

2007 Annual Case Law Update

Missouri Municipal and Associate Circuit Judges Association

Prepared for the 2007 Regional Educational Seminars

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2007 Annual Case Law Update

MMACJA Spring Seminar

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CONSTITUTIONAL LAW – DOUBLE JEOPARDY AS REGARDS LESSER INCLUDED OFFENSE

***State v. Cunningham*, 193 S.W.3d 774 (Mo. App. S.D. 2006)**

Defendant was convicted of (1) possession of cocaine and (2) possession of the very same cocaine *but* with intent to distribute. He got seven years on the simple possession charge, and fifteen on the intent to distribute. Concurrent sentences. On appeal he did not challenge the evidence, but claims a double jeopardy violation. The Southern District holds that it was double jeopardy to convict defendant for both possession of a controlled substance *and* possession of the same controlled substance with intent to distribute. The former is a lesser included offense within the latter. Hence, double jeopardy to convict as to both. The fifteen years for distribution was affirmed, but the seven years for mere possession was vacated.

CRIMINAL PROCEDURE – UNSIGNED DOCKET ENTRY STILL HAS LEGAL EFFECT

***Norfolk v. State*, 200 S.W.3d 36 (Mo. App. W.D. 2006)**

Defendant pled guilty to knowingly burning, and was sentenced to five years. Execution was suspended and defendant was placed on five years of probation. About four years into the probation, defendant failed to make restitution while incarcerated on an unrelated charge, and the court imposed another five years of probation. The state went on record that there would be no objection to termination of the new probation upon a showing of full restitution. A few months later, Norfolk and the others convinced the court that all of the restitution had been made, so the court ordered the probation terminated by an unsigned and typewritten docket entry. Three weeks later the court rescinded the order upon learning that Norfolk and others had lied to the court about the restitution issue. The court revoked the probation and ordered Norfolk to do the five years.

Norfolk filed a motion to vacate the sentence claiming the trial court had lost jurisdiction over him and the case when the order terminating the probation was entered. The motion was denied, but on appeal, the Western District vacates the sentence, holding that an unsigned docket entry discharging the defendant from probation was a valid order terminating the trial court's jurisdiction in the case. The fact that the order was unsigned was immaterial. It is true that judgments need to be signed, and they are invalid if not signed. But mere orders (which are not appealable as are judgments) need not be signed. Hence, the order was valid and the court lost jurisdiction.

SELF-INCRIMINATION – BREAK IN CUSTODY CURES *MIRANDA* OMISSION

***State v. Bremenkamp*, 190 S.W.3d 487 (Mo. App. S.D. 2006)**

Defendant was rounded up in a drug bust at a known drug house in Springfield. She was read her rights and she invoked her right to counsel and she remained silent. After a twenty hour hold, she was released with no charges being filed. About a month later a second warrant was served on the same drug house, and defendant was again found at the scene. But this time she was caught sitting at the kitchen table injecting drugs into her arm. She was again read her rights and this time she made several admissions to the police. She was not arrested at that time. Two weeks later yet a third warrant was served at the drug house. As might be expected, defendant was again on the scene, she was again read her rights, and she again made damaging admissions. Eventually defendant was charged with several narcotic violations for these events, and she was convicted. She appeals, claiming violation of her right against self incrimination and violation of her right to counsel during execution of the second and third search warrants and the related questioning to which she had submitted.

On appeal, the Southern District holds that the break in custody of the defendant cured any arguable *Miranda* /*Edwards* violations. The Court quotes the Western District's decision in *State v. Farris*, 125 S.W.3d 365 (Mo. App. W.D. 2004)(cited in the Regional Seminars a few years ago) as standing for the proposition that a break in custody removes the *Miranda* problems from the case. It was held that the invocation of the right to counsel made after the first arrest did not prevent re-initiation of an interrogation after a second *Miranda* warning weeks later and the defendant's agreement to speak at that time without counsel.

ELEMENTS OF THE OFFENSE – PROOF REQUIRED TO ESTABLISH INTENT TO DISTRIBUTE

***State v. McCleod*, 186 S.W.3d 439 (Mo. App. W.D. 2006)**

Defendant was apprehended after picking up a package at the FedEx office. The package was addressed to him. He was confronted by police while getting into his car and he fled the scene, leaving the package behind. His car also contained small amounts of paraphernalia and marijuana. The unopened package contained 7.5 ounces of marijuana, wrapped in one chunk and covered with plastic. At trial, defendant was convicted of trafficking and sentenced as a prior offender. He appeals, claiming insufficient evidence of intent to distribute.

On appeal, the Western District observes that there was insufficient evidence that the 7.5 ounces of dope possessed by the defendant was a "sales amount" which would establish that the defendant intended to distribute marijuana. Police Officer's opinion on that issue is not controlling. It is true that there can be a quantity so great as to compel the conclusion that this is a "sales amount," but 7.5 ounces is not enough under the circumstances of this case. Had the same 7.5

ounces been packaged in several separate smaller baggies, there would be a valid reason to look at that quantity as being in a readily marketable format which could easily be delivered to several different customers. But that was not the case here. So while it was true that that the defendant's carrying of rolling papers when picking up the package, the other dope in the car, and his flight from the police all indicated knowledge that the package contained marijuana, this was only persuasive on the point of "knowing" possession of a controlled substance. But the officer's testimony was insufficient with respect to the intent to distribute. Trafficking conviction is reversed.

CONSTITUTIONAL LAW – DUE PROCESS REQUIREMENTS FOR HEARING IMPAIRED DEFENDANTS

***Wadas v. Director of Revenue*, 197 S.W.3d 222 (Mo. App. W.D. 2006)**

Timothy Wadas is hearing impaired. He was stopped by the police for no headlights. The policeman knew Wadas was deaf and mute. Wadas smelled of alcohol, and his eyes were bloodshot. Using written communications, the officer asked for Wadas' driver's license. Wadas wrote back, "Not without my attorney." Wadas was arrested and transported to the station. The officer called a local lady who had considerable experience with signing for deaf people. She had a deaf son and niece and she had signed with them for forty years. She also signed for her church congregation. But she was not licensed by the state as an interpreter. When Wadas met the lady, the first thing he asked was whether she was licensed or not. He thereafter refused to deal with her based on counsel's advice to talk only to licensed interpreters. A breath test was offered, and Wadas (through the interpreter) asked to contact a lawyer. After three unsuccessful attempts, Wadas refused to go forward without talking to a lawyer, so the officer declared a refusal.

Wadas was revoked for the refusal and the revocation was affirmed by the Circuit Court. Wadas appeals, claiming that evidence of his refusal was inadmissible because of the absence of a licensed interpreter. The Western District agrees, reversing the revocation.

This is a case that makes it pretty clear that the courts must be very careful in providing a state licensed interpreter when we're dealing with a defendant who is *hearing impaired*. Section 476.753 makes inadmissible any evidence from a deaf person if not provided through a *licensed* interpreter. But note a special item in the statute. The requirement for a *licensed* interpreter is not automatic. The defendant must have "expressed" the need for a licensed interpreter. So if a defendant appears in court with a family member or friend who is willing to interpret, and the defendant fails to state his "expressed need" for a licensed interpreter, that requirement would perhaps be one that can be waived by the defendant.

O.S.C.A. and A.D.A. Information

Note however that requirements under the Americans with Disabilities Act are somewhat broader, such that Title II of the A.D.A. covers even courtroom *spectators* who are hearing impaired. The courts have an *affirmative duty* to assure "effective communication" for everyone,

not just defendants. O.S.C.A. receives an appropriation for costs of A.D.A. compliance with the need for sign language interpreters and auxiliary aids (such as real time captioning). Courts can submit such charges to O.S.C.A. for reimbursement on OSCA Form GN65. A copy of that form may be obtained from O.S.C.A.

CONSTITUTIONAL LAW – WHEN RIGHT TO COUNSEL ATTACHES

State v. Keeth, 203 S.W.3d 718 (Mo. App. S.D. 2006)

Rick Keeth was convicted of DWI and fined \$500.00. He received no jail time. He appeals, raising basically two points; (1) the trial court violated his constitutional rights by allowing him to go to trial without the assistance of counsel and (2) by erroneously denying his motion to suppress.

Keeth had driven his car into a ditch late one night and he thereafter leaned over onto the passenger side of the front seat and fell asleep. Shortly thereafter police officers found him, woke him up, and got him out of the car. A trooper showed up and asked Keeth to take a seat in the patrol car and while there, Keeth began to answer the trooper's questions about the accident. He admitted to driving the vehicle at the time of the accident which he stated happened only a few minutes earlier. He claimed he had gone to the ditch to avoid a herd of deer. He admitted to drinking two or three beers earlier and denied having consumed any alcohol since the accident. Keeth failed all three field sobriety tests whereupon he was arrested and eventually tried and convicted.

The main point in the case takes a renewed look at *Scott v. Illinois*, 440 U.S. 367 (1979) wherein the U.S. Supreme Court was faced with the question of whether the constitutional right to assistance of counsel was required when imprisonment is an authorized penalty but not imposed. Defendant there had argued that because jail time was an authorized penalty he was guaranteed the right to assistance of counsel. The Supreme Court disagreed holding that the right to counsel is only required if the defendant is actually sentenced to a term of imprisonment. 440 U.S. at 374.

About 15 years later the U.S. Supreme Court again discussed the issue in *Nichols v. United States*, 511 U.S. 738 (1994). In *Nichols* the Court went on to elaborate on *Scott* by saying "that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 749. The Missouri Supreme Court has held, consistent with *Scott*, that the right to counsel only exists when a defendant is sentenced to a term of imprisonment. *Trimble v. State*, 593 S.W.2d 542 (Mo. banc 1980).

The Southern District notes that there is case law from the Eastern District suggesting that the right to counsel exists whenever imprisonment is authorized, even in cases in which only a fine is imposed. *State v. West*, 949 S.W.2d 914, 915 (Mo. App. E.D. 1997). But that language is *dicta* because in that case the defendant had actually been sentenced to six months imprisonment.

The thrust of the holding in *Keeth* is that a defendant does not have any right to counsel so long as he is only fined but does not receive jail time. Naturally the better practice would be to get a written waiver along the lines contemplated by Section 600.051, RSMo at any time a court is going to take any kind of guilty plea or try a defendant *pro se* on any charge for which both a fine and jail time can be assessed. But if, as a practical matter, the court is a municipal level court which tends to assess fines only, there is no requirement for counsel.

A second point raised by *Keeth* was whether the trooper violated Keeth's *Miranda* rights by obtaining statements from Keeth at the accident scene in the absence of *Miranda* warnings. The Southern District notes that *Miranda* warnings do not need to be given during routine roadside questioning of a motorist pursuant to a routine traffic stop. *Miranda v. Arizona*, 384 U.S. 436, 439-440 (1966). This is because routine traffic stops are really more analogous to a "Terry stop" than a formal arrest. See *Terry v. Ohio*, 392 U.S. 1 (1968) and *State v. Goff*, 129 S.W.3d 857, 862 (Mo. banc 2004). The holding here is that during a routine roadside investigation, a policeman who lacks probable cause but nonetheless reasonably suspects that a particular person has committed, is committing, or is about to commit a crime may detain that person briefly to investigate the circumstances creating that suspicion. This typically would entail the officer asking the person a few questions "to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Miranda v. Arizona*, 384 U.S. at 439-440. Unless the detainee's responses create probable cause, the officer must release him. *Id.* Conversely, if the detainee's responses do create probable cause to arrest, an arrest may thereafter be legally made. Conviction affirmed.

ELEMENTS OF THE OFFENSE – CONTEXT MAY DETERMINE WHAT CONSTITUTES A "DANGEROUS WEAPON"

***State v. Mace*, 203 S.W.3d 254 (Mo. App. S.D. 2006)**

Christopher Mace was convicted of possession of marijuana as well as unlawful use of a weapon in violation of Section 571.030. He appeals only the weapons conviction, claiming there is insufficient evidence to support it. The Southern District reverses.

The portion of the statute under which Mace was convicted makes it a crime to conceal a knife, firearm, blackjack, "or any other weapon readily capable of lethal use" upon or about his person. It seems that during a traffic stop and the investigation of possible drug activity, the policeman observed on the back seat floor of defendant's car a so-called "Tire Thumper" which is said to be an instrument somewhat akin to a small baseball bat. Such an instrument is used by truckers to test their truck tires. The Southern District notes that the essential elements of the offense in question are the knowing concealment and accessibility of a functional lethal weapon. The issue of concealment was at least open to question but the case really turned on whether the Tire Thumper was properly regarded as a "weapon." The answer to that question would turn on a number of factors, including (1) the nature of the instrument itself, (2) the circumstances under which it is carried including the time, place, and situation in which the defendant is found in possession, (3) the manner in which it is carried, (4) the particular person carrying it and (5) perhaps

other factors such as possible peaceful uses thereof which the possessor might have. *Citing State v. Foster*, 930 S.W.2d 62, 64 (Mo. App. 1996).

In reversing the weapons conviction, the Southern District notes that the Tire Thumper found in the defendants' vehicle has a peaceful use, and there was no evidence of an attempt to conceal it other than the front seats of the vehicle being somewhat reclined. In addition, there was no evidence of any quarrels, fights, or disturbances at the scene, nor was there any evidence that the defendant threatened anyone or brandished the Tire Thumper in any way. For these reasons, the weapons conviction was reversed.

CRIMINAL PROCEDURE – NAME CALLING IN CLOSING ARGUMENTS

State v. Banks, _____ S.W.3d _____ (Mo. *banc* , SC 87921, February 27, 2007)

Banks was convicted of first degree murder and armed criminal action for killing Alvon Turner in a shooting at a drug house. Banks does not challenge the sufficiency of the State's evidence but he claims that the prosecutor's rebuttal closing argument referring to him as the "Devil" was improper and prejudicial. The Supreme Court agrees and the conviction is reversed and the case remanded.

During closing argument at the trial, defense counsel had assailed the prosecution witnesses as drug users and he questioned their ability to perceive accurately the events about which they had testified. He claimed that the police had relied solely on what the witnesses had said and therefore the State's case hinges upon the believability of those witnesses. In rebuttal the prosecutor noted that the setting was similar to Hell and when the State is making an effort " . . . to go and catch the Devil, there are no angels as witnesses. This is Hell. He is the Devil. They [meaning the witnesses] aren't angels. He is guilty beyond a reasonable doubt." (Slip Opinion, Page 1). Defense counsel objected and called for a mistrial. The prosecutor responded that she was not engaged in name calling but rather, she was only using an analogy. The trial court overruled the objection, denied the mistrial, and Banks was convicted.

The Supreme Court in reversing the conviction declares that " . . . the prosecutor's attack was wrong, unprofessional, and demeaning to a proper sense of justice and the legal system." The Court noted that calling the defendant the "Devil" was improper, citing *State v. Johnston*, 957 S.W.2d 734, 750 (Mo. *banc* 1997). In rejecting the State's insistence that the remark was proper, the Supreme Court declares, "The remark was pure hyperbole, and *ad hominem* personal attack designed to inflame the jury." (Slip Opinion, Page 2). Reversed. *Not yet disposed*.

CRIMINAL PROCEDURE – PROSECUTOR’S PRIOR REPRESENTATION OF DEFENDANT

State v. Wilson, 195 S.W.3d 23 (Mo. App. S.D. 2006)

Defendant was convicted of three counts of possession of a controlled substance. At sentencing, defendant argued for a new trial because of an alleged conflict of interest involving the prosecutor who had previously worked as a public defender, and while doing so, had represented defendant concerning unrelated criminal charges. The trial court denied the request for a new trial and defendant appeals.

Defendant did not reveal during the trial that the prosecutor had once defended her in a prior criminal case. There was no showing of a substantial relation between the cases or that any information used in the previous case was used against the defendant in the present case. Defendant did not allege a conflict of interest until sentencing. “On this record, it was reasonable for the trial judge to infer that he had been sandbagged by the defense.” 195 S.W.3d at 25. Any error was invited, and the appellate court reviews denial of a new trial only for plain error. No conflict of interest and no plain error.

SEARCH AND SEIZURE - FINDING OF CONTRABAND AFTER ARREST

State v. Jackson, 186 S.W.3d 873 (Mo. App. W.D. 2006)

Jackson was convicted of possession of methamphetamine and possession of marijuana within a county jail. His primary point on appeal is that the discovery of the contraband came only after his arrest, which he claims was unlawful.

Jackson was stopped by a deputy sheriff after committing a traffic violation (improper turn). During the traffic stop he tendered his driver’s license but he could not find his insurance card. The deputy called the dispatcher and found there were no warrants. He returned to Jackson’s vehicle and Jackson still had not found a current insurance card. He also appeared nervous. The deputy asked Jackson if there was anything illegal in the truck and whether he could search it, and while unhappy with the prospect of a search, Jackson consented to it.

Upon searching the truck the deputy found a rifle which was not loaded. While discussing the weapon with Jackson, the dispatcher advised the deputy that Jackson was on probation for felony assault. The deputy then arrested Jackson for being a felon in possession of a firearm. He also wrote Jackson traffic citations for failure to signal a turn and failure to provide proof of liability insurance.

While en route to the jail, the deputy informed Jackson that if he had anything illegal in his possession he should disclose it before entering the jail since he could face additional charges if anything illegal was found once they arrived at the jail.

While Jackson was being processed into jail he suffered a “panic attack” or shortness of breath from a physical condition and, while lying on the floor, appeared to have lost consciousness. One of the deputies attending to Jackson asked the arresting deputy if Jackson had been patted down for weapons but no detailed pat down had occurred. Concerned that Jackson might have a weapon in his pants pocket, an officer rolled Jackson over and found two small containers of methamphetamine. Eventually Jackson was dressed in jail clothing and his shirt and trousers were placed in a locker. The following morning it was learned by the arresting deputy that Jackson’s probation was for misdemeanor assault rather than felony assault. Hence, he was not a felon in possession of a firearm.

Later that day Jackson requested a container of lubricant for his glass eye. Such lubricant was said to be in his clothing. When the deputy went to get the requested lubricant, he smelled marijuana in the locker and thereafter found a green leafy substance in a baggie in Jackson’s shirt pocket. Based on his experience he immediately recognized it as marijuana.

Jackson filed a motion to suppress claiming that, because his arrest was the only reason he was in jail, and it eventually turned out to be unwarranted, the methamphetamine and the marijuana would have never been found. However, the police officer testified that Lexington has a policy that all traffic offenders who live outside of Lexington are required to post bond. Jackson lives about ten miles outside of town. Therefore, he was going to be arrested anyway on the two traffic charges and he would be required to post bond. Hence, the deputy having taken him to jail (and the eventual search of Jackson and his clothing) was justified based on the traffic offenses, even though the weapons charge was later dismissed. Both convictions affirmed.

D.W.I. – DRIVING TOO SLOWLY JUSTIFIES POLICE STOP

State v. Wirth, 192 S.W.3d 480 (Mo. App. S.D. 2006)

A deputy was traveling west on Kearney Street in Springfield, Missouri, during the early morning hours. He observed an SUV traveling the opposite direction at a very slow speed with its hazard lights activated. The driver of the SUV was conversing with a female who was walking along an adjoining walkway. The precise nature of the discussion does not appear in the Opinion.

The officer activated his emergency lights and stopped the SUV. When he approached the vehicle he noticed an odor of intoxicants about the defendant’s person. He administered field sobriety tests, after which he arrested defendant for DWI. Defendant was taken to jail where he was questioned, during which inquiry he admitted drinking beer. He tested .090% on the breathalyzer.

Defendant filed a motion to suppress claiming the traffic stop and subsequent arrest were made without any probable cause. The officer testified that defendant’s vehicle was impeding traffic. The Southern District notes that such conduct is violative of Section 304.011 and therefore the deputy was acting within his authority as a police officer when, after observing defendant

driving slowly enough to carry on a conversation with a pedestrian walking alongside the roadway (and having seen one or more cars having to slow down and swing around the defendant's vehicle in order to proceed), the officer was correct to stop the SUV in order to give directions to the defendant. Once the stop was made, presumably the officer could have either told the defendant to get moving at a proper speed or he could have given him a citation.

Inasmuch as the deputy's actions in stopping the vehicle were lawful, the issue of whether there was reasonable suspicion to believe defendant was engaged in any other unlawful activity that would justify the stop is simply moot. But then after the stop was made, probable cause to arrest for an alcohol related offense was developed, and this may be done even after a motorist is otherwise properly stopped without any suspicion of alcohol problems. *Citing State v. Huckin*, 847 S.W.2d 951, 954 (Mo. App. 1993). Thus, the evidence derived by the deputy after the original stop for slow driving was permitted and the conviction is affirmed.

D.W.I. – 20 MINUTES TO CALL LAWYER, NOT BONDSMAN OR FAMILY

***Burdynski v. Director of Revenue*, 192 S.W.3d 483 (Mo. App. S.D. 2006)**

Before being administered a breathalyzer test, the driver was given his statutory 20 minutes to call a lawyer. He called his family instead and they, in turn, called a bondsman. Records prove that the bondsman made a return call to the driver almost exactly 20 minutes later. The bondsman wanted to know if a bond had been set and he was advised that no bond was set. The records further establish that a few minutes later (meaning beyond the allotted 20 minutes) the implied consent law was again read to the driver. At that time the driver declined to take a breath test until he could "talk to a judge." 192 S.W.3d at 485. Thereafter the officer marked the driver down for a refusal. The Director's revocation for refusal was sustained. The rule is that the driver has 20 minutes to call a lawyer, not to call someone else who will call a lawyer.

D.W.I. – TIME TO CALL LAWYER IS STATUTORY RIGHT, NOT CONSTITUTIONAL

***Akers v. Director of Revenue*, 193 S.W.3d 325 (Mo. App. W.D. 2006)**

Akers was arrested for DWI and refused to take the breathalyzer test. The officer had given him 20 minutes in which to do so. In appealing his one year revocation, Akers claims that the trial court erred in upholding the revocation because his refusal to submit to the chemical test was not a knowing and voluntary refusal. His reasoning is that the arresting officer failed to advise that he (Akers) had a right to consult with an attorney.

The appeals court holds that the right to counsel in a case like this is provided by civil statute and is not any kind of extension of *Miranda v. Arizona*. The right to counsel under *Miranda* is absolute and unconstitutional and has no time limit. On the other hand, the right to counsel under Section 577.041 (a civil proceeding) is qualified and conditional in that the driver is entitled to

nothing more than 20 minutes to contact and speak to an attorney. Essentially, there are no guarantees that he can or will speak with counsel. Once the 20 minutes goes by, if the driver continues to refuse to submit to a breathalyzer, he gets revoked. The authority of law enforcement to request the driver to take a chemical test is not conditioned upon advice of *Miranda rights* or being told that he has the right to consult with an attorney.

EVIDENCE – EVIDENCE OF DEFENDANT’S DRUG USE PERMITTED TO SHOW MOTIVE AND RECALL ABILITY

***State v. Oplinger*, 193 S.W.3d 766 (Mo. App. S.D. 2006)**

Defendant was found guilty of robbery in the first degree and armed criminal action. He was found to be a prior offender and was sentenced to 30 years in prison on each conviction, both to run concurrently. On appeal he claims that the trial court erred in allowing the prosecutor to cross-examine him about his use of methamphetamine the night before the robbery occurred. It was held that such evidence was relevant to his ability to recall events, his motive to commit the crime, and was therefore more probative than it was prejudicial. There had also been a waiver by defense counsel because counsel had not included such issue in the motion for new trial. Hence, the review was for one of plain error which was declined by the appeals court.

CRIMINAL PROCEDURE – LESSER INCLUDED OFFENSE INSTRUCTION NOT WARRANTED BY THE EVIDENCE

***State v. Eoff*, 193 S.W.3d 366 (Mo. App. S.D. 2006)**

Defendant was convicted of three offenses: robbery in the first degree, assault in the second degree, and armed criminal action. Because he was a persistent offender he received fifteen, ten and five years, all consecutive.

On appeal the defendant claims trial court error in refusal to instruct the jury on the lesser included offense of second degree robbery and the lesser included offense of third degree assault. It seems the testimony was that the defendant committed the robberies while holding a stick in his hand which was a piece of wood about one inch by two inches in size and 18 inches long. During the course of the robbery the defendant hit the victim over the head with the stick and then poked her with it.

The two robbery counts would require the use of a dangerous instrument during the course of the robbery. The defendant took the position that the stick in question was not a "dangerous" instrument and, therefore, the jury should have been instructed on lesser included offenses. The Court observes that a "dangerous instrument" is any instrument which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. The Court observes that the stick used during this robbery was similar in size and shape to a billy club.

Further, the defendant received a laceration on her head which required five staples to close. Also, there was some chance the second blow may have fractured the victim's hand. Hence, the stick used by the defendant in the commission of the crime did indeed constitute a dangerous instrument and there was no reason under the evidence to instruct on the lesser included offenses.

D.W.I. – CONDITIONAL AGREEMENT TO TAKE BREATH TEST CONSTITUTES REFUSAL

Beach v. Director of Revenue, 188 S.W.3d 492 (Mo. App. W.D. 2006)

Dale Beach was stopped by a police officer for a traffic violation. He did very, very badly on the field sobriety tests. Following that poor performance he was placed under arrest by the police officer who asked Beach to put his hands behind his back to be handcuffed. Beach became belligerent and as a result he received a face full of mace. The officer called for ambulance personnel to assist Beach in relieving the mace's effects. The paramedics at the arrest scene irrigated and flushed Beach's eyes for 15 minutes with sterile water. They also advised the officer to irrigate Beach's eyes later but that was never done. The officer took Beach to the jail and Beach was asked to submit to a breathalyzer test.

After Beach had initially agreed to submit to a breathalyzer test, he declared that he would take the test only if the officer flushed the mace from his eyes and only when he could see the breathalyzer machine. The officer declared this to be a refusal and the Director revoked the driver's driving privileges for one year.

On appeal it was held that the statute provides *only one exception* to implied consent to testing, and that is the 20 minutes duration during which an attempt to reach a lawyer may be made. The assertion of any other condition to the test, including even the washing of mace from one's eyes, constitutes a refusal to take the test.

ELEMENTS OF THE OFFENSE – SEVERAL SMALL THEFTS CONSTITUTE ONE LARGE ONE

State v. Herd, 189 S.W.3d 212 (Mo. App. S.D. 2006)

Circumstantial evidence proved stealing over time. Defendant had worked as a sales clerk at a country store. During the year defendant worked at the store the gross sales increased but gross profits decreased. The store owners began examining all of the cash register tapes and became aware of numerous irregularities whenever defendant was on duty. The irregularities were almost always found to be in small amounts (between \$50.00 and \$100.00 each time). Following several weeks of surveillance, defendant was arrested and charged with felony theft.

While she had been apprehended with only \$85.00 in stolen funds at the time of her arrest, the certified public accountants offered testimony that she had stolen several thousand dollars over the six months prior to the time of the arrest. Evidence of her recurring theft technique (which involved punching in certain void transactions onto a cash register tape), which was shown to have existed over that same six month period, supported the verdict of guilty for stealing a sum in excess of \$750.00. The mere fact that the store owner offered somewhat different estimates of loss than did the CPA does not deprive the state of evidence sufficient for conviction.

CRIMINAL PROCEDURE - PROBATION REVOCATION AFTER EXPIRATION OF PROBATIONARY TERM

***Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006)**

Probationer was notified of pending action to revoke his probation before it expired, but the hearing was not held until after expiration of the original probationary term. On appeal it was held that the movant failed to show that the sentence which was eventually imposed should be vacated due to delays in scheduling the hearing because he failed to show that the delays were unreasonable. "The burden is on [the movant] to show that the delays were unreasonable by showing he was prepared and ready to proceed." 190 S.W.3d at 643.

SELF INCRIMINATION - ARGUMENT DID NOT VIOLATE RIGHT TO SILENCE

***State v. Dorris*, 191 S.W.3d 712 (Mo. App. S.D. 2006)**

Jesse Dorris was arrested by the Jackson Police Department, handcuffed, patted down, placed in a police vehicle and transported to the Jackson police station. Before being placed in the police vehicle, the arresting officer advised defendant of his *Miranda* rights, and defendant indicated that he understood such rights.

Upon arrival at the police station defendant was processed in by station officers during which time the officers and the defendant engaged in conversation that included, among other topics, defendant's criminal history and drug use. The processing officers then left the booking area but warned the defendant that he was under video surveillance. While the officers were out of the room, defendant was observed over the video surveillance equipment to be fidgeting with his right sock. The officers quickly returned to the booking room, inspected defendant's sock, found a hole in the sock and when reaching into the hole, found a bag of methamphetamine. The officer asked defendant, "Jesse, what's this?" to which defendant replied, "Another charge."

At trial, defendant sought to escape liability on the possession charge by claiming that the package containing the methamphetamine which was found in his sock had been actually located on the booking room floor before he came into the room. On closing argument the State argued that the defendant was well aware that he had been caught with narcotics in his sock because of his

awareness that he would be facing “another charge.” The jury found the defendant guilty and he was sentenced to ten years as a prior drug offender.

On appeal, defendant raised the lone point that the trial court plainly erred in permitting the State to argue during closing argument that the jury should infer guilt based on the defendant’s failure to offer an exculpatory statement about the methamphetamine. The prosecutor had argued that when confronted with the dope and the question, “Jesse, what’s this?” the defendant merely said he knew it was another charge. “He didn’t say, no way, what’s going on? That stuff was already here. I was just kicking it around.” 191 S.W.3d at 714.

In affirming the narcotics conviction, the Southern District restates the general rule that the silence of the accused while he is under arrest is not admissible against him because he is under no duty to speak. *Citing State v. Frenzel*, 717 S.W.2d 862, 866 (Mo. App. 1986). The rule is that the failure of an accused to volunteer any kind of exculpatory statement or to deny or explain any alleged incriminating fact - while he is under arrest - is inadmissible. But this rule is inapplicable where the accused waives his Fifth Amendment privilege by making statements while in custody. Dorris had already been given his *Miranda* warnings and he chose to freely converse with the officers. The appeals court observes what when he was asked “Jesse, what’s this?” the defendant responded “Another charge.” The defendant did not remain silent, as was his right.

Reviewing the closing argument of the State in context, it became clear that the State was challenging the veracity of the statement made by the defendant. Given that the defense offered by the defendant was that the controlled substance was *already* in the booking room, the State’s argument was merely undercutting the likelihood or believability of such an account. It did not constitute an impermissible reference to defendant’s right to remain silent. This was true because the defendant had, in fact, failed to remain silent. Instead, he made up a story and the State ridiculed it on closing.

EVIDENCE - CHAIN OF CUSTODY UNNECESSARY

***State v. Gott*, 191 S.W.3d 113 (Mo. App. S.D. 2006)**

Dennis Gott was convicted of possessing methamphetamine. At the time he was arrested the officers removed personal items from his pants pocket, including a small key bob. This was a small white plastic cylinder with a screw top lid sealed with a black gasket with a small triangular piece of metal with a hole in it for a keychain. The officers immediately recognized it as a likely container for narcotics. The deputy immediately locked the key bob in his vehicle and took it to his office where he packaged it in an evidence envelope and sealed it with tape. It was then sent to the lab, opened, tested, re-sealed and re-taped, and sent back to the deputy. The report establishing that the key bob contained methamphetamine was admitted at trial over defense objection, the objection being that there was no clearly defined chain of custody regarding the key bob.

At trial no less than three witnesses identified the key bob and discussed the chain of custody, and each described it as being in substantially the same condition as when they took it from

the defendant. The Southern District notes that "Chain of custody of an exhibit is irrelevant where the exhibit is positively identified at trial." *State v. Gustin*, 826 S.W.2d 409, 417 (Mo. App. 1992). Any possible weakness in the identification of such an object is a proper subject for cross-examination and may be considered by the jury in assessing the weight of the evidence.

In this case the testimony of the witness positively identified the evidence as being "in substantially the same condition as when they last saw it." Such testimony made it unnecessary to establish a full chain of custody. Even if such evidence were necessary, the testimony was sufficient to provide the "reasonable assurance" required. Court holds that the State need not offer "proof of hand-to-hand custody, a showing that the exhibit was continually watched, or proof of the exclusion of every possibility that the evidence had been disturbed." 191 S.W.3d at 116. Affirmed.

CONSTITUTIONAL LAW - SEPARATE DECISIONS TO ASSAULT SUPPORT SEPARATE CHARGES

***State v. Tyler*, 196 S.W.3d 638 (Mo. App. W.D. 2006)**

Roland Tyler was convicted on seven counts involving domestic assault in the first and second degree, and armed criminal action. He was sentenced to a total of 30 years. The facts are these.

Tyler went to the airport to pick up his girlfriend who was returning to Kansas City from New York. The girlfriend noticed that Tyler was sweaty and his eyes were "buggy." Little did she know, her troubles were just beginning.

Tyler accused his girlfriend of cheating on him and began a series of verbal assaults. He then gave her a "karate chop" to the throat while on their way home. He persisted in his rambling accusations that the girlfriend had been unfaithful to him.

When they got to their apartment in the basement of defendant's mother's home, Tyler used two belts to tie the victim's wrists to the ceiling rafters. He then stuffed a sock into her mouth, secured it with a bandana around her head, and punched her twice in the left side of the face, breaking her jaw. He then left the room for a few minutes but returned with some scissors that he used to cut off the victim's clothing. He scraped her skin with the blades of the scissors and then punched her in the chest. He then used electric cords to tie one of her ankles to a support column and the other to a water heater pipe so that she was spread-eagled off the floor and unclothed. He then kicked her repeatedly in the vaginal area. Tyler then left the basement area again to go upstairs, but he gave his victim one more parting shot which caused one of the belts around her wrist to break. When he came back downstairs he found the victim trying to free herself so he punched her in the chin. He removed the gag from her mouth long enough for her to spit out the blood and then he re-secured it. He then told her they were going to play the "truth game." In this game, he explained, he would stab her every time she told him a lie. He then knocked her unconscious with a head butt.

After the victim regained consciousness Tyler was pouring Gatorade on her face and he cut her under her left breast with a knife. Then he sliced her left temple. The “truth game” continued with Tyler stabbing the victim in her left thigh. Finally the gag was jostled out of the victim’s mouth and she screamed. Tyler dropped the knife and ran upstairs, whereupon the victim was able to reach the knife, free herself, and escape. As a result of these multiple assaults by Tyler, the victim suffered severe bruising of her chest and crotch areas, a stab wound to her leg and cuts on her head and chest. She had surgery to repair her broken jaw. She spent two or three weeks at a women’s shelter and underwent psychological counseling and therapy.

Following conviction on all seven counts by a jury and the 30-year sentence, Tyler appeals claiming a double jeopardy violation. His contention is that by entering judgment on multiple counts of assault for a continuous course of conduct involving one victim, his constitutional rights were violated. He essentially argues that the entire incident constituted a mere single assault for which he should not be subject to multiple punishments.

Not so, says the Western District. While it is true that the Constitution prohibits states from imposing multiple punishments for the same offense (*Benton v. Maryland*, 395 U.S. 784 1969), in the context of an assault case, separate offenses can arise from a single set of facts each time the defendant forms an intent to attack the victim. *State v. Childs*, 684 S.W.2d 508, 511 (Mo. App. 1984). If the defendant has an opportunity to reconsider his actions, each assault separated by time is considered a separate offense. *Id.* Similarly, when the charges are based on different acts or a separate *mens rea* is newly formed, the conduct gives rise to an additional crime. *Schofield v. State*, 750 S.W.2d 463, 466 (Mo. App. 1988).

The evidence was sufficient to show that Tyler used at least five different methods (punching, kicking, head butting, stabbing, and cutting/scraping) to assault the victim over an extended period of time. He either left the room or was interrupted from time to time, but he always returned and resumed his violent behavior. At other times he stopped the attacks long enough to explain what else he planned to do to the victim or to amplify on the rules of his “truth game.” In so doing, he clearly demonstrated renewed intent to inflict injury by committing numerous and sequential acts of first and second degree domestic assault. Thus, no double jeopardy violation is found.

CRIMINAL PROCEDURE - DISCOVERY OF CRIME SCENE EVIDENCE

***State v. Slater*, 193 S.W.3d 800 (Mo. App. W.D. 2006)**

Joshua Slater appeals several convictions arising from a high speed vehicular chase departing from a burglary scene. He was sentenced as a prior offender to consecutive terms of seven years on burglary and tampering counts, 30 years on assault on a law enforcement officer in the first degree and armed criminal action, and four years on resisting arrest. Slater claimed at trial that he was not the driver.

The case began with an eyewitness calling the Smithville police to report a burglary in progress at a residence. The witness had observed two men kick in the front door of a house and described yet a third man under the steering wheel of a white SUV parked out front. Smithville police arrived at the scene and the SUV departed in haste. Numerous police officers observed the driver as wearing a leather jacket and being unshaven. After a high speed chase and crash the defendant was apprehended at the scene. He fit the description of all the police officers involved in the chase. His two confederates had been apprehended at the burglary scene.

At trial, Slater took the position that it was not he who was under the wheel but rather, that he was one of the two individuals who kicked in the front door and committed the burglary. At trial one of the Smithville detectives was allowed to testify that scuff marks on the front door of the residence matched the shoes worn by one of the two fellows apprehended at the scene, but did not match those of the other fellow, nor did those marks match the footwear of Slater. This directly controverted Slater's theory of defense that he was one of the door kickers and *not* the driver. Slater claimed that the detective was not competent to offer such testimony and, therefore, its admission by the trial court was erroneous.

Even if the trial court abused its discretion in allowing the detective's testimony, there is "no reasonable probability that the trial court's error affected the outcome of the trial" and, thus, no prejudice because the evidence that Slater was driving the vehicle is overwhelming (even without the detective's scuff mark testimony). The Western District quotes the recent Supreme Court decision establishing that overwhelming testimony of guilt should not be disturbed by an evidentiary mistake that falls short of an abuse of discretion. *See, State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006).

Slater's second point on appeal related to his motion for discovery of crime scene evidence. He had filed a discovery motion seeking fingerprint or footprint evidence and the State advised that there was no such evidence. At trial the detective did not testify about footprints or fingerprints (which had been the subject of the discovery motion). The testimony was merely about the officer's observations regarding the marks made on the front door of the burglarized residence and how they matched only one pair of the shoes worn by the three persons believed to have been involved. It was simply not about footprints. Such evidence was in rebuttal to Slater's defense that he was not the driver of the SUV but rather it was he who had burglarized the residence. The Court notes that the State is normally under no obligation to disclose rebuttal witnesses or any item of physical evidence that rebuts a defendant's theory of defense. *Citing State v. Clark*, 975 S.W.2d 256, 263 (Mo. App. S.D. 1998). The only exceptions to the general rule are where the witness or physical evidence is presented to rebut an alibi defense or a defense of mental disease or defect. The detective's testimony was rebuttal evidence, and it did not qualify under one of the exceptions set forth in *Clark*. All convictions affirmed.

SENTENCING - SENTENCE NOT BASED ON REFUSAL TO CONTEST

***State v. Palmer*, 193 S.W.3d 854 (Mo. App. S.D. 2006)**

Palmer was convicted of first degree robbery and sentenced to 13 years in prison. He challenges the sentence claiming that the trial court sentenced him more harshly than usual based on his refusal to admit guilt in the sentencing phase of the proceeding. Sentence affirmed.

During sentencing the trial court stated that, “It is pretty disturbing to see you still not taking responsibility for that second robbery.” 193 S.W.3d at 856. Defendant claims that this statement indicated that the Court imposed a harsher sentence because he did not admit guilt in the sentencing phase. Southern District notes that it is fundamental that one convicted of a crime must not be subjected to a more severe punishment simply because he or she exercised a constitutional right, citing *Vickers v. State*, 17 S.W.3d 632, 635 (Mo. App. S.D. 2000). The leading case on this point is *Mitchell v. United States*, 526 U.S.314 (1999) where the Supreme Court held that the right to be free from self-incrimination extends also to sentencing hearings.

But since the range of punishment in this case was from ten to 30 years, and there were other extenuating factors (such as using weapons during parts of his criminal history, five misdemeanor convictions and 20 traffic convictions), it was clear that the trial court took into account numerous factors in settling on a sentence of 13 years. There was no abuse of discretion in the 13-year sentence. Sentence affirmed.

CRIMINAL PROCEDURE – COURT’S *SUA SPONTE* CONVICTION FOR LESSER INCLUDED OFFENSE PERMISSIBLE

***State v. Neher*, _____ S.W.3d _____ (Mo. banc , SC87860, January 9, 2007)**

Neher was charged with five different drug offenses. The trial court found Neher guilty of four of the five as charged, and found him guilty of a lesser included offense with respect to the fifth charge. The charge in question was originally lodged as possession of narcotics with intent to distribute. The Court found the defendant not guilty on that fifth count because there was a failure of proof as to the intended distribution. However, it was clear that Neher was in possession of the drugs in question. Therefore, the Court found him guilty on the lesser included, and indeed, uncharged lesser offense.

In affirming that action, the Supreme Court states that “The Court had the inherent power to convict Neher of the lesser-included possession offense, even if neither party asked the Court to do so.” The Court cites *State v. Kohser*, 46 S.W.3d 108, 111-13 (Mo. App. 2001). The defendant took the position that when the trial court found him not guilty of the fifth charge, such finding ended the matter and the Court could not thereafter find him guilty of the lesser-included offense. But the Supreme Court notes that a not guilty finding with respect to a charge that included a requirement for proof of intent to distribute did not preclude a guilty finding of the possession charge without

intent to distribute. The Court quotes *State v. O'Dell*, 684 S.W.2d 453, 465 (Mo. App. 1984) as standing for the proposition that double jeopardy does not bar a determination of guilt of a lesser-included offense in the same trial. Hence, no error. *Mandate issued February 27, 2007.*

EVIDENCE – DEFENDANT OPENED THE DOOR AS TO HIS CHARACTER

***State v. Tabor*, 193 S.W.3d 873 (Mo. App. S.D. 2006)**

Defendant was charged as a prior and persistent offender for unlawful use of a weapon. He was found guilty and sentenced to seven years. It seems that defendant had agreed to repair the transmission of a lady, but he never did the job even though he was paid the \$500.00. When confronted by the woman wanting either the money back or the transmission repaired, Tabor armed himself with a shotgun and began waving it and poking it in the face of everyone in the room, which included the lady who wanted her van repaired and others. Defendant was quite inebriated at the time and, after pointing the shotgun at everyone in the room and threatening the life of all of them, he finally sat down and passed out. The frightened bystanders took the shotgun away and hid it. For this behavior defendant was charged with knowingly exhibiting the shotgun in an angry or threatening manner.

At trial defendant denied the facts of the occurrence. Defense counsel knew his client had two prior felonies so he sought to de-fuse them by bringing them out on direct examination. But on cross-examination the prosecutor also established a prior DWI and no less than 46 other misdemeanors in the defendant's criminal past. But the prosecutor made his most important points in response to defendant's direct examination testimony that he was "an animal lover." He made that self-serving declaration during his direct examination testimony explaining how he had happened to come into possession of the shotgun. The details are not important for this discussion, but he certainly held himself out as "an animal lover."

When reminded of that declaration on cross-examination, the defendant responded "Yes, I love animals very much." What the defendant was unable to refute, however, was that he had been convicted in the very same courthouse the previous day for felony animal abuse. The defense objected to the animal abuse inquiry, but the trial court overruled the objection stating that the defendant had opened the door to his character and in particular, his character regarding being a so-called "animal lover."

Note: To digress briefly, it is interesting to learn that the Southern District affirmed Tabor's felony animal abuse conviction six weeks after the affirmance in this case. See *State v. Tabor*, 197 S.W.3d 247 (Mo. App. S.D. 2006). A brief review of that later affirming opinion indicates that Tabor sought to halter break a nine month old colt by dragging it behind a van and causing the horse's hooves and bones to be worn all the way into the joint. Even though the prosecutor did not attempt to place those grisly details before the jury, he certainly emphasized the animal abuse conviction from the previous day on closing argument.

In approving of the allowance of the testimony and argument about the felony animal abuse conviction, the Southern District affirms that where a defendant refers to a subject, even in a general way, he subjects himself to be cross-examined about that subject. *State v. Foulk*, 725 S.W.3d 56, 70 (Mo. App. 1987). Defendant claimed it was improper for the prosecutor to be able to refer to the conviction in the animal abuse case from the previous day because the appeals process in that case had not yet run its course. The Southern District responds, however, in Footnote 5 by citing Section 491.050, RSMo, which provides that any prior criminal case as well as any prior pleas of guilty, pleas of *nolo contendere*, and *findings of guilty* may be proved to affect [the defendants] in a criminal case. (Emphasis the Court's). 193 S.W.3d at 879, Footnote 5. Conviction affirmed (as was the conviction in the animal abuse case as well).

EVIDENCE – PERMISSIBLE REHABILITATION OF WITNESS BY PRIOR CONSISTENT STATEMENTS

***State v. Robinson*, 194 S.W.3d 379 (Mo. App. W.D. 2006)**

Defendant appeals his conviction for robbery in the second degree, claiming plain error in the admission of allegedly improper hearsay offered by the state. The case began when Robinson approached a cashier at a convenience store (apparently a prior acquaintance of his) suggesting to her that she refrain from making her safe drop (which would normally insulate large denomination bills from robbers) and he would then come stage a robbery and later split the money with her. The agreed-upon robbery took place a few days later while the store clerk was in the back of the store. The defendant was eventually apprehended. During the investigation the clerk initially denied her involvement in the robbery, but later gave a statement to the detective admitting her involvement in the robbery and also implicating Robinson. The clerk was then charged with robbery in the second degree - but lesser charges were lodged in exchange for her testimony at trial.

During the course of the trial the clerk's credibility had been attacked by defense counsel on cross-examination when he implied that the clerk was fabricating her testimony in exchange for the reduced charge from robbery to stealing without consent. Then when the detective was on the witness stand he was asked what the clerk had told him about the robbery, whereupon defense counsel objected on the grounds of hearsay. That objection was overruled. It is this challenged and allegedly hearsay testimony that is the subject of the appeal.

Defendant argues that the trial court erred in failing to declare a mistrial upon the introduction of the detective's testimony because such testimony improperly bolstered the witnesses credibility since it duplicated and corroborated her testimony when she had not been impeached.

Western District holds: Judgment affirmed. The detective's testimony was properly introduced as a prior consistent statement offered for the purpose of rehabilitating the witness

whose credibility had been attacked on cross-examination when defense counsel argued that the witness had fabricated her testimony in exchange for a reduced charge. The introduction of the detective's testimony for rehabilitation purposes was not an evident and obvious error, and no manifest injustice occurred.

The rule is that "Prior consistent statements are admissible for the purpose of rehabilitating a witness whose credibility has been attacked by an express or implied claim of recent fabrication. . . ." *State v. Ramsey*, 864 S.W.2d 320, 329 (Mo. banc 1993). "Statements consistent with trial testimony given before the corrupting influence to falsify occurred [i.e., before the favorable plea offer was made] are relevant to rebut a claim of contrivance." *Id.*

CONSTITUTIONAL LAW - BUSINESS RECORDS AFFIDAVIT VIOLATES SIXTH AMENDMENT

***State v. March*, _____ S.W.3d _____ (Mo. banc, SC87902, March 20, 2007)**

Defendant appeals his felony conviction for drug trafficking in the second degree. He contends on appeal that the trial court erred in overruling his objection to the admission of a laboratory report. In making this argument defendant relies on *Crawford v. Washington*, 541 U.S. 36 (2004) for the proposition that his inability to cross-examine the person that conducted the test and authored the report on the narcotics rendered the report inadmissible under the Confrontation Clause. The report had been offered and admitted under Section 490.680, RSMo (commonly referred to as the business records exception).

In reversing the conviction, the Supreme Court first observes that pre-*Crawford* Missouri case law has held that laboratory reports prepared by an unavailable declarant are admissible against the defendant over a Confrontation Clause objection because they fall under the business records exception to the hearsay rule. Quoting *State v. Taylor*, 486 S.W.2d 239, 242-43 (Mo. 1972). The State had argued that there was *dicta* in *Crawford* noting that certain hearsay exceptions had existed in 1791, such as the business records exception, and that they were by their nature non-testimonial. *Crawford*, 541 U.S. at 56.

But our Supreme Court points out that merely qualifying within a hearsay exception does not resolve the Confrontation Clause issue because *Crawford* divorced the hearsay exceptions from the Confrontation Clause analysis. The key issue in this case is whether the laboratory report was "testimonial" under *Crawford*. While not specifically defined in *Crawford*, the United States Supreme Court further elaborated on "testimonial" statements in *Davis v. Washington*, 126 S.Ct. 2266, 2273-74 (2006). In *Davis* the issue was whether or not statements made during a 911 call were "testimonial." Just as was seen in *State v. Kemp*, page 51 supra, the determinative factor in 911 call evidence is whether the declarations were elicited for purposes of assisting the police in responding to a then ongoing emergency (in which case they would be admissible) or whether those responses were elicited for the primary purpose of seeking to establish the elements of the offense for presentation at a later trial (in which case they would be

inadmissible). The Missouri Court rules that a laboratory report (like the one at issue here) which was prepared solely for prosecution to prove an element of the crime charged (i.e., that it was, *in fact*, a controlled substance) is testimonial evidence because it bears all the characteristics of an ex-parte affidavit. It was indeed created for the specific purpose of prosecuting a criminal defendant.

Of interest here is whether or not this case would have an impact on the Department of Revenue's driving record statute seen in Section 302.312. Under that statute a defendant's driving record properly certified by the custodian thereof is admissible in all courts of the state and in all administrative proceedings. It would appear that this statute would likely survive a *Crawford/Davis* challenge for the following reason. The records that would be the subject of the evidentiary offer under Section 302.312 were prepared by the Department of Revenue *in each and every case* as to *each and every individual* holding a Missouri driver's license. Such records were not and never have been prepared exclusively *for the prosecution of the particular defendant in question*. In short, such records are essentially a continuously maintained database of the driving records of all individuals holding a Missouri driver's license. They were not prepared for the specific purpose of prosecuting any particular driver. Thus, it appears that a reasonable distinction can be drawn between the Department of Revenue's business records statute and prosecution offers made at trial under Section 490.680.

EVIDENCE - IMPEACHMENT ON PENDING CHARGES NOT PERMITTED

***State v. Fry*, 197 S.W.3d 211 (Mo. App. S.D. 2006)**

Fry was convicted of first degree robbery, kidnapping, two counts of assault in the second degree, and first degree burglary. He was sentenced as a prior and persistent offender. He raises one point of trial court error.

Defendant and a confederate broke into the apartment of two female victims for the purpose of robbing them. They tied the victims up, physically abused them, and shocked them both with a stun gun. They then threatened to cut the victims' throats if they did not allow the defendants a safe getaway. Fry and his cohort were arrested within a matter of hours and thereafter Fry was convicted of the above referenced charges.

During the course of defendant's trial, defense counsel sought to cross-examine one of the victims based on the pendency of unrelated criminal charges in that same jurisdiction that were being prosecuted by the same prosecutor who was handling the defendant's case. The argument was that there was a "possible motivation" for the witness to testify in favor of the State. The trial court denied defense counsel the right to cross-examine the witness regarding these pending criminal charges.

Generally, "The credibility of a witness may not be attacked by showing his arrest and a pending charge which has not resulted in a conviction." *Citing State v. Lockhart*, 507 S.W.2d 395,

396 (Mo. 1974). There are three major exceptions to this rule: (1) where the inquiry shows a specific interest of the witness, (2) where it shows a possible motivation of the witness to testify favorably for the government, or (3) where it shows the testimony of the government witness was given in expectation of leniency. *State v. Franklin*, 16 S.W.3d 692, 695 (Mo. App. 2000). In this case the witness was facing charges for possession of a controlled substance but it was wholly unrelated to anything involving Fry. The prosecutor assured the trial court that no deals had been made for the witness' testimony, and the trial court granted defense counsel permission to conduct *voir dire* of both victims pertaining to the first victim's pending charges. The *voir dire* revealed nothing that caused the trial court to allow defense counsel to pursue his pending charge inquiry. The Southern District holds that on the record below there was simply no evidence tending to suggest any likelihood or reason to believe that the witness would alter her testimony. Affirmed.

CONSTITUTIONAL LAW - CROSS EXAMINATION DURING VIDEO TAPING IS SUFFICIENT CONFRONTATION

***State v. Griffin*, 202 S.W.3d 670 (Mo. App. W.D. 2006)**

Griffin appeals his conviction for one count of statutory rape in the first degree, three counts of incest, statutory sodomy in the first degree and two counts of child molestation in the first degree. He raises two points on appeal.

Griffin's first point is a violation of his right to confrontation under *Crawford v. Washington* because the minor child victim did not testify in person at trial. Prior to trial the State had filed a motion to permit the minor to testify by videotaped deposition, all in accordance with Section 491.680, RSMo. The State also filed a motion to exclude the defendant from the deposition proceedings under Section 491.685 based on the likelihood of significant emotional or psychological trauma that would result from the child testifying in the personal presence of the defendant. The deposition was eventually videotaped with defendant's counsel present and available to cross-examine the minor child. The deposition was offered at trial in lieu of live testimony in accordance with Section 491.680. The trial court overruled Griffin's Confrontation Clause objection. The Western District finds that defendant's prior opportunity to cross-examine the minor is dispositive of the case. Basically Griffin contended that it wasn't enough that his attorney was present at the videotaped deposition but rather, he felt that he himself should have been allowed to confront the witness face to face. The Western District observes that while *Crawford* set the requirements for testimonial hearsay in a criminal trial, that case did not directly address testimonial hearsay in a child abuse case. But that issue was indeed addressed in *Maryland v. Craig*, 497 U.S. 836, 845 (1990). In *Craig* the Maryland statutory procedure permitting child victims to testify at trial outside the presence of the defendant, judge, and jury by one-way closed circuit videotape was declared constitutionally sound. *Maryland v. Craig*, 497 U.S. at 860. Relying on *Maryland v. Craig*, the Missouri Supreme Court in *State v. Naucke*, gave its approval to the deposition procedure found in Chapter 491 (829 S.W.2d 445, 453) (Mo. *banc* 1992). The Western District concludes that "the Missouri Supreme Court's decision in *Naucke* is based on the United

States Supreme Court decision in *Craig* and with the continued viability of *Craig, Naucke* remains viable as well.” 202 S.W.3d at 681. Hence, there was no Confrontation Clause violation. Convictions affirmed.

EVIDENCE - EVIDENCE OF UNCHARGED BAD ACTS PERMITTED

State v. Brede, 198 S.W.3d 645 (Mo. App. S.D. 2006)

Defendant appeals his conviction for class B felony assault, armed criminal action, and class D felony unlawful use of a weapon. In his sole point on appeal, defendant maintained that the trial court abused its discretion in overruling his objection to “evidence of methamphetamine related activity” which was shown to the jury by way of a video taped statement of defendant. Defendant maintained he was not charged with any drug offenses and that the probative value of the drug evidence was outweighed by the prejudicial impact of the evidence of uncharged crimes.

Southern District states that the general rule is that evidence concerning other uncharged crimes, wrongs or acts is generally not admissible for the purpose of showing the propensity of the defendant to commit such crimes. However, the evidence may be admitted if it tends to establish motive, intent, absence of mistake or accident or a common scheme or plan. Southern District held that the statements by defendant on the tape were probative of a possible motive for shooting the victim, and also probative of appellant’s intent to carry out the assault. Further, the video statements were probative of showing an absence of mistake or accident on the part of the defendant when he shot the victim. The evidence elicited on the tape relating to “methamphetamine related activity” was logically and legally relevant. Conviction affirmed.

D.W.I. - STATE REGULATIONS OVERRIDE MANUFACTURER'S INSTRUCTIONS

Blazier v. Vincent, 204 S.W.3d 658 (Mo. App. W.D. 2006)

Blazier’s driving privileges were revoked for excessive BAC. At trial *de novo* the Circuit Court reversed the Director’s revocation finding that the Director failed to establish that the driver’s BAC exceeded the legal limit because the maintenance test results of the DataMaster used to test Ms. Blazier’s BAC were invalid and unreliable. The Western District reverses, finding that the Director had indeed presented a *prima facie* case. But since the proceeding in the lower court had stopped with the Circuit Court’s contrary conclusion, the driver was not called upon to adduce any evidence to rebut the Director’s *prima facie* case. Therefore, the judgment is reversed and the cause remanded to give the driver an opportunity to rebut the Director’s *prima facie* case.

At trial the driver objected to the introduction of the BAC test results on the ground that the DataMaster used in her case was not properly maintained. In particular, one of the three test readings during the maintenance check came in at .096. The manufacturer of the simulator solution

used to calibrate these machines certified that its solution should produce readings of .10, with a range of error of plus or minus .003. Hence, the driver argued that because the machine produced a reading outside of what the manufacturer certified that the solution should produce, the machine was not functioning properly and therefore should have been taken out of service.

The trial court agreed with that argument, but allowed the Director to make an offer of proof, during which the Type II permit holder for the Director testified that the machine was functioning within Department of Health guidelines. Those guidelines allow for readings within plus or minus .005 of .10. Using this acceptable range of tolerance, the .096 reading challenged by Ms. Blazier would have been acceptable. The Western District rules that, “Regardless of the manufacturer’s certified range of error regarding its simulator solution, if the Director presents evidence that the relevant instrument operates within regulatory guidelines, then a proper foundation has been laid that the device is approved.” 204 S.W.3d at 664 (quoting *Reckner v. Fischer*, 121 S.W.3d 296, 302 (Mo. App. W.D. 2003).

CRIMINAL PROCEDURE - PROSECUTOR MAY COMMENT ON DEFENDANT'S FAILURE TO JUSTIFY ACTIONS

***State v. Davis*, 201 S.W.3d 141 (Mo. App. S.D. 2006)**

Defendant was convicted of (1) the class A felony of first degree assault and (2) armed criminal action. He was sentenced to consecutive terms of life and 20 years imprisonment. Defendant appealed contending the state during closing argument improperly commented to the jury on the defendant’s failure to testify.

The case arose when the defendant, armed with a pistol, went into the kitchen of his neighbor’s house where he sat down at the table with his neighbor, the victim, and the victim’s wife. After a few moments the neighbor and the victim’s wife left the kitchen - leaving the defendant and the victim alone. The shooting occurred ten seconds after the others had departed from the room.

After the shooting the defendant left the scene but was later apprehended nearby by police officers. Upon being arrested he acknowledged an awareness as to why the police were there, stating that he and the victim had been friends for a long time, that the victim had angered him, and that he had shot the victim. Nothing was said at that time by way of self-defense or any other justification.

During his closing argument, the prosecutor had stated “... because of defendant’s statements after the fact about exactly what happened, ... you never heard defendant say to anybody, you know what, he [the victim] threatened me, so I shot him. You know what, he pulled a knife on me, so I shot him. There was nothing.” 201 S.W.3d at 143-144. Defense counsel asked for a mistrial and a curative instruction, both of which were denied.

Southern District holds there was no error in the trial court's action because the prosecutor's comments were neither direct nor indirect references to defendant's failure to testify. Southern District stated, "... the prosecutor's comments here were not improper references to Defendant's failure to testify. In looking at the prosecutor's comments in context, it is clear that he was commenting on the remarks Defendant made to officers when he was being arrested, and not on Defendant's failure to testify." 201 S.W.3d at 145. Defense counsel argued that defendant had no reason to shoot the victim, so something must have happened in those 10 seconds while victim and defendant were alone. In rebuttal, the prosecution merely argued that the comment made by defendant to officers was consistent with the victim's testimony.

In addition, the Southern District observes that "Defendant's statement [to the officers] had been properly introduced in evidence and the prosecutor was entitled to comment on it, and to ask the jury to draw inferences [from the content] of the statement." 201 S.W.3d at 145. Quoting *State v. Burrell*, 944 S.W.2d 948, 952 (Mo. App. W.D. 1997). Conviction affirmed.

SEARCH AND SEIZURE - STOP NOT TERMINATED UNTIL TICKET WRITTEN

***State v. Jones*, 204 S.W.3d 287 (Mo. App. S.D. 2006)**

Defendant was convicted of a class B felony of possession of methamphetamine. The court imposed a 3½ year sentence, suspended the execution of said sentence, and placed defendant on probation for 5 years. Defendant argues on appeal that his conviction should be reversed. One reason for reversal urged by the defendant was that the evidence discovered during the search of defendant's truck was discovered only after the defendant had been detained longer than necessary to complete a routine traffic stop.

The officer had stopped the defendant's vehicle for failure to use his turn signal. The officer determined that he would end the traffic stop when he received all requested information from the dispatcher. Defendant gave his consent to search the vehicle approximately 30 seconds after the final transmission from the dispatcher, but he was still seated in the patrol car and had not been given his traffic citation when he consented to the search. "As long as the officer is investigating [the driver's license, registration, proof of insurance, questioning the driver about his purpose and destination], running a computer check, and issuing a warning or citation, the officer may continue to conduct a reasonable investigation of the traffic violation by conversing with the driver." *State v. Maginnis*, 150 S.W.3d 117, 120 (Mo. App. 2004) A routine traffic stop is not concluded until the warning or citation is issued." 204 S.W.3d at 292. Conviction affirmed.

DWI - NO BREATHALYZER TEST REQUIRED FOR CONVICTION

***State v. Hall*, 201 S.W.3d 599 (Mo. App. S.D. 2006)**

Defendant appeals his conviction for driving while intoxicated. Defendant asserts on appeal there was insufficient evidence to prove he was under the influence of alcohol at the time he operated the vehicle. Specifically, defendant asserts that just prior to his arrest, he was involved in a vehicular accident such that the supposed indicia of intoxication observed by the investigating officer was the result of disorientation from the accident and not, in fact, evidence of intoxication.

Southern District affirms. Testimony of driver's physical condition, without any measure of blood alcohol content was enough to support a conviction when there was no evidence to show that driver's symptoms were the result of a wreck. Arresting officer testified he detected a strong odor of intoxicants emanating from defendant's person, the defendant's speech was slurred, and his whole body was swaying in a circular motion. Further, that defendant's eyes were bloodshot, that he failed the HGN test, that he fell over during the HGN test, that there were empty beer bottles in defendant's vehicle, and that defendant admitted to drinking that evening. Arresting officer related that *some of* the symptoms exhibited by appellant could have been consistent with someone who had just been in an accident, but he pointed out that defendant also had "the odor, the slurred speech, the swaying, the failure of the HGN test," - all of which were indicia of intoxication.

ELEMENTS OF THE OFFENSE - ACCOMPLICE LIABILITY AFFIRMED

***State v. Hicks*, 203 S.W.3d 241 (Mo. App. S.D. 2006)**

Here the evidence supported an inference that the defendant's partner had intended to rob the victim and therefore the evidence supported a conviction under accomplice liability without proof of the defendant's knowledge that the partner had a weapon. Held that the defendant need "not personally commit every element of the crime" to be convicted - just that he had an "affirmative participation in aiding . . . the crime." 203 S.W.3d at 244.

QUERY: Is an ordinance as to accomplice liability a requirement in a case such as this, or can a municipal court convict one under an accomplice theory without an accomplice ordinance? A specific ordinance is probably not necessary. As noted by the Southern District in this case, "The law of accessory liability emanates from statute, as construed by the courts." *State v. Barnham*, 14 S.W.3d 587, 590 (Mo. *banc* 2000). Furthermore, Section 562.041.1(2) provides that a person is criminally responsible for the conduct of another when either before or during the commission of an offense, with the purpose of promoting the commission of an offense he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense. 203 S.W.3d at 244.

Missouri no longer recognizes a distinction between principals and accessories. *State v. Wurtzberger*, 40 S.W.3d 893, 895 (Mo. banc 2001). Therefore, all persons who act in concert to commit a crime are equally guilty. *Id.*

DWI - INSUFFICIENT EVIDENCE OF OPERATION OF VEHICLE

***State v. Chambers*, 207 S.W.3d 194 (Mo. App. S.D. 2006)**

Defendant was convicted of felony DWI. On appeal, defendant contends there was insufficient evidence to support a determination that he was physically operating a motor vehicle. When the police found him, defendant was slumped over the steering wheel with the keys in the ignition and the windshield wipers operating. However, the engine was not running, and neither the passenger compartment nor the engine was warm. The headlights were not on, and the vehicle was not defendant's vehicle. Defendant refused to discuss with the police anything pertaining to the matter of who had been driving the vehicle.

On appeal, the Southern District holds there was insufficient evidence of the defendant's operation of a vehicle in an intoxicated state. Further, the defendant's decision not to say anything about whether he was driving did not indicate a consciousness of guilt, but rather, merely an exercise of his right to remain silent. Conviction reversed.

This is another one of those interesting cases involving a drunk who was asleep and slumped over the steering wheel of a car. Operating or not? Since the headlights were not on and the engine was not running, the felony conviction here was reversed. One thing is certain. If the engine is running, the driver is "operating". This is made clear in *Cox v. Director of Revenue*, 98 S.W.3d 548 (Mo. banc 2003). *Cox* has established a bright line test that if the key is in the ignition and the engine is running, the driver is "operating" the vehicle (even if asleep or unconscious).

DWI - EVIDENCE SUFFICIENT TO ESTABLISH OPERATION OF VEHICLE

***State v. Mitchell*, 203 S.W.3d 246 (Mo. App. S.D. 2006)**

Defendant was convicted of misdemeanor DWI. Defendant contends on appeal there was insufficient evidence to prove beyond a reasonable doubt that defendant was operating his vehicle while intoxicated. Southern District affirms. "Operating" means controlling a vehicle's functions. Because the brake lights and power accessories were on when the defendant was in the driver's seat, trial court could have found that "defendant was operating his vehicle ... and was on the cusp of driving." 203 S.W.3d at 253. The defendant's contention that the State could not convict if the vehicle was motionless is without merit. The Court cites *Cox* (mentioned in the preceding case discussion) and other cases where the vehicle was motionless but the violation

still existed. And there was evidence that Mitchell had his engine running at least part of the time the officer was in the area. Competing inferences from the evidence are for the trial court to resolve.

Comment: The *Mitchell* opinion is a detailed compendium of most of the controlling decisions in the cloudy area of what constitutes “operation” of a motor vehicle. It would probably be a good starting point for research in any case where that issue is contested.

EVIDENCE - POSSESSION OF IDENTICAL WEAPON RELEVANT TO CHARGES

State v. Miller, 208 S.W.3d 284 (Mo. App. W.D. 2006)

Miller was convicted of first degree robbery with a deadly weapon. On appeal he argues that the trial court abused its discretion by admitting into evidence a gun found in a car parked outside his home.

It seems that Miller and two accomplices robbed a convenience store, but their performance was caught on videotape. Miller wore a mask during the commission of the robbery. He and one of his accomplices used two identical silver semi-automatic handguns in the robbery. A perceptive witness (and the security cameras) captured images of the masked man’s distinctive Nike Air Jordan shoes. About two weeks later the police captured one of Miller’s accomplices who told the authorities that Miller was the masked robber. Miller was arrested at his home and searched where the Nike Air Jordan shoes were found. Police also found several nine-millimeter rounds and one expended cartridge in his bedroom. Police found an envelope in the bedroom addressed to Miller which contained the title to the vehicle in Miller’s driveway. A search of that vehicle revealed a silver nine-millimeter Ruger semi-automatic handgun, consistent with the statements and videotape from the robbery. In fact, one of the accomplices also said the gun was “identical” to the gun used in the robbery. The expended shell casing found in Miller’s bedroom matched the gun found in the vehicle.

In his defense, Miller offered evidence that one of the co-conspirators lived with him and had access to the vehicle, his shoes and the bedroom. During trial he challenged the admission of the gun into evidence.

The Western District holds that the admission of the gun was proper. A gun similar (if not “identical”) was used in the robbery and it was found in a place under Miller’s control which makes his identity as the masked robber more likely. The Court notes that identification of weapons doesn’t need be unequivocal; however, a sufficient foundation must be laid that the gun introduced is the gun used in the crime. “Weapons are admissible into evidence even though they are not directly connected with the defendant when they bear on the crime with which he is charged . . . Positive proof or unqualified identification is generally not required.” 208 S.W.3d at 288, citing *State v. Young*, 701 S.W.2d 490, 496 (Mo. App. E.D. 1985). Thus it was ruled that the State had laid sufficient foundation to introduce the gun, tying it to Miller and to the crime. An important

point was that the gun found in the vehicle outside Miller's house had fired the round matching the spent cartridge found in Miller's bedroom.

An additional point raised by Miller was a challenge to the trial court having allowed the prosecution to ask a number of leading questions of the witnesses. The appellate court notes that trial courts have great latitude in allowing and forbidding leading questions. *Lewis v. State*, 767 S.W.2d 49, 53 (Mo. App. W.D.1989). Convictions will be overturned only if the trial court's decision constituted an abuse of discretion and prejudiced the defendant. *State v. Thomson*, 705 S.W.2d 38,40 (Mo. App. E.D. 1985). Reviewing court finds no error in permitting leading questions in this case. Conviction affirmed.

ELEMENTS OF THE OFFENSE - RESISTING ARREST CONVICTION REVERSED

State v. Redifer, _____ S.W.3d _____ (Mo. App. W.D., WD65665, December 26, 2006)

Defendant was originally charged with DWI and driving while revoked. He had been convicted and sentenced, but was under orders to return to court (perhaps to pay fines or costs, or for failure to complete other requirements of the earlier court order). He failed to appear in court as required, and he was thereafter charged with such failure. Later he fled from an attempted arrest on the failure to appear warrant and as a result of such flight, he was charged with resisting arrest. He was convicted of that charge but on appeal the conviction was reversed because a resisting arrest charge can only be established if the resistance is in connection with an attempt to arrest for a "crime, infraction, or ordinance violation." The Court of Appeals notes that failure to appear is not a crime unless it was done willfully while on bond. The State had failed to show that the defendant's failure to appear was a willful failure which was a requirement under the statute cited in the charging instrument. Hence, the resisting arrest conviction is reversed and the defendant was discharged. *Application for transfer filed in Supreme Court on February 14, 2007.*

ELEMENTS OF THE OFFENSE – NO VALID CONSENT FROM INEBRIATED VICTIM

Lawrence v. State, 209 S.W.3d 515 (Mo. App. S.D. 2006)

Defendant entered a guilty plea to first degree domestic assault. At the guilty plea hearing he outlined for the Court the details of the injury to the victim. According to the defendant's account, the victim's most serious injuries were sustained during rough sex between him and the victim. He admitted that he had been drinking on the night in question but not nearly so much as the victim. He admitted that his victim ". . . was drunker than a lizard. The test result showed .30, that's pretty well on the way." Defendant further described that, after the injury occurred during the sexual activity, and when the victim complained about her injury, he struck her in the face a few times for making such complaints. The Court accepted the guilty plea and sentenced the defendant. Defendant thereafter sought to vacate the sentence based on his claim that he had really just been

engaged in unusual sexual activity; that he did not have the requisite intent to be guilty of an assault and therefore, the court's acceptance of the defendant's guilty plea was improper.

Defendant also took the position that the victim had assented to the abuse, overlooking the fact that she was quite intoxicated at the time. The trial court disagreed, and in denying the motion to set aside the guilty plea observed that, even though he said he took his actions in furtherance of some type of sexual activity, there is no dispute that defendant acknowledged that he did so purposely and knowingly. The record indicated that the defendant clearly understood and admitted at the time of the plea that his actions had caused injury to the victim resulting in bleeding and hospitalization. The trial court stressed the defendant's awareness of his conduct and the voluntary nature of it. The trial court findings did not specifically address the intoxicated state of the victim.

The appeal point was that the guilty plea must fail because the physical injury to the victim was consensual – that she agreed to the activity. In rejecting that notion, the Southern District notes that, while in limited circumstances consent is a defense to any degree of assault charge, nothing in the record before the Southern District suggests that the victim consented to being injured by the defendant. Hence, the victim's claimed assent to the defendant's conduct could not be regarded as valid, given her hopeless state of inebriation. Affirmed.

SEARCH AND SEIZURE – SEARCH OF *ENTIRE* VEHICLE PERMITTED

***State v. Irvin*, 210 S.W.3d 360 (Mo. App. W.D. 2006)**

Defendant was charged with felony possession of marijuana. Defendant moved to suppress the use of the marijuana as evidence, which the trial court granted in part. State appeals the order suppressing evidence.

Defendant had been stopped for speeding by a Platte County deputy sheriff who detected a strong odor of alcohol emanating from the car. Officer conducted a field sobriety test on defendant who failed it and who refused to complete other tests. Thereafter, defendant was arrested. Another officer arrived on the scene and the car was searched, which revealed a small baggie of marijuana in the pocket of a duffle bag sitting on the passenger side and another small baggie of marijuana in a tin container in the center console.

Shortly thereafter, the officer unlocked the trunk and discovered a large bag of marijuana. Defendant was then charged with felony possession. Defendant filed a motion to suppress. Trial court suppressed the marijuana found in the trunk but not the marijuana in the passenger compartment. State appeals.

Western District holds that where the search of the passenger compartment of the car incidental to arrest revealed small amounts of contraband, such discovery provided probable cause to search car's trunk, whether immediately or after impoundment. A delayed search of the vehicle, even if it is in police custody, can be justified by showing the initial existence of

probable cause to search the entire vehicle. Order sustaining motion to suppress is reversed. *Mandate issued February 1, 2007.*

ELEMENTS OF THE OFFENSE - INTENT TO DEPRIVE OWNER OF PROPERTY

State v. Martin, ____ S.W. ____ (Mo. App. W.D., WD65989, January 23, 2007)

In this case the defendant was charged with theft of a motor vehicle. The evidence was that he abandoned the vehicle not long after taking it. The defendant points to the short amount of time he used the car before abandoning it as evidence of his lack of intent to deprive the owner of it permanently. In short, he points to a temporal divide between an intent to temporarily deprive an owner of his property and an intent to deprive permanently. However, the appellate courts have repeatedly rejected such an argument. "Control of property in a manner adverse to the property rights of the owner, even for an instant, is sufficient to demonstrate an intent to deprive the owner of his property permanently." *State v. Hargrave*, 915 S.W.2d 387, 389-90 (Mo. App. 1996). Even where a defendant abandons the stolen property shortly after taking control, Missouri courts have upheld the sufficiency of the evidence of an intent to deprive permanently. *See State v. Sturgell*, 530 S.W.2d 737 (Mo. App. 1975) and *State v. Winkleman*, 761 S.W.2d 702 (Mo. App. 1988).

This case would seem to have some application in shoplifting and other municipal property deprivation cases where the taking was temporary or the property relinquished or abandoned within a very short time. *Mandate issued February 14, 2007.*

ELEMENTS OF THE OFFENSE - RESISTING MERE TRAFFIC STOP DOES NOT CONSTITUTE RESISTING ARREST

State v. Joos, ____ S.W.3d ____ (Mo. App. S.D., SD27323, January 26, 2007)

Robert Joos returns to our Spring Seminar discussions for an encore following his 2004 seminar appearance. *See State v. Joos*, 120 S.W.3d 778 (Mo. App. S.D. 2003) where Joos defended several charges of driving without a proper license by claiming a religious right to drive without such earthly permission. 120 S.W.2d at 781. Back then they were all misdemeanor charges.

Now in this year's case Joos stands charged with the Class B felony of operating a motor vehicle without a proper license, as well as felony resisting arrest by flight. On appeal Joos contends that the trial court erred by not allowing him to offer evidence and testimony regarding his good faith religious belief in the lawfulness of his conduct in driving without a license. He also challenges the sufficiency of the evidence supporting his conviction for felony resisting arrest. The Southern District affirms the trial court's conviction of Joos for felony operation of a motor vehicle without a license, but reverses the felony resisting arrest conviction.

Late one night a state trooper saw defendant sitting in his truck near a closed store. The trooper turned around to investigate, at which time the defendant drove off and led the trooper on a chase covering several miles and lasting 11 minutes. Finally the defendant drove into a country lane near his home, stopped, and got out of his truck. The two felony charges were thereafter filed.

As for the religious right to drive a vehicle without a driver's license, the Southern District made short work of that contention by referring to the earlier decision (noted above) which already answered that question contrary to defendant's contention.

With respect to the felony resisting arrest charge, the Court makes clear the requirement that the trooper must have contemplated an arrest prior to the defendant's flight. The key to the holding is the language of Section 575.150 providing that resisting an arrest for a felony is a Class D felony and can be committed by fleeing in such a manner that the flight creates a substantial risk of serious physical injury or death to anyone. However, if the attempted arrest is *not* being made for a felony, the flight in order to resist ". . . an arrest, detention or stop is a Class A misdemeanor." (Emphasis added.) Section 575.150.5, RSMo (Cum. Supp. 2004). Since the trooper first contemplated only stopping the defendant and had no valid basis to effect an arrest until after the defendant led the trooper on a high speed chase, the defendant could not be found guilty of felony resisting arrest (even though he was later convicted of the felony for driving without a driver's license). So the key element is the intent of the trooper *at the time* the flight from the arrest or stop commences. In this case, there was no "intent to arrest for a felony" in mind at the time the chase began. Hence, the resisting arrest conviction is reversed. In so doing, the reviewing Court notes that there has been no issue raised as to whether or not there should be a remand for a new trial for the misdemeanor offense. That issue appears to be left unanswered.

The Southern District notes in Footnote 3 of the Opinion that three recent cases from the Eastern District have also affirmed the principle that a felony violation of Section 575.150 "cannot occur unless a law enforcement officer actually contemplates an arrest [as compared to a stop]." *State v. Christian* 184 S.W.3d 597, 603 (Mo. App. E.D. 2006); *see also State v. Hunter*, 179 S.W.3d 317, 320 (Mo. App. E.D. 2005); and *State v. Brooks*, 158 S.W.3d 841, 851 (Mo. App. E.D. 2005). *Application for Transfer filed in the Supreme Court on March 2, 2007.*

CONSTITUTIONAL LAW – NO CONFRONTATION CLAUSE VIOLATION

***State v. Hedges*, 193 S.W.3d 784 (Mo. App. E.D. 2006)**

Hedges gets into a fight with his wife in March 2004. During the course of the fight, Defendant bites off a piece of his wife's right ear. Wife calls 911 and reports the details of the incident. Deputy shows up and sees Defendant standing approximately 300 yards from his house. Defendant tells Deputy he was the one deputy was looking for, and further explained he and his wife had been fighting and that he "Did what he had to do." Deputy goes to Defendant's home and talks to wife. She is holding a towel against her ear and there is a substantial amount of blood in the towel and on her ear. A portion of her ear is missing. Later that afternoon, after

being advised of his *Miranda rights*, Defendant admits he had bitten off his wife's ear and slapped her in the face. Defendant is charged with a Class C felony of domestic assault in the second degree and is found guilty by a jury. He is sentenced to two years. Defendant appeals.

Defendant raised several points on appeal: 1. Defendant asserts the trial court erred in denying his motion *in limine* which would have prevented the State from calling wife as a witness and asking her if she was refusing to testify by invoking her spousal privilege. During the trial, the issue of whether the State could ask wife about her invocation of the privilege was raised before wife took the stand. Court says, "Well the way we had talked about the prosecutor asking a second question is basically do you still intend to take the privilege" Defense counsel replies "Okay. Then I'm fine with that." Court holds: Defense waived any objection to the State asking wife if she intended to invoke her privilege.

2. Defendant alleges the trial court erred in denying his motion *in limine* which allowed the State to introduce into evidence the 911 tape of wife talking to a police dispatcher. Defendant says this violated his Sixth Amendment right to confront his wife as a witness. Eastern District holds that because Defendant had a right to cross examine wife at the preliminary hearing, his Sixth Amendment right to confrontation was not violated.

3. Defendant contends the trial court erred in denying his motion *in limine* because wife's statements on the 911 tape were hearsay. Court states: Wife's statements on the 911 tape were an excited utterance, and therefore an exception to the hearsay rule. Judgment affirmed.

EVIDENCE – POLYGRAPH EVIDENCE ADMITTED, BUT ONLY IN SPECIAL CIRCUMSTANCES

State ex rel. Kemper v. Vincent, 191 S.W.3d 45 (Mo. banc 2006)

Defendant was convicted of arson, first degree murder, and first degree assault. During the investigation she agreed to take a three hour polygraph examination, at the conclusion of which the investigating detective told her she had failed the examination. She thereafter confessed to the crimes. In fact, the polygraph results were at best inconclusive, and perhaps even relatively favorable to the defendant in terms of truthfulness. The trial court admitted the defense testimony which made it clear to the jury that the confessions were likely the product of the deceitful report the detective gave to the defendant to the effect that she had flunked the polygraph examination.

However, the next day the trial court thought better of its decision admitting that testimony and concluded that a mistake had been made based on the general inadmissibility of polygraph results. The trial court therefore declared a mistrial over defense objections. When the case was scheduled for re-trial, a writ of prohibition was filed by the defense based on double jeopardy grounds. The writ was made absolute.

The Supreme Court ruled that the trial court was wrong to declare a mistrial. And this was so even in spite of the general rule that polygraph examinations are absolutely inadmissible under *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. banc 1980). Indeed, even evidence that the defendant (1) took, (2) refused to take, or (3) was *willing to take* a polygraph is inadmissible. It is not merely a prohibition against *the result*. You simply shouldn't talk about them *at all*.

However, in spite of the general inadmissibility of polygraph evidence, it was regarded as properly admitted in this case under the "rule of completeness". This rule holds that a party may introduce evidence of the circumstances of a writing, statement, conversation or deposition so the jury can have a complete picture of the contested evidence that has been introduced by the adversary. And this rule applies, even though the evidence is of the type that, in the first place, should not have been admitted. *State v. Baldwin*, 808 S.W.2d 384, 390 (Mo. App. 1991).

The key to the case on the double jeopardy issue is whether there was "manifest necessity" to grant a mistrial. If so, a second trial does not violate the double jeopardy provision. If not, however, a second trial would so violate the double jeopardy prohibition.

Here the Supreme Court observed that the trial court simply changed its mind on the evidence. In these circumstances, a less drastic remedy, such as a limiting instruction, could have been utilized. The Supreme Court goes on to observe that this holding does not in any way abrogate the general rule that polygraph evidence is inadmissible. However, in the limited circumstance presented in the instant case - where police first tell a suspect that she will pass the test if she tells the truth, then they tell the suspect that she failed when the results do not support that conclusion and where those statements appear to be directly related to the suspect's eventual confession, the confession may not be introduced into evidence without the polygraph evidence also being admitted.

SEARCH AND SEIZURE – SEARCH OF ENTIRE VEHICLE AFTER ARREST UPHeld

***State v. Scott*, 200 S.W.3d 41 (Mo. App. E.D. 2006)**

Defendant was convicted of attempted tampering with physical evidence. Following a traffic stop for a burned out tail light, the police officer determined that Scott was driving while suspended. Scott was arrested on that charge, handcuffed, and placed in the back seat of the patrol car. The officer then searched Scott's car where he found crack cocaine in a container attached to the keychain for the keys in the ignition. Scott was transported to the police station where the officer put the cocaine in a clear plastic bag. Scott grabbed the bag off the counter, ran into the bathroom, and attempted to flush the bag down the toilet. These facts gave rise to the charge regarding attempted destruction of evidence.

Prior to trial Scott had challenged the admissibility of the cocaine based on an alleged illegal search of his car at a time when there was no real necessity for officer safety. Indeed, the search was conducted while Scott was handcuffed and locked in the police car. However, the court of

appeals cites *New York v. Belton*, 453 U.S. 454 (1981) for the proposition that once the officer has made a lawful custodial arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of the automobile as well as the contents of any containers found within the passenger compartment. Scott claimed that the issue of officer safety was not really present given his handcuffed state in the back seat of the locked patrol car. However, the Missouri Supreme Court has recognized that the concern for officer safety is applicable even in that situation and that searches incident to an arrest are therefore valid. *State v. Harvey*, 648 S.W.2d 87, 89 (Mo. banc 1983).

Scott had actually been charged with possession of cocaine, assault on police officers, and attempted destruction of evidence. All of those charges went to the jury based on the trial court's original admission of the cocaine into evidence. There was a hung jury on the cocaine possession charge, an acquittal on the assault on the police officer, and a conviction on the attempted destruction of evidence.

The day after the verdict the trial court reconsidered the admissibility of the cocaine and found it to be inadmissible. However, the court did not set aside the conviction for attempted destruction of evidence even though, had the cocaine not been admitted at trial, there would have been no evidence of an attempted destruction thereof by the defendant.

On appeal the Eastern District notes that the trial court was wrong in suppressing the cocaine based on *Belton* and *Harvey*. Therefore the conviction on the attempted destruction of evidence would stand.

D.W.I. – ILLEGAL SEARCH DISREGARDED IN ADMINISTRATIVE PROCEEDING

***Arch v. Director of Revenue*, 186 S.W.3d 477 (Mo. App. E.D. 2006)**

Randall Arch was stopped by police officers on a report of a vehicle weaving in and out of traffic. He did badly on the field sobriety tests and thereafter refused the breathalyzer. He was suspended under Section 577.041 and he appeals that suspension. The trial court found that Arch was not stopped with any sufficient probable cause that he was driving while intoxicated and therefore, reinstated his driving privilege.

This is yet another holding reaffirming that the lawfulness of the arrest is not relevant in determining if a license suspension by the Director of Revenue for refusal to take a breathalyzer should be reinstated. The answer is a simple one. These cases are civil in nature rather than criminal and therefore, the exclusionary rule regarding the prohibition of illegally obtained evidence does not apply. See *Garriott v. Director of Revenue*, 130 S.W.3d 613, 616 (Mo. App. 2004).

ELEMENTS OF THE OFFENSE – WHAT CONSTITUTES PRIOR FELONIES COMMITTED “AT DIFFERENT TIMES”

State v. Sanchez, 186 S.W.3d 260 (Mo. banc 2006)

Charles Sanchez was convicted after a jury trial of two counts of kidnapping, two counts of armed criminal action, one count of unlawful use of a weapon, and one count of first degree arson. At sentencing the trial court found that Sanchez was a prior and persistent offender having been convicted of two or more felonies at different times in the past.

It seems that about eight years earlier Sanchez, while carrying a shotgun, had entered a restaurant located in a shopping plaza and exhibited the weapon in a threatening manner. The police were called and he fled the scene in a pickup truck. When the police arrived at the shopping plaza moments later, they found the truck about 100 yards from the restaurant. They stopped Sanchez, removed him from the truck and patted him down, finding a handgun in his possession. As a result of his conduct that day at the mall, Sanchez pled guilty to two separate felonies - (1) exhibiting a shotgun in an angry or threatening manner and (2) carrying a concealed weapon (the pistol). It was these two separate felony convictions that the trial court relied on in finding Sanchez to be a persistent offender, thereby giving him 22 years.

The Supreme Court finds that the State did not prove the defendant was a persistent offender because of a failure to prove that the two prior felonies were committed "at different times." It was held that felonies are not committed at different times for purposes of the statute if they were actually committed as part of a continuous course of conduct in a single episode. True, the shotgun waving and the concealment of the handgun involved separate weapons and they occurred several minutes apart. But they were both part of the same continuous course of conduct. Hence, the sentencing based on persistent offender status was set aside and remanded for re-sentencing.

D.W.I. – WRONG DATE ON READOUT TICKET IRRELEVANT TO TEST RESULT

Whitworth v. Director of Revenue, 207 S.W.3d 623 (Mo. App. E.D. 2006)

In an administrative suspension case the Director was not allowed to put the breathalyzer readout ticket into evidence because the date and time on the ticket were unreadable and had actually been altered by hand. On appeal the Eastern District points out that Missouri law is well settled that discrepancies appearing as to the *time and date* on BAC printouts are irrelevant to the results of the test, citing *Hall v. Director of Revenue, 72 S.W.3d 231, 233 (Mo. App. E.D. 2002)*. The time and date component of the machine is a separate component from that of the sample collection portion of the unit. The machine will still function properly even if the date and time are incorrect. *Stuhr v. Director of Revenue, 766 S.W.2d 446, 449 (Mo. banc 1989)*. Hence, it seems clear that BAC printout information containing unreadable or possibly even erroneous time and date information would still be admissible based on this line of cases.

D.W.I. – REFUSAL, FOLLOWED BY LATER COMPLETION OF TEST, IS COMPLIANCE

Kimbrell v. Director of Revenue, 192 S.W.3d 712 (Mo. App. W.D. 2006)

Kimbrell's driving privileges were revoked for refusing a breath test. He appeals from the Circuit Court's decision upholding the Director's action. Reversed.

A state trooper arrested Kimbrell at the emergency room of a hospital early one morning. The facts regarding the apparent vehicular accident are unimportant. Probable cause was not challenged. The trooper took the driver to the county jail, read him his *Miranda rights*, and requested a breath test. The driver refused the test at 2:32 a.m.

Eight minutes later the driver received a telephone call from his attorney and, after speaking with the attorney, Kimbrell advised the trooper that he had changed his mind and he wanted to take the test after all. The trooper told Kimbrell that he had already refused, but Kimbrell stated that he still wanted to take the test anyway. The trooper then allowed driver to take the test and got a BAC of 0.193%. The test was conducted at 2:48 a.m., 16 minutes after the original refusal.

On appeal Kimbrell argues that because he actually did submit to a test (eventually) and results were obtained, any finding that he refused to submit to a test would be erroneous. The Director responds and relies on the rule that once there has been a refusal, “. . . the driver's subsequent request or offer, at a later time, to take the test does not alter his or her refusal.” *Moody v. Director of Revenue*, 14 S.W.3d 729, 732 (Mo. App. E.D. 2000). The Western District notes that *Moody* and other cases similarly decided are distinguishable because in all of those cases the police officer refused to administer the test once the driver said no. In *Kimbrell*, the trooper actually administered the test after Kimbrell changed his mind. Although it is not specifically referred to in the Opinion, one could perhaps accurately conclude that the reason the trooper relented was that the change of heart by Kimbrell took place within the statutory 20 minute window of opportunity during which Kimbrell could have been talking with his lawyer – and in fact, had indeed spoken with his lawyer. One might also reasonably conclude that if Kimbrell had allowed 30 or 45 minutes to pass, the trooper might not have been in such a forgiving mood.

In any event, the Western District observes that police officers have no duty to be as cooperative as the trooper was in this case, but if a test is *in fact given and results obtained*, then the statutory purpose of Section 577.041 has been fulfilled. The Director may not then revoke the driver's license for failure to submit to the test because in fact, test results were indeed obtained. Thus, the Circuit Court decision upholding the Director's revocation is reversed.

CRIMINAL PROCEDURE – EVIDENCE OF OTHER UNRELATED CRIMES NOT ADMISSIBLE

***State v. Holleran*, 197 S.W.3d 603 (Mo. App. E.D. 2006)**

The State had a submissible case against the defendant for tampering which related to the theft of a car because the defendant was driving a recently stolen car with mismatched license plates and he fled the scene on foot when pulled over. However, the State also offered evidence of stealing from Wal-Mart even though this evidence did not relate to the tampering charge, nor did it identify the defendant by *modus operandi* or come under any other exception. The admission of such evidence amounted to reversible error.

The *Holleran* decision contains a lengthy discussion of many of the justifications for the admission of evidence of other uncharged crimes in the trial of a defendant. *See* 197 S.W.3d 608-611. That discussion highlights the major exceptions to the rule against such admissibility, and provides the case citations supporting each exception.

CRIMINAL PROCEDURE - ACQUITTALS IN PRIOR CASES NO BAR TO CONSIDERATION IN PENALTY PHASE

***State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006)**

Calvin Clark shot a man carrying about \$1,500.00 and attempted to rob him. In the guilt phase of the trial, the jury found Clark guilty of first degree assault, armed criminal action and attempted first degree robbery. During the punishment phase of the trial, the State introduced evidence of prior crimes for which Clark had been acquitted. Clark contends the Court erred in permitting the State to introduce evidence of those prior crimes, given his acquittals in those cases.

The Supreme Court first declares that, as a general rule, the trial court has discretion during the punishment phase of a trial to admit whatever evidence it deems to be helpful to the jury in assessing punishment. *State v. Winfield*, 5 S.W.3d 505, 515 (Mo. banc 1999). Both the State and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment in a penalty phase setting. *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005). Even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase. *Winfield*, 5 S.W.3d at 515.

The State's evidence in the punishment phase was that Clark had previously shot five other people, killing four of them – three in a triple homicide and one in a separate incident. The State also introduced evidence that all of those individuals were shot with the same gun that Clark had used to shoot the victim in the present case. Clark had previously stood trial for those prior shootings, and in two separate trials was found not guilty both times.

It is observed by the Supreme Court that whether the State can introduce evidence of a defendant's previous acquittals during the penalty phase is an issue of first impression in this state. However, the United States Supreme Court has directly addressed the issue in *United States v. Watts*, 519 U.S. 148 (1997). *Watts* declares that an acquittal in a criminal case does not preclude the government from utilizing that issue in a subsequent action governed by a lower standard of proof. A jury verdict of not guilty in an earlier case does not prevent the sentencing court from considering conduct underlying that charge, so long as such conduct has been proven by a preponderance of the evidence. The Supreme Court notes that in *Watts*, the United States Supreme Court reasoned that an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. 519 U.S. at 155. The Missouri court states the proposition this way: "An acquittal is not a finding of any fact." 197 S.W.3d at 601.

The Court notes that the Missouri statute (Section 557.036.3) allows evidence of the defendant's "history and character" to be adduced in the penalty phase of the trial, and the preponderance of evidence controls unless the sentences are to be enhanced. 197 S.W.3d at 602. The Supreme Court holds that the trial court did not err in admitting evidence that the defendant had committed other murders, despite his acquittal on those prior charges. Hence, evidence of the possibility or likelihood that he committed those other murders was admissible on the issue of history and character, even though Clark had previously been acquitted of those charges.

CRIMINAL PROCEDURE - CHANCE TO WITHDRAW PLEA REQUIRED ON DEPARTURE FROM PLEA AGREEMENT

Eckhoff v. State, 201 S.W.3d 52 (Mo. App. E.D. 2006)

Here the plea bargain with one prosecutor was for two seven-year sentences, but when the matter came before the court, a later prosecutor asked the Court for 14 year sentences. As a practical matter, the earlier agreed to seven-year sentences, if imposed consecutively, could have been just as much as the later requested sentences if imposed concurrently. So is this a "no harm, no foul" situation? Eastern District says no. When the State departs from its bargain, the guilty plea is no longer a knowing, voluntary and intelligent one unless the trial court gives the defendant a chance to withdraw it. Remanded to the trial court so as to allow the defendant an opportunity to withdraw his guilty plea.

CRIMINAL PROCEDURE - COMMENTS ON DEFENDANT'S SILENCE HELD IMPROPER

State v. Steger, 209 S.W.3d 11 (Mo. App. E.D. 2006)

Ray Steger was convicted of assault, armed criminal action and unlawful use of a weapon. The charges grew out of some shooting involving Steger and his neighbors. The evidence was hotly contested as between the two sides. Steger told one story; the neighbors told a different story.

Steger raises two points on appeal. First he alleges that the trial court committed error in allowing the prosecution to make numerous references to his having elected to remain silent and seek legal counsel. The Court of Appeals reverses the convictions on that basis. The second allegation of error related to the trial court having allowed certain testimony from the investigating officers which controverted Steger's self-defense allegation. Since the case would likely be re-tried, the Eastern District ruled on that issue as well, finding no error in the allowance of such testimony.

On at least two or three occasions during the direct examination of the investigating officers the prosecutor elicited statements (or couched them in the form of leading questions) that the defendant didn't want to go further with the questioning and instead, wanted to talk to his attorney. Although not preserved for review, the Eastern District finds plain error in the trial court having allowed such continued references to the defendant's assertion of his constitutional privileges.

The leading case in this area is *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). There the Supreme Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings is fundamentally unfair and violates the due process clause. The term "silence" includes not only a refusal to speak to the police, but also a request for an attorney. *State v. Nastasio*, 957 S.W.2d 454, 461 (Mo. App. W.D. 1997).

The Eastern District notes that once a determination of a *Doyle* violation has occurred, the Court needs to ascertain whether the inadmissible evidence had a decisive effect on the jury. The controlling considerations in such an inquiry are as follows: (1) whether the State made repeated *Doyle* violations; (2) whether the trial court issued any curative remedies; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether there is overwhelming evidence of guilt. *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993).

In reversing, the Eastern District notes that the evidence was hotly contested in this case with two distinct and irreconcilable factual scenarios placed before the jury. Therefore the *Doyle* violations tainted the convictions and said convictions had to be set aside.

On the evidentiary point regarding the absence of any self-defense statements uttered by the defendant while the investigation was underway, the reviewing court notes that it was permissible for the prosecutor to inquire whether the defendant made any statements of any kind tending to suggest that he had been facing a self-defense situation while the shooting was going on. The Court observes that once the defendant puts self-defense into the case, it becomes the state's duty to overcome that evidence by proof beyond a reasonable doubt. *State v. Beck*, 167 S.W.3d 767, 788 (Mo. App. W.D. 2005). Once self-defense was in issue, it was appropriate for the State to seek to establish that the defendant's self-defense theory was a late-blooming argument and was never put forth at the time of the original investigation. Nonetheless, the case was reversed and remanded for the *Doyle* violations described above.

CONSTITUTIONAL LAW - OPPORTUNITY FOR CROSS EXAMINATION REQUIRED FOR VIDEO TESTIMONY

State v. Justus, 205 S.W.3d 872 (Mo. banc 2006)

Here the defendant was charged with child abuse. The trial court conducted an evidentiary hearing pursuant to Section 491.075 pertaining to the admissibility of hearsay statements by a child under the age of 14. The trial court found that the three-year-old victim was unable to testify due to the likelihood of severe emotional distress if she were required to testify. Court also held that her statements to her grandmother and to child abuse workers, along with a videotape of that statement, were sufficiently reliable to make them admissible.

Based on *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court reverses because the primary purpose of the child abuse worker's interview was to establish or prove past events which were relevant to the criminal prosecution. The victim's statements to the child abuse workers were testimonial in nature, and since the defendant did not have an opportunity to cross-examine the child previously, and because she was not available as a witness, the testimony of the child abuse workers and the videotape were both admitted in violation of the defendant's Sixth Amendment right to confrontation. In this particular case the Confrontation Clause violations were regarded as crucial to the outcome of the case and therefore, they were not harmless beyond a reasonable doubt. Reversed and remanded.

EVIDENCE - EVIDENCE OF UNCHARGED CRIME INADMISSIBLE TO SHOW MODUS OPERANDI

State v. Davis, 211 S.W.3d 86 (Mo. banc 2006)

Robert Davis and a co-defendant (Paul Bainter) were both convicted on multiple counts of armed criminal action, felonious restraint, first degree robbery and burglary, and resisting arrest. Each was convicted as a prior and persistent offender to a total of two life terms plus 512 years in prison. The Supreme Court had jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

Davis and Bainter were standing trial for an armed robbery at the IGA grocery store in St. Charles. The prosecution offered surveillance tape evidence from another robbery at McDonald's Bar in Hazelwood four days prior to the IGA robbery. The defense objected to evidence of this uncharged crime. The trial court overruled the objection, allowing the State to put on evidence of, and to repeatedly refer to, the McDonald's robbery.

The videotape from the McDonald's robbery showed that four hours before the robbery two men matching the description of the defendants had been in the store. The clerk picked photographs of the two defendants from a lineup and testified they were in the store on the day of the robbery. The bartender testified that both defendants looked similar to the robbers and she identified Davis as

someone who frequented the bar and Bainter as someone who lived nearby. When the defendants were apprehended they were in possession of handwritten notes containing directions to the street where McDonald's is located, along with several cash bills bearing staple holes. The bartender at McDonald's testified that customer receipts were often stapled to cash payments. In both robberies the perpetrators were two stocky white males carrying similar guns and wearing dark ski masks and gloves. In both robberies one man was taller than the other and one man called the other "Ed."

In supporting their effort to adduce such evidence the State argued that the two robberies were sufficiently similar that they were admissible under the *modus operandi* exception. In addition to the similarities previously listed, the robberies occurred within five miles and within four days of each other.

However, the Supreme Court notes that the robberies were different in several respects. At the IGA robbery the shorter robber did the talking and called the taller one Paul and then Ed. At McDonald's the taller robber was the spokesman and he called the shorter one Ed. The IGA robbers told the victims that no one would get hurt while the McDonald's robbers threatened to shoot a customer. *Both* of the IGA robbers collected the cash from the victims while at McDonald's one robber took the money while the other watched the door.

The Supreme Court concluded that before prior conduct can fall under the identity or *modus operandi* exceptions, there must be more than mere similarity between the crime charged and the uncharged crime. The two crimes must be nearly "identical", and their methodology "so unusual and distinctive" that they resemble a "signature" of defendant's involvement in both crimes. Quoting *State v. Bernard*, 849 S.W.2d 10, 17 (Mo. 1993). It was held that the IGA and McDonald's robberies were neither identical nor sufficiently unusual and distinctive. The State's trial presentation of the McDonald's robbery evidence was detailed and prejudicial. The trial court's admission of the evidence of that uncharged robbery was erroneous and an abuse of discretion. Convictions reversed. Consolidated with *State v. Bainter*, SC 87749. *Mandates issued in both cases on January 30, 2007.*

SEARCH AND SEIZURE - SEARCH AFTER TRAFFIC STOP CONCLUDED WAS NOT CONSENSUAL

***Missouri v. Sund*, _____ S.W.3d _____ (Mo. banc , SC87747, January 9, 2007)**

Defendant was convicted of drug trafficking based upon the discovery of marijuana in the trunk of her rental car. She challenges the validity of the search. The facts are these.

Late one evening defendant was stopped on I-44 by a police officer. The reason for the stop was improper lane use and to check if the driver was intoxicated or falling asleep. He talked with defendant and he determined that she was neither intoxicated nor sleepy. The computer check showed no outstanding warrants. The officer then determined that the rental car contract was in the

name of defendant's passenger. The passenger confirmed that the contract was in her name and gave the officer her driver's license.

The officer then asked defendant to join him in the patrol car. Once there, he informed defendant he was going to issue her a warning ticket. While he filled out the warning ticket and the racial-profiling form, and while waiting for further results on a computer check as to the passenger's driver's license, the officer questioned defendant about herself and the details of the trip.

Once the passenger's computer check came back with no warrants, the officer left the patrol car and returned the passenger's license to her. Brief questioning of the passenger produced answers consistent with those given by defendant. The officer then motioned defendant to exit the patrol car, he handed her the warning ticket, and told her to "be careful." By this point, 15 or 20 minutes had passed since the original stop.

As defendant was walking back to her vehicle, the officer asked if he could search it and all of its contents. The officer's inquiry included a request of defendant and her passenger to open the trunk of the car. Neither was willing to do so.

At this point the officer gave the women the choice of (1) consenting to his search of the trunk or (2) waiting for about 40 minutes until a drug dog could be obtained. Given that choice, the passenger (who had rented the vehicle) consented to the search of the trunk. Drugs were found and defendant was charged with trafficking. Her motion to suppress was overruled and she was convicted. On appeal defendant contends that the trial court erred in admitting the marijuana because the officer unlawfully detained her without reasonable suspicion after completion of the traffic stop by telling the women that they had to either consent to the search or wait for the drug dog. Hence, she claims the consent was unlawfully obtained.

The Supreme Court agrees, noting that the traffic stop was complete when the officer handed defendant the warning ticket, returned her license, and told her to "be careful." *State v. Barks*, 128 S.W.3d 513, 517 (Mo. banc 2004). But the State maintained the search was consensual. In response, the Court declares an encounter is consensual only if "a reasonable person would feel free to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). So the case turns on whether the officer's conduct would cause a reasonable person in defendant's position to believe she was not free to leave. Considering the totality of the circumstances, the Court finds this inquiry in defendant's favor. The ruling is consistent with prior decisions where drivers were required to wait pending arrival of the drug dog. *See State v. Granado*, 148 S.W.3d 309, 312 (Mo. banc 2004) and *State v. Sanchez*, 178 S.W.3d 549, 555 (Mo. App. W.D. 2005). Trial court should have suppressed the marijuana. Reversed and remanded. *Mandate issued on January 25, 2007.*

CONSTITUTIONAL LAW - ADMISSION OF EXCITED UTTERANCES NO VIOLATION OF CONFRONTATION CLAUSE

State v. Kemp, ____ S.W.3d ____ (Mo. banc , SC87371, January 30, 2007)

Early one day Jackie Washington ran, half-clad, to the Columbia home of her neighbors, the Johnsons. She was described as “frantic” and “emotionally distraught.” She told them her boyfriend, Lamont Kemp, had been holding her hostage at gunpoint. Mrs. Johnson called 911 and relayed to the operator statements made by Washington. Included in those statements were certain items, including the address of the scene of the crime, that Kemp was in possession of a big silver pistol, that “he had the gun on me, . . .” and that she had been held in her basement by defendant at gunpoint since the previous evening. Shortly thereafter the police surrounded defendant’s residence, arrested Kemp, and found three guns (two of which were loaded) that had been stolen about a month earlier.

Kemp was charged with and convicted of felonious restraint and unlawful use of a weapon. Prior to trial Jackie Washington dropped out of sight and could not be served with a subpoena. The trial court admitted a 39-second portion of the 911 call containing the above described information, ruling that Washington’s statements were excited utterances and that they did not violate the Confrontation Clause under *Crawford*.

The Supreme Court notes that since *Crawford* the United States Supreme Court decided *Davis v. Washington*, ____ U.S. ____, 126 S.Ct. 2266 (2006). The issue in *Davis* was “whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.” 126 S.Ct. at 2276. The U.S. Supreme Court held that “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” 126 S.Ct. at 2274.

The Missouri Court quotes *Crawford* by holding that when Jackie Washington made the challenged statements she was not making “a solemn declaration or affirmation made for the purpose of establishing or proving some fact” nor was she “an accuser [making] a formal statement to government officers.” *Crawford v. Washington*, 541 U.S. at 51. She made her statements in an emergency situation and to seek emergency help, not to bear testimony. Thus, no Confrontation Clause violation. Affirmed. *Mandate issued on February 15, 2007.*

CRIMINAL PROCEDURE – MUNICIPAL ORDINANCE VIOLATIONS QUASI-CRIMINAL IN NATURE

***City of Kansas City v. McGary*, _____ S.W. 3d _____ (Mo. App. W.D., WD66338, December 19, 2006)**

Defendant here was charged by the municipality with violation of the nuisance ordinance which prohibited unlicensed vehicles from being parked on the grass or dirt of residentially zoned property. The summons had been issued by a codes enforcement officer after a warning letter had been sent to the landowner. The ten-day grace period expired and the defendant was charged in municipal court with the ordinance violations. He was convicted and on appeal, the Western District affirmed.

Even though municipal ordinance violations are quasi criminal in nature, guilt must still be proven beyond a reasonable doubt and the rules of criminal procedure apply. *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990). In addition, municipal ordinance provisions imposing penalties are to be strictly construed against the municipality and they will not be extended by implication. This is true especially where the municipality seeks to impose some penalty on the landowner as opposed to mere civil relief. *Id.*

The teaching of this case reminds that, while the cities have certain police powers inherent in their nature, those powers are subject to the requirement of proof beyond a reasonable doubt and the application of usual rules of criminal procedure. *Application for transfer filed in the Supreme Court on February 16, 2007.*

D.W.I. – DRIVER IN HANDCUFFS NOT NECESSARILY UNDER ARREST

***Jones v. Director of Revenue*, 204 S.W.3d 709 (Mo. App. W.D. 2006)**

Driver appeals trial court's judgment upholding DOR decision to revoke his driving privileges for allegedly refusing to submit to a chemical test. Driver contends the trial court's judgment was not supported by substantial evidence because the DOR did not establish that the arresting officer had reasonable grounds to believe that driver was driving while intoxicated when he was placed under arrest. Driver asserts he was under arrest when the first officer handcuffed him and that the second officer did not acquire reasonable grounds to believe he was driving while intoxicated until after the first officer had arrested him.

Western District holds: when the first officer handcuffed driver, driver was *not under arrest*. The officer merely handcuffed driver for officer's safety, which was reasonable under the circumstances. Even if the first officer had arrested Jones when he placed handcuffs on him, the arrest would have been for acts other than driving while intoxicated. Second officer on the scene was the arresting officer and he had reasonable grounds to believe driver was driving while intoxicated. Affirmed.

D.W.I. – SENTENCE ENHANCEMENT FOR PRIORS BEFORE LAWYER JUDGE

State v. Brink, _____ S.W.3d _____ (Mo. App. W.D., WD66253, December 5, 2006)

Defendant appeals the Circuit Court's judgment convicting him of driving while intoxicated and sentencing him as a prior and persistent offender. He contends that the conviction violated his constitutional rights and that the state did not establish the requisite elements to convict him as a prior and persistent offender. He also challenges the constitutional validity of section 577.023, RSMo, that mandated the enhanced sentence.

Western District affirms conviction stating: (1) Evidence showed that officer had probable cause to stop Defendant because Defendant violated traffic laws. Because there is no fundamental right to intrastate travel the rational basis test applies in determining a reasonable relationship existed between the purported classification of which Brink complains a legitimate state interest; (2) The state's failure to allege in the information that the judges were lawyers (for Defendant's prior defenses) and that defendant was represented by counsel or waived in writing did not prejudice Defendant; (3) The document used by the state to show that Brink has been convicted in municipal court bore a sufficient seal and was admissible as evidence of Defendant's prior convictions under section 490.130; (4) The document used by the state that Defendant has been convicted in municipal court contained a handwritten statement that the judge was a lawyer did not effect its admissibility to prove Defendant's prior convictions; (5) The definition of "intoxicated-related traffic offense" in the version of section 577.023.1(1) in effect at the time of Defendant's offense included a violation of a municipal ordinance for driving with an excessive blood alcohol content. Defendant's violation of a municipal ordinance for driving with an excessive blood alcohol content satisfied the requirement for enhanced punishment; and (6) Section 577.023's disparate treatment of previous offenders based on whether or not a lawyer judge presided over the proceedings has a rational basis, and is therefore constitutional, in that a defendant subject to an enhanced driving while intoxicated charge deserves the protection of a judge fully trained in the law. *Application for transfer filed in the Supreme Court on February 14, 2007.*

SEARCH AND SEIZURE – EVIDENCE SUPPRESSED WHERE NO REASONABLE GROUNDS EXIST TO CONFRONT DEFENDANT

State v. Gabbert, _____ S.W.3d _____ (Mo. App. W.D., WD66350, Feb. 13, 2007)

Several Maryville police officers responded to a residence based on a complaint by the mother of a female juvenile who was apparently at that residence. Upon arrival, the officers fanned out around the premises. Almost immediately the officers in front radioed that someone had gone out the back door. Two officers proceeded to the rear of the residence where they observed defendant leaning against the outside of the house with his hands in his pockets. The officers ordered defendant to remove his hands from his pockets and advised him he was not free to leave because the officers were conducting an investigation.

Defendant was then asked to consent to a pat down search of his person and defendant agreed to the search. One of the officers found a pocket knife in defendant's front pocket and as he was retrieving it, defendant told the officer there was yet another knife inside of his sock. It was not plainly visible but the officers recovered it from the inside of defendant's right pants leg. This knife appeared to be a hunting knife in a sheath. Gabbert was then arrested, handcuffed, and taken to the police station. Defendant was not read his *Miranda rights*. At the police station Gabbert told the police that he did not live at that address as he was between places.

Thereafter Gabbert was charged with carrying a concealed weapon. He filed a motion to suppress all evidence and all statements made by him attendant to the arrest. The trial court sustained the motion on all points. Specifically, the Court found that Gabbert was not in a public place when the police approached him, and there was no reasonably articulable basis for the stop. Hence, the stop was improper, and any information obtained as a result of the stop (even though obtained through a search to which Gabbert had consented), was illegally obtained and subject to suppression. The State took an interlocutory appeal. The Western District affirms the trial court's suppression order.

The State claimed on appeal that Gabbert did not have standing to object to the seizure because he did not have a legitimate expectation of privacy in the rear of the residence of a third party. The Western District responds that while Gabbert may lack standing to object to the introduction of evidence secured by a search of a third person's premises or property, the search here was not of that type. Rather, it was a search of Gabbert himself. The Fourth Amendment protects people not places. *Citing Katz v. United States*, 389 U.S. 347, 351 (1967).

The State further argued that even if Gabbert had standing to object to the search and seizure, the pre-arrest encounter with the officers was not an unlawful seizure. It was noted that at the hearing on the motion to suppress the officers testified that Gabbert was not free to leave because he and the other officer were conducting an investigation. The Court observes that the police officer's first words with the defendant were to order him to remove his hands from his pockets. Even the officers characterized the request as an order rather than a mere suggestion. The trial court concluded that the totality of the circumstances indicated that Gabbert had been seized because he voluntarily submitted to the officer's authority.

The trial court also found that the officers failed to articulate any reasonable grounds for detaining Gabbert. A person may not be detained, even momentarily, without reasonable, objective grounds for doing so. *State v. Talbert*, 873 S.W.2d 321, 323 (Mo. App. S.D. 1994). Gabbert was not fleeing, and there was nothing to indicate he was using drugs. Nor was any evidence presented that there was a risk of danger to or from any person inside or outside the building.

Finally, the State argued that even if the initial stop was illegal, the illegality was purged when Gabbert voluntarily consented to the search of his person. Generally evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of

the poisonous tree. *State v. Miller*, 894 S.W.2d 649, 654 (Mo. *banc* 1995). However, certain exceptions exist wherein the evidence might still be admitted if the primary taint of the wrongful search is purged. One of these ways is through the attenuation doctrine. Under that doctrine the State must meet a dual requirement of proving first, that the consent given was in fact voluntary and second, that it is sufficiently independent from the primary illegality to purge the taint of that illegality. Both the trial court and the appeals court concluded that even if Gabbert's consent was voluntarily given, the State had failed to show that the search was sufficiently independent from the illegal stop to purge the taint of that illegality. Three of the factors to be considered in making that determination are (1) the temporal proximity of the illegality and the allegedly voluntary consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *State v. Miller*, 894 S.W.2d at 655. The Western District finds the presence of elements (1) and (2) and, even though element (3) was not present, its absence alone cannot dissipate the taint left by the first two elements. Thus, even if Gabbert had voluntarily consented to the search of his person, the State has failed to purge the taint of the primary illegality. Trial court's suppression order is sustained. *Mandate issued on March 7, 2007.*

SEARCH AND SEIZURE – NEW RULE FOR FRESH PURSUIT CASES

***State v. Renfrow*, _____ S.W.3d _____ (Mo. App. W.D., WD66102, February 27, 2007)**

Kirk Renfrow appeals from a judgment of conviction for DWI. In his sole point on appeal he claims that the trial court erred in overruling his motion to suppress evidence of his intoxication because that evidence was the product of an illegal stop. Specifically, defendant claims that the stop was unlawful because it was conducted by a police officer outside of his jurisdiction and not in fresh pursuit. Western District agrees and reverses the conviction, overruling precedent from twenty years earlier.

In the early morning hours a part time Lancaster police officer was traveling within the city limits near the edge of town. He saw a vehicle swerve across the center line. As the vehicle crossed U.S. Highway 36 outside the city limits, the officer observed considerably more erratic driving. After he had departed the city limits, the officer activated his emergency equipment and stopped the vehicle.

The city officer got the defendant's driver's license and then asked defendant to turn off his vehicle and come sit with him in the patrol car. It was at this time the city officer observed that the defendant exhibited indicia of intoxication. The officer contacted the Highway Patrol and requested a state officer to come and administer a sobriety test. The state trooper arrived, conducted field sobriety tests, and concluded that Renfrow was intoxicated. The trooper arrested Renfrow and breathalyzer results indicated a blood alcohol content of .134 %.

Court of Appeals notes that it is well established as a general rule that, in the absence of statute, municipal police officers have no official power to apprehend offenders beyond the boundaries of their municipalities. *City of Advance v. Maryland Casualty Company*, 302 S.W.2d 28, 31-32 (Mo. 1957). An exception exists, however, where there is fresh pursuit as defined in Section 544.157. Fresh pursuit must be initiated from within the officer's jurisdiction and it "implies instant pursuit." Section 544.157.1.

The appeals court agrees with Renfrow that the fresh pursuit exception does not exist here. Therefore, because the municipal officer was not in fresh pursuit and did not have authority to stop Renfrow outside the city limits, the stop and detention was an unlawful seizure. However, the State argues that the Western District has previously addressed the situation presented by a scenario wherein the subsequent arrest by the trooper is claimed to have been tainted by the earlier unlawful seizure by the city officer. One would perhaps expect that the State in such a situation might be confronted with the "fruit of the poisonous tree" doctrine. But the State relies on the earlier Western District opinion of *State v. Neher*, 726 S.W.2d 362 (Mo. App. W.D. 1987). There the officers followed an errant driver without turning on the emergency lights and they radioed a county sheriff to get a trooper. The city officers eventually activated the emergency equipment outside the city limits and got the vehicle off the road. The conviction in *Neher* had been sustained because the Western District had determined that the late arriving trooper who arrested the defendant had obtained the evidence of defendant's intoxication by reason of an independent investigation and therefore, there was no taint of the fruit of the poisonous tree.

The Western District now concludes that *Neher* is contrary to the result required by the independent source rule and the attenuation doctrine, and it should be overruled. Because there were no intervening circumstances between the stop by the municipal officer and the arrival of the state trooper, Renfrow's arrest by the trooper was not sufficiently insulated from the unlawful initial stop and therefore, any evidence resulting from the trooper's arrest should have been suppressed. Thus, it seems quite clear that before a city officer can properly effect an extra-jurisdictional arrest he must have commenced the fresh pursuit within the city limits. It will apparently no longer suffice to commence the pursuit outside the city limits and merely hold the defendant until the arrival of a state officer. *Not yet disposed.*

D.W.I. – NO PROOF OF INTOXICATION WHEN DRIVING

State v. Davis, _____ S.W.3d _____ (Mo. App. W.D., No. WD66397, March 27, 2007)

A St. Joseph police officer heard a dispatch report at 10:20 p.m. regarding a vehicular accident at a nearby intersection. He arrived on scene three minutes later and saw a vehicle that had crashed into a light pole. There was no one in or around the vehicle. An unidentified female witness approached the officer and told him that the occupants of the vehicle had fled to 803 Thompson, an address two or three blocks away.

The officer went to the Thompson address where he found two men walking through the back yard. He asked them to sit down. In response to the officer's questions, one of the men admitted crashing his car into the light pole while he was "messaging with the radio." He identified himself as Aaron Davis.

The officer detected intoxicants on the driver's breath, and he noted other indicia of intoxication. Field sobriety tests indicated intoxication and the defendant was arrested and transported to the station. He refused a breathalyzer and was thereafter charged with DWI and leaving the scene of an accident. At trial the state presented only the arresting officer's testimony and that of another investigating police officer, but not the female witness referred to above. The Court found Davis guilty on both counts. On appeal, Davis challenges his convictions on (1) *Miranda* violations and (2) a failure of proof that he drove while intoxicated. Because the latter point results in a reversal, the *Miranda* issue is not addressed.

The Western District notes that a DWI conviction requires proof of two elements; (1) that the defendant operated the motor vehicle and (2) he was intoxicated while doing so. *State v. Lynch*, 131 S.W.3d 422, 426 (Mo. App. 2004). But the Court points out that proof of intoxication at the time of the arrest, when it is remote from the operation of the vehicle, is insufficient in and of itself to prove intoxication at the time the person was driving. Thus, when dealing with a situation of remote circumstances, "time is an element of importance" that the State must establish to meet its burden of proving that the defendant drove *while* intoxicated. *State v. Dodson*, 496 S.W.2d 272, 274 (Mo. App. 1973).

It was not disputed that Davis was the driver. The only issue was whether or not Davis was intoxicated *at the time of the accident*. Although it is not precisely established in the Opinion, it appeared that the discovery of Davis in the nearby back yard was only about 10 or 15 minutes post-accident. But at trial there was no evidence presented to establish with precision the exact time of the accident. The State offered the declaration of the unidentified female witness only to establish why the officer went to the 803 Thompson address. It was not offered for the truth of the matter asserted (i.e., that it happened just a few minutes ago), but rather, merely offered to explain why the officer took the steps that he took. Hence, there was no sworn testimony (because it was clearly hearsay and not subject to cross-examination) establishing exactly when the wreck occurred.

The Court notes that the omission of the time element was critical because intoxication does not occur immediately upon the consumption of alcoholic beverages. Rather, alcohol must be absorbed into the bloodstream before the intoxicants begin to take effect roughly 30 to 90 minutes later. Quoting 2 Nichols & Whited, III, *Drinking/Driving Litigation: Criminal and Civil*, Sections 14.3, 14.27 (1998). Even though Davis admitted that he did not drink anything after the accident, that statement still does not prove that he was intoxicated while driving because there was simply no evidence to establish precisely when he was operating the vehicle.

The Court observes that if Davis had started drinking only a few minutes before the accident occurred, he would not have been intoxicated while driving but the intoxicating effects

might have become apparent sometime later when he was confronted by the police officer. This is essentially a discussion of the so-called “metabolic curve” defense which was discussed in some detail in *Meyer v. Director of Revenue*, 34 S.W.3d 230, 235 (Mo. App. 2000) (overruled on other grounds).

In reversing the conviction, the Western District concludes that a fact finder simply cannot determine that one who is under the influence of an alcoholic beverage at a specific time was necessarily in that same condition at some *earlier unspecified moment* without any evidence concerning the length of the interval involved. *State v. Dodson*, 496 S.W.2d at 274. Given the absence of evidence to show the approximate time of Davis’s accident, the State failed to prove beyond a reasonable doubt that he was driving while intoxicated and therefore, the conviction is reversed.