

**IN THE
SUPREME COURT OF MISSOURI**

No. SC84438

KENNETH STELLWAGON,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

**Appeal from the Greene County Circuit Court
The Honorable Mark Fitzsimmons, Judge**

Appellant's Substitute Brief

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Jurisdictional Statement

This appeal is from the judgment of the Circuit Court of Greene County ordering reinstatement of Kenneth Stellwagon's driving privileges, originally revoked for one year pursuant to §302.304, RSMo 2000, and denied for five years pursuant to §302.060(10), RSMo 2000, by the Director of Revenue. The trial court reinstated Mr. Stellwagon's driving privileges and the Director of Revenue appealed. After an opinion by the Court of Appeals, Southern District, this Court took transfer of the case. Therefore, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution (as amended 1982).

Statement of Facts

Kenneth Stellwagon was convicted of driving while intoxicated on April 20, 1997, in Greene County Circuit Court, Municipal Division (LF 11, Supp. LF 7). He was sentenced to 30 days in jail and a \$150.00 fine, execution of sentence suspended (LF 15, Supp. LF 11).

Mr. Stellwagon was again convicted of driving while intoxicated, second offense, in Greene County Circuit Court, on February 25, 2000 (LF 11, 17, Supp. LF 7, 13). He was sentenced to 48 hours in jail and a \$350.00 fine (LF 17, Supp. LF 13).

Appellant, the Director of Revenue (hereinafter "the Director") advised Mr. Stellwagon by letter dated March 14, 2000, that his driving privilege would be revoked for one year for accumulation of traffic convictions pursuant to §302.304, RSMo 2000¹ (LF 12, Supp. LF 8). The Director also advised Mr. Stellwagon, by separate letter also dated March 14, 2000, that his privilege to drive in Missouri would be denied for five years because he had been convicted twice of driving while intoxicated within five years pursuant to §302.060(10) (LF 13, Supp. LF 9).

Mr. Stellwagon filed an "Appeal of Loss of Driving Privileges" on April 10, 2000 (LF 1-2). In this pleading, Mr. Stellwagon indicated that there was no basis for the Director's decision because "[a] check of the records of the Municipal Court of Springfield, Missouri, does not reveal the existence of a DWI conviction occurring on or about April 29, 1997" (LF 1). The Director filed her answer on April 28, 2000 and attached a certified copy of Mr. Stellwagon's Missouri driving record reflecting the two convictions (LF 5-17).

¹ Hereinafter all statutory references are to RSMo 2000.

On May 30, 2001, both parties appeared before the Honorable Mark Fitzsimmons in Greene County Circuit Court for trial by record (Supp. LF 3-4). The docket entry, and the formal Judgment issued on June 29, 2001, state that the judge, having reviewed the evidence, finds that the Department of Revenue failed to carry its burden of proof (LF 24, Supp. LF 4). The court made no record of the argument on the motion and did not give any rationale for its decision.

The Director appealed the trial court's decision to the Missouri Court of Appeals, Southern District. In an opinion dated March 19, 2002, that Court affirmed, holding that the Director failed to introduce adequately legible copies that showed Mr. Stellwagon's prior convictions, the disposition of each case against him, and whether or not he was represented by counsel on his Springfield conviction. *Stellwagon v. Director of Revenue*, No. 24421, 2002 Mo.App. LEXIS 550 (Mo.App., S.D. March 19, 2002). This Court granted transfer.

Point Relied On

The trial court erred in setting aside the Director's one-year suspension and five year denial of Mr. Stellwagon's driving privilege because the Director met her burden of production but Mr. Stellwagon did not carry his ultimate burden of persuasion, in that the Director showed, through administrative records, that Mr. Stellwagon's purportedly nonexistent April 1997, DWI conviction did exist and Mr. Stellwagon failed to produce any evidence in response that showed that this conviction was insufficient to support the revocation and/or denial action.

Kinzenbaw v. Director of Revenue, 62 S.W.3d 49 (Mo. banc 2001)

Matthews v. Director of Revenue, 72 S.W.3d 175 (Mo.App., S.D. 2002)

Thomas v. Director of Revenue, No. ED78825, 2002 Mo.App., LEXIS 800

(Mo.App., E.D. April 16, 2002)

§302.311, RSMo 2000

Argument

The trial court erred in setting aside the Director's one-year suspension and five year denial of Mr. Stellwagon's driving privilege because the Director met her burden of production but Mr. Stellwagon did not carry his ultimate burden of persuasion, in that the Director showed, through administrative records, that Mr. Stellwagon's purportedly nonexistent April 1997, DWI conviction did exist and Mr. Stellwagon failed to produce any evidence in response that showed that this conviction was insufficient to support the revocation and/or denial action.

1. Introduction

After the Director revoked and denied Mr. Stellwagon's driving privileges, Mr. Stellwagon sought a trial *de novo* in circuit court. In his pleading, Mr. Stellwagon alleged only that there was simply no record of one of the convictions that served as the basis for the Director's action and that, as a result, the Director's action was groundless. The Director, in response, entered records before the circuit court that, although not pristine, showed -- at a minimum -- that Mr. Stellwagon was convicted of DWI on April 29, 1997. The parties submitted the case to the circuit court on the records.

The circuit court found that the Director failed to carry her burden of proof (LF 24, Supp. LF 4). The Director then appealed to the Missouri Court of Appeals, Southern District, who held that while the Director had "plead and put at issue the reasons for the revocation and denial of [Mr. Stellwagon's] driving privilege," she failed to introduce copies of Mr. Stellwagon's convictions that "adequately reflect[ed] the disposition of each case against [Mr. Stellwagon]." *Stellwagon v. Director of Revenue*, No. 24421, 2002 Mo.App. LEXIS 550, *7-8 (Mo.App., S.D. March 19, 2002).

But while the Court of Appeals cited this Court's recent decision in *Kinzenbaw v. Director of Revenue*, 62 S.W.3d 49 (Mo. banc 2001), it failed to apply it properly and hold Mr. Stellwagon-- not the Director -- to the burden of proof. The issue before this Court is thus whether, having demonstrated the existence of the April 1997, conviction, the Director carried her burden of production, and whether, in response, Mr. Stellwagon carried his ultimate burden of persuasion, pursuant to *Kinzenbaw*. The answer to the former question is yes; the answer to the latter, no.

2. Standard of review

In a case involving *de novo* review of a denial or revocation of driving privileges, pursuant to §302.311, this Court reviews the circuit court's decision and that decision will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Silman v. Director of Revenue*, 880 S.W.2d 574, 576 (Mo.App., S.D. 1994); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

3. Revocation and denial of driving privileges and trial *de novo* under §302.311

Pursuant to §302.304, the Director "shall 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." On March 14, 2000, the Director sent notice to Mr. Stellwagon that his license would be revoked pursuant to §302.304.

Similarly, the Director is required to deny any driving privilege to any person who has been, "convicted twice within a five-year period of violating state law, or a county or municipal ordinance where the judge in such cases was an attorney and the defendant was represented by or waived the right to an attorney in writing, or driving while intoxicated." Section 302.060(10). Also on March 14, 2000, the

Director notified Mr. Stellwagon that she would be denying his driving privilege for five years pursuant to §302.060.

Drivers who have been revoked or denied under either of these provisions may seek review, by trial *de novo* in the circuit court, pursuant to §302.311. This statute does not specify who carries the burden of proof, but this Court has recently addressed the burden question in *Kinzenbaw v. Director of Revenue*.

4. Mr. Stellwagon failed to carry his burden under *Kinzenbaw*

In *Kinzenbaw*, this Court held that under §302.311, the driver initially bears the burden of producing evidence that he is entitled to a license. *Kinzenbaw v. Director of Revenue*, 62 S.W.3d at 51. The burden of production then shifts to the Director to offer evidence that she has, such as the administrative record, to prove that the driver is not entitled to a license. *Id.* The burden of producing evidence, however, does not shift the burden of persuasion to the Director. *Id.* Indeed, under §302.311, the driver bears, and always retains, the ultimate burden of persuasion. *Id.*

In his petition, Mr. Stellwagon asserted that "[a] check of the records of the Municipal Court of Springfield, Missouri, does not reveal the existence of a DWI conviction occurring on or about April 29, 1997" and that, as a result, "[a] basis for the [Director's] decision does not exist and his [sic] decision should be overturned" (LF 1). Mr. Stellwagon did not assert that he had a statutorily insufficient accumulation of points, or even that he did not have two DWI convictions. Nor did he admit the existence of the April 1997, conviction, but maintain that he was not represented by an attorney.

The only live issue before the circuit court, therefore, was the mere existence of the April 1997 DWI conviction. "It is improper for the court to grant relief in actions involving a driver's license on grounds

not raised in the" petition for review in the trial court. *Cox v. Director of Revenue*, 974 S.W.2d 633, 635 (Mo.App., W.D. 1998) and citations therein. This rule squares with this Court's breakdown of the burden of proof in *Kinzenbaw*: the burden of production and the burden of persuasion comprise the burden of proof; "[c]ases also refer to a burden of pleading, which in most instances simply is assigned to the party with the burden of proof on an issue." *Kinzenbaw v. Director of Revenue*, 62 S.W.3d at 53.

Mr. Stellwagon bore the ultimate burden of persuasion and proof before the trial court; he thus bore the burden of pleading. And the only thing he pled -- albeit somewhat obliquely -- was that the April 29, 1997, conviction simply did not exist. The Director then came forward with evidence, in the administrative record, that it did. This satisfied the Director's burden of production on the sole and limited issue pled by Mr. Stellwagon.

The Court of Appeals, Southern District, recognized, but failed to properly apply, this allocation of burdens under *Kinzenbaw*. It correctly required Mr. Stellwagon to prove his entitlement to a license and noted that the burden then shifts to the Director. *Stellwagon v. Director of Revenue*, 2002 Mo.App. LEXIS at *6. But the Court of Appeals improperly foisted a burden onto the Director when it noted that she "pled and put at issue the reasons for the revocation and denial of [Mr. Stellwagon's] driving privilege." *Id.* at *7. Given this view of the burdens issue, it took little time for the Court of Appeals to take the Director to task for failing to offer perfect copies of Mr. Stellwagon's prior convictions and excuse the trial court, who could not "be faulted for finding of favor of" Mr. Stellwagon. *Id.* at *7-8.

As noted, however, it is the driver's burden, under *Kinzenbaw*, to plead and prove the reasons why the Director's action was improper. The Director, therefore, need not plead things or put matters at

issue -- that responsibility rests with the driver. Then, depending upon what driver pleads, the Director responds. And again, all that Mr. Stellwagon raised here was the specter of a non-existent conviction. The Director parried that concern when it showed that the April 1997 conviction did exist.

Admittedly, the Director's exhibit showing the April, 1997, conviction was not perfectly legible. But perfect legibility is not the legal standard, nor should it be. With respect to the April 29, 1997, conviction, the ticket does reveal the existence of a DWI conviction occurring on or about April 29, 1997.² The Municipal Court conviction contains Mr. Stellwagon's name on its face and makes reference to a charge of driving while intoxicated (LF 14, Supp. LF 10). It also reflects, in pertinent part, a court date of "2-26-97" at the bottom. *Id.* Page 15 of the legal file is the reverse of the summons. It too reflects the date of "4-29-97" and the recital "\$150 fine & 30 days in jail SES" (LF 15, Supp. LF 11). Finally, at the bottom of the page, the ticket recites: "THE JUDGE IN THIS CASE IS AN ATTORNEY BAR #35549" *Id.* This evidence was sufficient to satisfy the Director's burden of producing evidence on the only disputed issue: "That . . . [a] check of the records of the Municipal Court of Springfield, Missouri, does not reveal the existence of a DWI conviction occurring on or about April 29, 1997." (LF 1).

As to legibility, *Matthews v. Director of Revenue*, 72 S.W.3d 175 (Mo.App., S.D. 2002), is both instructive and significant to the extent that there, the Court of Appeals, Southern District, allocated the burdens correctly. *Matthews* also involved a record of out-of-state convictions that were, in some parts, difficult to read. Among the items that were legible were Mr. Matthews' "name and address, date

² Whether the ticket for the second conviction (of February 25, 2000) was legible was irrelevant to the issue that Stellwagon brought before the court via his petition.

of birth, that he was assessed fines and costs totaling \$96, that he pled guilty and was found guilty of a statute or ordinance described as speeding 11-15 miles per hour over the posted limit on an interstate, and that the judgment on March 5, 2001, resulted in probation." *Id.* at 178-179. But other items were difficult to read, including the recitation of the license number listed on one particular page of the exhibit. *Id.* at 179. Further, Matthews' drivers license numbers did not match from page to page, and that discrepancy was not explained. *Id.* But, the *Matthews* court noted, "the other pertinent pieces of information that identify Matthews, as well as the violation and judgment, are not in conflict." *Id.*

In these circumstances, the court in *Matthews* noted that it did not have before it "a situation where the documentation is either so illegible as to not be considered valid evidence or where conflicting entries indicate a conviction on one page, but no conviction on another." *Id.*, citing *Campbell v. Director of Revenue*, 953 S.W.2d 184, 186 (Mo.App., W.D. 1997), and *Callahan v. Director of Revenue*, 878 S.W.2d 826, 826-27 (Mo.App., E.D. 1993). The court further noted that under Missouri law, it is a conviction if a person is found guilty, placed on probation, and then receives a suspended execution of sentence (SES). *Id.*, citing *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993).

Here, as in *Matthews*, the pertinent portions of Mr. Stellwagon's April 29, 1997, conviction are legible. The exhibit shows, at the very least, that Mr. Stellwagon committed the offense of driving while intoxicated, had a court date on February 26, 1997, and thereafter received a fine and 30 days jail time, with suspended execution of sentence (LF 14-15, Supp. LF 10-11). The exhibit is not so illegible that it should be considered invalid -- nor did the Court of Appeals, Southern District, so suggest -- and there

are no discrepancies or inherent inconsistencies, nor did Mr. Stellwagon point to any.³ The exhibit, therefore, provided sufficient information for the Director to successfully discharge her burden of production.

Accordingly, it was Mr. Stellwagon's burden to then show that those facts, established by the administrative record, were not true or that the grounds for the suspension were unlawful, unconstitutional, or otherwise insufficient under §536.150 to support the Director's action. *Kinzenbaw v. Director of Revenue*, 62 S.W.3d at 54-55. If he wished to claim that one of the convictions was legally insufficient, he was required to plead that and to come forward with evidence to that effect. *Id.* at 55. *See Thomas v. Director of Revenue*, No. ED78825, 2002 Mo.App. LEXIS 800 (Mo.App., E.D. April 16, 2002).

Thomas, like *Kinzenbaw*, illustrates that Mr. Stellwagon did not carry his ultimate burden of persuasion. In *Thomas*, the Eastern District held that a driver who would dispute the fact of a foreign-state conviction must -- after the Director puts on the certified driving record -- come forward with evidence that the record of the foreign conviction is incorrect. *Id.* at **10-11. *See also, State v. Thomas*, 969 S.W.2d 354, 357 (Mo.App., W.D. 1998) (noting, in a criminal DWI case, that "[i]f the Department of Revenue records were erroneous, it was incumbent on Mr. Thomas to introduce evidence establishing that no such convictions occurred.")

³ Mr. Stellwagon's name is variously spelled "Stellwagon" and "Stellwagen" within these records but Mr. Stellwagon has never mentioned this fact or attached any significance to it. The Director here refers to him as "Stellwagon" because that is how his name was spelled, by counsel for both parties, in the briefing before the Court of Appeals, Southern District, and by the Court of Appeals in its opinion.

In the same way, and though he did not frame his pleadings as such, if Mr. Stellwagon wished to claim that the April 29, 1997, DWI municipal conviction was legally insufficient, for whatever reason, it was his burden to make that showing. He did not. And that was fatal to his petition. He retained the ultimate burden of persuasion, per *Kinzenbaw*, and did not meet it.

The Court of Appeals' opinion appears to punish the Director for the quality of her copies and accepts the trial court's action as understandable, to that extent. But whether a driver should properly prevail under §302.311 ought not be governed by the amount of toner in the copy machine, as it were. Rather, a driver, like Mr. Stellwagon, should prevail under *Kinzenbaw* if, and only if, he pleads and proves that the Director has wrongly taken his license away. Mr. Stellwagon simply did not do this.

Perhaps part of the reason why the Court of Appeals stumbled lies within the rule of *Kinzenbaw* itself. Under *Kinzenbaw*, this Court has dictated that the burden must shift, as between the driver and the Director. Plainly, though, in the wake of *Kinzenbaw*, both litigants and the Courts of Appeals are struggling to determine when the burden shifts, and to whom, and when, if at all, it shifts back. Yet, at the end of the day, as this Court made explicit in *Kinzenbaw*, the ultimate burden always rests with the driver. It makes sense, therefore, to require the driver to bear and carry that burden, outright and all the time, rather than splitting the hairs of the burdens of pleading, production, proof, and persuasion as between the driver and the Director. See *Kinzenbaw v. Director of Revenue*, 62 S.W.3d at 55-56 (Limbaugh, C.J., concurring).

5. The convictions support the revocation

Because the Director met her burden of production, her revocation of Mr. Stellwagon's license, pursuant to §§302.302.1(9) and 302.304.7 was proper. The Director was required to do nothing more.

The Court of Appeals, Southern District, however, focused on the Springfield municipal conviction from April 1997 because of its inability "to discern if [Mr. Stellwagon] either had counsel representing him, and/or waived such counsel during court proceedings as required by §302.060(10)." *Stellwagon v. Director of Revenue*, 2002 Mo.App. LEXIS at *8. While concerns about legal representation on a municipal conviction are relevant as to the denial of a license, pursuant to §302.060, such concerns have no bearing as pertains license revocations pursuant to §§302.302 and 302.304. Nowhere within these revocation provisions does the legislature require the convictions that give rise to points assessments to be counseled. This is in contrast to the denial provision at issue in this case, §302.060, which specifically and explicitly requires counsel in cases involving violation of county or municipal ordinances. Further, and assuming purely for the sake of argument that Mr. Stellwagon's April 1997 conviction was uncounseled, no constitutional impediment prevents the use of that conviction to support the revocation here. *See White v. King*, 700 S.W.2d 152, 156-57 (Mo.App., W.D. 1985) (prima facie criminal adjudication of a DWI charge valid for purposes of Director's action on a license, notwithstanding the validity of the conviction for collateral criminal law purposes).

6. The administrative record was sufficient to support the denial

As noted, whether the April 1997 conviction was counseled is relevant only for purposes of the denial of a license, generally speaking, pursuant to §302.060. But, even if *Kinzenbaw* can be read to hold that the Director must do something more to prevail on the denial than she did in the instant case -- in other words, if *Kinzenbaw* means that the Director was required to prove that Mr. Stellwagon was represented by counsel for purposes of the municipal conviction -- the administrative record was sufficient to support the Director's denial. The summons at issue in the legal file is a standard document, its format approved

by this Court as Form 37A. A review of that form shows an area with the heading "Defendant represented by counsel." Review of LF 15 and Supp. LF 11, in comparison, makes clear that Mr. Stellwagon was represented by counsel in regard to his 1997 Municipal Court conviction, because the "Defendant represented by counsel" area has a mark in the "yes" box. *See* Appendix. Therefore, there could have been no confusion as to what the record said and the Director did prove that Mr. Stellwagon had counsel for that conviction. As such, the Director's denial of Mr. Stellwagon's license was proper.

7. The Director should prevail

Under *Kinzenbaw*, Mr. Stellwagon bore the ultimate burden of persuasion in order to have his license restored. But the only thing Mr. Stellwagon did in his attempt to carry that burden was to plead that one of the underlying convictions did not exist. When faced with evidence that it did, he did nothing further. The Director, therefore, should prevail.

Conclusion

The Director respectfully requests that the judgment of the court below be reversed, and that the Director's revocation and denial of Mr. Stellwagon's driving privilege be reinstated.

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 1st day of July, 2002, 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 4,063 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.

Cheryl Caponegro Nield

Appendix