

**IN THE SUPREME COURT
OF THE
STATE OF MISSOURI**

| | | |
|---|---|---------------------|
| STATE EX REL. DANIEL BAHRENBURG, |) | |
| |) | |
| |) | |
| Relator, |) | No. SC 84581 |
| |) | |
| v. |) | |
| |) | |
| THE HONORABLE GLEN DIETRICH, |) | |
| (Associate Circuit Judge, Division II, |) | |
| Fourth Judicial Circuit) |) | |
| |) | |
| and |) | |
| |) | |
| THE DIRECTOR OF REVENUE, |) | |
| |) | |
| Respondents. |) | |

RELATOR’S BRIEF

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INDEX TO EXHIBITS

Note: The only exhibits before the Court are those attached to Relator's Petition for Writ of Mandamus. Those exhibits will be referred to by their numeric designation. Sub-exhibits will be referred to by the numeric designation of the primary exhibit along with reference to the specific sub-exhibit. (i.e. 1-A, 1-B, etc. or 4-1, 4-2)

Exhibit No.

Description

| | |
|---|--|
| 1 | Petition for Writ of Mandamus filed with Missouri Court of Appeals, Western District |
|---|--|

Sub-Exhibits

| | |
|---|---|
| A | Affidavit of Daniel Bahrenburg |
| B | Affidavit of G. Spencer Miller |
| C | Form – Waiver of Counsel and Plea of Guilty |
| D | Criminal Docket Sheet |
| E | Entry of Appearance |
| F | Motion to Set Aside Guilty Plea with Supporting Suggestions |
| G | Notice of Hearing |
| H | Not Used |
| I | Not Used |
| J | Criminal Docket Sheet |

K Abuse and Lose – Order of Suspension/Revocation
2 Suggestions in Support of Petition for Writ of Mandamus
filed with Missouri Court of Appeals, Western District
3 Order of Missouri Court of Appeals, Western District, dated
May 29, 2002
4 Suggestions in Opposition to Petition for Writ of Mandamus
filed by Respondent in Missouri Court of Appeals, Western
District

Sub Exhibits

1. Ticket dated April 22, 2002
2. Information dated May 6, 2002
5 Reply to Suggestions in Opposition to Relator’s Petition for
Writ of Mandamus

Sub Exhibits

Notice of Loss of Driving Privilege
6 Order of Missouri Court of Appeals, Western District
dated June 17, 2002.

**IN THE SUPREME COURT FOR
THE STATE OF MISSOURI**

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| STATE EX REL DANIEL BAHRENBURG, |) | |
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| Relator, |) | Case No. SC 84581 |
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| v. |) | |
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| THE HONORABLE GLEN DIETRICH |) | |
| (Associate Circuit Judge, Division II, |) | |
| Fourth Judicial Circuit) |) | |
| |) | |
| Respondent. |) | |

JURISDICTIONAL STATEMENT

This case arises out of the refusal to set aside a plea of guilty by the Honorable Glen Dietrich, Associate Circuit Judge for Division II in the Fourth Judicial Circuit (Nodaway County). Article V, section 4 of the Missouri Constitution grants this Court the power to issue and determine original remedial writs. Section 530.020, R.S.Mo. implements the power to issue and determine remedial writs and specifically provides that this Court “shall have power to hear and determine proceedings in prohibition.” It has held that a Petition for Writ of Mandamus is the appropriate procedural vehicle to challenge the refusal to set aside a plea of guilty at the trial court level. State ex rel. Lee v. Bailey, 817 S.W.2d 287 (Mo.App.W.D. 1991). Therefore, this Court has the jurisdiction to consider the issues raised in this case.

STATEMENT OF FACTS

On April 22, 2002, Relator Daniel Bahrenburg was given what is commonly called a ticket by an officer with the Maryville, Missouri Department of Public Safety. (Ex. 1-A, p. 1 para..3 and 4-1) In reality, the “ticket” was a “Complaint and Summons”. In the Complaint, Relator was charged with “possession drug paraphernalia”. (Ex. 4-1) Relator was assigned the Court date of May 7, 2002 at 9:00 a.m. (Ex. 4-1)

On May 7, 2002, Relator appeared at the Associate Circuit Court for Nodaway County, Missouri (Division II) at the designated time. (Ex.1-A, p. 1, para. 4) Respondent Dietrich is the judge for that court. Relator was not represented by an attorney. (Ex. 1-A, p. 1, para. 4) At that time Mr. Bahrenburg, the Relator, thought that the only charge against him was possession of drug paraphernalia. (Ex. 1-A, p. 1, para. 4)

After arriving at Court on May 7, 2002, Relator spoke with the Nodaway County Prosecuting Attorney, David Baird. (Ex. 1-A, p. 2, para. 5) On May 6, 2002, the day before, Mr. Baird had filed a two count information which alleged possession of marijuana **and** possession of drug paraphernalia. (Ex. 2, p. 2, para. 8 and Ex. 4-2) The Relator was never given a copy of the information. (Ex. 1-A, p. 2, para. 6)

The prosecutor, Mr. Baird, told Relator that if he would plead guilty to the charge of possession of marijuana, then the other count relating to possession of drug paraphernalia would be dismissed. (Ex. 1-A, p. 2, para. 6) Relator

understood that if he entered a plea of guilty pursuant to his discussion with Mr. Baird, then his sentence would include a \$300.00 fine and a 60 day jail sentence that would be suspended for 2 years while he was on probation. (Ex. 1-A, p. 2, para. 6-7) Mr. Bahrenburg had no idea that he would lose his driving privileges if he pleaded guilty to possession of marijuana. (Ex. 1-A, p. 3, para. 16)

On May 7, Mr. Baird never told Relator that if he pleaded guilty to the possession of marijuana charge then he would lose his driving privileges. (Ex. 1-A, p. 2, para 8) When Relator was before the Respondent Dietrich, the Respondent Dietrich never told him that he would lose his driving privileges if he pleaded guilty to possession of marijuana. (Ex. 1-A, p. 2-3, para. 10 and 15)

During the hearing before Respondent Dietrich on Relator's motion to set aside the plea of guilty, the prosecuting attorney stipulated that neither he nor Respondent Deitrich had said anything to Mr. Bahrenburg about a loss of driving privileges.

Relator completed a form that was given to him by Mr. Baird. (Ex. 1-C) The form did not contain any information about losing driving privileges. (Ex. 1-C) Relator told Respondent Dietrich that he was pleading guilty to the charge of possession of marijuana. (Ex. 1-A, p. 2, para. 10) After appearing before Respondent Dietrich and entering a plea of guilty, Relator was told by the court clerk that his driving privileges would be suspended. (Ex. 1-A, p. 3, para. 15)

During the guilty plea before Respondent, Relator was not asked his age nor was he asked whether a motor vehicle was involved in the offense. (Ex. 1-A,

p. 2, para. 12) During the guilty plea hearing, no evidence was presented or anything said about Relator's age or whether a motor vehicle was involved in his offense. (Ex. 1-A, pp. 2-3, para. 13-14) No record was made of the hearing. (Ex. 1-A, p. 2, para. 11 and Ex. 1-B, p. 1, para. 4-5)

The ticket which Relator was given by the police officer was not filed with the Court. (Ex. 4, p. 2, para. 2) The document that was filed with the Court that charged Relator with an offense was a two count information. (Ex. 4, p. 2, para. 1 and Ex. 4-2) The two count information does not mention Relator's age or whether the offense involved the use of a motor vehicle. (Ex. 4-2) Furthermore, the information does not allege a violation of section 577.500, R.S.Mo. (Ex. 4-2) As mentioned earlier, the two count information was never given to Relator by the prosecuting attorney or the Respondent Dietrich. (Ex. 1-A, p. 2, para. 6)

After learning that his driver's license would be suspended, Relator immediately hired an attorney. (Ex. 1-A, p. 3, para. 17) A motion to set aside the guilty plea was filed on the next day the Court was open after the guilty was entered. (Ex. 1-E, F, and F)¹ Following a hearing before Respondent Dietrich, Respondent Dietrich denied the motion to set aside. (Ex. 1-A, p. 3, para. 19 and Ex. J)

¹ May 8, 2002 was President Truman's birthday and the Courts were closed.

On the same day that he entered his guilty plea Respondent Dietrich entered his order suspending Relator's driving privileges. (Ex. 1K) On May 30, 2002, the Director of Revenue sent notice to Relator that his license had been suspended.

This court entered its order on July 17 directing Respondent Dietrich to vacate his order of May 17, 2002 overruling and denying Relator's Motion to Set Aside. Also, on the same date this court ordered the Director of Revenue added as a necessary party and ordered that the suspension of Relator's driving privileges be stayed.

POINTS AND AUTHORITIES RELIED ON

I. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO GRANT RELATOR’S MOTION TO SET ASIDE RELATOR’S PLEA OF GUILTY BECAUSE RELATOR WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS NOT GIVEN ADEQUATE OR SUFFICIENT NOTICE OF THE CHARGE OF POSSESSION OF MARIJUANA.

U.S. Constitution, Fourteenth Amendment

Mo. Constitution, Art. I, § 10

Mo. Constitution, Art. I, § 18(a)

Mo.R.Crim.Pro. 24.01

II. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO GRANT RELATOR’S MOTION TO SET ASIDE RELATOR’S PLEA OF GUILTY BECAUSE THE RELATOR, WHO WAS UNREPRESENTED BY COUNSEL, WAS NEVER ADVISED OF THE FULL RAMIFICATIONS OF HIS GUILTY PLEA IN THAT HE WAS NEVER INFORMED BY RESPONDENT DIETRICH OR THE PROSECUTING ATTORNEY THAT A PLEA OF GUILTY TO THE CHARGE OF POSSESSION OF MARIJUANA WOULD RESULT IN THE SUSPENSION OF HIS DRIVING PRIVILEGES AND AS A RESULT HE

DID NOT UNDERSTAND THE NATURE AND EXTENT OF HIS PLEA OF GUILTY AND DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHTS.

State v. Hasnan, 806 S.W.2d 54 (Mo.App.W.D. 1991)

Huffman v. State, 703 S.W.2d 566, 568 (Mo.App. 1986)

§ 577.500, R.S.Mo

§ 577.500.1, R.S.Mo.

§ 577.500.2, R.S.Mo.

§ 577.500.4(1)

State v. Abernathy, 674 S.W.2d 514 (Mo.App.S.D. 1989)

Mo.R.Crim.Pro. 24.02

III. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO SET ASIDE HIS ORDER OF MAY 7, 2002 SUSPENDING RELATOR'S DRIVING PRIVILEGES BECAUSE RELATOR WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS NEVER GIVEN NOTICE THAT HIS DRIVING PRIVILEGES WOULD BE SUSPENDED IF HE ENTERED A PLEA OF GUILTY AND HE WAS NEVER GIVEN THE OPPORTUNITY TO BE HEARD BY EITHER THE RESPONDENT OR THE DIRECTOR OF REVENUE.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)

Dixon v. Love, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977)

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Moore v. Board of Education of Fulton Public School No. 58, 836 S.W.2d 943, 947 (Mo.1992)

Nixon v. Williamson, 703 S.W.2d 526 (Mo.App. 1985)

§ 577.500, R.S.Mo.

State v. Stokes, 814 S.W.2d 702 (Mo.App.W.D. 1991)

State v. Rehm, 821 S.W.2d 127 (Mo.App.E.D. 1992)

§ 577.505, R.S.Mo.

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State v. Stokes, 814 S.W.2d 702, 703 (Mo.App.W.D. 1991)

§ 577.500, R.S.Mo.

V. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO SET ASIDE RELATOR'S PLEA OF GUILTY AND RELATOR'S ORDER OF MAY 7, 2002 SUSPENDING RELATOR'S

**DRIVING PRIVILEGES BECAUSE THERE WAS NO RECORD MADE
OF THE PROCEEDINGS IN VIOLATION OF § 543.335, R.S.MO.**

§ 543.335, R.S.Mo.

State ex rel. Lee v. Bailey, 817 S.W.2d 287 (Mo.App.W.D. 1991)

§ 577.500, R.S.Mo.

**VI. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN
ORDER PROHIBITING THE RESPONDENT DIRECTOR OF REVENUE
FROM SUSPENDING THE DRIVING PRIVILEGES OF RELATOR EVEN
IF RESPONDENT THE HONORABLE GLEN DIETRICH WERE TO
ORDER SUCH A SUSPENSION BECAUSE NEITHER RESPONDENT
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SUSPENSION OF RELATOR'S DRIVING PRIVILEGES OR WITH AN
OPPORTUNITY TO BE HEARD AS REQUIRED FOR DUE PROCESS OF
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Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)

Dixon v. Love, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729,

52 L.Ed.2d 172 (1977)

Jarvis v. Director of Revenue, 804 S.W.2d 22, 24 (Mo. 1991)

Dabin v. Director of Revenue, 9 S.W.2d 610, 615 (M.banc 2000)

§ 302.505, R.S.Mo.

§§ 577.500 and 577.505, R.S.Mo.

ARGUMENT

I.

RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO GRANT RELATOR'S MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY BECAUSE RELATOR WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS NOT GIVEN ADEQUATE OR SUFFICIENT NOTICE OF THE CHARGE OF POSSESSION OF MARIJUANA.

Citizens in the State of Missouri are constitutionally guaranteed due process of law. The United States Constitution in the Fourteenth Amendment sets forth that guarantee from the Federal perspective. Section 10 of Article I of the Missouri Constitution provides:

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

Further, Article I provides in section 18(a) that an accused has the right to be informed of the charges against him.

In order to facilitate the application of the provisions that require notice to an accused this Court has adopted Mo.R.Crim.Pro. 24.01 which provides in pertinent part:

He shall be given a copy of the indictment before he is called upon to plead.

Although it is not expressly stated, it is clear that procedural due process requires that an accused be informed of charges in a timely fashion so that there is a reasonable opportunity to consider the nature and extent of the accusations.

In this case, Daniel Bahrenburg, the Relator, appeared at Division II of the Circuit Court of Nodaway County on May 7, 2002. He was not represented by counsel. At that time he was only aware of one charge against him – possession of drug paraphernalia. The Court file reflects that a two count information was not filed until May 6, 2002, the day before Mr. Bahrenburg’s scheduled hearing. Furthermore, in Mr. Bahrenburg’s affidavit he relates that he was never given a copy of the two count information which was filed the day before.

No competent evidence has been submitted by the Respondent or the Prosecuting Attorney which rebuts the allegation of Mr. Bahrenburg about not receiving a copy of the information. Specifically, neither the Respondent nor the Prosecuting Attorney filed any affidavit contradicting Mr. Bahrenburg’s sworn statement. Furthermore, there was no record of what transpired at the court hearing. As a result, the only conclusion that may be reached is that there was a violation of Mo.R.Crim.Pro. 24.01.

One week to the day after Mr. Bahrenburg entered a plea of guilty to the newly added charge of possession of marijuana the Respondent conducted a hearing on Relator’s Motion to Set aside Guilty Plea. In Relator’s Motion it was called to the Respondent’s attention that one of the reasons the motion should be granted was that [Relator] “was not provided with a copy of any amendments to

the original charge against him or any additional charges that were filed subsequent to the original charges.” (Ex. 1F, p. 2).

The original complaint and summons (ticket) was served by Officer Hailey on Relator on April 22, 20002. That ticket was never filed with the Court. What is significant is that Mr. Bahrenburg had more than a month to consider the only charge against him. (It is noted that a conviction of that charge would not have resulted in a suspension of his driving privileges.) Then, he only had a few minutes to consider whether to enter a plea of guilty to the new charge of possession of marijuana. He did not have the benefit of representation by legal counsel and he had no knowledge that a plea of guilty would result in a loss of his driving privileges.

Relator’s motion to set aside was filed the first business day it was possible to file a motion following the day he entered his plea of guilty. Therefore, counsel was hired immediately after he learned about the loss of his driving privileges, and there was no delay in getting an appropriate motion on file.

There is no doubt about the fact that Respondent should have granted the motion to set aside for the simple reason that there was a failure to comply with the due process requirement that an accused be advised of the charges against him in a timely and meaningful fashion, and for the reason that there was a failure to comply with the mandatory provisions of Mo.R.Crim.Pro. 24.01. Therefore, this Court should grant Relator’s Petition for Writ of Mandamus and direct Respondent Dietrich to set aside Relator’s plea of guilty that was entered on May

7, 2002. Under the circumstances of this case such an order will not cause any prejudice to the State and will clearly protect Relator's right to procedural due process.

II.

RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO GRANT RELATOR'S MOTION TO SET ASIDE RELATOR'S PLEA OF GUILTY BECAUSE THE RELATOR, WHO WAS UNREPRESENTED BY COUNSEL, WAS NEVER ADVISED OF THE FULL RAMIFICATIONS OF HIS GUILTY PLEA IN THAT HE WAS NEVER INFORMED BY RESPONDENT DIETRICH OR THE PROSECUTING ATTORNEY THAT A PLEA OF GUILTY TO THE CHARGE OF POSSESSION OF MARIJUANA WOULD RESULT IN THE SUSPENSION OF HIS DRIVING PRIVILEGES AND AS A RESULT HE DID NOT UNDERSTAND THE NATURE AND EXTENT OF HIS PLEA OF GUILTY AND DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHTS.

On May 7, 2002 when Daniel Bahrenburg appeared at Division II of the Circuit Court of Nodaway County, there is no question about the fact that neither the Prosecuting Attorney nor the Respondent advised him that a plea of guilty to a charge of possession of marijuana would result in a suspension of his driving privileges. Mr. Bahrenburg was unaware of that result. On the other hand, both the Prosecuting Attorney and the Respondent were fully aware of the fact that such a plea would result in Mr. Bahrenburg losing his driving privileges. It was under

those circumstances that Mr. Bahrenburg entered a plea of guilty to the charge of possession of marijuana. Relator contends that those circumstances should have necessitated the Respondent Dietrich to set aside the plea of guilty. However, Respondent Dietrich refused to do so.

The precise issue under consideration seems to be whether the Respondent Dietrich was required to advise Mr. Bahrenburg of the fact that his driving privileges would be suspended as part of the necessary determination of whether the plea of guilty was being freely and voluntarily made and that there was a knowing and intelligent waiver of Mr. Bahrenburg's constitutional rights. It is the contention of Relator that it was necessary for him to be advised of the loss of his driving privileges because it was a direct consequence of his guilty plea. On the other hand it is the contention of the Respondent Dietrich and the Prosecuting Attorney that it was not necessary to provide such advice to Mr. Bahrenburg because the loss of driving privileges was a collateral matter.

In the case of *State v. Hasnan*, 806 S.W.2d 54 (Mo.App. W.D. 1991), the Missouri Court of Appeals, Western District, acknowledged the general rule that a defendant must be advised of the direct consequences of a guilty plea but need not be informed of the collateral consequences of a guilty plea. (Citing *Huffman v. State*, 703 S.W2d 566, 568 (Mo.App. 1986)). In the analysis set forth in *Hasnan*, Judge Gaitan noted that "direct consequences" are those which definitely, immediately and largely automatically follow the entry of a plea of guilty." (Citing *Huffman, supra*, at 568). The Court decided in *Hasnan*, that deportation

proceedings were not a direct consequence of a plea of guilty and held that the trial court did not err in refusing to set aside the defendant's guilty plea.

In this case, the question presented relates to the application of § 577.500, R.S.Mo. In accordance with § 577.500. R.S.Mo. upon a finding by the court that there has been a violation of the statute by a person under the age of 21 the Court “**shall** enter any order suspending or revoking the driving privileges of any person determined to have committed one of the following offenses who, at the time said offense was committed was under twenty-one years of age:” (§ 577.500.1) and the court “**shall** require the surrender to it of any license to operate a motor vehicle then held by any person against whom a court has entered an order suspending or revoking driving privileges under subsection 1 of this section.” (§ 577.500.2 R.S.Mo.) and the court **shall** forward to the director of revenue the order of suspension or revocation of driving privileges and any licenses acquired under subsection 2 of this section ...” (§ 577.500.4(1)). The provisions set forth in the statute are mandatory provisions. Therefore, whenever there is a plea of guilty and § 577.500, R.S.Mo. is applicable, the driving privileges of the person in question are to be suspended automatically. Such action is the direct result of a plea of guilty. Therefore, under the rationale of *Hasnan*, Daniel Bahrenburg should have been advised of the fact that his license would be suspended if he entered a plea of guilty. Failure to do so violated Mr. Bahrenburg's due process rights and negated his waiver of his constitutional rights and negated any free and voluntary plea of guilty. For that reason, Respondent Dietrich should have granted the motion to set

aside the guilty plea, but he refused to do so. For that reason that this court is asked to grant Relator's Petition for Writ of Mandamus.

In other court documents, Respondent has relied upon the case of *State v. Abernathy*, 674 S.W.2d 514 (Mo.App. S.D. 1989). It is correct that the *Abernathy* opinion quotes from a legal treatise on criminal law by LaFave & Israel that generically refers to the loss of a driver's license as being a collateral consequence of a guilty plea. However, such a quotation has all of the limitations of a generic, abstract, statement of a legal principle. It does not necessarily apply to all situations. For instance, at the time of the *Abernathy* decision, the Missouri "Abuse and Lose" law had not been enacted into law. Furthermore, the abstract statement from LaFave & Israel makes no attempt to consider the mandatory provisions of a statute like § 577.500, R.S.Mo. Therefore, the quotation from *Abernathy* is not persuasive in this case.

Respondent has also argued in papers filed in this case that the *Hasnan* case stands for the proposition that compliance with the provision of Mo.R.Crim.Pro. 24.02 satisfies the requirement that a defendant be informed of all of the direct consequences of a guilty plea. It is noted that in *dicta*, the *Hasnan* opinion does suggest that all direct consequences are stated in Rule 24.02. However, since the statement was simply *dicta* it is not dispositive of the issue in this case.

Furthermore, the statement relied upon by the Respondent out of the *Abernathy* case is based on a *non sequitur*. The *Abernathy* opinion states:

Given the mandatory nature of this rule [Mo.R.Crim.Pro. 24.02],

it is also logical to conclude that this list is exclusive and that all “direct results” are stated therein.

The suggestion that all mandatory rules are necessarily exclusive by virtue of the fact that the rule is mandatory is not logically consistent. For instance, is it possible to have a mandatory rule which is not exclusive? Certainly, the mere fact that something is required in a mandatory rule does not necessarily imply that there will never be circumstances where something in addition will need to be included. Mandatory does not necessarily mean “all inclusive”. Relator respectfully suggests to the Court that Rule 24.02 is simply a general guideline that must be modified depending on the circumstances. The fact is that Rule 24.02 and its predecessor rule were adopted prior to the enactment of the “Abuse and Lose” law. Therefore, it is not possible for Rule 24.02 to have included the ramifications of that statute. As a result, it is only fair, especially under circumstances where the defendant is not represented by counsel, for a defendant under the age of 21 to be informed that as a direct consequence of a plea of guilty to the charge of possession of marijuana, that a suspension of driving privileges will occur. By providing that information to a defendant there will be little inconvenience to the Court and there will be the assurance that a plea of guilty entered under those circumstances was made freely and voluntarily and that the defendant’s constitutional rights were fully protected.

Therefore, for the reasons set forth herein, Respondent should have granted Relator’s Motion to Set Aside Plea of Guilty and since he improperly refused to do

so, this Court should grant Relator's Petition for Writ of Prohibition and order Respondent to grant the motion. Again, there will be very little inconvenience for the Court to fully protect Relator's due process rights.

III.

RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO SET ASIDE HIS ORDER OF MAY 7, 2002 SUSPENDING RELATOR'S DRIVING PRIVILEGES BECAUSE RELATOR WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS NEVER GIVEN NOTICE THAT HIS DRIVING PRIVILEGES WOULD BE SUSPENDED IF HE ENTERED A PLEA OF GUILTY AND HE WAS NEVER GIVEN THE OPPORTUNITY TO BE HEARD BY EITHER THE RESPONDENT OR THE DIRECTOR OF REVENUE.

The undisputed evidence before the Court is that Daniel Bahrenburg, the Relator, was never advised by the prosecuting attorney or the Respondent that his driving privileges would be suspended if he entered a plea of guilty to the charge of possession of marijuana. That fact was stipulated to by the prosecuting attorney at the time of the hearing on the Motion to Set Aside. Therefore, the issue presented is whether Relator was entitled to notice of the suspension and had the opportunity to be on that issue by Respondent Dietrich or Respondent Director of Revenue.

On the day that he entered his plea of guilty, Relator was notified by the court clerk that his license would be suspended. That was after he had entered his guilty plea. On the same day he entered his plea of guilty, Respondent Dietrich entered his order suspending Relator's driving privileges with no hearing other

than the entry of the guilty plea. (Ex. 1K). On May 30, 2002, Respondent Director of Revenue sent notice to Relator of his suspension. In that notice, no provision was made for any type of hearing relating to the suspension. Relator respectfully suggests to the Court that these circumstances establish a denial of procedural due process.

“It is well settled that a driver’s license is a property interest that may not be suspended or revoked without due process.” *Plumer v. State of Md.*, 915 F.2d 927, 931 (C.A.4 (Md) 1990) citing *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Furthermore, although the suspension of a driver’s license may not require a full-blown evidentiary hearing, it is clear that notice and an opportunity to be heard are required to satisfy the requirements of due process. *Dixon v. Love*, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977). In this case, there was no notice and no opportunity to be heard.

The *Dixon and Bell* cases have been followed in the State of Missouri. *Jarvis v. Director of Revenue*, 804 S.W.2d 22, 24 (Mo. 1991) and *Dabin v. Director of Revenue*, 9 S.W.3d 610, 615, (Mo banc 2000). Furthermore, whenever there is a property interest that is protected by the due process clause, due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner. *Moore v. Board of Education of Fulton Public School No. 58*, 836 S.W.2d 943, 947 (Mo. 1992) citing *Nixon v. Williamson*, 703 S.W.2d 526 (Mo.App. 1985). In order for a hearing to be “meaningful”, there must be consideration of all elements essential to the decision must be considered. *Jarvis, supra*, at 804. In this

case there was a total denial of due process. There was no notice and no meaningful hearing.

There have been two cases that have considered due process issues in regard to suspensions pursuant to § 577.500, R.S.Mo. Although neither case is dispositive of the issues presented in this case. *State v. Stokes*, 814 S.W.2d 702 (Mo.App. W.D. 1991) and *State v. Rehm*, 821 S.W.2d. 127 (Mo.App. E.D. 1992).

In the *Stokes* case the defendant entered a plea of guilty to three separate charges. Those charges were: 1) Possession of marijuana; 2) Possession of drug paraphernalia; and 3) Driving while intoxicated. Following the pleas of guilty, the court entered an order pursuant to § 577.505, R.S.Mo.² The Court in *Stokes* held

² This case was concerned with the application of § 577.505, R.S.Mo. rather than § 577.500, R.S.Mo. Both sections relate to the general subject of “Abuse and Lose” legislation. Section 577.500, R.S.Mo. relates to persons who are under the age of 21 while § 577.505, R.S.Mo. relates to person who are over the age of 21. Under section 577.500, R.S.Mo. if a person is convicted of possession of a controlled substance and is under the age of 21, then the court is mandated to enter its order suspending or revoking the driving privileges of the person so convicted regardless of whether or not the possession of a controlled substance is associated with the operation of a motor vehicle. On the other hand, § 577.505, R.S.Mo provides that if a person is convicted of possession of a controlled substance and is over the age of 21 and was operating a motor vehicle at the time, then the court is

that in order to revoke a license in accordance § 577.500, R.S.Mo., the court must determine two issues: “1) whether the person pleaded guilty to or was found guilty of possession of a controlled substance; and 2) whether the offense occurred while that person was operating a motor vehicle.” *Stokes, supra*, at 703. On appeal the defendant argued that his revocation was defective because the information that charged him with possession of marijuana did not include the allegation that the possession of marijuana was associated with the operation of a motor vehicle. The Court held that the judgment of the trial court in entering its order of revocation was proper for two reasons: 1) The pleas of guilty by implication included an admission that the possession of marijuana was associated with the operation of a motor vehicle. (i.e. Defendant pleaded guilty to possession of marijuana and driving while intoxicated.); and 2) The order of revocation was a civil matter and not a criminal matter. Therefore, the information charging the possession of marijuana was not required to include the allegations about the operation of a motor vehicle because there was no enhancement of a criminal punishment. It is noted that there is no reference to the defendant not being represented by counsel or that defendant was unaware that his plea of guilty to the possession of marijuana could result in a loss of driving privileges. Furthermore, there was no

mandated to suspend or revoke the driving privileges. Although there are some differences in the two statutes, the applicable legal principles are the same.

claim that the defendant was denied procedural due process in the handling of his case. These distinctions keep this case from being on point.

In the *Rehm* case, the defendant made a similar claim to the claim in the *Stokes* case. The defendant claimed that the charge against him did not include the allegation that the defendant operated a motor vehicle while intoxicated **and** that the defendant was under the age of 21 at that time which was required to invoke the provisions of § 577.500, R.S.Mo. The Court held, consistently with the *Stokes* opinion, that since the revocation was a civil matter and not a criminal matter that it was not necessary for the criminal charge to include the allegation that the defendant was under the age of 21. However, it is very interesting to note the procedure that was followed by the trial court in handling the revocation issue in the *Rehm* matter.

At the close of evidence on the driving while intoxicated charge, which was held on May 18, 1989, the prosecuting attorney filed a “suggestion of the applicability of the abuse and lose law” in which it was alleged that the defendant was under the age of 21 at the time of the offense and that if the trial court found the defendant guilty of driving while intoxicated then the court would be required to enter its order revoking the defendant’s driving privileges. The court found the defendant guilty of driving while intoxicated on June 7, 1990 and scheduled a date for sentencing and a hearing on the applicability of the abuse and lose law. The hearing on those matters was held on July 19, 1990 and the court entered its order

relating to the sentence and its order revoking the driving privileges on September 21, 1990.

The defendant claimed on appeal that he was denied due process in regard to the loss of his driving privileges. That argument was summarily rejected by the Missouri Court of Appeals, Eastern District. The fact is that the constitutional protections set forth in the cases cited above were honored. There was notice provided to the defendant; adequate time to prepare to meet the issues relating to the potential loss of driving privileges; and there was a meaningful opportunity to be heard. The procedure followed by the court in *Rehm* is in great contrast to what happened in the case at bar. Daniel Bahrenburg had no notice prior to his plea of guilty and no opportunity to be heard.

Therefore, it is clear that Respondent Dietrich should have granted Relator's Motion to Set Aside which would have also required the withdrawal of the order of suspension because at that point there would have been no plea of guilty or finding of guilty to support an order of suspension. Respondent Dietrich's refusal to set aside the guilty plea should be corrected by this Court entering its order compelling Respondent Dietrich to set aside the guilty plea and to withdraw his order of suspension.

IV. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO SET ASIDE HIS ORDER OF MAY 7, 2002 SUSPENDING RELATOR'S DRIVING PRIVILEGES BECAUSE THERE WAS NO COMPETENT EVIDENCE PRESENTED TO THE COURT TO ESTABLISH A VIOLATION OF SECTION 577.500, R.S.MO.

As set forth above, Respondent Dietrich entered his order suspending the driving privileges of Relator Daniel Bahrenburg on the same day that the plea of guilty was entered. In his order, Respondent Dietrich made a specific finding that Relator was under the age of 21 at the time of the offense. Relator respectfully suggests that there was no competent evidence before the trial at that time to establish the essential fact of his age.

Indeed, to paraphrase and adapt the exact language set forth in the case of *State v. Stokes*, 814 S.W.2d 702, 703 (Mo.App. W.D. 1991) to fit the facts of this case, before a court can order a suspension of driving privileges under § 577.500, R.S.Mo. a court must determine two issues: 1) whether the person pleaded guilty to or was found guilty of possession of a controlled substance; and 2) whether the person was under the age of 21 at the time of the offense.

As set forth earlier, Relator was never given any notice that the trial court was going to suspend his driving privileges in the event that he pleaded guilty to or was found guilty of the offense of possession of marijuana. During the proceedings, Relator was never asked about his age as mentioned in Relator's

affidavit. There was nothing inherent in the plea of guilty to the offense of possession of marijuana as charged by the prosecuting attorney that included anything about the Relator's age. Therefore, any conclusion by Respondent Dietrich about Relator's age was based on something other than material that was actually presented to the Court while Relator was present. Certainly, Mr. Bahrenburg was never advised about what the Court was considering or what the Court intended to consider. In that respect, Relator was again denied his rights to due process.

Therefore, under the circumstances of this case, Respondent Dietrich should have set aside Relator's plea of guilty and should have withdrawn his order of suspension because it was not supported by competent evidence. Now, Relator is requesting this Court to grant his Petition for Writ of Prohibition and order Respondent Dietrich to do what he should have done when presented with the motion to set aside.

V. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER DIRECTING RESPONDENT, THE HONORABLE GLEN DIETRICH, TO SET ASIDE RELATOR'S PLEA OF GUILTY AND RELATOR'S ORDER OF MAY 7, 2002 SUSPENDING RELATOR'S DRIVING PRIVILEGES BECAUSE THERE WAS NO RECORD MADE OF THE PROCEEDINGS IN VIOLATION OF SECTION 543.335, R.S.MO.

In this case there was no record made of the hearing which occurred on May 7, 2002, the date that Relator Daniel Bahrenburg entered his plea of guilty. Section 543.335, R.S.Mo. mandates that in any case tried before an associate circuit judge, such as Respondent Dietrich, there must be a court reporter or there must be a record made by some type of recording device. There is no question that there was no record made in this case as required by § 543.335, R.S.Mo. That fact, in addition to other complications which it presents, is a basis for the plea of guilty to be set aside.

In the case of *State ex rel. Lee v. Bailey*, 817 S.W.2d 287 (Mo. App. W.D. 1991), the Relator had his driving privileges suspended following the entry of a plea of guilty to certain charges related to alcoholic beverages. In *Bailey*, since the Relator was under the age of 21, if the charges against him involved the use of a motor vehicle, then he was subject to losing his driving privileges in accordance with § 577.500, R.S.Mo. Like the case at bar, in *Bailey*, there was no record made of the guilty plea. In addition, there was no specific finding by the Court that there

was the involvement of a motor vehicle.³ The Court stated that although there might be some implication that a motor vehicle was involved, an implication was not sufficient to satisfy the requirement that the Court make a specific finding. Because there was no record of the hearing as required, it was held that mandamus was appropriate and that the Respondent, who was the trial judge, be ordered to set aside the plea of guilty.

The same result should occur in this case. There was no specific finding concerning an essential fact – Relator’s age. There was no required record. Respondent Dietrich should have granted the Motion to Set Aside and his refusal to do so should cause this Court to grant Relator’s Petition for Writ of Mandamus with the result that Respondent is ordered to do what he should have done earlier.

³ It is noted that in the official docket entries made by Respondent Dietrich in this case, there was no specific finding of the Relator’s age. (See Exhibits 1D and 1H.)

VI. RELATOR DANIEL BAHRENBURG IS ENTITLED TO AN ORDER PROHIBITING THE RESPONDENT DIRECTOR OF REVENUE FROM SUSPENDING THE DRIVING PRIVILEGES OF RELATOR EVEN IF RESPONDENT THE HONORABLE GLEN DIETRICH WERE TO ORDER SUCH A SUSPENSION BECAUSE NEITHER RESPONDENT PROVIDED RELATOR WITH NOTICE OF THE POTENTIAL SUSPENSION OF RELATOR'S DRIVING PRIVILEGES OR WITH AN OPPORTUNITY TO BE HEARD AS REQUIRED FOR DUE PROCESS OF LAW.

This Court when it granted its Alternative Writ in Mandamus also entered its order directing that the Director of Revenue be added as a necessary party. It is Relator's contention that even if Respondent Dietrich entered his order suspending Relator Daniel Bahrenburg's driving privileges, Respondent Director of Revenue should not enforce such an order without providing for the protection of Relator's constitutional rights.

It has already been established in Point III that because a driving license is a valuable property right, it may not be suspended or revoked unless procedural due process is provided. *Bell, supra; Dixon, supra; Jarvis, supra; and Dabin, supra.* Furthermore, it has been established that Respondent Dietrich did not provide notice to Relator of the potential suspension nor did he provide Relator with the opportunity to be heard. Both notice and the opportunity to be heard are necessary in order to provide with due process as constitutionally guaranteed to

Relator. Finally, it is noted that Respondent Director of Revenue did not make any provision to provide due process.

In the letter of May 30, 2002, the suspension is referred to a *fait accompli*. There is no attempt to provide any type of opportunity to be heard. In regard to other instances where driving privileges are suspended or revoked §§ 302.505, et seq., R.S.Mo. provide for a comprehensive procedure for review of such suspensions or revocations. Unfortunately, there is no such procedures for §§ 577.500 and 577.505, R.S.Mo. Obviously such procedures should exist in some form. Without similar constitutional protections in place neither Respondent Dietrich or Respondent Director of Revenue should be permitted to suspend or revoke licenses.

Therefore, for the reasons set forth herein, this Court should grant Relator's Petition for Writ of Mandamus and enter its order prohibiting the Director of Revenue from suspending Relator's driving privileges because of the denial of procedural due process of law.

CONCLUSION

It has been said that sometimes fact is stranger than fiction. Such is probably true of the facts of this case. An unrepresented person is charged in a Complaint issued by a police officer of the offense of possession of drug paraphernalia. A court date and time is listed on the Complaint. Unbeknownst to the accused, on the day before the scheduled court appearance, the Prosecuting Attorney files a two count information which adds the charge of possession marijuana. The accused never receives a copy of the information filed with the Court. The accused who is not represented by counsel appears at court and has a discussion with the Prosecuting Attorney. He is told that if he will plead guilty to the charge of possession of marijuana, there will be a fine and a suspended jail sentence. He does not know that a plea of guilty to that offense will result in the suspension of his driving privileges. The Prosecuting Attorney knows the significance of a plea of guilty to the newly added charge. The Judge knows the significance of a plea of guilty to the possession of marijuana charge as it relates to a suspension of driving privileges. However, neither the Prosecuting Attorney nor the Judge say anything to the accused about what will be a direct consequence of his guilty plea. There is no notice of the potential suspension, no opportunity to be confronted with the evidence that would support a suspension and no opportunity to be heard. It is reasonable to assume that had the accused been told about the potential for losing his driving privileges, then he would have hired an

attorney to represent him because that is in fact what occurs after he was told by the clerk of the court that his license would be suspended.

The very next business day a motion is filed with the trial judge to set aside the plea of guilty. Because of all of the issues presented by the Motion to Set Aside some of which are constitutional in magnitude, it would seem like the only logical thing for the trial judge to do is to set aside the guilty plea and any order of suspension which he has entered. Everyone would be placed back in their original position with a very minimum of delay. In fact, it is suggested that if the accused had requested a continuance at the first trial setting for purposes of finding an attorney to represent him, there would have been a delay of longer than one week. One week after the plea was originally entered there is a hearing on the accused's motion. The simplest, most reasonable and logical thing for trial judge to do is to simply set aside the plea of guilty. It would have been a simple act to do in order to make sure that the accused's constitutional rights are fully protected. Even if the issues were not clear or if the issues were doubtful, then the most logical thing to do is to give the defendant the benefit of the doubt and give him his day in court. At that point, there would have been no harm to anyone by setting aside the guilty plea. The accused would have had his rights protected and the State would have suffered no prejudice only a very insignificant delay. Who would have thought that the motion to set aside would be denied? Yet, the motion was denied which set in motion the judicial mechanism to correct an obviously bad and unfortunate situation. Fact is stranger than fiction.

Now, Relator comes to this Court and by necessity invokes the extraordinary writ of mandamus in order to protect his constitutional rights. He prays this Court to order Respondent Dietrich to set side the guilty plea entered on May 7, 2002 and to withdraw his order of suspension which was entered on the same day for the reasons set forth in this brief. It is unfortunate that Relator has had to trouble this Court with a matter that could have easily been handled by Respondent Dietrich when he ruled on the Motion to Set Aside.

Respectfully submitted,

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**IN THE SUPREME COURT FOR
THE STATE OF MISSOURI**

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|---|---|--------------------------|
| STATE EX REL DANIEL BAHRENBURG, |) | |
| |) | |
| Relator, |) | Case No. SC 84581 |
| |) | |
| v. |) | |
| |) | |
| THE HONORABLE GLEN DIETRICH |) | |
| (Associate Circuit Judge, Division II, |) | |
| Fourth Judicial Circuit) |) | |
| |) | |
| Respondent. |) | |

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2002, two copies of

Relator’s Brief was mailed to:

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