APPEAL NO. SC90738

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI,
Respondent,

vs.

WILLIAM R. SCHROEDER,
Appellant.

APPEAL FROM CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
20th JUDICIAL CIRCUIT, DIVISION V
THE HONORABLE GAEL D. WOOD
(Cause No. 07E5-CR00019-01)

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

MISSOURI STATUTES

OTHER STATE STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This appeal is from the January 26, 2010 Judgment entered by the Circuit Court of Franklin County, Missouri, Judge Gael D. Wood, convicting Appellant of felony Driving While Intoxicated after bench trial and denial of motions to suppress. Jurisdiction of the Supreme Court is based on the fact that this appeal involves the validity of a Missouri statute, and thus involves matters over which the Supreme Court has exclusive jurisdiction under Article V, Section 3 of the Constitution of Missouri. Therefore, jurisdiction is vested in this Court. MO. CONST. art. V, § 3. The Circuit Court of Franklin County entered the Judgment at issue on January 26, 2010. Appellant William R. Schroeder filed a timely notice of appeal on February 4, 2010.

STATEMENT OF FACTS

Appellant, William R. Schroeder, age 67 (A26) was, after a bench trial, sentenced to 5 years in prison for the class B felony of Driving While Intoxicated, Chronic Offender (A1-4), having been convicted of all counts under a 3-count Indictment charging: Count I, class B felony DWI-Alcohol-Chronic Offender, in violation of Mo. Rev. Stat. § 577.010; Count II, class A misdemeanor driving while license revoked, in violation of Mo. Rev. Stat. § 302.321; and Count III, failure to dim headlights, an infraction, in violation of section 307.070. In addition to the 5 year prison sentence on Count I, Mr. Schroeder was sentenced to one year in the county jail, concurrent, under Count II, and he was fined $25.00 on Count III. (A1-4).

On October 13, 2006, Mr. Schroeder was traveling on Highway AT in Franklin County, Missouri, in a Dodge automobile. (TS 6-7.) Missouri State Highway Patrolman Lonnie Keathley was traveling behind him. (TS 6-7.) Mr. Schroeder pulled the vehicle to the shoulder of the roadway to check for a low tire. (TS 7-9.) As Trooper Keathley passed the Dodge, the "bright lights came on…and stayed on." (TS 7.) "In response" to the bright lights coming on, the trooper made a U-turn and went back to make an "enforcement contact." (TS 7.) The trooper was "basically right in front of" the Dodge Magnum when the bright lights came on. (TS 8.) Based upon his observations and interrogations of Mr. Schroeder, Trooper Keathley arrested him for driving while intoxicated. (TS 9-17.)

Mr. Schroeder filed Motions to Suppress Evidence and Statements, as well as a Memorandum in Support of such motions, and a hearing was conducted on May 27,

2009. (LF 18-23, 37-42.) At the motion hearing, Trooper Keathley was Respondent's only witness. There was no evidence that at the time that Mr. Schroeder's vehicle's high beams allegedly came on and stayed on, Mr. Schroeder's vehicle was approaching an oncoming vehicle within five hundred feet, or that it was within three hundred feet of a vehicle traveling in the same direction. (TS 7-8.) The trooper testified that when the Dodge's bright lights came on, the trooper was "just basically right in front of it." (TS 8.) There was no evidence that Mr. Schroeder's headlights were at any time so aimed that the glaring rays projected into the eyes of any driver. The only testimony by the trooper regarding the reason he detained and questioned Mr. Schroeder was because Mr. Schroeder's "bright lights came on…and stayed on." (TS 7.)

On November 25, 2009, Mr. Schroeder filed Defendant's Amended Motion to Dismiss Count I of the Indictment Information, on grounds that the statutory scheme under which he was charged was unconstitutionally void for vagueness on its face and as applied to Appellant. (LF 58-64.) Appellant argued that the Mo. Rev. Stat. § 577.001 definition of "intoxicated condition" incorporated into the charged section 577.010 offense fails to give notice of prohibited conduct and lacks necessary standards to avoid arbitrary and discriminatory application. The trial court denied the same on November 29, 2009. (TS 26.) On the same date, Mr. Schroeder waived his right to jury trial (TS 27-30), and the case was by agreement submitted at trial to the bench on two State's exhibits: Exhibit 1, Mr. Schroeder's driving record (A5-22) and Exhibit 2, Trooper Keathley's police report (A23-32). (TS 33.) No additional evidence was adduced at trial.

On January 26, 2010, Mr. Schroeder was convicted of all three Counts of the original Indictment and sentenced as aforesaid. (LF 71-74; A1-4) Appellant William R. Schroeder filed a timely notice of appeal with this Court on February 4, 2010 on grounds that the appeal involves the validity of a statute of Missouri. (LF 75.)

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF THE INFRACTION OF FAILURE TO DIM HEADLIGHTS, COUNT III OF THE INDICTMENT, UNDER MO. REV. STAT. § 307.070, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THAT CONVICTION, IN THAT § 307.070 DOES NOT REQUIRE THE DIMMING OF HEADLIGHTS PER SE, BUT INSTEAD PROHIBITS MOTORISTS' USE OF A DISTRIBUTION OF LIGHT OR COMPOSITE BEAM SO AIMED THAT THE GLARING RAYS PROJECT INTO THE EYES OF ANOTHER DRIVER WHILE APPROACHING THAT OTHER DRIVER'S ONCOMING VEHICLE WITHIN 500 FEET, OR WHILE TRAVELING WITHIN 300 FEET OF THAT OTHER DRIVER'S VEHICLE TRAVELING IN THE SAME DIRECTION, AND THE STATE FAILED TO ADDUCE AT TRIAL ANY EVIDENCE THAT APPELLANT USED A DISTRIBUTION OF LIGHT OR COMPOSITE BEAM SO AIMED THAT THE GLARING RAYS PROJECTED INTO THE EYES OF ANOTHER DRIVER WHILE APPROACHING AN ONCOMING VEHICLE WITHIN 500 FEET OR WHILE TRAVELING WITHIN 300 FEET OF ANOTHER VEHICLE TRAVELING IN THE SAME DIRECTION, OR INTO THE EYES OF ANY DRIVER AT ANY TIME.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND MOTION TO SUPPRESS STATEMENTS BECAUSE THE DETENTION AND QUESTIONING OF APPELLANT WAS IN VIOLATION OF APPELLANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE MISSOURI CONSTITUTION, AND HENCE ALL EVIDENCE AND STATEMENTS OBTAINED THROUGH THE INVALID DETENTION AND QUESTIONING SHOULD HAVE BEEN SUPPRESSED, IN THAT THE OFFICER JUSTIFIED HIS DETENTION AND QUESTIONING OF APPELLANT BASED UPON APPELLANT'S ALLEGED VIOLATION OF § 307.070 RSMO., IN THAT THE EVIDENCE SHOWED APPELLANT DID NOT VIOLATE THAT STATUTE OR ANY STATUTE, SUCH THAT THE OFFICER DID NOT OBSERVE A VIOLATION OF ANY LAW AUTHORIZING HIM TO DETAIN AND QUESTION APPELLANT.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS COUNT I OF THE INDICTMENT WHICH SHOWED THAT THE MO. REV. STAT. § 577.001 DEFINITION OF "INTOXICATED CONDITION" AS INCORPORATED IN THE STATUTE UNDER WHICH APPELLANT WAS

CHARGED AND CONVICTED, MO. REV. STAT. § 577.010, IS UNCONSTITUTIONALLY VOID FOR VAGUENESS, BECAUSE THE DEFINITION FAILS TO GIVE NOTICE TO MOTOR VEHICLE OPERATORS OF WHAT CONDUCT IS PROHIBITED AND LACKS EXPLICIT STANDARDS NECESSARY TO AVOID ARBITRARY AND DISCRIMINATORY APPLICATION BY THE STATE, IN THAT THE DEFINITION CRIMINALIZES THE OPERATION OF A MOTOR VEHICLE IN THE UNQUANTIFIED AND UNQUANTIFIABLE STATE OF BEING "UNDER THE INFLUENCE" WITHOUT A REQUIREMENT THAT THE DRIVER'S ABILITY TO OPERATE A MOTOR VEHICLE IS IMPAIRED AT ALL, AND IN THAT THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION PROHIBIT SUCH STAUTORY VAGUENESS.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF THE INFRACTION OF FAILURE TO DIM HEADLIGHTS, COUNT III OF THE INDICTMENT, UNDER MO. REV. STAT. § 307.070, BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THAT CONVICTION, IN THAT § 307.070 DOES NOT REQUIRE THE DIMMING OF HEADLIGHTS PER SE, BUT INSTEAD PROHIBITS MOTORISTS' USE OF A DISTRIBUTION OF LIGHT OR COMPOSITE BEAM SO AIMED THAT THE GLARING RAYS PROJECT INTO THE EYES OF ANOTHER DRIVER WHILE APPROACHING THAT OTHER DRIVER'S ONCOMING VEHICLE WITHIN 500 FEET, OR WHILE TRAVELING WITHIN 300 FEET OF THAT OTHER DRIVER'S VEHICLE TRAVELING IN THE SAME DIRECTION, AND THE STATE FAILED TO ADDUCE AT TRIAL ANY EVIDENCE THAT APPELLANT USED A DISTRIBUTION OF LIGHT OR COMPOSITE BEAM SO AIMED THAT THE GLARING RAYS PROJECTED INTO THE EYES OF ANOTHER DRIVER WHILE APPROACHING AN ONCOMING VEHICLE WITHIN 500 FEET OR WHILE TRAVELING WITHIN 300 FEET OF ANOTHER VEHICLE TRAVELING IN THE SAME DIRECTION, OR INTO THE EYES OF ANY DRIVER AT ANY TIME.

Standard of Review

When reviewing the sufficiency of evidence supporting a criminal conviction, the Court gives great deference to the trier of fact. Appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Oliver,* 293 S.W.3d 437, 444 (Mo. banc 2009).

> In considering whether the evidence is sufficient to support the … verdict, we must look to the elements of the crime and consider each in turn. … [W]e are required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. We disregard contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. Taking the evidence in this light, we consider whether a reasonable juror could find each of the elements beyond a reasonable doubt.

State v. Grim, 854 S.W.2d 403[4][5] (Mo. banc 1993).

Argument

Count III of the Indictment charged Mr. Schroeder with the Infraction of Failure to Dim Headlights, in violation of Mo. Rev. Stat. § 307.070, as follows:

> The defendant, in violation of Section 307.070, RSMo, committed the infraction of failure to dim headlights on a motor vehicle within five hundred feet of an on-

> coming vehicle or within a distance of three hundred feet to the rear of a vehicle traveling in the same direction … in that on or about October 13th, 2006, in the County of Franklin, State of Missouri, the defendant operated a motor vehicle on the highway or public roadway known as ROUTE AT, and when such vehicle was within a distance of three hundred feet to the rear of another vehicle traveling in the same direction, used a distribution of light or composite beam so aimed that the glaring rays projected into the eyes of the other driver.

(LF 11) That charge tracks the language of Mo. Rev. Stat. Section 307.070, which states in pertinent part:

> Whenever the driver of a vehicle approaches an oncoming vehicle within five hundred feet, or is within three hundred feet to the rear of another vehicle traveling in the same direction, the driver shall use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the other driver….

Mo. Rev. Stat. § 307.070.1.

There exist, therefore, six elements of Mr. Schroeder's alleged traffic offense of failure to dim headlights, with elements 5 and 6 each comprising two separate sub-elements: (1) Mr. Schroeder; (2) on or about October 13, 2006; (3) in Franklin County, Missouri; (4) was the driver of a vehicle; (5) while either (a) approaching an oncoming vehicle within five hundred feet or (b) within three hundred feet of another vehicle traveling in the same direction as Mr. Schroeder's vehicle was traveling; and (6) Mr.

Schroeder then and there used a distribution of light or composite beam so aimed that the (a) glaring rays (b) projected into the eyes of such other driver. The State presented no evidence as to elements 5 or 6, and in fact adduced no evidence of either of the sub-elements of either element 5 or 6. Acquittal is therefore mandated.

Element five is broken into two alternative sub-elements, either of which can support a violation of Mo. Rev. Stat. § 307.070.1: the ticketed driver was either (a) approaching an oncoming vehicle within five hundred feet, or (b) traveling within three hundred feet of another vehicle traveling in the same direction. Respondent presented no evidence that at the time Mr. Schroeder's vehicle's high beams allegedly came on and stayed on, either he was approaching an oncoming vehicle within five hundred feet, or he was within three hundred feet of a vehicle traveling in the same direction.

As to element 5(a), there was no evidence that Mr. Schroeder's vehicle was approaching any oncoming vehicle at any time. Rather, Appellant's vehicle was parked on the shoulder of the road when its high beams came on and stayed on, and it was thus not approaching any vehicle, oncoming or not. There was no evidence that the trooper observed any oncoming vehicle. There was no evidence that Appellant's vehicle's high beams came on or stayed on within the prescribed five hundred foot distance for oncoming vehicle. There was no evidence of element 5(a).

As to element 5(b), there was no evidence, first, that the trooper observed Appellant's vehicle traveling in the same direction as any other vehicle at the time its high beams allegedly came on and stayed on. In fact, the evidence was that Appellant's vehicle was not traveling at all, but had come to stop on the shoulder of the road before

its high beams allegedly came on. Secondly, even if there were evidence that Appellant's vehicle was traveling when its high beams allegedly came on, there was no evidence that the trooper observed the vehicle to have been within 300 feet of any vehicle traveling in the same direction when its high beam allegedly came on or stayed on. In this regard, the trooper testified merely that he had been following the Appellant's vehicle, and that he drove past it when it pulled to the shoulder and stopped. After he passed Apppellant's vehicle, the trooper noticed that Appellant's stopped Dodge's high beams came on and stayed on. When asked what distance he was in front of the Dodge Magnum at that time, the trooper did not state a distance, but said he was "just basically right in front of it." (TS 8.) He did not say it was within three hundred feet or any other distance. He did not say what "in front of it" meant. No evidence was adduced regarding the distance between the trooper's vehicle and Mr. Schroeder's Dodge. Accordingly, the State adduced no evidence of element 5(b). Element 5 being broken into two alternative sub-elements, and the State failing to adduce evidence of either, no reasonable juror could have found that element beyond a reasonable doubt. Appellant must be acquitted on Count III.

Similarly, the State adduce no evidence of element 6, glaring rays projected into the eyes of the other driver. The trooper testified that he stopped, detained and questioned Mr. Schroeder because Mr. Schroeder's "bright lights came on…and stayed on." (TS 7.) Driving with one's high beams or "bright lights" on is not a traffic violation in Missouri. Sitting on the shoulder of the highway with one's high beams or "bright lights" on is not a traffic violation in Missouri. What is a traffic violation in Missouri is

to "use a distribution of light or composite beam so aimed that the glaring rays project into the eyes of the other driver" within the specific proximities to other vehicles detailed above. Mo. Rev. Stat. 307.070.1.

Element 6 comprises two conjunctive sub-elements, both of which must exist or there is no traffic violation under the statute in question: 6(a) the offending vehicle's lights must produce "glaring rays"; and 6(b) the lights must be so aimed that those glaring rays so produced "project into the eyes of the other driver." *Id.* There was no evidence that the Appellant's headlights produced "glaring rays." There was no evidence that the Dodge Magnum's lights were so aimed as to "project into the eyes of" any driver. As such, there was insufficient evidence of a violation of Mo. Rev. Stat. § 307.070.

Because the State failed to adduce any evidence of either of the two necessary sub-elements comprising element 6, glaring rays (6(a)) projected into the eyes of the other driver (6(b)), no rational juror could find element 6 beyond a reasonable doubt. Appellant must be acquitted on Count II.

Appellant having shown State's failure to adduce any evidence on two elements of the Count III infraction now prays this Court will reverse the judgment of the trial court, set aside Appellant's conviction under Count III of the Indictment, referred to there as "failure to dim headlights" and remand to the trial court for the entry of a not guilty judgment thereon.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND MOTION TO SUPPRESS STATEMENTS BECAUSE THE DETENTION AND QUESTIONING OF APPELLANT WAS IN VIOLATION OF APPELLANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE MISSOURI CONSTITUTION, AND HENCE ALL EVIDENCE AND STATEMENTS OBTAINED THROUGH THE INVALID DETENTION AND QUESTIONING SHOULD HAVE BEEN SUPPRESSED, IN THAT THE OFFICER JUSTIFIED HIS DETENTION AND QUESTIONING OF APPELLANT BASED UPON APPELLANT'S ALLEGED VIOLATION OF § 307.070 RSMO., IN THAT THE EVIDENCE SHOWED APPELLANT DID NOT VIOLATE THAT STATUTE OR ANY STATUTE, SUCH THAT THE OFFICER DID NOT OBSERVE A VIOLATION OF ANY LAW AUTHORIZING HIM TO DETAIN AND QUESTION APPELLANT.

Standard of Review

The Missouri Eastern District Court of Appeals, the Honorable Lawrence E. Mooney writing for the majority, recently reiterated the well-settled standard of review as to suppression issues.

> This Court's review of a trial court's ruling on a motion to suppress is limited to determining whether the decision is supported by substantial evidence. *State v.*

Johnson, 207 S.W.3d 24, 44 (Mo. banc 2006); *State v. Watkins*, 73 S.W.3d 881, 883 (Mo.App. E.D.2002). In reviewing the sufficiency of the evidence, we consider all evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling. *Id.* Additionally, we defer to the trial court's factual findings and credibility determinations. *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007); *State v. Dixon*, 218 S.W.3d 14, 18 (Mo.App. W.D.2007). We will reverse a trial court's ruling on a motion to suppress only if it is clearly erroneous; that is, only if we are left with a definite and firm impression that a mistake has been made. *Id.* Whether conduct violates the Fourth Amendment is an issue of law that this Court reviews *de novo*. *Sund*, 215 S.W.3d at 723.

State v. Ross, 254 S.W.3d 267 (Mo.App. E.D. 2008).

Argument

Appellant moved to suppress the statements attributed to him by Trooper Keathley arising out of the officer's detention of Appellant for Appellant's alleged failure to dim his headlights as required by § 307.070 RSMo., and moved to suppress all evidence that derived from that detention and interrogation on grounds the Trooper's detention of Appellant was an illegal, unreasonable seizure of his person. (LF 18-23)

The Fourth Amendment to the United States Constitution guarantees the right of all citizens to be free from unreasonable searches and seizures. U.S. Const. amend. IV. The prohibition of the Fourth Amendment against unreasonable searches and seizures applies to the states through the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV. Missouri's constitutional protection against unreasonable searches

and seizures is found in Article I, Section 15 of the Missouri Constitution. Mo. Const. art. I, § 15.

Routine detention of a motorist based upon a police officer's observation of that motorist's violation of state traffic laws is a reasonable seizure under the Fourth Amendment of the United States Constitution and Article I, Section 15 of the Missouri Constitution. *State v. Ross*, 254 S.W.3d 267 (Mo.App. E.D. 2008). In this case, however, according to the State's evidence, Appellant did not commit the infraction of failure to dim headlights in violation of § 307.070 RSMo., as discussed above. Because the alleged violation of that statute was the basis for Appellant's detention, the detention was an unreasonable seizure of Appellant's person. All evidence and statements obtained through the illegal and unconstitutional detention and questioning should have been suppressed.

According to the evidence, the reason Trooper Keathley detained and questioned Mr. Schroeder alongside highway AT was that the trooper had observed of Mr. Schroeder's alleged violation of Mo. Rev. Stat. § 307.070 (TS 7). As discussed above, the State failed to adduce evidence that Appellant had in fact violated that statute, in that there was no evidence of two elements of that offense. § 307.070 states in pertinent part:

> Whenever the driver of a vehicle approaches an oncoming vehicle within five hundred feet, or is within three hundred feet to the rear of another vehicle traveling in the same direction, the driver shall use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the other driver…

Mo. Rev. Stat. § 307.070.1.

There exist, therefore, six elements of Mr. Schroeder's alleged traffic offense of failure to dim headlights, with elements 5 and 6 each comprising two separate sub-elements: (1) Mr. Schroeder; (2) on or about October 13, 2006; (3) in Franklin County, Missouri; (4) was the driver of a vehicle; (5) while either (a) approaching an oncoming vehicle within five hundred feet or (b) within three hundred feet of another vehicle traveling in the same direction as Mr. Schroeder's vehicle was traveling; and (6) Appellant then and there used a distribution of light or composite beam so aimed that the (a) glaring rays (b) projected into the eyes of such other driver. The State presented no evidence as to elements 5 or 6, and in fact adduced no evidence of either of the sub-elements of either elements 5 or 6. Accordingly, the State failed to demonstrate Appellant's violation of any law which would have justified his detention by Trooper Keathley.

Element five is broken into two alternative sub-elements, either of which can support a violation of Mo. Rev. Stat. § 307.070.1: the ticketed driver was either (a) approaching an oncoming vehicle within five hundred feet, or (b) traveling within three hundred feet of another vehicle traveling in the same direction. Respondent presented no evidence that at the time Mr. Schroeder's vehicle's high beams allegedly came on and stayed on, either he was approaching an oncoming vehicle within five hundred feet, or he was within three hundred feet of a vehicle traveling in the same direction.

As to element 5(a), there was no evidence that Mr. Schroeder's vehicle was approaching any oncoming vehicle at any time. Rather, Appellant's vehicle was parked

on the shoulder of the road when its high beams came on and stayed on, it was thus not approaching any vehicle, oncoming or not. There was no evidence that the trooper observed any oncoming vehicle. There was no evidence that Appellant's vehicle's high beams came on or stayed on within the prescribed five hundred foot distance for oncoming vehicle. There was no evidence of element 5(a).

As to element 5(b), there was no evidence, first, that the trooper observed Appellant's vehicle traveling in the same direction as any other vehicle at the time its high beams allegedly came on and stayed on. In fact, the evidence was that Appellant's vehicle was not traveling at all, but had come to stop on the shoulder of the road before its high beams allegedly came on. Secondly, even if there were evidence that Appellant's vehicle was traveling when its high beams allegedly came on, there was no evidence that the trooper observed the vehicle to have been within 300 feet of any vehicle traveling in the same direction when its high beam allegedly came on or stayed on. In this regard, the trooper testified merely that he had been following the Appellant's vehicle, and that he drove past it when it pulled to the shoulder and stopped. After he passed Appellant's vehicle, the trooper noticed that Appellant's stopped Dodge's high beams came on and stayed on. When asked what distance he was in front of the Dodge Magnum at that time, the trooper did not state a distance, but said he was "just basically right in front of it." (TS 8.) He did not say it was within three hundred feet or any other distance. He did not say what "in front of it" meant. No evidence was adduced regarding the distance between the trooper's vehicle and Mr. Schroeder's Dodge. Accordingly, the State adduced no evidence of element 5(b). Element 5 being broken into two alternative sub-

elements, and the State failing to adduce evidence of either, the State failed to adduce evidence that Appellant had violated § 307.070, or any statute. As such the State failed to meet its burden of proof that Trooper Keathley was justified in detaining Appellant, and all evidence derived from that unjustified detention should have been suppressed.

Similarly, the State adduce no evidence of element 6, glaring rays projected into the eyes of the other driver. The trooper testified that he stopped, detained and questioned Mr. Schroeder because Mr. Schroeder's "bright lights came on…and stayed on." (TS 7.) Driving with one's high beams or "bright lights" on is not a traffic violation in Missouri. Sitting on the shoulder of the highway with one's high beams or "bright lights" on is not a traffic violation in Missouri. What is a traffic violation in Missouri is to "use a distribution of light or composite beam so aimed that the glaring rays project into the eyes of the other driver" within the specific proximities to other vehicles detailed above. Mo. Rev. Stat. 307.070.1.

Element 6 comprises two conjunctive sub-elements, both of which must exist or there is no traffic violation under the statute in question: 6(a) the offending vehicle's lights must produce "glaring rays"; and 6(b) the lights must be so aimed that those glaring rays so produced "project into the yes of the other driver." *Id.* There was no evidence that the Appellant's headlights produced "glaring rays." There was no evidence that the Dodge Magnum's lights were so aimed as to "project into the eyes of" any driver. As such, there was insufficient evidence of a violation Mo. Rev. Stat. § 307.070.

Because the State failed to adduce any evidence of either of the two necessary sub-elements comprising element 6, glaring rays (6(a)) projected into the eyes of the other driver

(6(b)), the State failed to meet its burden of proof that Trooper Keathley's detention of Appellant was based upon the observation Appellant's violation of any law. Because the trooper did not observe evidence of any offense, he was not empowered to detain and question Mr. Schroeder. Accordingly, the entire sequence of events alongside Highway AT was pursuant to an invalid and unconstitutional detention, which is to say an illegal seizure of Mr. Schroeder's person. For those reasons, the trial court erred in denying Mr. Schroeder's motions to suppress, and it was error to admit the evidence obtained by the State by virtue of the illegal seizure of Appellant's person.

The trial Court's judgment of guilt on all counts I and II of the Indictment, for driving while intoxicated and driving while revoked respectively, must be reversed unless Respondent shows that the trial court's error in denying the Motions to suppress was harmless beyond a reasonable doubt. *State v. Wolfe*, 13 S.W.3d 248, 263 (Mo. banc 2000). Because all of the evidence against Appellant on all counts was the fruit of the illegal seizure of his person, no evidence would have been available against Appellant had the trial court not erred in denying the motions to suppress. The error is therefore not harmless beyond a reasonable doubt.

Accordingly, this Court must reverse the trial court's Order denying Appellant's Motion to Suppress Statements and Motion to Suppress Evidence, reverse the trial Court's judgment of guilt as to Counts I and II, for driving while intoxicated and driving while revoked respectively, and remand this case to the trial court for a new trial on Counts I and II, with specific instruction to the trial court to sustain Appellant's motions

to suppress and exclude all statements and evidence obtained by virtue of Appellant's detention by Trooper Keathley.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS COUNT I OF THE INDICTMENT WHICH SHOWED THAT MISSOURI'S DWI STATUTORY SCHEME, WHEREBY THE MO. REV. STAT. § 577.001 DEFINITION OF "INTOXICATED CONDITION" IS INCORPORATED IN MO. REV. STAT. § 577.010, THE STATUTE UNDER WHICH APPELLANT WAS CHARGED AND CONVICTED, IS UNCONSTITUTIONALLY VOID FOR VAGUENESS, BECAUSE THAT STATUTORY SCHEME FAILS TO GIVE NOTICE TO MOTOR VEHICLE OPERATORS OF WHAT CONDUCT IS PROHIBITED AND LACKS EXPLICIT STANDARDS NECESSARY TO AVOID ARBITRARY AND DISCRIMINATORY APPLICATION BY THE STATE, IN THAT THE SAME CRIMINALIZES THE OPERATION OF A MOTOR VEHICLE WHILE IN THE UNQUANTIFIED AND UNQUANTIFIABLE STATE OF BEING "UNDER THE INFLUENCE" WITHOUT A REQUIREMENT THAT THE DRIVER'S ABILITY TO OPERATE A MOTOR VEHICLE IS IMPAIRED AT ALL, AND IN THAT THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION PROHIBIT SUCH STAUTORY VAGUENESS.

Standard of Review

The standard of review for constitutional challenges to a statute is de novo. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007). A statute is

presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006).

Argument

Missouri's statutory scheme for driving while intoxicated, Mo. Rev. Stat. §§ 577.001 and 577.010, is unconstitutional, because the definition of intoxication contained within that scheme, "under the influence," is void for vagueness on its face, and its application to Mr. Schroeder violated his rights to due process under the Fifth and Fourteenth Amendments to United States Constitution and Article I, Section 10 of the Missouri Constitution.

This Court has at least tacitly recognized the fatal vagueness in Missouri's DWI statutory language prohibiting driving while in an "intoxicated condition," and has held that "**the law requires**" proof of the motorist's "impaired condition of thought and action and the loss of the normal control of one's faculties" or "a condition 'that in any manner impairs the ability of a person to operate an automobile.'" *State v. Cox*, 478 S.W.2d 339[5][6] (Mo. 1972). (Emphasis added.) The appellant in *Cox* did not challenge the DWI statute on due process void for vagueness grounds, and this Court therefore did not rule on that issue. Instead *Cox* involved a challenge to the sufficiency of the evidence to sustain a DWI conviction. Mr. Cox had been charged with DWI under a statute that said: "No person shall operate a motor vehicle while in an intoxicated condition." (§ 564.440 RSMo. 1969) This Court held that to prove a case of driving "in an intoxicated condition" **"the law requires"** proof of the accused's "impaired condition of thought and

action and the loss of the normal control of one's faculties" or proof of her condition "that in any manner impairs the ability of a person to operate an automobile" to sustain a conviction.

Thus, where appellants have challenged the sufficiency of the evidence to sustain their convictions for driving "in an intoxicated condition," Missouri appellate courts have been forced to in essence inject the vague statute with further meaning, and to read into the statute "explicit standards" that the statute itself lacks. This is not enough, however, to insulate the Legislature's vague enactment from a challenge under the Due Process Clause of the Fifth Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution.

The due process provisions of the Missouri and United States Constitutions protect citizens from criminal statutes that are void for vagueness. The Fifth Amendment of the United States Constitution states, in pertinent part:

> "No person shall be … deprived of life, liberty, or property, without due process of law…."

(U.S. CONST., amend V.) The Fourteenth Amendment states, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(U.S. CONST. amend XIV.) Article I, section 10 of the Missouri Constitution states:

"That no person shall be deprived of life, liberty or property without due process of law."

MO. CONST. art. I, § 10.

"There are two controlling standards for vagueness challenges to a criminal statute. First, a statute is vague if it 'fails to give notice to potential offenders of the prohibited conduct.' In that regard, 'notice is inadequate when the terms of the statute are so unclear that people of common intelligence must guess at their meaning.' Second, 'a statute is vague if it lacks explicit standards necessary to avoid arbitrary and discriminatory application by the state.'" *State v. Callen*, 45 S.W.3d 888, 889-90 (Mo. banc 2001), *citing State v. Knapp*, 843 S.W.2d 345, 349 (Mo. banc 1992).

Under Mo. Rev. Stat. § 577.010, "A person commits the crime of **"driving while intoxicated"** if he operates a motor vehicle while in an intoxicated or drugged condition. Mo. Rev. Stat. § 577.010.1(emphasis in original). Section 577.001 provides that: "As used in this chapter, a person is in an **"intoxicated condition"** when he is under the influence of alcohol, a controlled substance, or drug, or any combination thereof." Mo. Rev. Stat. § 577.001.3 (emphasis in original). Section 577.010, by incorporating the section 577.001 definition of "intoxicated condition," thus criminalizes operation of a motor vehicle while "under the influence of alcohol, a controlled substance, or drug, or any combination thereof." There is no statutory definition of "under the influence." There is no definition of "drugged condition". Because § 577.001 as incorporated in § 577.010 fails to clearly define the prohibited conduct and allows for arbitrary and discriminatory enforcement, it is void for vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004). A criminal statute is vague if it fails to give notice to potential offenders of the prohibited conduct, or it lacks explicit standards to avoid arbitrary and discriminatory application by the state. *State v. Callen*, 45 S.W.3d 888, 889-90 (Mo. banc 2001).

The United States Supreme Court has recently reiterated the well-known rule that "[t]o satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). The void-for-vagueness doctrine embraces these requirements." *Skilling v. United States*, 2010WL2518587 [26], U. S. Supreme Court case number 08- 1394, (June 24, 2010), *citing Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Missouri's DWI statutory scheme meets neither of the two due process essentials. First, the phrase "under the influence" does not adequately define what behavior it bars. Second, section 577.001's standardless sweep allows policemen, prosecutors, judges and juries to pursue their personal predilections, thereby facilitating opportunistic and arbitrary prosecutions and convictions.

Missouri's DWI statutory scheme employs terminology that encompasses a variety of levels, degrees and manners of alcoholic influence without regard to the motorist's ability to safely operate an automobile. People of ordinary intelligence can only guess at the meaning of "under the influence," and the statute fails to provide explicit standards necessary to avoid arbitrary and discriminatory application by the state

and its agents. The statute permits conviction if the defendant is under *any* amount of influence of an intoxicating substance, however minimal. In what way a person must be influenced is not defined. In addition, the statute fails to establish any borderline level of intoxication, such as intoxication to the point of impairment, making it impossible for individuals to determine when they would be in violation of the law.

Missouri's failure to define "under the influence" is a paradigmatic example of lack of adequate notice and lack of explicit standards. The United States Supreme Court has said:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). A constitutional challenge as to vagueness is based upon procedural due process; *i.e.*, whether the statute provides fair notice, measured by common practice and understanding, as to the conduct which is

prohibited. *Id.* Defending against vague statutes also assures that guidance, through explicit standards, will be afforded to those who must apply the statute in order that arbitrary and discriminatory application will not occur. *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991). The Missouri DWI statutory scheme admits of arbitrary and discriminatory application. Missouri's DWI law has no explicit standards. Accordingly, it must be declared void for vagueness.

Other states have adopted definitions of intoxication that do provide notice and do establish explicit standards for enforcement. For example, Arkansas defines intoxication to mean influence "to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians." AR Code § 5-65-102. In Texas, the term "intoxicated" means either:

> (1) not having normal use of mental or physical facilities by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
>
> (2) having an alcohol concentration of 0.08 or more.

TX Penal Code § 49.01(2)(A), (B). In Delaware, "while under the influence shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person ordinarily would have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle." 21 Del. C. § 4177(c)(5). In Florida, a person is under the influence "when affected to the extent that

the person's normal faculties are impaired." Fla. Stat. § 316.193(1)(a). In Wyoming, it is unlawful for a person to drive if the person, "to a degree which renders him incapable of safely driving, is under the influence of alcohol." Wy. Stat. § 31-5-233(b)(ii)(A). In Colorado, "under the influence" means the person is affected "to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." Co. Rev. Stat. § 42-4-1301(1)(f). In Hawaii, "'under the influence of liquor' means that the person concerned has consumed intoxicating liquor sufficient to impair at the particular time under inquiry the person's normal mental faculties or ability to care for oneself and guard against casualty, or sufficient to substantially impair at the time under inquiry that clearness of intellect and control of oneself which the person would otherwise normally possess." Hi. Rev. Stat. § 281-1. Kansas criminalizes operation of a vehicle "under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle." Ks. Stat. § 8-1567(a)(3). In Montana, "'[u]nder the influence' means that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished." Mt. Code § 61-8-401(3)(a). In Pennsylvania, "[a]n individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle." 75 Pa. C.S.A. § 3802(a)(1). In South Carolina, it is unlawful to drive a vehicle "while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are

materially and appreciably impaired." S.C. Code 1976 § 56-5-2930. In Utah, it is unlawful to drive a vehicle under the influence "to a degree that renders the person incapable of safely operating a vehicle." Utah Stat. § 41-6a-502(1)(b).

In Arizona, it is unlawful for a person to drive or be in actual physical control of a vehicle "[w]hile under the influence of intoxicating liquor…if the person is impaired to the slightest degree." AZ Stat. § 28-1381(A). In Georgia, a safety standard is imposed: "A person shall not drive or be in actual physical control of any moving vehicle while: (1) Under the influence of alcohol to the extent that it is less safe for the person to drive." Ga. Code § 40-6-391(a). In New York, the legislature has delineated two offenses that constitute driving under the influence: (1) driving while ability impaired; and (2) driving while intoxicated. Driving while intoxicated is the .08 blood alcohol offense. Driving while ability impaired, however, includes an impairment requirement: "No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." N.Y. Veh. & Traffic Law § 1192.

Thus, a large number of Missouri's sister states' legislatures have understood what due process requires, and have written into their DWI statutes the explicit standards that this Court has in the past been forced to read into Missouri's vague statutes. The fact that this Court, in reviewing sufficiency of the evidence in individual cases, has articulated the explicit standards that must be in the DWI statute does not, however, save the statute from constitutional challenge.

An unconstitutionally vague word or phrase may survive a due process challenge, but only if it is both judicially defined and limited by proper narrowing instructions.

Bennett v. Owens-Corning Fiberglass Corp., 896 S.W.2d 464, 467 (Mo. banc 1995). Judicial definition alone, however, is not enough. *Id.* Here, although Missouri appellate courts have provided judicial definition of intoxication beyond the vague statutory definition, Missouri's pattern jury instructions do not provide any further definition to the jury. Missouri does not have proper narrowing instructions. MAI-CR3d 331.02 includes the following: "As used in this instruction, the term 'intoxicated condition' means under the influence of alcohol." The instruction merely restates the vague statutory definition of intoxication as "under the influence." The phrase "under the influence" is less explicit than the phrase "intoxicated condition." It does not rise to the level this Court has long held is required by the law. Thus, the fact that this Court, in reviewing the sufficiency of evidence in DWI cases, interprets "intoxicated condition" to mean physical and mental impairment is not sufficient to protect the due process rights of drivers on Missouri's highways. Nor is it sufficient to put the public on notice of what the law requires of them.

In Missouri, there is no definition of "under the influence" available to a jury, to police officers trying to enforce the law without intruding upon the rights of the public or to an average person attempting to understand and comply with the laws of the state. There is no reference to impairment or lack of control. There is no requirement that one's ability to drive safely be compromised. There is no guidance whatsoever as to what is prohibited. On its face and as applied to Appellant, the Missouri's DWI statutory scheme, sections 577.001 and 577.010, is unconstitutionally void for vagueness.

For all the above-stated reasons, Appellant prays this Court will enter its order and Opinion finding and declaring Missouri's DWI statutory scheme, Mo. Rev. Stat. §§ 577.001 and 577.010, unconstitutionally void for vagueness, reversing the judgment of conviction against Appellant under Count I of the Indictment, and remanding the case to the trial court with instruction to enter an order dismissing Count I of the Indictment. Appellant submits to the Court that should the relief sought by Appellant under Points Relied On I and II above be fully granted, it will be unnecessary to address the unconstitutional vagueness of Missouri's DWI statutory scheme.

CONCLUSION

Wherefore, Appellant William R. Schroeder prays this Court will enter its Opinion and orders:

1. As to Point III, declaring void for vagueness the Missouri DWI statutory scheme, Mo. Rev. Stat. §§ 577.001 and 577.010, reversing the judgment of guilt under Count I of the Indictment and remanding the cause to the trial Court with an Order to sustain Appellant's Motion to Dismiss Count I, unless this Court deems it unnecessary to reach the constitutional issues here presented by virtue of its decision to grant Appellant's prayed relief as to Points I and II;
2. As to Point I, reversing Appellant's conviction under Count III of the Indictment of the infraction of failure to dim headlights pursuant to Mo. Rev. Stat. § 307.070, referred to there as "failure to dim headlights" and remand to the trial court for the entry of a not guilty judgment thereon.
3. As to Point II, reversing the trial court's Order denying Appellant's Motion to Suppress Statements and Motion to Suppress Evidence, reversing conviction as to Counts I and II, for driving while intoxicated and driving while revoked respectively, and remanding this case to the trial court for a new trial on Counts I and II, with specific instruction to the trial court to sustain Appellant's motions to suppress and exclude all statements and evidence obtained by virtue of Appellant's detention by Trooper Keathley.

CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This Brief complies with the information required by Rule 55.03;

2. This Brief complies with the limitations contained in Rule 84.06(b) and Special Rule No. 1(b);

3. The word count of this Brief is 8080.

4. The disk containing this Brief and provided to this Court, and the disks containing this Brief served upon opposing counsel, have been scanned for viruses and are virus free;

5. This Brief was prepared using 13 point Times New Roman font, in Microsoft Word 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that he has served two true, accurate, and complete copies of the foregoing instrument, one copy of a disk containing this instrument, and one copy of the Appendix to Appellant's Brief (separately bound) upon **Chris Koster**, Attorney General's Office, P.O. Box 899, Jefferson City, Missouri 65102 and **Stephan Lawhorn,** Franklin County Prosecuting Attorney's Office, 414 East Main Street, Union, Missouri 63084, on this 16th day of July 2010.

_____
Frank K. Carlson