

SC90317

IN THE SUPREME COURT OF MISSOURI

NATALIE R. ROSS,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

**Appeal from the Platte County Circuit Court
The Honorable Daniel M. Czamanske, Circuit Judge**

SUBSTITUTE RESPONDENT'S BRIEF

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SUMMARY OF THE ARGUMENT

Unable to mount a compelling argument to support her only claim of error actually preserved, Ross decides to inject an entirely new point relied on. The new claim of error, challenging the substantial evidence supporting probable cause, was never raised in the trial court, not appealed in the court of appeals, and only injected in the Substitute Appellant's Brief in this Court. This new claim of error should be rejected. *See Magenheim v. Bd. of Educ. of Sch. Dist. of Riverview Gardens*, 340 S.W.2d 619 (Mo. 1960); Rule 83.08(b).

Not only was Ross' new claim not preserved, but it also fails on the merits. There is substantial evidence supporting the trial court's judgment finding an arrest, probable cause and refusal to submit to a chemical test. Viewing the evidence in the light most favorable to the judgment and affirming "under any reasonable theory supported by the evidence" the judgment should be affirmed. *Berry v. Dir. of Revenue*, 885 S.W.2d 326 (Mo. banc 1994).

Finally, the trial court judgment did not erroneously declare or apply the law. The plain language of the statute does not impose a 90 minute limitation on implied consent to conduct a chemical breath test, nor is implied consent eviscerated by an "unlawful" arrest. Indeed, under longstanding case law, a "lawful" arrest is not necessary to satisfy the elements for a civil license revocation case such as this. *See, e.g., Riche v. Dir. of Revenue*, 987 S.W.2d 331 (Mo. banc 1999). Accordingly, the judgment of the trial court should be affirmed.

STATEMENT OF FACTS

At 1:58 a.m. on the morning of February 2, 2008, Corporal Thomas G. Sims, Assistant Zone Supervisor of the Missouri Highway Patrol, Troop A, was dispatched to an area on Northbound I-435, at the Missouri River Bridge, in Platte County, Missouri. (TR 7, 18). He was dispatched to the area following a report that a female subject was on the shoulder of the highway. (TR 6-7, 18; Exhibit A).

When the officer arrived at the scene, he did not initially locate the female subject, but he did locate “fresh scrape marks on the roadway.” (TR 7; Exhibit A). The scrape marks “went from the left bridge rail, across all northbound lanes to the right shoulder.” (TR 7; Exhibit A). Off the right side of the highway, down a steep embankment, and “in line with the marks from the road” was a white passenger car. (TR 7; Exhibit A). The car was registered to Natalie R. Ross. (TR 18).

The officer walked down the snow-covered embankment and made contact, through the driver’s side door, with Ross. (TR 7; Exhibit A). The initial contact was made at 2:14 a.m. (Exhibit A). The officer “immediately detected a strong odor of intoxicants emitting from the passenger compartment.” (Exhibit A). Ross was seated in the right passenger front seat of her car and a male was laying in the rear seat. (TR 7; Exhibit A). The officer first checked to see if either Ross or the male were injured because he noticed “extensive damage” to

the front driver's side door of the vehicle. (TR 8; Exhibit A). He also asked Ross if she had gone up to the shoulder to try to flag down traffic to get help. (TR 8). She told him that she was not up on the shoulder and that she was not driving the vehicle. (TR 8; Exhibit A). Ross' footprints, however, were in the snow. (TR 9). The footprints "were on the driver's side and they led directly from the driver's side up to the shoulder of the road." (TR 9). The footprints were from high heeled or female shoes. (TR 10). The officer also found one of Ross' silver high heeled shoes, which matched the other one she was wearing in the car, "about halfway up the hillside." (TR 9). It was "[d]irectly from the driver's door up the embankment." (TR 11).

When the officer asked Ross to exit the car, he noticed that there was a pink and white glass pipe, consistent with smoking marijuana, laying on the front driver's seat of Ross' vehicle. (TR 8). "The pipe contained residue and had the odor of marijuana." (Exhibit A). When Ross was getting out of her car the officer also "noticed that her eyes were watery and bloodshot." (TR 8). In addition, he again noted a strong odor of intoxicant emitting from the passenger compartment of the vehicle." (TR 9). The officer also observed that her speech was mumbled. (TR 11; Exhibit A).

Upon exiting her vehicle, Ross tried to locate one of her silver high-heeled shoes that she was missing. (TR 9). Because Ross was unable to locate her other shoe in the vehicle, she chose to leave the one shoe in the vehicle. (TR 9,

15-16; Exhibit A). The officer then walked Ross up to the shoulder of the road and placed her under arrest for possession of drug paraphernalia. (TR 10). He put her in handcuffs behind her back and placed her in the front passenger seat of his patrol vehicle. (TR 12). He also informed her at the scene that she was under arrest for careless and imprudent driving involving the accident. (TR 10, 12, 19; Exhibit A).

When the officer asked Ross who was driving the vehicle, she stated that her friend was driving and that is who must have been up on the shoulder of the road. (TR 11). When asked who the friend was, Ross could not answer the question. (TR 11). The officer did not ask Ross to perform any field sobriety tests at the scene because of her lack of footwear and the freezing conditions. (TR 12). He felt it would have been unreasonable to have her stand on the shoulder for those tests. (TR 12). At Ross' request, they also waited for a tow truck to come and pick up her car. (Exhibit A). Ross was then transported to the Platte County Jail. (TR 12; Exhibit A).

The officer testified that he has received training in the administration of field sobriety tests, and specifically in the horizontal gaze nystagmus test ("HGN"). (TR 11-12). At the Platte County Jail, he performed the HGN test and had Ross perform the one-leg stand test and the walk-and-turn test. (TR 12). Because she had chosen to leave her one shoe in the vehicle, Ross performed the tests barefoot. (TR 15-16). All six clues of intoxication were observed on the

HGN test. (TR 13-14). Ross' performance on the walk-and-turn test also indicated that she was impaired. (TR 14-15). When performing the one-leg stand test, Ross fell back, swayed, and used her arms and a nearby wall for balance. (TR 12-16; Exhibit A).

The arresting officer testified at trial that he has experienced persons who are intoxicated in social settings and he has received training in the identification of intoxicated persons. (TR 16). Based on his observations of her balance, Ross' performance on the field sobriety tests, and the odor of intoxicants, he determined that she was impaired and her ability to operate a vehicle was impaired as well. (TR 16-17). Although she was already under arrest and in custody, the officer informed Ross that he was also placing her under arrest for driving while intoxicated. (TR 17). At 3:54 a.m., the officer read the Implied Consent Law word-for-word and Ross refused to take the breath test. (TR 20-22; Exhibit A). Thus, the three citations issued for Ross were for possession of drug paraphernalia, careless and imprudent driving involving an accident, and operating a vehicle while intoxicated. (TR 16-17, 19, 20, Exhibit A). Ross pled guilty to operating a vehicle while intoxicated. (TR 4).

At the trial concerning Ross' refusal to submit to the breath test, the Director of Revenue presented testimony as well as an Exhibit A supporting the elements of the claim. (TR 1-18, 21). Ross presented no evidence at trial, only argument. (TR 21). At no point did Ross ever argue to the trial court that the

evidence was insufficient to support reasonable grounds or probable cause. Instead, at the end of the trial Ross' only argument was that her arrest was outside of the 90 minute time frame required by § 577.039 for a lawful arrest, and that the "Implied Consent under provisions of 577.041 are all inconclusive [sic] with respect to the requirement of a valid arrest." (TR 22-24). Ross further cited *Reed v. Dir. of Revenue*, 184 S.W.3d 564 (Mo. banc 2006), and the trial court took the case under advisement on June 19, 2008. (TR 24).

The trial court entered judgment on June 27, 2008, holding that Ross was "arrested, that the arresting officer had reasonable grounds to believe that [she] was driving a motor vehicle while in an intoxicated condition, and that [she] refused to submit to the chemical test of [her] breath." (LF 11). Accordingly, the trial court affirmed the Director's revocation of Ross' driver's license under § 577.041. After trial, Ross filed a motion for reconsideration arguing that her arrest for driving while intoxicated was not lawful because it was not made within 90 minutes of initial contact. (LF 12).

In her appeal to the Missouri Court of Appeals, Western District, Ross did not dispute that the arresting officer had reasonable grounds to believe that she was driving a motor vehicle while in an intoxicated condition and that she refused the test; she only raised one point relied on, arguing that her arrest was not "within one and one-half hours of the claimed violation." Appellant's Brief in the Court of Appeals, p. 9 (stating Appellant's only Point Relied Upon).

ARGUMENT

Standard of Review

In a court-tried civil action, the trial court's judgment should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Fick v. Dir. of Revenue*, 240 S.W.3d 688, 690 (Mo. banc 2007). In accordance with these bedrock principles, courts view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. *Findley v. Dir. of Revenue*, 204 S.W.3d 722, 725 (Mo. App. S.D. 2006).

"The trial court has the prerogative to accept or reject all, part, or none of the testimony." *Berry v. Dir. of Revenue*, 885 S.W.2d at 328 (Mo. banc 1994). Furthermore, all facts are deemed to have been found in accordance with the result reached and the "judgment is to be affirmed under any reasonable theory supported by the evidence." *Id.*

In this case, substantial evidence supports the trial court's judgment, and the judgment does not erroneously declare or apply the law. Therefore, the trial court's judgment should be affirmed.

I. The Trial Court’s Judgment to Revoke Ross’ License Under § 577.041.4 is Supported by Substantial Evidence of Her Arrest, Probable Cause, and Refusal to Submit to a Chemical Test.

There is substantial evidence to support the trial court’s judgment in this case under § 577.041.4. Yet, during the entire course of this trial and appeal Ross has not once sought to preserve a claim nor challenged the substantial evidence. Until now. In Ross’ Substitute Appellant’s Brief recently submitted to this Court she raises for the first time an entirely new point relied on. This belated attempt to challenge the substantial evidence is not preserved. More importantly, the trial court’s judgment is in fact supported by substantial evidence and should be affirmed on that basis alone.

A. A Point Relied On Raised For the First Time in a Substitute Appellant’s Brief Fails to Preserve the Claim Under Rules 84.04 and 83.08 – Responding to Appellant’s Point II.

Apparently recognizing the weakness of her only point of error preserved for appeal and raised in the court of appeals, Ross submits a new point claiming that “no evidence associated Ross with possible impairment at the time of her arrests at the scene.” Appellant’s Substitute Brief, pp. 22-23. This claim of error is not preserved and should be rejected under Rules 84.04 and 83.08.

Rule 84.04 sets forth the requirements for preserving error on appeal. Courts routinely hold that a “failure to substantially comply with Rule 84.04

preserves nothing for appellate review.” *Speer v. K and B Leather Co.*, 150 S.W.3d 387, 389 (Mo. App. S.D. 2004); *see, e.g., Pearman v. Dept. of Social Servs.*, 48 S.W.3d 54 (Mo. App. W.D. 2001). This Court has held that even “[c]omplaints in the printed argument of a brief and assignments or points first presented in a reply brief do not comply with [the Court’s] rules and present nothing for [the Court’s] consideration.” *Magenheim v. Bd. of Educ. Of Sch. Dist. of Riverview Gardens*, 340 S.W.2d 619 (Mo. 1960) (finding also that “[i]ssues submitted in appellant’s original brief are not to be enlarged by presentation in his reply brief”).

In the trial court Ross did not present any evidence or challenge the sufficiency of the evidence. In the court of appeals, Ross asserted only one point relied on and did not challenge the evidence supporting probable cause. She failed to follow Rule 84.04 in order to preserve the claim of error she now asserts under her second point relied on. Thus, her second point relied on presents “nothing for [this Court’s] consideration.” *Id.*

Likewise, Rule 83.08 states that a substitute brief in this Court “shall not alter the basis of any claim that was raised in the court of appeals brief.” Ross’ new point relied on was not preserved as required by Rule 84.04 and is inconsistent with Rule 83.08. Therefore, the point should be denied.

B. There is Substantial Evidence of Ross' Arrest, Probable Cause and Refusal to Submit to a Chemical Test.

Ross' belated efforts to challenge the evidence in this case only serves to highlight the substantial evidence supporting the trial court's judgment. This action was brought in the trial court under § 577.041.4, and as such the trial court should be affirmed if there is substantial evidence to support the elements of the claim. In a case under § 577.041.4 the trial court "*shall determine only:*"

- (1) Whether or not the person was arrested or stopped;
- (2) Whether or not the officer had: (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; . . . and
- (3) Whether or not the person refused to submit to the test.

§ 577.041.4 (emphasis added). This is precisely the judgment of the trial court. After hearing evidence and testimony offered only by the Director (with Ross having offered no evidence), the trial court specifically found "[1] that the petitioner was arrested, [2] that the arresting officer had reasonable grounds to believe that the petitioner was driving a motor vehicle while in an intoxicated condition, and [3] that the petitioner refused to submit to the chemical test of his breath." (LF 11).

There is no factual dispute that Ross was arrested. Indeed, Ross was told she was being arrested at three different times. Consistent with the evidence before the trial court, the Director argued in the court of appeals that “the arrest requirement was satisfied when Officer Sims, once he walked her up the hill, placed Ms. Ross in handcuffs behind her back and placed her in the front passenger seat of his vehicle.” Respondent’s Brief, p. 15; *see also id.* p. 11 (arguing that “Ross is trying to confuse the issues by in essence arguing that the only arrest that is pertinent in this case is her arrest for driving while intoxicated”).

It was the officer’s belief before the trial court that Ross was arrested shortly after the initial contact for possession of drug paraphernalia and careless and imprudent driving, and then later at the police station (more than 90 minutes after the initial contact) for driving while intoxicated. “However, the officer’s subjective belief is not controlling on the question of probable cause” and the officer’s “characterization of the arrest” does not “negate the circumstances known to him, justifying the arrest.” *State v. Heitman*, 589 S.W.2d 249, 254 (Mo. banc 1979) (internal citations omitted) (“The facts supplying probable cause to arrest were present and whether the officer subjectively so believed or said, is of no real moment.”); *Guhr v. Dir. of Revenue*, 228 S.W.3d 581, 585 n.3 (Mo. banc 2007) (“The trial court applies an objective standard . . .”).

Ross never challenged probable cause in the trial court or the court of appeals, and the trial court did not specify in its judgment at what point there was probable cause to arrest for driving while intoxicated. The trial court merely found that there was probable cause. (LF 11). If we are to construe all facts in favor of the judgment and affirm on any basis in the record, then the judgment should be affirmed on the basis of the following facts known to the officer at the time of the *first* arrest:

- At 2:00 a.m. in the middle of winter the officer located “fresh scrape marks on the roadway” that “went from the left bridge rail, across all northbound lanes to the right shoulder.” (TR 7; Exhibit A) The scrape marks were from Ross’ car that was down a steep embankment and had extensive damage; (*Id.*)
- When the officer contacted Ross he “immediately detected a strong odor of intoxicants emitting from the passenger compartment” of Ross’ car; (Exhibit A)
- Ross lost one shoe walking up to the roadway, lied that she had not gone up to the roadway, and stated she could not find her shoe; (TR 8-10)
- Ross had a pink and white marijuana pipe next to her in her car with a residue and odor of marijuana; (TR 8; Exhibit A)

- Ross lied about who was driving her car; (TR 11)
- When Ross was getting out of her car the officer also “noticed that her eyes were watery and bloodshot”; (TR 8)
- Ross’ speech was mumbled. (TR 11; Exhibit A).

The undisputed evidence known at the time of Ross’ first arrest (and within 90 minutes of the initial contact) is more than sufficient to support the trial court’s finding of probable cause. *See, e.g., Berry*, 885 S.W.2d at 328 (finding probable cause under similar circumstances); *Brown v. Dir. of Revenue*, 85 S.W.3d 1 (Mo. banc 2002) (reviewing cases satisfying probable cause including one in which probable cause was based only on the driver’s erratic driving and odor of alcohol on his breath). And although field sobriety tests are not required to establish probable cause, *see Brown v. Dir. of Revenue*, 85 S.W.3d 1 (Mo. banc 2002), Ross eventually failed all of those tests.

Finally, there is no factual dispute that Ross actually refused to submit to the chemical breath test. Thus, the undisputed evidence unquestionably supports all of the elements for a civil license revocation case under § 577.041.4. Based on the substantial evidence, the trial court’s judgment should be affirmed without any need for further analysis of the statute.

II. The Trial Court’s Judgment Does Not Erroneously Declare or Apply the Law and is Consistent with the Applicable Statutory Provisions and the Case Law – Responding to Appellant’s Point I.

Instead of challenging the undisputed evidence, Ross preserved only a single legal argument on appeal. Her sole point of error preserved for review concerns the 90 minute limitation for a lawful criminal arrest under § 577.039, and whether it applies in this civil license revocation case under § 577.041. This argument, however, assumes that the requisite probable cause was not established before 90 minutes passed from the officer’s initial contact with Ross. As set forth above, there was substantial evidence to support an arrest and probable cause before 90 minutes expired. But even if 90 minutes had expired, Ross’ legal arguments under the statute would still fail. The plain language of the statutory sections at issue – §§ 577.039 and 577.041 – are conclusive, and neither the implied consent provision in § 577.020, nor the exclusionary rule, undermine the elements of the license revocation claim in this case.

A. The Plain Language of the Statutory Sections at Issue – §§ 577.039 and 577.041 – are Conclusive.

The starting point for any statutory analysis is the language of the statute itself. And the “primary rule of statutory construction is to ascertain the intent of the legislature by giving the language used its plain and ordinary meaning.”

Fast v. Marston, 282 S.W.3d 346, 349 (Mo. banc 2009). In this case, the plain language of the provisions at issue – § 577.039 and § 577.041 – are conclusive.

Section 577.039, specifically provides what sections it applies to:

“An arrest without a warrant . . . *for a violation of section 577.010 or 577.012* is lawful whenever . . . such arrest without warrant is made within one and one-half hours after such claimed violation occurred”

§ 577.039 (emphasis added). The officer purported to arrest Ross first for possession of drug paraphernalia, then for careless and imprudent driving, and finally for driving while intoxicated in violation of § 577.010. But this case is not about the lawfulness of her criminal arrests under § 577.039. Indeed, she already pled guilty to driving while intoxicated in violation of § 577.010. (TR 4; *State v. Natalie Renae Ross*, 08AE-CR00554). Instead, this is a civil action concerning the revocation of Ross’ driver’s license under § 577.041.

There is no reference to civil license revocation cases in § 577.039, nor any incorporation of the corresponding section numbers. In fact, § 577.039 specifically applies only to criminal violations and not civil matters. Had the legislature intended that the 90 minute window for the “lawfulness” of a criminal arrest should apply to civil license revocation cases it would have been a simple matter to include one additional section number. *See Roux v. Dir. of Revenue*, 732 S.W.2d 595, 596 (Mo. App. E.D. 1987) (holding that § 577.039 does

not regulate all arrests but is limited to “arrests ‘for a violation of sections 577.010 to 577.012’”); *State v. Setter*, 721 S.W.2d 11, 15-17 (Mo. App. W.D. 1986) (“[W]hen any person is arrested for any offense other than those prescribed under § 577.010 and/or § 577.012, by use of a motor vehicle while the person was intoxicated or drugged, then the limitations prescribed in § 577.039 shall not apply.”). Instead, the legislature selected only two criminal provisions to which the 90 minute window applies. And neither are at issue in this case.

Equally important in the plain language analysis of the statute is the fact that § 577.041 does not itself require that the arrest or stop be “lawful” under § 577.039 (or any other provision for that matter) in order to support a civil license revocation case. Liability under § 577.041 is not “conditioned upon the requirement” in § 577.039. *Reed v. Dir. of Revenue*, 184 S.W.3d at 568 (Mo. banc 2006). The legislature made no reference to § 577.039 in the requirements for a civil license revocation case under § 577.041, nor imposed any requirement that the arrest or stop be “lawful.” The legislature certainly could have qualified the requirements of § 577.041 with a reference to § 577.039 or inserted the word “lawful” in § 577.041. But the legislature did not.

The plain language of the statutory sections at issue – §§ 577.039 and 577.041 – should end the analysis, and the trial court judgment should be affirmed.^{1/}

B. Section 577.020 Does Not Limit Implied Consent to 90 Minutes.

Disregarding the plain language of §§ 577.039 and 577.041, Ross argues that § 577.020 is controlling in this case. She argues that certain qualifying language in § 577.020 makes a “lawful” arrest under § 577.039 a “condition precedent to implying her consent to a chemical analysis of her breath” and therefore a necessary precondition for the required refusal element under § 577.041. Appellant’s Substitute Brief, p. 13. This circuitous argument is not supported by the statute or the case law.

^{1/} Contrary to Ross’ suggestions, application of the plain language of the statutory sections at issue does not create an illogical result, but is perfectly consistent with long-standing case law for refusal cases. Instead, it would be illogical to hold that certain unlawful or invalid arrests can no longer satisfy the requirements of a refusal case under § 577.041, while other unlawful or invalid arrests can support a refusal case. Moreover, it is perfectly logical to distinguish between a civil license revocation case and a criminal arrest.

The statute does not make a “lawful” arrest under § 577.039 (*i.e.* an arrest made within 90 minutes) a condition precedent to implied consent. Section 577.020 provides that:

Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person’s breath, blood . . . (1) if the person is arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition

§ 577.020.1. Ross’ argument focuses on the phrase “subject to the provisions of sections 577.019 to 577.041.” According to Ross, because the cross-referenced sections encompass § 577.039 then implied consent is withdrawn if the arrest does not meet the 90 minute window for purposes of a criminal arrest. However, § 577.039 says nothing about implied consent. It deals only with whether an arrest is lawful for criminal purposes. Thus, there is nothing about implied consent within § 577.039 to which it can be “subject to.”

In contrast, there are provisions within the range of “sections 577.019 to 577.041” that deal with the implied consent for chemical tests. For example, § 577.020.2 provides that “[t]he implied consent to submit to the chemical tests .

. . shall be limited to not more than two such tests arising from the same arrest, incident or charge.” And § 577.033 indicates instances when a person is “deemed not to have withdrawn the consent.” It is easy to see how both of these provisions fit the criteria for which implied consent could be “subject to.” But nowhere in § 577.039 is there any provision for, or reference to, implied consent, withdrawal of consent, or anything like unto it.

This Court in *Reed v. Dir. of Revenue*, also did not conclude that implied consent is conditioned upon an arrest in compliance with § 577.039. Instead, this Court held that “[t]he legislature has determined that anyone who operates a motor vehicle on public roads in this state impliedly consents to taking a chemical test to determine whether he or she is driving intoxicated.” *Reed*, 184 S.W.3d 564 at 567; *see* § 577.020 (providing that a test shall be administered “whenever the person has been arrested or stopped for any reason.”). “Missouri’s implied consent law is so named because it provides that ‘any person who drives on the public highways is deemed to have consented to a chemical test to determine the alcohol or drug content of the person’s blood.’” *Guhr*, 228 S.W.3d at 583 (quoting *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002)). This Court did not say that implied consent included driving on the public highways and a lawful arrest, but only driving on the public highways. Thus, a cross-reference in § 577.020 that includes § 577.039 does not result in

the withdrawal of implied consent and does not undermine the arrest element for a license revocation claim under § 577.041.

C. The Exclusionary Rule Does Not Apply to Civil License Revocation Claims Under § 577.041.

Even if we assume that Ross' arrest or stop based on probable cause was not within 90 minutes and therefore "unlawful" under § 577.039, that does not mean that it was not still an arrest or a stop for purposes of a civil license revocation case under § 577.041. Yet, that is exactly what Ross is arguing.

Ross asserts that if an arrest is "unlawful" under § 577.039 because it was more than 90 minutes after initial contact, that a license revocation claim cannot be established if the person refuses a chemical test. This argument runs directly contrary to the decisions of this Court concerning the exclusionary rule. This Court has held that the exclusionary rule does not apply in a civil context such as this. *See, e.g., Riche v. Dir. of Revenue*, 987 S.W.2d 331, 334-35 (Mo. banc 1999).

There is no question that Ross was in fact "arrested or stopped" in this case as required by § 577.041. In fact, she was informed of her arrest at least three separate times. This, along with probable cause and refusal to take a chemical test, is all that is required to satisfy a civil revocation case under § 577.041. *See Guhr*, 228 S.W.3d at 584; *Garriott v. Dir. of Revenue*, 130 S.W.3d 613, 615 (Mo. App. W.D. 2004).

In a refusal case under § 577.041, there is no required “showing that the initial stop was valid, or even that the arrest was lawful.” *Garriott*, 130 S.W.3d at 616 n.3; *see also Riche*, 987 S.W.2d 331. To support her position, Ross relies on *Reed*, 184 S.W.3d 564.^{2/} Reliance on *Reed*, however, is misplaced for several reasons.

First, *Reed* was not a refusal case. This distinction is very important to the analysis because an entirely separate section was at issue in *Reed*. Section 577.037 was the section at issue in *Reed* because the central question was whether the blood alcohol content test results were admissible in the case. *Reed*, 184 S.W.3d at 567-68 (“Section 577.037, RSMo Supp. 2003, governs the admissibility of chemical tests to establish a driver’s blood alcohol content in license suspension and revocation proceedings.”). Section 577.037 contains a specific requirement that any blood alcohol test “shall have been performed as provided in section 577.020 to 577.041.” § 577.037.4. This provision, specifically incorporating § 577.039, was the basis for this Court’s holding:

^{2/} Ross also relies on *Collette v. Dir. of Revenue*, 717 S.W.2d 551 (Mo. App. W.D. 1986). However, *Collette* was a case in which the refusal came before the arrest. That is not the case here. The Court in *Collette* also lamented § 577.039, stating that the limitation “ignores the reality faced by investigating officers,” and urged the General Assembly to “consider the problem.” *Id.* at 557-58.

A failure to comply with the provisions of sections 577.020 to 577.041 means that the chemical analysis is not admissible in civil proceedings to suspend or revoke a driver's license. . . . Accordingly, the blood alcohol test results obtained from the arrest in violation of section 577.039 are not admissible.

Reed, 184 S.W.3d at 568. Unlike the provision at issue in *Reed* – § 577.037 – there is no reference to lawfulness under § 577.039, nor any incorporation of that section in the requirements to support a refusal case under § 577.041.

Second, this Court in *Reed* maintained throughout the opinion that there was an arrest, albeit unlawful under § 577.039. *See Reed*, 184 S.W.3d at 565 (“Nicholas Reed was arrested”); *id.* (“The arrest”); *id.* at 566 (“ . . . arrested Reed.”); *id.* at 567 (“Reed was then arrested”); *id.* (“Given that the arrest”); *id.* at 568 (“Reed was arrested”); *id.* (“ . . . test results obtained from the arrest”); *id.* (“ . . . he was arrested for driving while intoxicated”); *id.* (“Reed’s arrest”). At no point did this Court in *Reed* hold that there was no arrest or stop. Instead, this Court merely held that the arrest was unlawful and therefore the blood alcohol test results were not admissible.

There is no requirement that the arrest be lawful under § 577.039 in order to satisfy the elements of a refusal case under § 577.041, and *Reed* does not

support such a conclusion. Several other courts have reached the same conclusion. In *Sullins v. Dir. of Revenue*, 893 S.W.2d 848, 850 (Mo. App. S.D.1995), for example, the driver refused to take a breath analysis test and his license was revoked under § 577.041. He contested the validity of his arrest and claimed that it was invalid because the officers were outside the city limits. He then claimed that there had to be a valid arrest before there could be a refusal. The Southern District disagreed and held that even if the traffic stop was illegal, the evidence of the driver's arrest and refusal could be considered.

The court in *Garriott*, 130 S.W.3d at 614-15 followed the rationale in *Sullins* and held: "Although Mr. Garriott's reason for claiming the arrest is invalid is different from Mr. Sullins' reason, his intended result is the same-he did not refuse under section 577.041 because he was not validly arrested." In *Garriott* the court then held:

But Mr. Garriott's contention that the validity of the stop matters in this case is meritless. Section 577.041.4 is very clear about what the trial court can consider in a hearing about a revocation for refusal to take a test: whether the driver was arrested, whether the officer had reasonable grounds to believe the driver was driving while intoxicated, and whether the driver refused to take the test. *The statute does not require a*

showing that the initial stop was valid, or even that the arrest was lawful.

Garriott, 130 S.W.3d at 616, n. 3 (emphasis added). Like the claims made in *Garriott* and *Sullins*, Ross' claim that her arrest was unlawful does not affect the elements of § 577.041.

The substantial and uncontroverted evidence supports the trial court's judgment in this case. Furthermore, the judgment does not erroneously decide or apply the law. Accordingly, this Court should affirm the trial court.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment upholding the Director's revocation of Ms. Ross' driver's license.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b)-(c)

The undersigned hereby certifies that on this 22nd day of October 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,037 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.
