MACDL
Missouri Association of Criminal Defense Lawyers

Spring, 2014

President's Letter

Kim Benjamin
MACDL 2013-14 President

MACDL currently has 420 members, which is indicative of our organization's strength and impact. We have more members than we have ever had. We have benefits of our membership that are imperative for the criminal defense bar in our state. My membership in MACDL was hit or miss when I was a new attorney working at the public defender. Not so much because of the cost but because I did not see the benefits of being a MACDL member.

After 2002 when I went into private practice and became active again with MACDL, attending CLEs and then one day I walked into a MACDL Board meeting and looked at the Board members. There were about 15-20 of some of the best lawyers in Missouri, many of whom I knew from my years at the public defender. I was impressed with their passion and commitment to issues of the criminal defense bar. But one thing was missing … There was not a single woman on the Board. I became involved with the Board and have been excited to serve this year as only the second female president of MACDL. In my years on the Board I have focused on how to increase our membership in MACDL and on the Board, especially that of women and minorities. I am proud to say that after my election to the Board I have recruited and encouraged some of the best female criminal defense lawyers to MACDL and our Board. We have room for improvement, however. And that is where you come in …

Reach out to criminal defense lawyers in your community -- men, women, minorities alike. Encourage membership with MACDL. The larger our organization the more impact we have in Missouri, whether it be in the legislature or in our local courtrooms. The more passionate and creative legal minds in our group, the better we all become as individuals.

The benefits of MACDL membership are many, but some of the few that have impacted me the most are the amazing and talented lawyers who help each other on our MACDL Listserve and our DWI Listserve. My ability to win DWIs and the DOR hearings for my clients has increased by great lengths due to our sharing ideas, law, motions and experiences with each other, so I am confident that others have had similar experiences.

MACDL puts on the best CLEs in Missouri on the issues facing the criminal defense attorney. This year we have collaborated with the Public Defender to create a juvenile law CLE for FREE for our members. That is an amazing gift some of our best have put together for you. We have a new MACDL committee for juvenile law that will improve the quality of our representation of children across the state. This is an exciting endeavor we have taken on.

MACDL also puts great energy into the Amicus Committee, Strike Force Committee and legislative efforts in Jefferson City. This year the legislature is contemplating a complete overhaul of the criminal statutes. We are actively participating in that process with the hope that the changes are helpful to all sides of criminal justice. In the end I expect us to have changes we like, and some changes we do not like, but that is usually the way any change in the law makes us feel.

As an organization, we provide benefits to our members, our clients, and the judicial system as a whole. It is up to you to seek the benefits out, encourage others to join us, and in the end we will become stronger and more diverse.

Please take a minute to reflect on your experiences with MACDL and send a note, whether positive or critical, to me at Kim@CassCountyTrialLawyers.com. We appreciate your input as it will help us grow and improve. Your thoughts are always a gift!

MACDL
Missouri Association of Criminal Defense Lawyers

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Member News

Welcome New 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.

Nancy Gray • Lee's Summit, MO

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Meeting Schedule

MACDL Annual Meeting and Spring CLE

April 10-11, 2014
Hilton Branson Convention Center
Branson, MO

Bernard Edelman DWI Conference

July 18-19, 2014
Tan-Tar-A
Osage Beach, MO

MACDL *ListServe*

The MACDL ListServe 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 ListServe link. (www.macdl.net)

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 Talmage Newton IV, 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: Talmage E. Newton IV
Pleban & Petruska Law LLC
2010 S. Big Bend Blvd. • St. Louis MO 63117
Phone 314-645-6666 • Email: tnewton@plebanlaw.com

Legislative Update

by Brian Bernskoetter

The 2nd Regular Session of the 97th General Assembly is well under way and the Governor and Legislature are already at odds over tax revenue estimates and, in turn, the level of funding for many programs and especially K-12 education funding.

Proposals to lower income tax for businesses and families are also getting major consideration this year, following a veto from the Governor in 2013 on a similar proposal.

The Senate and the House Leadership are making the criminal code re-write a priority this session. The House and Senate have already passed these bills out of committee (HB 1371 and SB 491). As has been mentioned in the past, the criminal code has become a bit of a hodgepodge of crimes and punishments that don't always reflect the proper balance.

The MACDL Board recently met to review the legislation proposed by the General Assembly. For those of you not familiar with the process, the Board is presented a very long list of bills, typically 75 -100, that staff has complied which are of interest to criminal defense lawyers and the criminally accused. The Board reviews the bills and comments on the how the bill will affect their practice or the lives of their clients. Board members then volunteer to serve as subject matter experts to testify at a hearing or advise others who will be testifying at hearings regarding bills with a given subject matter. The Board also uses this review to debate whether or not MACDL should support, oppose, or monitor bills.

Below is a brief list of bills which the Board of Directors reviewed and took positions on during the recent Board Meeting. This is a truncated list and companion bills or identical bills are typically not listed.

HB 1059 - Removes the provision that prohibits persons from being stopped, inspected, or detained solely for not wearing a seat belt and increases the fine for seat belt violations. OPPOSE

HB 1151 - Allows misdemeanor offenses for stealing to be expunged. SUPPORT

HB 1204 - Establishes the Preserving Freedom from Unwarranted Surveillance Act, which prohibits the use of drones or other unmanned aircrafts to gather evidence or other information with specified exceptions. SUPPORT

HB 1220 - Requires a convicted sex offender to be told of his or her obligation to register as a sex offender at the time of adjudication instead of the current requirement of prior to release or discharge. SUPPORT

HB 1257 - Prohibits any member of the state highway patrol or local law enforcement agency or employee of the national highway traffic safety administration from collecting breath, blood, or saliva for research purposes. SUPPORT

HB 1332 - Prohibits the unauthorized release of data collected by automobile event data recorders, unless there is a valid search warrant. SUPPORT

HB 1371 - Changes the laws regarding the Missouri Criminal Code. SUPPORT

HB 1388 - Requires a search warrant for a government entity to obtain location information of an electronic device. SUPPORT

HB 1409 - Creates the Commission on Lethal Injection Administration and places a moratorium on the death penalty until certain procedures and protocols are adopted and implemented. Includes a provision to allow MACDL to appoint a member to that Commission. SUPPORT

HB 1466 - Changes the laws regarding the Open Meetings and Records Law, commonly known as the Sunshine Law, on records or documents involving law enforcement officers. OPPOSE

HB1560 - Adds an option of 50 years without parole for first degree murder when the person is under 18 years of age at the time the offense was committed. OPPOSE

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Legislative Update

Legislative Update *(from page 3)*

HB 1561 - Allows certain individuals to petition to be removed from the sexual offender registry and specifies that any offender who was a juvenile at the time of his or her conviction shall be removed. SUPPORT

HJR 71 - Proposes a constitutional amendment that provides secure electronic communications and data. SUPPORT

SB 491 - Changes the laws regarding the Missouri Criminal Code. SUPPORT

SB 608 - Prohibits the gathering of intelligence about a person unless there is evidence of criminal activity and requires warrants to search curbside garbage that is awaiting collection. SUPPORT

SB 681 - Provides a process for the Parole Board to review the case histories of offenders serving more than 15 years in prison and recommend clemency or allow release on parole. SUPPORT

SB 732 - Requires any criminal justice entity conducting eyewitness identifications to adopt specific procedures for conducting photo and live lineups that meet specified requirements. SUPPORT

SB 790 - Modifies penalties for first degree murder to include an option of 50 years without parole when the person was under the age of 18 at the time of committing the offense. OPPOSE

Amicus Update

Amicus Update

The Amicus Committee had the opportunity this year to assist a member's client through an amicus brief in support of certiorari to the United States Supreme Court. The issue in Bucklew v. Steele, No. 12-10, 430, centered around the right to effective assistance of counsel in clemency proceedings for death row inmates. While certiorari was ultimately denied by the Court, it gave our organization an opportunity to highlight an important issue at the highest level.

MACDL and the Amicus Committee are always willing to help our members in furthering the goals of our organization to effectively represent criminal defendants in Missouri and strive to improve the criminal justice system. If you have an issue which you believe could impact (positively or negatively) the criminal defense bar as a whole, and you feel amicus support could be beneficial, please do not hesitate to contact MACDL for assistance.

Also, if you have the time and resources to assist the Amicus Committee in briefing these important issues when they arise, please reach out and join our list of attorneys – any help would be appreciated.

Talmage E. Newton IV
MACDL Amicus Commitee Chair
Pleban & Petruska Law, L.L.C.
tnewton@plebanlaw.com

Thank You!

MACDL would like to thank the following Sponsors/ Exhibitors at our 2013 Fall CLE:

The Bar Plan Mutual Insurance Company

Eng & Woods

Law Offices of Travis Jacobs

Dan Viets, Attorney at Law

Juvenile Justice Committee Legal Update

by Mae Quinn

Changes to Missouri's Dual Jurisdiction Program Under "Jonathan's Law"

Johnathan's Law

Missouri's juvenile justice system took a significant step forward in 2013 with the passage of legislation that seeks to keep more juvenile offenders under the supervision of the Department of Youth Services (DYS) and out of adult prisons." Jonathan's Law," as it is known, was named after 17 year-old Jonathan McClard, who hanged himself while in prison in 2008 after pleading guilty to first-degree assault in connection with a 2007 shooting that partially paralyzed another teenager. Prior to sentencing, Jonathan was accepted into the Dual Jurisdiction Program by DYS, but was denied entry into the program by the judge and given a 30-year maximum prison sentence instead. Seven weeks after the sentence was handed down, and three days after his 17th birthday, Jonathan committed suicide.

Missouri's Dual Jurisdiction Program, which began in 1996, is one of the first of its kind. It was created for certified youth who are tried as adults in Missouri courts. The basis for this program is that juveniles in adult jails are at greater risk for both sexual assault and suicide than those in juvenile facilities. Also, because there is very little emphasis on rehabilitation in adult prisons, many believe that sending a juvenile to an adult facility will do nothing more than teach them to be better criminals. On the other hand, if accepted to the Dual Jurisdiction Program, participants are housed in a youth-oriented, home-like facility for a designated time up to their 21st birthday. Once a convicted youth reaches the age of 21, a hearing is held at which time the judge can decide whether to place them on probation or continue the sentence in an adult facility. Rehabilitation, rather than punishment, is the main focus of these facilities. Participants receive services for education, mental health and counseling, drug treatment, victim empathy, and restitution. According to DYS, this program has proven successful and juveniles who complete the program have extremely low recidivism rates compared to juveniles who are placed in the Missouri Department of Corrections.

After Jonathan's death, his mother, Tracy McClard, sought to improve the Dual Jurisdiction Program by opening it up to more certified juveniles across the state. It was her belief that the judge erred in not more carefully considering the DYS recommendation that Jonathan be accepted into the Dual Jurisdiction Program. After garnering unanimous votes in the House and Senate, "Jonathan's Law" was passed on May 16, 2013 and signed into law by Governor Nixon on June 12.

Now codified at sections 211.069, 211.071, and 211.073 of Missouri's Juvenile Code, "Jonathan's Law" accomplishes its desired objective in a couple of ways. First, it now requires judges to consider dual jurisdiction as a sentencing option for certified juveniles who have been found guilty and to issue findings if they choose to reject a DYS recommendation to accept a juvenile into the program. Second, it provides for an additional six months to the eligibility timeline for dual jurisdiction. Previously only youth under 17 could be considered. Jonathan's Law extends to youth who are 17 years and 6 months.

Prior to the passing of "Jonathan's Law," many judges were unaware of the Dual Jurisdiction Program and its benefits. While this legislation does not bar judges from giving adult sentences to convicted juveniles, they are now required to at least consider placement in the Dual Jurisdiction Program prior to handing down sentences and, if applicable, clearly state their reasons for rejecting such a placement. Tracy McClard contends that if the judge had been required to issue findings explaining his rejection of the DYS recommendation, her son would have gone into the Dual Jurisdiction Program and would not have been sent to adult prison. It should be noted that the prosecution in Jonathan's case disagrees with this contention.

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Johnathan's Law

Johnathan's Law (from page 5)

As for the extension of time granted by "Jonathan's Law," Tracy McClard has stated that Jonathan felt rushed and pressured to plead guilty because his crime was committed just six months prior to his 17th birthday. Interestingly, however, the statute is somewhat ambiguous as it relates to the age cut off.

Specifically Jonathan's Law provides that dual jurisdiction must be considered "in a case when the offender is under seventeen years and **six months** of age and has been transferred to a court of general jurisdiction pursuant to section 211.071." An argument could be made that this applies to anyone who was 17 ½ or younger at the time of their offense. Thus, it is hard to know exactly how many additional juveniles will be affected by these amendments. But they will undoubtedly increase the number of juvenile offenders eligible for the Dual Jurisdiction Program.

MACDL on Facebook

Be sure to "Like" MACDL on Facebook!

https://www.facebook.com/pages/Missouri-Association-of-Criminal-Defense-Lawyers/300675033407382

MACDL Website Traffic

Item	Counts
Total Hits	1,914,756
Average Hits per Day	1,062
Total Visitors	343,264
Average Page Views per Day10	480
Average Page Views per Visitor	2.53
Average Visitors per Day	190

Case Law Update

For up-to-date Case Law Updates please visit the MACDL website/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

Calling All Writers ...

If you have an article of interest relating to the practice of criminal defense, why not submit it for publication in the MACDL newsletter?

Submit them electronically to info@macdl.net with "MACDL Newsletter" in subject or mail to MACDL.

MACDL
Missouri Association of Criminal Defense Lawyers

This newsletter is a semi-annual publication of the Missouri Association of Criminal Defense Lawyers (MACDL). Your comments are welcome.

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Post-Conviction Update

by Elizabeth Unger Carlyle © 2014

This column includes summaries of pertinent cases from September 1, 2013, forward. As usual, readers are cautioned that they should check the cases cited below for subsequent history.

Procedural Issues

Gasa v. State

2013 WL 6198248 (S.D. Mo. 11/27/2013)

The movant filed a timely pro se motion, then retained counsel. Counsel filed an untimely amended motion after the state moved the court to "proceed on ... pro se motion" some four months after the amended motion was due. The amended motion added two new grounds for relief as well as expanding the facts supporting all of the grounds asserted. Without conducting a hearing, the motion court adopted the state's proposed findings of fact and conclusions of law and denied the pro se motion. The court of appeals remands for a hearing to determine whether motion abandoned the movant. If so, the amended motion will be deemed timely.

Williams v. State

2013 WL 6592768 (W.D. Mo. 12/17//2013)

Mr. Williams was convicted and sentenced under the original version of Rule 29.15, which required the pro se motion to be filed within 30 days after the filing of the transcript on direct appeal. Mr. Williams' retained direct appeal counsel undertook to file his motion for him, but did so three days late. The post-conviction motion was dismissed as untimely, and the court of appeals affirmed the dismissal. Then, in July, 2010, Mr. Williams filed a "motion to reopen" his Rule 29.15 proceedings, citing McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008). The circuit court denied his motion for want of jurisdiction. The court of appeals holds that the circuit court does have jurisdiction to reopen the proceedings, make a determination of abandonment, and if abandonment is found, consider the merits of the post-conviction proceeding.

Procedural Issues *(Cont.)*

States v. State

413 S.W.3d 704 (E.D. Mo. 2013)

Mr. States was entitled to an evidentiary hearing on his claim that plea counsel mistakenly told him that he was entitled to 346 days of jail time credit if he accepted the plea offer. The fact that Mr. States said he was not promised anything to plead guilty does not refute his contention that he relied on the advice of counsel regarding jail time credit, because legal advice is distinct from a "promise." Remanded for evidentiary hearing.

Washington v. State

2013 WL 27968 (E.D. Mo. 2013)

Mr. Washington was entitled to an evidentiary hearing on his claim that trial counsel was ineffective when he failed to introduce evidence of Mr. Washington's intellectual limitations as relevant to the issue of whether he knowingly waived his right to remain silent after Miranda warnings. The amended motion indicates that Mr. Washington's IQ is between 72 and 80, and has limited verbal and written comprehension. This information was not presented in court. In light of the evidence in the case, the suppression of Mr. Washington's confession had a reasonable probability of affecting the outcome. Remanded for evidentiary hearing.

Scott v. State

2013 WL 6170608 (W.D. Mo. 11/26/2013)

Mr. Scott was entitled to an evidentiary hearing on his ground for relief alleging that his plea counsel told him incorrectly that he was entitled to four years' credit against his sentence for time already served. The fact

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Post-Conviction Update (from page 7)

Procedural Issues (Cont.)

that the trial court said that no one could assure him of that AFTER agreeing with counsel did not, on the face of the motion, make Mr. Scott's belief that he would get the time credit unreasonable. Remanded for evidentiary hearing.

Substantive Issues

Douglas v. State

410 S.W.3d 290 (E.D. 2013)

Mr. Douglas was permitted to withdraw his plea of guilty to the offenses of second degree murder and armed criminal action because the plea proceedings did not establish a factual basis for the plea. Initially, the state recited a factual basis. Mr. Douglas said that he did not remember the facts as stated by the state. Questioned by the court, he said that his co-defendant asked him to drive the co-defendant's car. While they were riding around, the co-defendant pulled a handgun and shot the victim. The movant testified that he knew that the co-defendant was going to shoot someone. The court of appeals found that this colloquy was insufficient to prove accomplice liability given the movant's denial that he was driving for the purpose of helping the co-defendant shoot the victim.

Ervin v. State

2013 WL 5629380 (E.D. 10/15/2013)

Mr. Ervin established that had it not been for his counsel's failure to investigate the case, he would not have entered a plea of guilty. Had counsel simply reviewed the discovery provided by the state, he would have learned that the conviction was not supported by evidence. Because Mr. Ervin was not aware of this at the time of the plea colloquy, his failure to complain about his counsel did not refute his post-conviction claim. Therefore, his plea was vacated. (There was no rehearing motion or transfer application filed in this case. The mandate issued November 6. I don't know why it doesn't have a S.W.3d cite.)

McNeal v. State

412 S.W.3d 886 (Mo. Banc 2013)

Mr. McNeal was entitled to an evidentiary hearing on his ground for relief alleging that he was denied effective assistance of counsel when trial counsel failed to request an instruction on the lesser included offense of trespassing. (Mr. McNeal was charged with burglary.) First, the court held that while trial counsel's

Substantive Issues (Cont.)

performance is presumed to be the result of reasonable trial strategy, that presumption alone cannot justify denying a post-conviction motion without a hearing. Because Mr. McNeal's testimony provided a basis for the jury to conclude that Mr. McNeal did not intend to commit a crime when he entered the apartment, but only decided to commit theft once he had trespassed, he would have been entitled to an instruction on trespassing had it been requested. Remanded for evidentiary hearing.

Habeas Corpus

In Re Ferguson v. Dormire

413 S.W.3d 40 (W.D. 2013)

Mr. Ferguson was granted relief from his conviction for second degree felony murder and first degree robbery because of a Brady violation. The violation was the failure to disclose favorable evidence from an interview with the wife of a prosecution witness which impeached the witness's explanation of how he was able to identify Mr. Ferguson. The court found that this evidence was material because it would have led to other favorable evidence, and would have impeached the prosecution witness's testimony. Prejudice was shown because, when considered with other undisclosed evidence, "the undisclosed evidence renders Ferguson's verdict not worthy of confidence." (As everyone probably knows, the Attorney General elected not to retry Mr. Ferguson, and he has now been freed.)

Hall of Fame

Congratulations to

Kent Gipson (Maria Gasa)
Jessica Hathaway (Willie Douglas)
Samuel Henderson, Kathleen Zellner and Douglas Johnson (Ryan Ferguson)
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Maleaner Harvey (Corey J. States)
Amanda Faerber (Thomas Washington)
Amy Bartholow (Vandyne Ervin)
Susan Hogan (Carlis Scott)
Andrew Zleit (David McNeal)

Defining "Reasonable" Public Defender Workloads

by Cat Kelly, Director, Missouri State Public Defender

Announcing the Birth of the Brand New National Association for Public Defense!

This is the first organization in the country created exclusively by and for public defenders and those who advocate on behalf of public defense issues. It is designed to encompass all who work in indigent defense, regardless of type or job: state, county, and federal defenders, full-time and contract defenders, lawyers, investigators, social workers, paralegals and other support staff. It also welcomes our many allies -- defender alumni, academics and advocacy organizations, and the many private criminal defense practitioners who have been strong advocates for quality public defense. The group was founded this past summer and already has surpassed the 3000 member mark, so it certainly appears to be an idea whose time has come.

Individual dues are only $25 per year and will help support a united national voice on public defense issues -- no minor benefit to any of us in this field! But membership also provides access to plenty that is useful in the daily practice of any criminal defense lawyer, including a daily blog on criminal justice issues, as well as over 30 free webinars in the next twelve months. Many of the webinars have been presented by criminal defense trainers who teach at national programs -- programs that would cost a whole lot more than $25 to attend. Among the ones already available are topics like: How to Get Judges to Take Competency More Seriously; *Stopping Judicial Rehabilitation During Voir Dire, Litigating Junk Science, Immigration Law for Criminal Defense Lawyers* and Finding all the facts: *Essential work product for trial preparation*. More will follow. All in all -- it certainly looks like a worthwhile investment of a mere $25. Check out the group's website: http://publicdefenders.us/ and decide for yourself.

New Public Defender Commissioners Appointed

The Governor has appointed **H. Riley Bock** (D), of New Madrid; and **Alan Wells** (D), of Farmington, to serve on the Public Defender Commission. If confirmed by the Senate, the two will replace Commissioners Muriel Brison and Eric Barnhart, both of whom are in expired terms. They will join the remaining two current Commissioners: **Doug Copeland** (R) of St. Louis, currently serving as Commission Chair, and **Nancy Watkins** (D), also of St. Louis, who is Vice Chair. The other three positions on the seven-member Commission remain vacant. By statute, there can be no more than four members of one political party on the Commission and at least four of the seven members must be attorneys. They each serve six-year terms and continue to serve thereafter until they are replaced. The Governor's press release about the new nominations stated:

Bock served as the prosecuting attorney for New Madrid County before retiring in 2002. He also served as an assistant public defender, and as the county's public administrator. In addition to practicing law both as prosecutor and in private practice, Bock also has farmed and taught at New Madrid County Central High School, and has been active in a number of civic and non-profit organizations. The Governor has appointed him for a term ending Jan. 6, 2020.

Wells has been director of the St. Francois County and Ste. Genevieve County 9-1-1 since 1993, where he also is the county emergency management assistant coordinator. Prior to that position, he was an undercover drug narcotics enforcement officer for the St. Francois County Sheriff's Department for 10 years; from 1988 to 1992. He also was director of the multi-county drug and narcotics task force. The Governor has appointed him for a term ending Jan. 6, 2020.

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)

DWI Traffic Law Update

by Jeff Eastman

Refusal

Rothwell v. DOR

2013 Mo. App. LEXIS 1459
(Mo. App. W.D. 2013)

After driver's arrest, LEO read the implied consent advisory while still in the field and driver agreed to submit to a chemical analysis of his breath. At the station, driver refused. When LEO attempted to secure a warrantless draw of his blood, driver became combative and no sample was seized.

Driver was then transported to a hospital where he consented to a warrantless draw of his blood. Post arrest, driver served with a notice of revocation of his privilege as a consequence of his initial refusal. Driver appealed.

Trial court vacated refusal sanction finding that driver consented to a chemical analysis of his blood without LEO having procured a warrant. The Western District affirmed rejecting the Director's request that it reconsider its prior decision in McKay v. Director.

Tweedy v. DOR

412 SW3d 389
(Mo. App. E.D. 2013)

In this refusal proceeding, the Director appealed the trial court's judgment vacating the Director's sanction. At the beginning of the trial, driver made an ongoing objection to LEO's arrest narrative which contained a double hearsay statement; namely, the narrative stated LEO 1 told LEO 2 he witnessed driver driving. The trial court observed that to address this objection, the Director had agreed to subponea LEO 1 to testify at trial. The Director accordingly subpoenaed LEO 1 but he did not appear for trial. The Director then attempted to call driver to testify which the court denied, stating "The burden was on the Director to produce the witness that they had agreed to produce and who has not appeared pursuant to that subponea, and I will not allow the Director to back door that evidence." The Director then indicated he would submit his case on the records pursuant to Section 302.312. The trial court received those records while acknowledging driver's objection to Exhibit A on the ground that LEO 2's narrative

Refusal *(Cont.)*

contained double hearsay. Exhibit A was admitted subject to a later ruling on that objection. Exhibit B, a supplemental report completed by LEO 1 was then admitted over driver's objection.

Although the trial court admitted Exhibit B, the supplemental report completed by LEO 1, the court found the document "created more problems than it solved." The trial court noted that Exhibit B was undated, unsigned, and contained multiple inconsistencies. Most egregiously, Exhibit B included a previously unmentioned third officer present who was not referenced in Exhibit A and included a different reason for the traffic stop than in Exhibit A. Concluding that the report was prepared to stand in lieu of LEO 1's subpoenaed live testimony, the court found it not credible. Trial court sustained driver's objection to the double hearsay contained in Exhibit A and did not allow the testimony of LEO 1. Without this evidence, the Director failed to prove his burden. The trial court ordered the suspension removed. On appeal, the Director argued that the trial court erred in excluding the double hearsay statement contained in Exhibit A because it was admissible to establish that LEO 2 had probable cause to arrest driver.

The Eastern District held that the burden of proof is upon the Director to establish the grounds for suspension by preponderance of the evidence. The Director has both the burden of production and persuasion. Here, the trial court sustained driver's objection to the double hearsay statement contained in Exhibit A because LEO 1 failed to appear and testify. The court determined that Exhibit B, the document prepared by LEO 1 was prepared in lieu of live testimony and was not credible. The court declined to consider both Exhibit B and the double hearsay statement contained in Exhibit A that B was intended to validate. Without evidence that driver was driving, the trial court held that the Director had failed to establish probable cause to arrest driver.

The appellate court held that established Missouri law provided that it was not necessary for LEO to observe a person driving to create the requisite probable cause under Section 302.505.1. Rather, that LEO

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DWI Traffic Law Update *(from page 10)*

Refusal *(Cont.)*

may rely upon information received from a police dispatch or civilian witnesses. However, under the particular circumstances of this case, the Director had agreed to subponea LEO 1 to verify his double hearsay statements contained in Exhibit A. In the present proceeding, the trial court found that Exhibit B was a "fiction"and not credible.

The appellate court noted "It appears that the essence of the Director's argument appeal is that the findings of the trial court regarding the credibility or accuracy of Exhibit B are irrelevant to the question of whether Exhibit A established that LEO 1 had probable cause to believe driver was driving while intoxicated at the time of his arrest." The Director argued that LEO 1's statement to LEO 2 was sufficient in itself to demonstrate that LEO 2 had probable cause to believe that driver was driving while intoxicated even if LEO 1's statement was later found to be not credible. The appellate court observed that the result of this argument was that the Director's evidence would automatically meet the burden of proof under Section 302.505.1 regardless of its truth. The Director's approach would thus rob the trial court of its power to determine whether the Director had met both his burden of production and persuasion. This is contrary to White v. Director of Revenue. **"The loss of a drivers license is a severe civil penalty and trial courts have duty to ensure there is an accurate basis for the penalty."**

Thus, the appellate court concluded that even if LEO 1's double hearsay statement in Exhibit A had been admitted, its admission alone would not have met the Director's burden of persuasion because Exhibit A relied upon Exhibit B which the trial court found to be a fiction.

In his second point, the Director argued the trial court erred in refusing to consider driver's post arrest admission for the purpose of determining whether he was driving with a BAC of .08% or more because such party-upon admissions fell within an established exception to the hearsay rule. The driver's argument is without merit however because probable cause to arrest must be based upon information in the officer's possession at the time of the arrest, not on information acquired after the fact. Director cannot use this post arrest admission to establish that the officer had probable cause to arrest driver at the time of the arrest.

Refusal *(Cont.)*

Finally, the Director argued the trial court erred in sanctioning the Director for failing to produce a subpoenaed witness by forbidding him to call driver as a witness. This argument was likewise rejected. Under the unique facts presented, the burden was upon the Director to produce LEO 1 for live testimony. As Missouri Supreme Court recognized in Doughty v. Director of Revenue, constitutional due process protections, including the right to an effective opportunity to defend by confronting and cross examining adverse witnesses, apply to the suspension or revocation of a drivers license by the Director. While the language of Doughty placed the initial subponea burden on the driver and not the Director, Doughty did not answer the question of whether a driver may rely upon the Director's subponea. When the Director agrees to undertake the responsibility to subponea a witness, the Director creates a duty to ensure that the witness appears to give live testimony, especially when the witness is a law enforcement officer who has a symbiotic relationship with the Director in this type of enforcement action. Driver did not subponea LEO 1, relying upon the Director's expressed agreement. The driver was relying upon the Director to produce LEO 1 and was dependent on their agreement to exercise his constitutional right to confrontation.

When the Director failed to produce LEO 1, the trial court stated it would not allow the Director to admit LEO 1's evidence through the back door by calling driver as a witness against himself. This, the appellate court held, demonstrated merely an exercise of the trial court's discretion to admit or deny evidence and would not be reversed on appeal. Judgment of the trial court affirmed.

Miscellaneous

Mills v. DOR

407 S.W.3d 124
(Mo. App. E.D. 2013)

Driver convicted multiple times of driving while intoxicated and subjected to a ten year minimum denial of his privilege. Driver sought a limited driving privilege during his period of denial. The trial court found that driver had twice violated the provisions of Section 577.041 which rendered him statutorily ineligible for any

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Miscellaneous (Cont.)

such privilege. Driver appealed and the Eastern District affirms. Although Section 302.309 had been amended on a number of occasions, none of the amendments affected the interpretation of 302.309.3 as previously set forth in Hagen v. Director. *Commentator's Note: Senate Bill 23 revised Section 302.309 so as to remove the twice in a lifetime chemical refusal revocation as an LDP disqualifier. Although relief remains discretionary, this statutory ineligibility has been removed.*

Lara v. DOR

411 S.W.3d 347
(Mo. App. W.D. 2013)

Director appealed judgment reinstating driver's privilege. Director argued the trial court erroneously applied the law in finding that the arresting officer did not have probable cause to believe driver was operating a motor vehicle. On appeal, the Western District reversed. LEO found driver parked in a driveway with the rear lights on. She stopped her patrol car and observed no movement in or around the car. She made a MULES inquiry and was given the name and address to whom the vehicle was registered. Based upon the time of night, lack of movement around the car and the fact that the vehicle was registered to an owner living at a different address, she decided to investigate. She activated her rear emergency equipment and approached the car and found the engine running. The driver appeared to be asleep or slumped in the driver's seat. LEO tapped on the door and awakened the driver who looked around in a confused manner and turned off the engine. Upon inquiry, he answered that he had driven from his girlfriend's house and that he lived at the house where he was parked.

LEO observed indicia of intoxication and eventually arrested driver for driving while intoxicated. A subsequent chemical analysis of his breath revealed a BAC of .115%. After hearing, the trial court entered its judgment reinstating driver's driving privilege finding that Director failed to meet his burden of proving that LEO had probable cause to arrest driver where driver was asleep in a vehicle in his own driveway and had simply turned off the engine. The Western District disagreed and reversed. Relying upon Cox v. Director of Revenue, the uncontested facts in this case showed that LEO found driver sleeping or unconscious in the driver's seat of the car with the engine running. Such evidence showed that driver caused the car to function and gave the trooper probable cause to believe that

Miscellaneous (Cont.)

driver was operating the vehicle. The trial court therefore erroneously declared and applied the law.

Alternatively, driver argued that the trial court's judgment should be affirmed in that there was insufficient probable cause to find that driver had operated a motor vehicle while in an intoxicated condition. In rejecting driver's claim, the appellate court noted that the trial court's conclusion discussed only whether LEO had probable cause to believe driver was operating a motor vehicle. Thus, the trial court did not make findings regarding the credibility of the evidence as to the indicia of intoxication. Since the Director had requested finding on this issue and such issue were contested, remand was necessary for the trial court to enter the requested findings.

Cortner v. DOR

408 S.W.3d 789
(Mo. App. E.D. 2013)

Post arrest in the field, LEO asked driver to submit to a chemical test of his breath. Driver agreed. LEO then transported driver to the detention center. After arrival, LEO learned that no qualified operator was available to administer the test. LEO contacted another officer in another municipality to confirm that he was available to administer the test. Driver was then transported to the second location for testing. There, when asked to submit, driver requested to speak to counsel. LEO provided driver with a telephone and a telephone book. Driver advised the officers that the telephone book did not list his lawyer's number. Driver stated that he needed his cell phone or his wallet to obtain his attorney's phone numbers. LEO informed driver they could not give him his cell phone and wallet because those items were at the first detention facility. Driver insisted that he needed his cell phone or his wallet to contact his attorney. Driver chose not to use the police station telephone to attempt to contact counsel. After twenty minutes passed, driver refused to take the breath test. The trial court adopted the traffic commissioner's findings that driver did not refuse to submit to a chemical test of his breath in that LEO effectively hindered driver's ability to contact an attorney by moving him to another municipality without his phone or wallet. The sanction was vacated and the Director was ordered to reinstate driver's driving privilege.

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Miscellaneous *(Cont.)*

The Director appealed and on appeal, the Eastern District reversed. The appellate court noted that a driver's consent to a breath test is implied if the person is arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition. A driver may withdraw his consent by refusing to submit to a chemical test. A driver has no constitutional right to speak with an attorney before deciding whether to submit to such test.

Missouri's Implied Consent law provides a limited statutory right to seek a lawyer's advice. The purpose of Section 577.041.1 is to provide the driver with a reasonable opportunity to contact an attorney to make an informed decision as to whether to submit to a test. The objective of Section 577.041 is satisfied if the driver is given the opportunity to attempt to contact an attorney and the 20 minute statutory period expires without contact being made or the driver abandons the attempt. The statute provides for the opportunity to attempt to contact "an" attorney, not a particular attorney.

Under the present facts, LEO provided driver with a reasonable opportunity to attempt to contact "an" attorney and driver's refusal to submit to the test after 20 minutes constituted a refusal. Judgment reversed.

Davis v. DOR

SD 32612
12-19-13

Trial court reinstated driver's privilege after an evidentiary hearing and Director appealed. Director argued the trial court misapplied the law when it found driver was not driving a vehicle. The Southern District agreed reversing the trial court's judgment.

LEO dispatched to investigate a report of an intoxicated man who had injured himself in a golf cart accident. When LEO arrived he encountered a witness. This witness told LEO that he had been informed that a golf cart had wrecked near the home of one of the witness' relatives. Thinking that the wreck might have involved one of his relatives, the witness went to the location of the wreck and found driver lying on the ground next to the golf cart. Driver could not stand without assistance and witness convinced driver to allow witness to drive him home in the golf cart. Witness reported driver became angry because witness was driving too slowly and, according to witness, driver reached over from his position in the passenger seat of the golf cart and pushed the accelerator of the golf cart with his foot as the golf cart was going around a corner. Driver was thrown from the golf cart and sustained injuries.

Miscellaneous *(Cont.)*

LEO then spoke to driver and observed indicia of intoxication, as well as an admission that driver was "too drunk to be driving." In the trial court proceeding, the only evidence presented was Director's Exhibit A. The trial court held that it was not convinced that driver was driving because that fact was only supported by a hearsay statement.

In rejecting this finding, the appellate court noted that under Section 577.041, the issue was whether LEO had reasonable grounds to believe that driver was driving and that reasonable belief may be based upon hearsay. Probable cause need not be established by the officer's personal observations. The trial court should have determined whether LEO had reasonable grounds to believe driver was driving while intoxicated rather than whether driver was actually driving. Judgment reversed.

Warren v. DOR

SD 32501
12-11-13

Trial court reinstated driving privilege after a judicial review pursuant to Section 577.041. Director contended the trial court misapplied the legal standard for reasonable grounds to believe driver was driving while in an intoxicated condition and therefore the revocation should be reinstated.

The only issue was whether LEO had reasonable grounds to believe driver was driving a motor vehicle while intoxicated. LEO had responded to the scene of a one-vehicle accident and he found no one present. During his investigation he determined that the vehicle belonged to driver. While investigating, he received a call from dispatch that a subject who had been involved in a crash was requesting an ambulance about five miles from the accident scene. LEO went to the other location and found this individual in respiratory distress. He administered medical treatment until the ambulance arrived and transported him to the hospital. LEO went to the hospital where he arrested the individual for driving while intoxicated.

Following a hearing, the trial court entered its judgment finding: Petitioner had at some time been involved in an accident (time unknown); petitioner was injured, with difficulty breathing and talking; petitioner's breath had

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Miscellaneous (Cont.)

the odor of alcohol; petitioner had normal, watery, and blood shot eyes; petitioner had slurred, confused and mumbling speech; petitioner said he crashed his vehicle because he was driving too fast; and petitioner told the officer that he had been drinking (time and amount unknown). Trial court determined issues in favor of Petitioner and against Director.

The trial court considered the contested evidence presented through the direct and cross examination of LEO. From this contested evidence, the trial court found the aforementioned historical facts from information the arresting officer possessed at the time of the arrest. Based upon these historical facts, the trial court concluded that LEO did not have probable cause to believe petitioner was driving while he was intoxicated. In other words, Director failed to sustain his burden of proving this issue. Relying upon *Stolle* and *Domsch*, the appellate court said that it could not, as a matter of law, hold that the trial court clearly erred in finding that arresting officer did not have reasonable grounds to believe petitioner was driving a motor vehicle while in an intoxicated condition. The Director's point was denied and the trial court's judgment affirmed.

Letterman v. DOR

412 S.W.3d 459
(Mo. App. S.D. 2013)

Director appeals judgment reinstating driving privileges arguing trial court error in failing to make the requested findings of fact and by concluding that LEO lacked probable cause to arrest driver for DWI. Judgment affirmed.

The appellate court observed that the Director, neither pre hearing nor post trial, specified the controverted factual issues on which the Director wanted the trial court to make findings. Although a request for findings need not be written, the movant must clearly and unequivocally specify which facts are controverted. In the present case, a general request for findings of fact "on disputed issues" was insufficient and thus the trial court's failure was not erroneous.

In Point II, the Director argued there was sufficient probable cause to arrest driver for driving while intoxicated contrary to the trial court's judgment. In rejecting the Director's claim, the appellate court reiterated that in the absence of written findings,

Miscellaneous (Cont.)

evidence is considered as having been found in accordance with the result reached, that is, in the light most favorable to the judgment. If the Director fails to meet its burdens of proof, the trial court is required to order the Director to reinstate the individual's driving privilege.

The Director argued that the trial court's judgment was against the greater weight of the evidence because the facts known to LEO were sufficient to give him probable cause to believe that driver had been operating a motor vehicle while intoxicated. However, a claim that the judgment is against the weight of the evidence necessarily involves a review of the trial court's factual determinations and a trial court is free to disbelieve any, all, or none of the evidence presented. The appellate court is prohibited from re-evaluating the evidence. Thus, in determining whether the judgment is against the weight of the evidence, "weight" denotes the probative value of the evidence and not the quantity of evidence.

Driver contested the issue of probable cause and the trial court was not persuaded that the facts known to LEO would cause a person of reasonable caution to believe that driver had been operating a vehicle while intoxicated. It was undisputed that an accident had resulted from a dog running in front of driver. The trial court was free to believe that driver's glassy eyes and mumbling were attributable to the fact that he had not been wearing a helmet and was serious injured in the accident. The trial court could have found the PBT result was not credible given the lack of calibration, the absence of proper maintenance and/or utilization not in accordance with the manufacture's recommendations. As the evidence relevant to probable cause was controverted, the appellate court deferred to the trial court's determinations.

"The smell of alcohol on [driver's] person and his admission that he drank three beers did not compel the trial court to conclude that there was probable cause to arrest [driver] for operating a vehicle while intoxicated.

Because Director failed to meet his burden of persuasion, the trial court did not error in ordering Director to reinstate driver's driving privilege.

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Criminal

State v. Collins

413 S.W.3d 689
(Mo. App. S.D. 2013)

Driver appeals his conviction for driving while revoked contending there was insufficient evidence to sustain his conviction. Specifically, driver complained that the evidence failed to prove beyond a reasonable doubt that when he was driving, he did so knowingly or with criminal negligence with respect to knowledge of the fact that his driving privilege had been revoked. In rejecting defendant's claim of error, the appellate court noted that a certified copy of defendant's driving record was sufficient proof that driver acted with criminal negligence. This record demonstrated that defendant had been revoked 30 times from 1985 to 2009, indicated that these revocations were continuous and that his license was never reinstated. These entries were sufficient to establish "the requisite mental state."

Driver argued that this exhibit however did not show that he was ever notified of the revocation and thus did not establish his mental state. The Southern District rejected this argument finding his reliance misplaced. First Section 302.321 expressly includes inculpable mental state of criminal negligence. Second, in contrast to State v.Triplett upon which defendant relied, Triplett's revocation became effective the same day as his arrest, whereas defendant's first revocation took place more than 25 years prior to his arrest and his license was revoked approximately 30 more times thereafter. Finally, such record further established that his license could not be reinstated by law until 2018.

Defendant also argued that the state had alleged that defendant "knew" his drivers license was revoked and failed to produce evidence of such knowledge. Again, the Southern District disagreed. "The information charged that Collins violated Section 302.321. The clear and unambiguous language of this section sets forth the required culpable mental state of criminal negligence for committing the crime of driving while revoked. As criminal negligence is clearly and unambiguously defined in Section 562.016.5 there is no room for construction of the required culpable mental state." Defendant's conviction affirmed.

State v. Eisenhouer

SD 32441
10-21-13

Defendant appealed his conviction following a jury trial. He claimed the trial court erred in excluding evidence of his PBT numerical result of .002%. Finding no error, the Southern District affirmed. Pre-trial, the trial court considered the state's motion in limine to exclude evidence of the PBT result. The state argued that Section 577.021.3 expressly prohibited admission of a PBT result as evidence of blood alcohol concentration. Defendant countered that the statute permitted use of a numerical reading as exculpatory evidence. Defendant contended that a reading below .08 percent was exculpatory. The trial court sustained state's motion and prohibited any reference to the test results were in this case. During trial, nothing about the PBT or anything related to it was mentioned in the presence of the jury. However, defendant did make an offer of proof as to the PBT result.

Criminal *(Cont.)*

Twelve minutes after leaving to deliberate, the jury returned a finding of guilt. Defendant timely appealed claiming that the trial court erred in excluding testimony as to the PBT result. The Southern District affirmed.

Generally, a trial court's decision to exclude testimony is reviewed for an abuse of discretion, granting substantial deference to the trial court's decision. This general rule does not necessarily apply however when an evidentiary principle or rule is violated, especially in criminal cases.

The appellate court observed that the Supreme Court does not have the constitutional power to promulgate rules of evidence. Rather, Missouri's rules come from various sources including statute, common law and the constitution. Even though a trial court may erroneously violate such a principle or rule, the inquiry does not end there. An appellate court reviews evidential errors to ascertain whether they were prejudicial, that is, whether the errors were more likely than not to have effected the outcome.

In rejecting defendant's argument, the appellate court noted that the provisions of Section 577.021 demonstrate that the legislature has clearly forbidden the use of the PBT to prove intoxication. "This statute embodies the General Assembly's determination that a PBT is 'too unreliable' to be used for this purpose."

The appellate court considered this a case of first impression. It is fundamental that on appeal the trial court's action is presumed to be correct and the burden is on the appellant to establish that the action was erroneous. Here, defendant failed to sustain his burden. The trial court determined that the limitation of Section 577.023.3 - but shall be admissible as evidence of blood alcohol content but shall not be

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CRIMINAL (CONT.)

admissible of blood alcohol content - bars the admission of a numerical value of the positive result of the PBT 'as evidence of blood alcohol content.'" Defendant failed to present a cogent and persuasive argument otherwise. Conviction affirmed.

State v. Lilly

410 S.W.3D 699
(Mo. App. W.D. 2013)

Defendant filed a motion to suppress challenging the admissibility of certain pre-trial statements he made to the police and any evidence which was the fruit of those statements. Defendant's motion alleged that the evidence was inadmissible because the state failed to establish the corpus delicti of the offenses charged and because he was not given his Miranda warnings prior to questioning. Following an evidentiary hearing, the trial court sustained defendant's motion finding the evidence to be in derogation to the corpus delicti rule and suppressed statements made before and after the Miranda warnings.

The trial court's order was based upon the corpus delicti rule, not on the alleged Miranda violation. Because the order excluding evidence was based upon the corpus delicti rule, it was not a ruling suppressing evidence or suppressing a confession or admission within the meaning of Section 547.200.1(3) or (4). Thus no interlocutory appeal was authorized and the appeal was dismissed.

State v. Troya

407 S.W.3d 695
(Mo. App. W.D. 2013)

Defendant convicted of driving while intoxicated. He was sentenced to ten years in prison. Pre-trial, the state sought and received leave to file a first amended information which added an allegation that defendant was a prior and persistent offender as defined in Section 558.016. This substitute information asserted that defendant, as a persistent offender, was subject to "an extended term of imprisonment, specifically for a term of years not less than ten years and not to exceed thirty years, or life imprisonment as that of a class A felony." The court advised defendant that he was being charged as a persistent offender which had the effect of "elevating the range of punishment to a class A felony."

In Point I, defendant contended the trial court plainly erred in sentencing him to a ten year imprisonment

CRIMINAL (CONT.)

term because the trial judge misunderstood the possible range of punishment to be ten to thirty years or life imprisonment when the correct range of punishment was five to thirty years or life imprisonment. While defendant failed to preserve this issue for appellate review by not objecting at the time of sentencing, he sought and received plain error review.

At the sentencing hearing, the trial court twice defined the sentencing range defendant faced as an "A-range of punishment" which was consistent with the language of the first substitute information. However, a range of punishment is defined by both the maximum and minimum limits of the available sentences. In the present case, defendant was subject to an extended term of imprisonment. Section 558.016.7 provides "[t]he total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are . . . (2) For a class B felony, any sentence authorized for a class A felony[.]"

The statute only extends the maximum, it does not alter the minimum sentence. Therefore, defendant's range of punishment as a persistent offender should have been five to thirty years or life imprisonment. Since the trial court's acceptance of the first substitute information and statements throughout the proceeding indicated that defendant's sentence was based on a mistaken belief that he was subject to a minimum term of ten years imprisonment, defendant's case was reversed and remanded for re-sentencing.

State v. Beck

2013 Mo. App. LEXIS 1161
(Mo. App. S.D. 2013)

Defendant charged with DWI and filed motion to suppress. At the hearing, LEO testified he noticed a pickup traveling in the opposite direction. The pickup was driving over the fog line separating the shoulder of the road from the driving lane. LEO turned around, activated his emergency lights and made a traffic stop and the truck pulled over. LEO discovered defendant was driving and he was eventually arrested for driving while intoxicated.

The trial court granted the motion to suppress stating "The mere touching or crossing the fog line by itself" does not justify a traffic stop. The state appealed. On appeal, the state argued the trial court clearly erred in granting the motion to suppress.

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Criminal *(Cont.)*

The Southern District disagreed. Relying upon State v. Roark, 229 S.W.3d 216, State v. Abelyn, 136 S.W.3d 812 and State v. Mendoza, 75 S.W.3d 842, it could not be said that the trial court clearly erred in granting the motion to suppress.

The state argued that LEO also testified that driver's car was weaving. However the trial court did not make that finding. Rather, the trial court stated that the vehicle merely touched or crossed the fog line. Therefore the cases upon which the state relied were thus distinguishable. By citing these cases, the state relied on a fact that the trial court did not find was contrary to the trial court's express ruling. Such reliance is impermissible under the standard of appellate review.

De Novo

Gannon v. DOR

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

Director appealed the judgment of the trial court in favor of driver. At the beginning of the trial de novo proceeding, the Director requested findings of fact regarding any indicia of intoxication which the court did not believe. The trial court's judgment did not contain any specific findings. Rather, the court entered a form judgment with boxes checked and one sentence reflecting a finding that the officer "did not have probable cause based upon insufficient evidence and testimony re: field sobriety tests re: impairment." The appellate court found this finding insufficient.

"The trial court's judgment does not contain specific findings regarding credibility relating to the evidence of indicia of intoxication." Even assuming the trial court had found evidence relating to the administration of field sobriety tests not credible, the appellate court found that DOR still presented sufficient evidence of observations or indicia of intoxication which, if believed, were sufficient to support a prima facie finding of probable cause to arrest driver for driving while intoxicated. Therefore, absent a finding from the trial court regarding credibility concerning this evidence, the Director met his burden. The trial court erred in finding insufficient evidence of probable cause such that the judgment must be reversed.

De Novo *(Cont.)*

However, in that driver's motion for directed verdict, treated as a motion for judgment pursuant to Rule 73.001(b) appeared to have denied driver an opportunity to present evidence to rebut the Director's prima facie case, the matter was remanded for a new trial to allow driver the opportunity to present such evidence and to allow the trial court an opportunity to make requested credibility determinations.

Smith v. DOR

410 S.W.3d 703
(Mo. App. E.D. 2013)

Driver's privilege was administratively suspended. He filed a petition for trial de novo. Driver mailed a subpoena to the officer to secure his presence at trial. The officer did not appear and the case was continued. Driver mailed a second subpoena to LEO and he again failed to appear. At trial, Director sought to submit his case utilizing the certified reports of the officer. Driver orally requested the trial court strike the certified written reports in that it would be "fundamentally unfair" for the Director to proceed because LEO had been subpoenaed to afford driver the opportunity to challenge the reports and LEO failed to appear. The trial court sustained driver's oral motion and ordered driver to submit copies of the subpoenas. Subpoenas were never filed. The trial court entered its judgment ordering the Director to reinstate driver's privilege.

On appeal, the Director argued the trial court erred as a matter of law in granting driver's motion because the subpoenas were invalid as they did not conform to the requirements of Section 491. The Eastern District agreed in that the trial court, without reviewing the validity of the subpoenas, excluded the entirety of LEO's written reports as a result of LEO's failure to appear. Without deciding whether or not the trial court had the authority to strike the written reports of a non party witness for his or her failure to appear under the issuance of a duly executed subponea, the appellate court held that the trial court had no authority under the facts of this case as no copies of the subpoenas or evidence of their service upon LEO was ever offered. There was thus no evidence as to whether the subpoenas complied with the requirements of Chapter 491. Absent such evidence, the trial court was without substantial evidence that LEO was properly and duly served. Judgment reinstating drivers privilege was reversed and cause remanded for further proceedings.

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De Novo (Cont.)

De Novo (Cont.)

Johnson v. DOR
411 S.W.3d 878
(Mo. App. S.D. 2013)

Director appeals from a judgment reinstating driving privilege. After driver's arrest for driving while intoxicated she consented to a chemical analysis of her breath resulting in a "invalid sample." Five minutes later a second test on the same device was administered which reported a result of .209% as her BAC.

In the trial de novo proceeding, the Director's evidence consisted solely of the Director's certified records. Driver's counsel objected to the admission of the .209 BAC because the second test was administered within five minutes of the first test. Counsel argued that LEO should have waited at least fifteen minutes before administering the second test. At the conclusion of the proceeding, counsel for the Director solicited and the trial court granted the parties leave to file a letter brief on this contested issue. Responsive thereto, driver's counsel filed correspondence referencing Martin v. Director wherein the court had found that a second test administered within three to six minutes following an invalid sample was unreliable. The Director did not tender any brief or additional evidentiary material to the trial court for consideration.

In its subsequent judgment, the trial court found that petitioner's first BAC read-out was unreliable and not credible as it read "invalid sample." The second sample was taken within five minutes of the invalid sample. The court found that the officer conducting the breath test did not follow the Department of Health's regulations nor the Intoxilyzer 5000 User Manual. From such judgment, the Director appealed.

On appeal, the Director argued the trial court erred in that its decision resulted from an erroneous application or declaration of law and that the judgment was not supported by any evidence.

In rejecting the Director's arguments, the appellate court reiterated the burdens placed upon the Director noting that nothing within Exhibit A, the Director's sole evidence, explained the meaning of "invalid sample." The appellate Court noted that although the second result may have been admissible pursuant to Section 302.312.1, the trial court was not required to believe it.

Notably, the trial court kept the record open so that Director could submit a manual as evidence but the Director did not do so and, as a consequence thereof, the trial court could reasonably infer that the manual would have been unfavorable to the Director. Thus, as driver contested the reliability of the second breath test result and the trial court decided the factual issue adversely to the Director, the appellate court deferred to the trial court's determination.

The Director also argued that the judgment resulted from an erroneous declaration or application of the law in that the testing officer was not required to observe driver for an additional fifteen minutes before performing the second test. In support of its argument, the Director cited cases and regulations which addressed the foundational requirements for the admission of a breath test result. This argument, the appellate court noted, was misdirected because it conflated the admissibility of evidence with the credibility of evidence. The appellate court noted that nothing in the record indicated that the trial court excluded the .209 BAC result. Rather, the trial court simply did not find that result reliable.

Finally, the Director argued that the trial court's judgment was not supported by any evidence arguing that driver bore the burden to produce an expert to testify that the validity of the test was effected by the officer's failure to carry out a second observation period and/or his failure to introduce into evidence portions of the Intoxilyzer Manual stating that a second observation was necessary. Thus, the Director argued, the driver failed to carry his burden.

In rejecting the Director's argument, the appellate court again reiterated that the Director bears the burden of production and the burden of persuasion. The Director's argument failed because driver was under no obligation to present expert testimony to refute the Director's documentary of proof. Rather, it is the Director who bears the burden of producing evidence. Here, the Director asked for and received permission with regard to DOH regulations and the Intoxilyzer. The Director failed to follow up with additional evidence. As the trier of fact, the trial court had a right to draw an adverse inference against the Director for failing to produce the operating manual for the Intoxilyzer 5000 after having been given an opportunity to do so. As driver bore neither the burden of persuasion nor production, the judgment in her favor required no evidentiary support. As such, the judgment was affirmed.