MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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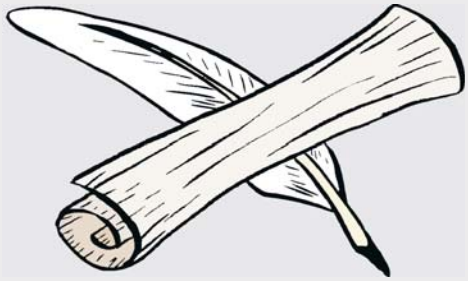
Fall, 2012

A Message from the MACDL President

by Jeff Eastman



I would like to take this opportunity to thank everyone who made this year's DWI Seminar a great success. It was a wonderful learning experience for all who could attend. For those who could not, we were privileged to have the Missouri Court of Appeals Western hear oral arguments on three separate cases involving intoxication related issues. It was a pleasure to host them and witness great advocates in action. From the comments and reviews we have received, it was an excellent learning opportunity.

Angela Hasty and Dan Miller argued license sanction cases and Bob Adler, a criminal case. All did a fantastic job and are to be recognized for the sacrifices they made in arguing at the Lake in the presence of almost two hundred of their peers and before a prepared and very inquisitive appellate panel comprised of the Honorable Zel Fischer, Special Judge, Mark Pfeiffer and Gary Witt.

The Court just ruled in Angela's case, *McKay v. Director of Revenue*, WD 74458, affirming the victory she obtained in the trial court proceeding. In *McKay*, Angela's client refused a breath test. She was then taken to a hospital for a blood test. At the hospital, she acquiesced to blood test, which upon analysis revealed a blood alcohol concentration in excess of .080%. Her client was initially served with a notice that her license would be revoked because she refused a breath test. When the blood test result was obtained, she was then served with a notice that her license would also be sanctioned as a consequence of her excessive blood alcohol concentration.

Angela challenged the refusal sanction, arguing that her client's acquiescence in the requested blood test negated her initial refusal in that the government had secured what it had sought, a sample for testing. The Western District agreed affirming the trial court's decision. Great work Angela!

As President of this organization, I encourage each of you to solicit at least one individual to join us, to be a part of the Missouri Association of Criminal Defense Lawyers. Let them know the benefits we offer to our members, such as frequent and timely Continuing Legal Education Programs. Let them know we tract pending legislation, that our members testify before legislative committees advancing the interests of our organization. Let them know our Amicus Committee is actively involved in cases significant to our profession and practice. Finally, let them know that when they are the target of the government, our Strike Force is there to assist.

Over the course of the next year, I ask that each of you take the time to extend at least one invitation to broaden our base and voice. I hope to see you at our November Seminar in Kansas City.

MACDL/MO Bar Fall CLE

November 30, 2012
Harrah's, Kansas City, MO

Harrah's NORTH KANSAS CITY

MACDL

Missouri Association of Criminal Defense Lawyers

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Post-Conviction Update

by Elizabeth Unger Carlyle © 2012

This column includes summaries of pertinent cases from January, 2012, forward. Discussions of the recent U.S. Supreme Court decisions in *Martinez v. Ryan*, *Missouri v. Frye*, and *Lafler v. Cooper* is also included. As usual, readers are cautioned that they should check the cases cited below for subsequent history

Extraordinary Writs

Some of these cases involve rather extensive procedural discussions. The author apologizes if the readers' eyes glaze over,[1] but the process is important to attorneys trying to determine the correct remedy for a constitutional violation.

State ex rel. Koster v. McCarver, 2012 WL 1677423 (Mo. App. E.D. May 15, 2012) (Rehearing and transfer denied July 19, 2012)

At the time of the trial of Robert Gnade, Lincoln County, Missouri, allowed potential jurors to "opt out" of jury service by performing six hours of community service and paying $50. Ten of the 1200 people summoned for jury duty during the term in which Mr. Gnade's trial occurred had opted out using the program. Mr. Gnade did not raise an issue regarding this program on direct appeal, and his conviction was affirmed in 2009. He did not file a post-conviction motion. In August of 2010, in *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010), the Missouri Court of Appeals ruled that the opt-out program was improper, and reversed the conviction. In 2010, when appellate public defender Ellen Flottman learned that potential jurors in Mr. Gnade's case had used the opt-out program, she filed an amended motion for new trial in Mr. Gnade's criminal case. The motion was denied by operation of law. In March of 2011, Mr. Gnade filed a petition for writ of habeas corpus in St. Francois County. That court granted relief and ordered a new trial. The state then filed a petition for writ of certiorari. On certiorari review, the court of appeals held: 1) the filing of the amended motion for new trial did not preserve the issue; but 2) habeas corpus was a proper remedy, and 3) the circuit court's finding that Mr. Gnade had shown "cause and prejudice" justifying consideration of the merits of his claim on habeas corpus was not an abuse of discretion. Specifically, the circuit court found that the basis for the claim was not known to Mr. Gnade or his appellate counsel until after the period for filing a post-conviction motion. The court of appeals declined to hold that a petitioner must file a post-conviction motion when he is unaware of any basis for post-conviction relief. Because no showing of prejudice was required, the order for a new trial was affirmed.

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[1] The late, great Texas journalist Molly Ivins referred to a similar issue as "a real MEGO — my eyes glaze over."

Extraordinary Writs *(Cont.)*

In Re Ewing v. Denney, 360 S.W.3d 325 (W.D. 2012)

Mr. Ewing alleged that he was entitled to resentencing to allow him to file notice of appeal. His retained counsel informed Mr. Ewing that he would represent him on appeal. Counsel filed a notice of appeal, but failed to pay the required filing fee, and the appeal was dismissed as untimely. Counsel then neither informed Mr. Ewing of the dismissal nor took steps to permit an untimely appeal under Sup. Ct. R. 30.03. Mr. Ewing, believing that his appeal was pending, did not file a Rule 29.15 motion. By the time Mr. Ewing learned of his predicament, the time for requesting untimely appeal under Rule 30.03 had expired. Mr. Ewing, through counsel, filed a motion to recall mandate, but it was denied. He then filed a petition for writ of habeas corpus in circuit court of DeKalb County, where he was incarcerated. That court granted relief and ordered resentencing. However, the circuit court of Jackson County, where the criminal case originated, denied resentencing on the ground that it was without jurisdiction, since one circuit court does not have supervisory authority over another circuit court.[2] Mr. Ewing then filed a petition for writ of habeas corpus in the court of appeals. The state conceded that he was entitled to relief. In granting habeas relief, the court of appeals found that ineffective assistance of appellate counsel constituted cause sufficient to overcome the procedural default. The court then ordered the circuit court of Jackson County to resentence Mr. Ewing to the identical sentences originally imposed, so that a timely notice of appeal can be filed.

State ex rel. Volner v. Storie, 2102 WL 2785865 (Mo. App. S.D. July 10, 2012)

In this mandamus action, the movant filed a post-conviction motion which included an *in forma pauperis* affidavit. The circuit court entered a handwritten order stating that the motion "is not properly recognized in this criminal action." The court then failed to appoint counsel or take any other action with respect to the motion. Mandamus was issued, directing the court to appoint counsel and hear the post-conviction motion.

Martinez v. Ryan, 132 S.Ct. 1309 (2012)

The U.S. Supreme Court held in this case that in federal habeas corpus proceedings attacking convictions from states like Missouri, where ineffective assistance of counsel claims must be raised in post-conviction proceedings, a habeas petitioner may avoid procedural default by showing that the default was due to ineffective assistance of circuit court level post-conviction counsel. This is a major departure from the holdings in all of the federal circuit courts. While the final impact on Missouri practice is not clear, two observations can be made. First, under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), the state of Missouri follows the federal standard for "cause and prejudice" in state habeas cases. Thus, ineffective assistance of post-conviction counsel should be raised, where supported by the facts, as a basis for avoiding procedural barriers to *state* habeas corpus review. Second, because of the possibility of a conflict of interest, it is now unwise for the same attorney to represent a client in both state post-conviction and habeas corpus proceedings.

Awful Case Denying Post-Conviction Relief

Cross v. State, 359 S.W.3d 571 (E.D. 2012)

Although this column concentrates on good news, it is sometimes important to make sure everyone is aware of the bad news. The case below holds valid a waiver of the right to move for post-conviction relief. Formal Opinion 126, Missouri Supreme Court Advisory Committee, May 19, 2009, holds that it is unethical for trial or appellate counsel to advise a defendant about such a waiver, and that it is *also unethical for the prosecutor to require such a waiver as a condition of a plea bargain*. In the *Cross* case, however, the defendant told the court that his attorney had discussed the waiver with him. The *Cross* court evaded the Opinion 126 problem by holding that, since Mr. Cross had not raised the denial of his ineffective assistance of counsel claims on the merits as a ground for appeal, but had relied only on the proposition that the waiver was improper, he was out of luck under *Cooper v. State*, 356 S.W.3d 148 (Mo. banc 2011); and *Krupp v. State*, 356 S.W.3d 142 (Mo. banc 2011). Two lessons from this case: 1) Don't agree to waive post-conviction rights; and 2) When appealing from a denial of post-conviction relief after such a waiver, be sure to raise the merits of any ineffective assistance of counsel claims as evidence that there is an actual, as opposed to a potential, conflict of interest with trial counsel.

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[2] In light of this rule, stated in *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 619 (Mo. banc 2006), depending on the relief sought, it may not be necessary to file an initial petition for habeas corpus in the circuit court. See Sup. Ct. R. 91.02(a) which provides that the petition should be filed in the circuit court for the county of custody "unless good cause is shown for filing the petition in a higher court." The inability of the circuit court to grant the requested relief would appear to be "good cause."

Post-Conviction Cases, Procedural Issues

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012)

The state cannot waive the limitation period stated in Rules 29.15 and 24.035. However, when a movant alleges that the motion is untimely but that he falls within a recognized judicial exception to the timeliness requirement, he is entitled to a hearing on that issue. Here, one of the movants in this consolidated case, Hill, alleged that his girlfriend delivered the motion to the court on time, but the court lost the motion and did not filemark it until a year and half later. His case was remanded for a hearing.

Wiley v. State, 368 S.W.3d 236 (Mo. App. E.D. 2012)

The post-conviction motion was untimely, but the movant responded to the motion to dismiss by stating facts tending to show that he attempted to file his post-conviction motion one month before it was due by tendering it to the prison mailroom and that it was returned for insufficient postage three months later. The post-conviction court dismissed the post-conviction action without a hearing. The court of appeals reversed and remanded for a hearing, holding that the pleading implicated the judicial exception to the time limit which applies "in very rare circumstances" where "an improper filing, caused by circumstances beyond the control of the movant, justified a late receipt of the motion by the proper court."

Jackson v. State, 366 S.W.2d 656 (Mo. App. E.D. 2012)

The case was remanded for further proceedings with respect to the movant's claim that he had been promised a 10 to 15 year sentence by trial counsel, but trial counsel told him that he could not tell the court this during the plea hearing. The plea colloquy did not refute this allegation.

Graves v. State, 2012 WL 2498855
(Mo. App. W.D. June 29, 2012)

Remand was required for an evidentiary hearing at which the movant must show that his motion was timely. The state agreed that the filing date stamped on the motion was not the actual filing date, but the movant still has the burden to show timeliness; the state cannot waive untimeliness.

Case Law Update

For up-to-date Case Law Updates, please visit the MACDL website's "Newsletter" page and check out the link to Greg Mermelstein's Reports located at the bottom of the page. (http://www.macdl.net /newsletter. aspx)

Post-Conviction Relief Granted

Lafler v. Cooper, 132 S.Ct. 1376 (2012)

The petitioner was denied effective assistance of counsel where he was improperly advised to reject a plea agreement, went to trial, was convicted, and received a longer sentence than that offered in the plea agreement. The case establishes that a defendant has a right to reasonably effective (under the *Strickland* standard) assistance of counsel when a plea bargain is offered. Here, both sides agreed that the defendant had not received such assistance. The court reversed the conviction and directed that the state either offer the defendant the original plea or dismiss.

Missouri v. Frye, 132 S.Ct. 1399 (2012)

The defendant was offered a plea agreement, but the offer expired before trial counsel informed the defendant that it had been made. The defendant then accepted a less favorable plea agreement. The court held that the right to effective assistance of trial counsel includes the right to be informed in a timely manner of any offer made by the prosecution. However, under the particular facts of the case, it was not clear that the original offer would have been accepted by the court, which is required to show prejudice. The case was remanded for further proceedings on that issue. It should be noted that the Western District Court of Appeals, from whose opinion the U.S. Supreme court case arose, held that it was without power to require the state to reinstate the original plea bargain offer, because it was for a reduced charge. *Frye v. State*, 311 S.W.3d 350, 360-361 (Mo. App. W.D. 2010). What will finally happen in Frye's case is not yet clear.

Radmer v. State, 362 S.W.3d 52 (MO. App. W.D. 2012)

Mr. Radmer was denied effective assistance of counsel in the sentencing phase of his trial. After he was convicted of statutory rape, the state presented evidence of extraneous offenses and other aberrant behavior, and testimony that the aberrant behavior was typical of sex offenders. The defense presented three witnesses who said that he was never inappropriate around children and that he was a good employee. Although defense counsel had a report from a pretrial evaluation indicating the Mr. Radmer had intellectual deficits, he did not present this evidence to the jury. At the post-conviction hearing the doctor who performed the pretrial evaluation testified that Mr. Radmer had an IQ of 75, and was a "regressed sex offender" rather than a pedophile. The doctor believed Mr. Radmer was

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Post-Conviction Update *(from pg 4)*

Post-Conviction Relief Granted *(Cont.)*

amenable to treatment. Trial counsel offered no strategic reason for not presenting this testimony. The court found deficient performance, noting that the submission of mental health history can be a "viable defense" at the sentencing phase of a bifurcated trial. Further, the presumption that the failure to call a witness is reasonable trial strategy was rebutted by the fact that trial counsel referred to the evidence at sentencing, and testified at the evidentiary hearing that the evidence to which the expert had testified was evidence he would have wanted to present had he had it available, and that he did not believe he had a strategy one way or the other. Prejudice was shown where this evidence had a reasonable probability of affecting the sentence. The post-conviction court's grant of relief was not clearly erroneous.

Dodson v. State, 364 S.W.3d 773 (Mo. App. W.D. 2012)

Where the plea agreement was described in court as "four and defer", and the defendant was not told that if he did not get probation, he could not withdraw his plea, the plea was involuntary. At the post-conviction hearing, trial counsel indicated that the parties agreed that the defendant should receive probation, but did not present that agreement to the trial court because of the court's standing refusal to accept agreements for probation. Mr. Dodson testified that he did not understand, when he entered his plea, that "four and defer" meant that if he did not receive probation, he could not withdraw his plea. The court holds that under Rule 24.02(d), any agreement which leaves any aspect of the sentence up to the judge is a non-binding agreement, and the defendant must be so advised.

Hall of Fame

Congratulations to the attorneys for the defendants described in this article who obtained relief:

Ellen Flottman (Gnade)
Rosemary Percival (Ewing)
Jessica Hathaway (Wiley)
Rosalynn Koch (Hill)
Andrew E. Zleit (Jackson)
Ruth Sanders (Graves)
Benny Volner (pro se)
Pamela Kay Blevins (Radmer)
Emmett Queener and Craig Johnston (Frye)

New MACDL Members

MACDL sincerely appreciates your support. We can't function without you! Your dues pay for postage, printing, MACDL's interactive website, this newsletter, travel expenses of CLE speakers, and lobbying efforts in the Missouri General Assembly, among other things.

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MACDL would like to thank our 2012 Annual Meeting and CLE sponsors.

Lexis Nexis

The Bar Plan

Public Defender Gets Ruling on Caseload Writ

by Cat Kelly

On July 31st, the Missouri Supreme Court issued a long-awaited ruling in the litigation over Missouri's overloaded public defender system. In the case of *State ex rel. Missouri Public Defender Commission v. Waters* (SC91150), the high court ruled that a Christian County trial court judge had erred by forcing the public defender to represent a defendant despite the fact that the public defender office's excessive caseload prevented it from providing competent representation to any additional defendants.

The State's highest court ruled that the Public Defender Commission's rule limiting public defender caseloads should have been applied, and the public defender should not have been appointed to represent a defendant otherwise eligible for public defender services. The Court held that, "[s]imply put, a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation," reaffirming that, "[e]ffective, not just pro forma, representation is required by the Missouri and federal constitutions." In the future when public defender offices declare limited availability status, the Court encouraged trial judges to "triage" cases on their dockets so that the most serious cases can be appointed counsel and heard immediately, while continuing or delaying less serious matters. The court did not make any determination as to whether the Public Defender Commission's methodology for determining an office's maximum allowable caseload is appropriate. Instead, it said that question had not been presented to the court in the record on the case before it and that until such time as it is, the rule is presumptively valid and must be followed by Missouri's trial courts.

The case, which impacts the issue of public defender caseloads across Missouri's 115 counties, arose out of the defender office located in Springfield and serving the three southwest Missouri counties of Greene, Christian, and Taney. Over two years ago, the State Public Defender notified the courts in those counties that the local office had exceeded the maximum allowable caseload it could effectively handle. Under a duly enacted state regulation (Title 18 of the Missouri Code of State Regulations, Division 10, Chapter 4.010) established by the Missouri Public Defender Commission, the office would have to begin turning cases away unless the defenders, judges and local prosecutors were able to reach a consensus about what to do with the excess cases. No consensus was reached, and in July 2010, the State Public Defender notified the court that it would not accept new cases for the remainder of that month and would limit the number of new cases it could accept for each month thereafter.

Christian County Associate Circuit Judge John Waters appointed the defender office to represent indigent defendant Jared Blacksher despite the office's notice. The public defender attempted to refuse the appointment, arguing that taking additional cases put the overloaded attorneys at risk of violating their professional and ethical obligations to effectively represent their clients. They asked the court to provide counsel for Blacksher through other avenues, such as appointing a private lawyer, or to agree to not seek jail time for the defendant. The associate circuit court judge declined, and the State Public Defender took a writ to the Missouri Supreme Court, arguing that courts must not appoint the public defender to any additional cases once an office has exceeded the established caseload standards and been placed on limited availability in accordance with the state regulation. Almost two years later, the Court ruled that the judge was in fact in error in not following the rule.

In addition to the Springfield office, seven other defender offices serving another 20 Missouri counties have been placed on limited availability. According to Kelly, courts in those areas have, for the most part, been overruling the defenders' attempted refusal of new cases while waiting for the high court to issue its opinion in this case. Eight additional defender offices, serving 33 other counties, have given notice to their courts that they are at risk of closure to new cases due to excessive caseload, but those have likewise been on hold waiting for this decision. Currently, all but one of Missouri's public defender offices are operating above capacity.

The Missouri Association of Prosecuting Attorneys (MAPA) (http://www.mobar.org/esq/aug3/MAPA%20Response%20to%20Public%20Defender%20Case%20Decision.pdf) issued a press release in response to the court's ruling, citing a 2007 Department of Justice study for the proposition that Missouri's public defenders do not in fact have a caseload crisis. The Sixth Amendment Center, (http://sixthamendment.org/?p=537) based in Boston, MA, which does quite a bit of work with the Department of Justice, rebutted the MAPA's conclusions drawn from the DOJ statistics in a recent blog posting.

Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee which receives and reviews all requests for MACDL to appear as amicus curiae in cases where the legal issues will be of substantial interest to MACDL and its members. To request MACDL to appear as amicus curiae, you may fill out the amicus request on the MACDL website (www.MACDL.net) or send a short letter to Grant J. Shostak, Amicus Curiae Committee Chair, briefly explaining the nature of the case, the legal issues involved, and a statement of why MACDL should be interested in appearing as amicus curiae in the case. Please set out any pertinent filing deadline dates, copies of the order of opinion appealed from and any other helpful materials.

Committee Chair: Grant Shostak
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8015 Forsyth Boulevard
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Phone: (314) 477-3367
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Thanks!

Thanks to Sarah Jane Foreman for filing an Amicus Brief on behalf of MACDL in *State ex rel. Missouri Public Defender Commission v. Waters* (SC91150, decided July 31, 2012). The Missouri Supreme Court ruled that the trial court erred in appointing the public defender to represent an indigent client when the office's excessive caseload would have prevented the public defender from giving competent representation.

Lawyer Assistance Strike Force

As a benefit of membership, members have the opportunity to consult with MACDL`s Strike Force if they are threatened in any way for providing legal representation to a client in a criminal proceeding and are subpoenaed to provide information, cited for contempt, being disqualified from the representation, or who become the subject of a bar complaint resulting from such representation. Please visit the website for guidelines. (www.macdl.net)

MACDL ListServe

The MACDL ListServ helps facilitate, via e-mail, all sorts of criminal defense law discussions, including recommendations for expert witnesses, advice on trial practices, etc. Subscription is free and limited to active MACDL members. To subscribe, please visit our website, enter the member's only page, and follow the listserv link. (www.macdl.net)

Joint Committee on Missouri Criminal Code

by Brian Bernskoetter

This year the House and Senate passed SCR 28 which created the Joint Committee on Missouri Criminal Code. This committee, made up of three House and Senate members, is charged to conduct a comprehensive review of the Missouri Criminal Code and the Missouri Bar Association's recommendations for revising the Code; examine any other relevant issues; and recommend ways to improve the cohesiveness, consistency, and effectiveness of the state's criminal laws.

The Missouri Bar has been working on revising the criminal code for the last few years and last session their work product was put into bill form as Senate Bill 872 and House Bill 1897.

The committee will be meeting every Tuesday from September 11th thru October 16th. Public comment is specifically requested at the October 9th and October 16th meetings which will take place from 1- 5pm in Jefferson City at the Missouri State Capitol in the Senate Lounge.

MACDL staff and Board Members will attend the hearings to represent the interests of the private criminal defense bar.

Case Law Update

by Jeff Eastman

Criminal

State v. Frye

132 S.Ct. 1399; 182 L.Ed.2d 379; 2012 U.S.Lexis 2321
March 21, 2012

Frye was charged with driving with a revoked license, a class D felony. The state sent defendant's counsel an offer containing two possible dispositions. The first offered to reduce the charge to a misdemeanor offense with a 90-day jail sentence recommended. In the alternative, the state offered to recommend a three-year sentence to the original felony charge without a recommendation regarding probation but requiring ten days of shock incarceration. The state afforded defendant a specific time frame within which to accept either offer or the offers would be withdrawn. Defense counsel failed to inform defendant of the offers prior to their expiration.

After the offer had expired and prior to defendant's preliminary hearing, he was again arrested for driving while revoked. He thereafter waived his preliminary hearing and eventually entered a plea of guilty to the D felony of driving while revoked. There was no plea agreement. The state asked for a three-year sentence and requested ten days shock incarceration. The trial judge sentenced defendant to three years in prison.

In a post conviction relief proceeding, defendant alleged ineffective assistance of counsel in that his trial counsel failed to inform him of the plea offer prior to its expiration date. Defendant testified that he would have entered a guilty plea to the misdemeanor offense had he known of the offer.

On eventual review by the United States Supreme Court, the majority of the Court held that the right to effective assistance of counsel applies to all critical stages of the criminal proceeding including plea negotiations. The Court held that as a general rule, defense counsel has a duty to communicate formal offers from the prosecution which set forth terms and conditions that may be favorable to the accused. When defense counsel allows an offer to expire without advising his client or allowing him to at least consider it, counsel does not render effective assistance. In the present case, as the offer was not communicated, the offer lapsed.

Criminal *(Cont.)*

The Court then inquired as to whether or not prejudice was occasioned. The Court held that to show prejudice, a defendant must demonstrate a reasonable probability that he would have accepted the earlier offer had he been afforded effective assistance of counsel. In addition, a defendant must demonstrate a reasonable probability the plea would have been entered without the prosecution withdrawing it or the trial court refusing to accept it, assuming such authority existed under state law. Thus, to establish prejudice in this instant proceeding, it was necessary to show a reasonable probability that the end result would have been more favorable by reason of a plea to the lesser charge or a sentence of less prison time.

The Supreme Court found that there appeared to be a reasonable probability that Frye would have accepted the prosecutor's original offer if it had been communicated to him as he eventually pleaded guilty to a more serious charge with no sentencing agreement or recommendation in place.

However, such did not end the inquiry. Frye would also be required to show that the offer, once accepted, remained available. In the present case, given his subsequent arrest for driving while revoked, the Supreme Court questioned whether the prosecutor would have honored the offer accepted and whether the trial judge would have approved it. The cause was therefore remanded back to the Missouri Court of Appeals, Western District to address these issues.

State v. Burks

SD31023
February 3, 2012
____S.W.3d ____ (Mo. App. S.D. 2012)

After bench trial defendant was found guilty of driving while intoxicated. On appeal to the Southern District the defendant raises three points. In Point I, he alleged trial court error in admitting his refusal to submit to a PBT prior to his arrest. In rejecting defendant's argument, the Southern District first notes that defendant asked the court to take up his motion to suppress the case. Following said procedure, the state was afforded the opportunity of

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Criminal *(Cont.)*

introducing the results and hear defendant's refusal to submit to the PBT on the issue of probable cause to arrest defendant. Thus, there was no error in the admission of said testimony. The appellate court further noted that the trial court was qualified and did not consider the PBT refusal on the issue of intoxication as reflected in its comments. Thus, there was no error in the trial court's admission of defendant's refusal to submit to a PBT.

In Point II, defendant alleged trial court erred in the admission of evidence concerning the FST's administered to defendant. In this point, defense counsel argued there was insufficient foundation in that the arresting officer did not give the instructions required by NHTSA when administering each test. The appellate court rejected defendant's argument in that there was no evidence as to what those guidelines required. Defendant also argued that the HGN test was inadmissible given the arresting officer's failure to follow the same guidelines. In rejecting defendant's argument, the court observed that the trial court was presented with no evidence that the failure to follow NHTSA guidelines would affect the reliability of the tests. Such challenges, simply went to the weight, rather than to the admissibility of the test results. Likewise, challenges made to the officer's failure to comply with NHTSA requirements regarding the walk and turn and one leg stand tests went to their weight rather than to their admissibility. Southern District found the trial court did not abuse its discretion in admitting the officer's testimony concerning the results of each of these tests.

Finally, the defendant argued that the evidence was insufficient to support the defendant's conviction for driving while intoxicated. In rejecting the defendant's argument, the appellate court noted that defendant relied upon the improper standard of review. In a civil case, appellate review considers whether the judgment is against the weight of the evidence applying the principles of Rule 84.13(d). In a criminal case, appellate review is limited to determining whether or not there was sufficient evidence from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt. In applying said standard, the appellate court accepts as true all reasonable inferences drawn from the evidence and disregards all evidence and inferences to the contrary. Applying such standard, the court found sufficient evidence from which the trial court could have found defendant guilty beyond a reasonable doubt.

State v. Burns

359 S.W.3d 558 (Mo. App. W.D. 2012)

Defendant was convicted of driving while intoxicated and careless and imprudent driving after a bench trial. On appeal, he challenged the sufficiency of the evidence to support both convictions, as well as the lawfulness of the initial traffic stop. As to the C&I allegation, defendant argued that the evidence failed to establish that he improperly operated his vehicle on a road or highway in that his conduct occurred on a private parking lot. Viewing the evidence in the light most favorable to the judgment, the record indicated that defendant's conduct was not limited to the confines of a private parking lot in that he exited the parking lot and entered onto a public street by driving over the sidewalk then jumping the curb. Thus, at least part of his conduct occurred while he was operating the vehicle on a public street. The appellate court found that trial court could have reasonably inferred that the sidewalk and curb adjacent to the public thoroughfare were part of the public roadway. Relying upon a number of prior civil cases, the court recognized the statute had previously been interpreted to apply to drivers entering a public roadway from a public street or lot.

As to Point II and collateral to Point I, defendant contended the trial court erred in convicting him of driving while intoxicated in that there was no lawful basis for the initial traffic stop. The appellate court likewise rejected defendant's argument having previously found there was sufficient evidence to prove the offense of careless and imprudent driving.

In Point III, defendant challenged the sufficiency of the evidence to prove that he was intoxicated. Specifically, driver contented that the evidence was insufficient because no officer ever opined as to whether or not he was intoxicated. The Eastern District, relying upon *State v. Banosdol*, 974 S.W. 2d 650 (Mo. App. 1998) rejected said argument. There, the court held that if evidence of intoxication is presented from which a lay witness may offer an opinion as to intoxication, a jury may "similarly reach its own conclusion on intoxication based upon such evidence." Here, the record provided a sufficient basis for the court to make a determination that defendant was intoxicated. Defendant admitted drinking during the two hours prior to his stop, his speech was slurred, his breath smelled of intoxicants, his eyes were glassy, he failed field sobriety testing and a preliminary breath test showed that his BAC exceeded the legal limit. Such was sufficient for the trial court, as a finder of fact, to convict defendant of the offense alleged.

State v. Clampitt

364 S.W.3d 605 (Mo. App. W.D. 2012)

Special prosecuting attorney secured four separate investigatory subpoenas seeking, amongst other things,

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Criminal *(Cont.)*

text message content and details for incoming and outgoing text messages as well as name, contact information and billing address for subscriber during her investigation of defendant for first degree involuntary manslaughter and leaving the scene of a vehicular accident. During a motion to suppress hearing, special prosecutor testified she sought the same in hopes of obtaining an admission from defendant that either he or a member of his family was driving the vehicle at the time of the accident. She testified that she did not seek a warrant because she believed the text messages "were records that were in possession of a third party" and that the investigative subpoenas were sufficient for obtaining such information from third parties.

The trial court granted defendant's motion to suppress finding that defendant had a reasonable expectation of privacy in the text messages, that the investigative subpoenas used were unreasonable and that the good faith exception to the exclusionary rule did not apply to prosecutors. On appeal, the Western District affirmed relying in part upon *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010).

State v. Graves

358 S.W.3d 536 (Mo. App. S.D. 2012)

In a bench trial, defendant was found guilty of the class A misdemeanor of driving while intoxicated. On appeal, he challenged the sufficiency of the evidence. The Southern District rejected each point.

As to Point I, the appellate court noted that before opening statement, defense counsel stipulated that his client was seated at the defense table. Upon further inquiry by the court, counsel represented "I am stipulating that the defendant in this case is the person sitting next to us. Yes, your honor." Thereafter, during opening statement and throughout the cross examination of the State's sole witness, defense counsel repeatedly referred to the defendant as my client. When counsel challenged the identification of the defendant on appeal, the appellate court noted that despite the ambiguity of the stipulation, "defense counsel expressly stipulated that his client was seated at the defense table at trial and that the defendant in this case was the person sitting next to defense counsel table." Such was sufficient to support the fact that the defendant seated at defense counsel was the defendant in the case and that the person identified throughout the proceedings as the defendant was one in the same person.

In Point II, defendant claimed that the State failed to adduce evidence of a prior intoxication related traffic offense sufficient to enhance his status to prior offender.

Criminal *(Cont.)*

Defendant argued that the phrase "shall include" as set forth in Section 577.023.16 required the State to prove prior convictions, pleas of guilty or findings of guilt with evidence of convictions received by a search of the records of the Missouri Uniform Law Enforcement System maintained by the Missouri State Highway Patrol. In rejecting the defendant's argument, the court noted that the term "shall" was thereafter followed by the clause "but shall not be limited to." As such, the court found the legislature did not limit the evidence of prior convictions to the MULES system consistent with the court's prior holding in *State v. Thomas*, 969 S.W.2d 354. Judgment of the trial court was affirmed.

State v. Martin

SD30957
March 13, 2012
____ S.W.3d ____ (Mo. App. S.D. 2012)

After a bench trial, defendant was found guilty of driving while intoxicated. On appeal, she claimed the trial court erred in its failure to sustain her motion for judgment of acquittal, its failure to take judicial notice of its findings in a prior civil case and its failure to sustain her objection to the State's closing argument. The appellate court first discussed whether the trial court erred in not taking judicial notice of its findings in the refusal case. In the prior refusal proceeding, the trial court found that the eye witnesses testimony was so conflicting and inconsistent that when accompanied by their ability to identify defendant as the operator of the motor vehicle, their testimony held no weight.

In rejecting defendant's argument, the appellate court noted that a judicially noticed fact must have independent reliability and trustworthiness since such fact may be established without supporting evidence. In Missouri, if a fact is within the common knowledge of people of ordinary intelligence, judicial notice may be taken of that fact. Judicial notice must be exercised cautiously and must be declined if there is doubt about the notoriety of a fact. In the present case, the court was asked to take judicial notice of a credibility finding. The credibility of a witness' testimony in a prior proceeding is not a fact within the common knowledge of people of ordinary intelligence and thus the trial court properly refused to take judicial notice of that finding.

In Point II, defendant argued that a witness' testimony was so contradictory that it should be disregarded under the doctrine of deconstructive contradictions. Without said testimony, defendant argued that the State failed to make a submissible case for driving while intoxicated and

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Criminal *(Cont.)*

therefore the trial court erred in denying her motion for judgment of acquittal. The doctrine of deconstructive contradictions requires that a witnesses' testimony or statements at trial be so inconsistent, contradictory, and diametrically opposite that the testimony is robbed of all probative value. The doctrine is limited to a witness' trial testimony and not to contradictions between trial testimony and prior out of court statements. Mere discrepancies in a witness' trial court testimony are not sufficient to invoke the doctrine. Instead, the conflict must concern vital points or elements. In the present case, the contradictions alleged were primarily between the witness' testimony in the civil proceeding as contrasted with her testimony in the criminal trial. As such, the same fell outside the ambit of the doctrine alleged. In addition, the contradictions did not relate to the essential element at issue, whether defendant was actually operating a motor vehicle. The trial court found that the witness positively identified defendant as the driver such that the trial court properly denied appellant's motion for judgment of acquittal.

In a related point, appellant argued that the trial court erred in refusing to grant a judgment of acquittal because there was insufficient evidence to find that she was operating a motor vehicle had the trial court properly excluded the challenged evidence. Again, the appellate court found that the trial court properly rejected appellant's efforts to give collateral estoppel effect to the findings in the prior civil proceeding. Relying upon consistent precedent, the appellate court noted that for collateral estoppel purposes, no relationship exists between a determination of fact in a criminal case and a determination of fact made in a prior administrative proceeding.

Finally, appellant alleged error in the following statement made by the prosecutor during closing argument,

> "It should be pointed out that defense although asked but did not disclose an alibi defense, such as I was not in the drivers seat, I was in another seat. If they did that they would have had to disclose Katie Hoeffer. The first time we ever heard the name of Katie Hoeffer was today. And your honor that means that that witness was more particularly available to the defense than it was to the state. And the fact that they did not subpoena or call her can entitle the court to presume that therefore her testimony would be adverse to them. If she had been equally available to either party that would not be the case. But since they never told us the name until today, that presumption may be made."

Criminal *(Cont.)*

The trial court did not rule on defendant's objection to the statement but advised the State to continue with its closing argument which presumptively overruled the objection.

Appellant complains that the State misstated the law because the court can only infer that the testimony would be negative and an inference is permissive while a presumption is mandatory. The appellate court rejected defendant's argument noting that in a bench tried case, the judge is presumed to be able to disregard inappropriate or improper argument and proceed to a fair result. There was nothing in the record to suggest the trial court based its decision on anything other than the evidence presented and therefore the trial court did not abuse its discretion in overruling appellant's objection. Judgment affirmed.

State v. McNeely

358 S.W.3d 65 (Mo. 2012)

Defendant refused to consent to a chemical analysis of his breath or blood after he was arrested for driving while intoxicated. When the defendant refused, the arresting officer ordered a medical professional to draw his blood. The officer testified that he had always previously sought a warrant but felt the same was no longer necessary because of an article he read in the "Traffic Safety News." Prior to trial, defendant filed a motion to suppress the results of his blood test arguing that the non-consensual and warrantless draw violated his Fourth Amendment rights. The trial court agreed and sustained his motion excluding the test results.

On review, the Supreme Court framed the issue as to under what specific facts is a non-consensual and warrantless blood draw in a DWI case a reasonable search and seizure. Our Supreme Court first looked to the decision of *Schmerber v. California*, 384 US 757 (1966). In *Schmerber*, the high court provided a "limited exception" to the warrant requirement for taking a blood sample in an alcohol related case. In allowing the challenged seizure, the Supreme Court expressly limited its holding to the facts of that case. The special facts present in *Schmerber* lead the arresting officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. The threat of evidence destruction was caused by the fact that the percentage of alcohol in the defendant's blood began to diminish shortly after his drinking ceased and because time had to be taken both to investigate the accident scene and transport defendant to a hospital. As a consequence, there was insufficient time to seek out a judge for a warrant. The court upheld the seizure in *Schmerber* as a consequence of these "special facts."

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Criminal *(Cont.)*

In *McNeely,* no such facts were present. It was a routine driving while intoxicated case where there was no accident or serious bodily injury.

The *McNeely* court held that the natural dissipation of blood alcohol evidence alone did not constitute a sufficient exigency so as to dispense with the warrant requirement under the Fourth Amendment. The court found that US Supreme Court precedent held that searches conducted outside the judicial process, without prior approval by a judge, are "per se" unreasonable under the Fourth Amendment. The court concluded that the fact that the blood alcohol content dissipates over time is, in and of itself, an insufficient basis to negate the need for a warrant. Other special facts are required. In *McNeely* there were no such other facts and thus the trial court's order was affirmed.

De Novo

Harvey v. Director of Revenue

WD72606
May 9, 2012

Driver challenged the admission as well as the validity of the blood alcohol test of his breath in that he had whisky-soaked chewing tobacco in his mouth when the test was conducted. The trial court "found the issues in favor of [Harvey] and against [the director]." From such judgment the director prosecuted an appeal.

Director argued the trial court erred as a matter of law in following *Hurt v. Director*. Director's claim was predicated upon oral comments made by the trial court following closing argument wherein the court thought *Hurt* to be controlling. In its written judgment however, the trial court made no reference to *Hurt*. The trial court's judgment was affirmed on appeal.

In a 6-5 en banc decision, the majority found that while an appellate court *may* consider oral comments made by the trial court to aid in interpreting an ambiguous judgment, where the language of the judgment is plain and unambiguous, an appellate court need not look outside the four corners of the judgment for its interpretation. In the present case, the judgment was unambiguous and therefore, the appellate court could but was not required to consider the trial court's gratuitous comments.

In the present proceeding, the factual issues were found in favor of the driver and against the director. Citing *White v. Director of Revenue*, the appellate court found that there is

De Novo *(Cont.)*

no presumption that the director's evidence established a prima facie case and hence no burden shifted to the driver. Driver presented evidence that he had placed whiskey soaked chewing tobacco in his mouth prior to being stopped and that it remained in his mouth when the breath test was performed. Through cross examination and argument, driver challenged the reliability and validity of the blood alcohol test results based upon its presence. Although the state presented evidence from an expert who opined that the whiskey-soaked tobacco would not have affected the accuracy of the results, driver discredited that opinion through cross examination.

Because of the validity of the test results were contested, the trial court was free to assess the credibility and weight to be afforded to the evidence presented. Since all fact issues upon which no specific written findings are made must be considered as having found in accordance with the result reached, the trial court must have found the test results to be unreliable and therefore the director failed to prove that element of her case. Under the appropriate standard of appellate review, the appellate court defers to that determination. Judgment affirmed.

Ziegler v. Director

SD30694
April 26, 2012
____S.W.3d____ (Mo. App. S.D. 2012)

Driver challenged Section 302.500 administrative sanction arguing trial court erred admitting the blood alcohol test results in that the blood was not drawn in strict compliance with Section 577.029 because neither the arresting officer nor the paramedic who drew the blood knew whether the kit used contained "water prep or betadine." The paramedic testified that the medically accepted practice for drawing blood would be to use either betadine or some other antiseptic to cleanse the skin prior to drawing the blood. In rejecting driver's argument, the Eastern District held that there was no evidence that either water prep or betadine did not meet a standard of accepted medical practices. That is, the court was asked to conclude that a "water prep" was not an antiseptic. The court rejected driver's argument that the paramedic's testimony that using a "water prep" was equivalent to using a "non-antiseptic." Having no evidence that water cannot be used as a base in an antiseptic solution, the trial court's judgment was affirmed.

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Refusal

McKay v. Director of Revenue

WD74458
August 7, 2012
____S.W.3d_____ (Mo. App. W.D. 2012)

Driver arrested for driving while intoxicated and thereafter requested to submit to a chemical analysis of her breath. She refused. The arresting officer eventually drove her to a hospital where, without the necessity of a search warrant, driver acquiesced in the officer's request that she provide a sample of her blood.

The director then served driver with notice of the revocation of her license as a consequence of her initial refusal to submit to a chemical analysis of her breath. At the conclusion of her trial court proceeding, the trial judge stated in its judgment that driver "Gave a blood sample as per request of [the] officer." From such judgement, the director appeals. The Western District affirms. The court rejected the director's perspective that the officer's eventual ability to obtain driver's voluntarily submitted blood test results without the necessity of a warrant had no bearing on whether her license could be revoked for her initial refusal to submit to a chemical analysis of her breath. The court found that the tests requested were not mutually exclusive events.

The Western District distinguished the present case from *Bender v. Director of Revenue* in that in *Bender*, the arresting officer obtained a search warrant to seize a sample of Bender's blood whereas in the present case, no warrant was obtained. The Western District likewise distinguished the Southern District cases of *Smock v. Director* and *Snow v. Director of Revenue*. In those cases, the focus of the analysis was on a voluntary and successful completion of a chemical test and the statutory authority of the officer to request a second test when the first test was not successfully completed. Those cases involved an initial consent, followed by an unsuccessful chemical test, followed by a refusal to submit to further testing. In the present proceeding, driver submitted to the subsequently requested test.

The Western District considered the holding in *Kimbrell v. Director* instructive. In *Kimbrell*, the driver initially refused the officer's request for a chemical test. Thereafter, he advised the officer that he had changed his mind and asked that he be tested. The officer permitted him to do so and a valid result was obtained. Although the trial court sustained the director's revocation efforts, the appellate court reversed. The court, in evaluating the purpose behind the implied consent law noted that if law enforcement elects to administer a test, even after an initial refusal, and results are obtained, the alcohol content of the driver's blood has been demonstrated and thus the statutory purpose of the implied consent law has been fulfilled.

In the present case, the driver's BAC was objectively determined through a consensual warrantless chemical testing of her blood, despite her initial refusal. Therefore, the purpose of the statutory scheme was fulfilled. Judgment affirmed.

Refusal *(Cont.)*

DeClue v. Director

361 S.W. 3d 465 (Mo. App. E.D. 2012)

Driver was arrested for driving while intoxicated and was thereafter notified by director that his privilege to operate a motor vehicle would be revoked pursuant to Section 577.041. Driver filed a petition for judicial review. After several continuances, a hearing was held wherein driver appeared in person and by counsel but the director failed to appear. Thereafter, the court entered an order finding the director in default for failing to file a response to driver's petition. Six days later, director filed a motion to set aside the default judgment arguing that notice was never served on the prosecuting attorney and thus the circuit court was without authority to proceed in the absence of the prosecuting attorney. Driver responded alleging that a prosecuting attorney was indeed present at the hearing.

After an evidentiary hearing, the trial court denied the director's motion to set aside the default judgment. Then the court reissued its order denominating the same as a judgment. The director appealed.

In the Eastern District, the director argued that the trial court erred in overruling the director's motion in that the director could not be found in default for failure to file a responsive pleading because the director is not required to file an answer. The director conceded that appellate review was for "plain error" in that the director failed to raise this argument in its motion to set aside or void the default judgment. In its opinion, the Eastern District noted that plain error review is discretionary with the appellate court and is rarely granted in civil cases. Plain error places a much greater burden on a defendant than when he alleges prejudicial error. To find plain error "first, our examination of the record must facially establish grounds for a belief that a manifest injustice has occurred. Then, if facially substantial grounds are found to exist, the appellate court will turn to whether a manifest injustice or miscarriage of justice actually occurred. Relief or plain error occurs only when the error is outcome determinative."

In the present case, the court found that the circuit court plainly erred in entering a default judgment for the driver.

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Refusal *(Cont.)*

The judgment unequivocally stated that driver was in default for failing to file a responsive pleading. Such finding, the court held, was contrary to both the governing statute and established case law. Neither the director nor the prosecuting attorney, as the director's representative, is required to file an answer or other responsive pleading. Therefore, the circuit court's entry of a default judgment on such a ground was a manifest injustice. Judgment reversed and case remanded for further proceedings consistent with the appellate opinion.

Manzella v. Director

363 S.W.3d 393 (Mo. App. E.D. 2012)

In this Section 577.041 proceeding, the driver challenged the director's decision to administratively sanction his license as a consequence of his refusal to submit to a blood alcohol test. At trial, driver objected to the admission of the Alcohol Influence Report and its supplemental documentation on grounds of hearsay, best evidence, authenticity, and lack of foundation as a business record under Section 490.680. The trial court admitted the exhibit over driver's objection and thereafter sustained the director's order of revocation. Driver appealed. On appeal, the Eastern District affirmed. The appellate court noted that Section 577.041 provides that evidence of a driver's refusal to submit to a blood alcohol test is admissible in a revocation proceeding. Section 577.041.2 requires the arresting officer to create and forward to the director a certified report containing details of the arrest. Upon receipt of such report, the director is required to revoke the license of a person refusing to take the test for a period of one year.

Section 302.312.1 provides for the admissibility of revenue records. The enactment created a special statutory exception to evidentiary rules otherwise applicable to the content of revenue records. The Eastern District noted that the legislative intent of the statute is clear and the court would not distort it by inferring additional requirements. Driver's arguments with respect to foundation, authenticity, best evidence and hearsay therefore failed.

The court also rejected driver's complaint that he was deprived of the opportunity to cross examine the law enforcement officer who found probable cause for arrest when the director proceeded on records alone. The appellate court noted first that driver failed to assert this issue in a separate point relied on but instead injected it into the argument portion of his brief. The appellate court also found that the driver's argument had no merit as he was free to subpoena and examine the officer himself. Revocation affirmed.

Miscellaneous

Hill v. Director

134 S.W.3d 545 (Mo. 2012)

Driver sought reinstatement after ten year denial. Director challenged action arguing that driver's conviction for possession of drug paraphernalia rendered him ineligible as it was a conviction "related to ... drugs." The Supreme Court agreed.

Additionally, driver argued that the phrase "possession of drug paraphernalia" was overly broad and therefore unconstitutional. Supreme Court rejected driver's argument holding that driver could not collaterally attack his prior conviction in an action to challenge a driver's license sanction. Trial court judgment reversed.

Brinker v. Director

363 S.W.3d 377 (Mo. App. E.D. 2012)

Director denied driver's privilege to operate a motor vehicle for one year for "committing fraud or deception during the examination process or making application for a permit, license, or non driver license which contained false or fraudulent information" in violation of Section 302.171. Driver challenged the determination in a Section 302.311 proceeding. At trial, the only evidence was a certified copy of the director's efforts comprising driver's Missouri driving record, a letter to driver informing him of the director's decision and five documents each containing a photograph, signature and personal information at the bottom of each page. Two of the photo documents bore the signature of driver and contained personal information as well as his license number and its expiration date. The other three photo documents contained information regarding a second individual and bore the signature of that individual. The person in the photograph on one of these three documents bearing the other individual's name did not resemble the person in the photograph on the other two documents bearing the same name. It did however "somewhat resemble the person in the photograph on the document bearing drivers name."

At the conclusion of the proceeding, the trial court found that the director's evidence did not contain any documentation purporting to be an application prepared and submitted by driver. The court found that the computer generated documents containing photographs of two individuals offer no explanation or verification of what caused said documents to be created or at whose request. The court thereafter reinstated driver's driving privilege finding the director's evidence insufficient.

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Miscellaneous *(Cont.)*

The Eastern District affirmed. Citing *Kinzenbaw v. Director*, 62 S.W.3d. 49 (Mo.banc 2001), the appellate court held that the driver bore the initial burden of producing evidence that he was entitled to a license. Once the driver met such burden, the burden shifted to the director to produce evidence that the driver was not qualified for a driver's license. Once the director met said burden, it became the drivers burden to show that the facts purported to be established by the director's record were not true or that the grounds for suspension were unlawful, unconstitutional, or otherwise insufficient under Section 536.150 to support the director's actions.

In *Kinzenbaw*, the court noted there were two components of the burden of proof: the burden of producing or going forward with the evidence and the burden of persuasion. In a Section 302.311 proceeding, the burden of producing evidence is a party's duty to introduce enough evidence on an issue to have the issue decided by the fact finder. In contrast, the burden of persuasion is a party's duty to convince the fact finder to view the facts in a way that favors that party. In a Section 302.311 proceeding, the burden of producing evidence shifts from one party to another and back again. The burden of production does not - it remains with the driver at all times.

In the present case, the trial court found and the Eastern District agreed that the records submitted by the director did not contain sufficient information for the trial court to find that driver made an application for a drivers license that contained or was substantiated with false or fraudulent information or documentation. The documents received into evidence offered no explanation or verification of what caused said documents to be created or at whose request. The director offered no evidence to explain the origin or context of the documents. The documents contained no proof that driver even made application for a license and if an application was made, the documents did not show who supplied the false or fraudulent information or what the false or fraudulent information consisted of. The appellate court found that the director "is relying upon unsubstantiated photos, speculation, and stacked inferences to support her theory that [driver] made a false statement in applying for a license." In conclusion, the appellate court found that director did not satisfy her burden of producing evidence demonstrating a prima facie showing of the facts necessary to support a denial of drivers driving privilege.

Miscellaneous *(Cont.)*

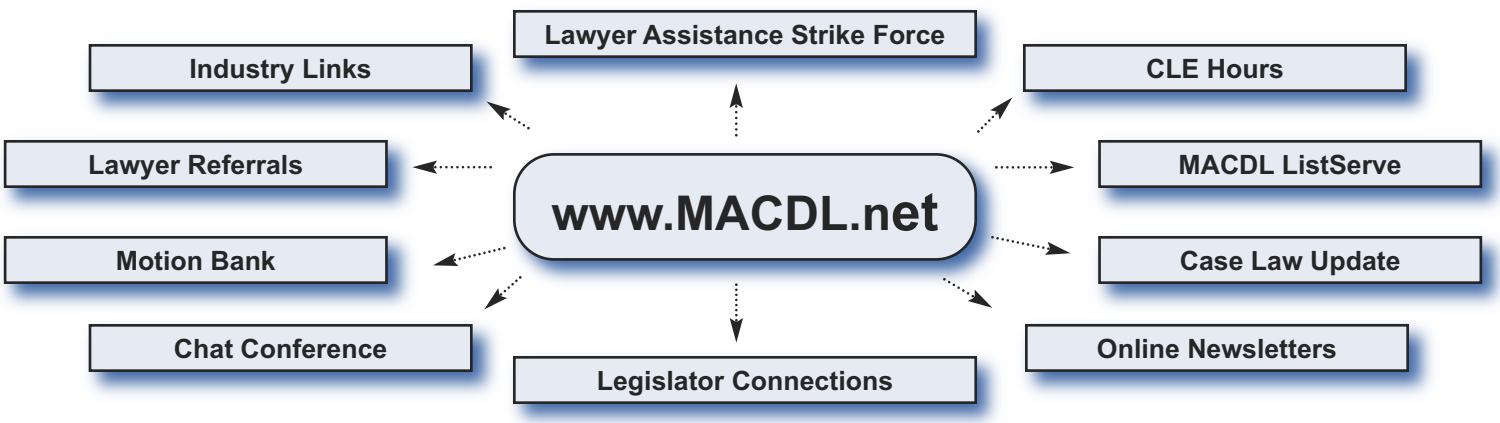
Mansheim v. DOR

357 S.W.3d 273 (Mo. App. E.D. 2012)

Driver sought limited driving privileges during a ten year period of denial. Director filed a motion to dismiss driver's petition arguing that driver was ineligible in that he had been convicted of leaving the scene of an accident and therefore was statutorily disqualified pursuant to Section 302.309.3(6). The trial court adopted the findings and recommendations of the commissioner and entered its judgment granting driver limited driving privileges and director appealed.

The Eastern District reversed. The appellate court found that driver's driving history reflected or included a conviction for leaving the scene of an accident, which with other violations had occasioned a revocation of his operating privilege. The director had also notified driver that his privilege would be denied for ten years in that he had more than two convictions for driving while intoxicated.

It its analysis, the appellate court found that driver was statutorily "otherwise ineligible" for driving privileges in that his privilege had been previously revoked or suspended for leaving the scene of the accident. The court rejected driver's arguments that an individual would always be denied a limited driving privilege if he had ever previously been convicted for leaving the scene of an accident. Citing *Hagan v. Director*, 968 S.W.2d 704 (Mo. banc 1998).



Bruce's Top 10 Federal Cases

by Brian Gaddy

Smith v. Cain

132 S. Ct. 627 (2012)

***Brady* Discovery Violations**

The defendant was charged with killing five people during a robbery. A survivor was the single eyewitness at trial. No other physical evidence or eyewitness testimony was presented. The survivor positively identified the defendant as he had been "face to face" with him. PCR counsel later obtained a detective's handwritten notes which indicated the witness could not identify any of the intruders because had not seen their faces.

Under *Brady v. Maryland*, the State violates due process if it withholds evidence that is favorable to the defense and material to guilt or punishment. Here, the State did not contest that the statements were favorable and had not been disclosed, but instead argued that the statements were not "material" to the defendant's guilt in light of trial evidence, including the strength of the witness's trial testimony. Evidence is material under *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability does not mean that the defendant would more likely than not have received a different verdict, but instead means that the likelihood of a different result is great enough to undermine the confidence in the trial. Evidence impeaching an eyewitness may not be material if the state's other evidence is strong enough to sustain confidence in the proceeding. But here, the survivor's testimony was the only evidence that linked the defendant to the crime. Although the surviving witness was strong at trial, the undisclosed statements directly contradicted his trial testimony and were material to his credibility. This was a clear *Brady* violation.

United States v. Jones

132 S. Ct. 945 (2012)

The Use of GPS Tracking Devices under the Fourth Amendment

The police attached a GPS tracking device on the defendant's vehicle. A federal search warrant had authorized the placement of the GPS within ten days in the District of Columbia. On the 11th day, and in Maryland, the device was installed. The government stipulated non-compliance with the warrant. The GPS relayed more than 2000 pages of data over a four-week period which was used to connect the defendant to a drug operation and stash house. The defendant sought to suppress the GPS data as an illegal search and seizure under the Fourth Amendment. The government claimed placement of the GPS was not a search.

The Supreme Court held the government's installation of the GPS on the vehicle constituted a Fourth Amendment search. The police physically occupied private property to install the device and obtain information. The Court discussed the historical underpinnings of the Fourth Amendment, including a discussion of early cases tied to common-law trespass. Although modern Fourth Amendment cases have departed from the trespass concept to an analysis of "reasonable expectation of privacy," the analysis in this case did not rise or fall within the expectation of privacy formula. Historically, the Fourth Amendment was understood to embody a particular concern for government trespass upon protected areas. The reasonable expectation of privacy test did not narrow the scope of the Fourth Amendment or alter the historical views that a government intrusion into a protected area may violate the Fourth Amendment. The reasonable expectation of privacy test added to, but was not substituted for, the common-law trespass test. Thus, the government's intrusion on the vehicle is dispositive. Because the trespass is dispositive, the Court did not reach the government's argument as to whether a person has a reasonable expectation of privacy in the location of their vehicle on public roads that are visible to all.

Ryburn v. Huff

132 S. Ct. 987 (2012)

Fourth Amendment – Exigent Circumstances for Police Safety

This was a section 1983 lawsuit that alleged a Fourth Amendment violation. Vincent Huff was described as a "weird" high school student who kept to himself. The police were called on a rumor that Vincent was going to "shoot up" his school. Since Vincent had been absent for two days, the police decided to interview him. They knocked on his door several times, but there was no answer. They next called his mom's cell phone. Mrs. Huff answered and said she was inside with Vincent. When the officer indicated they wanted to question Vincent, she hung up. Moments later, the mother and Vincent came to the front porch. The officers asked Vincent about the school shooting rumor, to which he replied "I cannot believe you are here for that." The officers asked Mrs. Huff if they could continue the discussion inside the house, and she replied no. The officers found it "extremely unusual" for a parent to decline such a request. The officer asked if there were any guns in the house. The mother then turned around and went into the house quickly. Because the officer was fearful that she could be retrieving a weapon, he followed her into the house. Vincent followed them in, and a second officer followed Vincent into the house. The police ultimately concluded that the shooting

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rumor was false. The Huffs filed a 1983 action claiming their rights were violated when the police entered their house without a warrant.

The Supreme Court held that it was permissible for the officers to enter the house without warrant. In prior cases, the Court has observed that police may enter a house without a warrant when they have an objectively reasonable basis for believing that an occupant is imminently threatened with serious injury. Because the mom had displayed odd behavior, there could have been dangerous weapons inside the house, and the officers and occupants could have been in danger. Reasonable officers could have concluded that there was an imminent threat to their safety and to the safety of others within the house.

Perry v. New Hampshire
132 S. Ct. 716 (2012)

Eyewitness Testimony

The police were called on a report of someone breaking into cars in an apartment parking lot. They observed Petitioner standing between two cars holding two car-stereo amplifiers. When asked where the amplifiers came from, Petitioner said he found them on the ground. The witness who called the police was also questioned, and she identified the Petitioner, who was standing next to the officer in the parking lot, as the suspect. Later, the witness was shown a photospread but was unable to identify Petitioner. At trial, the Petitioner challenged his identification by arguing that the witness observed what amounted to a one-person showup in the parking lot which all but guaranteed his identification.

The admission of eyewitness identification may violate due process when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator. An identification influenced by improper police actions must be screened pre-trial and excluded if there is a very substantial likelihood of irreparable misidentification. In this case, however, the suggestive circumstances were not arranged by the police. The due process requirement of pre-trial screening for reliability is not required where the suggestive circumstances were not created by law enforcement. Due process concerns arise only when officers use an identification procedure that is both suggestive and unnecessary. Although the Court acknowledged that eyewitness identification can be fallible, the potential unreliability of this type of evidence does not alone render its introduction at trial fundamentally unfair. Since a jury should typically determine the reliability of evidence, the Court is generally unwilling to enlarge the domain of due process "checks" on the admissibility of evidence.

Howes v. Fields
132 S. Ct. 1181 (2012)

***Miranda* Custody Requirement**

Fields was an inmate in a Michigan prison. While in custody, he was taken to a conference room by prison staff to meet with two deputies who wanted to question him about another incident that occurred outside the prison and before his current incarceration. Fields passed through a locked door to get to the conference room and was interrogated for five to seven hours. Fields was told he was free to leave and that he could return to his jail cell. The officers were both armed during the interview. The interview room door was open at times and closed at other times. At one point during the interview, Fields became agitated when confronted with allegations of sexually abusing a child. One of the officers told him that if he did not want to cooperate he could just leave. Fields eventually confessed. At no time during the interview was Fields given *Miranda* warnings or advised that he did not have to speak with the officers.

The Supreme Court first observed that it had never adopted any categorical rule whether the questioning of a prison inmate is "custodial" for *Miranda* purposes. Custody is a term of art that specifies circumstances generally thought to present a danger of coercion. A key question is whether a reasonable person would have felt he or she was free to terminate the interrogation and leave. Relevant factors include the location of the questioning, the duration, statements made during the interview, the presence or absence of physical restraints, and the release of the interviewee at the end of the questioning. Determining whether a person's freedom of movement is curtailed is not the only factor. Questioning an inmate who is already serving a prison term does not generally involve the shock that often accompanies an arrest or a police station interview. According to the Court, the inmate, unlike a person off the street, is not likely to be lured into speaking by a longing for a prompt release. The Court also reasoned that an inmate knows the law enforcement officers who question him probably lack the authority to affect the duration of his sentence. Because serving an unrelated jail sentence does not implicate the concerns with a police station type of interrogation, service of a prison term, without more, is not enough to constitute *Miranda* custody. The Court observed that the circumstances surrounding this interview did not suggest a coercive atmosphere. An inmate being questioned about the sexual abuse of a boy would probably prefer the questioning occur in a conference room instead of general population. Fields was told he could leave and go back to his jail cell. He was not physically restrained or threatened, and he was offered food and water. The conference room door was at times open.

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According to the Court, all of these factors suggest an environment in which a reasonable person would have felt free to terminate the interview and leave.

Martinez v. Ryan
132 S. Ct. 1309 (2012)

Ineffective Assistance of Post-Conviction Counsel

Under Arizona law, claims of ineffective assistance of trial counsel cannot be raised in the direct appeal. The claims are reserved for state collateral proceedings. In this case, the post-conviction attorney did not raise ineffective assistance of trial counsel in the post-conviction proceeding. On federal habeas review, the defendant claimed for the first time that he received ineffective assistance of trial counsel and claimed that he received ineffective assistance of post-conviction counsel for failing to preserve the ineffective claim in the state collateral proceeding. The Court refused to answer whether a defendant has a constitutional right to the effective assistance of counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance of trial counsel. Instead, the Court only addressed whether ineffective assistance of state post-conviction counsel may provide "cause" for a procedurally defaulted claim presented on federal habeas review. The Court held that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial in a federal habeas proceeding.

Missouri v. Frye
132 S. Ct. 1399 (2012)

Defense Counsel's Duty to Communicate Plea Offers

The defendant was charged with a Class D felony of driving with a revoked license. On November 15, the prosecutor made a plea offer to counsel: a three-year sentence on the felony, stand silent regarding probation but request ten days in jail as shock time, or reduce the charge to a misdemeanor with a 90-day jail sentence. The written offer expired on December 28. Counsel never informed the defendant of the offer. Due in part to a new charge, the defendant later entered a plea of guilty to the felony and received a three-year sentence of imprisonment. In a PCR proceeding, he claimed he received ineffective assistance of counsel for his lawyer's failure to communicate the plea offer. He claimed he would have accepted the misdemeanor offer had he known about it. The State argued that there is no constitutional right to a plea offer or a plea bargain, and that the subsequent guilty plea was based on accurate advice at the time it was entered.

The Supreme Court held the Sixth Amendment right to effective assistance of counsel applies to critical proceedings before trial, including the negotiation of plea bargains. 97% of federal convictions and 94% of state convictions result from guilty pleas. Plea bargaining is central to the criminal justice system. As a general rule, defense counsel has a duty to communicate formal plea offers. Counsel's failure to communicate the plea offer caused the offer to lapse. Counsel's performance was deficient. To show prejudice from the deficient performance, a defendant must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective counsel. A defendant must also show a reasonable probability that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Lafler v. Cooper
132 S. Ct. 1376 (2012)

Ineffective Assistance of Counsel in Evaluating Plea Offers

The defendant was charged with assault with intent to murder, firearm offenses and being a habitual offender under Michigan law. On two occasions, the prosecutor offered to dismiss two counts and recommend a sentence of 51 to 85 months. Trial counsel mistakenly believed the prosecution could not prove an element of assault with intent to murder and recommended that the offer be rejected. All parties stipulated that counsel's advice to reject the offer was deficient. After trial, the defendant was sentenced to 185 to 360 months. On appeal, the defendant claimed he received ineffective assistance of counsel in receiving advice to reject the plea offer on a mistaken analysis of the law by the defense lawyer. The State urged that an error-free trial eliminates any claims of ineffective assistance of counsel in the plea bargaining process where the plea was rejected.

The Court recognized that the Sixth Amendment right to effective counsel extends to the plea-bargaining process. Since it was stipulated that counsel's performance was deficient, the Court analyzed what is required to show prejudice. In the context of a plea bargain, the defendant must show that the outcome of the plea process would have been different with competent advice. The defendant must show that but for counsel's ineffective advice, there is a reasonable probability that the plea offer would have been accepted and the prosecution would not have withdrawn it. The Court rejected the State's argument that there can be no finding of ineffective assistance of plea counsel if the plea is rejected and the defendant is later convicted at a fair trial. If the proper showing is made, the court may exercise discretion in determining whether the defendant should receive the sentence initially offered by the prosecution. In some situations, a resentencing may suffice. In other situations where the prosecution agreed to drop charges, the court may require the prosecution to reoffer the original plea proposal.

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Blueford v. Arkansas
132 S. Ct. 2044 (2012)

Double Jeopardy

Alex Blueford was babysitting a one-year old for his girlfriend. The boy suffered severe head injuries and later died. The medical professionals believed Blueford had intentionally injured the boy, while Blueford claimed he accidentally knocked the boy to the ground. He was charged with capital murder (no death penalty). The trial court instructed on lesser included offenses of first degree murder, manslaughter and negligent homicide. During deliberations, the jury verbally reported that it was unanimous against charges of capital murder and first degree murder, but was deadlocked on manslaughter. The defense lawyers requested new verdict forms for the jury to complete on those offenses that they had reached a verdict on. The court refused. The jury later returned and indicated that it could not reach a verdict. The trial court declared a mistrial. The State sought retrial on capital murder. The defense sought to have capital murder and first degree murder dismissed based on the jury foreman's verbal report to the Court that the jury was unanimous against capital murder and first degree murder. The lower state courts rejected a double jeopardy challenge on the grounds that the foreperson's report was not a formal announcement of acquittal or a formal jury verdict.

The Supreme Court held there was no double jeopardy bar against retrial on the capital and first degree murder charges. The foreperson's report to the trial court was not a final resolution of anything. The deliberations had not yet concluded when the report was given. When the jury emerged later, the indication was simply that the jury could not reach a verdict. There was no indication whether it was still the case that the jurors believed the defendant was not guilty of capital or first degree murder. The fact that deliberations continued after the verbal report deprives that report of finality necessary to constitute an acquittal for double jeopardy purposes. The Court also rejected the argument that the jury instructions required resolution of the higher offense before considering a lesser-included offense. There was nothing in the instructions that prohibited the jury from reconsidering a vote on a higher offense. The jury was free after its verbal report to revisit the higher offenses. It cannot be assumed that the jury's votes did not change after it went back to continue deliberations. The Court rejected the notion that the trial court should have accepted partial verdicts or submitted new verdict forms on the higher offenses. Here, the jury did not convict or acquit the defendant of any particular offense. Double jeopardy does not prevent a second trial on any offense.

Miller v. Alabama
132 S. Ct. 2455 (2012)

The Eighth Amendment and LWOP Sentences for Juveniles

This case involved a 14-year old defendant who was certified as an adult, convicted of first degree murder, and sentenced to life imprisonment without possibility of parole. The Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life imprisonment without possibility of parole for juvenile homicide offenders. Children are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility may lead to recklessness, impulsivity, and heedless risk-taking. A mandatory penalty scheme of life in prison for first degree homicide offenses prevents a sentencing court from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. A life sentence without parole is likened to the death penalty for a juvenile offender. And the death penalty may only be imposed after an individualized sentencing hearing where mitigating qualities, such as youth, are considered. If life imprisonment without parole is mandatory in a juvenile homicide case, the sentencing court cannot make any individualized sentencing assessments or consider youth as a mitigating factor.

MACDL Website Traffic *(March 4, 2009 - August 27, 2012)*

Item	Counts	Item	Counts
Total Hits	1,213,217	Average Visitors per Day	169
Average Hits per Day	953	Average Page Views per Day	361
Total Visitors	215,232	Average Page Views per Visitor	2.14