

SC90400

IN THE SUPREME COURT OF MISSOURI

ADAM FORD WHITE,

Respondent,

vs.

DIRECTOR OF REVENUE,

Appellant.

Appeal from the Henry County Circuit Court
The Honorable Wayne P. Strothmann, Judge

SUBSTITUTE APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Henry County reinstating the driving privileges of Respondent, Adam Ford White, following a trial *de novo* pursuant to § 302.535, RSMo.^{1/} The appeal was filed in the Missouri Court of Appeals, Western District, which issued an order and memorandum opinion under Rule 84.16(b) on July 7, 2009. Appendix (“App.”) A5-A14. This Court transferred the appeal on October 6, 2009.

^{1/} All statutory cites are to the 2008 Missouri Revised Statutes, as amended, unless otherwise noted.

STATEMENT OF FACTS

Adam Ford White was arrested based on probable cause that he was driving while intoxicated. He was stopped by officer Bill Bremer, a fourteen year employee of the Missouri Highway Patrol, on September 20, 2007, at approximately 8:40 p.m. (Tr. 3-5). Officer Bremer was driving the speed limit in the left lane when he observed White passing him (speeding) in the right lane and turning illegally (without a signal) into a parking lot. (Tr. 5). After stopping White, and while talking to him, officer Bremer detected an odor of intoxicants from White, and noticed “several beer cans strewn throughout the vehicle.” (Tr. 5-6). Officer Bremer testified that White had a “strong odor” of intoxicants. (Tr. 6, 23). And while White initially denied drinking, he eventually admitted to drinking “one at around 5:00.” (Tr. 6).

Officer Bremer had White take a preliminary breath test, which indicated alcohol was present. (Tr. 8-9). Officer Bremer, who is NHTSA-trained on all standardized field sobriety tests, then had White perform certain field sobriety tests. (Tr. 4, 7-9). On the horizontal gaze nystagmus test White had five of the six clues, thus indicating intoxication. (Tr. 20). In the other field sobriety tests, White had some difficulties. He did not have clues of intoxication on the one-leg stand test, but White failed to make the correct pivot on the walk-and-turn test and was unusually slow and deliberate in reciting the letters of the alphabet. (Tr. 21-23). Moreover, officer Bremer noticed that throughout the field sobriety

tests White swayed and his eyes were bloodshot. (Tr. 23). Based on his observations and years of experience officer Bremer arrested White for driving while intoxicated and transported him to the Henry County Jail. (Tr. 24).

The Director suspended White's driver's license pursuant to § 302.505, and White sought review in the Circuit Court of Henry County by filing a petition for review. (LF 4-6). The only issue at trial was the probable cause assessed by officer Bremer. White stipulated to everything, except probable cause, in favor of the Director, including the results of the breath test which showed White's blood alcohol content was .102. (Tr. 2-3). The only witness to testify was officer Bremer. The only other evidence was the Director's exhibit 1, containing records pertaining to White's arrest. The trial court said nothing about the evidence, the credibility of the witness, or probable cause, but instead simply entered a form judgment in favor of White and against the Director. (LF 8).

POINT RELIED ON

The Trial Court Erred in Entering a Judgment in Favor of White, Because the Judgment is Against the Weight of the Evidence and Erroneously Applies the Law, In That There is Substantial and Uncontroverted Evidence For Which Courts Have Routinely Found Probable Cause, Including White's Unusual or Illegal Operation of a Vehicle, a Failed Preliminary Breath Test, a Strong Odor of Intoxicants from White, Empty Beer Cans in His Vehicle, an Admission of Drinking, Swaying, Bloodshot Eyes, and a Failed Horizontal Gaze Nystagmus Test.

Guhr v. Dir. of Revenue, 228 S.W.3d 581 (Mo. banc 2007)

Brown v. Dir. of Revenue, 85 S.W.3d 1 (Mo. banc 2002)

Hinnah v. Dir. of Revenue, 77 S.W.3d 616 (Mo. banc 2002)

Eggleston v. Lohman, 954 S.W.2d 696 (Mo. App. W.D. 1997)

ARGUMENT

The Trial Court Erred in Entering a Judgment in Favor of White, Because the Judgment is Against the Weight of the Evidence and Erroneously Applies the Law, In That There is Substantial and Uncontroverted Evidence For Which Courts Have Routinely Found Probable Cause, Including White’s Unusual or Illegal Operation of a Vehicle, a Failed Preliminary Breath Test, a Strong Odor of Intoxicants from White, Empty Beer Cans in His Vehicle, an Admission of Drinking, Swaying, Bloodshot Eyes, and a Failed Horizontal Gaze Nystagmus Test.

Standard of Review

As for all court-tried civil cases, the standard of review is set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The trial court’s judgment will be affirmed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.* at 32.

In this case, the only evidence presented at trial was by the Director. The arresting officer testified and the Director’s exhibit 1 was admitted without objection. In contrast, White presented no evidence and the trial court made no assessment or finding of credibility. *See Geist v. Dir. of Revenue*, 179 S.W.3d 391, 393-94 (Mo. App. E.D. 2005). When there is “no specific finding as to the

credibility of the officer's testimony . . . [an appellate court] will not presume that the [trial] court found a lack of credibility on this issue and need not defer to the trial court's conclusion." *Id.* (citing *Mathews v. Dir. of Revenue*, 8 S.W.3d 237, 238 (Mo. App. E.D. 1999) and *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002)); see also *Brown v. Dir. of Revenue*, 85 S.W.3d 1, 7 (Mo. banc 2002) (quoting *Mathews*).

The evidence presented by the Director at trial was substantial and uncontroverted. Accordingly, the judgment of the trial court should be reversed.

A. The Trial Court's Judgment Was Against the Weight of the Evidence Because There Was Substantial and Uncontroverted Evidence of Probable Cause.

To establish a *prima facie* case for suspension, "the Director must present evidence demonstrating: '(1) probable cause for the arrest and (2) the driver's blood alcohol level exceeded the legal limit.'" *White v. Dir. of Revenue*, 227 S.W.3d 532, 534 (Mo. App. W.D. 2007) (quoting *Coyle v. Dir. of Revenue*, 181 S.W.3d 62, 64 (Mo. banc 2005)). White stipulated that his blood alcohol level exceeded the legal limit. Therefore, the only issue at trial was probable cause.

Probable cause exists "when the surrounding facts and circumstances demonstrate to the senses of a reasonably prudent person that a particular offense has been or is being committed." *Brown*, 85 S.W.3d at 4 (quoting *Smyth v. Dir. of Revenue*, 57 S.W.3d 927, 930 (Mo. App. W.D. 2001)). The trial court

“must assess the facts by viewing the situation as it would have appeared to a prudent, cautious, and trained police officer.” *Brown*, 85 S.W.3d at 4. The analysis requires consideration of all of the information in the officer’s possession before the arrest, *see Hinnah*, 77 S.W. 3d at 620, and the reasonable inferences drawn from that information, *see Edmisten v. Dir. of Revenue*, 92 S.W.3d 270, 274 (Mo. App. W.D. 2002).

“The probable cause determination is governed by the ‘practical considerations of everyday life on which reasonable people act, not the hindsight of legal technicians.’” *Coffin v. Dir. of Revenue*, 277 S.W.3d 865, 869 (Mo. App. W.D. 2009) (quoting *Hinnah*, 77 S.W.3d at 620). And the “ultimate test is satisfied ‘when a police officer observes an unusual or illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with the motorist.’” *Martin v. Dir. of Revenue*, 248 S.W.3d 685, 688 (Mo. App. W.D. 2008) (quoting *Rain v. Dir. of Revenue*, 46 S.W.3d 584, 587 (Mo. App. E.D. 2001)). The amount of evidence necessary to prove probable cause is considerably less than that required to prove guilt beyond a reasonable doubt. *See Warner v. Dir. of Revenue*, 240 S.W.3d 745, 750 (Mo. App. W.D. 2007).

When reviewing the trial court’s judgment, this Court “must determine whether there was evidence of probable cause and, if so, whether the trial court’s judgment was against the weight of that evidence.” *Guhr v. Dir. of Revenue*, 228 S.W.3d 581, 584 (Mo. banc 2007). Here, the Director presented substantial and

uncontroverted evidence of probable cause, and the trial court's judgment is against the weight of that evidence:

- White was speeding in the right lane as he passed officer Bremer and then he illegally turned without a signal; (Tr. 5).
- There was a "strong odor" of intoxicants coming from White; (Tr. 6, 23).
- There were "several beer cans strewn throughout" White's vehicle; (Tr. 5-6).
- White initially denied drinking then admitted to drinking "one at around 5:00;" (Tr. 6).
- A preliminary breath test taken by White indicated alcohol was present; (Tr. 8-9).
- White failed the horizontal gaze nystagmus test, indicating intoxication, and had difficulty with other tests; (Tr. 20).
- Officer Bremer noticed that throughout the field sobriety tests White swayed and his eyes were bloodshot. (Tr. 23).

Similar evidence has been considered and routinely found to support probable cause. For example, the fact that White was speeding and failed to properly signal is significant since the unusual or illegal operation of a vehicle is a factor supporting probable cause. *See Brown*, 85 S.W.3d at 4. Speeding has also been considered a factor supporting probable cause. *See Id.* at 7 (citing

Peters v. Dir. of Revenue, 35 S.W.3d 891, 893 (Mo. App. S.D. 2001)).

When a person admits to drinking, as White did, it unquestionably supports probable cause. *Guhr*, 228 S.W.3d at 586. Likewise, the odor of intoxicants and bloodshot eyes is routinely cited for probable cause. *See Flaiz v. Dir. of Revenue*, 182 S.W.3d 244, 249 (Mo. App. W.D. 2005). Indeed, “[t]he odor of alcohol is one of the classic indicia of intoxication.” *Id.* (citing *Saladino v. Dir. of Revenue*, 88 S.W.3d 64, 71 (Mo. App. W.D. 2002)). The fact that White exhibited five out of six clues in the horizontal gaze nystagmus test is substantial evidence itself. “A score of four to six points represents substantial evidence that the person being tested is intoxicated.” *Coyle*, 88 S.W.3d at 894 n.7.

The presence of beer cans in the vehicle has also long been held to support probable cause. *See, e.g., Berry v. Dir. of Revenue*, 885 S.W.2d 326, 328 (Mo. banc 1994). As has swaying. *See, e.g., Norris v. Dir. of Revenue*, 156 S.W.3d 786, 788 (Mo. App. W.D. 2005). And finally, a preliminary breath test which is positive for alcohol is not only considered by the courts for probable cause, *see, e.g., Pruessner v. Dir. of Revenue*, 273 S.W.3d 555, 559 (Mo. App. E.D. 2008), but is also specifically admissible by statute for purposes of probable cause. § 577.021.3 (“A [chemical] test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence.”).

All of this evidence, which courts have repeatedly considered for purposes of probable cause, was in officer Bremer's possession before White's arrest, *see Hinnah*, 77 S.W. 3d at 620, and constitutes substantial and uncontroverted evidence of probable cause such that the trial court's judgment is against the weight of the evidence. *See Guhr*, 228 S.W.3d at 584.

B. The Trial Court's Judgment Erroneously Applies the Law Because the Precedents Overwhelmingly Support Probable Cause.

The trial court departed from the overwhelming legal authority and therefore erroneously applied the law. There are a number of cases that are remarkably similar to this case, and for which probable cause was found to exist. For example, in *Guhr v. Dir. of Revenue*, 228 S.W.3d 581 (Mo. banc 2007), this Court noted that the evidence supporting probable cause consisted of: (1) erratic driving and not using headlights at night; (2) moving two tequila bottles from the cab to the bed of the truck after being stopped; (3) refusing to obey the officer's instructions; (4) a smell of alcohol; and (5) an admission that the he "had been drinking." *Id.* at 586.

In this case, White was not driving erratically without lights on at night like Guhr, but he was speeding past a police officer and failed to properly signal. White did not move tequila bottles like Guhr, but he had empty beer cans in the vehicle. He did not refuse the officer's instructions like Guhr, but he did smell of

alcohol and admitted to drinking. Furthermore, there is still more evidence supporting probable cause in this case than in *Guhr*: White failed a preliminary breath test, failed field sobriety tests, swayed, and had bloodshot eyes. Thus, the evidence of probable cause in this case was even more than in *Guhr*, and this Court reversed the trial court's judgment in *Guhr* that the officer did not have probable cause. *Id.*

Similarly, the court of appeals in *Eggleston v. Lohman*, 954 S.W.2d 696 (Mo. App. W.D. 1997), noted that the evidence supporting probable cause consisted of: (1) an illegal turn; (2) the smell of alcohol; (3) "slightly" slurred speech; and (4) a failed finger-to-nose test. *Id.* at 697. Based on this evidence, and this evidence alone, the court found probable cause in *Eggleston*. *Id.* ("When the results of Eggleston's finger-to-nose test are considered with the illegal turn Eggleston made, the smell of alcohol on Eggleston's breath, and Eggleston's slurred speech, Stobbs had reasonable grounds to believe that Eggleston was driving a motor vehicle while intoxicated."). In contrast, the undisputed evidence supporting probable cause in this case was much more than that in *Eggleston*.

There are still more examples, including *Martin v. Dir. of Revenue*, 248 S.W.3d 685 (Mo. App. W.D. 2008), (driver failed to maintain her lane, admitted to drinking, stated she was "DWI", had glassy eyes, had difficulty following directions, failed finger-to-nose test), *Soest v. Dir. of Revenue*, 62 S.W.3d 619

(Mo. App. E.D. 2001) (driver was weaving and admitted to having one beer), and *Barish v. Dir. of Revenue*, 872 S.W.2d 167 (Mo. App. W.D. 1994) (erratic driving, swaying, bloodshot eyes, failure of unspecified field sobriety tests; smell of alcohol coming from car).

The trial court should have followed the multitude of cases supporting probable cause under similar circumstances. In finding in favor of White, the trial court's judgment erroneously applied the law and should therefore be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's judgment because it is against the weight of the evidence and erroneously applies the law.

Respectfully submitted,
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**CERTIFICATION OF SERVICE AND OF COMPLIANCE WITH RULE
84.06(b) AND (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 2,781 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.

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