

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

RAYMOND L. NORRIS,

Respondent,

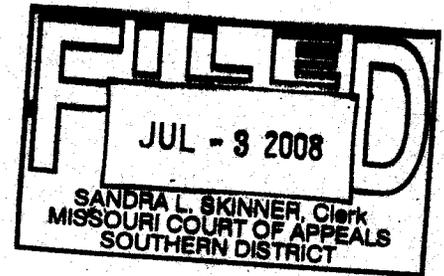
v.

No. 28871

MISSOURI DIRECTOR OF REVENUE,

Appellant.

Appeal from the Circuit Court of Dent County
Honorable Sanborn Ball, Judge



89994

FILED

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RESPONDENT'S BRIEF

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SCANNED

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JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement set forth in the Appellant's Brief.

STATEMENT OF FACTS

Dent County Deputy Sheriff Michael Letchworth was following a yellow “Hummer” sport utility vehicle as it traveled through the town of Salem, Missouri during the early morning of May 13, 2007. (Tr. 4-5). He saw it pull into the parking lot of the Sonic drive-in restaurant and turn off its lights. (Tr. 5). The deputy pulled into the lot behind the Hummer and turned on his emergency lights. (Tr. 6). Although the driver had not done anything illegal, Deputy Letchworth “just wanted to see why he was there.” (Tr. 6, 25). He felt that that at 3:00 a.m. “there’s better places to go other than Sonic.” (Tr. 25).

When he saw the flashing red lights, the driver of the Hummer, Ray Norris, got out and approached Deputy Letchworth as he was sitting in his patrol car. (Tr. 6-7). He walked at “kind of a fast pace” according to the deputy. (Tr. 7). Mr. Norris, upon arriving at the side of the car, asked why he was stopped, and Deputy Letchworth stated “because its 3:00 in the morning and I was just trying to figure out why you’re here.” (Tr. 7-8).

The Sonic drive-in in Salem is owned by Norris’s sister, and Mr. Norris explained this to the deputy in answering his question. (Tr. 9). Deputy Letchworth asked for identification, and Norris produced his valid Missouri driver’s license. (Tr. 8-9). Deputy Letchworth then “ran him for

warrants” which he stated “took a few minutes.” (Tr. 9). Letchworth did not smell any alcohol, but he noticed that Norris appeared nervous and agitated, that he was sweating, and that “his eyes were kind of looking back and forth.” (Tr. 17-18)

When he learned that Mr. Norris did not have any arrest warrants, Deputy Letchworth asked for consent to search his Hummer. (Tr. 9). Mr. Norris refused to consent to the search. (Tr. 9). The deputy then told Norris “that he was going to call the drug dog, and we would just continue from there.” (Tr. 9). He told him “just to stay back here with me.” (Tr. 9).

At that point Mr. Norris told Deputy Letchworth that he could search his vehicle. (Tr. 10). The deputy did so and did not find anything illegal. (Tr. 10). Then he asked to search Norris. (Tr. 10). Mr. Norris refused to grant such consent, and he began walking away. (Tr. 10). Deputy Letchworth followed, took hold of Norris, and brought him back to his patrol car. (Tr. 10).

Mr. Norris then took off his coat and dropped it on the ground. (Tr. 10-11). He told the deputy that he would allow him to search his person. (Tr. 11). Letchworth picked the coat up and searched inside it. (Tr. 11). He found a matchbox and opened it. (Tr. 11). Inside the matchbox was a small

plastic baggie containing white powder which field tested positive for methamphetamine.¹ (Tr. 11-13).

Deputy Letchworth arrested Mr. Norris at the Sonic parking lot for possession of a controlled substance. (Tr. 14, 29). The deputy informed him of his Miranda rights, and Norris asked to call an attorney, which Letchworth did not allow him to do. (Tr. 14, 29, 34). The deputy called for a drug-sniffing dog. (Tr. 14).

Salem Police Officer Joe Chase arrived on the scene a few minutes later with his dog. (Tr. 40). He led the dog around Norris's vehicle, but the dog did not alert. (Tr. 51). A second search inside the Hummer also failed to uncover any illegal contraband. (Tr. 51).

Deputy Letchworth and Officer Chase next discussed doing an "eye test" on Mr. Norris. (Tr. 19-21). Both have experience and formal training in the horizontal gaze nystagmus test used to detect alcohol intoxication; Officer Chase testified that he also has additional training in the vertical

¹ The Director's brief implies that there was evidence showing that the search of Mr. Norris "yielded a fully loaded .357 Magnum pistol" (App. Br. at 2). The Director cites page 17 of the Legal File in support of this assertion, which corresponds with a page of a police report that the Director attached as an exhibit to its Answer filed in the circuit court. Although officers testified to certain facts that are also reflected in the report, there was no testimony regarding the discovery of a firearm at the hearing. The police report itself was not offered or received into evidence. The section of the police report referring to the discovery of the firearm states that it was found by "Salem Police Officer Tracey Hughes" *in Mr. Norris's vehicle during a search incident to his arrest.* (L.F. 16-17). The firearm was not found to be stolen, nor was there any suggestion that it was concealed or that the possession of it violated any state or federal law.

gaze nystagmus test. (Tr. 42, 47). The vertical gaze nystagmus test was “touched on” when Chase was taking the eight-hour training course on the horizontal gaze nystagmus test. (Tr. 40-42). Chase explained that vertical gaze nystagmus will be present “if the person is under the influence of a controlled substance such as cocaine, methamphetamine, anything that would be considered a stimulant.” (Tr. 44).

Officer Chase held his finger in front of Mr. Norris and instructed him to follow it with his eyes. (Tr. 45). As Chase was moving his finger up, he saw that Norris’s eyes “had an involuntary jerking as they were coming up.” (Tr. 45). Chase “did that a couple of times to make sure that [he] was clear in what [he] saw.” (Tr. 45). He concluded that Norris “failed that field sobriety test.” (Tr. 46).

Chase also “used a flashlight to check Mr. Norris’s pupil size.” (Tr. 46). In this test he stated that he has informal training “from private patrol officers and also my brother who is an officer in Bel-Ridge and also a drug recognition expert.” (Tr. 46-47). When Officer Chase shined his flashlight in Norris’s eyes, he “observed Mr. Norris’s eyes to be very constricted and to have very little to no reaction to any incoming light.” (Tr. 47). Chase concluded based on his experience that “those types of results from those

types of eye tests have almost always been indicative of methamphetamine, just simply because we don't encounter cocaine around here." (Tr. 47-48).

Upon completion of the second eye test, Deputy Letchworth arrested Mr. Norris for driving under the influence of drugs. (Tr. 19-20). The officers did not conduct any other field sobriety tests because, according to Letchworth, Norris "wanted to talk with a lawyer," and the deputy "didn't feel like he would cooperate". (Tr. 20-21). He took Mr. Norris to the sheriff's station, arriving there at 4:06 a.m. (Tr. 32).

Deputy Letchworth read him Missouri's implied consent law at 4:13 a.m. (Tr. 32). Letchworth testified that he does not believe that Norris asked for an attorney at that time. (Tr. 22). Deputy Letchworth produced a cup and requested a urine sample from Mr. Norris, which, at 4:16 a.m., he refused to give. (Tr. 32). At 4:18 a.m., Letchworth again advised Norris of his Miranda rights, and asked "if he would answer the interview questions on the AIR form," to which Norris once again stated that "he would not talk . . . without an attorney." (Tr. 33-34). Deputy Letchworth did not allow Norris any opportunity to contact an attorney, confiscated his drivers' license, and sent it to the department of revenue. (Tr. 33).

Mr. Norris petitioned for a hearing to review the revocation of his driver's license in the Dent County Circuit Court under §577.041.4. (L.F. 4-

5). After hearing evidence and argument from both sides, the circuit court granted Mr. Norris's request to restore his driving privileges, finding that the arresting officer, in violation of §577.041.1, did not allow him twenty minutes to attempt to contact an attorney after his request to do so, and that the Director of Revenue failed to show that Mr. Norris was not prejudiced by the officer's violation of the statute. (L.F. 18-20). The Director of Revenue has appealed. (L.F. 21).

POINT RELIED ON

The circuit court did not err in overruling and setting aside the revocation of Norris's driving privileges because it correctly applied the law and its judgment is supported by the evidence in that (1) the Director failed to meet its burden of proving that Deputy Letchworth had reasonable grounds to believe that Norris was driving while intoxicated, and (2) it was undisputed that Norris requested an opportunity to contact an attorney both before and after being read the Implied Consent Law, but that the arresting officer repeatedly failed, in violation of §577.041.1, to allow him twenty minutes to do so.

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

McMaster v. Director of Revenue, 941 S.W.2d 813 (Mo. App. 1997)

Schussler v. Director of Revenue, 196 S.W.3d 648 (Mo. App. 2006)

ARGUMENT

The circuit court did not err in overruling and setting aside the revocation of Norris's driving privileges because it correctly applied the law and its judgment is supported by the evidence in that (1) the Director failed to meet its burden of proving that Deputy Letchworth had reasonable grounds to believe that Norris was driving while intoxicated, and (2) it was undisputed that Norris requested an opportunity to contact an attorney both before and after being read the Implied Consent Law, but that the arresting officer repeatedly failed, in violation of §577.041.1, to allow him twenty minutes to do so.

Appellate review of an order setting aside the revocation of a driver's license is governed by the standard set forth in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Kotar v. Dir. of Revenue, 169 S.W.3d 921, 924 (Mo.App. 2005). The judgment of the trial court shall be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Id.

In Missouri, a driver who operates a motor vehicle is deemed to have impliedly consented to a chemical test to determine the alcohol content of the driver's blood. §577.020.1. If a driver under arrest for driving while

intoxicated refuses to submit to a chemical test, the Director of Revenue shall revoke the person's driver's license for a period of one year.

§577.041.3. Prior to requesting a driver to submit to a chemical test, the officer must give the reasons for the request and inform the driver that evidence of a refusal to take the test may be used against the driver and the driver's license shall be immediately revoked upon refusal. §577.041.1.

If a driver requests to speak to an attorney, the driver is to be given twenty minutes to attempt to contact an attorney immediately after the officer informs the driver of the Implied Consent Law. §577.041.1; McMaster v. Lohman Dir. of Revenue, 941 S.W.2d 813, 817 (Mo.App. 1997). The purpose of this statutory provision is to provide the driver with a reasonable opportunity to contact an attorney to make an informed decision as to whether to submit to a chemical test. Kotar, 169 S.W.3d at 925. After the twenty minutes has expired, a continued refusal to submit to the test is deemed a refusal. §577.041.1.

A driver whose license has been revoked for refusal to submit to a chemical test may petition for a hearing before a court in the county in which the arrest occurred. §577.041.4. At the hearing, the Director has the burden of establishing a prima facie case for revocation for refusal to submit to a chemical test. Kotar, 169 S.W.3d at 924. The Director must show: (1)

the driver was arrested; (2) the officer had reasonable grounds to believe that the driver was driving while intoxicated; and (3) the driver refused to submit to a chemical test. Id. at 925-26 (citing §577.041.4; Mount v. Dir. of Revenue, 62 S.W.3d 597, 599 (Mo.App. 2001)). The driver then has the burden of rebutting the Director's prima facie case for revocation. Id.

Section 577.041.1 is violated if an officer fails to allow a driver, upon request, twenty minutes to attempt to contact an attorney after being read the Implied Consent Law. Id. at 926. To be entitled to relief, the driver must be actually prejudiced by the officer's failure to comply with the statute. Id. The burden is on the Director to show that the driver was not actually prejudiced by the officer's failure to comply with §577.041.1. Id. Failure to satisfy the burden will result in reinstatement of the license to drive a motor vehicle.

Rowan v. Director of Revenue, 870 S.W.2d 261 (Mo.App. 1994).

In this case, the Director failed both to meet its burden of proof of showing that the arresting officer had reasonable grounds to believe that the driver was intoxicated, and to meet its burden to show that the driver was not actually prejudiced by the officer's failure to comply with §577.041.1.

Letchworth did not have reasonable grounds to believe that Norris was intoxicated

In determining whether there were reasonable grounds to arrest a driver for DWI, the trial court must evaluate the situation from the viewpoint of a cautious, trained, and prudent police officer at the time of the arrest.

Terry v. Director of Revenue, 14 S.W.3d 722, 724 (Mo. App. 2000).

"Reasonable grounds" is virtually synonymous with probable cause. Id.

There is no precise test for determining whether reasonable grounds existed; rather, it is based on the particular facts and circumstances of the individual case. Id. The type of facts needed to determine probable cause can be found in the definition of the substantive offense and in case law dealing with the sufficiency of the evidence to convict of the substantive offense. Wilcox v. Director of Revenue, 842 S.W.2d 240 (Mo. App. 1992).

An officer has probable cause to arrest an individual for driving while intoxicated when he observes the illegal or unusual operation of a vehicle, and he observes indicia of intoxication when he comes in contact with the driver. Arch v. Director of Revenue, 186 S.W.3d 477 (Mo. App. 2006). In this case, there was no evidence that any officer witnessed Mr. Norris operating his vehicle illegally or unusually. Deputy Letchworth was the only officer who saw him driving, and he admitted that Norris did not do anything illegal. (Tr. 25). Nor did Letchworth testify that Norris did

anything unusual, unless pulling into a parking lot of a drive-in restaurant can be categorized as the unusual operation of a vehicle.

Additionally, the evidence indicia of intoxication was weak at best. There are no Missouri cases which recognize the vertical gaze nystagmus test as a valid method of determining intoxication. Officer Chase's testimony that vertical gaze nystagmus will be present "if the person is under the influence of a controlled substance such as cocaine, methamphetamine, anything that would be considered a stimulant" suggests that a driver who has recently consumed stimulants such as coffee, soda, or chocolate would not be able to pass this field sobriety test. These substances are simply not recognized in this state as intoxicants that create a driving impairment. The only other evidence of Norris's intoxication was Chase's flashlight test. Even if this can be considered a valid test for the presence of methamphetamine administered by a qualified tester (there was no proof of either at the hearing), there was no evidence of how much methamphetamine would produce the pupil constriction, and whether or not that amount would cause driving impairment.

Letchworth did not follow §577.041 when he did not allow Norris twenty minutes to contact an attorney, and the Director failed to show that Norris was not prejudiced

“No matter when the driver requests an attorney--whether before or after an arresting officer recites the Implied Consent Law to the driver--section 577.041.1's twenty-minute waiting period begins running immediately after the officer has informed the driver of the Implied Consent Law.” McMaster v. Director of Revenue, 941 S.W.2d 813, 817 (Mo. App. 1997). “A driver who requests to speak to an attorney after being given a Miranda warning but before being read the Implied Consent Law may not be aware that he or she needs to, or has the right to, make an additional request to speak to an attorney again after being read the Implied Consent Law.” Schussler v. Director of Revenue, 196 S.W.3d 648, 652 (Mo. App. 2006). To hold otherwise would place an undue burden on the driver and defeat the purpose of the statute. Id.

The Director asks this court not to follow the above precedent and to reverse the circuit court's judgment reinstating Mr. Norris's driving privileges. Even when a Missouri driver makes numerous requests to consult with an attorney and such requests are consistently refused by the arresting officer, the Director says that the law should ignore these requests and refusals and focus solely on the driver's response to the request for

consent to a chemical test. The Director argues that if the driver does not at that precise moment request time to speak with an attorney, even though the directives that the statute requires the officer to give the driver do not mention the driver's right to consult an attorney, then the twenty minute provision of §577.041.1 is not activated.

This same argument has been considered and rejected in McMaster and Schussler. The reasoning in those cases is sound and persuasive. This court should decline the Director's request to reject their precedent.

CONCLUSION

For these reasons, Respondent requests this court to affirm the judgment of the circuit court reinstating his driving privileges.

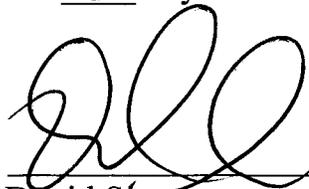
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon all parties via first class mail on this 3 day of July, 2008.



David Simpson