

**IN THE
SUPREME COURT OF MISSOURI**

No. SC84812

STEPHEN PAUL HARPER,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

**On Appeal from the Circuit Court of Jackson County,
the Honorable Vernon E. Scoville, III, Judge**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Stephen Harper appeals from a July 25, 2002, judgment of the Circuit Court of Jackson County, the Honorable Vernon E. Scoville, III, Judge. The circuit court affirmed the decisions of the Director of Revenue under § 302.060, RSMo. 2000, to revoke Harper’s driving privileges for one year, and to deny such privileges for ten years, based on Harper’s convictions related to driving while intoxicated.

In his Jurisdictional Statement, Harper correctly says that this appeal raises “questions pertaining to construction of state statutes.” Appellant’s Brief at 7. He then points out – again correctly – that the appeal addresses “the meaning of ‘conviction’ or convicted’ as applied to § 302.060(9).” *Id.* But then Harper errs. He asserts this court has jurisdiction because “a state statute is alleged to directly violate the Constitution, either facially or as applied.” *Id.* But the legal file does not support Harper’s implicit assertion that he timely raised a constitutional claim in the circuit court – a prerequisite for jurisdiction in this court.

Certainly no such claim appeared in Harper’s Amended Petition for Review of Notice of Revocation and Application for Stay of Revocation. Legal File (L.F.) at 14-17. Nor is there any suggestion in the circuit court’s order that Harper raised a constitutional question before the circuit court ruled. L.F. at 23-24. Harper did raise a constitutional claim in his Motion to Reconsider and Amend Order, or in the Alternative for a New Trial. L.F. at 25-26. There he asserted that the statute was unconstitutional because it discriminates against one person in favor of another or class of persons, with

no rational basis for any differentiation in treatment, and therefore violates [Harper's] rights under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

L.F. at 26.

But raising such a claim in a motion for new trial was not sufficient to vest this court with jurisdiction. It has long been established that in order to invoke the jurisdiction of this court on the ground that a constitutional question is involved, the particular question to be presented on appeal must have been raised at the earliest opportunity consonant with good pleading and orderly procedure under the circumstances of a given case. . . . Almost always, it is too late to raise the question in a motion for new trial

In re Search Warrant of Property at 501 Pine St., 256 S.W. 2d 783, 784 (Mo. 1953). The exception is where the constitutional question arises from something that occurs during the trial. But this is not such a case. The constitutional claim that Harper raised in his motion for new trial and that he asserts on appeal is based on the facts and the law as they stood before he filed his original petition.

Because Harper failed to make a constitutional claim even by the time of his amended petition, he failed to raise it at the “earliest opportunity” and cannot raise it here. And because Harper cannot raise the constitutional issue on which his assertion of jurisdiction is based, this court lacks jurisdiction over this appeal. *Id.*

STATEMENT OF FACTS

On or about April 28, 1999, appellant Stephen Harper, while under the influence of alcohol, caused an accident that resulted in physical injury to at least four persons in at least two vehicles. L.F. at 6-8. He was charged with four counts of felony assault in the second degree. *Id.* On March 13, 2000, he pled guilty on each of the four counts. Supplemental Legal File (Supp. L.F.) at 8. On May 25, 2000, he was sentenced to “imprisonment for the period of Three (3) Years on each count; said sentence [sic] to run concurrently with each other.” Supp. L.F. at 10.

In February 2001, the Director of Revenue received notification of the March 2000 convictions. L.F. at 23. The Director immediately issued two notices to Harper. *Id.* The first advised Harper that based on the assessment of 12 points for each of the felony convictions, his driving privileges were revoked for one year. L.F. at 19. The second advised him that based on three felony convictions, his privileges would be withheld for 10 years. L.F. at 20.

Harper sought review in the Circuit Court of Jackson County, apparently challenging only the one-year revocation.¹ The Director answered. L.F. at 1-2.

¹ Neither the Legal File nor the Supplemental Legal File contains a copy of Harper’s original Petition for Review, nor a copy of the circuit court docket. He thus cites no support for his assertion that the petition was timely filed. App. Br. at 9. The Director apparently did not assert in the circuit court that either the original petition or the amended

On March 11, 2002, Harper applied for a limited driving privilege, which the Director denied based on Harper's multiple convictions. L.F. at 21. Harper then filed an amended petition for review, which included a challenge to the ten-year denial. L.F. at 14-17.

Based on the pleadings and argument by counsel, the circuit court on July 25, 2002, denied Harper relief and affirmed the Director's decisions. L.F. at 23-24. The July 13 Order was not denominated a "judgment." Harper then moved to reconsider or for a new trial. L.F. at 25-26. The circuit court denied that motion on August 13, 2002. L.F. at 28. Finally, on October 3, 2002, the circuit court amended its July 13 Order to include "judgment" in the title. L.F. 31-33.

Harper filed a notice of appeal on August 29, 2002. L.F. 1-2.

petition was untimely.

ARGUMENT

I. Because Harper has four felony convictions, he is barred from receiving driving privileges for ten years.

The key question here is the same one decided in *Clare v. Director of Revenue*, 64 S.W. 3d 877 (Mo. Ct. App. E.D. 2002).² The statute imposing a ten-year ban on driving privileges, § 302.060(9) RSMo. 2000, applies to a person with multiple “convictions”:

The director shall not issue any license and shall immediately deny any driving privilege: . . .

(9) To any person who has been convicted more than twice of violating state law . . . relating to driving while intoxicated

Clare, like Harper, was convicted on multiple counts arising from a single motor vehicle collision.³ The court of appeals held that convictions on multiple counts were separate convictions for purposes of § 302.060(9). By coming to this court, Harper seeks to reverse the *Clare* holding. But that holding is correct.

² More recently, the same court applied the *Clare* holding in *Timko v. Director of Revenue*, 86 S.W.3d 132 (Mo. Ct. App. E.D. 2002).

³ The record in *Clare* did not show how many vehicles were involved. Here those injured were in at least two vehicles; Harper hit one so hard that it, in turn, hit the vehicle in front of it with enough force to injure someone in that vehicle as well. *See* L.F. at 6-8.

In determining whether Harper and Clare were “convicted” more than twice, the court must “take the words in a statute in their plain and ordinary sense.” *Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W. 3d 462, 465 (Mo. banc 2001). If it must refer to some authority to define the word, the court looks first to dictionaries. *Curry v. Ozarks Electric Corp.*, 39 S.W. 3d 494, 496 (Mo. banc 2001).

Dictionary definitions support the conclusion that each violation of a criminal law results in a “conviction.” To “convict” is to “find or prove (someone) guilty of an offense, especially by the verdict of a court,” THE AMERICAN HERITAGE DICTIONARY (Houghton Mifflin 1981) at 292, or “to judge or find guilty of an offense charged,” WEBSTER’S NEW WORLD DICTIONARY (William Collins 1979) at 311. The legal definition tracks the lay one: to “convict” means “[t]o find (a person) guilty of a criminal offense,” and a “conviction” is a “judgment (as by a jury verdict) that a person is guilty of a crime.” BLACK’S LAW DICTIONARY (7th Edition, West 1999) at 355. Harper was found guilty of four “offenses” or “crimes,” so he has four “convictions” regardless of whether the four crimes occurred in the same incident.

Similarly, Missouri courts have defined a “conviction” as occurring when “judgment has been pronounced upon the verdict,” *Yale v. Independence*, 846 S.W. 2d 193, 194 (Mo. banc 1993), or as “a final judgment when one suffers a loss of privileges or the imposition of a disability,” *State v. Prell*, 355 S.W. 3d 447, 450 (Mo. Ct. App. W.D. 2000). Harper four times “suffer[ed] a loss of privileges or the imposition of a disability.” Each conviction is independent; were even three of the four reversed, Harper would still have a

three-year sentence. *See* L.F. 10-11.

Under any common definition of “convict,” Harper was “convicted” more than twice.

Because § 302.060(9) has a plain and natural meaning, courts cannot resort to rules of construction. *Jones v. Director of Revenue*, 832 S.W. 2d 516 (Mo. banc 1992). But even if the court found ambiguity and invoked rules of construction, the first rule it must apply would require it to affirm the circuit court’s holding. Because § 302.060 is remedial in nature, and is intended to protect the public, it “must be liberally construed to effect its beneficiary purpose.” *Wilson v. Director of Revenue*, 873 S.W. 2d 328, 329 (Mo. Ct. App. E.D. 1994), *citing Appleby v. Director of Revenue*, 851 S.W. 2d 540, 541 (Mo. Ct. App. W.D. 1993). *See also Messer v. King*, 698 S.W. 2d 324, 325 (Mo. banc 1985) (remedial purpose and liberal construction of § 302.060(10)). Put another way, § 302.060 must be liberally “interpreted ‘in order to accomplish the greatest public good.’” *Hagan v. Director of Revenue*, 968 S.W. 2d 704, 706 (Mo. banc 1998). Thus “all reasonable doubts” about the legislature’s intent in drafting the statute “should be construed in favor of applicability to the case.” *Martinez v. State*, 24 S.W. 3d 10, 19 (Mo. Ct. App. E.D. 2000). Here, “the greater public good is served by liberally interpreting the [statute] in favor of keeping multiple offenders off the road.” *Hagan*, 968 S.W. 2d at 706. Harper’s construction runs directly contrary to that “greater public good.” It requires a narrow, rather than a liberal construction of the law. It thus could not be accepted even if resort to rules of construction were required.

Harper admits that the license revocation law is a remedial statute that merits

construction in favor of public safety, but then retracts that concession by asserting that the *Clare* reading of the law moves the remedy “too far . . . from its remedial purpose.” App. Br. at 18. He is wrong. As he correctly states, “The stated purpose of Chapter 302 is to protect the safety and welfare of the public by expeditiously removing the most dangerous drunk drivers from Missouri roadways.” App. Br. at 17. Often, the “most dangerous drunk drivers” are “recurrent intoxicated violators.” *Id.*, quoting *White v. King*, 700 S.W. 2d 152 (Mo. Ct. App. W.D. 1985). But Harper’s implicit argument that *all* of the “most dangerous drunk drivers” are those who violate repeatedly has no basis in law or logic. When a driver like Harper or Clare acts so egregiously that he is convicted of multiple felonies – and for Harper at least, involving multiple vehicles – he has demonstrated that he is among the “most dangerous drunk drivers.”

To avoid that result, Harper asks the court to look to the definition section of Chapter 302. The legislature there defined “conviction,” for purposes of Chapter 302, as “any final conviction.” § 302.010(3). Harper implicitly concedes that circular definition does not help his case. Thus he moves on to a subsequent clause in that provision – one that does not modify the definition of “conviction,” but merely establishes the point at which a suspension or revocation will begin: “the date of final judgment affirming the conviction shall be the date determining the beginning of any license suspension or revocation pursuant to section 302.304.” *Id.* Rather than equate “conviction” and “final judgment,” as Harper suggests, this clause distinguishes between them: one thing, a “conviction,” is “affirm[ed]” in another, a “final judgment.”

Harper's more general insistence on reading § 302.060(9) *in pari materia* with the rest of Chapter 302 provides him no additional help. In fact, like the distinction between "convictions" and "judgments" in § 302.010, the "points" scheme in Chapter 302 that Harper refers to actually points away from his conclusion. As in the suspension and revocation processes, the legislature used the word "conviction" in dictating when and how many "points" to assign to particular events. Twelve points are allocated to "the second or subsequent conviction for any of the following offenses however combined," followed by a list of drunk driving offenses. § 302.302.1(10). The words, "however combined," suggest that it doesn't matter whether the convictions are for separate instances or for the same instances. The statute then also applies the 12-point penalty to "[a]ny felony involving use of a motor vehicle." § 302.302.1(11). The statute thus equates a "felony" with a "conviction."

There is no doubt here that Harper committed four "felonies," or four crimes relating to driving while intoxicated, for he received four sentences. That means he was convicted four times, and is subject to § 302.060(9).

II. The statute rationally distinguishes among persons who are convicted of different numbers of felonies.

Assuming that Harper can assert a tardy constitutional claim, his equal protection claim nonetheless fails. No person in Harper's situation – having multiple felony convictions – is treated differently from Harper.

And differential treatment of similarly situated persons is the hallmark of equal protection analysis. “Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.” *Ex Parte Wilson*, 48 S.W. 2d 919, 921 (Mo. 1904), *quoting* BRILL’S CYCLOPEDIA OF CRIMINAL LAW, vol. 1, § 42. An equal protection claim can thus “only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he.” *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904). The statute distinguishes according to the number of convictions – a distinction that Harper does not even try to disparage.

Harper’s real complaint is not with § 302.060(9), or with the Director’s application of that law. His real complaint is with the exercise of prosecutorial discretion – with the possibility that one prosecutor chooses to include injuries to multiple persons in a single count, while another chooses to set out the charges in separate counts. The direct results of the prosecutors’ decisions are disparate sentencing options. A single count leads to a single felony conviction, and thus to a single sentence within the range permitted by the applicable law. Here, for example, a single count against Harper could have led, at most, to a single sentence not to exceed seven years, § 558.011.1(3), and a \$5,000 fine, § 560.011.1(1). By instead proceeding on multiple counts, the prosecutor opened Harper to the possibility of multiple prison terms and multiple fines. Harper cites no authority for the proposition that leaving such discretion to prosecutors violates any constitutional

mandate. And just as leaving that discretion to prosecutors is constitutional, having the Director rely on the results of the prosecutors' decisions is constitutional.

Harper's argument, taken to its logical extreme, would threaten Missouri's longstanding rule that actors take their victims as they find them. *See, e.g., State v. Johnson*, 475 S.W. 2d 95, 96 (Mo. 1971). By striking a vehicle containing more than one person, Harper and Clare were in a position no different from the man who carjacked a vehicle containing more than one person – a circumstance in which the State “could have charged defendant in two separate counts resulting in convictions and sentencing for two counts of kidnaping.” *State v. Bradley*, 1990 Mo. App. LEXIS 1831 *5 (Mo. Ct. App. E.D. 1990). Similarly, this court has recognized that “the killing by culpable negligence of three different human beings” constitutes “three separate offenses . . . even though the three deaths arose out of the same acts constituting culpable negligence.” *State v. Whitley*, 382 S.W. 2d 665, 667 (Mo. 1964).

Harper argues that the collateral result of the prosecutor's decision to charge separate offenses ultimately renders the line drawn in § 302.060(9) unreasonable, as that provision is read by the Director and in *Clare*. But the line so read is entirely reasonable. It requires the Director to perform what is in effect a ministerial act: count the number of convictions reported by the circuit courts, and impose the restrictions that number of convictions requires. It is Harper's alternative that is unreasonable. He would require that the Director look behind, in some undefined fashion, each set of multiple convictions. He would expect the Director to differentiate between those that "aris[e] out of a single incident" (App. Br. at 26) and those that arise out of multiple incidents. But he does not articulate a manner in which the Director could do that even if she wished to. The records provided by the circuit courts simply do not provide that kind of detail.

Nor is there any constitutional reason to demand that they provide such detail. The legislature's choice to leave it to prosecutors to determine how to charge cases and to the Director to act mechanically based on the results of those decisions is a rational one that passes constitutional muster. The degree to which the Director of Revenue is required to look behind the notice he receives of a conviction and explore whether and how various convictions are interrelated is also a policy question, decided by the legislature. The legislature has instructed the Director to only count the number of convictions on a driver's record, not to determine whether multiple convictions resulted from a single culpable act. Here, she did so, found four convictions, and fulfilled her ministerial duty. If Clare wants to modify the drivers license laws to give additional screening authority to the Director, he

must go to the legislature, not to the courts.

III. That a circuit court delayed in sending notice to the Director of Revenue of a felony conviction does not excuse a driver from any portion of a revocation period.

In his third point, Harper attempts to use the failure of the circuit court in his criminal case to comply with § 302.225.2 as a basis for avoiding the full impact of the revocation and denial that were prompted by his criminal acts. That attempt fails.

On February 5, 2001, Harper was notified that his license was revoked for one year beginning March 7, 2001. The revocation was based on Harper's March 13, 2000 convictions. Though the precise date on which the Director learned of those convictions is not shown in the record, it was during "February, 2001," and the Director issued the February notice "immediately upon receiving notice of [Harper's] convictions." L.F. at 32. The revocation was based on § 302.302.1(9).

Harper is right that § 302.225.2 required the circuit court to notify the Director of the conviction within ten days, and the Director didn't receive notice for nearly a year. The question Harper poses is the impact of the tardy notice. Harper explains that the

requirement § 302.225.2 imposes on the courts should be considered “mandatory” rather than “directory.”

But what Harper wants is not a ruling about whether circuit courts must or merely should promptly notify the Director of criminal convictions. What he wants is the restoration of his driving privileges – and thus, presumably, a ruling that the one-year revocation under § 302.302.1(9) could not run from March 7, 2001. But to the extent Harper wants an earlier expiration date for the revocation, his claim is moot. We are approaching two years beyond the revocation period. A determination that his revocation expired sometime before March 7, 2001, would give Harper nothing.

Moreover, Harper is wrong in his argument that he can somehow benefit from the circuit court’s violation of § 302.225.2. First, he misuses the “mandatory”/“directory” analysis. Whether § 302.225 is mandatory on circuit courts does not answer the sole question posed here: the legality of the Director’s action. Nothing in § 302.225 tells the Director to do – or not to do – anything. The Director’s actions must be judged under the statutes that apply to the Director, not the statutes that regulate the courts.

As to the one-year revocation, the Director acted pursuant to § 302.304. The Director must “revoke the license and driving privilege of any person when the person's driving record shows such person has accumulated twelve points in twelve months.” § 302.304.7. Only in February 2001, when the Director received notice of Harper’s criminal convictions, did Harper’s “driving record show” that he had “accumulated twelve points in twelve months.” The Director’s action at that point was, to use the word invoked

by Harper, “mandatory.” The length of the revocation was fixed by law. Again, that the circuit court may have failed to comply with its obligation does not excuse the Director from complying with hers.

And Harper is wrong as to § 302.225 in any event. His assertion that the statute must be “mandatory” and that failure to comply would benefit a convicted defendant makes no sense. Why would the legislature choose to shorten the revocation period – *i.e.*, to reduce the protection granted by § 302.304 – merely because a court failed to timely notify the Director of a criminal conviction? While failure to begin the revocation period promptly to some extent “frustrates legislative intent” (App. Br. at 33), shortening the revocation period, as Harper seems to demand, frustrates it even more.

The Court of Appeals, Eastern District, has considered similar demands three different times. In each instance, the court rejected them, holding that placing a time limit on a court for providing notice to the Director must be a directory, not a mandatory requirement. *Owens v. Director of Revenue*, 865 S.W. 2d 879 (Mo. Ct. App. E.D. 1993); *Buttrick v. Director of Revenue*, 1990 Mo. App. LEXIS 1113 (Mo. Ct. App. E.D. 1990); *Kersting v. Director of Revenue*, 792 S.W. 2d 651 (Mo. Ct. App. W.D. 1990). As that court explained, the purpose of § 302.244.2 “is to speed suspension or revocation, not to provide procedural safeguards for the driver.” *Buttrick*, 1990 Mo. App. LEXIS 1113 at *3. And though a portion of the holding in *Buttrick* was later reversed by legislation, the Eastern District reiterated in *Jennings v. Director of Revenue*, 986 S.W. 2d 513, 514 (Mo. Ct. App. E.D. 1999), that the key in evaluating when a revocation on points begins is the

Director's receipt of notice: "As noted in *Buttrick*, Director is not omniscient and must be notified in order to carry out the duty of assessing points and determining the imposition of a revocation or suspension." The Western District had recently followed that lead.

Sumpter v. Director of Revenue, 88 S.W. 3d 491, 494-95 (Mo. Ct. App. W.D. 2002).

Again, there is no logical bridge between the requirement that Harper cites (10-day notification) and the result he implicitly seeks (a shorten revocation period). By contrast, the Director was on firm footing when she did precisely what the statute required: to immediately impose a one-year revocation once Harper's driving record showed that he had accumulated twelve points.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be affirmed.

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