NO. WD 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,

APPELLANT.

Appeal from the Circuit Court of Platte County, Missouri

Sixth Judicial Circuit

Honorable Abe Shafer, Judge

APPELLANT'S BRIEF

BRUCE B. BROWN, MO. BAR NO. 30307
P.O. BOX 679
KEARNEY, MISSOURI 64060
1-816-628-6100
1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

A. *United States Supreme Court Cases* ***Page***

B. Missouri Supreme Court Cases ***Page***

C. Missouri Appellate Court Cases

D. Missouri Statutes

E. Missouri Rules of Court

F. Federal and State Cases

G. Constitutional Provisions

H. <u>Other Authorities</u>

NO. SC 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,
p
APPELLANT.

Appeal from the Circuit Court of Platte County, Missouri

Sixth Judicial Circuit

Honorable Abe Shafer, Judge

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This case involves Appellant's convictions for the class D felony of driving while intoxicated (§§577.010 and 577.023 RSMo), for the class A misdemeanor of driving while revoked (§302.321 RSMo), and for the class C misdemeanor of following another vehicle too closely (§304.017, RSMo). This case arose out of Platte County, Missouri, and was tried before the Honorable Abe Shafer, Division One. The issue implicating this Court's exclusive jurisdiction under Article 5, §3 of the Missouri Constitution involves Appellant's challenge to a portion of §577.023, RSMo, as being unconstitutional, violating the Equal Protection clauses of both the Missouri Constitution (Article One, §2) and United States Constitution (Amendment 14) and/or violating the Due Process clauses of both the

Missouri Constitution (Article One, §10) and United States Constitution (Amendment 14), on either or both of the following grounds:

1. §577.023 is unconstitutional because it denies equal protection to those who plead guilty or have been found guilty of municipal intoxication-related traffic offenses by treating differently those persons who appear before a municipal judge who is a lawyer versus those persons who appear before a municipal judge who is a nonlawyer for purposes of enhancement of criminal penalties in that a plea before a lawyer judge can be used for enhancement, but a plea before a nonlawyer judge cannot be used for enhancement.

2. §577.023 involves an unconstitutional deprivation of due process in that it treats prior violations of municipal intoxication-related traffic offenses, which are civil prosecutions, as equivalent to state intoxication-related traffic offenses, which are criminal, for the purpose of enhancing the criminal penalty from a misdemeanor to a felony.

Herein, the State has relied on a plea of guilty to a municipal intoxication-related traffic offense involving a lawyer judge to enhance the penalty from a class A misdemeanor to a class D felony. Appellant preserved this constitutional issue in the trial court by filing a pretrial motion to dismiss the felony information and to declare §577.023, RSMo, unconstitutional, by filing trial motions to dismiss raising this issue, and by filing his post-trial motion, again raising this issue.

On April 21, 2004, Judge Shafer found Defendant guilty of Count I (felony DWI), Count II (driving while revoked), and Count IV (following too closely), and not guilty of Count III (minor in possession of alcohol). Judge Shafer granted Defendant additional time

under Rule 29.11(b) to file post-trial motions. On May 14, 2004, Defendant timely filed his post-trial motions. On June 3, 2004, Judge Shafer affirmed the convictions, sentencing Defendant on Count I to the department of corrections for three (3) years with a recommendation of placement in a treatment program; sentencing Defendant on Count II to ninety (90) days in the Platte County jail to run concurrently with Count I; and assessing a fine on Count IV of $100.00. Judge Shafer also set an appeal bond of $35,000.00. Defendant did not post this bond.

On June 10, 2004, Defendant, by and through his attorney, filed a motion for leave to appeal in forma pauperis. Judge Shafer granted the motion, appointing trial counsel. On June 11, 2004, Defendant filed his notice of appeal to this Court.

STATEMENT OF FACTS

Appellant will hereinafter also be referred to as Defendant or by name, Jeremy. Respondent will hereinafter also be referred to as the State. References to the legal file will be abbreviated as "L.F.", to the transcript as "Tr.", and to exhibits as "Ex".

On the evening of August 22, 2003, and the early morning hours of August 23, 2003, the Missouri Highway Patrol conducted a "DWI saturation" in Platte County, Missouri. Trooper Ben Comer along, with several other troopers, initially met in the zone office in Platte County. Trooper Comer had recently completed his academy training, was on a probationary status with the highway patrol, and was under the general supervision of his field training officer, Corporal John Holtz. Trooper Comer's vehicle was a white Crown Victoria and was "fully-marked", meaning that it has emblems on the side, bars on top with

"emergency lights and so on . . . all displayed on the outside". (Tr. 10-12; 18-21; 77; 88 & 89; 127).

At about 2:20 a.m. on August 23, 2003, Trooper Comer had recently completed a traffic stop and was operating stationary radar on 152 Highway. Trooper Comer's vehicle was facing eastbound, sitting on the right shoulder, east of an intersection with Green Hills Road. About a mile east of his location was another intersection identified as Platte Purchase Road/Drive. Highway 152 was a double-lane highway, but was under construction. West or behind Trooper Comer's location, the left lane was closed with barrels or traffic cones or "some kind of barrier" separating the right and left lane. Trooper Comer could not recall whether or not the left lane was closed and marked by some type of barrier east of his location, but acknowledged that this lane could have been closed. Trooper Comer believed the speed limit was 55 m.p.h.. "Road conditions were dry." (Tr. 12-14; 21-24; 90; 92; 126 & 127).

As Trooper Comer was sitting in his vehicle, he was watching approaching traffic from his rearview mirror. Eventually, Trooper Comer observed the headlights of some approaching vehicles. Trooper Comer checked the speed on his radar unit. He could not recall the speed, but could recall that the vehicles were not traveling in excess of 55 m.p.h.. As these vehicles moved towards his position, Trooper Comer would observe the vehicles in his rearview mirror, then look away, checking the speed. He repeated these observations until the vehicles passed him. Prior to passing him, Trooper Comer could not determine any distances between the vehicles and could not recall whether or not the first vehicle slowed down as it neared his vehicle. Trooper Comer did not observe any brake lights or

any “drastic slowdown”, but acknowledged the possibility “that the first vehicle may have observed [him] and let off on the gas”, resulting in a reduction in speed. (Tr. 14; 24-27; 90; 92; 126 & 127).

As the vehicles passed him, Trooper Comer observed the second vehicle to be about one car length behind the first vehicle and the third vehicle to be about a car length and a half behind the second vehicle. When the third car was about 300 feet east of him, Trooper Comer engaged his vehicle and accelerated to catch up to the vehicles. (Tr. 14; 27 & 28; 91; 94).

Upon catching up with the vehicles, Trooper Comer was unable to determine the distances between the vehicles. At a point about a half mile east of Green Hills Road, Trooper Comer observed the second vehicle slowly drift to the right of the third vehicle, where he then observed a portion of the right taillight of the second vehicle; the right tires also went “over a little bit on the fog line”, perhaps as much as a foot. The second vehicle then slowly drifted back to the “line of travel”. According to Trooper Comer, the movement to and fro did not involve any erratic driving, weaving, or any sudden movement. (Tr. 14 & 15; 28 & 29; 94 & 95; 126).

As the vehicles approached the exit ramp at Platte Purchase Drive, Trooper Comer observed the second vehicle move slowly to the right, crossing over the fog line “just before” the exit. Again, Trooper Comer did not observe any sudden movements or unusual operation. And, as the vehicle exited onto and traveled up the ramp, Trooper Comer did not observe any violations. (Tr. 16 & 17; 29-31; 94 & 95).

As the vehicle was proceeding up the exit ramp, Trooper Comer initiated his emergency equipment. The vehicle responded, pulling to the right side of the exit ramp and stopping. Trooper Comer positioned his vehicle behind the other vehicle, with about a car length and a half between the vehicles. Trooper Comer then exited his vehicle and contacted the driver, who produced a Missouri nondriver identification card reflecting the name, Jeremy Pike. Eventually, Trooper Comer identified the other occupants of the vehicle, two of whom were juveniles and the other, Scott Moppin, who was the owner of the vehicle. (Tr. 32; 94-97; 129-131).

Trooper Comer requested Jeremy to exit the vehicle. As he was exiting, Jeremy put his hand on the vehicle, which Trooper Comer concluded to be an act of leaning back or steadying himself, but upon watching the video, Trooper Comer acknowledged that Jeremy was "not really" leaning back. (Tr. 132; 164; Defendant's Ex. A). Jeremy then walked back to the patrol car with Trooper Comer following. As reflected in the video and acknowledged by the trooper, Jeremy appeared to be chewing gum. (Tr. 164).

After entering the patrol vehicle, Trooper Comer allegedly observed Jeremy's eyes to be "watery and glassy and red" or "bloodshot and somewhat staring".[1] Trooper Comer also smelled a strong odor of an alcoholic beverage coming from him. Jeremy admitted to drinking four (4) beers. Trooper Comer also claimed that Jeremy's speech "sounded

[1] On cross-examination, Trooper Comer admitted that he did not mark the eyes as being "glassy" in his alcohol influence report. (Tr. 150 & 151).

somewhat slurred and mumbling." Based on these circumstances, Trooper Comer was "suspicious" about Jeremy being intoxicated. (Tr. 97-99).

Trooper Comer next requested Jeremy to exit the patrol car to perform some "field sobriety tests" behind the patrol car. By having Jeremy position himself behind the patrol car, none of the field sobriety tests were recorded on the video camera in the patrol car. Trooper Comer justified having the tests performed behind his vehicle because of "officer safety issues" – specifically he was the lone officer, there were persons in the Moppin vehicle, and his patrol car would serve as a barrier "between me and the other subjects and the other vehicle." (Tr. 134). On cross-examination, Trooper Comer admitted that he did not "personally feel threatened by these passengers", that his spotlight was on the Moppin vehicle, and that other troopers arrived at the scene sometime after he conducted the first field sobriety test. (Tr. 99, 134-138, 167-169, 172).

After concluding the field sobriety tests, Trooper Comer placed Jeremy under arrest for driving while intoxicated. The time of arrest was about 2:47 a.m.. Trooper Comer then handcuffed Jeremy, placing him alone in the patrol car. Trooper Comer next assisted the other officers in searching the Moppin vehicle. At about 3:22 a.m., Trooper Comer returned to his patrol car and proceeded to the Platte County jail, arriving there about 3:37 a.m.. While waiting to conduct the chemical test, Trooper Comer read Jeremy the Miranda warnings at about 3:47 a.m. and the Implied Consent warnings at about 3:49 a.m.. Trooper Comer could not recall whether he checked Jeremy's "mouth for any foreign substances: gum, tobacco, or anything like that". The breath test occurred about 4:09 a.m. with a BAC result of .121%. (Tr. 104-107, 110-116, 147, 153, 154, 160, 165).

At the conclusion of the trial, Judge Shafer found Jeremy guilty of felony DWI (Count I), driving while license was revoked (Count II), and following another vehicle too closely (Count IV). Judge Shafer found Jeremy not guilty of possession of alcohol by a minor (Count III). (Tr. 187 & 188; L.F. 41 & 42; A1 & A2).

With regard to the essential procedural history, Defendant filed a motion to suppress on March 5, 2004. (L.F. 24-26). Defendant also filed a motion to dismiss felony information and to declare §577.023, RSMo, unconstitutional, along with suggestions in support. (L.F. 11-23). A hearing on both motions occurred on March 17, 2004. (Tr. 7-47). Defendant filed suggestions in support of the motion to suppress on March 18, 2004. (L.F. 29-33). Judge Shafer overruled the motion to suppress on March 18, 2004, and allowed the State to file an amended felony information, adding three counts for the misdemeanors of "driving while operator's license was revoked" (Count II), "minor in possession of alcohol" (Count III), and "following another vehicle too closely" (Count IV). (L.F. 5, 41 & 42; Tr. 54-61).

On April 21, 2004, the bench trial occurred. Defendant filed supplemental suggestions in support of the motion to dismiss the felony DWI and to declare §577.023 unconstitutional. (L.F. 45-54). Judge Shafer denied the motion to dismiss. (L.F. 6; Tr. 64). During the trial, Defendant renewed his motion to suppress and objected to the admission of all evidence obtained after the stop of the vehicle. Judge Shafer overruled the objection, but recognized the continuing nature of the objection. (Tr. 95 & 96).

After being found guilty, Defendant requested additional time to file post-trial motions, which Judge Shafer granted. (L.F. 6; Tr. 188). On May 14, 2004, Defendant filed

his motion for judgment of acquittal and suggestions in support. (L.F. 59-70). On June 3, 2004, Judge Shafer overruled Defendant's motion for acquittal, sentenced Defendant, and entered judgment thereon. (L.F. 7). Defendant timely filed a notice of appeal to this Court on June 11, 2004. (L.F. 8).

POINTS RELIED ON

POINT ONE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense wherein the judge was a lawyer as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional,

violating the Equal Protection clauses of both the Missouri Constitution (Article One, §2) and United States Constitution (Amendment 14), in that it denies equal protection to those who plead guilty or have been found guilty of municipal intoxication-related traffic offenses by treating differently those persons who appear before a municipal judge who is a lawyer versus those persons who appear before a municipal judge who is a nonlawyer for purposes of enhancement of criminal penalties and in that a plea before a lawyer judge can be used for enhancement, but a plea before a nonlawyer judge cannot be used for enhancement.

State v. Baker, 524 S.W.2d 122(Mo.banc 1975).

Baldasar v. Illinois, 446 U.S. 222(1980).

Turner v. Safley, 482 U.S. 78(1987).

Mahoney v. Doerhoff Surgical Services, 807 S.W.2d 503(Mo.banc 1991).

Article One, §2, Missouri Constitution

Fourteenth Amendment, United States Constitution

MO.REV.STAT. §577.023.

MO.REV.STAT. §479.020.

Missouri Rules of Court 18.

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Due Process clauses of both the Missouri Constitution (Article One, §10) and United States Constitution (Amendment 14), in that it involves an unconstitutional deprivation of due process, treating prior violations of municipal intoxication-related traffic offenses, which

are civil prosecutions, as equivalent to state intoxication-related traffic offenses, which are criminal, for the purpose of enhancing the criminal penalty from a misdemeanor to a felony and in that the dual systems of prosecution when used in this manner violate notions of fundamental unfairness.

A.B. v. Frank, 657 S.W.2d 625(Mo.banc 1983).

Baldasar v. Illinois, 446 U.S. 222 (1980).

Riley v. St. Louis County of Missouri, 153 F.3d 627(8th Cir. 1998).

Kansas City v. Stricklin, 428 S.W.2d 721(Mo.banc 1968).

Fourteenth Amendment, United States Constitution

Article One, §10, Missouri Constitution MO.REV.STAT. §577.023

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to suppress the evidence obtained as a result of the traffic stop of Defendant because the stop violated Defendant's Fourth Amendment rights in that prior to the stop, the officer did not have probable cause to believe that any traffic violations had occurred, nor did he have a reasonable, articulable suspicion that the occupants of the motor vehicle were involved in any criminal activity.

State v. Slavin, 944 S.W.2d 314(Mo.App. W.D. 1997).

Pyles v. Roth, 421 S.W.2d 261(Mo. 1967).

Skiles v. Schlake, 421 S.W.2d 247(Mo. 1967).

Rowe v. State, 769 A.2d 879, 363 Md. 424(2001).

Fourth Amendment, United States Constitution.

MO.REV.STAT. §304.015.

MO.REV.STAT.§304.017.

POINT FOUR

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Driving While Intoxicated because a rational trier of fact could not have found Defendant guilty of all of the elements of Driving While Intoxicated beyond a reasonable doubt in that Trooper Comer's testimony was too contradictory, inconsistent, vague, and speculative to support a finding beyond a reasonable doubt that Defendant was intoxicated at the time of the stop of the vehicle, in that the evidence of a blood alcohol content in excess of .08% was invalid or unreliable, and in that evidence of the results of the field sobriety tests cannot be relied upon as circumstantial evidence of intoxication.

State v. Langdon, 110 S.W.3d 807(Mo.banc 2003).

State v. Carr, 95 S.W.3d 121(Mo.App. W.D. 2002).

State v. McNaughton, 924 S.W.2d 517(Mo.App. W.D. 1996).

State v. Rose, 86 S.W.3d 90(Mo.App.W.D. 2002).

MO.REV.STAT. §577.010.

MO.REV.STAT. §577.020.

MO.REV.STAT.§577.021.

MO.REV.STAT.§577.037.

POINT FIVE

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Following Too Closely because a rational trier of fact could not have found Defendant guilty of all of the elements of Following Too Closely beyond a reasonable doubt in that Trooper Comer's testimony at most established a close proximity for a brief time period and failed to establish that the close proximity was not reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

State v. Moore, 659 S.W.2d 252(Mo.App. W.D. 1983).

ARGUMENT

POINT ONE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense wherein the judge was a lawyer as permitted under MO.REV.STAT.§577.023.1(1) and because this provision is unconstitutional, violating the Equal Protection clauses of both the Missouri Constitution (Article One, §2) and United States Constitution (Amendment 14), in that it denies equal protection to those who plead guilty or have been found guilty of municipal intoxication-related traffic offenses by treating differently those persons who appear

before a municipal judge who is a lawyer versus those persons who appear before a municipal judge who is a nonlawyer for purposes of criminal penalties and in that a plea before a lawyer judge can be used for enhancement, but a plea before a nonlawyer judge cannot be used for enhancement.

Standard of Review

As reflected in *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503(Mo.banc 1991), the following principles apply when there is an equal protection challenge under both the state and federal constitutions:

> The first principle of such an inquiry is that a duly enacted statute is presumed to be constitutional. That presumption obtains unless the statute clearly contravenes some constitutional provision. [Citation omitted]. Such a law is presumptively invalid because it impinges upon a substantive right or liberty conferred by the constitution, whether or not its purpose is to create any classifications. [Citation omitted].
>
> In terms of equal protection, a statute that neither creates suspect classifications nor impinges on a fundamental right will withstand constitutional challenge if the classification bears some rational relationship to a legitimate state purpose. [Citation omitted]. A fundamental right, under this analysis, is a right "explicitly or implicitly guaranteed by the Constitution." [Citation omitted]. They include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy *and other basic liberties*. [Citations omitted].

* * *

> In terms of equal protection, the presumption of constitutional validity vanishes when the purpose of the legislation is to create classes upon criteria that are inherently suspect or impinges upon a fundamental right. [Citation omitted]. In such a case, the challenged state legislation is subjected to "searching judicial scrutiny."
>
> Id. at 512. (Emphasis ours).

Under the "strict scrutiny test", the burden is upon the State to show a "compelling interest" in the classification. See, e.g., *Labor Educational & Political Club v. Danforth*, 561 S.W.2d 339, 348(Mo.banc 1978). If the statute does not involve a fundamental right, then the courts apply the "rational basis test", which appears to place the burden on the challenger to "present facts or arguments to show that the classification as applied is not rational." *Mahoney*, 807 S.W.2d at 513; see also, *Carney v. Hanson Oil Co., Inc.*, 690 S.W.2d 404, 407[7](Mo.banc 1985). The Court should also take note of the case of *Turner v. Safley*, 482 U.S. 78(1987) which sets forth four (4) factors to be considered when applying the "rational basis test" in the context of prison regulations. Id. at 89-91. The *Turner* case is instructive, particularly because it applies these factors to two situations, upholding one regulation and invalidating another. Id. at 91-100.

However, before determining which test applies, the Court must also determine whether or not there is a violation of the equal protection clauses under the state and federal constitutions. This determination simply involves the question of whether or not "all who

stand in the same relation to the statute at issue" are being treated uniformly. *Carney*, 690 S.W.2d at 407[5].

Equal Protection Violation

As reflected in the Information, Appellant is charged with the Class D felony of driving while intoxicated based upon his alleged status as a "persistent offender" under MO.REV.STAT. §577.023.1(2)(a), which defines a persistent offender as follows:

> A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses, where such two or more offenses occurred within ten years of the occurrence of the intoxication-related traffic offense for which the person is charged. (A7 & A8).

The definition of "intoxication-related traffic offense" is in §577.023.1(1) which involves "driving while intoxicated, driving with excessive blood alcohol content, * * * or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney in writing".

The State relies upon the following two events as being intoxication-related traffic offenses:

> On or about January 9, 2002, the defendant pled guilty to driving while intoxicated for events occurring on or about October 12, 2001, in the Circuit Court of Platte County, Missouri; and

> On or about January 8, 2003, the defendant pled guilty to driving under the influence of alcohol for events occurring on or about October 18, 2002, in the Circuit Court of Clay County, Missouri, Oakview Municipal Division, *where the judge was an attorney* and the defendant was represented by counsel.
>
> (L.F. 41). (Emphasis ours).

Appellant's challenge herein involves the validity of the plea of guilty in Oakview Municipal Division for purposes of enhancing the class of the crime under §577.023.

Test

Appellant has been unable to locate any cases determining which test applies in the context herein. The *Turner* case resolved the issue as it related to prisoner rights, including fundamental rights, in the context of prison regulations, applying the rational basis test. 482 U.S. at 89. However, these types of prisoner cases involve rights in a post-deprivation of liberty setting, not a predeprivation setting. Appellant submits that §577.023 impinges upon fundamental rights.

First, the Court should note that if there is a finding of being a prior offender or a persistent offender, §577.023.4 requires a mandatory term of imprisonment. "The very nature of this statute is one of enhancement from a penalty of a fine for the first offense to one of imprisonment for subsequent offenses". *A.B. v. Frank*, 657 S.W.2d 625, 628(Mo.banc 1983). In addition, solely because of the two previous pleas, the offense herein is transformed from a misdemeanor to a felony. §577.023.4 is essentially the same

as the enhancement statute involved in the case of *Baldasar v. Illinois*, 446 U.S. 222(1980), wherein a concurring opinion of the *Baldasar* Court recognized that the defendant was clearly being deprived of his liberty as a result of the prior conviction. The concurring justices were extremely concerned about the fact that the subsequent offense "was transformed from a misdemeanor to a felony, with all the serious collateral consequences that a felony conviction entails". Id. at 226 & 227. Thus, the strict scrutiny test applies herein.

However, in light of the *Turner* case and the case of *State v. Baker*, 524 S.W.2d 122(Mo.banc 1975), regardless of the test applied, the lawyer judge provision of §577.023.1(1) does not pass constitutional muster.

Analysis

As reflected in the *A.B.* case, "the purpose of this Prior/Persistent Offender statute is to deter persons who have previously been convicted of driving while intoxicated from repeating their unlawful acts and to severely punish those who ignore the deterrent message". Id. at 628. At least with regard to a plea of guilty, the only conceivable purpose for differentiating between a lawyer and nonlawyer municipal judge is that the plea may somehow be "unreliable" because a nonlawyer would not be properly prepared to ensure that a plea was knowingly, voluntarily, and intelligently made. Cf., *Baldasar*, 446 U.S. at 225-228. Viewed in the proper perspective, neither the "deterrent/punishment purpose" nor the "reliability purpose" provide a legitimate basis for treating municipal ordinance violators differently.

With regard to the "reliability purpose", looking initially to MO.REV.STAT. §479.020.3, a nonlawyer may serve as a municipal judge "of any municipality with a population of [less than] seven thousand five hundred", except if such municipality is located in "a county of the first class with a charter form of government". However, a nonlawyer municipal judge is required under §479.020.8 to "satisfactorily complete the course of instruction for municipal judges prescribed by the supreme court". (A14 & A15). See, also, Missouri Court Rules, 18.04(Each nonlawyer municipal judge shall satisfactorily complete the certification course of instruction prescribed by the committee as required by section 479.020). A nonlawyer municipal judge is also required to be involved in continuing judicial education. See, Rule 18.05. And, under Rule 37.59 [now Rule 37.58], all municipal judges, except as provided in Rules 37.49 or 37.57, are required, before accepting a plea of guilty, to "address the defendant personally, in open court, and inform him of, and determine that he understands, upon oral or written information provided" as to four circumstances in order to ensure that the defendant's plea is "knowingly, voluntarily, and intelligently made". See, Rule 37.59(b) & (c). This rule [Rule 37.58] provide a municipal judge with very detailed and specific guidance as to accepting a plea of guilty, permitting a defendant to waive the right to assistance of counsel, and entering a judgment on a factual basis. (A16-A18). Thus, the plea of guilty is presumably reliable for these purposes whether the judge is a lawyer or nonlawyer.

The Court should further note that as a result of the existence of Rule 37.59 [37.58], the key issue is not whether the judge is a lawyer or nonlawyer, but instead whether the judge followed the provisions of these rules. A "ready alternative" to the current provisions

of §577.023.1(1), which would accommodate the constitutional complaint herein, would be to require a showing that the "judge in such case" complied with the provisions of Rule 37.58 "and the defendant was represented by or waived the right to an attorney in writing." Cf., *Turner*, 482 U.S. at 90 & 91; 98.

In addition, although there is no legislative history regarding the lawyer/nonlawyer judge provision, perhaps the legislature added this provision in response to the *Baldasar* case, which requires a prior conviction to be counseled in order to use such a conviction for enhancement purposes. 446 U.S. at 223-230. If so, then it would constitute an "exaggerated response". See, *Turner*, 482 U.S. at 90 & 91; 97 & 98. As reflected in the *Baldasar* case, a counseled conviction will at least raise a rebuttable presumption of reliability because the accused "has the guiding hand of counsel at every step in the proceeding against him." 446 U.S. at 227. While the role of a judge is significant, with regard to the reliability issue, that role is relatively minor when accepting a plea of guilty as opposed to actually having a trial; and, with the required legal education and detailed guidelines for accepting a plea of guilty, it is not the artificial status of being a lawyer judge versus a nonlawyer judge which makes the plea reliable, but instead whether the judge followed the rules.

As in the *Turner* case, the alternatives to the lawyer judge provisions in §577.023.1(1) are "obvious" and "easy", and the burden to enact proper legislation is *de minimis*. 482 U.S. at 98.

With regard to the "deterrent/punishment purpose", the reasoning of the ***Baker*** case is enlightening and will serve to reject any argument that the inequality of treatment is "rational".

As to the statute in question in ***Baker***, it treated multiple criminal offenders differently, increasing punishment by means of mandatory consecutive sentences for some multiple offenders, but not for others. After quoting the statute, the ***Baker*** Court noted as follows:

> Even in the absence of any legislative history, it is evident that the purpose of this statutory provision is to insure that some multiple criminal offenders are to be punished more severely than others. However, it is equally apparent that the section does not apply to all convicted multiple offenders. *It applies if, but only if, a defendant is convicted of at least two offenses before he is sentenced for either offense*. The question presented is whether such a classification is reasonable. Does it result in irrational inequality of treatment for multiple criminal offenders?
>
> Id. at 127. (Emphasis in original).

In answering these questions, the ***Baker*** Court analyzed several cases, gleaning therefrom several principles of law and rules of interpretation. Id. at 127-129. Concluding that the statue was unreasonable, the ***Baker*** Court observed as follows:

> The increased punishment by means of mandatory consecutive sentences is not made applicable simply on the basis that a defendant has

committed multiple offenses. It is not based on how many offenses a defendant has committed or how severe they are.

Id. at 129.

And, after analyzing some examples which made "evident" the "inequality of treatment", the *Baker* Court declared as follows:

> Equal protection does not require that all persons be dealt with identically. For example, one burglar may be sentenced to four years imprisonment and another may be sentenced to two years or five years. The factual situations can justify this difference in sentences imposed. However, equal protection does require that distinctions in classifications for the purpose of sentencing have some relevance to the purpose for which the classification is made. [Citations omitted]. That relevance cannot be found when applicability of the mandatory consecutive sentencing requirement for multiple offenders has no relationship to such things as seriousness of the offenses committed, the factual circumstances surrounding the offenses, whether the offenses were committed at the same time or at different times or the previous criminal record of defendant, and is dependent *solely on* the chronological *happenstance* of whether there were two convictions before sentencing on either offense. Paraphrasing what the court said in *Baxstrom*, supra, we conclude that the capriciousness of the classification established by §546.480 is thrown sharply into focus by the fact that the benefit of the

> judicial discretion of the trial judge in the light of all facts and circumstances to determine whether multiple sentences should be concurrent or consecutive is withheld *only* in those cases *wherein it so happens* that a defendant is convicted on two charges (whether by plea or trial is immaterial) before he is sentenced on either. A person with a past criminal record is presently entitled to the exercise of the judge's discretion so long as he is not convicted on two new offenses before he is sentenced on either. However, a first offender is not entitled to that discretion if his two convictions occur before sentencing on either. Given this distinction, *all semblance of rationality of the classification, supposedly based on multiple crimes and criminal propensities, disappears.*
>
> Id. at 130. (Emphasis ours).

In other words, the different treatment could result from a "happenstance" or fortuitous event, which is constitutionally impermissible.

As such reasoning applies herein, the following examples clearly show the inequality of treatment:

> ***Example One*:** Defendant A first pleads guilty to a state BAC and within the ten year period thereafter pleads guilty to a municipal BAC wherein the judge was an attorney. In both instances, his blood alcohol content was .08%. He is considered to be a persistent offender subject to a felony prosecution.

***Example Two*:** Defendant B first pleads to a state DWI and within the ten year period pleads guilty to seven (or more) municipal DWI's wherein the judge was not an attorney. In all instances, his blood alcohol content was .20% or above. He is only a prior offender subject to a Class A misdemeanor prosecution.

In Example One, the two alcohol-related offenses are merely based upon the minimum blood alcohol level, see, e.g., MO.REV.STAT. §577.012, regardless of whether or not there was any substantial physical evidence of intoxication/impairment. In Example Two, the numerous alcohol-related offenses not only involve a much higher blood alcohol level, but are more than likely also based upon substantial physical evidence of intoxication/impairment. Even though Defendant B has committed more alcohol-related offenses and even more factually serious offenses, Defendant B is not subject to a felony prosecution solely on the happenstance that the judge was a nonlawyer.

In light of the purpose of the enhancement statute, there simply is no rational basis for treating Defendant A and Defendant B differently. As in *Baker*, "[g]iven this distinction, all semblance of rationality of the classification, supposedly based on multiple crimes and criminal propensities, disappears." 524 S.W.2d at 130.

As a result, the lawyer judge provision of §577.023.1(1) violates the equal protection clause, and Appellant must be accorded the same rights as those persons who entered a plea of guilty before a nonlawyer judge. The felony information should have been dismissed. However, because Appellant was unable to post an appeal bond and has served a

period of incarceration in the department of corrections and because the case was tried before the court, it is probably more appropriate to reverse the felony conviction and remand for resentencing under a misdemeanor conviction. See, also, *State v. Emery*, 95 S.W.3d 98(Mo.banc 2003); *State v. Gibson*, 122 S.W.3d 121(Mo.App. W.D. 2003).

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Due Process clauses of both the Missouri Constitution (Article One, §10) and United States Constitution (Amendment 14), in that it involves an unconstitutional deprivation of due process, treating prior violations of municipal intoxication-related traffic offenses, which are civil prosecutions, as equivalent to state intoxication-related traffic offenses, which are criminal, for the purpose of enhancing the criminal penalty from a misdemeanor to a felony and in that the dual systems of prosecution when used in this manner violate notions of fundamental unfairness.

Standard of Review

Before a person may be deprived of liberty, whether the proceeding is denominated criminal or civil, the person is entitled to due process of law. See, *State ex rel. Simanek v. Berry*, 597 S.W.2d 718, 720(Mo.App. W.D. 1980). The rights of an accused in a criminal prosecution must comport with prevailing notions of fundamental fairness, including the right to a fair opportunity to defend against the state's accusations. See, *Chambers v.*

Mississippi, 410 U.S. 284, 294(1973); *California v. Trombetta*, 467 U.S. 479, 485(1984). The same type of tests as in an equal protection challenge – namely, strict scrutiny and rational basis – also apply to a due process claim. See, *Casualty Reciprocal Exchange v. Missouri Employer Mutual Insurance Company*, 956 S.W.2d 249, 256[6-8](Mo.banc 1997). As in the equal protection analysis in Point One, §577.023 implicates fundamental rights of due process involving a substantial deprivation of liberty, increasing punishment from a class B misdemeanor up to a class D felony, from a fine to mandatory incarceration, and from a maximum six (6) months in the county jail to up to four (4) years in the department of corrections. See, also, MO.REV.STAT. §§577.010, 558.011.1(4) & (6); *A.B. v. Frank*, 657 S.W.2d 625(Mo.banc 1983). Because fundamental liberty interests are involved, under the strict scrutiny test, "substantive due process is violated when the state infringes `fundamental` liberty interests without narrowly tailoring that infringement to serve a compelling state interest". *Riley v. St. Louis County of Missouri*, 153 F.3d 627, 631(8th Cir. 1998).

History of §577.023

Before addressing the specific issues, some of the history involving §577.023 should be reviewed. As reflected in the *A.B.* case, the 1982 version of this law provided for enhancement of penalty to a term of imprisonment for second and subsequent offenses and included convictions for a violation of a municipal or county ordinance for driving while intoxicated if the defendant was represented by counsel. Id. at 626 & 627, fn. 2. "A.B." filed a suit for declaratory judgment and injunctive relief, challenging the constitutional validity of the statute on the following grounds:

1. The statute is unconstitutional because it chills the exercise of plaintiff's right to counsel by increasing the penalty for second and subsequent convictions in which defendant was represented by counsel, but does not increase the penalty if defendant was convicted after defending pro se.

2. The statute is an unconstitutional deprivation of due process in that it treats prior convictions of municipal ordinances prohibiting driving while intoxicated as equivalent to criminal offenses for the purpose of enhancing the penalty for violations of Section 577.023.

3. The statute is unconstitutional in that it denies equal protection to those convicted of municipal drunk driving ordinances by treating them differently from persons convicted of any other kind of municipal ordinance violation for purposes of future enhancement of criminal penalties.

Id. at 627.

The trial court sustained A.B.'s motion. Id. On appeal, the Supreme Court recognized that "[a]lthough these constitutional challenges may have merit, this appeal will be rendered moot after September 28, 1983 by Senate Bills 318 and 135, which amend §557.023". Id. The amendment deleted convictions for a county or municipal offense[2], thus removing

[2] The amendment provided that "[a]n `*intoxication-related traffic offense'* is driving while intoxicated, driving with excessive blood alcohol content, or driving under the influence of alcohol or drugs in violation of state law".

violations of municipal or county ordinances so that "one cannot be convicted as a prior or persistent offender under the revised statutes on the basis of municipal or county convictions for drunken driving". Id. at 627 & 628.

In 1991, the legislature amended §577.023, including again violations of municipal ordinances for driving while intoxicated, this time in the definition of an "intoxication-related traffic offense". The legislature also limited the use of municipal ordinance violations to situations in which the municipal judge was a lawyer and the defendant had a lawyer or waived his or her right to a lawyer. Although the legislature has amended §577.023 several times since 1991, the provisions involving municipal violations have not changed.

Due Process Challenge

Appellant's challenge to §577.023 is essentially the same as the second ground in the *A.B.* case. On its face, treating municipal violations as equivalent to state violations may not appear to violate any notions of fundamental fairness, but a close examination of these two systems reveals striking and fundamental differences.

In Missouri, there is a dual system for prosecuting traffic offenses – the first being violations of state law, which are criminal prosecutions, and the second being violations of municipal ordinances, which are "civil actions to recover a debt due the city or to impose a penalty for infraction of such ordinances; such proceedings are not prosecutions for crime in a constitutional sense". See, *Kansas City v. Stricklin*, 428 S.W.2d 721, 724(Mo.banc 1968). Although many criminal procedural protections are applicable to a municipal prosecution, this basic principle still is the law. See, e.g., *City of Webster Groves v.*

Erickson, 789 S.W.2d 824(Mo.App. E.D. 1990). And, there are some significant differences between state prosecutions and municipal prosecutions which involve constitutional or criminal procedural protections, including rights of discovery, *compare* Rule 37.54 *with* Rules 25.01-25.16, rights to a jury trial, *compare* MO.REV.STAT. §479.130 & Rule 37.61 *with* Rule 27.01, and the right to have an appellate court to consider alleged irregularities in the municipal court. See, *City of Springfield v. Stoviak*, 110 S.W.3d 418(Mo.App. S.D. 2003). Furthermore, as to arrests for violations of §577.010 (DWI) or §577.012 (BAC), §577.039, which imposes time limits for a warrantless arrest, does not apply to arrests for violations of similar municipal ordinances. See, *Strode v. Director of Revenue*, 724 S.W.2d 245(Mo.banc 1987).

However, even more significant is the differences between these systems as to the punishment which can be imposed in terms of incarceration. A first offense for DWI under state law is a class B misdemeanor, having a maximum imprisonment of six (6) months. See, §§577.010 & 558.011.1(6). In third and fourth class cities, the maximum imprisonment is ninety (90) days. See, §§77.590 & 79.470. In addition, there are situations where a municipality, such as a town or village, may not be authorized to impose incarceration as a punishment. See, §80.090(37).

The Court should also note that a municipal prosecution can be referred to or separately prosecuted by the State for a criminal prosecution, and thus, there are additional incentives to plead guilty and for "speedy dispositions", regardless of the fairness of the result, particularly if the defendant would be a prior or persistent offender if prosecuted under state law. As this Court is likely aware, a municipal conviction for DWI bars a state

prosecution for the same offense. See, *Weaver v. Schaff*, 520 S.W.2d 58(Mo.banc 1975). Thus, as reflected in the *Baldasar* case, there is a substantial likelihood that municipal prosecutions "may create an obsession for speedy dispositions, regardless of the fairness of the result, including `insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. . . . There is evidence of the prejudice which results to misdemeanor defendants from this `assembly-line justice.' Moreover, if the case is tried to a jury, * * *, it is entirely possible that jurors may be less scrupulous about applying the reasonable-doubt standard if the offense charged is `only a misdemeanor.`" 446 U.S. at 228, fn. 2.

Herein, the State is relying on a plea of guilty to an intoxication related offense "in the Circuit Court of Clay County, Missouri, Oakview Municipal Division". (L.F. 41). Oakview is a village, and the intoxication related ordinance is Ordinance No. 97-43. (A9-12; L.F. 48-54). Under §1, the traffic offenses of driving under the influence of intoxicating liquor [§1.a.)], under the influence of drugs [§1.b.)], and blood alcohol content [§1.c.)] are defined. Under §1.d.), the "penalty" for a violation of this section is "[a]ny person violating any provision of this section shall, upon conviction, be fined not more than five hundred dollars ($500.00)." Incarceration is not authorized.

In addition, as asserted to the trial court, the section number on the traffic citation herein is §97-432 with a charge of "operated . . . while intoxicated" reflecting a blood alcohol content of .123%. (L.F. 49; State's Ex. 1, A13). Section 2 of the ordinance defines another traffic offense of "Intoxicated driving per se". Curiously, there does not appear to be a penalty for this offense. (A12; L.F. 54). Thus, it is possible that no penalty

besides a conviction can legally be imposed, with a "worst case scenario" of a maximum fine of $500.00.

As reflected in Count I of the amended felony information, Appellant's guilty plea to the ordinance violation occurred after the plea of guilty to the DWI in the circuit court of Platte County, a state violation. (L.F. 41, 49). Therefore, had the prosecution in Oakview been referred for state prosecution, Appellant could have been charged as a prior offender under §577.023.1(3), a class A misdemeanor, see, §577.023.2, thus significantly altering the punishment from zero days in jail to a minimum of five (5) days and maximum of one (1) year in the county jail. See, §577.023.4. Obviously, the incentive to plead guilty to the ordinance violation, regardless of the fairness of the result, was substantial.

For example, the officer's written reports could readily support a factual basis for a plea to a DWI, but a deposition of the arresting officer might have revealed evidence tending to negate the guilt. Assuming the municipal judge allows depositions, see Rule 37.54, the pursuit of this avenue takes time and effort and possibly additional cost to the municipality, which may result in a referral of the charge to the state for prosecution. While there would be the necessary factual basis for a plea of guilty, see Rule 37.59(e)[37.58(f)], and while the defense attorney would be acting ethically, see, *Weaver*, 520 S.W.2d at 64 & 65, the "rush" to avoid a state prosecution does create the "obsession for speedy dispositions, regardless of the fairness of the result". *Baldasar*, supra.

In light of the different standards and circumstances involving municipal prosecutions versus state prosecutions, not only do municipal prosecutions not comport to the same prevailing notions of fundamental fairness existing in state prosecutions, but the

dual system also creates a fundamentally unfair system of prosecution when treating a municipal prosecution as equivalent to a state prosecution and when using a municipal violation for felony enhancement purposes. Assuming, *arguendo*, that the State has a compelling interest to deter repeat offenders and to severely punish those who ignore the deterrent message, see, *A.B.*, 657 S.W.2d at 628, under the current dual system, the State of Missouri has not narrowly tailored the aforesaid infringement to serve this interest. To do so, either the dual system must be eliminated, requiring all alcohol-related driving offenses to be prosecuted in the state criminal system, or a uniform system of prosecution and imprisonment must be imposed upon all municipalities, which is constitutionally equivalent to the state criminal system.

As a result, §577.023.1 violates the due process clause of both the state and federal constitutions, thereby voiding those provisions defining an intoxication-related traffic offense to include municipal ordinance violations. As the municipal plea herein is void for purposes of enhancement, Appellant's status as an alleged persistent offender transforms at most to that of a prior offender, a class A misdemeanor, and the felony information should have been dismissed. However, because Appellant was unable to post an appeal bond and has served a period of incarceration in the department of corrections and because the case was tried before the court, it is probably more appropriate to reverse the felony conviction and remand for resentencing under a misdemeanor conviction. See, also, *State v. Emery*, 95 S.W.3d 98(Mo.banc 2003); *State v. Gibson*, 122 S.W.3d 121(Mo.App. W.D. 2003).

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to suppress the evidence obtained as a result of the traffic stop of Defendant because the stop violated Defendant's Fourth Amendment rights in that prior to the stop, the officer did not have probable cause to believe that any traffic violations had occurred, nor did he have a reasonable, articulable suspicion that the occupants of the motor vehicle were involved in any criminal activity.

Standard of Review

In looking over numerous cases, Appellant would respectfully suggest that the basic standard of review at times appears to be conflicting or incomplete, at least with regard to an appellate court's review of the evidence. Clearly, an appellate court conducts a de novo review of whether the Fourth Amendment has been violated as this issue is a legal question.

See, e.g., *State v. Slavin*, 944 S.W.2d 314, 317[4](Mo.App. W.D. 1997); *State v. Werner*, 9 S.W.3d 590, 595(Mo.banc 2000). With regard to the evidence, the appellate court will defer to the trial court's findings of fact or judgment, reversing only if it is "clearly erroneous", meaning that the appellate court must be "left with the definite and firm belief that a mistake has been made". See, e.g., *State v. Taber* 73 S.W. 3d 699, 703[4](Mo.App. W.D. 2002). And, when reviewing the facts, an appellate court will review the facts "in a light most favorable to the trial court's ruling." See, e.g., *Slavin*, 944 S.W.2d at 310[1]; *Taber*, 73 S.W.3d at 703[5]. However, these standards of evidentiary review are tempered by other rules.

One, "[o]nce a motion to suppress has been filed, the state bears the burden of going forward with the evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion should be overruled." See, e.g., *Slavin*, 944 S.w.2d at 317, citing §542.296.6. As this Court noted in *State v. Miller*, 894 S.W.2d 649(Mo.banc 1995), "the prosecution's burden of proof at a suppression hearing is not a technicality; it plays a powerful and integral role in the effort to ensure the effectiveness of the Constitution's Fourth Amendment prohibition against unreasonable searches and seizures. The protection of the citizens' Fourth Amendment rights supersedes any benefit derived from bending the law to secure a single conviction". Id. at 657. In addition, when the facts are "sketchy", the "brunt of any hiatuses falls on the state as it bore the burden of overcoming the warrant requirement of the Fourth Amendment." *State v. Oberg*, 602 S.W.2d 948, 950(Mo.App. W.D. 1980).

Two, the deference to the trial court's findings of facts are basically limited to the weight of the evidence or the credibility of a witness. See, e.g., *Werner*, 9 S.W.3d at 595. And, even though a trial court may accept or reject all, part, or none of the testimony it hears, including testimonial records, this doctrine is not absolute, being limited to situations where there is a real conflict in the evidence. See, e.g., *Helton v. Director of Revenue*, 944 S.W.2d 306, 310[6](Mo.App. W.D. 1997). Where the case is virtually one of admitted facts or where the evidence is not in conflict, no such deference is required." See, e.g., *Epperson v. Director of Revenue*, 841 S.W.2d 252,255[5](Mo.App. W.D. 1992); *State v. Rodriquez*, 904 S.W.2d 531, 534[3](Mo.App. S.D. 1995). Deference is also not allowed as to a party's own uncontradicted evidence because "[a] party is bound by the uncontradicted testimony of that party's own witnesses, including that elicited on cross-examination." *Nettie's Flower Garden v. SIS, Inc.*, 869 S.W.2d 26, 231[15](Mo.App. E.D. 1993). A reviewing court is also not required to give deference where the disputed question is not a matter of direct contradictions by different witnesses. *Epperson*, 841 S.W.2d at 255[4]. In addition, the "plaintiff is bound by his own testimony; may not have the benefit of or resort to the support of evidence inconsistent with such testimony, and conceded facts may not be disregarded." *Levin v. Sears, Roebuck & Co.*, 535 S.W.2d 525, 527(Mo.App. K.C. 1976).

Three, when reviewing evidence in a light most favorable to the ruling, the appellate court is bound to follow "the wise, judicious limitation that this rule calls for consideration of all, not merely an isolated part or parts, of the facts shown on his behalf and does not require or authorize the court to supply missing evidence, or to give him the benefit of

forced, speculative or unreasonable inferences". See, *Economy Gas Company v. Bradley*, 472 S.W.2d 878, 880[2](Mo.App. 1971); *Levin*, 535 S.W.2d at 527. Appellate review also involves the complete record, both at the hearing on the motion to suppress and the trial, and the judgment must be based upon substantial evidence, meaning "competent evidence from which the trier of fact can reasonably decide the case." See, e.g., *Slavin*, 944 S.W.2d at 318[8]; *Taber*, 73 S.W.3d at 703[3]; *Cohen v. Express Financial Services, Inc.*, 145 S.W.3d 857, 866(Mo.App. W.D. 2004). Appellate courts must further always be mindful of determining if the evidence is sufficiently contradictory as to no longer be of any probative value. See, e.g., *Shackelford v. West Central Electric Cooperative, Inc.*, 674 S.W.2d 58, 63[8](Mo.App. W.D. 1984)(where witness' final account repudiates a prior statement and witness' testimony is therefore inconsistent, prior statement no longer carries any probative force); *Gilpin v. Pitman*, 577 S.W.2d 72, 79-81[9, 10](Mo.App. K.C. 1978)(witness' testimony apparently possessed with probative value on direct examination may be shown upon cross-examination to be mere guess, speculation, impression or conjecture and thus of no probative value to establish submissible case; witness may qualify his testimony in such a way as to render it of no probative value); *Carson v. Hagist*, 143 S.W. 2d 355, 358 & 359[2, 3](Mo.App. St. L. 1940)(it is always within appellate court's province to determine whether particular testimony has any evidentiary value and, if it is found to be inherently false and unbelievable, to cast it aside and disregard it as lacking all capacity for proof of fact to which it purportedly relates).

Four, despite the great deference given to the trial court's findings of facts, appellate courts still have a duty to ensure that the evidence is not against the weight of the evidence.

As to this standard, Appellant would refer the Court to the case of *Marsh v. State*, 942 S.W.2d 385(Mo.App.. W.D. 1997):

> Appellate courts must exercise caution in setting aside a judgment as being "against the weight of the evidence," and should do so "with a firm belief that the decree or judgment is wrong." Id. However, when the record engenders a firm belief that the judgment is wrong, the reviewing court may weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment.
>
> Id. at 388.

Finally, warrantless search and seizure cases turn on the "concrete factual context of the individual case". And, the facts are not to be determined "on an after the fact basis depending upon what a search reveals, but instead, are governed by the facts as they exist, at the time the search is undertaken without regard to what is subsequently revealed". *Oberg*, 602 S.W.2d at 950[1] & 955[13]; see also, *Miller*, 894 S.W.2d at 653[5](well-worn principle of law that successes of search cannot be used to justify its legality). The issue of guilt is irrelevant to the determination of whether the evidence is admissible at the trial of the criminal charge. See, e.g., *Slavin*, 944 S.W.2d at 321.

Facts

Appellant would submit that the essential facts are virtually undisputed or not in conflict. Some other facts are "sketchy", and Appellant will accordingly set forth those facts in light of the State's burden of proof. Appellant's challenge to the validity of the

traffic stop involves the officer's observations while parked on the side of the roadway, while following Appellant's vehicle, and up to the point where Appellant stopped his vehicle in response to the officer's signals. The officer was the only witness to testify, and because the State can only "testify" through its witnesses, the State is bound by his testimony, whether uncontradicted, inconsistent, vague, or speculative.

On August 23, 2003, at about 2:20 a.m., Trooper Comer was parked on the side of the roadway in his patrol vehicle, operating his stationary radar. Trooper Comer's vehicle was a white Crown Victoria and was "fully-marked", meaning that it has emblems on the side, bars on top with "emergency lights and so on . . . all displayed on the outside". (Tr. 10, 13, 14, 21, 89, 90, 126).

The roadway was a double-lane highway, but it was under construction. The right lane was open for traffic, but the left lane was closed with barrels or traffic cones or "some kind of barrier" separating the right and left lane. Road conditions were dry, and the speed limit was 55 m.p.h.. (Tr. 22-25).

As Trooper Comer was sitting in his vehicle, he was watching approaching traffic from his rearview mirror. Eventually, Trooper Comer observed the headlights of some approaching vehicles. Trooper Comer checked the speed on his radar unit. He could not recall the speed, but could recall that the vehicles were not traveling in excess of 55 m.p.h.. As these vehicles moved towards his position, Trooper Comer would observe the vehicles in his rearview mirror, then look away, checking the speed. He repeated these observations until the vehicles passed him. Prior to passing him, Trooper Comer could not determine any distances between the vehicles and could not recall whether or not the first vehicle

slowed down as it neared his vehicle. Trooper Comer did not observe any brake lights or any "drastic slowdown", but acknowledged "that the first vehicle may have observed [him] and let off on the gas" resulting in a reduction in speed. (Tr. 14; 24-27; 90; 92; 126 & 127).

As the vehicles passed him, Trooper Comer observed the second vehicle to be about one car length behind the first vehicle and the third vehicle to be about a car length and a half behind the second vehicle. When the third car was about 300 feet east of him, Trooper Comer engaged his vehicle and accelerated to catch up to the vehicles. (Tr. 14; 27 & 28; 91; 94).

Upon catching up with the vehicles, Trooper Comer was unable to determine the distances between the vehicles. At a point about a half mile east of his original location, Trooper Comer observed the second vehicle slowly drift to the right of the third vehicle, where he then observed a portion of the right taillight of the second vehicle; at the same time, the right tires went "over a little bit on the fog line", perhaps as much as a foot. The second vehicle then slowly drifted back to the "line of travel". According to Trooper Comer, the movement to and fro did not involve any erratic driving, weaving, or any sudden movement. (Tr. 14 & 15; 28 & 29; 94 & 95; 126).

As the vehicles approached the exit ramp, Trooper Comer observed the second vehicle move slowly to the right, crossing over the fog line "just before" the exit. Again, Trooper Comer did not observe any sudden movements or unusual operation. And, as the vehicle exited onto and traveled up the ramp, Trooper Comer did not observe any violations. (Tr. 16 & 17; 29-31; 94 & 95).

Law

As noted in *Whren v. United States*, 116 S.Ct. 1769(1996):

> The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. [Citation omitted]. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances.
>
> Id. at 1772.

For the stop to be "constitutionally legal" or reasonable, the officer must generally have probable cause to believe that a traffic violation has occurred or a reasonable, articulable suspicion that an occupant was involved in criminal activity. Id.; see also, *Miller*, 894 S.W.2d at 651; *Slavin*, 944 S.W.2d at 317.

With regard to determining the existence of probable cause, as reflected in *Hinnah v. Director of Revenue*, 77 S.W.3d 616(Mo.banc 2002):

> Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." [Citation omitted].

> Whether there is probable cause to arrest depends on the information in the officers' possession prior to the arrest. [Citation omitted]. There is no precise test for determining whether probable cause exists; rather, it is based on the particular facts and circumstances of the individual case. [Citation omitted].
>
> Id. at 621. [9 10, 11].

However, before making any determination about probable cause, courts must examine the elements of the alleged offense in order to understand the type of facts needed to determine probable cause. See, *State v. Moore*, 659 S.W.2d 252, 257(Mo.App. W.D. 1983). Reference to cases involving sufficiency of evidence issues are instructive because the "only difference between facts needed to establish probable cause and those needed to prove guilt beyond a reasonable doubt is in the degree or quantum of proof, not in the facts or elements of the offense. The latter is a much higher standard." Id.

With regard to the standards for determining "reasonable suspicion", Appellant would refer the Court to the *Slavin* case, which recognizes the following guidelines:

> Reasonable suspicion must be based upon a specific, articulable set of facts indicating that criminal activity is afoot. [Citation omitted]. The law enforcement authorities must be able to articulate more than just an "inchoate and unparticularized suspicion or `hunch`". [Citation omitted]. Furthermore, the assessment of the officer's actions, in light of the facts and circumstances confronting the officer at the time, must be objective, and not

> based upon the officer's actual state of mind at the time the challenged action was taken. [Citation omitted]. * * * the reasonableness of a law enforcement officer's suspicion is determined upon consideration of the totality of the circumstance surrounding the stop. [Citation omitted]. Under this totality of the circumstances test, the fact that each factor relied on by the officer is innocent in itself does not preclude a finding of reasonable suspicion if, when taken together, the facts are adequate to create reasonable suspicion of criminal activity. [Citation omitted]. "[T]he relevant inquiry is not whether the particular conduct is `innocent' or `guilty,' but the degree of suspicion that attached to particular types of noncriminal acts." [Citation omitted].
>
> 944 S.W. 2d at 318.

As these guidelines are applied to a traffic stop, Missouri courts have recognized that "unusual or erratic" driving can provide a valid basis for stopping a vehicle. See, e.g., *State v. Bunts*, 867 S.W.2d 277(Mo.App. S.D. 1993)(traffic stop justified because the defendant abruptly dropped his speed by nearly twenty miles per hour when passing a police officer, "causing two following motorists to also reduce their speed and pass [the d]efendant to avoid the possibility of an accident."); *State v. Malaney*, 871 S.W.2d 634(Mo.App. S.D. 1994)(traffic stop justified because the defendant was weaving erratically within his lane of traffic); *State v. Mendoza*, 75 S.W.3d 842(Mo.App. S.D. 2002)(traffic stop not justified where vehicle moved over to passing lane in response to presence of officer's vehicle,

drove upon left yellow line, returned to *driving* lane traveling for two miles before being stopped, and no allegations of failing to signal lane changes); *State v. Abeln*, 136 S.W.3d 803, 810 fn. 7(Mo.App. W.D. 2004)(traffic stop not justified for slightly crossing over fog line once or twice for a moment).

In light of the absence of any detailed analysis of the reasonable suspicion standard in a traffic stop setting, Appellant would also refer this Court to *United States v. Colin*, 314 F.3d 439(9th Cir. 2002). The *Colin* Court's concluding comment should be a "guiding light" in all cases:

> [I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.
>
> Id at 446.

The *Colin* Court also adopted a standard for determining whether or not a driving pattern was "unusual" or "erratic", requiring *pronounced* movements observed for a *substantial* distance. Id. at 445 & 446(emphasis added by court). Requiring a driving pattern reflecting pronounced movements over a substantial distance would avoid "virtually random seizures of innocent travelers" for common driving conduct. Cf., *Slavin*, 944 S.W.2d at 320 & 321.

Absence Of Traffic Violations

As reflected in the amended information, the State charged a traffic violation of operating a motor vehicle and following "another vehicle more closely than is reasonably

safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway" in violation of §304.017. (L.F. 42; A1). Although not charged, at the hearing on the motion to suppress, the State attempted to elicit testimony from Trooper Comer that the crossing over the fog line was a "lane violation". (Tr. 16). Trooper Comer did not issue a traffic ticket for any lane violation. (Tr. 31). The State briefly argued either ground as legal justification for the stop. (Tr. 42 & 43). Appellant briefed this alleged lane violation, assuming that the State was referring to MO.REV.STAT. §304.015.2. (L.F. 31-33; 60; 68-70). The State never responded. Appellant will hereinafter address each issue.

Following Too Closely

Whether there was a traffic violation of following too closely is first defined by statute under §304.017, which in relevant part provides:

> The driver of a vehicle shall not follow another vehicle more closely than is reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway. (A21).

As clearly reflected therein, this statute "is not specific in stating the distance. Variables are involved – speed, traffic and condition of the roadway." *Terrell v. Bailey Limestone Co., Inc.*, 575 S.W.2d 775, 778(Mo.App. K.C.D. 1978). Unfortunately, as not so clear are cases interpreting this statute in terms of a "criminal" violation of this statute.

As reflected in the case of *Pyles v. Roth*, 421 S.W.2d 261(Mo. 1967), this Court recognized that §304.017 "was enacted for the protection of every person or vehicle which would reasonably be afforded a measure of protection by the enforcement of the terms

thereof. Northing contained in the section would indicate any intention to restrict its application". Id. at 262. However, the *Pyles* Court also recognized that close proximity alone does not establish a violation and that additional evidence would be necessary, such as being so close that the driver's view was obstructed and could not see the dangers ahead. Id. at 263. See, also, *Joffe v. Beatrice Foods Company*, 341 S.W.2d 880, 884[2](Mo.App. K.C. 1960)(close proximity and keeping up with another vehicle does not constitute negligence). As reflected in the *Terrell* case:

> Given the general familiarity of the public with automobile operation, jurors of average intelligence could be expected to understand that "following too closely" would mean that the driver of the following vehicle should not be so close to the vehicle ahead that he could not, under the circumstances, avoid striking the vehicle ahead which undertook a properly signaled and executed maneuver which involved a reduction of speed.
>
> 575 S.W.2d at 778.

See, also, *Daly v. Schaefer*, 331 S.W.2d 150, 156(Mo.App. 1960)(sudden stop without reason or without timely warning by lead vehicle may relieve following vehicle of negligence in rear-end collision); *Joffe*, 341 S.W.2d at 884[3]. And, in *State v. Murray*, 568 S.W.2d 945(Mo.App. St.L. 1978), the Court of Appeals concluded that the statute was

violated when the defendant's vehicle followed the lead vehicle at a distance of six (6) feet for three (3) miles, although the speeds of both vehicles were not established.[3]

Appellant would also submit that a temporary or brief reduction in distances would not violate the statute, particularly because traffic conditions may change with little or no warning, which requires consideration of "all of the circumstances and the natural reaction and conduct to be expected of ordinary people in a given situation". *Schmidt v. Allen*, 303 S.W.2d 652, 658[13](Mo. 1957). In addition, when more than two vehicles are present, particularly a vehicle following the alleged violator, such vehicle's speed and proximity should also be a factor because a driver is under a duty to anticipate the presence and movement of others on the highway. See, *Schmidt*, 303 S.W.2d at 658[14]; see also; §304.017, requiring a driver to have due regard for the traffic upon the roadway.

Applying these standards to the facts herein, the State cannot establish probable cause because the State simply failed to establish a violation of the statute.

Initially, the Court should note that Trooper Comer's opinion about Appellant's vehicle being too close to the lead vehicle is actually based upon a very brief observation, both in terms of time and distance. Specifically, as the three vehicles passed by him, he looked to the left and observed the vehicles. (Tr. 26, 126). As the vehicles approached him

[3] Curiously, the *Murray* Court quoted and relied on §304.017, but did not quote that portion dealing with speed, traffic conditions, and roadway conditions, noting only that the statute "provides: The driver of a vehicle . . . shall not follow another vehicle more closely than is reasonably safe and prudent . . ." Id. at 946.

from behind, he could not observe the proximity of each vehicle to the other. (Tr. 25 & 26, 126). He also could not recall whether or not the lead vehicle reduced its speed. (Tr. 127). He could only recall that a "drastic reduction" in speed did not occur. (Tr. 27, 126 & 127). After the vehicles passed him, Trooper Comer followed the vehicles. He was unable to determine the distances between the vehicles, apparently focusing more so on Appellant's vehicle moving slightly to the right of the line of travel. (Tr. 28 & 29).

Even assuming that a distance of "one car length" was in close proximity, the State failed to establish that this distance was anything other than a brief reduction in the distance between the lead vehicle and Appellant's vehicle, occurring as a result of the lead vehicle reducing its speed without warning in response to the presence of the trooper's fully marked, white patrol car. In light of the "general familiarity of the public with automobile operation", the "natural reaction" of the "ordinary" driver to the presence of a police vehicle is to reduce speed. Trooper Comer also acknowledged that the lead vehicle could have reduced its speed in response to his presence. (Tr. 26 & 27, 126 & 127). Whether the reduction of speed is with warning, such as brake lights, or without warning, a temporary reduction of distance between the lead vehicle and the following vehicle(s) will "naturally" occur as the following vehicle takes time to react to the reduction of speed of the lead vehicle. If there is no warning, then the reaction time of the following vehicle may be longer, which in turn, causes the vehicles to be in close proximity for a reasonable period of time.

The Court should also note that the third vehicle, following Appellant's vehicle, was only a distance of a car length and a half behind Appellant's vehicle as it passed the

trooper's vehicle. (Tr. 14, 26, 91 & 92, 126). There is no substantial evidence indicating its speed or whether its close proximity to Appellant's vehicle did not affect this situation. And, after the vehicles passed Trooper Comer, there is no further evidence as to the speeds of the three vehicles or whether or not the vehicles maintained or changed these distances.

Given the State's burden of proof and the inability of Trooper Comer to recall or determine speeds and distances, the "brunt of any hiatuses falls on the state". See, *Oberg*, 602 S.W.2d at 950. A traffic violation of following too closely simply did not occur.

Lane Violation

In light of the condition of the highway, involving a double-lane highway with the left lane closed and under construction and the right lane open, it would appear that an alleged lane violation would involve §304.015.2, which provides in relevant part that "[u]pon all public roads or highways of sufficient width a vehicle shall be driven upon the right half of the roadway, * * * ". (A19). As reflected in the case of *Skiles v. Schlake*, 421 S.W.2d 244(Mo. 1967), the "obvious purpose of this statue is to change the common law of the road that one has a right to travel on either side of the highway when no one is coming in the opposite direction". Id. at 245 & 246. The *Skiles* Court further recognized that driving off the roadway onto the shoulder, "by and of itself", does not violate the statute, and, "[i]n fact, drivers *frequently* leave the traveled portion of the roadway for valid reasons and with no injurious consequences". Id. at 247 (emphasis ours); see also, *State v. Scholl*, 114 S.W.3d 304, 308 & 309(Mo.App. E.D. 2003) *citing* the *Skiles* case. In *Skiles*, the driver was allegedly driving about two feet onto the shoulder, 421 S.W.2d at 246, and in *Scholl*, the

driver allegedly drove off the highway from the right hand side into an embankment. 114 S.W.3d at 309.

The Court should also note that the predecessor statute to §304.015.2 was apparently §304.020, repealed in 1953. See, *Berry v. Harmon*, 329 S.W.2d 784, 789[2](Mo. 1959). §304.020 required a driver "to drive as close to the right-hand side of the highway as practicable". In interpreting §304.020, this Court in *Moss v. Stevens*, 247 S.W.2d 782(Mo. 1952) recognized that this provision "does not receive a literal construction but has reference to the attending circumstances and to the usable or passable way". Id. at 785[3]. Thus, if the "shoulder" of the highway is usuable, it would not be unusual to drive upon such area, and, in fact, would account for a "frequent" traveling upon such area. See, *Skiles*, supra. And, even though driving as close as practicable to the right-hand side is no longer required, common sense would dictate that a motorist would still desire to drive closer to the right than to the left side of a roadway.

In the case at bar, the State appears to have asserted that the movement of Appellant's vehicle over the "fog line" on the right side of the roadway was a violation of law. The fog line is the "white line that demarcates the shoulder from the road." *Riche v. Director of Revenue*, 987 S.W.2d 331, 333(Mo.banc 1999); see also, *Abeln*, 136 S.W.3d at 809[fn 4]. Although neither the *Moss*, *Skiles*, nor the *Scholl* cases refer to the "fog line", the *Abeln* Court approved several cases from other jurisdictions which would also support Appellant's assertion that crossing over the "fog line" is not "by and of itself" a violation of §304.015. 136 S.W.3d at 810 [fn. 7]. Of these cases, the case of *Rowe v. State*, 769 A.2d 879, 363 Md. 424 (2001) is quite instructive.

Although a different statutory provision is involved – namely, driving "as nearly as practicable entirely within a single lane", which would be essentially the same as MO.REV.STAT. §304.015.5(1) – the ***Rowe*** case involved two brief crossovers of the fog line within a distance of 1.2 miles. 769 A.2d at 881 & 884. Relevant herein is the ***Rowe*** Court's recognition that "more than the integrity of the lane markings, the purpose of the statute is to promote safety on laned roadways." 769 A.2d at 885[12]. This purpose is fully consistent with the observations of the ***Moss***, ***Skiles***, and ***Scholl*** Courts as well as another provision of §304.015 – namely, §304.015.1 which in relevant part provides that "[a]ll vehicles not in motion shall be placed with their right side as near the right-hand side of the highway as practicable, * * * ". In other words, for safety purposes, the parked vehicle should generally be on the shoulder of the highway, out of the usually traveled portion of the highway and to the right of the fogline.

In this same "vein of safety", the Court should also note that in light of common experience/judicial notice, the fog line, like warrantless search and seizure cases, has a relevance to be determined in the "concrete, factual context" of the case at bar. As this Court should be aware, some roadways in Missouri do not have a fog line. Those roadways that do, the fog line is not always clearly marked. Regardless, the area to the right of the fog line may be composed of grass, gravel, or pavement. This area may "drop off" from the pavement to the left of the fog line or may be even or nearly even with such pavement. Obviously, if the shoulder is paved and even or nearly even with the pavement to the left of the fog line, then the driver is operating upon "usuable" portions of the highway. Perhaps more important, still, is the fact that driving as nearly as practicable to the fog line is or

should be a "favored public policy" of this State or any other state since the lane to the driver's left will involve oncoming traffic, passing traffic, or, as herein, a roadway closed to traffic. And, when a motorist does so drive, minor and brief movements onto and over the fog line will naturally or frequently occur.

Simply put, merely crossing over the fog line is not a traffic violation in the State of Missouri.

Reasonable, Articulable Suspicion

Looking at the "totality of the circumstances", the State also failed to establish that a reasonable, articulable suspicion of criminal activity existed prior to the stop of Appellant's vehicle. The brief, temporary existence of a "close proximity" between the Appellant's vehicle and the lead vehicle is a factor to be considered, albeit a completely innocent factor. The two alleged crossings over the fog line could also be a factor, see, e.g., *Rowe*, 769 A.2d at 884-889, but the Court cannot ignore the innocent fact that these two crossings were brief and slight. The first crossing was about a foot, which is about the width of a tire. The third vehicle was also undoubtedly at or near the fog line since Trooper Comer only observed a portion of the right taillight of Appellant's vehicle to the right of the third vehicle's "line of travel". (Tr. 28 & 29). Trooper Comer did not testify about the length of this alleged crossover. The State also failed to exclude any potential adverse effect of the presence of the temporary cones or barrels marking the left lane closure or the potential adverse effect of the third vehicle following Appellant's vehicle. There were also no allegations of the existence of any dangerous conditions to the right of the fog line. As to the alleged second crossover, the State did not establish the width of the crossover past the

fog line, the length of the crossover, the absence of any potential adverse effect of the lane closure or third vehicle, or the existence of any dangerous conditions. Instead, the State's evidence established that it allegedly occurred "just before" Appellant's vehicle exited to the right onto the exit ramp. Such crossovers are simply not unusual and in fact are better characterized as a common or frequent occurrence.

In addition, Trooper Comer candidly admitted that over the distance of the mile in which he observed the vehicles, Appellant's vehicle did not weave, did not make any sudden, unexplained, erratic movements to the right or left, and did not commit any turning violations when moving right onto the exit ramp. See, §304.019.1. Furthermore, the pavement to the right of the fog line was even or "fairly level" with the pavement to the left, or at least did not drop off on the right side, so that Appellant's vehicle was traveling upon usuable portions of the road. (Tr. 30 & 31).

Simply put, there was not only *no* evidence of unusual or erratic driving, but instead there was also evidence of operation involving common or frequent conduct. See, *Skiles*, 421 S.W.2d at 247; *Rowe*, 769 A.2d at 887 & 888.

In light of the concrete, factual context of the case at bar, the State failed to establish the existence of any traffic violation or a reasonable, articulable suspicion of criminal activity. The trial court should have sustained the motion to suppress, excluding all evidence obtained as a result of the traffic stop, which involves the same evidence supporting all of the charges against the Appellant. Given the fact that the State had at least

two opportunities to introduce any substantial evidence to the contrary[4], this Court should reverse the convictions and discharge the Appellant therefrom. See, e.g., *Rodriguez*, 904 S.W.2d at 538; *Slain*, 944 S.W.2d at 321.

POINT FOUR

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Driving While Intoxicated because a rational trier of fact could not have found Defendant guilty of all of the elements of Driving While Intoxicated beyond a reasonable doubt in that Trooper Comer's testimony was too contradictory, inconsistent, vague, and speculative to support a finding beyond a reasonable doubt that Defendant was intoxicated at the time of the stop of the vehicle, in that the evidence of a blood alcohol content in

[4] Appellant's attorney also deposed Trooper Comer before the hearing on the motion to suppress, and neither the State nor Trooper Comer attempted to clarify or modify any material facts revealed therein. (Tr. 17 & 18).

excess of .08% was invalid or unreliable, and in that evidence of the results of the field sobriety tests cannot be relied upon as circumstantial evidence of intoxication.

Standard of Review

Appellant would initially refer this Court to the case of *State v. Langdon*, 110 S.W.3d 807(Mo.banc 2003), citing the case of *State v. Whalen*, 49 S.W.3d 181(Mo.banc 2001):

> In reviewing a challenge to the sufficiency of the evidence, this Court determines whether there is sufficient evidence from which a reasonable juror could have found the defendant guilty beyond a reasonable doubt. In applying this standard, the Court:
>
> > must look to the elements of the crime and consider each in turn . . . [The Court is] required to take the evidence in the light most favorable to the State and to grant the State all reasonable inferences from the evidence. [The Court] disregard[s] 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, [the Court] consider[s] whether a reasonable juror could find each of the elements beyond a reasonable doubt. [Citation omitted].
>
> Courts view the evidence in the light most favorable to the verdict and give the state the benefit of all reasonable inferences. But, in so doing, courts will not supply missing evidence or give the state the benefit of unreasonable, speculative or forced inferences.

As in Point Three, other rules should apply herein, particularly since there was a bench trial.

One, the deference to the trial court's findings of facts are basically limited to the weight of the evidence or the credibility of a witness. And, even though a trial court may accept or reject all, part, or none of the testimony it hears, including testimonial records, this doctrine is not absolute, being limited to situations where there is a real conflict in the evidence. See, e.g., *Helton v. Director of Revenue*, 944 S.W.2d 306, 310[6](Mo.App. W.D. 1997). Where the case is virtually one of admitted facts or where the evidence is not in conflict, no such deference is required." See, e.g., *Epperson v. Director of Revenue*, 841 S.W.2d 252, 255[5](Mo.App. W.D 1992). Deference is also not allowed as to a party's own uncontradicted evidence because "[a] party is bound by the uncontradicted testimony of that party's own witnesses, including that elicited on cross-examination." *Nettie's Flower Garden v. SIS, Inc.*, 869 S.W.2d 26, 231[15](Mo.App. E.D. 1993). A reviewing court is also not required to give deference where the disputed question is not a matter of direct contradictions by different witnesses. *Epperson*, 841 S.W.2d at 255[4]. In addition, the "plaintiff is bound by his own testimony; may not have the benefit of or resort to the support of evidence inconsistent with such testimony, and conceded facts may not be disregarded." *Levin v. Sears, Roebuck & Co.*, 535 S.W.2d 525, 527(Mo.App. K.C. 1976).

Two, when reviewing evidence in a light most favorable to the ruling, the appellate court is bound to follow "the wise, judicious limitation that this rule calls for consideration of all, not merely an isolated part or parts, of the facts shown on his behalf * * * ". See, *Economy Gas Company v. Bradley*, 472 S.W.2d 878, 880[2](Mo.App. 1971); *Levin*, 535

S.W.2d at 527. The judgment must be based upon substantial evidence, meaning "competent evidence from which the trier of fact can reasonably decide the case." *Cohen v. Express Financial Services, Inc.*, 145 S.W.3d 857, 866(Mo.App. W.D. 2004). Appellate courts must further always be mindful of determining if the evidence is sufficiently contradictory to no longer be of any probative value. See, e.g., *Shackelford v. West Central Electric Cooperative, Inc.*, 674 S.W.2d 58, 63[8](Mo.App. W.D. 1984)(where witness' final account repudiates a prior statement and witness' testimony is therefore inconsistent, prior statement no longer carries any probative force); *Gilpin v. Pitman*, 577 S.W.2d 72, 79-81[9, 10](Mo.App. K.C. 1978)(witness' testimony apparently possessed with probative value on direct examination may be shown upon cross-examination to be mere guess, speculation, impression or conjecture and thus of no probative value to establish submissible case; witness may qualify his testimony in such a way as to render it of no probative value); *Carson v. Hagist*, 143 S.W.2d 355, 358 & 359[2, 3](Mo.App. St. L 1940)(it is always within appellate court's province to determine whether particular testimony has any evidentiary value and, if it is found to be inherently false and unbelievable, to cast it aside and disregard it as lacking all capacity for proof of fact to which it purportedly relates).

Three, despite the great deference given to the trial court's findings of facts, appellate courts still have a duty to ensure that the evidence is not against the weight of the evidence. As to this standard, Appellant would refer the Court to the case of *Marsh v. State*, 942 S.W.2d 385(Mo.App. W.D. 1997):

> Appellate courts must exercise caution in setting aside a judgment as being "against the weight of the evidence," and should do so "with a firm belief that the decree or judgment is wrong." Id. However, when the record engenders a firm belief that the judgment is wrong, the reviewing court may weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment.
>
> Id. at 388.

Law

In the case at bar, the State charged Appellant in Count I with driving while intoxicated, a violation of MO.REV.STAT. §577.010. (L.F. 41; A1). In §577.001.2, the term "intoxicated condition" is generally defined as "under the influence of alcohol, a controlled substance, or drug, or any combination thereof". If there is a valid chemical test of .08% "or more by weight of alcohol in the person's blood, this shall be prima facie evidence that the person was intoxicated *at the time the specimen was taken*". §577.037.1. (Emphasis ours). If the chemical test is below .08% or if the chemical test is invalid, Appellant would submit that §577.037.5 would also apply, which provides in relevant part that a charge alleging a violation of driving while intoxicated "shall be dismissed with prejudice * * * unless one of more of the following considerations cause the court to find a dismissal unwarranted:

> (1) There is evidence that the chemical analysis is unreliable as evidence of the defendant's intoxication at the time of the alleged violation

due to the lapse of time between the alleged violation and the obtaining of the specimen;

(2) There is evidence that the defendant was under the influence of a controlled substance, or drug, or a combination of either or both with or without alcohol; or

(3) There is substantial evidence of intoxication from physical observations of witnesses or admissions of the defendant. (A24).

Appellant would also refer the Court to the case of *State v. Farmer*, 548 S.W.2d 202(Mo.App. Spr. 1977):

Chemical blood, breath, saliva or urine tests have been routinely administered and offered in evidence in drunken driving cases since the "implied consent" law was enacted in 1965, Laws of Mo. 1965, p. 670, but proof of intoxication by means of a chemical test is in no sense requisite to a conviction of driving while intoxicated. The elements of the offense charged are simply 1) that defendant operated a motor vehicle, and 2) that he was intoxicated while so doing. [Citations omitted]. Section 564.442, RSMo Supp. 1975[§577.037], attaches certain evidentiary weight to the results of chemical tests for intoxication, properly administered, but the statute which defines and denounces the offense of driving while intoxicated, §564.440, RSMo 1969[§577.010], does not require the State to prove gross intoxication; the State need only prove a degree of intoxication which impairs the ability of a person to operate an automobile. [Citations omitted].

> Alcoholic intoxication is a fact which may be proved by any lay witness who has had a reasonable opportunity to observe the defendant. [Citations omitted].
>
> Id. at 205. See also, MAI 17.21(Defendant drove while intoxicated to the extent that defendant's driving ability was impaired).

"Intoxication is a physical condition usually evidenced by unsteadiness on the feet, slurring of speech, lack of body coordination and an impairment of motor reflexes." See, *State v. Rose*, 86 S.W.3d 90, 101(Mo.App. W.D. 2002). Obviously, evidence of impairment would include the operation of the vehicle and the accused's mental and physical condition at or near the time of the alleged operation.

Appellant further would direct the Court the case of *Verdoon v. Director of Revenue*, 119 S.W. 3d 543(Mo.banc 2003) with regard to the standard when the State has established a "*prima facie* case":

> The driver is entitled to present rebuttal evidence that raises a genuine issue of fact regarding the validity of the blood alcohol test results. The rebuttal evidence should challenge the presumption of validity established by the director's prima facie case; but the driver's burden is one of production not persuasion. The director retains the burden of proof throughout the proceeding.
>
> Id. at 546.

As applied to a criminal Driving While Intoxicated proceeding, if the State established a prima facie case as to such issues as the validity of the blood alcohol test results or the validity of other evidence supporting a finding of intoxication, the defendant is entitled to present rebuttal evidence that raises a contrary, genuine issue of fact, which challenges the presumption of the validity of the State's prima facie case. The defendant's burden is one of production not persuasion, and the State retains the burden of proof of beyond a reasonable doubt throughout the trial.

Finally, during the trial and in closing arguments, defense counsel raised an issue involving Trooper Comer's failure to administer the field sobriety tests in front of the video camera. (Tr. 165 & 166; 178). Although Trooper Comer did not "destroy evidence", by avoiding the "eye of the camera", the result was the same – namely, Defendant and the trier of fact were "deprived of the opportunity to independently evaluate" whether or not Trooper Comer properly administered the field sobriety tests. (Tr. 165 & 166).

In light of such cases as *State v. McNaughton*, 924 S.W.2d 517, 524 & 525[21-27] (Mo.App. W.D. 1996) and *Baldridge v. Director of Revenue*, 82 S.W.3d 212, 222 & 223[10-17](Mo.App. W.D. 2002), Appellant would submit the following standard of review.

First, the nature of the evidence in question is such that it "might be used in defendant's defense and its exculpatory value must have been apparent". *McNaughton*, 924 S.W.2d at 525[27]. Second, the defendant must show "bad faith" on the part of the officer. Id. at 525[25].

As to the standard for determining "bad faith", it is necessary to show an intentional act; mere negligence is not sufficient. *Baldridge*, 88 S.W.3d at 223. It is well-settled that "[d]irect proof of the required mental state is seldom available and such intent is usually inferred from circumstantial evidence". *State v. Brown*, 660 S.W.2d 694, 699[13](Mo.banc 1983). Thus, to establish a prima facie case, the defendant should only need to show the absence of a satisfactory explanation for failing to preserve the exculpatory evidence. *Baldridge*, 88 S.W.3d at 223[12, 17].

Facts and Argument

As Appellant pointed out in Point Three, supra, Trooper Comer was the only witness to testify, and because the State can only "testify" through its witnesses, the State is bound by his testimony, whether uncontradicted, inconsistent, vague, or speculative. In presenting the issue herein, Appellant will analyze the circumstances in terms of the sequence of historical facts: one, operation of the motor vehicle; two, observations at the scene of the arrest; and three, events involving the chemical test. However, before addressing these occurrences, Appellant will address the issue involving the evidentiary effect of Trooper Comer's failure to administer the field sobriety tests within the view of the video recorder.

Evidentiary Value of Video Recording

MO.REV.STAT. §577.020.7 provides as follows:

> Any person given a chemical test of the person's breath pursuant to subsection 1 of this section or a field sobriety test may be videotaped during any such test at the direction of the law enforcement officer. Any such video recording made during the chemical test pursuant to this subsection or a field

> sobriety test shall be admissible as evidence at either any trial of such person for either a violation of any state law or county or municipal ordinance, or any license revocation or suspension proceeding pursuant to the provisions of chapter 302, RSMo. (A22 & A23).

Obviously, the legislature recognizes the evidentiary value of a video recording of the officer's administration of a field sobriety test. This Court can also undoubtedly take judicial notice of the significance of such evidence because, absent any tampering of the recording, the video recording does not lie, is not affected by any biases, and does not otherwise suffer from the frailties of the human mind. A video tape is an objective witness, and it will accurately contain inculpatory and/or exculpatory evidence.

As reflected in the case of *Brown v. Director of Revenue*, 85 S.W.3d 1(Mo.banc 2002), the failure to conduct field sobriety tests or properly administer such tests is not necessarily fatal to the State's burden to prove intoxication. Id. at 5-7. However, assuming the particular test has been established as a reliable indicator of intoxication, upon a foundational showing "1) that the officer is adequately trained to administer such test and render an opinion; and 2) that the test was properly administered", the failure of the driver to properly perform these tests is "admissible as circumstantial evidence of intoxication.". *Rose*, 86 S.W.3d at 97, 98, & 101. And, as this Court knows, an appellate court will rely on such evidence as sufficient to affirm a conviction.

As the *Rose* Court also recognized, any "criticisms" which the driver might have about the particular field sobriety test in general or as it applied to him/her must be "borne out through the various options available at trial, such as cross-examination" or presenting

one's own expert witness to discredit the officer's testimony and other evidence. Obviously, if the administration of the field sobriety test is videotaped, there will be objective, accurate "eyewitness" evidence as to whether the officer "properly administered" the test. And, if the videotape reflects an improper administration, such evidence will be used in defendant's defense, and its exculpatory value would be apparent. An expert witness for the defense can easily review the tape to formulate an opinion and show the tape to the trier of fact, explaining in detail the fatal defects. Defense counsel could also effectively cross-examine the officer.

In the case at bar, a video recorder was available to record the administration of the field sobriety tests, both audio and video. By going to the back of the patrol car, Trooper Comer's administration of the field sobriety test was not recorded on the video. Trooper Comer justified the performance of the tests behind his vehicle because of "officer safety issues" – specifically, he was the lone officer, there were persons in the Moppin vehicle, and his patrol car would serve as a barrier "between me and the other subjects and the other vehicle." (Tr. 134). On cross-examination, Trooper Comer admitted that he did not "personally feel threatened by these passengers", that his spotlight was on the Moppin vehicle, that he had called for backup after Jeremy exited the Moppin vehicle, and that other troopers arrived at the scene sometime after he conducted the first field sobriety test and before the fourth test. (Tr. 99, 128, 134-138, 167-169, 172).

With regard to the audio problems, the evidence did not indicate that Trooper Comer was acting in "bad faith" as he appeared to have a satisfactory explanation for the malfunction of the microphone. (Tr. 129, 169). However, as to the video, there is at least a

prima facie case of bad faith because Trooper Comer failed to satisfactorily justify the administration of the field sobriety tests outside the view of the video recorder. While initially there may have been some legitimate safety concerns, Trooper Comer harbored no personal safety concerns, there were several other troopers in the area, and he had called for backup after Jeremy exited the Moppin vehicle. Had Trooper Comer briefly delayed the administration of the field sobriety tests, other troopers would have arrived to aid in securing the scene. In addition, Trooper Comer never opined any concerns about the "dissipation" or loss of evidence related to intoxication if a brief delay occurred.

Thus, any of the field sobriety tests herein which involve any type of physical acts in the administration of the tests should be disregarded and deemed to be "inadmissible – indeed unacceptable – " as circumstantial evidence of intoxication. See, *Rose*, 86 S.W.3d at 101.

Operation of Motor Vehicle

Even if there was probable cause to believe a traffic violation occurred or a reasonable, articulable suspicion of criminal activity, the substantial evidence does not support a finding of impairment. The alleged "following too closely" and crossing over the fog line were brief and minor. On the other hand, as Trooper Comer candidly admitted, he did not observe any speeding, weaving, erratic driving, or any other traffic violations, such as failing to signal the right turn onto the exit ramp. There are also no allegations that Appellant did not stop in a timely or reasonable manner in response to Trooper Comer's signal to stop. (Tr. 14-16; 21-30; 90-96; 126 & 127).

Scene of Stop

Upon contacting Jeremy, Trooper Comer obtained a Missouri nondriver identification card from him and eventually identified the other occupants. Trooper Comer then requested Jeremy to exit the vehicle. At this juncture, there are no allegations that Jeremy had any physical problems in producing the card nor any allegations of odors of alcoholic beverages. (Tr. 96 & 97, 130-132).

As Jeremy exited the vehicle, Trooper Comer initially alleged that he placed his hand on the vehicle to "lean back" or to "steady himself". (Tr. 132). However, when confronted with the video, Trooper Comer admitted that Jeremy did "not really" lean back at any time. As reflected in the video, Jeremy "kinda steps up on the pavement and then steps back down and makes a series of steps towards [the patrol] vehicle". (Tr. 164).[5]

Jeremy then proceeded towards the trooper's vehicle with Trooper Comer following. Jeremy walked several steps; as he comes into better view of the camera, he appears to be chewing gum, a fact which Trooper Comer admits. (Tr. 164). Trooper Comer could not recall whether or not he asked Jeremy about any foreign substances being in his mouth or checked for such substances. (Tr. 147).

After entering the patrol car, Trooper Comer alleged that he could smell a "strong" odor of an alcoholic beverage coming from Jeremy and that Jeremy's eyes were watery, bloodshot, and somewhat staring. (Tr. 98). Trooper Comer also testified that Jeremy's eyes were glassy, but equivocated on cross-examination. (Tr. 97, 150 & 151). Although the

[5] Appellant intends to file the video (Defendant's Ex. A) with this Court, and thus, this Court can draw its own conclusion.

time of his observation is unknown, Trooper Comer testified that Jeremy's pupils were "normal", as also reflected in a "box" which he checked on his alcohol influence report, among other boxes for choices of "constricted, dilated, slow reaction to light or artificial light." (Tr. 151 & 152). Jeremy admitted consuming four (4) beers. (Tr. 98). Trooper Comer also alleged that Jeremy's speech was "somewhat slurred and mumbling". (Tr. 98 & 99). Based on these observations and admission, Trooper Comer was "suspicious" about Jeremy being intoxicated and requested Jeremy to exit the vehicle to perform some field sobriety tests at the back of the patrol car. (Tr. 98 & 99, 134).

At this point, the Court should initially note that a "strong" odor of an alcoholic beverage is not substantial evidence of intoxication. Alcohol "has little or no odor, i.e., pure ethyl alcohol by itself will have no odor". *Drunk Driving Defense*, Fifth Edition, Lawrence Taylor, J.D., Aspen Law and Business (2000), §4.2.5, p. 184. The odor is caused by the type and flavoring of the drink, with beer and wine having the strongest odor on the breath, yet being "the least intoxicating of alcoholic beverages". Id. Jeremy admitted to drinking beer. Trooper Comer also acknowledged that odor does not "in and of" itself indicate whether a person is intoxicated. (Tr. 172). The timing of the last consumption is also a factor as to the level of the odor, id. at 185, as also acknowledged by Trooper Comer. (Tr. 150). In addition, Jeremy's admission to drinking four (4) or five (5) beers is of little or no probative value as to being intoxicated since the evidence involving the time period of consumption does not establish a starting time and indicates a stopping time of 1:00 a.m.. (Tr. 108 & 109).

With regard to the eyes being bloodshot and watery, there are numerous nonalcoholic reasons, and Trooper Comer did not in any manner attempt to exclude any such factors. See, *Defense Drunk Driving*, §4.2.3, pages 180-182. The size of the pupils, whether constricted, normal, or dilated, is also of little or no probative value, although "consumption of alcohol raises the level of norepinephrine in the blood, which causes dilation." Id. at §4.2.7, pages 189 & 190. Curiously, Trooper Comer denied that alcohol causes a dilation of the pupils. (Tr. 151). And, as to "slurred speech" it is also of a little or no probative value since "[i]mpairment of speech is, for example, a common – and sober – reaction to the stress, fear, and nervousness that a police investigation would be expected to engender; fatigue is another well-known cause". *Drunk Driving Defense*, §4.2.6 (2004 Supp.), page 84. Trooper Comer also never indicated that he had seen or heard Jeremy before that night.

In light of the speculative nature of these types of observations, such evidence might be relevant in providing a reasonable suspicion, thus allowing the officer to further detain the driver. However, such evidence should not constitute substantial evidence beyond a reasonable doubt. As recognized in *State v. Moore*, 659 S.W.2d 252, 255[4](Mo.App. W.D. 1983), "[a] broad gulf exists between what is necessary to prove one guilty and the requirement of probable cause of a warrantless arrest[,] . . . [b]are suspicion . . . is not enough to support a finding of probable cause for a warrantless arrest."

With regard to the field sobriety tests, Trooper Comer first administered a test known as the Horizontal Gaze Nystagmus (HGN). In addition to the training and proper administration requirements, another evidentiary requirement involves a minimum of eight

(8) hours of training. *Rose*, 86 S.W. 3d at 98. The *Rose* Court also set forth the basic steps for properly administering the test. Id. at 99. Looking to Trooper Comer's testimony (Tr. 78-82, 99-101), it would appear that he received the minimum hours of training – although he could not remember the number of hours of training, only that it was "probably" more than eight (8) hours (Tr. 81; 100 & 101) – and that he properly administered the test – although it would seem that a proper administration would involve focusing his sole attention on administering the test rather than also watching the occupants of the Moppin vehicle with his "peripheral vision". (Tr. 136). Thus, based on his testimony, Trooper Comer appears to have satisfied the minimal requirements, and with a "score of six", there would be substantial, circumstantial evidence of intoxication. However, a videotape of the administration of this test could have revealed an improper administration of the test, and therefore, the test result should be disregarded.

Trooper Comer next requested Jeremy to perform the "Alphabet Test", which is a "nonstandard test". Trooper Comer requested Jeremy to recite "C to W", and Jeremy allegedly recited "G to Z". (Tr. 84). On cross-examination, Trooper Comer acknowledged that "C" and "G" could sound the same and that he did not stop Jeremy to correct him. (Tr. 137 & 138). Jeremy apparently completed this portion of the alphabet without any problems. (Tr. 138). While Jeremy may not have closely listened to Trooper Comer's instructions, his completion of this portion of the alphabet would indicate that his mental processes were not impaired.

The third test was the "Romberg Balance Test", which allegedly "tests the ability for the internal clock". (Tr. 85). In administering this test, Trooper Comer instructs the subject as follows:

> I instruct the subject * * *, to keep their feet together, hands down by their side, slightly tilt their head back, close their eyes and count off 30 seconds in their head.
>
> And then when they are done counting off the 30 seconds, they're to open their eyes and say "STOP." At this point or during this time I'm keeping track of their time.
>
> (Tr. 85).

As to Jeremy, the time involved was allegedly 40 seconds. According to Trooper Comer, more than a 4 or 5 second deviation is an indicator of intoxication, although he admitted that this test varies from "individual to individual", with his other test subjects "who appear to be very intoxicated and were right on 30 seconds, others may be on drugs or something like that and may count off a full minute". (Tr. 140). Trooper Comer further acknowledged that because Jeremy counted silently "in his head", Trooper Comer did not know whether Jeremy counted "one thousand one or one, two three". (Tr. 139). Trooper Comer also testified that he watches for "swaying", but apparently did not observe any swaying. (Tr. 142).

Looking to Missouri case law involving the "Romberg Balance Test". Appellant has been unable to locate any criminal cases addressing the reliability of this test. Appellant located several civil cases, one of which explained the administration of this test – namely,

Hugh v. Prudential Ins. Co., 179 S.W.2d 630(Mo.App. 1944). Curiously, the *Hugh* Court described this test as "having the patient stand upright with his feet close together with his eyes closed, then the physician turns the patient around several times, and if the test is positive, in many cases, the patient will even fall to the floor, and he may sway considerably". Id. at 634. Appellant's counsel believes that this test is also a "nonstandard" test, but regardless, would point out that it apparently does vary widely from individual to individual. In addition, a videotape of the administration of this test could have revealed an improper administration, particularly in light of the fact that the videotape does reflect an internal clock (Tr. 162 & 163), which would allow the trier of fact to compare the lapse of time. As with the HGN, the result of this test should be disregarded.

Trooper Comer next administered the "One Leg Stand". With regard to generally administering this test, Trooper Comer testified as follows:

> A. I instruct them to stand with their heels and toes together with their hands down by their side and to watch as I demonstrate the test myself.
>
> I instruct them to raise a foot off the ground approximately 6 inches, to watch their foot, and count one thousand one, one thousand two, one thousand three and so on until I tell them to stop. And during this time, I tell them to keep their hands down by their side, watch their foot and count out loud.
>
> Q. Does the person you're testing get to choose which foot they stand on?
>
> A. When I give my tests, I give them a choice.

Q. And what does this test look for, what are you watching for?

A. I'm watching for his ability to; One, follow instructions, and then; Two, complete the test without raising his hands from his side and also keeping his balance.

One of the indicators is not keeping your foot raised up during the test by putting your foot down.

Q. And if you don't perform the test correctly, what does that indicate?

A. Each indicator, there's so many indicators for each test, which I guess you could say we assign points to which a combination of points during a test would show signs of intoxication.

Q. *Do you know how many points – is there a standard number of points that it takes to fail the One Leg Stand*?

A. *Yes, I believe on the One Leg Stand I believe it's 6*.

(Tr. 82-84).

With regard to administering the test to Jeremy, Trooper Comer testified as follows:

Do you recall how he performed on the One Leg Stand Test?

He used his hands for balance, which is one of the indicators, to keep their hands down by their side. He stepped down I believe twice, I don't remember, at this moment.

Q. Do you recall if he swayed while balancing?

A. Yes, he did sway while balancing.

Q. So he received *three* marks on that one?

A. *Yes.*

Q. *Is that considered pass or fail*?

A. *That'd be a fail*.

(Tr. 104, Lines 3-14). (Emphasis ours).

Trooper Comer also testified that "swaying" involved a "one to two" inch upper body movement in each direction. (Tr. 143). According to Trooper Comer, Jeremy raised his arms "quite a distance from his body." (Tr. 143). Jeremy raised his arms "somewhere between six inches and a foot away from the body". (Tr. 144).

The Court should further note that Trooper Comer also testified that Jeremy performed this test on the side of the road. During his deposition, at the hearing on the motion to suppress, and initially at trial, he clearly testified that this area was in fact paved and not gravel. (Tr. 17 & 18; 32; 155). On cross-examination, when shown several pictures of this area (Defendant's Ex. B to BB) and the video, Trooper Comer admitted that this area was gravel. (Tr. 155-158; 163). The following also occurred on cross-examination:

Q. As a part of that test, you're having him stand on the shoulder of the highway; is that correct?

A. Yes.

Q. And the shoulder of the highway, depending on maybe its deviation in the, if there is any deviation in the shoulder, that could perhaps if he's standin' in something that could perhaps affect him, too; would that be correct?

A. It's possible.

Q. If he's standin' on some gravel or somethin' like that, that could have some affect in his ability to perform that test, correct?

A. Yes.

(Tr. 144, Lines 8-20).

Clearly, this Court should not ignore all of this testimony as it directly and objectively calls into question the trooper's credibility and "engenders a firm belief that the judgment is wrong" allowing this Court to "weigh the evidence including, of necessity, evidence and all reasonable inferences drawn therefrom, which is contrary to the judgment". See, *Marsh*, supra. Such evidence also cannot be disregarded because the contrary inferences "are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." See, *Langdon*, supra. And, again, the videotape could have revealed evidence of improper administration. Although Jeremy actually appears to have passed this test, if the alleged result is considered to be a "fail", then it should be disregarded.

The final test involved the "Portable Breath Test", which is a breath test permitted under the provisions of §577.021:

> Any state, county or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified pursuant to chapter 590, RSMo, may, prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 or 577.012. A test administered pursuant to this section shall be admissible as evidence of probable cause to arrest *and as exculpatory evidence*, but shall not be admissible as evidence of blood alcohol content. The provisions of section 577.020 shall not apply to a test administered prior to arrest pursuant to this section.
>
> (Emphasis ours).

There are no requirements for any maintenance inspections of this machine, and none were performed on Trooper Comer's machine. (Tr. 144 & 145). Trooper Comer also testified that the test "gives a good indicator of the Blood Alcohol Concentration and the presence of alcohol in the subject". (Tr. 103). Trooper Comer further testified that the result was "positive" for the presence of alcohol. (Tr. 103).

On cross-examination, Trooper Comer admitted that this machine does provide a specific blood alcohol content percentage, but he did not write this amount in his report or display it to the video camera "due to NHTSA standards", which supposedly state that the instrument is only approved for determining the absence or presence of alcohol. (Tr. 146-148). When asked whether or not he had read §577.021, Trooper Comer acknowledged that he "at one time may have" (Tr. 148), and when asked about the statute providing that the test

result could be used as "exculpatory evidence", Trooper Comer asked, "What does that mean by exculpatory?" (Tr. 149). Finally, Trooper Comer in "earlier testimony" had indicated that he could not recall the amount of the result, but "thought maybe it was around .10". (Tr. 149). He further acknowledged that this result "could be a high reading" if there was the presence of "some sort of substance or something that may have interfered with it". (Tr. 149). And, as this Court should recall, there was substantial evidence indicating the presence of gum (Tr. 164) and establishing the trooper's failure to check Jeremy's mouth for any substances. (Tr. 147).

While the result of this test if at or above .08% can only be used to potentially establish probable cause to arrest and not as circumstantial evidence of intoxication, a reading of below .08% could potentially be "exculpatory evidence". In addition, Trooper Comer's obvious misinterpretation of the law and his apparent misunderstanding about exculpatory evidence at least indicate that his ability to formulate reliable opinions is doubtful, particularly when coupled with his opinion that the shoulder was paved.

Administration of Chemical Test

"A prima facie foundation for the introduction of breath analysis test results is established if the test is performed according to the techniques and methods approved by the division of health, by an operator holding a valid permit, and by the use of devices and equipment approved by the division". *Young v. Director of Revenue*, 835 S.W.2d 332, 334[1](Mo.App. W.D. 1992). And, if the officer testifies as to complying with every required procedure on the operational checklist for the approved breath analyzer, see, 19

CSR 25-30.060, there is a prima facie case as to the officer performing the chemical test "according to the techniques and methods approved by the division of health". *Young*, 835 S.W.2d at 335[4].

In light of the direct examination of Trooper Comer, the State does appear to have established the requisite foundation for admission of the test result of 0.121%. (Tr. 110-117). However, on cross-examination, during the videotape replay, Jeremy clearly appears to be chewing gum, a fact also admitted by Trooper Comer. (Tr. 164). On cross-examination, Trooper Comer admitted that he could not recall asking Jeremy about any foreign substances in his mouth or checking for such substances, both before the administration of the PBT and the Datamaster. (Tr. 147, 160). Trooper Comer also acknowledged that the presence of a foreign substance can cause a higher BAC result on both the PBT and Datamaster. (Tr. 147, 161).

As reflected in the case of *Carr v. Director of Revenue*, 95 S.W.3d 121(Mo.App. W.D. 2002), the presence of any foreign substance in the mouth within fifteen (15) minutes before the administration of the chemical test is a violation of 19 CSR 25-30.060, "which requires the officer to observe the person to whom the test is to be administered for fifteen minutes before conducting the test to ensure the person does not smoke, vomit, or place anything into his mouth". 95 S.W.3d at 126. The *Carr* Court also recognized several authoritative "drinking and driving experts" who have opined that a "foreign substance" in the mouth within this fifteen (15) minute waiting period can cause "an extremely high breath alcohol value that is far from indicative of alveolar breath alcohol concentration." Id. at 120, quoting Nichols and Whited. The *Carr* Court also essentially recognized that the

noncompliance with the regulation rebuts the prima facie case, which would require the test result to be disregarded. Id. at 128-130. Such a ruling is proper because §577.020.3 & .4 require compliance with the "methods" approved by the state department of health and 19 CSR 25-30.060 is so approved.

Herein, through cross-examination of the State's only human witness and through the videotape witness, Appellant rebutted the State's only witness and only evidence. The State is bound by Trooper Comer's testimony, and the videotape evidence is substantial. A genuine issue of fact was raised during cross-examination as to the reliability and admissibility of the chemical test result, and the State did not attempt to rehabilitate Trooper Comer on this issue. (Tr. 166-171). Instead, in closing argument, the State complained that if the defense was to "properly raise the bubble gum defense", he "had an opportunity to bring in some sort of expert" (Tr. 187), an argument clearly and properly rejected by the *Carr* Court. 95 S.W.3d at 129 & 130. The State also argued that the "officer testified for 15 minutes prior, which was almost two hours after, he had no oral intake, no vomiting, no smoking". (Tr. 189). However, unlike some foreign substances, such as a "mint", see, *Carr*, 95 S.W.3d at 126 & 127, distinguishing the *Testerman* case, gum does not dissolve. This Court can undoubtedly take judicial notice of the fact that gum will "lose its flavor" after a period of time, but it will not disappear unless spit out or swallowed. Trooper Comer never claimed that Jeremy did either act.

In light of the various appellate standards of review, the State's burden of proof of beyond a reasonable doubt, the nature of Trooper Comer's testimony, and Missouri law, the

substantial evidence does not support a finding that the State proved the element of intoxication beyond a reasonable doubt.

POINT FIVE

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Following Too Closely because a rational trier of fact could not have found Defendant guilty of all of the elements of Following Too Closely beyond a reasonable doubt in that Trooper Comer's testimony at most established a close proximity for a brief time period and failed to establish that the close proximity was not reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

Appellant would refer the Court to the "Standard of Review" set forth in Point Four and the argument in Point Three, involving "Following Too Closely". If the Court concludes

that probable cause existed as to Jeremy following the lead vehicle too closely, then there is probably sufficient evidence to support a conviction herein because the facts are the same. However, Appellant raises this issue to avoid any potential argument by the State that a failure to raise this issue would be some type of admission against interest and because "[a] broad gulf exists between what is necessary to prove one guilty and the requirement of probable cause of a warrantless arrest[,] . . .". *State v. Moore*, 659 S.W.2d 252, 255[4](Mo.App. W.D. 1983).

CONCLUSION

For the reasons stated hereinbefore, Appellant respectfully requests the Court to reverse the judgment of the trial court on either Point One or Point Two, declaring §577.023 to be unconstitutional, to remand this case back to the trial court for sentencing, and to enter such other relief as this Court deems just. As to Point Three, Appellant respectfully requests this Court to reverse the trial court's denial of the motion to suppress the fruits of the search and seizure, declare that the evidence is then insufficient to support the convictions, and order Appellant to be discharged. As to point Four, Appellant respectfully requests the Court to reverse the conviction of Driving While Intoxicated, declaring the evidence as being insufficient, and order the discharge of Appellant. As to Point Five, Appellant respectfully requests the Court reverse the conviction of "following too closely", declaring the evidence as being insufficient, and order the discharge of Appellant.

Respectfully submitted,

BROWN & BROWN

By:_____

BRUCE B. BROWN, BAR NO. 30307
P.O. BOX 679
KEARNEY, MISSOURI 64060
1-816-628-6100
1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that one copy of the Appellants' Brief and one copy of the disk thereof were mailed this ____ day of December, 2004, to:

Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

I further certify that the brief complies with Rule 84.06(b) by not exceeding 31,000 words and that it contains 21,452 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

_____
BRUCE B. BROWN

NO. WD 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,

APPELLANT.

APPENDIX

Table of Contents