035 motion involves the validity of a state statute, this appeal involves an issue reserved for the exclusive jurisdiction of the Missouri Supreme Court. Article V, §§ 3 and 10, Mo. Const.; *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156, 158 (Mo. banc 2007).

¹ Rule references are to Missouri Court Rules (2008), and further statutory references are to Revised Statutes of Missouri, 2000, unless otherwise noted.

STATEMENT OF FACTS

Appellant was charged by amended information with, the class C felony of statutory rape in the second degree, § 566.034, sentence enhancement to the maximum sentence for a class B felony because he was alleged and found to be a persistent offender, § 558.016, RSMo (Supp. 2006) (LF 10-11; LF 19, pg. 27; LF 21, pg. 33).²

On June 10, 2008, the day Appellant was set to have a court-tried case, Appellant abruptly changed course and announced that he wished to plead guilty without an agreement with the State because he did not want to force the 16-year-old victim or her family to testify (LF 13, pgs. 1-2; LF 16, pgs. 15-16; LF 19, pgs. 25-26). During the guilty plea, Appellant admitted that he was over 21-years-old and that once during the spring of 2007, he knowingly had consensual sexual intercourse with the 16-year-old victim (LF 18-20, pgs. 24-30).

The plea court accepted the guilty plea, finding that it was made freely, voluntarily and intelligently after a full understanding of the charge, all rights to a trial, and the consequences of a guilty plea, and that there was a factual basis for the plea and to sentence Appellant as a persistent felony offender (LF 20-21, pgs.

² The guilty plea and sentencing transcripts contained in the legal file contain four transcript pages per legal file page. The reference to that transcript is first to the page of the legal file, and then to transcript page number, located at the bottom right corner of each transcript page. (e.g., LF 19, pg. 27).

32-33). The court also ordered a sentence assessment report prepared for a later sentencing hearing (LF 20-21, pgs. 32-33).

On September 5, 2008, Appellant was sentenced to 10 years in prison for second-degree statutory rape (LF 29, pg. 28; LF 32-35). Appellant again accepted responsibility for his crime (LF 29, pg. 25). Appellant told the court that his attorney did what he asked him to do and that he was satisfied with his attorney's services (LF 30, pgs. 30-31).

On December 22, 2008, Appellant filed a *pro se* motion under Missouri Supreme Court Rule 24.035 (LF 36-45). On February 26, 2009, private counsel Richard Monroe, entered his appearance as Special Public Defender for Appellant and requested an additional 60-days to file the amended Rule 24.035 motion (LF 46).

On April 27, 2009, an amended Rule 24.035 motion was filed (LF 47-104). The first claim set out in that amended motion was that the offense of statutory rape in the second degree is unconstitutional because it was adopted in violation of article III, § 23 of the Missouri Constitution (LF 47, 58-63).³ The motion noted that Rule 24.035 allows a movant to challenge a conviction or sentence that violates the constitution or that exceeds the jurisdiction of the court (LF 58). The second-degree statutory rape statute was adopted in violation of the single subject

³ Because Appellant is not challenging the other claims on this appeal, those claims and the evidence concerning them have been omitted from this brief.

and germane title provision of the Missouri Constitution, article III, § 23, which provides, in pertinent part, “No bill shall contain more than one subject which shall be clearly expressed in its title...” (LF 58).

The amended motion noted that the second-degree statutory rape statute in effect at the time of Appellant’s charged crime had been passed by the General Assembly as Senate Bill 693 in 1994 (S.B. 693), with an effective date of January 1, 1995 (LF 59). The title of the bill noted that it was to repeal certain named statutes “relating to sexual offenses,” and to enact in lieu thereof new statutes “relating to the same subject,” including § 566.034 (second-degree statutory rape) (LF 59).

Yet the body of the bill enacted legislation including the following subjects, which do not relate to sexual offenses:

- (i) Investigative subpoena powers of prosecuting attorneys;
- (ii) criminal offense of purchase or possession of intoxicating liquor by minors;
- (iii) criminal offense of purchase or possession of non-intoxicating beer by minors; and
- (iv) authorization for depositions by prosecutors.

(LF 59-60). These bear no relation to the title’s purpose – sexual offenses. Thus, S.B. 693 covered multiple subjects, rather than the single subject as required by the Missouri Constitution (LF 60).

The amended motion noted that although second-degree statutory rape related to the title subject (“sexual offenses”), it did not fit “germanely and congruously” with other topics covered in the bill, especially those set out above (LF 63). And since an unconstitutional law is no law, Appellant’s conviction and judgment are void and must be vacated (LF 63).

An evidentiary hearing was held on December 22, 2009 (Tr. 2). At that hearing, the trial court took judicial notice of the underlying criminal case file (Tr. 2, 8), as well as S.B. 693 (1994) (Tr. 46). In addition, several witnesses testified, including Appellant (Tr. 22-46). While testifying, Appellant again admitted that he was guilty of the charged offense (LF 44-45).

On March 1, 2010, the motion court issued an order denying Appellant’s Rule 24.035 claim (LF 105-122). Regarding Appellant’s claim that the offense of second-degree statutory rape is unconstitutional because it was adopted in violation of article III, § 23 of the Missouri Constitution, the motion court found that § 566.034 did not violate the single subject and germane title provision of the Missouri Constitution because “the offense of statutory rape is clearly related to the title of the bill that created it – ‘sexual offenses.’”) (LF 106-107). The court found that even if several other statutes contained in S.B. 693 were unconstitutional because they had been enacted in violation of the Missouri Constitutional requirement that no bill shall contain more than one subject which shall be clearly expressed in its title, those invalid statutes could be severed from

the bill (LF 106-107). Thus, the motion court concluded that § 566.034 is constitutional (LF 107).

This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINT RELIED ON

The motion court clearly erred in denying Appellant’s Rule 24.035 motion challenging the validity of § 566.034, because the senate bill containing that statute when it was enacted violated Appellant’s rights under article III, § 23 of the Missouri Constitution, in that S.B. 693 (1994) contained multiple subjects in violation of the constitutional requirement that “[n]o bill shall contain more than one subject which shall be clearly expressed in its title,” because the title of the bill said it was to repeal and enact in lieu thereof certain named statutes “relating to sexual offenses,” including § 566.034, yet the body of the bill enacted legislation that did not relate to sexual offenses, such as things dealing with the purchase or possession of intoxicating alcohol by minors; those portions cannot be severed because it cannot be presumed that the legislature would have enacted one portion of S.B. 693 without the others; and the entire bill is unconstitutional because it cannot be determined beyond a reasonable doubt that one of the bill’s multiple subjects is its controlling purpose and the other subjects are not.

Rizzo v. State, 189 S.W.3d 576 (Mo. banc 2006);

St. Louis Health Care Network, et al., v. State, 968 S.W.2d 145

(Mo. banc 1998);

People v. Cervantes, 189 Ill.2d 80, 723 N.E.2d 265, 243 Ill.Dec. 233

(1999);

Ex Parte Smith, 135 Mo. 223, 36 S.W. 628 (Mo. 1896);

Mo. Constitution, Article III, § 23;

§ 566.034; and

Rule 24.035.

ARGUMENT

The motion court clearly erred in denying Appellant's Rule 24.035 motion challenging the validity of § 566.034, because the senate bill containing that statute when it was enacted violated Appellant's rights under article III, § 23 of the Missouri Constitution, in that S.B. 693 (1994) contained multiple subjects in violation of the constitutional requirement that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title," because the title of the bill said it was to repeal and enact in lieu thereof certain named statutes "relating to sexual offenses," including § 566.034, yet the body of the bill enacted legislation that did not relate to sexual offenses, such as things dealing with the purchase or possession of intoxicating alcohol by minors; those portions cannot be severed because it cannot be presumed that the legislature would have enacted one portion of S.B. 693 without the others; and the entire bill is unconstitutional because it cannot be determined beyond a reasonable doubt that one of the bill's multiple subjects is its controlling purpose and the other subjects are not.

Facts:

The first claim of Appellant's amended Rule 24.035 motion challenged the constitutionality of Appellant's conviction because the offense of statutory rape in the second degree, § 566.034, is unconstitutional because it was adopted in violation of article III, § 23 of the Missouri Constitution (LF 47, 58-63). The

motion noted that Rule 24.035 allows a movant to challenge a conviction or sentence that violates the constitution or that exceeds the jurisdiction of the court (LF 58). The second-degree statutory rape statute that supported Appellant's conviction was adopted in violation of the single subject and germane title provision of the Missouri Constitution, article III, § 23, which provides, in pertinent part, "No bill shall contain more than one subject which shall be clearly expressed in its title..." (LF 58).

The amended motion noted that the second-degree statutory rape statute in effect at the time of Appellant's charged crime had been passed by the General Assembly as S.B. 693 in 1994, with an effective date of January 1, 1995 (LF 59). The title of the bill noted that it was to repeal certain named statutes "relating to sexual offenses," and to enact in lieu thereof new statutes "relating to the same subject," including § **566.034** (second-degree statutory rape) (LF 59).

Yet the body of the bill enacted legislation including the following subjects, which do not relate to sexual offenses:

- (i) Investigative subpoena powers of prosecuting attorneys;
- (ii) criminal offense of purchase or possession of intoxicating liquor by minors;
- (iii) criminal offense of purchase or possession of non-intoxicating beer by minors; and
- (iv) authorization for depositions by prosecutors.

(LF 59-60). These bear no relation to the title's purpose – sexual offenses. Thus, S.B. 693 covered multiple subjects, rather than the single subject as required by the Missouri Constitution (LF 60).

The amended motion noted that although second-degree statutory rape related to the title subject (“sexual offenses”), it did not fit “germanely and congruously” with other topics covered in the bill, especially those set out above (LF 63). And since an unconstitutional law is no law, Appellant's conviction and judgment are void and must be vacated (LF 63).

An evidentiary hearing was held on December 22, 2009 (Tr. 2). At that hearing, the trial court took judicial notice of S.B. 693 (1994) (Tr. 46).

On March 1, 2010, the motion court issued an order denying Appellant's Rule 24.035 claim (LF 105-122). Regarding Appellant's claim that the offense of second-degree statutory rape is unconstitutional because it was adopted in violation of article III, § 23 of the Missouri Constitution, the motion court found that § **566.034** did not violate the single subject and germane title provision of the Missouri Constitution because “the offense of statutory rape is clearly related to the title of the bill that created it – ‘sexual offenses.’”) (LF 106-107). The court found that even if several other statutes contained in S.B. 693 were unconstitutional because they had been enacted in violation of the Missouri Constitutional requirement that no bill shall contain more than one subject which shall be clearly expressed in its title, those invalid statutes could be severed from

the bill (LF 106-107). Thus, the motion court concluded that § **566.034** is constitutional (LF 107).

Standard of Review:

This Court’s review of the motion court’s decision is limited to a determination of whether the judgment of the court is clearly erroneous. **Rule 24.035(k); *State v. Bradley***, 811 S.W.2d 379, 383 (Mo. banc 1991). A judgment will be found clearly erroneous if, upon review of the entire record, the appellate court is left with the definite and firm belief that a mistake has been made. ***Id.***

Further, regarding an attack to the constitutionality of a statute, this Court has held that laws enacted by the legislature and approved by the governor have a strong presumption of constitutionality. ***State v. Salter***, 250 S.W.3d 705, 709 (Mo. banc 2008). As a result, attacks against a statute’s constitutionality based on procedural limitations are not favored. ***Id.*** Thus, the person challenging the validity of a statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations. ***Id.***

Single Subject Violation:

§ **566.034**, as contained in enacting bill S.B. 693, is unconstitutional in that it violates the single subject provision of article III, section 23 of the Missouri constitution.

Article III, section 23 of the Missouri Constitution states, “[n]o bill shall contain more than one subject which shall be clearly expressed in its title ...” On the purposes behind this provision is to prevent “logrolling,” which is the

practice of combining several unrelated provisions in a single bill when none of the provisions individually will garner enough votes, but collectively will generate sufficient support from the legislators with a strong interest in particular provisions to secure a majority vote for the bill as a whole. *Rizzo v. State*, 189 S.W.3d 576, 578-579 (Mo. banc 2006); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 101 (Mo. banc 1994).

“An act satisfies section 23’s single subject requirement if all its provisions ‘fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.’” *Rizzo*, 189 S.W.3d at 579 *quoting*, *Hammerschmidt*, 877 S.W.2d at 102. A “single subject,” includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation, and the subject is discerned, when possible, from the bill’s title. *Id.*

The title of S.B. 693 said that it was to repeal certain named statutes “relating to sexual offenses,” and to enact in lieu thereof new statutes “relating to the same subject,” including § **566.034** (second-degree statutory rape) (LF 59). Yet the body of the bill enacted legislation that did not relate to sexual offenses: Investigative subpoena powers of prosecuting attorneys; criminal offense of purchase or possession of intoxicating liquor by minors; criminal offense of purchase or possession of non-intoxicating beer by minors; and authorization for depositions by prosecutors (LF 59-60); S.B. 693. These parts of the bill did not fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose. *Rizzo*, 189 S.W.3d at 579. Thus,

S.B. 693 violated the Missouri Constitutional single subject provision under article III, section 23 of the Missouri Constitution.

It cannot be seriously argued that S.B. 693 does not violate the single subject restriction. It would stretch logic to say that matters such as those involving the purchase or possession of intoxicating liquor or non-intoxicating beer by minors are statutes “relating to sexual offenses,” the title of the bill.

The real issue in this case is whether because § 566.034, does relate to the subject of the bill (sexual offenses), that the provisions of the bill that do not relate to sexual offenses can be severed leaving the ones relating to sexual offenses, such as § 566.034, intact and thus constitutional. In other word, is S.B. 693 unconstitutional in its entirety or may some sections be severed?

This Court has held that when it concludes that a bill contains more than one subject, the entire bill is unconstitutional unless the Court is convinced beyond a reasonable doubt that one of the bill’s multiple subjects is its controlling purpose and the other subject is not. *Rizzo*, 189 S.W.3d at 581 *quoting*, *Hammerschmidt*, 877 S.W.2d at 103. It is only where there is a single, central purpose that this Court will sever the portions of the bill containing the additional subjects and permit the bill to stand with its primary core subject intact. *Id.*

Here, there is such a hodge-podge of unrelated statutes contained in S.B. 693 that this Court cannot conclude that there is a single, central purpose, from which this Court can conclude beyond a reasonable doubt that one of the bill’s multiple subjects is its controlling purpose and the other subjects are not. Because

logrolling taints the entire act, this Court cannot be justified in choosing from the act the subject which, if submitted alone, the Legislature would have enacted. *See, St. Louis Health Care Network, et al., v. State*, 968 S.W.2d 145, 149 (Mo. banc 1998), which found a single subject violation and found that the entire bill was unconstitutional. *In accord, People v. Cervantes*, 189 Ill.2d 80, 723 N.E.2d 265, 243 Ill.Dec. 233 (1999) (legislation entitled “Safe Neighborhoods Law,” which created offense of gunrunning, violated single subject rule because the legislation also covered a wide array of other subjects). *Also see*, Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn. L.Rev 389, note 7 at 399-400 (1958) (suggesting that a bill that includes multiple subjects renders that entire bill “suspect,” and thus the use of severance is “manifestly unsound”).

The question remains, “What to do with Appellant’s conviction under an unconstitutional statute?” Generally, an unconstitutional statute is void *ab initio*. *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 143 (Mo banc 2008). In the context of a habeas corpus proceeding, this Court held that in such a proceeding this Court can investigate and question the constitutionality of an act upon whose provisions a person has been tried and convicted. *Ex Parte Smith*, 135 Mo. 223, 36 S.W. 628, 629 (Mo. 1896). Because an unconstitutional law is void, and “is as no law,” a conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment. *Id.* Further,

“if ... an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings, and even after conviction and

judgment, and thus upon the ground that no crime is shown, and therefore the trial court had no jurisdiction, because its criminal jurisdiction extends only to such matter as the law declares to be criminal; and, if there is not law making such declaration, or what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction, and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should in any other manner be made apparent.

Id. at 630. *In accord*, ***State v. Burgin***, 203 S.W.3d 713 (Mo. App. E.D. 2006) (conviction under an unconstitutional statute is void).

Appellant's conviction for second-degree statutory rape, **§ 566.034**, violated Appellant's rights under Article III, § 23 of the Missouri Constitution, because S.B. 693 contained multiple subjects in violation of the constitutional requirement that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." Thus, the judgment of the motion court overruling Appellant's Rule 24.035 motion was clearly erroneous and should be reversed. The cause should be remanded with instructions for the motion court to vacate Appellant's conviction and judgment for second-degree statutory rape, **§ 566.034**.

CONCLUSION

The plea court had no jurisdiction to take Appellant's guilty plea because S.B. 693 (1994), which included § **566.034** when it was enacted, violated Appellant's rights under Article III, § 23 of the Missouri Constitution, in that S.B. 693 contained multiple subjects in violation of the constitutional requirement that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." Thus, the judgment of the motion court was clearly erroneous and should be reversed. The cause should be remanded with instructions for the motion court to enter an order vacating Appellant's conviction and judgment for second-degree statutory rape, § **566.034**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached appellant's brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,831 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec Endpoint Protection, which was updated on October 21, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached substitute brief and a floppy disk containing a copy of this brief were hand-delivered this ____ day of October, 2010, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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