

Spring, 2009

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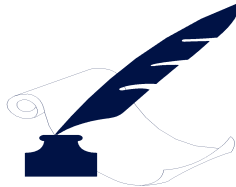
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The MACDL Newsletter is a semi-annual publication of the

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Your comments and suggestions
are welcome!



MACDL President's Letter

by S. Dean Price

As my tenure as President begins to wind down, it strikes me how active and passionate the membership and the Board of Directors of MACDL continues to be. MACDL has identified many pieces of legislation that need to be lobbied and testified against, and several more that need to be vociferously supported. MACDL has been instrumental in assisting with the move to expand the Missouri Plan to Greene County and in drafting and suggesting legislation to institute and expand the rights of citizens to have prior convictions expunged.

It has been a very busy and productive year.

At present, a serious move is afoot to revise the current Criminal Code in Missouri. Members of our organization are serving on the committee and speaking up for practical and sane answers to thorny questions. Should you desire to assist in this effort, the first step is becoming active in the Criminal Law Committee of the Missouri Bar. At present, criminal defense attorneys and the interests of the innocent accused are under-represented on this important committee. Please consider becoming active.

In the ten months that I have had the honor and privilege to serve as President of MACDL, I have often been asked: "What can I do to help?" First, look to the committees of the Missouri Bar. Second, come to

the Annual Meeting in April being held in Branson this year. There will be MACDL committee reports from our active committees touching on everything from legislative issues to acting as a Strike Force for lawyers under attack to writing Amicus briefs on important issues to arranging our second-to-none CLE programs. These MACDL committees are not just for Board Members, but are for you. Come to the next Board Meeting and see what MACDL does where the rubber meets the road. Become an active part of it.

It is with mixed emotions that I pen this note. It has been a humbling and enjoyable experience this year watching MACDL grow and begin to reach into law schools to begin mentoring students that may one day become our colleagues. It has been exciting and instructive to attend our seminar programs and work diligently to overhaul our CLE offerings to best serve our members. On the other hand, it is coming to an end. I will miss the fellowship and time spent with the members and the Board of Directors. How fortunate I am to feel the same as the optimistic orphan from the Broadway show "Annie." She continued to stay bright and positive even in the moment of farewell by saying: "How lucky I am to have something that makes saying goodbye so hard."

See you in Branson.

MACDL 2009 Meeting Schedule

April 17-18, 2009

MACDL Annual Meeting & Spring CLE

Branson Convention Center • Branson, MO

July 24-25, 2009

Bernard Edelman DWI Defense Institute

Lodge of Four Seasons • Lake Ozark, MO

October 23, 2009

MACDL Fall CLE

St. Louis • Location TBD



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2009 Legislative Update

by Brian Bernskoetter



The First Session of the 95th General Assembly began on January 7th with the swearing in of 43 new Representatives and five new Senators. There have been over 1,075 bills filed during this legislative session which is around 15% fewer than the number that had been filed at this time last session.

The leaders of the House and Senate, along with the Governor, have made job creation a number one priority this year and thus far the Legislature has focused most of its efforts on job creation initiatives and tackling the tough budgetary constraints the state is facing. Listed below are the Priority Bills MACDL is tracking.

MACDL: Pro

HB 146 Hughes - Authorizes the expungement of certain criminal records including convictions for any nonviolent crime, misdemeanor, or nonviolent drug violation.

HB 235 Jones (89) - Removes the expiration date for the Statewide Court Automation Fund and allows the fee to be collected and the fund to function indefinitely.

HB 330 Bruns - Allows courts to impose continuous alcohol monitoring or verifiable breath alcohol testing for certain offenders of alcohol-related offenses.

HB 484 Deeken - Establishes the Commission on the Death Penalty and places a moratorium on all executions until January 1, 2012.

SB 27 Goodman - Modifies provisions relating to the public defender system.

MACDL: Against

HB 33 Sater - Requires the State Highway Patrol to create, maintain, and make available for public inquiry on the Internet a registry of persons convicted of certain drug offenses.

HB 62 Lipke - Changes the laws regarding crime prevention.

HB 63 Lipke - Increases the penalty for the crime of resisting or interfering with an arrest, detention, or stop from a class D felony to a class C felony.

HB 152 Ruestman - Expands the DNA profiling system by requiring any person 17 years of age or older who is arrested for a felony to provide a biological sample for the purpose of DNA profiling analysis.

HB 317 Lipke - Specifies that no defendant in a criminal case is entitled to compel the examination of a witness who is younger than 14 years of age.

HB 351 Parkinson - Requires any person who is found guilty of or pleads guilty or nolo contendere to a felony in this state on or after August 28, 2009, to serve a minimum prison term of 85% of his or her court sentence.

HJR 10 Cox - Proposes a constitutional amendment increasing the number of Governor-appointed citizens serving on the Appellate Judicial Commission and the number of candidates nominated for vacancies.

SB 30 Stouffer - Requires certain motorists who have had their driver's licenses suspended or revoked to display restricted license plates.

SB 46 Schaefer - Requires any person who pleads guilty to or is found guilty of a felony on or after August 28, 2009, to serve a minimum prison term of eighty-five percent of his or her sentence.

“Legislative Update” >p3

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://macdl.net/bridge.asp?pagenumber=48744>.

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
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St. Louis, MO 63105
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Legislative Update *(Continued from page 2)*

SB 180 *Bartle* - Specifies that knowledge of one's location is not necessary to commit certain criminal acts.

SJR 9 *Lembke* - Proposes constitutional amendments modifying the procedures for selection of nonpartisan judges and provisions relating to judicial commissions.

MACDL: No Position

HB 589 *Talbot* - Requires any criminal justice entity that conducts eyewitness identification procedures to adopt written policies for using an eyewitness to identify a suspect.

SB 8 *Champion* - Creates a "Crime Laboratory Review Commission" to independently review the operations of crime laboratories in the state of Missouri that receive state-administered funding.

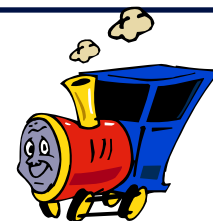
SB 36 *Goodman* - Modifies provisions relating to sexual offenses against children.

SB 310 *Bartle* - Requires custodial interrogations of persons suspected of certain serious offenses to be recorded.

SB 312 *Goodman* - Repeals the current procedures regarding criminal activity forfeiture actions and establishes new procedures.

Welcome Aboard!

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



Andrew Hale • Clayton	Stephan Bell • Fulton
Frank Tolen • Carthage	Jennifer Bukowsky • Columbia
William Tucker • St. Louis	Quinn Grimes • Clayton
Steve Geeding • Pineville	Jessica Hathaway • St. Louis
Charles Genisio • Joplin	Theresa Lininger-Morman • Kansas City
Wood Investigative Services • Springfield	Janeal Matheson • Liberty
James Feely, Jr. • St. Louis	Kevin O'Brien • Columbia
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Thomas Carnes • St. Louis	Mike Stanfield • Springfield
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Jason Ludwig • Jefferson City	David Brengle • Jackson
Joseph Luby • Kansas City	Charles Billings • St. Louis
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Steven Majors • N. Kansas City	Daniel Bruntrager • St. Louis
Kay Evans • Columbia	John Gromowsky • Kansas City
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Zachary Rennick • Washington	Sue Kathleen Webber • Kansas City
Christopher Angles • Kansas City	W. Michael Hamilton • Columbia
Duane Randle • Camdenton	Jenny R. Young • Columbia
Caterina Ditriaglia • St. Louis	Anita K. Oakes • Joplin
Tim Mudd • Kansas City	Joel Harris • Ozark
Laura O'Sullivan • Clayton	Thomas R.B. Ellis • Columbia
Monique Abby • St. Louis	Patrick Sullivan • Chillicothe

*MACDL would like to thank
our 2008 Fall CLE Sponsors:*

*Thank
you*

The Bar Plan

Wood Investigative Services

Interlock of St. Louis, Inc.



**Building a Better
MACDL Web Site
... Take a Look!**

Over the next few weeks, MACDL's web site will be upgraded with new and improved features, including:

- a member populated motion bank;
- online commerce;
- the ability to pay dues online and to set them up on a recurring basis; and
- the ability to register and pay for CLE's online.

We will also be incorporating an interactive legislative feature that will allow a faster, more convenient way to communicate with your Representative or Senator on key issues. We have made improvements to our "Contact Us" page so we can better handle your inquiries.

We invite you to visit our site, www.MACDL.net, and get familiar with all these new features and to interact with your fellow MACDL members via our new chat conference.

MACDL Web Traffic Report

Activity Summary (10/20/08 - 2/26/09)

Total Visitors	10,580
Average Visitors per Day	80
Total Unique Visitors	2,431



**We're Looking
for the Best!!**

The Missouri Association of Criminal Defense Lawyers (MACDL) recognizes outstanding service and performance by dedicated criminal defense attorneys.

Some of our awards are divided into the various areas of the state. Not all awards are given each year. The award ceremony takes place at MACDL's Annual Meeting typically held in April of each year.

**If You Know One ...
Nominate Him/Her!**

Please take the time to nominate outstanding criminal defense attorneys that you know, see and work with throughout the state. For more information on MACDL's awards including how to nominate an attorney please visit our website's (www.macdl.net) Awards page.



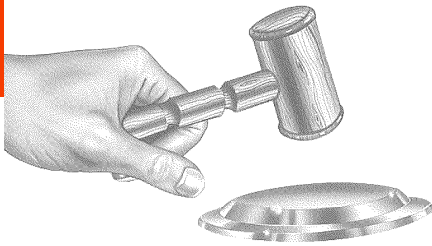
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Top Ten Federal Decisions

by Bruce C. Houdek



U.S. v. Spikes 543 F.3d 1021 (8th Cir. 2008).

Imposition of a fine only and deferred prosecution do not constitute a "criminal justice sentence" under the Federal Sentencing Guidelines for the purpose of increasing the defendant's criminal history points.

U.S. v. Pierson 544 F.3d 933 (8th Cir. 2008).

Admission of a 20-year old conviction pursuant to Fed. R. Evid. 404(b) is not error where the defendant opened the door while testifying offering related favorable evidence.

U.S. v. Foxx 544 F.3d 943 (8th Cir. 2008).

When calculating a drug conspiracy defendant's sentence under the guidelines the Court may consider drugs distributed by the conspiracy prior to his joinder when such distribution was reasonably foreseeable to him.

U.S. v. Webb 545 F.3d 673 (8th Cir.).

The Court in calculating a drug defendant's sentence may rely on drug amounts that exceed the amount alleged in the indictment if the higher amount is proven by a preponderance of evidence.

U.S. v. Street 548 F.3d 618 (8th Cir.).

The Eighth Circuit reversed the admissibility of expert testimony concerning the lawlessness of a motor cycle gang where there was no evidence that the defendant was a member.

U.S. v. Williams 537 F.3d 969 (8th Cir. 2008).

For the purpose of determining whether or not a defendant is an armed career criminal pursuant to 18 U.S.C. § 924 (e) Missouri conviction for auto theft is not a crime of violence unless it is theft by coercion.

Larson v. U.S. 2008 WL 5397757.

Defendant plead guilty and cooperated with the government in other cases. The government denied his request to file a

motion for downward departure pursuant to United States Sentencing Guideline § 5K.1. The Court held that the motion can only be considered by the District Court if there is a substantial threshold showing by the defendant of unconstitutional conduct or motivation by bad faith on the part of the US Attorney's Office. The opinion suggests that information provided prior to a plea agreement or cooperation agreement cannot be considered.

U.S. v Fisher __F.3d__ 2008 WL 5351907.

The Court denied the defendant's request for a two-level acceptance of responsibility deduction pursuant to United States Sentencing Guideline §3E1.1(a). The defendant has the burden to establish that he has demonstrated acceptance of responsibility and the Court may consider aspects of the defendant's conduct beyond the mere fact of a guilty plea. The Court found that the defendant had waited until the day before trial to enter his plea

and the Court could consider the timeliness of his conduct, could also consider that he had attempted to minimize his offense conduct, made false denials, and frivolously objected to relevant conduct and affirmed the finding that he had failed to carry his burden of demonstration of entitlement to the reduction.

Rothgry v. Gillespie County 128 S. Ct. 2578 (2008).

Supreme Court held that the defendant's initial appearance before a judicial officer, where he is informed of the charges against him and his liberty is subject to restriction constitutes the commencement of adversary judicial proceedings, which trigger his Sixth Amendment right to counsel.

Watson v. U.S. 128 S. Ct. 579 (2007).

A person does not use a firearm in relation to a drug offense in violation of 18 U.S.C. § 924 (c) where he trades drugs for the firearm.



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Federal and State Tax Filings/Liens

Insurance Fraud Investigations

Jury Consultation (fast turnaround)

Pre-deposition Interviews

Place of Employment Locate Investigations

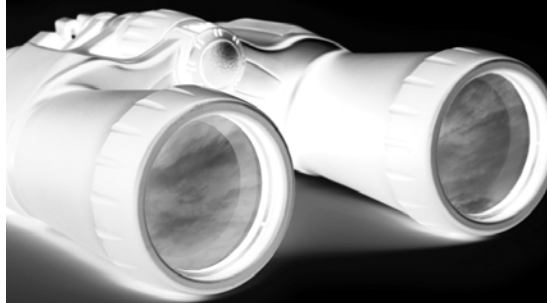
Real Estate Property Investigations

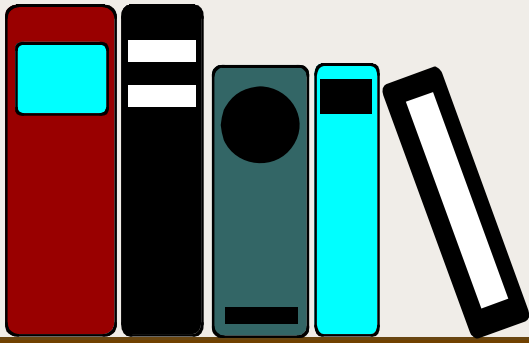
Surveillance (Local and Nationwide)

Telephone Record Research

Vehicle License Plate Research

Worker's Compensation Investigations





The Brass Verdict

Author: Michael Connelly; Review by Scott Hamilton

Michael Connelly released two books in 2005, The Lincoln Lawyer and The Closers. First, The Closers featured his long time hero, Los Angeles police detective Harry Bosch.

In the second novel, Michael Haller is a skilled lawyer with a problematic life. Michael's car is his office as he tells his driver, "I haven't had an office since I left the Public Defenders Office twelve years ago. My car is my office. I've got two other Lincolns just like this one. I keep them in rotation. Each one's got a printer, a fax and I've got a wireless card in my computer. Anything I have to do in an office I can do back here while I'm on the road to the next place. There are more than forty courthouses spread across L.A. County. Being mobile is the best way to do business."

In The Brass Verdict, he merges his two characters into one compelling legal thriller. While Connelly's novel touches on many of the important legal topics of the day, the story is purely an entertaining legal thriller. There is no preaching here. Characters rule this novel.

Coming off The Lincoln Lawyer, Michael Haller has taken a self imposed lay-off from the law. During his time off, healing from the gun shoots from his last trial, he found himself addicted to pain pills. He has decided to ease back into the practice by taking only a few cases. However, Jerry Vincent a former Prosecutor and

friend is killed and Connelly inherits his cases. Most of them are dogs but one is a rainmaker.

Walter Elliot is a high powered studio executive. Walter Elliot is accused of killing his wife. That is where Harry Bosh comes in to play. Bosch wants to see Vincent's past and present files because he believes the murderer was a client, but Mickey refuses to release the information that would violate lawyer/client privileges.

Bosch has 33 years on the force and is "a man on a mission" to seek justice wherever he can find it. He's a tough cop and an honest one, and there are angry sparks between him and Mickey from the moment they first meet. Mickey would just as soon have nothing to do with Harry. The deeper both men dig into Vincent's past, the more suspicions are raised.

The real fun in this story is guessing at what is coming next. Are you right or wrong? More often than not your wrong, but should have known better. As the pieces come together and this novel wraps up with a trial, each of the characters are brought back together to tie all of the story lines and subplots to a satisfying conclusion. The novel reads easy and plot lines are well developed. This book is easy to recommend.

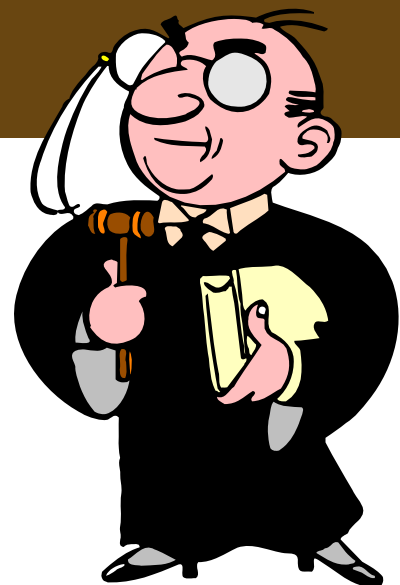
Smulls v Roper Amicus Brief

by Charles Rogers

MACDL filed an amicus brief in support of Herbert Smulls' certiorari petition in the U.S. Supreme Court. Smulls was convicted and sentenced to death by an all white jury in St. Louis County after the prosecutor used a peremptory strike to exclude the only African American venire person.

A panel of the Eighth Circuit ruled in Smulls' favor on the Batson claim in his deferential habeas corpus case, but the Eighth Circuit in bank reversed that decision and denied relief.

The MACDL amicus brief, which is available at www.MACDL.net, focused on the history of giving pretextual reasons for peremptory strikes of minority jurors by members of the St. Louis County prosecutor's office. Joe Luby of the Public Interest Litigation Clinic in Kansas City authored the brief.





DWI and Traffic Law Update

by Jeff Eastman

Dorsey v. Wilson

263 S.W.3d 790 (Mo.App. E.D., September 16, 2008)

Writ of Mandamus proceeding. Relator challenged his continued incarceration after having successfully completed the ITC program. Writ made permanent. The Eastern District holds that Section 559.115.3 requires that one be released on probation upon successful completion unless the trial court finds "such release constitutes an abuse of discretion."

By statute, a finding of abuse of discretion may only be made after conducting a hearing on the matter within ninety to one hundred and twenty days of the offender's sentence. Since no timely hearing was held, Relator ordered release.

Rozier v. Director of Revenue

--- S.W.3d ---, 2008 WL 4388191, Mo.App. W.D., September 30, 2008 (NO. WD68534)

Although driver challenged arresting officer's decision to arrest, in cross-examination she failed to contest the accuracy of a video which recounted her appearance, responses to questions and performance on both the walk and turn and one leg stand tests. The arresting officer's uncertainty as to probable cause immaterial as evidence is to be viewed from the perspective of a prudent, cautious and trained police officer. Judgment in favor of driver reversed.

Smith v. Director of Revenue

260 S.W.3d 896 (Mo.App. S.D. August 27, 2008)

Driver arrested for DWI, given the Implied Consent Advisory and asked to submit to a breath test. His efforts resulted in a print out of "invalid sample." Conflicting evidence was offered as to cause of "invalid sample" readout. LEO then asked driver to submit to a blood test which driver refused. Driver was thereafter served with a notice of revocation.

The trial court affirmed the revocation and driver appealed. Southern District affirms noting that regardless of the cause of the "invalid sample" reading, LEO had the right to request a second test. Since the second test was requested and refused, the trial court properly affirmed the revocation.

This opinion also reaffirms that LEO need not reread the Implied Consent Advisory before asking for a second chemical test.

Krieger v. Director of Revenue

266 S.W.3d 316 (Mo.App. W.D. 2008)

In a 302.500 de novo proceeding, driver argued that he rebutted the Director's prima facie case with evidence that his BAC was less than .08% at the time of stop. The trial court agreed and set aside his suspension.

The Director appealed arguing the trial court erred in admitting an expert's metabolic curve calculations. Specifically, the Director argued that the driver's representations as to his history of alcohol consumption were not "facts and data otherwise reasonably reliable" as required by Section 490.065.3 in that driver's statements to the expert and when testifying differed from driver's representations to the arresting officer.

The Western District affirms. Issues as to the driver's credibility as to consumption history are matters entrusted to the sound and discretion of the trial court which will not be reversed on appeal.

Miller v. Director of Revenue

268 S.W.3d 407 (Mo.App. W.D., August 05, 2008)

Driver challenged ten year denial of license for three or more DWI convictions. In a trial court proceeding, Director offered a certified copy of its file containing records from the State of Iowa. The appellate court found such records sufficient to meet the Director's burden of production.

Appellate Court held that burden of persuasion then shifted to driver to show that the facts that reportedly were established by the administrative record were not true or that the grounds for the suspension were unlawful, unconstitutional or otherwise insufficient under Section 536.150.

Since driver offered no evidence, he failed to carry his burden of persuasion. Counsel's arguments as to the sufficiency of the administrative record were resolved by referencing the Iowa Code and a close examination of the records themselves. Judgment reversed.

Swan v. Vincent

268 S.W.3d 422 (Mo.App. W.D., August 05, 2008)

Minor involved in a one car accident. Upon LEO's arrival he observed evidence commonly associated with alcohol impairment. Due to minor's condition no FST's were administered. LEO accompanied minor to hospital where he requested a blood test. The minor refused and was issued a notice of revocation of his driver's license.

www.MACDL.net

"DWI and Traffic Law Update" >p8

In a Section 577.041 challenge, the trial court reversed the Director's decision. In an oral pronouncement from the bench, the trial court found that as to individuals under 21, there must be evidence of a stop with reasonable grounds that minor's BAC exceeded .02%. Here, the trial court found there was no evidence sufficient to find that an arrest had been made. In a subsequent written judgment, the trial court stated that "Petitioner was under the age of 21 years old and that Respondent presented no evidence that the police officer had reasonable grounds to believe, after stopping Petitioner, that Petitioner has a BAC of .02% or greater."

The Director appealed and challenged both findings. The Western District reversed. As to the oral pronouncement, the appellate court found that the officer's actions in accompanying the minor in the ambulance, the driver being strapped in route and remaining with him at the hospital were sufficient to constitute a stop. As to the written judgment, the appellate court found ample evidence of reasonable suspicion that the minor had a BAC of .02% or more when considering the manner in which he drove, the presence of alcohol containers at the scene, the odor on his breath, the condition of his eyes and his uncooperative behavior. The trial court's judgment was thereafter reversed.

State v. Karl

--- S.W.3d ----, 2008 WL 5130118, Mo.App. W.D., December 09, 2008 (NO. WD68855)

Defendant found guilty after trial by jury of driving while intoxicated. On appeal he argued that the State presented insufficient evidence to convict beyond a reasonable doubt. The Western District affirms finding sufficient evidence in the record for which a reasonable juror could conclude that State met its burden as to each element.

The Western District reaffirms that it accepts as true all evidence favorable to State including all favorable inferences drawn from the evidence and disregards all evidence and inferences to the contrary. Here, State's witnesses testimony as to indicia of intoxication and observations of driving close in time to one car accident sufficient to sustain State's burden. The Court disregards defendant's witness's testimony as "unfavorable to the state."

Rugg v. Director of Revenue

--- S.W.3d ----, 2008 WL 5145377, Mo.App. E.D., November 18, 2008 (NO. ED90855)

In this trial de novo proceeding, the Director's evidence consisted solely of records. Petitioner testified but did not controvert many of the "facts" contained within the Director's file. The trial court found no probable cause. Director appealed. In reversing the trial court's decision, the Eastern District emphasizes the trial court made no finding that the arresting officer's statements were "incredible" and held that on appeal, it would not affirm on the presumption that the trial court did so.

Citing *Brown v. Director of Revenue* for the proposition "when the evidence supporting revocation is uncontroverted and the trial

court has not specifically found the Director's witness incredible, appellate courts will not presume that a trial judge found a lack of credibility and will not affirm on that basis." The Court distinguishes the instant proceeding from those cases wherein the Director's records were inherently contradictory which provided a sufficient basis for the trial court to set aside the administrative sanction.

State v. Severe

--- S.W.3d ----, 2008 WL 4976221, Mo.App. W.D., November 25, 2008 (NO. WD69162)

In a post-*Turner* decision, the Western District holds that the State may not offer new or additional evidence on remand in an effort to establish a Defendant's enhanced offender status. To do so would violate the expressed timing elements of Section 577.023.8 and Supreme Court's interpretation of similar language in *State v. Emery*, 95 S.W. 3d 98 (Mo. banc 2003).

See also *Bizzell v. State*, 265 S.W. 3d 892, wherein a *Turner* issue occasioned a remand with instructions to the trial court to allow the State to present other evidence to establish Defendant's persistent offender status. Please note in *Bizzell* the issue as to the propriety of offering additional evidence appears not to have been raised in the appellate proceeding.

State v. Gaw

--- S.W.3d ----, 2008 WL 4823595, Mo.App. S.D., November 07, 2008 (NO. SD 28715)

Defendant involved in one car accident. When LEO arrived, defendant was outside the vehicle. LEO observed indicia of intoxication and detected an odor of burnt marijuana on defendant. When asked, defendant gave LEO a small baggie which LEO believed to be marijuana. In a subsequent pat down, LEO found paraphernalia in defendant's pocket.

Defendant was arrested for possession of marijuana. After a positive PBT, LEO asked defendant who was driving to which Defendant replied it was either his girlfriend or a friend of hers. According to LEO, defendant later in the investigation admitted being the driver.

Defendant's motion to suppress was denied. In a bench trial defendant was found guilty. On appeal, he alleged that the trial court erred in admitting his statements as to who was driving in that he had been subjected to a custodial interrogation without having been advised of his Miranda rights. The Southern District agreed.

After defendant's arrest for possession, LEO inquired as to who was driving. According to LEO, on this latter occasion, defendant admitted he was the driver. Defendant had not been Mirandized prior to this admission. The State concedes and the Southern District held that defendant's Miranda rights were violated by the initial series of questions asked after defendant's arrest for possession, questions which resulted in defendant's admission to driving.

However, the State argued that defendant’s post Miranda statements rendered the earlier violation harmless. The Southern District disagreed. This appellate court found that the same LEO conducted both the pre and post *Miranda* interrogations while exercising continued control over defendant. The Court further found that the content of defendant’s statements “sufficiently overlap to be considered as responses to a continuous line of inquiry.” It was thus error to admit LEO’s testimony to defendant’s admissions of driving. Cause remanded for new trial.

State ex. rel Moore v. Brown

--- S.W.3d ----, 2008 WL 4949305, Mo.App. S.D., 2008., November 19, 2008

After an Alford plea, defendant was sentenced to sixty days in jail with the execution thereof suspended. Within ten days of defendant’s sentence, she moved to set aside her plea and/or in the alternative to be re-sentenced. During the hearing on her motion, she withdrew her request to her Alford plea electing to proceed on her alternative motion for re-sentencing on the basis that manifest injustice occurred. Over the State’s objection, an Amended Judgment was thereafter entered which, amongst other things, converted her sentence from an SES to an SIS.

In a Writ of Mandamus proceeding, the State challenged the trial court’s authority to set aside the original judgment. The Southern District observed that the trial court claimed that Rule 29.07(d) gave it the inherent authority to re-sentence. The Southern District disagreed. While Rule 29.07 allows a trial court to set aside a judgment and permit a Defendant to withdraw her guilty plea, this defendant expressly withdrew her request to withdraw her guilty plea. Since the defendant did not pursue the withdrawal of her plea, Rule 29.07(d) not apply and the trial court lacked authority to re-sentence. Writ made permanent.

State v. Craig

--- S.W.3d ----, 2008 WL 4700966, Mo.App. W.D., October 28, 2008 (NO. WD68570)

In a “hybrid” proceeding, defendant plead guilty to the class B misdemeanor of DWI but did not admit that the three prior offenses listed in the Information were sufficient to prove his aggravated offender status. He moved to dismiss the felony information arguing that the prior pleas relied upon were not knowingly, voluntarily and intelligently made as required by Supreme Court Rules and that as to one prior conviction there was neither a record of his guilty plea or a finding of guilt.

The trial court denied the motion and sentenced defendant as an aggravated offender. defendant filed a direct appeal.

After a *sua sponte* review of jurisdiction, the Western District dismissed the appeal noting that the only issues cognizable on a direct appeal from a guilty plea are subject matter jurisdiction of the trial court and the sufficiency of the charging information. Since defendant’s appeal was predicated upon neither, his appeal was dismissed.

Coleman v. Missouri State Criminal Records Repository

268 S.W.3d 464, Mo.App. E.D., October 28, 2008 (NO. ED 90823)

In 1964 Petitioner was arrested for and subsequently convicted of stealing. In 2007, at age 68, she sought expungement of her arrest records so as to expand her charitable volunteer efforts to a local homeless shelter.

During the expungement proceeding, Petitioner testified that she probably committed the charged crime and believed that she had plead guilty to the same.

In granting her requested relief, the trial court found, amongst other things, that Petitioner’s arrest was based on false information and that there was no probable cause at the time of the action to expunge to believe that Petitioner had committed the charged offense.

In reversing the trial court’s decision, the Eastern District found that Petitioner had failed to satisfy at least two of the statutory requirements, to wit: that her arrest was based upon false information and that there was no probable cause at the time of the expungement action to believe that Petitioner had committed the offense.

The Court noted that not only did Petitioner acknowledge the prior finding of guilt, she also admitted to having committed the subject offense. Petitioner was therefore not entitled to request expungement.

The trial court also found that application of the expungement statute to the present facts was inconsistent with the legislature’s intent. While the appellate court agreed, it recognized that a court could not go beyond the plain and ordinary meaning of the words in the statute which deprive a court of the equitable power to close and expunge arrest records. Judgment reversed.

See also *Martin v. Missouri State Criminal Records Repository and Missouri State Highway Patrol*, 267 S.W. 3d 808 (Mo.App. E.D. 2008) wherein the Court held that where sentences imposed, a conviction results thus disqualifying applicant for expungement.

Smith v. State

267 S.W.3d 829 (Mo.App. E.D., October 28, 2008)

Petitioner sought expungement of his arrest record. The State consented to the requested relief but then appealed the trial court’s judgment citing as error the absence of a hearing on the record.

In affirming the trial court’s judgment, the Eastern District observed that a hearing on the record is required by both Section 512.180.2 and *Sellenriek v. Director*, 826 S.W. 2d 338 (Mo. 1992). However, the State failed to establish that the hearing was not recorded through documentation in the legal file or an affidavit from the circuit clerk or court reporter. The court also noted

that the State failed to set forth what error the trial court committed or how the state was prejudiced by the unavailability of a transcript and the trial court’s ruling. Judgment affirmed.

Pruessner v. Director of Revenue

--- S.W.3d ----, 2008 WL 5454216 (Mo.App. E.D., December 16, 2008)

Trial court set aside administrative license sanction under 302.500 et seq. finding neither probable cause nor a BAC in excess of .080%. The Eastern District reversed. Appellate Court finds that officer’s observation of lane weaving and speed observations coupled with an odor, admission of consumption, watery and glassy eyes as well as poor performance on the alphabet test and a positive PBT were sufficient to establish probable cause.

Driver’s paraplegic condition prohibited administration of walk and turn and one leg stand test. However, the inability to administer either procedure did not preclude a probable cause finding as probable cause may exist even in their absence.

Driver’s challenge to the BAC result likewise rejected when driver offered no evidence to rebut Director’s prima facie case. Driver offered no evidence in support of driver’s argument that there was no 15 minute observation period or that proscribed conduct had occurred within the observation time frame.

Hollon v. Director of Revenue

--- S.W.3d ----, 2008 WL 5130107, Mo.App. W.D., December 09, 2008

Refusal proceeding. Western District holds that evidence of speed, admission of consumption, odor, and glassy and watery eyes were facts “sufficient” for officer to “suspect” that driver may have been driving while intoxicated and “justified” administering PBT under Section 577.021.

Western District rejects trial court’s expressed finding to PBT unreliability. Trial court’s stated reason for rejecting PBT not supported by the record. Although trial court found driver had not been observed for the minimum 15 minute deprivation period, Western District disagreed. Video evidence confirmed driver’s representation that he last consumed alcohol a distance of 42 miles from point of stop. From such evidence, there was no basis for the trial court to have found that the officer had failed to comply with requisite deprivation. Judgment reversed.

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MACDL 2009 Annual Meeting Agenda

Friday, April 17, 2009

8:30 a.m. - 9:00 a.m.

Registration/Breakfast

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

"Winning in the Real World — Talking to Prosecutors & Judges"

Speaker: J.R. Hobbs, Kansas City, MO

10:15 a.m. - 10:30 a.m.

Break

10:30 a.m. - 11:30 a.m.

"Winning is Hard Work"

Speaker: Rob Russell, Sedalia, MO

11:30 a.m. - 1:15 p.m.

Lunch — Awards Presentation

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

Title – TBD

Speaker: Scott Rosenblum, St. Louis, MO

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

*"When Winning is ...
Pre-Trial Motions that Matter"*

Speaker: Dee Wampler, Springfield, MO

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

Break

3:30 p.m. - 5:00 p.m.

*"When Winning is...
Effectively Persuading the Judge to Your Side"*

Judge's Panel

Missouri Supreme Court Judge Zel Fischer

Circuit Court Judge Jacqueline Cook
Cass & Jackson

Circuit Court Judge Charlie Atwell
Jackson

Circuit Court Judge John Moody
Wright, Douglas & Ozark

Saturday, April 18, 2009

8:00 a.m.

Breakfast

8:15 a.m. - 8:45 a.m.

MACDL Membership Meeting

8:45 a.m. - 9:00 a.m.

Legislative Update

Speaker: Randy Scherr, MACDL Executive Director

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

*"When Winning is ...
Sticking to the Basics"*

Speaker: Dean Price, Springfield, MO

10:15 a.m. - 10:30 a.m.

Break

10:30 a.m. - 12:00 p.m.

*"When Winning is ...
Suppressing Statements & Evidence"*

Speaker: Dan Birdsong, Rolla, MO

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