

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

SCOTT A. RAISHER

Appellant

v.

DIRECTOR OF REVENUE

Respondent

DOCKET NUMBER **WD69090**

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: January 27, 2009

Appeal From:

Circuit Court of Platte County, MO
The Honorable James Walter Van Amburg, Judge

Appellate Judges:

Division Four: Thomas H. Newton, C.J., Joseph M. Ellis, and James Edward Welsh, JJ.

Attorneys:

Jeffrey S. Eastman, Gladstone, MO

Counsel for Appellant

Attorneys:

Nicole L. Loethen, Jefferson City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

SCOTT A. RAISHER, Appellant, v.
DIRECTOR OF REVENUE, Respondent

WD69090

Platte County

Before Division Four Judges: Newton, C.J., Ellis, and Welsh, JJ.

A state trooper arrested Raisher for driving while intoxicated. A breathalyzer test showed Raisher's blood alcohol content (BAC) was below the legal limit. The trooper believed Raisher was not breathing properly and administered a second test using the same machine, which reported Raisher's BAC was above the legal limit. The Director suspended Raisher's license for driving while intoxicated, and Raisher petitioned the circuit court for review. At the proceeding, the Director presented the second test result indicating Raisher's BAC was above the legal limit. Raisher presented the first test result indicating his BAC was below the legal limit. The trooper testified that the result reporting the higher BAC was more accurate than the lower test result because the breathing for the lower test result was not as deep as the breathing for the higher result. The trooper also testified that the breathalyzer is designed to generate an error message if the breath sample is inadequate and did not do so during the first test yielding the lower result. The circuit court affirmed the Director's license suspension. Raisher appeals, arguing the trial court improperly shifted the burden of proof to him when it affirmed the Director's suspension of his license.

REVERSED.

Division Four holds:

The Director has the burden to establish intoxication by a preponderance of evidence. A *prima facie* case for intoxication is established when the Director shows (1) probable cause for arrest, and (2) a breath test reporting a BAC beyond the legal limit. A driver may rebut the *prima facie* case by raising a genuine issue of fact as to whether the driver's BAC was above the legal limit. Here, Raisher successfully rebutted the Director's *prima facie* case with the results from his first breathalyzer test. The Director did not overcome this rebuttal and consequently failed to meet its burden.

Precedent indicates that breath test results cannot be invalidated without scientific evidence. Raisher's first test result rebutted the Director's case but the trooper's testimony did not overcome the first test result because his testimony was not scientific evidence. Moreover, the trooper's observation that the breath sample was inadequate was in conflict with the breathalyzer's analysis of the sample and its failure to generate an error code. An appellate court may disregard certain testimony when it is inherently contradictory. Because the trooper testified the breathalyzer is designed to reject improper breath samples and did not do so during either test, his testimony that Raisher's lower test result was attributable to improper breathing was contradictory. At best, the evidence was in equipoise. Consequently, the Director failed to

show Raisher's BAC was above the legal limit by preponderance of the evidence. Therefore, the circuit court erred, and we reinstate his driving privilege.

Opinion by: Thomas H. Newton, C. J.

January 27, 2009

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.