

No. SC90585

*In the
Supreme Court of Missouri*

DAMON FELDHAUS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit, Division Seven
The Honorable Daniel Pelikan, Judge**

RESPONDENT'S BRIEF

**CHRIS KOSTER
Attorney General**

**ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Jeff.Bartholomew@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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JURISDICTIONAL STATEMENT

Appellant appeals the denial of his amended motion to vacate, set aside, or correct judgment and sentence pursuant to Rule 24.035, filed in the Circuit Court of St. Charles County. Appellant sought to set aside his guilty pleas and convictions for two counts of driving while intoxicated (chronic offender), § 577.010, RSMo¹ and § 577.023, RSMo, for which he was sentenced to two concurrent sentences of eight years imprisonment.

Because Appellant challenges the constitutional validity of a Missouri statute, this Court has exclusive jurisdiction. MO. CONST. art. V, § 3.

¹All statutory references are to Revised Statutes of Missouri 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

Appellant was charged in the Circuit Court of St. Charles County as a prior and persistent offender with two counts of driving while intoxicated (chronic offender). (L.F. 5-6, 23-24).

On May 7, 2008, Appellant appeared in the Circuit Court of St. Charles County to enter pleas of guilty. (Tr. 1-29). Appellant and his counsel both told the court that Appellant would enter guilty pleas to both counts pursuant to an agreement with the State in which Appellant would receive eight years imprisonment for each count, with the sentences to be served concurrently. (Tr. 2).

Appellant testified that he understood that by entering guilty pleas, he was waiving certain constitutional rights, including his right to a jury trial. (Tr. 3-4). Appellant testified that he had signed two petitions to enter guilty pleas, that he had reviewed each of his cases with his attorney, that each case involved a charge of driving while intoxicated as a chronic offender, and that each charge was a class B felony.

Appellant testified that he had reviewed with his attorney his right to a jury trial, and that he had reviewed the State's recommendation with him, and that he wished to enter guilty pleas on both charges. (Tr. 4-5). Appellant testified that he understood all of his constitutional rights related to a criminal trial, and that he wanted to waive them and enter guilty pleas to each of the charges. (Tr. 5-6).

The prosecutor then announced the evidence that the state would have presented at trial. (Tr. 7). The prosecutor stated that on the evening of June 7, 2007, Appellant operated a motor vehicle while under the influence of alcohol. (Tr. 7). The prosecutor

further stated that on November 27, 2007, Appellant operated a motor vehicle under the influence of drugs. (Tr. 9).

Regarding Appellant's prior offenses, the prosecutor relayed that on September 25, 2000, Appellant pleaded guilty in St. Louis County for driving while intoxicated on July 16, 1999; that on September 5, 2000, Appellant pleaded guilty in St. Charles County for driving while intoxicated on October 20, 1999; that on April 4, 1997, Appellant pleaded guilty in St. Louis County for driving while intoxicated on May 15, 1996; and that on March 11, 1997, Appellant pleaded guilty in St. Charles County for driving while intoxicated on November 8, 1996. (Tr. 8-10). The prosecutor recommended two sentences of eight years imprisonment, to be served concurrently. (Tr. 11).

Appellant's counsel agreed with the prosecutor's statements, and Appellant testified that he understood the nature and essential elements of the offenses and that the prosecutor's recommendation was the basis upon which he was entering his guilty pleas. (Tr. 11). Appellant agreed with the prosecutor's statement regarding the facts of each case, and Appellant testified that he did the things the prosecutor had stated he did, and that he was pleading guilty because he was actually guilty. (Tr. 12-17).

Appellant testified that on June 10, 2007, he had drunk between six and ten beers and decided to drive home, and that he had been intoxicated when he drove. (Tr. 13-15). Appellant further testified that on November 26-27, 2007, he had smoked two or three marijuana cigarettes or joints and then drove his vehicle while he was impaired. (Tr. 15-17). Appellant also admitted that he had been driving while intoxicated on July 16, 1999, October 20, 1999, May 15, 1996, and November 8, 1996. (Tr. 17-19).

The court found that Appellant's guilty pleas had been freely and voluntarily entered with an understanding of the nature of the charges, the ranges of punishment, and the consequences thereof. (Tr. 20). The court found that there was a factual basis to support Appellant's guilty pleas and accepted the pleas and found Appellant guilty beyond a reasonable doubt. (Tr. 20-21). The court further found that Appellant was a chronic offender under §§ 558.011, 560.011 and 577.023 by having pleaded guilty or been found guilty of four or more intoxication-related traffic offenses. (Tr. 21-22). Appellant asked that the court follow the state's recommendation. (Tr. 22). The court sentenced Appellant to two current terms of eight years imprisonment. (Tr. 26-27).

During his plea and sentencing, Appellant never raised any constitutional claims or issues regarding his convictions or sentences.

On October 31, 2008, Appellant timely filed a *pro se* motion for post-conviction relief pursuant to Supreme Court Rule 24.035. (L.F. 41-48).

An amended motion was filed on February 9, 2009, in which Appellant alleged that he was denied due process of law because § 577.023, RSMo, the statute defining "aggravated offender," "chronic offender" and "persistent offender" violated the void for vagueness doctrine. (L.F. 50-59).

Appellant claimed that under § 577.023, a person who had pleaded guilty or had been found guilty of four or more intoxication-related traffic offenses could be convicted and sentenced as either an aggravated offender, a chronic offender, or a persistent offender, and that an "arbitrary determination" by the prosecutor as to which classification he chose to charge a person with amounted to discrimination by the State,

because a prosecutor could charge and prove a person with four prior findings of guilt in intoxication-related traffic offenses as a persistent offender, but charge and prove another person with four prior findings of guilt in intoxication-related traffic offenses as a chronic offender. (L.F. 53).

On February 26, 2009, the motion court denied Appellant's request for an evidentiary hearing, (L.F. 40), and on April 10, 2009, the motion court overruled Appellant's amended motion. (L.F. 60-62). Appellant commenced his appeal on May 14, 2009 in the Court of Appeals, Eastern District, (L.F. 40, 63-66), and on December 23, 2009, that court issued an order holding that Appellant's claim appeared to be preserved for appellate review because it was included in his amended post-conviction motion, and that the claim appeared to be "real and substantial, not merely colorable." The Court of Appeals, Eastern District, determined that it was without jurisdiction to consider the appeal and transferred the cause to this Court.²

² The Eastern District's order of December 23, 2009 was not included in the legal file.

ARGUMENT

This Court should decline to review Appellant’s sole claim on appeal, that § 577.023 is unconstitutional due to its alleged vagueness in permitting enhanced punishment based on having a certain number “or more” of prior intoxication-related traffic offense convictions, because it is a non-jurisdictional claim that Appellant failed to raise at the earliest opportunity and which was waived by his guilty pleas. Alternatively, the motion court did not clearly err in denying Appellant’s claim without an evidentiary hearing because the statute is not vague.

A. Motion court’s findings.

On April 10, 2009, the motion court issued findings of fact and conclusions of law. (L.F. 60-62). Addressing Appellant’s claim that § 577.023, RSMo (the chronic offender statute) was void for vagueness and that he was denied due process, the motion court held that “there is no ambiguity in the plain language of the statute,” and that “there is no conflict as to the definition of each class of offender proscribed in § 577.023.” (L.F. 61). The court held that “the statute clearly defined a ‘chronic offender’ and set forth explicit standards necessary for the application of statutory requirements for enhanced penalties of offenders who repeatedly commit the crime of driving while intoxicated.” (L.F. 61).

The court held that Appellant’s claim and interpretation of the statute was not supported by the language of the statute, which gave Appellant ample notice that having four or more intoxication-related traffic offenses was proscribed conduct subjecting him to an enhanced penalty of up to that of a class B felony. (L.F. 61). The court held that

there is no conflict in the definition of each class of offender in 577.023, and that because 577.023 explicitly states the standards under which an offender may be subject to enhanced penalties, it avoids arbitrary and discriminatory application by the state. (L.F. 61-62).

The court held § 577.023 was not void for vagueness, as a person of ordinary intelligence is given sufficient notice of both the prohibited conduct and the enhanced penalty. (L.F. 62). The court found that Appellant had not pleaded facts that would entitle him to relief and overruled his Rule 24.035 motion. (L.F. 62).

B. Standard of Review.

Appellate review of the denial of a Rule 24.035 motion is limited to determining whether the trial court's findings and conclusions are clearly erroneous. Supreme Court Rule 24.035 (k); *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. *Taylor*, 929 S.W.2d at 224. On review, the motion court's findings and conclusions are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). When a movant seeks post-conviction relief following a guilty plea, appellate review is limited to a determination of whether the guilty plea was knowing and voluntary. *Rollins v. State*, 974 S.W.2d 593, 595 (Mo. App. W.D. 1998).

An evidentiary hearing is not required where the motion and the files and records of the case conclusively show that movant is entitled to no relief. Rule 24.035 (h). As distinguished from other civil pleadings, courts will not draw factual inferences or

implications in a post-conviction motion from bare conclusions or from a prayer for relief. *Morrow v. State*, 21 S.W.3d 819, 822-823 (Mo. banc 2000). Appellant is entitled to an evidentiary hearing only if his motion meets three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters of which movant complains must have resulted in prejudice. *Id.*

Appellant challenges the constitutionality of § 577.023. Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). If at all feasible, the statute must be interpreted in a manner consistent with the constitutions, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *Id.* The party challenging the validity of the statute has the burden of proving that the act "clearly and undoubtedly" violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008).

C. Appellant's claim is not reviewable as it is a non-jurisdictional claim that he failed to raise at the earliest opportunity.

Appellant never asserted any claim regarding the constitutionality of §577.023 until he filed his *pro se* motion under Rule 24.035. "Constitutional violations are waived if not raised at the earliest possible opportunity." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998); *see also State v. William*, 100 S.W.3d 828, 831 (Mo. App. W.D. 2003); Rule 24.04(b)(2).

In order to preserve a constitutional issue for appellate review, a party must (1) raise the issue at the first available opportunity, (2) state the constitutional provision claimed to be violated by specifically referencing the article and section of the constitution or by quoting the constitutional provision itself, (3) state the facts that comprise the constitutional violation and (4) preserve the constitutional issue throughout the criminal proceeding. *State v. Gonzales*, 253 S.W.3d 86, 88 (Mo. App. E.D. 2008); *State v. Newlon*, 216 S.W.3d 180, 184 (Mo. App. E.D. 2007).

By entering pleas of guilty, Appellant waived all non-jurisdictional defects, including statutory and constitutional guaranties. *See Moore v. State*, 288 S.W.3d 810, 812 (Mo. App. S.D. 2009); *State v. Sexton*, 75 S.W.3d 304, 309 (Mo. App. S.D. 2002); *Bruce v. State*, 998 S.W.2d 91, 93-94 (Mo. App. W.D. 1999). In *Moore*, the Southern District stated the following:

The failure to challenge the constitutionality of a statute at the earliest opportunity waives the issue. *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224-25[3] (Mo. banc 1998). The proper time to raise such issues must be done on motion before trial. *State v. Turner*, 48 S.W.3d 693, 696-97 (Mo. App. W.D. 2001); Rule 24.04. If Defendant wanted to challenge the constitutionality of this statute, he must have done so before pleading guilty.

Moore, 288 S.W.3d at 812, *citing Sexton*, 75 S.W.3d at 309.

Like the present case, the appellant in *Moore* challenged the constitutionality of § 577.023, claiming that it was void for vagueness because it could allegedly be arbitrarily applied. *Moore*, 288 S.W.3d at 812. The court in *Moore* held that “Notwithstanding dicta

in *Dorsey v. State*, 115 S.W.3d 842, 844 n. 2 (Mo. banc 2003), the instant claim is not jurisdictional and Movant's guilty plea waived it. We deny Point II and Movant's motion, taken with the case, to transfer this constitutional issue to the Missouri Supreme Court for decision.” *Id.*

In a footnote, the *Moore* court noted this Court’s decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) for authority that Moore’s claim was not jurisdictional and that his guilty plea waived it. *Moore*, n.2. In *Webb*, this Court recognized that the concept of jurisdiction had been distorted and held that there are only two kinds of jurisdiction in Missouri: personal jurisdiction and subject matter jurisdiction. *Webb*, 275 S.W.3d at 252. Personal jurisdiction refers simply to the power of the court to require a person to respond to a legal proceeding that may affect his rights or interests. *Id.* at 253. Subject matter jurisdiction refers to the court’s authority to render a judgment in a particular category of case, and, in Missouri, is governed solely by the state constitution, which gives circuit courts original jurisdiction “over *all* cases and matters, civil and criminal.” *Id.* (emphasis in original).

While cases have claimed that other errors were “jurisdictional,” this Court described these as claims of “jurisdictional competence,” which do not question either personal or subject matter jurisdiction, but instead question “the court’s authority to render a particular judgment in a particular case.” *Id.* at 254. In rejecting the concept that claims of “jurisdictional competence” are actually jurisdictional claims, this Court stated:

Elevating statutory restrictions to matters of “jurisdictional competence” erodes the constitutional boundary established by article V of the Missouri

Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides. If “jurisdictional competence” is recognized as a distinct concept under which a statute can restrict subject matter jurisdiction, the term creates a temptation for litigants to label every statutory restriction on claims for relief as a matter of jurisdictional competence. Accordingly, having fully considered the potential ill effects of recognizing a separate jurisdictional basis called jurisdictional competence, the courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is no third category of jurisdiction called “jurisdictional competence.”

Id. at 254.

In the present case, under a proper understanding of jurisdiction, Appellant’s claim is not jurisdictional. The only two valid questions of jurisdiction show that the trial court had jurisdiction in this case. The trial court had personal jurisdiction over Appellant, as he committed crimes in St. Charles County, and had subject matter jurisdiction, as Appellant’s case was a criminal case. The issue Appellant raises – whether § 577.023 was void for vagueness because it could allegedly be arbitrarily applied - does not call into question either subject matter or personal jurisdiction. Therefore, Appellant’s claim, fitting within the concept of “jurisdictional competence,” is not actually a jurisdictional claim, but a constitutional claim, which Appellant waived by failing to assert it at the earliest opportunity (*i.e.*, his guilty plea).

Nevertheless, Appellant ignores this Court's decision in *Webb* and instead cites *State v. Burgin*, 203 S.W.3d 713, 716 (Mo. App. E.D. 2006) in an attempt to transform his constitutional claim into a claim that the circuit court lacked subject-matter jurisdiction to find Appellant guilty and to sentence him. (App. Br. 29). The *Burgin* court quoted language from this Court's opinion in *Ex parte Smith*, 36 S.W. 628 (Mo. 1896), which stated that "[A]n unconstitutional law is no law . . . and therefore the trial court has no jurisdiction, because its jurisdiction extends only to such matters as the law declares to be criminal; if there is no law . . . if that law is unconstitutional . . . then the court transcends its jurisdiction and [the defendant] is entitled to his discharge." *Burgin*, 203 S.W.3d at 717, quoting *Smith*, 36 S.W. at 630.

The *Burgin* court addressed a situation that was materially different from the present case. *Burgin*'s claim was that he was convicted under a statute that this Court later held to be unconstitutional in *State v. Beine*, 162 S.W.3d 483 (Mo. 2005). But *Burgin* was decided in 2006, well before this Court clarified the concept of jurisdiction in *Webb*. Second, the court specifically held that *Burgin*'s claim, which had not been preserved at trial,

was not an untimely constitutional challenge to a statute which had already been found unconstitutional, but rather a claim that manifest injustice had occurred and whether plain error review was appropriate. *Burgin*, 203 S.W.3d at 716. *Burgin*'s claim was not reviewable because it was an unpreserved constitutional claim that implicated the jurisdiction of the circuit court; rather, it was reviewable because it was an unpreserved claim that involved manifest injustice. In the present case, § 577.023 has not been found

to be unconstitutional, and the circuit court clearly had subject-matter jurisdiction to convict and sentence Appellant.

Appellant's use of this Court's opinion in *Dorsey v. State*, 115 S.W.3d 842, 844 (Mo. banc 2003) as authority that his claim regarding the constitutionality of § 577.023 was based on a "jurisdictional defect" and thus not waived by his guilty plea, (App. Br. 27-29), is misplaced. Because Appellant did not raise this constitutional claim at the earliest opportunity, it was waived by his guilty plea and is not reviewable. Since no constitutional issue was preserved, Appellant lacks any reviewable claim on appeal.

D. Section 577.023 is not unconstitutionally vague.

Appellant argues that § 577.023, the statute that defines "aggravated offender," "chronic offender," "intoxication-related traffic offense," "persistent offender," and "prior offender" and provides for enhanced sentencing for those who plead guilty or are found guilty of more than one intoxication-related traffic offense, violates the void for vagueness doctrine. (App. Br. 14-15). Appellant claims this is because a person who has pleaded guilty to or is found guilty of four or more intoxication-related traffic offenses could be convicted and sentenced as either an aggravated offender, a chronic offender, or a persistent offender, and that an "arbitrary determination" by the prosecutor as to which classification he chose to charge a person with amounted to discrimination by the State, because a prosecutor could charge and prove a person with four prior findings of guilt in intoxication-related traffic offenses as a persistent offender, but charge and prove another person with four prior findings of guilt in intoxication-related traffic offenses as a chronic offender. (App. Br. 36-37). This argument has no merit.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. The void-for-vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protect against arbitrary and discriminatory enforcement. The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Nevertheless, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.” *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004) (internal citations omitted). The law will be held valid if any reasonable and practical construction will support it, and the courts must endeavor by every rule of construction to give it effect. *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

A statute is presumed to be constitutional and will be held unconstitutional only if it clearly violates some constitutional provision; any doubts are resolved in favor of the validity of a statute. *Thompson v. State Bd. of Registration for Healing Arts*, 244 S.W.3d 180, 185 (Mo. App., E.D. 2007). Due process mandates that a statute prohibiting certain activity furnish: 1) reasonable notice of the proscribed activity; and 2) guidelines so that the governmental entity charged with enforcing the statute may do so in a nondiscriminatory, non-arbitrary fashion. *Id.*

Section 577.023 provides, *inter alia*:

1. For purposes of this section, unless the context clearly indicates otherwise:

- (1) An “**aggravated offender**” is a person who:

(a) Has pleaded guilty to or has been found guilty of three or more intoxication-related traffic offenses;

* * *

(2) A **“chronic offender”** is:

(a) A person who has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses;

* * *

(3) An **“intoxication-related traffic offense”** is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo, murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing;

(4) A **“persistent offender”** is one of the following:

(a) A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses;

* * *

(5) A **“prior offender”** is a person who has pleaded guilty to or has been found guilty of one intoxication-related traffic offense, where such prior offense occurred within five years of the occurrence of the intoxication-related traffic offense for which the person is charged.

2. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a prior offender shall be guilty of a class A misdemeanor.

3. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a persistent offender shall be guilty of a class D felony.

4. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or section 577.012 who is alleged and proved to be an aggravated offender shall be guilty of a class C felony.

5. Any person who pleads guilty to or is found guilty of

a violation of section 577.010 or section 577.012 who is alleged and proved to be a chronic offender shall be guilty of a class B felony.

Section 577.023, RSMo.

Here, Appellant complains that the statute is vague because the use of “or more” in defining how many prior convictions permit enhancement gives the prosecutor “arbitrary and discriminatory” discretion in determining which level of enhancement to seek; for example, a defendant with four prior intoxication-related traffic offenses could be a persistent offender, aggravated offender, or chronic offender (App.Br. 36-37). The legislature’s grant of prosecutorial discretion, however, does not amount to unconstitutional ambiguity or arbitrariness. The fact that another section or statute proscribes the same conduct does not create an ambiguity; it is “axiomatic” that a single offense may constitute an offense under two different statutes. *State v. Ondo*, 232 S.W.3d 622, 629 (Mo. App. S.D. 2007). When certain conduct may be punishable under two different statutes, the prosecutor has the discretion to decide under which statute to charge the defendant, and the fact that two statutes which proscribe substantially the same conduct carry a different category of crime and punishment does not eliminate the prosecutor’s discretion to charge the defendant under the statute with harsher punishment. *Id.* That the prosecutor has discretion in making charging decisions regarding punishment does not render the punishment arbitrary. See *State v. Trimble*, 638 S.W.2d 726, 736 (Mo. banc 1982) (the death penalty is not unconstitutional simply because the prosecutor has discretion in charging capital murder).

The statute at issue does simply what the Southern District recognized as permissible in *Ondo*: it gives the prosecutor discretion to seek a more severe punishment for similar conduct which could result in a lesser punishment. It is true that a person with four prior intoxication-related traffic offenses can be found to be an aggravated offender or a persistent offender upon another conviction, but the enhancement statute also clearly establishes and gives adequate notice that having four prior intoxication-related traffic offenses can result in a person being found to be a chronic offender. Prosecutorial discretion in deciding whether to seek that enhancement does not make this clear prohibition ambiguous. Under Appellant's logic, any enhancement statute at all would be unconstitutionally vague because the prosecutor has discretion not to seek any enhancement; thus the enhancement would be improperly "vague" because the prosecutor's discretion prevented it from being applied in exactly the same manner in every case. Further, because the prosecutor has the discretion to refuse to prosecute someone who has committed a crime, Appellant's argument would require every criminal statute to be declared "vague" due to the existence of that discretion. While these results are absurd, they are the necessary extension of Appellant's logic, and demonstrate the folly of his position. Therefore, § 577.023's scheme for enhancement based on the number of prior intoxication-related traffic offenses is not unconstitutionally vague. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the motion court's denial of Appellant's Rule 24.035 motion be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
jeff.bartholomew@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,847 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 1st day of February, 2010, to:

Gwenda Reneé Robinson
415 S. 18th Street, Suite 300
Office B, Area 68
St. Louis, MO 63103
Phone 314-340-7662
Fax 314-340-7685
Attorney for Appellant

ROBERT J. (JEFF) BARTHOLOMEW
Assistant Attorney General
Missouri Bar No. 44473
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEY FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

Section 577.023, RSMo A1
Findings of Fact, Conclusions of Law and Judgment A4