



# MACDL

## ACTION REPORT

*Newsletter*

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NEWSLETTER

FEBRUARY 1987

### REPORT FROM THE PRESIDENT

Dear Member:

Since our meeting at Tan-Tar-A MACDL has made several changes which will help our association to become more responsive to the individual needs of our members.

The Board has hired Frances Hall, who is experienced in criminal defense practice, as Executive Secretary to assist with the various needs of the Board and our membership. Her address and phone number are listed below. Please make a note of them as this will be MACDL's new "office" address.

With the new rules governing attorneys' educational requirements, we have contracted with Mike Baker of UMKC for help with the arrangements for our Seminar this Spring. We expect to be able to get about 8 hours of CLE credit for each of you who attends.

**MARK YOUR CALENDARS!** Our Annual Meeting and CLE is scheduled for May 8 & 9, 1987, at the Omni Hotel in St. Louis. Two outstanding jurists will be honored at the Awards Dinner on Friday night, May 8th. Your brochures should be arriving soon with all the details.

A recent request from a member produced an amicus brief by Prof. Robert Popper and James Wyrsh in an effort to protect attorneys from Grand Jury subpoenas.

Recently some of us personally conferred with Randy Scherr, our lobbyist in Jefferson City, regarding bills pending before the legislature. It takes a lot of time and effort for Randy and our officers to enlighten the legislators so that the bills get fair consideration. Your individual testimony would definitely help in this task. If you will be in the Jefferson City area and available to speak, a call to Randy at (314) 636-2822 or to Jay DeHardt at (816) 461-3440, would be greatly appreciated.

I hope you'll MEET ME IN ST. LOUIS in May.

Sincerely,  
DAVID C. GODFREY,  
President

MACDL EXECUTIVE SECRETARY

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## RECENT MISSOURI DECISIONS

### SUPREME COURT

#### DISSENTS CHALLENGE FAILURE TO REMOVE QUESTIONABLE JURORS:

State v. Larry Johnson, No. 68249, 12/16/86 (City of St. Louis) Defendant appeals his conviction for rape, sodomy, robbery and kidnapping. During voir dire a potential juror was not excused for cause although she expressed reservations about her impartiality and her ability to apply the proper burden of proof. Writing for the Court, Judge Rendlen affirmed the conviction, finding upon consideration of the entire voir dire that the juror demonstrated an ability to be fair and to follow the law and instructions of the court.

Chief Justice Higgins and Judge Welliver concurred in a DISSENT by Judge Blackmar believing the challenge to the potential juror should have been sustained. Judge Welliver also filed a separate DISSENT in which he pondered why able judges do not remove even the slightest suspicion of unfair trial by simply calling another juror from the panel. Judge Blackmar concurred in this opinion.

### EASTERN DISTRICT

#### INEFFECTIVE ASSISTANCE OF COUNSEL:

Robert Sanders v. State, No. 50700, 12/2/86 (St. Louis County). The denial of Sanders' 27.26 motion is REVERSED AND REMANDED. Division Three, Crandall, J., holds that defense counsel's failure to interview the codefendant before deciding not to call her as a witness constituted ineffective assistance. Sanders alleged the codefendant could exonerate him, and counsel made no other attempts to determine what her testimony would have been.

#### REFUSAL TO INSTRUCT ON SELF-DEFENSE:

State v. Judith Goforth, No. 50790, 12/9/86 (Washington County). Defendant was convicted of involuntary manslaughter. The trial court refused to give her instructions on self-defense and defense of another, MAI-CR 2d 2.41. Division Three, Karohl, J., REVERSED AND REMANDED, holding that defendant's testimony of the deceased's specific acts against herself and her son in the home while drinking were sufficient to support submitting such an instruction on decedent's reputation while drinking.

Recent Missouri Decisions

REMARKS SAME AS A HAMMER:

State v. Donald Steward, No. 50666, 12/9/86 (City of St. Louis). Defendant's convictions of 1st degree murder and burglary are REVERSED AND REMANDED. Division Three, Crandall, J., holds that the trial judge's extemporaneous remarks to the jurors that they had to reach a verdict constituted a hammer instruction, and it was prejudicial error not to use MAI-CR 2d 1.10.

DOR MUST SHOW WHAT BREATHALYZER EQUIPMENT WAS USED:

Francis Felber v. Director of Revenue, No. 51423, 12/3/86 (St. Louis County). Because there was no evidence to show what equipment was used to conduct the breath analysis, Division One, Crist, J., has affirmed the judgment overturning suspension of petitioner's driver's license.

SOUTHERN DISTRICT

FAILURE TO RAISE DOUBLE JEOPARDY DEFENSE IS INEFFECTIVE ASSISTANCE:

Larry Green v. State, No. 14545, 11/17/86 (Greene County). The denial of Green's 27.26 motion without an evidentiary hearing is REVERSED AND REMANDED WITH DIRECTIONS to vacate three of his four convictions for stolen property. Division One, Green, J., holds that Green's counsel was ineffective because his failure to raise a defense of double jeopardy constituted a failure to perform a duty.

ERRONEOUS EXCLUSION OF EVIDENCE:

State v. Reynold Spulak, No. 14574, 11/24/86 (Wright County). Defendant's conviction for 2nd degree trespass is REVERSED AND REMANDED. Division Two, Maus, J., holds that the trial court erred in excluding certain testimony proffered by the defendant.

WESTERN DISTRICT

IMPROPER CROSS-EXAMINATION OF DEFENDANT:

State v. Norman Goodman, No. 37570, 11/25/86 (Boone County). Defendant was convicted of kidnapping and sodomy. During cross-examination the prosecutor was allowed to question defendant about prior statements and a prior crime. Division Three,

## Recent Missouri Decisions

Gaitan, J., REVERSED AND REMANDED, holding that since the questioning, which was highly prejudicial, referenced collateral matters, the prosecutor was bound by the witness' answer, and that there was no foundation for admission of the statement.

Judge Lowenstein concurred in the majority opinion, but Judge Manford DISSENTED and certified the case to the Supreme Court pursuant to Mo.Const.art.V, Sec. 10.

### DISSENT CLAIMS BURDEN SHIFTED TO DEFENDANT:

State v. Michael House, No. 37082, 11/25/86 (Clay County). In affirming defendant's conviction for stealing property of \$150 or more, Division Four, Clark, J., held there was sufficient evidence to show that defendant supported his accomplice's criminal activities, entitling the State to submit the charges of stealing and burglary.

In a DISSENTING OPINION, Judge Nugent asserts the evidence showed no more than mere presence and an opportunity to participate, and that the majority opinion erroneously shifted the burden to defendant, first to try to prevent the crime and then to prove he did so.

### EXCLUSION OF UNDISCLOSED DEFENSE WITNESS UNFAIR:

State v. Robert Kimmell, No. 38189, 12/9/86 (Livingston County). Defendant's conviction for driving while intoxicated is REVERSED AND REMANDED. Writing for the Division, Judge Turnage holds that exclusion of the testimony of a defense witness on the grounds that she had not been listed in response to the State's discovery request resulted in fundamental unfairness to defendant, and the State failed to show it would be prejudiced by allowing the witness to testify.

### INFORMATION INSUFFICIENT :

State v. Linda Smith, No. 38174, 10/14/86 (Callaway County). Defendant was convicted of forgery. Holding the trial court was without jurisdiction because the information was insufficient to meet Rule 23.01(b), Division One, Shangler, J., REVERSED. The State failed to allege a purpose to defraud, an essential element of Sec. 570.090.

Although Judge Manford concurred, feeling bound to follow the latest Supreme Court ruling, he believes it is time to adopt a "substance over form" analysis of criminal informations. He contends the information in this case sufficiently informed defendant of the offense charged.

## Recent Missouri Decisions

### REFUSAL OF CONTINUANCE:

State v. Michael Wilson, No. 37706, 11/25/86 (Jackson County). Defendant's conviction for stealing over \$150 is REVERSED AND REMANDED. In a Per Curiam opinion, the court held it was error to refuse defendant's oral motion for continuance on the grounds of counsel's lack of preparation because defendant was entitled to an opportunity to attain the most favorable result possible.

### UNAUTHORIZED DISMISSAL OF TRIAL DE NOVO APPLICATION:

City of Kansas City v. Danny Harness, No. 38099, 11/25/86 (Jackson County). Following conviction in the Kansas City Municipal court, defendant applied for trial de novo. After submission of the cause, the trial court dismissed defendant's application. Division Two, Dixon, J., REVERSED AND REMANDED, holding that since all that remained was for the trial court to enter judgment, it was without authority to dismiss the application.

## ATTORNEY GENERAL'S OPINIONS

### COURT CANNOT EXTEND PROBATION TERM:

Opinion Letter No. 1-86, 12/3/86 (Requested by Dick D. Moore): The Attorney General finds no judicial interpretation of the courts' ability to enlarge the conditions of probation, and Chapter 559 is devoid of any language empowering the courts to extend the term of a defendant's probation. If this occurs, he recommends filing a motion to modify the judgment under the reasoning in Ossana v. State, 669 S.W.2d 72 (Mo.App. 1985).

RECENT MISSOURI DECISIONS

SUPREME COURT

DISCOVERY FROM D.O.R. LIMITED TO WHAT IS "AVAILABLE":

Ralph Earl Arth v. Director of Revenue, etc., #68164, 1/13/87 (St. Louis County) On review of the suspension of his driving license for having a BAC of over .13%, plaintiff served interrogatories on the director. Objections to them were overruled and, upon failure to answer, the director's pleadings were stricken and plaintiff's driving privileges were reinstated. In a per curiam opinion, the Court en banc REVERSED AND REMANDED WITH DIRECTIONS, holding that the sanctions constituted an abuse of discretion inasmuch as the information requested was not "available" to the director. The department should be required by interrogatory to provide the licensee with any information concerning the licensee or his case that is in the records of the department. Anything else must be requested under Rules 57.03 and 58.01.

Judge Welliver concurred in a DISSENT wherein Judge Rendlen noted that determination of whether a party should be compelled to answer relevant interrogatories is committed to the discretion of trial judges; he found no abuse of discretion in this case.

EASTERN DISTRICT

27.26 DISMISSAL HELD IMPROPER:

Jerome Berry v. State, No. 51607, 12/23/86 (St. Louis County). The dismissal of Berry' 27.26 motion is REVERSED AND REMANDED. Division Five, Gaertner, J., holds that dismissal is improper where there is no indication that the requirements of 27.26(h) have not been ignored.

FAILURE TO NOTIFY COUNSEL:

Ricky Mills v. State, No. 51443, 12/23/86 (City of St. Louis). Mills appeals the denial of his 27.26 motion without evidentiary hearing. Division One, Crist, J., REVERSED AND REMANDED, holding that failure to notify counsel of the date the ruling on his motion was to be made mandates a remand.

Recent Missouri Decisions

DENIAL OF CROSS-EXAMINATION RIGHT:

State v. Ronald Williams, No. 50913, 12/30/86 (City of St. Louis). Defendant's convictions of 1st degree robbery and first-degree burglary are REVERSED AND REMANDED. Division Three, Karohl, J., holds that by sustaining the State's motion in limine the trial judge denied defendant an opportunity to cross-examine the complaining witness about her motive to lie about her identification of him.

WESTERN DISTRICT

GOING FROM ONE CELL TO ANOTHER IS NOT "ESCAPE":

State v. Ralph Buck, No. 37850, 12/16/86 (Callaway County). Defendant's conviction for escape from confinement is REVERSED. Division Four, Clark, J., holds that it did not constitute an escape for defendant to make his way from one locked cell to another locked cell, without gaining access to a corridor. Defendant's conduct was not indicative of a plan to escape and he was not charged with attempt.

NO THEFT IN FRAUDULENTLY OBTAINING A LOAN:

State v. Frank Grainger, No. 37629, 12/16/86 (Lafayette County). Defendant was convicted of stealing property by deceit upon evidence that he fraudulently induced a bank to renew his loan. Division Two, Lowenstein, J., REVERSED, holding that his conduct was not a violation of Section 570.030 because he did not obtain or retain possession of property of another.

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