

NO. SC83415

SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

MARK GALAZIN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF MILLER COUNTY, MISSOURI
TWENTY-SIXTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE MARY A. DICKERSON, JUDGE

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREA MAZZA FOLLETT
Assistant Attorney General
Missouri Bar No. 48517

P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

INDEX

	PAGE
<u>INDEX</u>	1
<u>TABLE OF AUTHORITIES</u>	3
<u>JURISDICTIONAL STATEMENT</u>	6
<u>STATEMENT OF FACTS</u>	6
<u>POINT RELIED ON</u>	9

ARGUMENT..... 10
CONCLUSION..... 24
CERTIFICATE OF SERVICE AND COMPLIANCE..... 26

TABLE OF AUTHORITIES

PAGE

Cases

Error! No table of authorities entries found.

Error! No table of authorities entries found.

JURISDICTIONAL STATEMENT

This appeal is from a conviction for one count of the felony of driving while intoxicated, § 577.010, RSMo 1994, and one count of the misdemeanor of failure to drive on the right half of the roadway when of sufficient width, § 304.015, RSMo, obtained in the Circuit Court of Miller County, and for which the appellant was sentenced to a term of four years of imprisonment for driving while intoxicated and a term or two days in the county jail and a \$500 fine for failure to drive on the right half of the roadway. The Court of Appeals, Western District, reversed and remanded the appellant's case in State v. Galazin, No. 57900 (Mo.App. W.D. Jan. 23, 2001). This Court has jurisdiction as it sustained the respondent's application for transfer pursuant to Supreme Court Rule 83.04. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Mark Galazin, was charged by information with the felony of driving while intoxicated and the misdemeanor of failure to drive on the right half of the roadway when of sufficient width (L.F. 1-2).¹ Appellant's jury trial began July 7, 1999, in the Circuit Court of Miller County, the Honorable Mary A. Dickerson presiding (Tr. 1-3). In the light most favorable to the verdict, the evidence adduced at trial is as follows:

At about 1:45 a.m. on June 21, 1998, Officer Scott Patrick of the Lake Ozark Police Department was on routine patrol when he received a radio call informing him that a person was driving in an erratic manner (Tr. 93-97). Subsequently, Officer Patrick saw Appellant's vehicle in Lakeview, Missouri, at the corner of Business 54 and W Highway (Tr. 97, 99). The officer watched as Appellant pulled into a convenience store parking lot, entered the store, and returned to his car (Tr. 97, 104). Appellant pulled out of the parking lot, and Officer Patrick followed him, maintaining a distance of about three car lengths (Tr. 104).

Officer Patrick followed Appellant and saw his vehicle cross the center line several times (Tr. 104-05). Officer Patrick activated his lights and siren, but Appellant continued to drive another one-eighth to one-quarter mile down the street (Tr. 105). Eventually, Appellant stopped near the area of Lakeland Market (Tr. 105).

Officer Patrick approached Appellant's vehicle and asked for a driver's license and proof of insurance (Tr. 105-06). Appellant replied that he did not have a license (Tr. 106). Officer Patrick noticed that Appellant's eyes were watery and bloodshot, that his speech was slurred, and that his shirt was stained with

¹The information also charged Appellant with the misdemeanor of driving with a suspended license (L.F. 1-2). This charge was still pending at the time Appellant filed his appeal (*see* Tr. 189-91).

tobacco chew and saliva (Tr. 106). The officer also saw empty beer bottles in the back and on the floor of Appellant's car (Tr. 106).

Officer Patrick asked Appellant to step out of his car (Tr. 106-07). Appellant continued to slur his speech, and he staggered as he walked (Tr. 107). Concerned about Appellant's physical condition, the officer asked Appellant to perform field sobriety tests and conducted the gaze nystagmus test (Tr. 107-08). Appellant failed each of the six points of the test (Tr. 110-11). Officer Patrick also asked Appellant to perform the "finger to the thumb test," in which Appellant was to touch each finger to his thumb and count "1, 2, 3, 4; 4, 3, 2, 1" (Tr. 112). The officer noticed that Appellant could not touch the tips of his fingers together and occasionally missed any contact between his fingers (Tr. 113). Officer Patrick then asked Appellant to recite the alphabet from "B" to "P," but Appellant left "N" and "O" out of his recitation (Tr. 113-15). Based upon Appellant's poor performance, Officer Patrick arrested him for driving while intoxicated and drove him to the Lake Ozark Police Department (Tr. 115-16).

At the station, Officer Patrick informed Appellant of his Miranda rights and provided him with a telephone and a telephone book (Tr. 116). The officer explained the Missouri Implied Consent form and told Appellant that he would lose his license for one year if he refused to submit to a chemical test (Tr. 117). Informed of his rights, Appellant refused a breath test (Tr. 117).

Appellant presented one witness and took the stand in his own defense. Laura May Cagle testified that she saw Appellant several times on June 20 and at about 12:30 a.m. on the morning of June 21 (Tr. 134-40). She stated that she did not see him consume alcohol and that Appellant did not appear to be intoxicated (Tr. 139-40).

Appellant testified that had previously pled guilty to two counts of driving with an excessive blood alcohol content and to one count of careless and imprudent driving (Tr. 145-47). He stated that he had not consumed alcohol in the hours prior to 1:15 a.m. but had taken the prescription medications Paxil, Klonopin,

Ativan, and Percocet (Tr. 150-51). Appellant also told the jury that he did not have beer bottles in his vehicle when Officer Patrick stopped him (Tr. 157).

Appellant's jury found him guilty of driving while intoxicated and failure to drive on the right half of the highway (Tr. 191-92). On November 15, 1999, the court sentenced Appellant to a term of four years of imprisonment for driving while intoxicated and a term of two days in the county jail and a \$500 fine for failure to drive on the right half of the highway (Tr. 195).

The Court of Appeals, Western District, reversed and remanded Appellant's case. State v. Galazin, No. 57900 (Mo.App. W.D. Jan. 23, 2001). This Court sustained Respondent's application for transfer pursuant to Supreme Court Rule 83.04.

POINT RELIED ON

The trial court did not plainly err or err in allowing Lake Ozark Officer Scott Patrick to testify about his stop, observations, and arrest of Appellant in Lakeview because this issue was not preserved for appeal in that Appellant failed to file a written pre-trial motion to suppress and failed to demonstrate that he suffered manifest injustice in that he did not prove that his arrest was unlawful. Moreover, the State presented evidence that Appellant's arrest was valid because it offered oral evidence of a written mutual aid agreement between Lake Ozark and Lakeview, and the suppression of evidence is not a proper remedy for an alleged violation of a statute.

State v. Hardiman, 943 S.W.2d 348 (Mo.App. S.D. 1997);

State v. Henderson, 954 S.W.2d 581 (Mo.App. S.D. 1997);

State v. Conn, 950 S.W.2d 535 (Mo.App. E.D. 1997);

State v. Brown, 998 S.W.2d 531 (Mo. banc 1999), *cert. denied*, 528 U.S. 979 (1999);

Section 542.296.2-.3, RSMo 1994;

Supreme Court Rule 30.20.

ARGUMENT

The trial court did not plainly err or err in allowing Lake Ozark Officer Scott Patrick to testify about his stop, observations, and arrest of Appellant in Lakeview because this issue was not preserved for appeal in that Appellant failed to file a written pre-trial motion to suppress and failed to demonstrate that he suffered manifest injustice in that he did not prove that his arrest was unlawful. Moreover, the State presented evidence that Appellant's arrest was valid because it offered oral evidence of a written mutual aid agreement between Lake Ozark and Lakeview, and the suppression of evidence is not a proper remedy for an alleged violation of a statute.

In his brief before the Court of Appeals, Western District, Appellant alleged that the trial court clearly erred when it admitted the testimony of Officer Scott Patrick into evidence (App. Br. 7).² According to Appellant, Officer Patrick had no authority to make an arrest in Lakeview, Missouri, because he was a Lake Ozark police officer and the record did not reflect a "fresh pursuit" that would allow an arrest inside the town of Lakeview (App. Br. 7-9). Appellant did not allege that the arrest violated his Fourth Amendment rights (*see* App. Br. 7-9).

A. Relevant Facts

²The abbreviation "App. Br." refers to the portions of the original brief Appellant filed with the Court of Appeals, Western District. The abbreviation "App. Reply Br." refers to the Reply Brief that Appellant filed with the Court of Appeals. Appellant did not file a substitute brief in this Court.

Prior to trial, Appellant did not file a written motion to suppress evidence of his arrest (*see* L.F.). The issue was not addressed in any pre-trial suppression hearing (*see* Tr.).

At trial, Officer Patrick testified that he received a radio call about a subject driving in an erratic manner (Tr. 96-97). Shortly thereafter, Appellant's defense counsel raised "a foundation objection and . . . a relevancy question objection" and noted that the officer had not mentioned "any necessity to come outside of the city limits of Lake Ozark or any municipal ordinance authorizing him to come outside the city limits of Lake Ozark" (Tr. 98). The State asked Officer Patrick if "to the best of [his] knowledge and belief, did Lake Ozark have a mutual aid contract with the City of Lakeview," and the officer replied, "[y]es" (Tr. 99). Defense counsel objected on the grounds of hearsay and best evidence, noting that "[i]f there's such a document in existence, that's the best evidence" (Tr. 99-100).

Counsel approached the bench, and the court told the parties that it would allow the State to question the officer "with regard to what was his territory, where he patrolled" (Tr. 100). The proceedings returned to open court, and the State asked the officer what his "area of operation" was (Tr. 101). At that point, defense counsel again objected as to hearsay and best evidence and voir dired Officer Patrick (Tr. 101). In the course of that voir dire, the officer stated that he had never read a specific mutual aid contract and that he based his knowledge on what his training supervisor had instructed him (Tr. 101). Defense counsel renewed his objection, and the court stated, "[i]f he is going to relate what someone told him, the objection is sustained. If he's going to testify based upon his carrying on of his duties, the objection is overruled" (Tr. 101-02). After further discussion at the bench, the State asked Officer Patrick, ". . . based on your education and training with the Lake Ozark Police Department, where was your area of operation?" (Tr. 102-03). Over defense counsel's objection, Officer Patrick responded, "[t]he City of Lake Ozark, Lakeview and Lakeside" (Tr. 103). Subsequently, defense counsel objected to the officer's further testimony "on the basis of

foundation" (Tr. 103). The State noted that it believed that the officer "testified to his jurisdictional limits based on his education and training" (Tr. 104). The court overruled the objection (Tr. 104).

B. Legal Analysis

As a general rule, the procedural rules of the State of Missouri "require that the contention of an unlawful search and seizure be made by a motion to suppress the evidence in advance of trial." State v. Hardiman, 943 S.W.2d 348, 349-50 (Mo.App. S.D. 1997); State v. Henderson, 954 S.W.2d 581, 585 (Mo.App. S.D. 1997) (internal citations omitted). The motion to suppress "shall be made before the commencement of the trial." § 542.296.3, RSMo 1994. The lone exception to the rule requiring pre-trial suppression applies only to defendants who "had no reason to anticipate the evidence would be introduced and [were] surprised." State v. Hardiman, *supra* at 350; State v. Henderson, *supra* at 585 (internal citations omitted); *see also* § 542.296.3, RSMo 1994 ("A party may move to suppress during trial if "he was unaware of the grounds or had no opportunity to do so before the trial."). Trial judges, in their discretion, may "entertain a motion at any time during trial." § 542.296.3, RSMo 1994. However, if a defendant fails to file a timely motion to suppress, then the burden of proof shifts from the State to the defendant. State v. Conn, 950 S.W.2d 535, 536-37 (Mo.App. E.D. 1997).

By failing to file a pre-trial motion to suppress evidence of his arrest, Appellant failed to preserve his claim for appeal. Thus, Appellant bears the burden of demonstrating plain error resulting in manifest injustice. State v. Kalagian, 833 S.W.2d 431, 434 (Mo. App. E.D. 1992). Plain error review is discretionary and should be used sparingly. Supreme Court Rule 30.20; State v. Small, 873 S.W.2d 895, 899 (Mo. App. E.D. 1994). Additionally, plain error review is limited to those cases that demonstrate "a strong, clear demonstration of manifest injustice or miscarriage of justice" that "so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected." State v. Hernandez, 880 S.W.2d 336, 338 (Mo. App. W.D. 1994); State v. Hadley, 815 S.W.2d 422, 423 (Mo. banc 1991).

The record of Appellant's case contains no evidence that Appellant ever filed or specifically asked the trial court to suppress evidence of his arrest. The Legal File contains no written documentation of a motion to suppress, and the transcript reflects that Appellant objected to the arresting officer's testimony on the grounds of foundation, relevancy, hearsay, and best evidence (*See* Legal File, Tr. 98-104). By failing to file a motion or to specifically move to suppress the evidence, Appellant failed to preserve his claim; accordingly, Appellant, not the State, should have been required to prove why the contested evidence should have been suppressed. *See State v. Conn, supra*.

Appellant alleges that he did not have to follow the rule requiring the pre-trial filing of a motion to suppress because he "had no reason to believe that [the State] would attempt to introduce evidence of Appellant's arrest at the trial of this matter without a proper evidentiary foundation" (App. Reply Br. 5).³ A defendant may be excluded from the rule requiring pre-trial suppression if he "had no reason to anticipate the evidence would be introduced and was surprised." *State v. Hardiman, supra; State v. Henderson, supra*. However, Appellant did not fall under the lone exception to the rule, because Appellant had every reason to anticipate that evidence of his arrest would be introduced at trial. Appellant was arrested for driving while intoxicated. In cases involving that offense, evidence of all of the factors surrounding the defendant's arrest,

³*See also State v. Galazin*, slip op. at 6. In his reply brief before the Court of Appeals, Appellant relied on §542.296.1, RSMo 1994, which states that "A person aggrieved by an unlawful seizure made by an officer . . . may file a motion to suppress the use in evidence of the property or matter seized" (*see also* App. Reply Brief 4, emphasis in the Reply Brief). Appellant also stated that, assuming *State v. Hardiman, supra*, and *State v. Henderson, supra*, are controlling, those cases create an exception upon which he relies--i.e., that he was surprised that evidence of his arrest would not be introduced "without proper evidentiary foundation" (App. Reply Br. 4-5).

such as erratic driving, belligerence or incoherence, and poor performance on field sobriety tests, is routinely admitted into evidence. Given what is routinely admitted in other DWI trials, Appellant had every reason to believe that all of the factors surrounding his own arrest--including when, where, and why the arresting officer decided to stop his vehicle--would be presented at his trial. Appellant attempted to circumvent the exception by stating that he "had no reason to believe that [the State] would attempt to introduce evidence of Appellant's arrest . . . *without proper evidentiary foundation*" (App. Reply Br. 5) (emphasis added); *see also State v. Galazin*, slip. op. at 6. The exception, however, applies only to those defendants who did not anticipate the introduction of evidence, not the accompanying documents with which it was introduced. Appellant had every reason to believe that evidence of his arrest would be introduced at trial. The rule requiring the pre-trial filing of a motion to suppress is important because suppression motions are designed to give both the State and the defense an opportunity to prepare for the issues that will--and will not--be addressed at trial. In the present case, had Appellant challenged the legality of his arrest in a pre-trial suppression motion, the State would have had sufficient time to find documentation of a mutual aid agreement and present it to the court. Because Appellant did not challenge the officer's arrest jurisdiction prior to trial, the State had no reason to believe that Appellant would do so during trial and therefore did not prepare to offer such documentation. Lacking any indication that this issue would be challenged, the State was arguably unprepared to meet the Appellant's mid-trial foundation objection.

If the rule requiring pre-trial motions is ignored or otherwise abrogated, then defense attorneys will be allowed to completely forgo suppression motions and instead wait until trial to object to evidence that they knew would be offered but nonetheless deemed "surprising." This places the State in an untenable position. Prosecutors will be forced to spend needless time and manpower obtaining every document, witness, or other piece of evidence that could conceivably be challenged or will be forced to delay the criminal justice system (and perhaps run the risk of mistrial) by waiting for mid-trial suppression motions and asking for continuances

to obtain the challenged information. While § 542.296.3 currently curtails one party's ability to surprise the other, its abrogation would allow defense attorneys to surprise the State and would greatly hinder a prosecutor's ability to research, prepare, and try a case.

Assuming, *arguendo*, that the State had any burden in the case at bar, the State met that burden by presenting the testimony of Officer Patrick. Officer Patrick testified that to his knowledge, the cities of Lakeview and Lake Ozark had a mutual aid agreement (Tr. 99). The officer also testified that, based upon his training and experience, his "area of operation" included Lake Ozark, Lakeview, and Lakeside (Tr. 103). Although Appellant did not specifically move to suppress the evidence of his arrest, he did object to Officer Patrick's testimony on the grounds of hearsay and best evidence (*see* Tr. 98-104). With regard to Appellant's hearsay objections, even if Officer Patrick based his testimony on hearsay (in this case, his training supervisor's instructions), the trial court did not err in admitting such testimony into evidence. Arguably, a police officer is an expert on matters regarding his job duties, such as where he can make an arrest. An expert may rely on hearsay evidence to form the basis of his opinions. *See State v. Brown*, 998 S.W.2d 531, 539 (Mo. banc 1999), *cert. denied*, 528 U.S. 979 (1999). Moreover, Appellant mistakenly relied on the best evidence rule as the basis of his trial objections, because "the best evidence rule does not exclude evidence based on personal knowledge even if documents or other writings would provide some of the same information." *Cooley v. Director of Revenue*, 896 S.W.2d 468, 470 (Mo. banc 1995). As such, the trial court did not violate the best evidence rule by allowing Officer Patrick to testify as to what his training supervisor taught him.

The ruling of the Court of Appeals, Western District, is erroneous for several reasons. First, despite what is reflected in the record, the Court of Appeals held that "the trial judge . . . did in fact entertain a motion to suppress the officer's testimony" and therefore determined that Appellant preserved his issue and placed the burden of proof onto the State. *State v. Galazin*, slip op. at 7. In doing so, the Court of Appeals' ruling

contradicts § 542.296.2-.3, RSMo 1994, which states that although the trial court may entertain a motion at any time during trial, the defendant "*shall*" move to suppress "*before the commencement of the trial.*" The record reflects that Appellant filed no pre-trial motion, and in the course of trial, Appellant made no oral motion to suppress but rather objected on the grounds of best evidence, hearsay, foundation, and relevancy (*see* L.F., Tr. 98-104). The Court of Appeals' determination that the judge "entertained" a motion during trial does not mean that Appellant preserved such issue for appeal, and the fact remains that Appellant never presented any motion to suppress, written or oral, for the trial court's consideration.

Second, the opinion is in error because it ignored the fact that Appellant did not fall under the exception to the rule requiring a pre-trial motion to suppress. *See State v. Galazin*, slip op. at 6-7. Appellant's compliance with the applicable statute is clearly an issue, because as previously stated, the burden of proof rests on whether Appellant "was unaware of the grounds [i.e., "the charge arising out of the seizure"] or had no opportunity to do so before the trial." § 542.296.3, RSMo 2000; *see also State v. Hardiman, supra; State v. Henderson, supra*. The Court of Appeals should not be allowed to substitute the notion that "the trial judge here did in fact entertain a motion to suppress the officer's testimony" for the clear statutory language requiring pre-trial suppression. *State v. Galazin*, slip op. at 7. The opinion of the Court of Appeals needed to address whether or not Appellant could be properly excluded from statutory requirements, because without such exclusion, Appellant cannot be deemed to have met his burden of proof.

Third, the opinion is in error because it contradicts the law governing expert testimony. The Court of Appeals determined that "the State did not meet its burden" of proof "[b]y coming forward with only Officer Patrick's testimony as to his authority in Lakeview." *State v. Galazin*, slip op. at 9. However, an expert may rely on hearsay for the basis of his testimony. *State v. Brown, supra*. Given that a police officer is an expert in the areas of when, where, and how he may effectuate an arrest, the Court of Appeals' holding violates established law that allows experts to base their testimony on hearsay. Officer Patrick's reliance on his

training supervisor's instructions and his resulting testimony should have been sufficient without additional written documentation, particularly in light of the fact that in failing to file a pre-trial motion to suppress evidence of his allegedly extra-jurisdictional arrest Appellant not only failed to meet his burden of proof but gave the State no notice that he would challenge the officer's jurisdictional authority.

Fourth, the Court of Appeals erred because even if Officer Patrick violated a statute by conducting an extra-jurisdictional arrest, suppression of evidence is not the proper remedy where the issue concerns the violation of statutory authority, rather than the violation of constitutional rights. In the case at bar, Appellant did not raise a Fourth Amendment claim before the Court of Appeals (*see* App. Br. 7-9, App. Reply Br.).

In cases involving an officer's violation of statutory procedure, such as making an arrest outside of his jurisdiction, other courts have taken an approach far different from that of the Missouri Court of Appeals.⁴

For example, in State v. Gadsden, 303 N.J. Super. 491, 697 A.2d 187 (N.J. Super. Ct. App. Div. 1997), the defendant argued that the trial court erred in admitting evidence of his arrest because the arresting officers were outside of their jurisdiction. Gadsden, *supra*, 697 A.2d at 188-89.⁵ At trial, the defendant moved to suppress the evidence of his arrest because the officers violated a state statute that limits an officer's jurisdiction to the borders of his municipality. Id. at 190. The prosecutor argued that while the officers were indeed outside of their jurisdiction, they effectuated an arrest "pursuant to their authority as private citizens" and also argued "that the exclusionary rule was not the appropriate remedy because there was not a violation of the defendant's constitutional rights [,] only a violation of a statute." Id. The trial court denied the

⁴Respondent respectfully notes that this issue was not presented before the Court of Appeals.

⁵In Gadsden, officers in Hillside, New Jersey, obtained a warrant for the defendant's arrest and subsequently arrested him at his residence in Newark, a city contiguous to Hillside. Gadsden, *supra*, 697 A.2d 189-90.

defendant's motion to suppress, and while it did not find that the "private citizen doctrine" applied to the officers, it did determine that the statutory "violation was a procedural infraction, not a constitutional infringement." Id.⁶

On appeal, the Superior Court of New Jersey held:

This court has opined that the 'essential, if not sole, purpose served by the exclusionary rule in the context of a Fourth Amendment controversy is prophylactic--to deter and discourage police conduct which is constitutionally offensive.' Moreover, we have stated that the central purpose of the exclusionary rule is not to rectify a wrong already done, but to compel respect for the constitutional protections afforded the public in the most effective manner, by removing the incentive to disregard it. . . . New Jersey courts have held that the exclusionary rule is to be applied only in cases in which evidence has been seized in violation of a suspect's constitutional rights.

⁶The court also determined that the applicable statute "was a general empowering law" and not a part of New Jersey's Criminal Code. Id.

Id. at 192-93 (internal citations omitted). Based on the foregoing principles, the Superior Court determined that although the Hillside police officers were outside of their jurisdiction when they arrested the defendant, such violation was procedural and did not violate the defendant's constitutional rights. Id. at 193.⁷ After examining the law of other jurisdictions, the Superior Court noted that "[t]he trend of many states is to follow Pennsylvania and hold that where a police officer violates a criminal-procedure statute, *such as exceeding territorial jurisdiction*, evidence gathered as a result *is not automatically subject to suppression.*" Id. at 194 (emphasis added).

Similarly, in People v. Martinez, 898 P.2d 28 (Colo. 1995), Denver officers arrested the defendant at a residence from which he allegedly distributed cocaine, then subsequently learned that the residence was actually in Englewood, approximately one-half block outside of the Denver city limits. Id. at 30. The defendant moved to suppress the evidence of his arrest on the grounds that the Denver officers were outside of their jurisdiction; the prosecutor, in turn, argued that although the officers violated the jurisdictional statute, the search did not violate the defendant's constitutional rights. Id.

On review, the Supreme Court of Colorado noted that it had "often held that a statutory or criminal rule violation by itself [did] not mandate invocation of the exclusionary rule." Id. at 31. While cautioning that it did "not suggest that officers are free to execute warrants outside of their jurisdiction without consequence," the court determined that the Denver officers' jurisdictional mistake "was objectively understandable and reasonable" and noted that officers from the cities of Denver, Aurora, and Sheridan each patrolled the

⁷The Superior Court did note that "violations of procedural rules which assume constitutional dimensions may require the exclusion of evidence which has been seized as a result." Id. at 194.

questioned area. *Id.* at 32-33. Ultimately, the court "conclud[ed] that the search did not violate [the defendant's] constitutional rights." *Id.* at 32.

Other states have also evaluated the application of the exclusionary rule to statutory violations. In *People v. Dyla*, 142 A.D.2d 423, 536 N.Y.S.2d 799 (N.Y. App. Div. 1988), the Supreme Court of New York acknowledged that "courts in most other [s]tates hold that where a police officer exceeds his territorial jurisdiction, evidence gathered as a result is not necessarily subject to suppression." *Dyla, supra*, 142 A.D.2d at 438. The Supreme Court of Utah has held "that suppression of evidence is an appropriate remedy for illegal police conduct only when that conduct implicates a fundamental violation of a defendant's rights." *State v. Rowe*, 850 P.2d 427, 429 (Utah 1992).⁸ In *Chandler v. State*, 680 So.2d 1018, 1026 (Ala. Crim. App. 1996), the Court of Criminal Appeals of Alabama stated that "the Fourth Amendment exclusionary rule does not require exclusion of illegally obtained evidence, but only that evidence that is found as a result of a violation of the Fourth Amendment."⁹

The Court of Appeals, Western District should not have overturned Appellant's conviction because absent any violation of Appellant's constitutional rights, suppression was not the proper remedy. At the time of Appellant's arrest, Officer Patrick had been a member of the Lake Ozark Department for over a year, and he testified that his "area of operation" included Lake Ozark, Lakeview, and Lakeside (Tr. 95, 101-03). In

⁸Note that at issue in *Rowe* was a violation of the state's nighttime search provision. *Id.* at 427.

⁹In *Chandler, supra* at 1026, the defendant argued that police violated Alabama's criminal eavesdropping statutes. The court held that the police's interception of the telephone communication did not constitute a crime but noted that even if it did, "the conversation intercepted would not be rendered inadmissible by that fact." *Id.* The court also noted that the two statutes at issue "contain[ed] no exclusionary rule providing for the per se prohibition against the use of evidence obtained in violation of the statutes." *Id.*

the minutes before Appellant's arrest, Officer Patrick received a radio call that a subject was driving erratically (Tr. 96-97). The officer saw the vehicle and watched as its driver, Appellant, drove to a convenience store (Tr. 97, 107). After Appellant left the convenience store, Officer Patrick followed Appellant's car and watched as Appellant repeatedly crossed over the center line (Tr. 104). The officer stopped Appellant's car and subsequently determined that Appellant had been driving while intoxicated (Tr. 105-15).

Based on the foregoing, it does not appear that Appellant's constitutional rights were violated. A trained police officer saw Appellant driving erratically, stopped Appellant, investigated the situation, and conducted field sobriety tests. From the transcript, it does not appear that Appellant was randomly or maliciously targeted, nor was Appellant unreasonably or abusively detained. Moreover, Officer Patrick believed he could effectuate arrest because his training and job experience indicated that his "area of operation" included Lakeview (Tr. 103). The Court of Appeals need not have reversed and remanded Appellant's case, because the evidence of Appellant's arrest need not have been suppressed.¹⁰

¹⁰Respondent notes that the Court of Appeals cited City of Ash Grove v. Christian, 949 S.W.2d 259

(Mo.App. S.D. 1997) and State v. Pfleiderer, 8 S.W.3d 249 (Mo.App. W.D. 1999), in support of its determination that the trial court erred in suppressing Officer Patrick's testimony because such evidence "was obtained pursuant to an unauthorized and therefore illegal arrest." State v. Galazin, slip op. at 11, 11 n.28. In Pfleiderer, *supra*, suppression of evidence was proper because police violated the defendant's constitutional rights by continuing to detain and search him after they had determined that he was not carrying a weapon. The respondent in City of Ash Grove, *supra*, does not appear to have argued that suppression was not the proper remedy for a statutory violation; rather, the case centered on whether or not the arresting officer was in fresh pursuit of the defendant when he effectuated arrest outside of his jurisdiction.

In view of the foregoing, Respondent asks this Court to affirm Appellant's conviction and sentence.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREA MAZZA FOLLETT
Assistant Attorney General
Missouri Bar No. 48517

Post Office Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Special Rule 1 (b) of this Court and contains 5,181 words, excluding the cover, signature block, and this certification as determined by WordPerfect 9 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, postage prepaid, this _____ day of April, 2001, to:

Timothy R. Cisar
2140 Bagnell Dam Boulevard, Suite 401
Lake Ozark, MO 65049
Attorney for Appellant

ANDREA MAZZA FOLLETT
Assistant Attorney General