

NO. SC86144

IN THE MISSOURI SUPREME COURT

SCOTT PONTIUS,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

**Appeal from the Circuit Court of St. Charles County
The Honorable Terry R. Cundiff, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**GREGORY R. FUTHEY
Attorney at Law
Missouri Bar No. 28896**

**780 Lakeside Plaza
Lake St. Louis, MO 63367
(636) 978-9099
Fax (636) 978-1163**

**ATTORNEYS FOR RESPONDENT
SCOTT PONTIUS**

Table of Contents

Table of Contents	2
Table of Authorities	3
Jurisdictional Statement	5
Statement of Facts	6
Point Relied On	9
Argument	10
Standard of Review	10
The Director failed to make Prima Facie Case.	11
Conclusion	15
Certificate of Compliance and Service	16

Table of Authorities

Cases

Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. banc 1985) 14

Eskew v. Director of Revenue, 17 S.W.3d 159 (Mo. App. E.D. 2000) 11

Fainer v. Director of Revenue, 2003 WL 22997012 (Mo. App. E.D. 2003) 12

Grace v. Director of Revenue, 77 S.W.3d 29 (Mo. App. E.D. 2002) 12

Hinnah v. Director of Revenue, 77 S.W.3d 616 (Mo. banc 2002) 13

Hopkins-Barken v. Director of Revenue, 55 S.W.3d 882 (Mo. App. E.D. 2001) 11

Marsey v. Director of Revenue, 19 S.W.3d 176 (Mo. App. E.D. 2000) 11

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 10

Nightengale v. Director of Revenue, 14 S.W. 3d. 267 (Mo. App. W.D. 2000). 9,14

Parres v. Director of Revenue, 75 S.W.3d 311 (Mo. App. E.D. 2002) 11

Pontius v. Director, No. ED83375, slip op. (Mo. App., E.D. May 11, 2004)9,13,14,15

Roberts v. Wilson, 97 S.W. 3d 487 (Mo. App. W.D. 2002) 9, 14

Simmons v. Director of Revenue, 3 S.W.3d 897 (Mo. App. S.D. 1999) 9, 13

Sooch v. Director of Revenue, 105 S.W.3d 546 (Mo. App. E.D. 2003) 8

State v. Calhoon, 7 S.W.3d 494 (Mo. App. W.D. 1999) 12

Tinker v. Director of Revenue, 2003 WL 23104477 (Mo. App. E.D. 2003) 12

Statutes

Article V, § 3, Missouri Constitution (as amended 1982) 5

Mo. Rev. Stat. § 302.312 (2000)7, 12

Mo. Rev. Stat. § 477.050, RSMo (2000) 5

§ 577.041, RSMo (2000) 5, 7, 13

Mo. Rules of Procedure 73.01 (c) 13

Jurisdictional Statement

This appeal is from a judgment of the Circuit Court of St. Charles County reinstating the driving privileges of Scott E. Pontius, after revocation of those privileges by the appellant, the Director of Revenue, following Pontius' refusal to submit to a test pursuant to § 577.041, RSMo (2000). This appeal involves none of the issues reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction lies in the Missouri Court of Appeals, Eastern District. Article V, § 3, Missouri Constitution (as amended 1982); § 477.050, RSMo (2000).

Statement of Facts

On March 21, 2002, at 9:22 pm, Officers Murray, Frauenfelder, and Gilliam, of the Lake St. Louis Police Department, responded to the scene of an automobile collision (LF 17). Based upon the statements of two civilian witnesses, the collision, which occurred outside the Days Inn Pub, which is, also, shared with the Days Inn Motel, involved two motor vehicles, one of which was registered to Pontius, the Respondent (LF 17-18). Again, based upon the statements of two civilian witnesses, apparently, the vehicle registered to Pontius, when pulling out of a parking spot outside the Days Inn Pub, backed into the passenger side of a stopped car (LF 18). The civilian witnesses went on to say that, after hitting the stopped car, the driver of the vehicle registered to Scott Pontius, exited the vehicle, looked at the damage, and then asked the drivers of the vehicle he hit not to call the police (LF 18) and the driver then walked back into the Days Inn Pub without giving his name or insurance information (LF 18).

When the officers responded to the scene, they took the statements of the individuals who were in the car hit by the vehicle registered to Pontius (LF 17-21). The drivers of the struck car provided the police with a description of the driver of the vehicle registered to Pontius and his actions (LF 18). Because the driver of the vehicle registered to Pontius had left the scene of the crash, the officers ran the license plates in order to identify the registered owner of the vehicle. (LF 18).

In order to find the driver of the vehicle registered to Pontius, the officers canvassed the Days Inn Pub (LF 20). While the officers were in the pub, a female who

identified herself as a friend of Pontius called and asked to speak with the officers (LF 20). The friend told the officers that she had driven Pontius home from the pub (LF 20). When the officers asked to speak with Pontius, the friend refused to allow the officers to speak with Pontius (LF 20). She also refused to take Pontius to the police station (LF 20).

At 10:21 that same evening, Officers Gilliam and Frauenfelder went to Pontius' home (LF-20). When the officers arrived at Pontius' home they noticed that he matched the description given to them by the witnesses (LF-20). The officers also noticed that there was a strong smell of alcohol on his breath, and that his eyes were watery, bloodshot, and glassy (LF-20). Further, the officers also noticed that Pontius' balance was uncertain (LF-20). The officers arrested Pontius for leaving the scene of an accident and for suspicion of driving while intoxicated (LF 20). Later that evening at the police station, Pontius refused to submit to field sobriety tests and a breath test (LF 13, 14, 15). While at the police station, one of the civilian witnesses was able to identify Pontius as the driver of the car that hit them (LF-20). The Director of Revenue (Director) revoked Pontius' drivers license pursuant to § 577.041, RSMo (2000) (LF 32). Pontius appealed this determination to the circuit court, and a drug court commissioner found in favor of the Director and approved the revocation of Pontius' driver's licence on December 20, 2002 (LF 32). Pontius asked the court for a new trial/rehearing (LF 34).

At the trial de novo the Director submitted her case "on the record" pursuant to §302.312 (Tr. 2; LF 9, 65). The Director had notified Pontius on June 24, 2002 that she would be relying on the Alcohol Influence Report (AIR) at trial (LF-8). Pontius' attorney

did not object to any of the information in the AIR save for the civilian witness statements on the grounds that they were hearsay (Tr 2-7). On April 17, 2003, the trial court found in favor of the Director (LF 57).

On May 14, 2003, Pontius filed his “Motion to Set Aside and Reconsider Judgment” arguing, again, that the court erred in considering “civilian hearsay” and, also, that there was no evidence sufficient to allow the officers to form a reasonable belief that the person operating the motor vehicle at the time of the accident was operating the vehicle in an intoxicated condition.(LF 58-59). Only a day prior, on May 13, 2003, the Court of Appeals, Eastern District, held, in *Sooch v. Director of Revenue*, 105 S.W.3d 546 (Mo App. ED 2003), that St. Charles County drug court commissioners lacked jurisdiction to hear driver’s license cases and such trials de novo in St. Charles must be heard by associate circuit judges or circuit judges.

On August 18, 2003, following reconsideration, the Court held that the witness statements were hearsay and could not be considered by the court (LF 65). The Court also stated that under *Sooch*, a petitioner is entitled to due process, and as such, the witness statements should be excluded as hearsay (LF 61). The court further stated that without the witness statements there was insufficient evidence to meet the Director’s burden (LF 61) and the court sustained Pontius’ Petition at the close of the Director’s case.. Therefore, the court ordered the Director to reinstate Pontius’s driving privileges (LF 61). The Director appealed this ruling on August 18, 2003 (LF 63).

Point Relied On

The trial court did not err in granting Respondent Petition for Review and ordering the Appellant to reinstate Respondent's drivers license as a result because the Director did not make her prima facie case, in that the Director did not prove that the officers had a reasonable belief that Respondent was driving his motor vehicle in an intoxicated condition at the time of the accident.

Simmons v. Director of Revenue, 3 S.W.3d 897 (Mo. App. S.D. 1999)

Pontius v. Director of Revenue, No. ED83375, slip op. (Mo. App. E.D. May 11, 2004)

Roberts v. Wilson, 97 S.W. 3d 487 (Mo. App W.D. 2002)

Nightengale v. Director of Revenue, 14 S.W. 3d. 267 (Mo. App. W.D. 2000).

Argument

Point Relied on I

The trial court did not err in granting Respondent Petition for Review and ordering the Appellant to reinstate Respondent's drivers license as a result because the Director did not make her prima facie case, in that the Director did not prove that the officers had a reasonable belief that Respondent was driving his motor vehicle in an intoxicated condition at the time of the accident.

There is no dispute that Respondent was arrested and refused to take the chemical test. The sole issue is whether the arresting officer had probable cause to believe that Pontius was driving a motor vehicle in an intoxicated or drugged condition.

Standard of Review

Review of a trial court's judgment after a trial de novo is governed by the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The decision of the trial court must be affirmed on appeal unless there is no substantial evidence to support it, the decision is against the weight of the evidence, or the trial court erroneously declares or applies the law. *Id.* at 32; *Eskew v. Director of Revenue*, 17 S.W.3d 159, 160 (Mo. App. E.D. 2000).

If the disputed question is not a matter of contradiction by different witnesses, this court is not required to defer to the trial court's findings of credibility. *Hopkins-Barken v. Director of Revenue*, 55 S.W.3d 882, 885 (Mo. App. E.D. 2001). "In addition, our standard of review does not permit us to disregard uncontroverted evidence that support[s] the

Director's contention that all elements were proved." *Id.* "Deference to the trial court's findings is not required when the evidence is uncontroverted and the case is virtually one of admitting the facts or when the evidence is not in conflict." *Marsey v. Director of Revenue*, 19 S.W.3d 176, 177 (Mo. App. E.D. 2000).

The Director's failed to make her prima facie case.

As stated by Appellant, in a proceeding where a person's license has been revoked for failure to submit to a breath test, the circuit court shall determine only (1) whether or not the person was arrested; (2) whether or not the person refused to submit to the test; and (3) whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle in an intoxicated condition. *Marsey v. Director of Revenue*, 19 S.W.3d 176, 177 (Mo. App. E.D. 2000).. The term reasonable grounds is "virtually synonymous with probable cause for arrest for driving while intoxicated." *Parres v. Director of Revenue*, 75 S.W.3d 311, 314 (Mo. App. E.D. 2002).

In this case the Director failed to meet her prima facie case for revocation of Pontius' drivers license and the trial court at the close of the Director's case sustained the petition. As stated by Appellant, first, under RSMo § 302.312 it is appropriate for the Director to submit her case on the certified records of the Department of Revenue. *See Generally, Tinker v. Director of Revenue*, 2003 WL 23104477 (Mo. App. E.D. 2003); *Fainer v. Director of Revenue*, 2003 WL 22997012 (Mo. App. E.D. 2003); and *Grace v. Director of Revenue*, 77 S.W.3d 29 (Mo. App. E.D. 2002). Further, it is appropriate for the court to admit into evidence certified Department of Revenue records under § 302.312

in both civil cases, as here, as well as in criminal cases. *State v. Calhoon*, 7 S.W.3d 494 (Mo. App. W.D. 1999). And, these records showed that on March 21, 2002 Corporal Gilliam and Sergeant Bastean arrested Pontius for leaving the scene of an accident and suspected driving while intoxicated(LF-20). At the police station that night, Pontius, after being advised of Missouri's consent law, refused to submit to field sobriety tests or take a breath test (LF-20). In this case, the officers responded to the scene at 2122 hours (LF-17) and the arrest occurred at 2221 hours, some 59 minutes after responding to the initial complaint.

As to the officers' reasonable grounds to believe Pontius was driving a motor vehicle in an intoxicated condition, the Director did not meet her burden. Section 577.041.4(2) requires the officers to have had reasonable grounds to believe Pontius was intoxicated when the accident occurred as that would have been when he was driving a motor vehicle. *Simmons v. Director of Revenue*, 3 S.W.3d 897, 901 (Mo. App. S.D. 1999). The Director submitted her case on the records pursuant to § 302.312 (Tr-2) According to Section 577.041.4, the issue is not whether a person was actually driving but whether the officer had reasonable grounds to believe that the person was driving a vehicle in an intoxicated condition. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 622 (Mo. banc 2002).

This case is a fact driven case in which the facts do not support the officers having a reasonable belief that the driver of the Pontius vehicle may have been intoxicated. When the officers responded to the scene of the collision **not one witness** mentioned or stated

that the driver of the Pontius vehicle appeared to have any indicia of intoxication. The first time there was an indication of intoxication was when the officers arrived at Pontius' home, some 59 minutes after responding to the accident, they noticed that he matched the witnesses' description, that he had a strong smell of alcohol on his breath, and that his eyes were watery, bloodshot, and glassy (LF-20). The officers arrested Pontius, and he refused to submit to field sobriety tests. (LF 13-15). As stated by the Court of Appeals, Eastern District in this case "There is no evidence on the record indicating Respondent's condition at the time of the collision was anything but normal. "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Rule 73.01(c). *Pontius v. Director of Revenue*, No. ED83375, slip op. at 5 (Mo. App., E.D. May 11, 2004)

In a refusal case, the Director has the burden of establishing a prima facie case pursuant to 577.041.4. "If the Director makes a prima facie case, the burden shifts to the driver to rebut that case by a preponderance of the evidence." *Roberts v. Wilson*, 97 S.W.3d 487, 492 (Mo. App W.D. 2002) Conversely, if the Director fails to make a prima facie case, it will result in the reinstatement of driving privileges. *Nightengale v. Director of Revenue*, 14 S.W. 3d. 267, 269 (Mo. App. W.D. 2000) *Pontius v. Director of Revenue*, slip op. at 4. With or without the hearsay testimony, the Director failed to prove that any of the officers had reasonable grounds to believe that Pontius was intoxicated at the time he was allegedly driving the motor vehicle at the time of the accident. *Nightengale v. Director of Revenue*, 14 S.W. 3d. 267, 270 (Mo. App. W.D. 2000).

Miscellaneous Responses.

The Appellant asserts in her brief, if Pontius had a objection to the use of the written report of the officers, or the statements of the witnesses, which he knew about well in advance of hearing, he could have called them to testify. “The Missouri Administrative Procedure Act . . . provides each party with the opportunity to call and examine witnesses, to introduce exhibits and ‘to impeach any witness regardless which party first called him to testify.’” *Collins v. Director of Revenue*, 691 S.W.2d 246, 254-256 (Mo. banc 1985). Since the Director did not sustain her burden and the court sustained Pontius’s Petition at the close the of the Director’s case, there was no need to have witnesses, the officers or Pontius testify. *Pontius v. Director of Revenue*, slip op. at 5.

Because the AIR, and the witness statements contained therein, showed that the officers did not have reasonable grounds to form a belief that Pontius was intoxicated at the time of his purported operation of the motor vehicle it was proper for the trial court to grant Respondent’s Petition for Review and order the Appellant to reinstate Respondent’s license.

Conclusion

In view of the foregoing, this Court should affirm the judgment of the trial court.

GREGORY R. FUTHEY MBE#28896

780 Lakeside Plaza
Lake St. Louis, MO 63367
(636) 978-9099
Fax (636) 978-1163

ATTORNEY FOR RESPONDENT
SCOTT PONTIUS

Certificate of Service and Compliance with Rule 84.06 (b) and (c)

The undersigned hereby certifies that on the 22nd day of October, 2004, two true and correct copies of the foregoing brief and one disk containing the brief were mailed postage prepaid to:

Ms. Cheryl Caponegro Nield
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2874 words in Word Perfect 9 format.

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.

Gregory R. Futhey
Attorney for Respondent