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APR 20 2015

22ND JUDICIAL CIRCUIT
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IN THE 22ND JUDICIAL CIRCUIT COURT
(CITY OF ST. LOUIS)
STATE OF MISSOURI

STATE OF MISSOURI,)	
)	
Plaintiff,)	Cause Number 1422-CR02831
v.)	
)	Division Number 11
CARL HARRIS,)	
)	
Defendant)	

ORDER DENYING DEFENDANT’S MOTION TO DISMISS
AND TO DECLARE SECTION 568.040.1 RSMO UNCONSTITUTIONAL

Carl Harris, by his attorney, Julie Regenbogan, has filed a Motion to Dismiss the Information and to Declare Missouri Statute Section 568.040.1 Unconstitutional. Section 568.040.1 of the Revised Statutes of Missouri (RSMo) sets out the elements of the crime of criminal nonsupport.

On April 15, 2015, the Court took up Defendant’s Motion to Dismiss. Julie Regenbogan appeared as attorney for Defendant Carl Harris. Assistant Circuit Attorney Natalie Warner appeared as attorney for the State. The Court heard oral arguments from the lawyers and then set a schedule for the State to submit a supplemental memorandum of law on the issue raised in Defendant’s Motion. The State each filed a supplemental memorandum of law. The Court took the case under submission on April 17, 2015.

Based on the Defendant’s Motion to Dismiss, on the arguments of the lawyers and on the lawyers’ memoranda of law, the Court denies Defendant Carl Harris’ Motion to Dismiss as follows:

In 2012, the Missouri Legislature amended Section 568.040.1 RSMo. This statute creates the crime of criminal nonsupport. Prior to the 2012 amendment, the statute provided that “a parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his or her child or stepchild who is not otherwise emancipated by operation of law.” (Emphasis added.) The Missouri Legislature’s amendment in 2012 removed the requirement that the State prove, beyond a reasonable doubt, that the parent was without good cause in his or her failure to pay child support. However, the amended statute continued to provide in Section 568.040.3 RSMo that “(i)nability to provide support for good cause shall be an affirmative defense under this section. A person who raises such affirmative defense has the burden of proving the defense by a preponderance of the evidence.”

Defendant argues that the Legislature’s 2012 amendment is unconstitutional because it shifts the burden of proof on the issue of good cause from the State to the defendant. The Defendant contends that this shift violates the principles of due process of law and of equal protection of the law and so cannot stand. In particular, the Defendant points out that the United States Supreme Court has ruled that a person cannot be imprisoned because of his or her inability to pay a fine or to pay restitution unless it is shown that the person had the ability to pay but refused to do so. Bearden v. Georgia, 461 U.S. 660, 668 (1973). The Supreme Court concluded that, at such hearings, “a sentencing court must inquire into the reasons for the failure to pay.” Id. at 672.

Under the current Section 568.040.1 RSMo, the State needs to prove only that the defendant knew that he or she had an obligation to provide child support and that he or she

failed to provide the support owed. No inquiry into the financial circumstances of the defendant is required unless the defendant brings up the issue of his or her inability to pay.

The Court agrees with Defendant that the 2012 amendment to Section 568.040.1 RSMo did shift the burden of proof in criminal nonsupport cases. The State no longer needs to initially offer proof that the defendant had the ability to provide support but intentionally failed to do so. Instead, the State must now prove that the defendant has an unemancipated child, that the defendant knew that he or she had an obligation to support the child and that he or she failed to provide adequate support. Ability to provide support is an issue if the defendant raises the issue in an affirmative defense, which the defendant must prove by a preponderance of the evidence as required in Section 568.040.3 RSMo.

However, the Court does not conclude that this shift in the burden of proof is unconstitutional.

Parents have a duty to support their dependent children. This duty is inherent in the creation of each child. Society does not require people to apply for permission to bring a child into the world. At the same time, society properly assumes that each parent will do everything he or she can to provide a child with support until the child reaches independence. Section 568.040.2(3) RSMo. defines "support" as providing "food, clothing, lodging and medical or surgical attention." The failure to provide support means that the parent is not fulfilling his or her fundamental duty. Further, "(i)t is not fundamentally unfair to impose (a harsh sanction) on person who fails to meet their human and social responsibility to support the children which they, of their own free will, bring into this society." David v. Barber, et al., 853 F.2d. 1418, 1420 (7th Cir. 1988).

Section 568.040.2(2) defines “good cause” as meaning “any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support.” Whether or not a particular individual who is accused of committing criminal nonsupport has “any substantial reason” why he or she cannot do so is a matter that is particularly within the ability of that defendant to know and to present evidence about. This situation makes “good cause” an affirmative defense that the defendant would introduce when the State has charged him or her with criminal nonsupport.

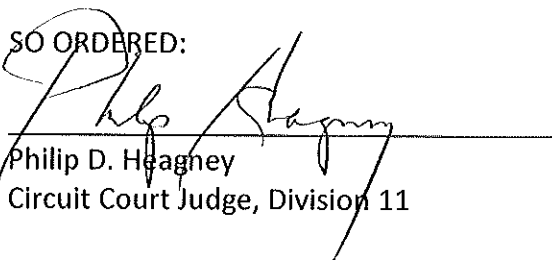
As the United States Supreme Court noted in Dixon v. United States, 548 U.S. 1, 9 (2006), “where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.” Here evidence about employment records, pay stubs, bank records and medical issues, along with other similar information, would be key with regard to the issue of good cause for failure to pay. This information is particularly available to the Defendant. This is evidence which “excuse(s) conduct that would otherwise be punishable” but “does not controvert any of the elements of the offense itself” Smith v. United States, 133 S.Ct. 714, 719 (U.S. 2013).

On November 18, 2014, Judge Troy Cardona, presiding in Division 6 of the Jefferson County Circuit Court issued his order granting Defendant’s Motion to Dismiss Information and to Declare Missouri Statute 568.040 Unconstitutional in Cause Number 13JE-CR01517-01. Judge Cardona concluded that the Missouri Legislature’s 2012 change to Section 568.040.1 “shifted to a defendant to show inability to comply . . . and therefore (made Section 568.040.1 RSMo) invalid because it shifts the burden of persuasion to the defendant in criminal cases and

does not require the State to prove criminal intent” See Judgment of Judge Troy Cardona in State v. Dennis E. Meacham, Jefferson County Circuit Court, dated 11/18/2014 at Page 1.

This Court respectfully sees the Missouri Legislature’s 2012 action in amending Section 568.040.1 RSMo in a different light. Under the amended statute, the State must still prove, beyond any reasonable doubt, that the defendant knew that he or she had an unemancipated child and that he or she had an obligation to support that child and that he or she failed to support the child. This Court believes that proof of these elements shows criminal intent. The issue of whether or not the defendant had good cause for his or her failure to support is an affirmative defense which the defendant can raise under Section 568.040.3 RSMo and evidence for which is primarily within the defendant’s power to know and to produce at trial.

In 2012, the Missouri Legislature changed the elements of criminal nonsupport set out in Section 568.040.1 RSMo, but its decision to do so was within its authority. The Legislature continued to comply with due process and equal protection of law when it made evidence as to good cause for failure to provide support an issue which the defendant must address as an affirmative defense. For this reason, the Court denies Defendant’s Motion to Dismiss the Information and to Declare Missouri Statute Section 568.040.1 Unconstitutional.

SO ORDERED:

Philip D. Heagney
Circuit Court Judge, Division 11

April 20, 2014

Cc: Julie Regenbogan, Attorney for Defendant
Natalie Warner, Assistant Circuit Attorney