MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

P.O. Box 1543
Jefferson City, MO 65102
Ph: 573-636-2822
www.MACDL.net

Fall, 2009

In This Issue

The MACDL Newsletter is a semi-annual publication of the

Missouri Association of Criminal Defense Lawyers
P.O. Box 1543
Jefferson City, Missouri 65102
Phone: 573-636-2822
Fax: 573-636-9749
Email: info@macdl.net
Website: www.MACDL.net

Your comments and suggestions are welcome!

MACDL President's Letter

by Mike McIntosh

MACDL, in partnership with the MoBAR, recently completed one of our most successful seminars with the Second Annual Bernard Edelman DWI Institute Impaired Driving. There is not enough space to thank all our sponsors, speakers and program chairs, but Carl Ward, Jeff Eastman and Kim Benjamin deserve a special salute.

You can knock out your ethics early if you register now for the Fall CLE, "Drugs, Guns & Ammo" to be held October 23 at Harrah's in St. Louis. Go to the MACDL website (www.MACDL.net) for a link to the registration information. With the one hour of Ethics, you can get 8.3 hours of CLE.

You may be contacted by a present member of a MACDL committee asking for voluntary enlistment. Currently, most of the working committees are made up of Board members and the consensus of the Board is to become more diverse with non-Board committee persons. Please consider saying yes when you are contacted; we need you.

We have many items of interest on the horizon. Section 590.701.1 RSMO regarding recording of custodial interrogations has been signed into law and has become effective. Also, the recent veto of Senate Bill 37 by the Governor, which would have provided docket relief to the overburdened public defenders but shifted pro bono work to the private bar, is an issue that will reappear next year and requires great attention and investment by all of us in criminal defense.

Since the fall of 2005, our membership has gone from about 300 members to over 500 members. Our Executive Director Randy Scherr and his staff, Sarah Goldman, and Brian Bernskoetter have been the backbone of this growth. We can still do better, especially in areas of cultural, gender and racial diversity. I urge each of you to engage your friends in the defense bar to join us if they are not a member of MACDL.

See you at Harrah's in October for "Drugs, Guns and Ammo."

Mike McIntosh
MACDL President

MACDL

Missouri Association of Criminal Defense Lawyers

2009-2010 Officers & Board

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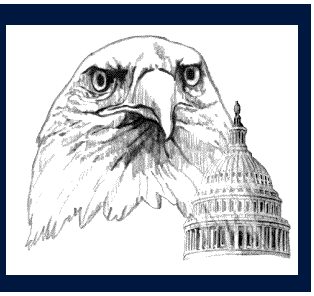
2009 MACDL Legislative Update

by Randy Scherr



The 2009 legislative session ended on May 16 with over 160 bills being finally passed and sent to the Governor. Prior to the July 14 signing deadline, the Governor vetoed 23 bills, including SB 37 revising the Public Defender System.

The 2009 constitutionally required veto session will convene on September 16. All 23 bills vetoed by the Governor (which is rumored to be the seconded highest number on record) will be before the General Assembly. However, it is unlikely that any motion to override the veto of any of these bills will be sustained.

Missouri Non-Partisan Court Plan

The opponents of the current Missouri Non-Partisan Court Plan continued to push their efforts to repeal the plan during the 2009 legislative session. House Joint Resolution 10 passed the Missouri House by a slim margin but was stalled in the Missouri Senate.

In July the proponents of that effort filed an initiative petition with the Secretary of State to have placed on the ballot in November 2010 the repeal of the Missouri Non-Partisan Court Plan and the implementation of the Federal Judicial Selection Process. That initial petition was withdrawn when the supporting group, ShowMe Better Courts, was alerted that the petition would be rejected because it was submitted in an improper form. The group has since submitted a second draft petition and it is currently under review by the Secretary of State and the Attorney General.

The Missourians for Fair and Impartial Courts (MFIC), the statewide coalition of which MACDL is a founding member, has been meeting regularly to discuss strategy in preparation of both submission of the initiative petition and the 2010 legislative session. The group is currently undertaking a major fundraising effort to sustain the activities opposing the efforts challenging the court plan. If you are interested in contributing or have questions about the efforts of MFIC or the status of the Non-Partisan Court Plan please contact Randy Scherr in the MACDL office at 573-636-2822 or email him at rjscherr@swsconsultants.com.

MACDL Web Traffic Report

Activity Summary *(As of August 27, 2009)*	
Total Hits	145,350
Total Unique IPs	4,651
Total Page Views	39,757
Average Hits per Day	821
Average Page Views per Day	224
Average Visitors per Day	113

Member Services

MACDL ListServ

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

Case Law Update

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

Amicus Curiae Committee

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

Committee Chair: Grant J. Shostak
Shostak & Shostak, LLC
8015 Forsyth Boulevard
St. Louis, MO 63105
Telephone: (314) 725-3200
Facsimile: (314) 725-3275
E-mail: gshostak@shostaklawfirm.co

MACDL'S Partial Tuition Scholarship

Gerry Spence Trial Lawyers College Death Penalty Seminar 2010

During June 12-19, 2010, the Trial Lawyers College will be presenting a unique seminar designed specifically for criminal defense lawyers who handle death penalty cases. This program will focus on and address techniques the trial lawyer can use to successfully and adequately represent and understand a defendant facing the death penalty and to defeat death. You will be exposed to and become familiar with the method developed over the years and taught at the Trial Lawyers College.

You will learn to:

- help the jury crawl into the hide of the client;
- know and understand the jury;
- discover the story and win;
- empower the jury to stand up against the injustice of the death penalty

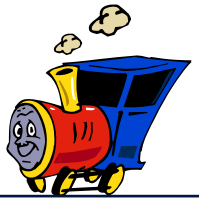
In addition, you will be taught valuable skills in how to personally survive the emotional intensity of a death penalty case and to deal with your own issues while fulfilling your obligations as an attorney.

If you have any questions, do not hesitate to contact the Trial Lawyers College at (800) 688-1611, or by email at info@triallawyerscollege.com.

Two lucky MACDL Members could receive 1/2 of the TLC tuition. To apply for tuition, watch our website www.macdl.net for more information and an application.

Welcome Aboard!

We'd like to welcome the following new members to MACDL!



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Erin Heimsoth • *Sedalia*
Heather Ingrum-Gipson • *Sedalia*
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Curtis Winegarener • *Kansas City*
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Dorothy Savory • *Kansas City*
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Nathan Coleman • *Joplin*
Christopher Fink • *Cameron*
Michael Walker • *Kansas City*
Sherrie Brady • *Independence*
Thomas Harvey • *Bel-Nor*
Brandi Miller • *St. Louis*
Venus Harry • *St. Louis*
Sue Crane • *Fulton*

MACDL Fall CLE
Drugs, Guns & Ammo
October 23, 2009
Harrah's
Maryland Heights, MO

MACDL 2009 Fall CLE Meeting Schedule Draft Agenda

8:00 a.m. - 8:45 a.m.

Registration

8:30 a.m. - 9:15 a.m.

"Supreme Court Case Law Update on Search and Seizure Issues"

Presenter: Professor Rodney Uphoff; Columbia, MO

9:15 a.m. - 10:00 a.m.

"Ramifications of Drug and Gun Convictions"

Presenter: Michelle Monahan; St. Louis, MO

10:00 a.m. - 10:15 a.m.

Break

10:15 a.m. - 11:00 a.m.

"Whatever You Do Don't Take This Exit! (Road Blocks & Check Points)"

Presenter: Scott Hamilton; Lexington, MO

11:00 a.m. - 11:50 a.m.

"Attorneys' Perspectives on Motions to File"

Presenters: Grant Smith; Lake Ozark, MO and Herman Guetersloh; Rolla, MO

11:50 a.m. - 1:00 p.m.

Lunch

1:00 p.m. - 2:15 p.m.

"Drug Dogs – An Expert's Perspective"

Presenter: Steve Nicely; Austin, TX

2:15 p.m. - 3:15 p.m.

"State Case Law Update on Gun Laws, Self Defense & the Castle Doctrine"

Presenter: Kevin Jamison; Gladstone, MO

3:15 p.m. - 3:30 p.m.

Break

3:30 p.m. - 4:15 p.m.

"Federal Case Law Update on Drugs & Guns"

Presenter: Kevin Curran; St. Louis, MO

4:15 p.m. - 5:05 p.m.

"Bring Lawyers, Guns & Money"- An Ethics Discussion

Presenter: Matthew O'Connor;Kansas City, MO

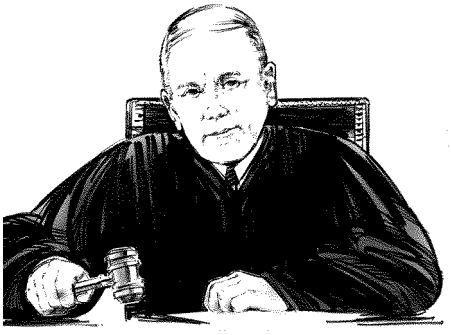
The MACDL Fall Conference Contains ...

8.3 Hours of Missouri CLE,
Including 1.0 Hours of Ethics.

Register online at www.MACDL.net

Top Ten Federal Decisions

by Bruce C. Houdek



Arizona v. Gant
129 S. Ct. 1710 (2009).

Police may not search the passenger compartment of a vehicle incident to the arrest of a recent occupant unless there is reasonable cause to believe that the person arrested might access the vehicle during the search, or that the vehicle contains evidence of the offense of arrest.

Herring v. United States
129 S. Ct. 695 (2009).

Where police rely on erroneous information from another jurisdiction in good faith in making an arrest, evidence found during the arrest will not be excluded. The exclusionary rule should not be applied unless there is a substantial additional deterrence of police misconduct.

Melendez-Daiz v. Massachusetts
129 S. Ct. 2527 (2009).

Crawford v. Washington applies to laboratory reports and the anyalist must be produced by the government as a witness to validate them.

Safford Unified School Dist v. Redding
129 S. Ct. 2633 (2009).

School officials may not strip search a seventh grade girl on suspicion that she has prescription strength ibuprofen.

Flores-Figueroa v. United States
129 S. Ct. 1886 (2009).

In prosecution of a charge of aggravated identity theft, the government is required to prove that the defendant had knowledge that the false identification he used belonged to another actual person. The opinion contains an extensive discussion of the requirements of criminal intent.

United States v. Smith
____ F. 3rd ____ (8th Cir. 2009) 2009 WL 194787

Smith was sentenced to a mandatary minimum life sentence although his plea agreement contemplated cooperation with law enforcement and a sentencing downward departure pursuant to § 3553 (e) and guideline § 5K1.1. Smith was debriefed for two days, passed a polygraph test, and testified at co-defendant's sentencing hearing. He also testified as a prosecution witness at the trial of a co-defendant. The co-defendant who went to trial was acquitted where Smith's testimony was uncollaborated. The government refused to move for a departure and the Court of Appeals found that the defendant had not met his burden of proof of improper motivation on the part of the government.

United States v. Lovelace
565 F. 3rd 1080 (8th Cir. 2009).

The district court relied on personal knowledge of the defendant having previously prosecuted him as a state prosecutor which was not disclosed in the presentence report. Such failure is a plain error violation of Rule 32 Fed. R. Crim. P. and the case is remanded for resentence before a different district judge.

United States v. Garcia
565 F. 3rd 1080 (8th Cir. 2009)

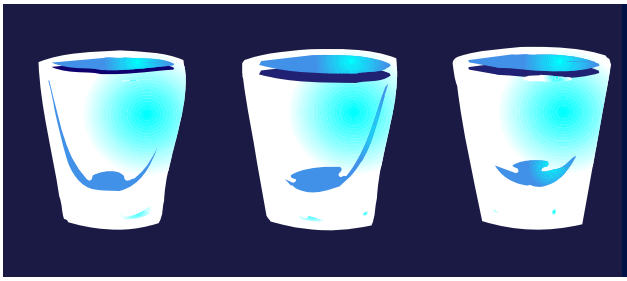
Defendant requested disclosure of presentence investigation reports of government witnesses. The District Court declined to review the presentence reports of the witnesses to determine whether or not they contained any material exculpatory or impeachment information, and if so whether or not failure to provide that information to the defense counsel prior to sentencing was error. The case is remand to the district court for that review.

United States v. Bender
566 F. 3rd 748 (8th Cir. 2009).

Bender was convicted of illicit sexual conduct with a minor and viewing pornography on a public computer. The district court imposed special conditions of supervised release, the court remanded for resentence holding that the conditions such as not reading a Playboy magazine, prohibition from entering a public or private library, and entry into places where minors frequent without prior approval and presence of a responsible adult. The court held that those conditions were not sufficiently particularized as to the defendant or his offense, that the library prohibition was overbroad, and that the frequenting prohibition was not reasonably necessary.

United States v. Alvarez-Manzo
570 F. 3rd 1070 (8th Cir. 2009).

The 8th Circuit affirms suppression of the contents of bus passenger's bag seized without reasonable suspension and also affirms suppression of evidence seized pursuant to a subsequent consent to search that was found to be fruit of the poisonous tree.



DWI and Traffic Law Update

by Jeff Eastman ♦ Gladstone, MO

Significant Legislative Changes Effective July 1, 2009

Senate Bill 947 of the 2008 legislative session made several significant changes to the practitioner.

Section 302.060.2 was amended to require an *Ignition Interlock Device* be installed on any vehicle for a period of not less than *six months upon re-issuance after a five or ten year license* denial. "If the person fails to maintain such proof with the director, the license shall be suspended for the remainder of the six month period or until proof as required by this section is filed with the direc-tor. Upon completion of the six month period, the license shall be shown as reinstated, if the person is otherwise eligible."

Section 302.304.17 was added requiring an Ignition Interlock Device for a period of *not less than six months as a condition of reinstatement after a second DWI/BAC conviction.* "If the person fails to maintain such proof with the director, the license shall be re-suspended or re-revoked and the person shall be guilty of a class A misdemeanor."

Section 302.309.3(2) expands limited driving privileges to any person seeking the required services of a certified ignition interlock device provider.

Section 302.309.3(4) adds as an ignition interlock device as a condition precedent to the issuance of a limited driving privilege *during a five or ten year denial or during a restricted driving privilege after a point based revocation from a second time conviction*. "Failure of the driver to maintain ... proof of installation of a functioning certified ignition interlock device, as applicable shall terminate the privilege."

Section 302.341 was amended and now *automatically removes a failure to appear suspension* from a driving history upon proof of the disposition of the charges and payment of fines and costs and the reinstatement fee.

Section 302.525.3 *redefines alcohol related enforcement contact* so as to include convictions for driving with excessive BAC, driving while intoxicated, driving while under the influence of drugs or alcohol, as well as driving with an unlawful alcohol concentration.

Section 302.525.5 was amended to require an ignition interlock device for not less than six months upon *reinstatement after an administrative revocation for a second alcohol related enforcement contact in a five year time frame.*

Section 302.525.2(3) requires an ignition interlock device *during a restricted driving privilege after a second or subsequent administrative sanction under section 302.525 or a refusal coupled with a section 302.525 sanction.*

Section 304.590.1 was added creating a "travel safe zone." When so designated, upon a conviction or a plea of guilty by any person for a moving violation therein, the court shall double the amount of fine authorized to be imposed by law.

Section 577.023.16 was amended to read in its entirety,

> Evidence of a prior conviction, plea of guilty, or finding of guilty in an intoxication-related traffic offense shall be heard and determined by the trial court out of the hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri Uniform Law Enforcement System maintained by the Missouri State Highway Patrol. After hearing the evidence, the court shall enter its findings thereon. A conviction or a plea of guilty or a finding of guilt followed by incarceration, a fine, a suspended imposition of sentence, a suspended execution of sentence, probation or parole or any combination thereof in any intoxicated-related traffic offense in a state, county, municipal court or any combination thereof shall be treated as a prior plea of guilty or finding of guilty for purposes of this section.

Section 577.041.10 mandates that upon a *second or subsequent chemical refusal revocation* that the driver have an ignition interlock device for *a period of not less than six months upon reinstatement.* **"If the person fails to maintain such proof with the director as required by this section, the license shall be re-revoked and the person shall be guilty of a class A misdemeanor."**

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Significant Legislative Changes Effective July 1, 2009 *(Continued)*

Section 577.600 was amended to require an ignition interlock device for a period of not less than six months *upon a plea of guilty or finding of guilty for a second intoxicated related traffic offense.* Note that the statute does allow the court to require such device after a plea of guilty or a finding of guilty on a first such offense.

House Bill 62

(Signed by Governor Nixon July 9, 2009)

Section 302.060.1(10) occasions a five year denial to any person *convicted twice within a five year period* of driving while intoxicated or any other *intoxication-related traffic offense* as that term is defined in subsection (3) of subsection (1) of Section 577.023.

Thus, no longer may the practitioner negate a five year denial by coupling a DWI with a BAC.

Please note that subsection 10 was further amended to read, "The director shall not issue a license to such person for five years from the date such person was convicted or plead guilty for involuntary manslaughter while operating a motor vehicle in an intoxicated condition or for driving while intoxicated or for any other intoxication-related traffic offense as defined in subsection (3) of subsection (1) of Section 577.023 for the second time."

This language would seem to suggest that a plea of guilty rather than a conviction can now provide the predicate basis for a five year denial.

Section 303.024.6 makes it a class D felony for any person to *knowingly or intentionally produce, manufacture, sell or otherwise distribute a fraudulent document and intended to serve as an insurance identification card.* One who *knowingly or intentionally possesses* a fraudulent document intended to serve as an insurance identification card is guilty of a class B misdemeanor.

Section 304.820 now was added and provides, "No person *twenty-one years of age or younger operating* a moving motor vehicle upon the highways of this state, shall, by means of a hand-held electronic wireless communication device, send, read, or write a text message or an electronic message." A violation of this section shall be deemed an infraction and shall be deemed a moving violation for purposes of point assessment under Section 302.302.

Section 311.325 was added and provides, "Any person under the age of twenty-one years who purchases or attempts to purchase or has in his or her possession, any intoxicating liquor, or who is visibly in an intoxicated condition as defined in Section 577.001 *shall be deemed to have given consent* to a chemical test or tests of the person's blood, breath, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood." The balance of the section parallels the implied consent statute but makes no reference to the sanction to be imposed if a person refuses such test.

Section 311.326 revises the *minor in possession* statute so as to permit *expungement* now *"after a period of not less than one year after reaching the age of twenty-one."* Prior to this change, expungement could be sought after a period of not less than one year or upon reaching the age of twenty-one which ever occurred first.

Section 577.023 was again amended adding the phrase *"continuous alcohol monitoring."* Said phrase is defined as "automatically testing breath, blood, or transdermal alcohol concentration levels and tampering attempts at least once

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House Bill 62 *(Continued)*

(Signed by Governor Nixon July 9, 2009)

Section 577.023 *(Continued)*

every hour, regardless of the location of the person being monitored and regularly transmitting the data."

Subsection (6) of Section 577.023 has added,

> In addition to any other terms or conditions of probation, *the court* shall consider, as a condition of probation for any person who pleads guilty to or is found guilty of an intoxication-related traffic offense, *requiring the offender to abstain* from consuming or using alcohol or any products containing alcohol as *demonstrated by continuous alcohol monitoring* or by verifiable breath alcohol testing performed a minimum of four times per day as scheduled by the court for such duration as determined by the court, but not less than ninety days. The court may, in addition to imposing any other fine, costs, or assessments provided by law, require the offender to bear any costs associated with continuous alcohol monitoring or verifiable breath alcohol testing.

Section 577.029 was amended so as to *delete* any requirement that a blood draw be occasioned at the *place of employment* of the individual taking the draw.

Section 577.023.16 was yet again amended and now reads as follows:

> Evidence of a prior conviction, plea of guilty, or finding of guilt in an intoxicated-related traffic offense shall be heard and determined by the trial court out of the hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri Uniform Law Enforcement System maintained by the Missouri State Highway Patrol. After hearing the evidence, the court shall enter its findings thereon. A plea of guilty or a finding of guilt followed by incarceration, ***a fine***, a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in any intoxication-related traffic offense in a state, county or municipal court or any combination thereof, shall be treated as a prior plea of guilty or finding of guilt for purposes of this section.

Section B of House Bill 62 has an emergency clause which makes the changes to Section 577.023 and 577.029 effective upon the governor's signature.

Criminal Cases

State v. Craig

CS.W.C, 2009 WL 1872108 (Mo. June 30, 3009)

In this proceeding, the Supreme Court holds that where a defendant pleads guilty to the current offense of driving while intoxicated but wishes to contest the allegations occasioning an enhanced punishment, Rule 24.035 does not preclude a direct appeal because defendant did not plead guilty to the charged offense. Rather, he admitted to facts establishing certain elements of the offense but specifically requested a hearing to contest those facts establishing the applicability of the enhancing provisions of Section 577.023. It was permissible to bifurcate the enhancement proceedings and litigate whether his sentence was subject to enhancement and then challenge the enhancement in a direct appeal.

The Supreme Court further holds that to enhance a penalty under Section 577.023, the State is not obligated to affirmatively prove strict compliance with Rule 24.02 (State prosecutions) and 37.58 (Municipal prosecutions). The court noted that the issue was not whether the defendant's previous guilty pleas were knowing and voluntary; rather, whether the state, in a subsequent prosecution must affirmatively prove, "time and time again" that prior courts did not err in accepting the pleas. If a defendant believed his prior pleas did not pass constitutional muster, the proper forum to address those insufficiencies would have been a timely direct attack on the alleged deficient plea itself.

The Court further found that one challenged enhancing exhibits was insufficient to demonstrate beyond a reasonable doubt that an intoxicated-related traffic offense had occurred because such exhibit was blank in the area wherein the court was to designate whether defendant had plead guilty or not guilty. The Court found such exhibit to be "facially deficient" and thus could not be relied upon as an enhancing predicate.

State v. Royal

277 S.W.3d 837 (Mo.App. W.D. 2009)

Defendant charged with felony DWI, second-degree assault in violation of section 565.060.1(4) and second degree murder as a result of a death and injuries sustained as a result of

"DWI and Traffic Law Update" >p9

Criminal Cases *(Continued)*

State v. Royal *(Continued)*

vehicular accident. He was convicted on each count. On appeal, Defendant challenged the validity of his DWI conviction arguing that it was a lesser included offense of the second-degree assault allegation. The Eastern District agreed and vacated his DWI conviction. The Eastern District rejected the State's argument that Defendant's felony DWI was not a lesser included offense because of the enhancement predicate elements noting that such were not elements of the offense but rather sentencing elements.

State ex rel Koster v. Koffman

CS.W.3d C, 2009 WL 1852428
(Mo.App. W. D. 2009)

In a writ of habeas corpus proceeding, Defendant challenged his continued incarceration. Petitioner had previously plead guilty to the class D felony of driving while intoxicated and received a suspended execution of sentence. Thereafter, his probation was revoked and his sentence ordered executed. He filed a habeas petition alleging that one of his prior predicates was a municipal suspended imposition of sentence therefore the original sentence imposed was in excess of the maximum allowed by law. The trial court sustained the petition granting relief. The Western District thereafter quashed writ holding that nothing in the record provided to the appellate court supported Petitioner's allegation that the offense resulted in a suspended imposition of sentence. As the record before the court showed a facially valid confinement, habeas relief was not available. Note however that the dismissal was without prejudice.

City of Springfield v. Belt, Jr.

C S.W.3d C, 2009 WL (Mo.App. S.D. July 7, 2009)

Defendant cited under City's red light ordinance. The hearing examiner found the driver failed to rebut presumptions within the ordinance. Driver then filed an application for trial de novo. The City responds filing a Motion to Dismiss which the trial court sustained and the Southern District reversed. Court observes that Rule 37 applies only to municipal court prosecutions.

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Criminal Cases *(Continued)*

City of Springfield v. Belt, Jr. (Continued)

In its opinion, the Southern District held that driver waived any challenge to the administrative procedure by acquiescing in the process and not raising a challenge thereto until making his trial de novo request.

Moore v. State

C S.W. 3d C, 2009 WL 1846777
(Mo.App. S.D. June 29, 2009)

In a Rule 24.035 proceeding, Movant challenged the sufficiency of the evidence as to the prior predicates used for enhancement. The Southern District holds that Movant waived any objection to the sufficiency of evidence offered in support of enhancement when pleading guilty to the offense.

www.MACDL.net

Refusal Cases *(Continued)*

Jones v. Director of Revenue

C S.W.3d C , 2009 WL 1988498
(Mo.App. S.D. July 10, 2009)

The trial court set aside refusal revocation sanction finding there was no reasonable grounds for LEO to have stopped Petitioner's vehicle. Southern District reverses. Appellate court finds that basis for initial traffic stop irrelevant in a Section 577.041 civil proceeding.

Ross v. Department of Revenue

C S. W.3d C , 2009 WL 1585984
(Mo.App. W.D. June 9, 2009)

In this Section 577.041 proceeding, driver challenged the Director's revocation efforts alleging that there was no valid statutory arrest within ninety minutes of the claimed violation. After the trial court affirmed this sanction, driver appealed and Western District reversed.

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Refusal Cases *(Continued)*

Ross v. Department of Revenue *(Continued)*

Western District holds that to make a prima facie case for revocation under Section 577.041, the Director must show that a valid warantless arrest for a violation of Section 577.010 or 577.012 was made within ninety minutes of the time of the claimed violation. An arrest outside of said time frame is unlawful and therefore cannot provide the basis for the administrative sanction.

Western District also rejects argument that although arrests for careless and imprudent driving and possession of drug paraphernalia were made within ninety minutes, there was no evidence to support that such arrests were made upon reasonable grounds to believe that driver was intoxicated at the time.

Hager v. Director of Revenue

C S.W.3d C, 2009 WL 1144315
(Mo.App. S.D. April 29, 2009)

Review of refusal revocation. Driver presents no evidence. Trial court sets aside sanction in that "there was absolutely no evidence that [Driver] was the operator at the time of the wreck." Southern District reverses. Court finds that LEO was dispatched to one car accident whereupon LEO finds vehicle "still hot." Vehicle was towing a trailer with an ATV on it. No one was present but a wallet was found on the dash. The identification in the wallet was the same as the registered owner who was found a short distance away behind a bar. Upon returning driver to the scene, a passing motorist asked driver if he had lost a second ATV on the highway. Driver admitted to there being a second ATV behind the first Driver was subsequently arrested for DWI and refused LEO's request that he submit to a chemical test. In reversing, the appellate court observed that there was no indication in the judgment that the trial court disbelieved any of the Director's evidence. Rather, the trial court's decision was premised upon no one having observed Driver operating the vehicle; LEO didn't know when the accident had actually occurred; and Driver did not admit to driving. The Southern District found such rationale insufficient given the testimony as to the timing of the various observations and dispatch, Driver's admissions regarding the ATV, and his close proximity to the accident.

Refusal Cases *(Continued)*

Coffin v. Director of Revenue

277 S.W.3d 865 (Mo.App. W.D. 2009)

LEO dispatched to investigate vehicle traveling wrong direction on I-70. En route LEO advised vehicle had corrected direction but then became involved in one vehicle accident. No one present at scene upon LEO's arrival. LEO determined registration and contacted owner's wife who was aware that vehicle "had been crashed." Wife advised husband wasn't home and provided LEO with spouse's cell phone number. LEO calls number and speaks with husband who denies knowledge of accident. Upon inquiry spouse states he is at home and, when confronted with wife's statement, hangs up. Two hours later second LEO finds husband about 200 feet from accident, observes signs of intoxication and arrests husband. Husband subsequently refuses chemical test and challenges refusal sanction. Trial court affirms sanction as does Western District. Driver's sole issue was whether LEO had "reasonable grounds" to believe Driver was DWI. Appellate court affirms reiterating LEO need not have personally observed Driver driving or observed evidence of intoxication at time of accident. Court distinguishes burden in refusal case from that in criminal prosecution. Court details circumstances of Driver's actions and reactions surrounding incident in sustaining sanction emphasizing Driver's lack of concern over vehicle and presence within close proximity to accident scene.

Administrative Cases

Hurt v. Director

CS.W.3d.C, 2009 WL 1241292
(Mo.App. S.D. May 7, 2009)

Driver arrested for DWI. A subsequent breath test yielded a result in excess of .080%. In a de novo proceeding, Driver argued that the presence of chewing tobacco in his mouth throughout the fifteen minute observation period invalidated the test result. The trial court agreed. On appeal, the Southern District affirms relying upon Coyle v. Director 181 S.W.3d 62 (Mo. 2006) and holding that where there is credible evidence that Driver had chewing tobacco present in the mouth during the fifteen minute observation period creates a presumption of invalidity in the test result which must be rebutted by the Director. Where the Director fails to offer such evidence in rebuttal, the test result is invalid.

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Administrative Cases *(Continued)*

Raisher v. Director of Revenue

276 S.W.3d 362 (Mo.App. W.D. 2009)

Driver arrested for DWI after LEO observed indicia of intoxication. Two evidential breath tests on the same Datamaster preformed by the same LEO within minutes of each other yielded valid results .078% and .094%.

LEO characterized the first sample as "invalid" in his report in that he believed driver failed to provide a deep lung sample of air. The trial court agreed and affirmed the Director's decision. Driver appealed and the Western District reversed.

The Appellate Court noted that in a Section 302 proceeding, the Director's burden is by a preponderance of the evidence. A preponderance of the evidence is that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it. That is, evidence which as a whole shows the fact to be proved to be more probable than not.

The Western District found LEO's testimony as to why the first reading was lower "not credible" and held that it should have been disregarded under the doctrine of "destructive contradictions." This doctrine provides "that testimony loses its probative value when it is so inherently incredible, self destructive or opposed to known physical facts on a vital point or element that reliance on the point is necessarily precluded." Here, the court found that LEO's testimony as to driver's efforts to provide a breath sample could not overcome the scientific validity attached to the first test result. Trial court judgment reversed.

Barrett v. Director

C S.W.3d C, 2009 WL 1444645
(Mo.App. E.D. May 26, 2009)

Minor stopped when LEO observed Minor's vehicle to have both its left headlamp and it rear registration lights out. Upon coming into contact with Minor LEO detected a "moderate" odor of intoxicants, bloodshot eyes and learned that Minor had consumed one beer. After various field tests, Minor was arrested and charged with the aforementioned equipment violations and being a Minor visibly intoxicated. A subsequent analysis of Minor's breath revealed a BAC of .06%. The Director administratively sanctioned Minor's privilege under '302. In a subsequent de novo proceeding the trial court reversed the sanction and reinstated Minor's privilege finding that 302.505.1 did not support the suspension "in this unique case." The Director appealed and the Eastern District

Administrative Cases *(Continued)*

reversed finding that a person less than 21 years of age is subject to suspension if that person was stopped upon probable cause to believe such person was driving while intoxicated in violation of section 577.010.

Mullen v. Director of Revenue

C S.W.3d C , 2009 WL 1585977
(Mo.App. W. D. June 9, 2009)

In this 302.500 de novo proceeding, the trial court set aside the Director's sanction finding there was no probable cause to believe that Petitioner was driving at the time of this one car accident. In its findings of fact, the trial court found amongst other things that (1) LEO did not ask driver whether or not he was operating the vehicle at the time of the accident; (2) Driver never admitted or gave any indication that he was operating the vehicle; (3) Prior to placing driver under arrest, LEO did not ask any other individuals whether or not Petitioner was driving the vehicle at the time of the accident; (4) Prior to placing driver under arrest, LEO did not undertake any effort to determine whether or not there were any other individuals involved in the accident or if there was anyone else who had been driving or occupying the overturned vehicles; and (5) Prior to placing driver under arrest, LEO was not told by any individual that Petitioner was operating the vehicle at the time of the accident.

Relying upon these expressed findings as supported in the record, the Western District recognized that as it would relate to the issue of driving that the record showed that the only information LEO possessed prior to arresting driver was that a white Ford pickup registered to a third party was lying on its top in a hayfield and that Petitioner was lying on a back board near the passenger side of the overturned truck when LEO arrived. This, the Western District held, was insufficient evidence to support a finding of probable cause. Trial court's decision affirmed.

Connelly v. Director of Revenue

C S.W. 3d C, 2009 WL 1851188 (Mo.App. E.D. 2009)

In this Section 302.500 de novo proceeding the Director relied exclusively upon her records. Driver objected to both exhibits. Exhibit A, which contained the alcohol influence report and narrative of the breath test did not include a maintenance report. The Eastern District finds that defendant's objection as to foundation and an incomplete record were sufficient to raise an issue as to whether maintenance of the breath analyzer was properly conducted.

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Administrative Cases *(Continued)*

Connelly v. Director of Revenue *(Continued)*

Exhibit B was the maintenance report. This document bore the un-notarized certification of the director and contained maintenance records of the Missouri Department of Health and Senior Services. Driver contended that the document was not properly certified because it was not notarized. Driver further argued that it lacked foundation and authentication because it was a Department of Health record that the director attempted to authenticate and claim as her own. The Eastern District disagreed finding that notarization was not required pursuant to Section 302.312. The appellate court further found, citing Coleman v. Director, 970 S.W.2nd 394 (Mo.App. S.D. 1998) that if copies of records that were lawfully filed or deposited with the Department of Health or arresting officer are furnished to the director for use in sanctioning a license, such records when properly certified are admissible under Section 302.312.

In conclusion, the Eastern District found that Exhibit B need not be notarized and was properly certified and thus admissible and thereby provided the requisite foundation for the admission of the breath test result contained in Exhibit A. The trial court's judgment was affirmed.

Roberson v. Director of Revenue

CS.W.3dC, 2009 WL 1748672 (Mo.App. W.D. 2009)

The Western District holds that a change in Section 577.029 negating the requirement of the use of a non-alcohol swab in a blood draw case is procedural and thus may be retroactively applied to an arrest made before the effective date of the amendment.

Expungement Cases

S.S v. Mitchell

C S.W.3d C, 2009 WL 1920029
(Mo.App. E.D. July 7, 2009)

The July 2005 amendment to Section 577.054 authorizes the court to expunge all records relating to an individual's arrest, plea, trial or conviction of a first alcohol related offense including records relating to a driver's administrative alcohol sanction. Upon judgment of expungements, all records relating to the expungement action, as well as the original events, are confidential.

Denial Cases

Akins v. Director of Revenue

C S.W.3dC, 2009 WL 1515118 (Mo.App. E.D. 2009)

Driver convicted of three counts of vehicular assault arising out of one accident. Director immediately revokes and thereafter denies Driver's privilege for ten years under section 302.060(9). Driver files petition for judicial review and trial court affirms. On appeal, the Eastern District affirms rejecting the Western District's opinion in Harper v. Director, 118 S.W. 3d 195 (Mo. App. W.D. 2003) where the court had considered the instances or occurrences of driving while intoxicated regardless of the number of counts in each occurrence. The Eastern District recognizing the split amongst the appellate divisions order the case transferred to the Missouri Supreme Court.

CDL Cases

Renner v. Director of Revenue

C S.W.3d C, 2009 WL1444637 (Mo.App. E.D. 2009)

Driver was arrested for driving his personal vehicle while intoxicated and received a suspended imposition of sentence. Thereafter, driver received a notice of the disqualification of his privilege to drive a commercial motor vehicle and filed a petition for judicial review. The trial court set aside the sanction and the Director appealed. The Eastern District reversed finding that a suspended imposition of sentence is a "conviction" as that term is defined in '302.700.1(8).

Public Defender's Corner

by J. Marty Robinson, State Public Defender

If at first you don't succeed, redefine what you did as "success."
~ Stephen Cobert ~

With a mix of considerable disappointment and a little expectation, we watched on July 14th as Governor Nixon vetoed SB37. While it was never presented as a "solution" to the crisis facing indigent defense in Missouri, it was nonetheless the latest culmination of years of effort. Was it a waste?

Before answering, reviewing a little history is in order.

The resources of the Missouri State Public Defender System (MSPD) have, for the most part, been stagnant for the past decade. When I say "for the most part," I'm trying to be fair.

In some of the past 10 years, state employees have received cost of living increases, (but not this year). In those years, Missouri's public defenders received the same COLA as all state employees. A few years ago, we received $1.15 million (of $10 million needed) to contract excess cases to the private Bar. This year, most of that $1.15 million is being converted to 12 new attorneys (of nearly 200 needed). However, we are tentatively scheduled to receive $2 million of federal stimulus/stabilization money, subject to the budget office's approval of our contract spending plan.

Hearing all this, and with an incomplete or biased view of the history, one might say the crisis has been and is being addressed. Not so.

We should not forget that during the same time period as these minimal increases, MSPD's budget was cut. In 2004, the legislature cut our E&E budget by $2,510,360 or 43.68%. (There is a certain amount of justice, or perhaps coincidence, in that a leader in making those cuts is now a former lawyer-legislator that has served his time in federal prison. But, that's another story.)

So, in all fairness, after considering our debits and credits over the past 10 years, we are about where we started this century when considering resources. Not so, with cases.

Sure, there are people (prosecutors) that have attempted to discredit MSPD and the very existence of a caseload crisis by questioning how we count cases. (Never mind that the same methodology of accounting has been used for nearly 30 years.) But, there is no questioning the fact that MSPD has more cases than a decade ago. For what it's worth, we've seen no indication that anyone familiar with the issue, including the Governor, takes the prosecutors' argument seriously.

We've always said the problem is one of resources.

MSPD has requested the resources it needs from the legislature, every year, for the past decade. A few would debate whether the resources were needed. More often, we were told the resources didn't exist. (Maybe you've heard. We've had some tough economic times and tight state budgets.) In the absence of resources, we were told to "think outside the box" and do something other than simply ask for money which they don't have (and might not give anyway). So, we got out of our box.

- 2005, the Missouri Bar formed a Task Force to study the State Public Defender.
- 2006, the Missouri Senate assigned an Interim Committee to study the State Public Defender.
- 2007, the Missouri Supreme Court formed a Committee to study and propose a Court Rule to limit public defender case-loads. (Rejected by trial judiciary.)
- 2008, the State Public Defender Commission passed a State Rule (CSR) to limit public defender caseloads. (Validity pending in the appellate courts.)
- 2009, the Missouri Legislature overwhelmingly passes SB37 to limit public defender caseloads. (Vetoed, July 14, 2009)

Significant today is the Governor's veto message. (As we say in the Ozarks), Boiled down to gravy, the problem is one of resources. Now, where have we heard that before?

I guess we're now to get back in our box. We're to go back to our old model, requesting and competing for limited state resources in a time of tough economic conditions and tight state budgets. Our ten-year loop is now complete. But, are the conditions the same as a decade ago? Not so.

At the risk of being found out as a citizen of the "Cobert Nation," let me attempt to define what's different today than in past years.

For one thing, I think it's fair to say the State Public Defender has attempted numerous, if not every reasonable, outside-the-box remedy to a crisis the most right-minded people agree exists. For years, we've chased this thing down the

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rabbit holes of Court Rules, State Rules, and legislation, only to be told the solution lies in resources that we've been denied years earlier. But, look at who now says so. The Governor.

The veto of SB37 was a matter of policy. It was not the "solution." Again, it's resources. Time will tell if the policy arm of the executive has written a check the budget arm of state government can't (or won't) cash. Let's hope not.

For another thing, I think it's fair to say an age of "political entitlement" has come to an end. For years, the so-called law enforcement arm of the criminal justice system has seemed to have its way in Jefferson City. Judging from some reactions and a downright dishonest campaign, they seem very threatened by the notion that the State Public Defender has any amount of influence in the Capitol. One legislator noted how for years he had given the prosecutors everything they wanted. But, the first time he support the PDs, they threw him under the bus. I suppose doing that makes sense if you have, or think you have, political capital to burn. Still, it's not very nice.

Finally, I think it's fair to say the journey itself had value. By completing this ten-year loop, the State Public Defender System is in a far different position than in the past, especially if we're now sent on another loop or down more rabbit holes. We've tried the outside-the-box ideas, only to be told we were in the right box all along. It seems, having exhausted all alternative remedies, the only remedy left is more resources.

Without a question, far from a waste of time, this has been a long and extremely successful campaign. It has changed how the public, press, Bar, elected officials, and even Public Defenders look at the state of affairs in Missouri criminal justice system and policy.

Now, to build on that success ...

2009 MACDL Award Winners

The Missouri Association of Criminal Defense Lawyers recognizes outstanding service and performance by dedicated criminal defense attorneys. This year's winners were awarded at MACDL's Annual Meeting in April.

Charles Shaw Award
Molly Hastings

Lew Kollias Awards
Michael Byrne
Karen Kraft

Robert Duncan Award
Kathleen Webber
Ellen Flottman

Benjamin N. Cardozo Award
Judge Richard Callahan

Atticus Finch
Joe Luby

Bernard Edleman Tradition Award
Carl Ward

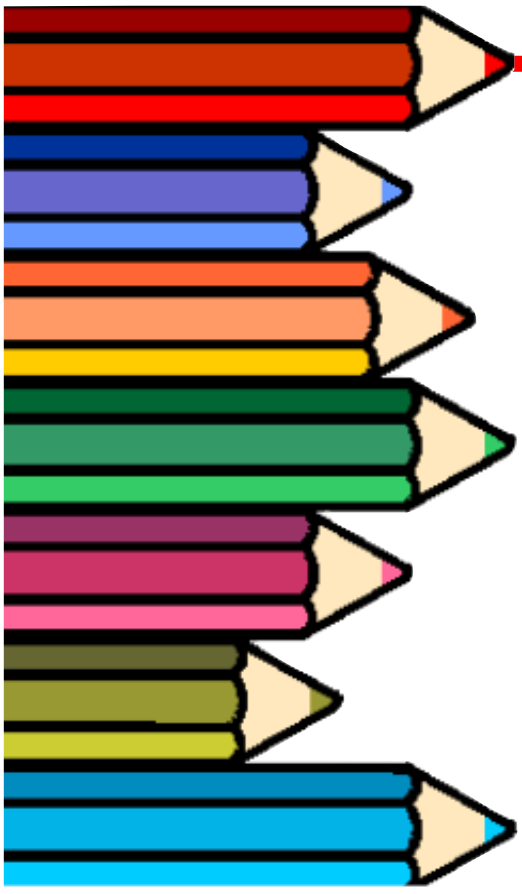
Lifetime Members Awards
Dan Dodson
Joseph Passanise

President's Award
Dean Price

For more information on MACDL's awards, including how to nominate an attorney please visit our website's (www.macdl.net) awards page.

The Awards Committee would like the membership's input for potential recipients for 2010 MACDL Awards. To submit nominations for the various MACDLAwards, please provide name, mailing address, phone number, intended MACDL Award and pertinent case information. Send this information, in an electronic format to: Brian Gaddy (bgaddy@ggbtrial.com) prior to January 4th, 2010.

Missouri Association of Criminal Defense Lawyers
P.O. Box 1543
Jefferson City, MO 65102
www.macdl.net



Mark Your Calendar Today!

MACDL 2010 Meeting Schedule

April 29 - May 1, 2010
MACDL Annual Meeting & Spring CLE
Branson Convention Center
Branson, MO

July 23-24, 2010
Bernard Edelman DWI Defense Institute
Lodge of Four Seasons
Lake Ozark, MO

October 22, 2010
MACDL Fall CLE
Location TBD