MACDL
Missouri Association of Criminal Defense Lawyers

Fall, 2013

President's Letter

Kim Benjamin
MACDL 2013-14 President

As I write this letter for the MACDL newsletter, I realize I am nearly six months into my term as the President and just a few weeks after an exhausting, yet exhilarating jury trial that thankfully ended in an acquittal.

The recent trial reminded me why I became a lawyer -- and not just any kind of lawyer, but a criminal defense trial lawyer. It was to fight for people, to help people, and to talk to members of our community and seek justice from them in the courtroom.

I know I am not the only one. Many of you are born fighters, too. Many of you wish to help people, solve problems and resolve conflict when you can. I know I am not the only one who read To Kill a Mockingbird, watched courtroom TV dramas, and decided, "I want to do that!" The courtroom is where we become alive and defend the Constitution as did our forefathers. It is our passion.

When I first became President, I called one of our own founding fathers, Bob Welch of Independence. He told me of the days when just a few defense lawyers decided Missouri needed an organization like NACDL. They sat around and talked, had a few drinks and food, and planned their endeavor to create a group that works together for a common goal -- to defend the Constitution and be the best defense lawyers they can be. Just a few started what is now well over 400 strong.

We have come very far in the past 25+ years. We have grown in number and in strength as we help each other across this state. Through our active ListServe for members and our DWI defense ListServe, we help each other every day. It is wonderful to see other lawyers, sometimes the competition, helping each other find cases, write briefs, argue a case, even try a case.

It is an exciting time for MACDL. We now have a Facebook page and a new Juvenile Justice Committee chaired by Washington University Law School professor Mae Quinn. We have the best CLEs in the state thanks to CLE Chair Michelle Monahan and DWI CLE Chairs Jeff Eastman and Carl Ward.

We continue to work in Jefferson City to actively pursue new legislation and defeat bad legislation. Year after year we seem to have to fight to protect our Constitutional rights at the state capitol and in each courtroom in our state. Nearly every year, we have defeated the proposed legislation to take away our right to depose witnesses in a criminal case. Some people actually believe that when a case is about money, discovery has no bounds, but when it is about life, liberty and freedom -- well, we do not really need full discovery. We fight and so far we have won.

I challenge you to keep fighting, help each other, but also to ask for help from each other. You are not alone. We are a collective group of talented and vigorous criminal defense Warriors!

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Missouri Association of Criminal Defense Lawyers

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Petitions Filed Calling for Election of Supreme and Appellate Court Judges

Two proposed initiative petitions were file in late August with Secretary of State Jason Kander's office by John Elliott of Smithville amending Article V of the Missouri Constitution relating to the selection of Supreme Court and Appellate Court Judges.

The petitions have been approved by the Secretary of State for circulation. If the supporters collect enough signatures in six of the state's eight congressional districts, the proposed changes could be placed on the November 2014 ballot for statewide approval.

Although separate petitions, both would propose to:

- Increase the Supreme Court to nine judges, which has had seven judges since 1890.
- Cut the judges' current, 12-year terms to eight years.
- Eliminate the Nonpartisan Court Plan approved by the voters in 1940, also known as The Missouri Plan, replacing it with direct partisan elections of all Supreme Court and Appellate Court judges.

Both proposals are very similar expect on how the election of the Supreme Court judges would take place. One proposal would call for one Supreme Court judge elected from each of the state's eight congressional districts, with a statewide election for the ninth judge serving as the Chief Justice. The other would have 3 judges elected from each of the states appellate districts.

In a statement issued immediately after the petitions were filed, Missourians for Fair and Impartial Court (MFIC), which includes retired judges and "a broad coalition of community-based organizations," said "If approved, (the proposed amendments) would replace Missouri's nonpartisan courts with partisan politics and unlimited campaign money in our courts".

Former Supreme Court Chief Justice John Holstein said: "In other states, it generally costs millions of dollars to run for the Supreme Court, but in Missouri it costs nothing ... because (Missouri) judges are selected based on their qualifications and then are either kept or thrown out by voters in a retention election where they are judged on their record on the bench."

Elliott would not disclose on whose behalf he filed the petitions.

Retired Supreme Court Chief Justice William Ray Price Jr. said "Millions of dollars are spent in election contests in states where judges are elected." "That kind of money is spent for influence, not good government," he said in the MFIC news release. "Through these attacks on Missouri's nonpartisan courts, people with power and money are trying to buy the Missouri judiciary and we, as Missourians, should stop them."

MACDL is a founding member of MFIC.

The petitions, filed with the Secretary of State, are reviewed by the Attorney General for completeness and accuracy. The Secretary of State prepares the Ballot title and the State Auditor prepares the Fiscal Note denoting the fiscal impact, if any, to the state. Then if certified for circulation the promoters may begin collecting signatures. The requisite number of signatures must be filed by the first week in May in order to be placed on the Nov. 2014 ballot.

A similar proposal was circulated in 2010 but the proponents fell short of the required number of signatures to place it on the ballot.

Asset "Adoptions"

By Dan Viets

Local City Councils May Limit Federal Asset "Adoptions"

The Constitution of the State of Missouri requires that all proceeds of asset forfeitures in our state be used to fund education. The clear public policy purpose behind this longstanding provision is to prevent the conflict of interest which occurs when police agencies are allowed to profit from the assets they seize from suspects. In addition, if police departments, sheriff's offices and the highway patrol are allowed to keep such assets without going through our courts, and the money is therefore not subject to allocation by local or state government, there is no oversight by elected officials whatsoever over how these funds are used. Not only do police departments often use them to buy new "toys" like armored personnel carriers and high tech surveillance devices, but some have actually granted raises to their staff from such money.

That is exactly the situation which now prevails when local and state police agencies hand over assets seized to federal government agents, typically, the Drug Enforcement Administration. Missouri has some of the nation's best forfeiture laws, enacted in the early 1990's in response to outrageous abuses across the state by police agencies publicized by the *Kansas City Star,* the *St. Louis Post* and other media. Unlike federal courts, our laws require that there be a conviction for a felony offense related to the assets seized before any forfeiture can proceed. In federal courts, these safeguards do not apply.

Police agencies in Missouri evade and arguably violate these laws when they hand over seized assets to federal agencies for forfeiture. A later statute allows our circuit courts to authorize such transfers and provide very little due process for the claimants of such property. Most egregiously, the statute provides that the claimant must file his or her claim within 96 hours of the filing of the motion for transfer by local prosecuting attorneys.

In several recent cases, my clients did not even receive notice of the filing of the motion for transfer until more than 96 hours after the filing of the motion. This cannot be constitutional. It deprives the claimant of any meaningful notice or opportunity to challenge such motions. In my cases, when I filed a "late" challenge to the transfer, the court has allowed such late filing, though the law does not allow for it. This prevents us from taking the 96 hours after filing issue to the appeals courts.

However, many, if not most, claimants take the notice for the truth. They assume, logically enough, that when the letter tells them they had only 96 hours to file a challenge, that it is already too late to try.

We should all be diligent in seeking opportunities to challenge the transfer statute and also seek to persuade the Missouri General Assembly to amend or repeal this law which invites abuse and defeats the clear intent of our state's Constitution.

But another possible approach to the problem is to ask local City Councils to direct their police departments to refrain from engaging in such transfers. The Council clearly has the authority to establish policy for their law enforcement agencies. The fact that this money would otherwise go to support education should give us potent political leverage in making the case for such restrictions.

Thank You!

MACDL would like to thank our Sponsors/Exhibitors at our 2013 Annual CLE

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Defining "Reasonable" Public Defender Workloads

by Cat Kelly, Director, Missouri State Public Defender

At the heart of Missouri's litigation and legislative battles over the mismatch between public defender resources and caseloads, is the question of how to define what a "reasonable" public defender workload ought to be.

Case numbers alone don't tell us a lot. A caseload of 100 misdemeanor cases is a very different workload than the same number of felony cases, and a Class C felony child sex case is likely to require a lot more attorney time than the average Class A felony drug case will. A caseload of 100 felony cases over the course of a year is likely to be a lot lower actual workload than a system that expects the attorney to turn 100 juvenile cases over each month. Two lawyers carrying the exact same number of cases will also have very different workloads when one only has to walk downstairs or across the street to go to court or visit the jail, while the other has a 100 mile round trip drive to each.

Then there's the question of whether to focus on the number of cases open in an attorney's caseload at any given time or the number of new cases coming through the door over a period of time. At one point in the history of MSPD's caseload relief efforts, then-sitting Chief Justice Laura Stith convened a committee of judges, prosecutors, private and public defenders to contemplate a Supreme Court rule limiting public defender caseloads. When this question was put to that group, the judges were very leery of limiting caseloads based upon the number of cases the lawyers had open at any given time, because that would provide an incentive for the defenders to drag their feet in moving cases in order to avoid getting new case assignments. At the same time, the defenders were equally worried about judges speeding up the justice conveyor belt, ramming cases out to trial/disposition without regard to sufficient time for the attorney to prepare, in order to "free up" the attorney to take on yet more cases. New assignments coming in the door are less subject to manipulation by either party – but if you only count the cases coming in the door over a given week or month or year, you're ignoring all the cases already overflowing the lawyer's filing cabinet that are continuing to consume attorney time.

Have a headache yet? Us, too. Public defender systems and courts all over the country are wrestling with these same issues as more and more defenders are crying "uncle" -- saying they simply can't continue taking the levels of workloads assigned without putting their licenses and professionalism on the line; while the courts in which they practice are seeking guidance on how to figure out if the PD claims are legit or simply a lot of whining without warrant.

In Missouri, the American Bar Association's Subcommittee on Legal Aid and Indigent Defense [SCLAID] has stepped in to help sort out the chaos. They have given a $70,000 grant to the firm of RubinBrown, a well-known St. Louis accounting and analysis firm, and tasked them with not only figuring out a workload standard for Missouri's public defenders, but in the process to develop a DIY model that can be offered to other defender organizations around the country struggling with the same issues.

To date, they have been reviewing all the literature out there on how different workload studies have been done and pulling out the best practices, analyzing months of time-keeping data by MO defenders, and conducting surveys of both defenders and a "control" group of private defense attorneys about how much time various tasks and case types generally take and what's not getting done within those time frames. In late August, they will be convening a group of private defense attorneys and defenders to meet in person, to review their findings, compare them to various standards of practice for criminal defense lawyers, and (hopefully!) pin down some touchstones that both defenders and courts can use to evaluate the reasonableness of public defender workloads.

Will the end result be a magic number with which no one can argue? Of course not. The practice of criminal defense is as much art as science. Every case is unique, every jurisdiction is unique, and the skills and abilities of every attorney are unique. The goal is not perfection, but ballpark averages. Or, as the Pirates of the Caribbean put it, "more like guidelines." But very important guidelines. Because until we can all stop arguing over how to define and delineate the extent of the problem, we're not going to get anything done on finding some solutions to it, and it's way past time for that.

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DWI Traffic Law Update

by Jeff Eastman

CRIMINAL

State v. Massaro

SD32102 • March 18, 2013

Defendant appealed his conviction for driving while intoxicated contending that the trial court erred in failing to sustain his motion to suppress. Specifically, defendant argued that the initial stop was an improper *Terry* stop because the information relied upon by the officer affecting the stop was supplied an anonymous informant and lacked the requisite specific articulable facts to constitute a reasonable suspicion that defendant had engaged in criminal activity. The trial court denied the motion to suppress and the Southern District affirmed the conviction.

Factually, during the early morning hours, a security officer at a hospital called law enforcement to report a possible drunk driver. The suspect arrived at the hospital looking for a patient. The guard suspected the man was intoxicated because he both appeared intoxicated as well as smelled of intoxicants. LEO was dispatched to the hospital but while en route was redirected to a second hospital because the original security guard had reported that the man had left in his vehicle and was headed to a second hospital. The security guard provided both the make and model of the individual's vehicle as well as his license plate number.

LEO stopped this vehicle as it entered the parking lot of the second hospital. LEO administered field sobriety tests and arrested the defendant for driving while intoxicated.

LEO was the only witness who testified during the suppression hearing as to the events leading up to the traffic stop in the second parking lot. The trial court overruled the motion. During the bench trial, LEO again was the only witness who testified. After the bench trial, defendant was found guilty and appealed.

Defendant alleged on appeal that LEO stopped him based upon an anonymous tip rendering the stop invalid such that all evidence obtained thereafter be suppressed. The Southern District disagreed. In the present case, the court found that it is possible for an anonymous tip to exhibit sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop if the police first corroborate specific facts present in the tip, particularly facts predicting future behavior. In the present case, the informant initially told LEO that a male individual who appeared to be intoxicated had arrived at the hospital looking for a patient. This informant then told LEO that the individual had left and provided LEO with the make, model and license plate of the subject vehicle and information as to where the driver was going. Within ten minutes, LEO observed the vehicle in question pull into the referenced parking lot thereby corroborating the informant's prediction of defendant's action. This accurate prediction sufficiently corroborated all of the information provided by the informant which thereby supported LEO's reasonable suspicion that defendant was engaged in criminal activity. Judgment affirmed.

State v. Foster

392 S.W.3d 576 (Mo. App. S.D. 2013)

State appeals trial court's order suppressing evidence. Southern District rejected both theories advanced for reversal and affirmed the trial court's order.

LEOs were patrolling late at night looking for drunk drivers. They observed a vehicle driven by defendant signal and turn. The officers followed. The vehicle's left tires crossed the center line in less than a mile. Defendant then signaled and turned into his driveway at which time LEO activated his emergency lights.

Defendant pulled into his attached garage and parked. As the door was closing, LEO got under it and into the garage. LEO had no warrant, no consent to enter and did not suspect defendant of any felony. When defendant was asked to step outside he refused. He was then grabbed by the shoulder and taken outside "under authority of law". He was eventually arrested for driving while intoxicated and not driving on the right side of the roadway.

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CRIMINAL *(Cont.)*

On appeal, the state asserted that LEO entered defendant's home with probable cause to arrest him for DWI and exigent circumstances justified a warrantless entry. In the alternative, the state argued that LEO had observed traffic violations and exigent circumstances justified his entry.

In State v. Wren, 768 P.2d 1351 (Idaho. App. 1989) officers responded to a neighborhood complaint and advised Wren, who was in his own yard, to "quiet down" or be cited for peace disturbance. Wren replied abusively and went into his house. Officers then pushed their way through the doors, subdued him by force, arrested him inside his home and found marijuana in his pocket.

On appeal, the Idaho court found that Wren's motion to suppress should have been sustained. The court held that LEO may not pursue a non violent misdemeanor offender into his home and seize him without an arrest warrant unless the pursuit is triggered by flight from a lawful arrest outside the home or exigent circumstances other than the pursuit itself, make it necessary to enter the home without a warrant. Hot pursuit by itself, creates no necessity for dispensing with a warrant and a warrantless arrest within the home cannot be justified upon hot pursuit alone. Thus, a warrantless arrest in the home must be justified upon exigent circumstance in addition to the pursuit.

Relying upon Wren, the Southern District held that defendant's center line violation did not justify a warrantless entry into his home.

The appellate court also rejected the state's assertions that LEO had probable cause to arrest defendant for DWI when they entered his garage. The probable cause argument failed first in that the state mixed two fundamentally different concepts by conceding that this "is not the strongest case for probable cause or reasonable suspicion" incorrectly suggesting that one is as good as the other for purposes of arrest. Secondly, the state could not utilize on appeal a NHTSA study suggesting that lane use violations represent significant evidence of impairment where that study was not offered in the trial court proceeding. Judgment sustaining the motion to suppress affirmed.

State v. Gittemeier

400 S.W.3d 838 (Mo. App. E.D. 2013)

Defendant charged as a prior and persistent offender with a class B felony of driving while intoxicated. After a jury trial, defendant was found guilty. On appeal, he alleged that the evidence was insufficient as a matter of law to prove intoxication, that he was not operating a motor vehicle upon a publicly maintained land or road and that the trial court improperly granted the state's motion in limine regarding his expert witness. The Eastern District affirmed.

CRIMINAL *(Cont.)*

Defendant initially argued there was insufficient evidence to prove he was intoxicated at the time he was operating his ATV in his neighbor's yard. In support of this argument, he relied upon State v. Byron, 222 S.W.3d 338 (Mo. App. W.D. 2007) which held that when there is a significant interval of time between the time of an accident and the time the defendant is observed to be intoxicated, the prosecution must offer specific evidence that the defendant was intoxicated at the time the defendant was driving.

In Byron, defendant was involved in a single car accident with no witnesses sometime between 12:40 a.m. and 1:45 a.m. He left the scene and was interviewed by police at his home around 2:00 a.m. In said proceeding, the state presented evidence of Byron's intoxication at the time of his interview and arrest but no evidence as to the state of his intoxication at the time of his accident. The Western District reversed the conviction finding insufficient evidence to establish Byron drove while intoxicated.

In the present case, although there was a one hour time lag between the time of the incident and when law enforcement first arrived, the state presented evidence of defendant's intoxication at the time he operated the vehicle through its lay witness. As such, the present case was factually distinguishable from Byron. The lay individual's testimony was sufficient to satisfy the state's burden of proof so long as said individual had a reasonable opportunity to observe the defendant's physical condition.

It was also permissible for the state to rely upon a blood alcohol concentration taken from a sample nearly six hours after the time of the alleged incident where driver admitted to having had a few drinks and specifically told law enforcement that he had not had anything to drink between the time of the accident and his arrest.

In his second point, defendant argued the trial court erred in instructing the jury on whether he drove a motor vehicle under the influence of alcohol because

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CRIMINAL *(Cont.)*

his ATV was not a motor vehicle and he claimed he did not drive it on a publicly maintained road. He contended that he only drove on privately maintained roads. In rejecting defendant's argument, the court found evidence of the use of the roadways within a privately maintained subdivision open to the public sufficient. As the purpose of Section 577.010 is to protect the public from intoxicated drivers, defendant's operation of his ATV on a road open to the public created a clear hazard for the traveling public and there was thus no error in finding the state had made a submissible case.

Finally, the appellate court affirmed the trial court's ruling as to the exclusion of defendant's expert where defendant did not timely disclose the subject matter upon which the expert would testify.

State v. Finch

398 S.W.3d 928 (Mo. App. S.D. 2013)

Defendant arrested and charged with driving under the influence of drugs. After a bench trial, he was found guilty. On appeal, defendant complained that the state did not prove that he was "in an intoxicated or drugged condition or that his ability to drive was in any way impaired."

On appeal, the Southern District set forth the following sequential analytical process as to defendant's claim of insufficient evidence: First, identify a challenged factual proposition needed to sustain the conviction; Second, identify all favorable evidence in the record tending to prove that proposition; Third, show why such evidence, when considered along with its reasonable inferences, is so non probative that no reasonable fact finder could believe the proposition.

In the present case, defendant focused on evidence and inferences which allegedly favored him and disregarded contrary evidence. This approach is contrary to the appellate standard of review and gained defendant nothing and, as such, is properly disregarded.

In the present case, testimony from two officers indicated that defendant's driving ability was impaired. A drug recognition evaluator testified without objection that based upon his observations of defendant, he did not believe that defendant would be able to safely operate a motor vehicle. Similar testimony was elicited without objection from the officer who field tested defendant for impairment. Judgment of conviction affirmed.

CRIMINAL *(Cont.)*

State v. Reed

400 S.W.3d 509 (Mo. App. S.D. 2013)

In this post McNeely case, LEO made contact with defendant when defendant drove to pick up a passenger in a car where the driver of that car had been stopped for erratic driving. LEO thought that defendant's stopping thirty yards from the location of the stopped car and remaining in the car was unusual. He thereafter conducted an investigation and eventually arrested defendant for driving while intoxicated.

Without defendant's consent and without a warrant, LEO transported defendant to a hospital and drew blood approximately two hours later. Defendant was then prosecuted for driving while intoxicated.

Defendant filed a motion to suppress which was sustained. The trial court found there were no exigent or emergency circumstances negating the need for a warrant. The trial court held "[the trooper] had a host of choices before him ... [H]e chose not to seek a search warrant. He did not call the office of the prosecuting attorney to determine whether search warrants would readily be available." He testified that he "knew how to do so, was trained to do so and had done so in the past."

The State argued on appeal "Does a two hour and five minute delay caused by a prior driving while intoxicated investigation, the evanescent nature of blood alcohol concentration in a person's blood and the additional one hour or two hour delay necessary to obtain a search warrant create an exigent circumstance exception to the search warrant requirement of the Fourth Amendment?" The Southern District found that it did not and rejected the state's argument that the trooper was simply too busy that night to apply for a search warrant.

DE NOVO

O'Rourke v. DOR

ED98949 • June 25, 2013

In this trial de novo proceeding, the Director relied solely upon his certified records. Driver objected to the admission of the evidential breath test report

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DE NOVO *(Cont.)*

arguing that the maintenance report did not comply with DHSS rules and regulations in that the testing officer did not conduct separate observation periods before each effort driver made to supply an evidential breath test sample. Driver also argued that the testing officer was required to change the mouth piece after each sample was provided. The trial court overruled driver's objections and the exhibits were admitted into evidence. Driver then testified as to having provided three separate samples with the testing officer "pushing buttons" during each test and stating to driver that the machine was not registering.

The trial court found that the Director failed to sustain his burden as to driver's breath alcohol concentration and therefore vacated the sanction. The Director appealed.

On appeal, the Eastern District held that DHSS rules and regulations do not require a separate observation period before each breath sample nor is there a requirement that the mouth piece be changed prior to providing each sample. Thus, the test results were properly admitted into evidence.

Although the records were admissible, the appellate court found that driver sustained his burden of proof rebutting the Director's prima facie case through his testimony. The appellate court found that both the burden of proof and the burden of persuasion remained with the Director and that despite the breath test result's admissibility, that result is not presumed valid. As Driver successfully rebutted Director's evidence, the trial court judgment was affirmed.

REFUSAL

Risner v. DOR

SD31744 • February 1, 2013

Driver appealed trial court's decision upholding the revocation of his license for refusing to submit to a chemical test arguing the trial court's decision that the arresting officer had reasonable grounds to believe driver was operating the vehicle was against the weight of the evidence. On appeal, the Southern District affirmed.

Viewed in the light most favorable to the trial court's determination, the evidence suggested that LEO observed an SUV pull out of a parking lot of a bar rather quickly. The vehicle swerved in and out of its lane, changed lanes without signaling and exhibited other erratic behavior. LEO initiated a traffic stop.

REFUSAL *(Cont.)*

The SUV pulled into a parking lot and LEO immediately placed a spot light on the vehicle. No one switched seats after the vehicle stopped. LEO approached the vehicle and found defendant and his girlfriend struggling in the drivers seat of the SUV. Both of defendant's hands were on the steering wheel and his foot was on the accelerator. LEO inquired as to what was going on. Defendant responded that his girlfriend was driving and he didn't want her to get in trouble so he was switching seats.

LEO observed indicia of intoxication throughout his contact with defendant. At various times during the encounter, defendant and his girlfriend each admitted driving and then denied driving. Both were arrested for driving while intoxicated. Post arrest, driver was asked and thereafter refused to submit to a breath test.

At trial, LEO described the position of driver and his girlfriend at the time of stop as follows, "They were side by side in the driver's seat. [Driver's girlfriend] was against the driver's door and one of her legs was on the seat. The other leg was somewhat over the left leg of [driver]. [Driver] was sitting in the seat with his right foot on the gas pedal, and they were side by side there." LEO felt that both driver and his girlfriend were operating the vehicle.

On appeal, the court framed the issue as "whether an arresting officer had reasonable grounds to believe that a suspect is operating a vehicle when the suspect is siting in the driver's seat, has his hands on the steering wheel, has his foot on the accelerator and admits to driving the vehicle even though another person is sitting in the driver's seat with him." The appellate court answered the question in the affirmative.

Hasselbring v. DOR

394 S.W. 3d 433 (Mo App. S.D. 2013)

In this refusal proceeding, the trial court set aside the refusal sanction finding that driver did not knowingly refuse to submit to a chemical analysis of her breath. After an evidentiary hearing including a review of the video, the trial court found that the Director failed to show that driver "refused" the requested test. The court found that a reasonable person in the driver's situation would have been thoroughly confused as to whether or not they had just made a knowing refusal

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REFUSAL *(Cont.)*

of a chemical test which was going to result in a one year revocation of their privilege to drive. The court focused on evidence that driver was told prior to the requested chemical test, that when she submitted to the preliminary breath test, this was the only test that she would be required to take.

The trial court noted that prior to the admission of a portable breath test, LEO advised the driver that this was the only test he was going to give her. "He indicated that this was the only test. And then after that he was trying to explain to her that she had to go and take another test, and she at that point was very confused. I remember her asking some questions and the officer saying 'Well you've got to tell me "'Yes'" or "'No"' or I am going to mark it as a refusal' type of thing." In the present case, the confusion created by the officer's comments and conduct were sufficient for the trial court to believe that driver, in her mind, thought that she had submitted to the only test that would be requested of her.

On appeal to the Southern District, the Judgment was affirmed. The appellate court found that if the trial court did not believe the Director's evidence, it could find for driver as Director had both the burden of production and persuasion. In the instant proceeding, the Director did not sustain her burden of persuasion and therefore the trial court's judgment was affirmed.

REFUSAL *(Cont.)*

MISC

Kluesner v. DOR

395 S.W.3d 46 (Mo. App. S.D. 2013)

Driver challenged his ten year denial occasioned by reason of his third conviction for driving while intoxicated. Driver alleged that Director failed to sustain his burden of proof that he was either represented by counsel or waived the right to counsel in writing as to each conviction relied upon.

In rejecting said argument, the Southern District reaffirmed prior decisions holding that where the conviction arose as a result of a state court prosecution, Section 302.060 does not require evidence of representation or waiver where the predicate conviction arose in a state court prosecution. Judgement affirmed.

Senate Judiciary Committee Holds Public Hearing at MOBAR Conference

The Missouri Senate Judiciary Committee held a public hearing on three separate comprehensive issues during the Missouri Bar Annual Conference in Columbia.

Public testimony was presented on the Criminal Code revisions, the public defender system and the current state of court fees.

Outgoing Bar President Pat Stark gave a brief history of the 5-6 year effort to revise Missouri's extensive criminal code and urged the Senate Committee to make that bill a priority for the upcoming session. The 1,000-page revision bills have been filed the last two sessions in the House and Senate but have never received a vote on either floor.

Doug Copeland, Chair of the Missouri Public Defender Commission, presented the committee with an update on the new procedures within the PD offices. The House and Senate offered far differing versions of a PD bill last session but could not agree on a compromise to address the resource issues confronting the PD system.

Judge Gary Witt and Betsy Aubushon with the Supreme Court presented a comprehensive review of the current court fees charged in the state's courts.

Total fines and fees collected by the courts each year, not including civil judgments collected through garnishments, etc. total $215,380,106. Of this amount, $23,424,191 goes for the operation of the courts (Clerk Fee, State GR, Court Automation, Court Reporter, Family Court, Law Library, and Treatment Courts. The balance, or $191,955,915, goes to other entities.

Missouri Treatment Court Programs

Addiction is universal. It knows no race, gender, age or socio-economic background. Addiction is also treatable. Treatment court programs are specially designed court dockets which promote accountability and treat addiction among substance abusing offenders, increasing their likelihood of successful habilitation. Treatment court programs are a proven cost-effective method for diverting offenders from incarceration in prisons. Additionally, treatment court programs:

- Lower the recidivism rate of offenders when compared to either incarceration or probation
- Allow offenders to remain in their communities, to support their families and to pay taxes
- Reduce the number of infants exposed to drugs or alcohol
- Reduce crime and the need for foster care, and they help ensure that child support payments are made

Treatment court programs utilize the Ten Key Components to ensure fidelity to the model and maximize success. Treatment court programs must adhere to Key Component 2:

> Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

Recent research has found that the regular participation of defense counsel at staffings and court review hearings had a significant positive impact on participant graduation rates and program costs. Not all treatment court programs in Missouri have defense counsel on their teams. Your assistance is needed in filling these open positions and ensuring due process.

All defense attorneys should be reasonably knowledgeable about treatment court programs operating in the jurisdiction where they practice. This knowledge should include a general understanding of the criteria for eligibility, the requirements for successful completion of the program and the likely consequences for failure to complete the program. Defense counsel should be familiar with a wide range of dispositions that may benefit his or her clients. Knowledge about a local treatment court program is a specific example of an attorney's obligation to investigate potential ways of resolving cases to his or her clients' benefit.

Participation in a treatment court program often occurs as a result of an agreement to settle a pending case. The client must ultimately decide whether to seek admission to the treatment court program, to proceed to trial or to pursue another disposition. In addition to describing the treatment court program, counsel may help the client make an informed choice by arranging for the client to attend a treatment court program session and to meet with current or former participants.

The timeline for applying to enter a treatment court program can be a concern for counsel. A legitimate therapeutic purpose is served by encouraging a prompt commitment to treatment. Addicts are most vulnerable to successful intervention when they are in the crisis of initial arrest and incarceration, so intervention must be immediate and up-front. Further, for a defendant with a serious addiction or a pattern of abusing drugs or alcohol, a delay in starting a treatment program may be detrimental. The defendant will either be in jail unable to post bail or at risk of arrest for additional offenses because of his or her drug or alcohol use. Currently, the state average for a post-plea adult program participant in Missouri to enter the program is 403 days from the date the original offense occurred. Research has shown the optimal time for program admission is within 30 days of initial arrest.

One possible approach to this delay in program admission is Provisional Admittance. This is an opt-out period during which a client may enter a treatment court program while adversary counsel continues to investigate the case, obtain and review discovery, and discuss with the client potential legal and factual defenses. The Drug Courts Coordinating Commission has encouraged treatment court programs in Missouri to begin the use of Provisional Admittance.

Missouri is a national leader with more treatment courts per capita than any other state in the nation. Missouri was one of the first states to pass legislation to establish DWI courts and allowed for limited driving

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Missouri Treatment Court Programs *(from pg 10)*

privileges to be granted by a DWI court judge or commissioner. Statewide, more than 300 limited driving privileges have now been granted to DWI participants and graduates who had a five or ten year license revocation but are now driving legally.

Missouri treatment court programs greatly need your help. Please contact your local treatment court program and learn how they are helping clients in your community. Consider joining your local treatment court team if defense counsel is not represented. If time is a barrier, join with other members of your local bar and rotate your time as a team member. Ask your local treatment court judge or commissioner how they are addressing Provisional Admittance and refer all eligible clients to the treatment court program early in the judicial process.

For more information on treatment court programs in Missouri see the links below:

Treatment Court Programs in Missouri

Missouri Treatment Court Program Data and Fact Sheet

April 10-11, 2014
MACDL Annual Meeting & Spring CLE
Hilton Branson Convention Center
Branson, MO

October 18, 2013
MACDL Fall CLE
Hilton Garden Inn Convention Center
Columbia, MO

July 18-19, 2014
Bernard Edelman DWI Conference
Tan-Tar-A
Osage Beach, MO

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)

Welcome 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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Post-Conviction Update

by Elizabeth Unger Carlyle © 2013

This column includes summaries of pertinent cases from March 13, 2013, forward. As usual, readers are cautioned that they should check the cases cited below for subsequent history.

Post-Conviction Cases, Procedural Issues

Anderson v. State, 402 S.W.3d 86 (Mo. banc 2013)

In denying the post-conviction motion, the trial/motion judge stated that he had spoken with the foreperson of the jury, who told him that the reason that death was imposed for the murder of one victim but not the other was that the jury was "troubled" by the fact that the defendant had shot the victim while she was holding a baby. The findings also included the statement that the court had learned that the jury did not find the testimony of the defendant's expert credible. The Supreme Court found that the conversations with the jury foreman should not have been considered by the trial court, because Mr. Anderson's counsel did not have the opportunity for cross-examination. Moreover, the court showed counsel an article about the defense expert that he had apparently obtained some years earlier. Based on this information, the defense sought to have the judge recuse himself; he refused. The Missouri Supreme Court reversed:

> While the court expressly stated that it did not consider the information regarding the jury's reasons for giving Mr. Anderson a sentence of death for the murder of Debbie Rainwater, the court's sharing of the jury's reasoning with Mr. Anderson's appellate counsel indicates the court's belief of the foreperson's statements .... Someone not acquainted with the judge's record of integrity, which is evidenced by his openness regarding his conversations with the foreperson, reasonably could believe that his decision to overrule Mr. Anderson's Rule 29.15 motion was influenced by the information obtained outside the judicial proceedings in Mr. Anderson's case. For that reason, the judge erred in failing to recuse himself.

Post-Conviction Cases, Procedural Issues *(Cont.)*

Baker v. State, 403 S.W.3d 91 (Mo. App. 2013)

Mr. Baker's post-conviction motion alleged that his trial counsel was ineffective for failing to make an offer of proof when he was denied the right to question the state's expert on defensive issues. This allegation requires an evidentiary hearing; without such a hearing the court cannot determine what evidence would have been presented via the offer of proof.

Greer v. State, 2013 WL 4419338 (ED98913 Aug. 20, 2013) NOT YET FINAL

Mr. Greer was entitled to an evidentiary hearing on his claim that the trial court improperly considered the fact that he had exercised his right to a jury trial when imposing sentence, and trial counsel failed to object: "The comments made by the sentencing judge evidence the possibility of improper consideration of movant's decision to exercise his constitutional right to proceed to trial."

Procedural Note

In **Eastburn v. State, 400 S.W.3d 770 (Mo. banc 2013)**, the Missouri Supreme Court held that a "motion to reopen post-conviction proceedings" is not a pleading that can be filed under the Missouri court rules. Rather, to allege that a movant has been abandoned by post-conviction counsel, one should file a "Motion for Post-Conviction Relief Due to Abandonment."

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Post-Conviction Cases, Substantive Issues

Johnson v. State, 2013 WL 3989253 (WD74813 June 11, 2013) (Although this case has not yet been published, no motion for rehearing or transfer was filed.)

Mr. Johnson's plea of guilty was reversed because it was not fully supported by a factual basis. In order to convict a defendant of distributing a controlled substance near a school, the state must prove that the defendant knew he was within 2,000 feet of a school, not merely that the transactions occurred in the forbidden location. The defendant testified that he did not know how near the school was to the location of the transactions. The court held that under Mo. Rev. Stat. §562.021.3 as in effect at the time of the offense, only a culpable mental state of knowing or intentional conduct satisfied the statute, and that mental state was not established by the plea colloquy.

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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.

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