

**No. SC89994**

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**IN THE SUPREME COURT OF MISSOURI**

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**RAYMOND L. NORRIS,**

**Respondent**

**v.**

**DIRECTOR OF REVENUE, STATE OF MISSOURI,**

**Appellant**

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**APPELLANT'S SUBSTITUTE BRIEF**

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## **I. JURISDICTIONAL STATEMENT**

This appeal raises the question of whether the Director of Revenue, State of Missouri, demonstrated that the Appellee, Raymond L. Norris, having been apprised of the automatic revocation provisions of the state's Implied Consent Law, Section 577.041.1, RSMo<sup>1</sup>, refused to submit to chemical testing upon demand of a law enforcement officer, such that his driver's license was subject to revocation for alleged refusal to submit to a chemical test pursuant to Section 577.041.1.

The Court has jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution in that the Court has ordered transfer after opinion by the Southern District Court of Appeals.

## **II. STATEMENT OF FACTS**

This case arises from events occurring on May 13, 2007, when Deputy Michael Letchworth of the Dent County Sheriff's Department confronted Raymond Norris in the city of Salem, Dent County, Missouri.

Deputy Letchworth noticed Norris drive a yellow Hummer vehicle into a Sonic Drive-in at approximately 3:00 a.m. (LF 11, 16, Tr. 5) Deputy Letchworth testified that this was unusual and due to the late hour went to investigate. Deputy Letchworth made

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<sup>1</sup> All statutory citations are to the 2000 Revised Statutes of Missouri unless otherwise noted.

contact with the driver, Norris, and observed that his manner was aggressive and nervous, his eyes were constricted and his skin was sweaty and clammy, and he was wearing a coat. (LF 16) During a personal search, Norris threw his coat on the ground (LF 17). In a pocket of the coat, Deputy Letchworth found a white powdery substance, which was field tested positive for methamphetamine. (Tr. 13-14)

Based on Norris's unusual behavior and the presence of a controlled substance, Deputy Letchworth arrested Norris (LF 16). Deputy Letchworth read Norris his Miranda rights at 3:06 a.m., and Norris requested to speak to an attorney (LF 16). After that, Deputy Letchworth did not ask Norris any further questions. (Tr. 30-31)

Deputy Letchworth requested backup, and Officer Joe Chase of the Salem Police Department arrived and conducted a field sobriety test and the vertical gaze nystagmus test on Norris (Tr. 19-20). Based on his training, Officer Chase concluded that Norris had consumed an illegal substance (Tr. 19-20).

Deputy Letchworth transported Norris to the Sheriff's Department, arriving at approximately 4:00 a.m. (Tr. 32). Deputy Letchworth requested Norris submit to a chemical test of his urine (Tr. 32), and read the statutory Implied Consent warning to Norris at 4:13 a.m.<sup>2</sup> (Tr. 21-22) Norris twice refused to submit to the chemical test by

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<sup>2</sup>The warning given states (LF 12):

☐ You are under arrest and I have reasonable grounds to believe you were driving a motor vehicle while you were in an intoxicated or drugged condition;

saying he would not take it (LF 17). Norris did not ask for an attorney at the time he was read the Implied Consent notice. (Tr. 22, 33) Deputy Letchworth warned Norris that his license would be revoked if he would not submit; again asked Norris to submit to a test; and again was refused (LF 17). The refusal was recorded as of 4:16 a.m. Deputy Letchworth thereafter sought to interview Norris, and again advised him of his Miranda rights, but Norris would not talk without an attorney (Tr. 33-34).

Based on Norris's refusal to submit to the chemical testing, on May 15, 2007, the Director issued a Form 4323 revoking Norris's driver license, effective June 18, 2007.

Norris filed a petition to review his license revocation (LF 4-5). The trial court held a hearing on September 24, 2007. On November 16, 2007, the Circuit Court, Sanborn N. Ball, Judge, entered a Judgment overruling and setting aside the Director's revocation of Norris's license, and ordering its reinstatement (LF 18-20). The trial court

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- To determine the alcohol/drug content of your blood, I am requesting that you submit to a chemical test of your  Breath  Blood  Other Urine (Check no more than two);
  - If you refuse to take the test(s), your driver license will immediately be revoked for one year;
  - Evidence of your refusal to take the test may be used against you in a court of law;
  - Having been informed of the reasons for requesting the test(s), will you take the test(s)?  Yes  No Time: 0416 (MIL)

based its decision on the fact that Deputy Letchworth, in violation of § 577.041.1, did not give Norris 20 minutes to try to contact an attorney.

The Office of the Attorney General filed a Notice of Appeal on December 14, 2007. (LF 21-22) On February 6, 2009, a panel of the Court of Appeals for the Southern District handed down an opinion reversing the decision of the Circuit Court to reinstate Norris's license, holding that the twenty-minute waiting period did not apply, but remanding the matter to the Circuit Court for a determination as to whether the officer had reasonable cause to make the stop, an issue that was briefed by the parties at trial but not addressed in the decision of the Circuit Court.

### **III. POINT RELIED UPON**

**The trial court erred in reversing the revocation of Norris's driver's license due to the fact he was not given a twenty-minute provision under the terms of Section 577.041.1, RSMo, because Norris did not request to speak to a lawyer when requested to submit to a urine test and the twenty-minute waiting period was not triggered, in that the statute states that the twenty-minute period shall only be granted when a person requests to speak to counsel after the reading of the Implied Consent Notice. Section 577.041.1, RSMo; *Paxton v. Director of Revenue*, 258 S.W.3d 68 (Mo.App. E.D., 2008); *Williams v. Director of Revenue*, 277 S.W.3d 318 (Mo.App. S.D., 2009).**

#### IV. SUMMARY OF ARGUMENT

The Districts have divided on the question of whether a law enforcement officer is required by Section 577.041, RSMo, to wait twenty minutes before noting a refusal to take a chemical test, where the driver had previously requested to speak to counsel, but does not do so at the time the Implied Consent notice is read. The Eastern District, *Paxton v. Director of Revenue*, 258 S.W.3d 68 (Mo.App. E.D., 2008), and the Southern District, *Williams v. Director of Revenue*, 277 S.W.3d 318 (Mo.App. S.D., 2009), have correctly observed that the statute explicitly states that the duty to wait twenty minutes only arises when the request for counsel is made in response to the reading of the Implied Consent notice. The Western District, in the case of *Schussler v. Director of Revenue*, 196 S.W.3d 648 (Mo. App. W.D., 2006), incorrectly read into the statute a requirement that the officer provide the waiting period to any driver who has previously requested to speak to counsel, even in another context. The trial court incorrectly applied the law when it followed *Schussler* and reinstated the driver's license based on a request to speak to counsel that took place prior to the reading of the Implied Consent Notice.

## V. ARGUMENT

### A. Standard of Review

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. W.D.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.

Here, the circuit court's judgment erroneously declares and misapplies Section 577.041.1, RSMo, regarding a driver's opportunity to contact an attorney when requested to submit to a chemical urine test, so the judgment should be reversed.

### B. The Implied Consent Law

The trial court erred in reversing the revocation of Norris's driver's license due to the fact he was not given a twenty-minute provision under the terms of Section 577.041.1. The statute only states that the twenty-minute period shall be granted when a person requests to speak to counsel after the reading of the Implied Consent Notice. *Paxton v. Director of Revenue*, 258 S.W.3d 68 (Mo.App. E.D., 2008); *Williams v. Director of Revenue*, 277 S.W.3d 318 (Mo.App. S.D., 2009). Norris, however, did not

request to speak to a lawyer when requested to submit to a urine test, so no right to a twenty-minute waiting period ever arose.

A Missouri driver's license is a privilege, not a right. By applying for a driver's license and using the highways, a driver "impliedly consents" to the administration of chemical tests of breath, blood, saliva, or urine for the purpose of determining the alcohol or drug content of the driver's blood if the driver is arrested and there are reasonable grounds to believe the driver was driving while drugged or intoxicated. Sections 577.020, 577.041.1, RSMo. If the driver, after being read the Implied Consent warning, refuses the test, the Director must revoke the driver's license for one year. Section 577.041.3, RSMo.

To uphold the revocation of a driver's license for refusal to submit to a chemical test, the trial court shall determine only the following: 1) whether the driver was arrested; 2) whether the arresting officer had reasonable grounds to believe the driver was driving while intoxicated or drugged; and 3) whether the driver refused to submit to the test. *McMaster v. Lohman*, 941 S.W.2<sup>nd</sup> 813, 815 (Mo. App.W.D.1997). The Director of Revenue has the burden of proof, and failure to satisfy the burden will result in the reinstatement of the driver's license. 941 S.W.2<sup>nd</sup> at 815-16.

Section 577.041.1, RSMo, describes the procedure a law enforcement officer must follow in making a request for a chemical test under the terms of Section 577.020. The section specifically provides for the procedure that must be followed when the driver, upon receiving a request to submit to a test, requests to speak with an attorney. The

applicable language provides for a waiting period, but only if the driver makes his request to speak to counsel at the time he is asked to submit to a test:

If a person when requested to submit to any test allowed pursuant to section 577.020 requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney. If upon the completion of the twenty-minute period the person continues to refuse to submit to any test, it shall be deemed a refusal.

This entire case turns upon the meaning of these sixty words.

### **C. Construction of the Statutory Requirement**

The question before the Court is: does Section 577.041.1 require that a twenty-minute waiting period be given to a driver who has requested to speak to counsel *before* the reading of the notice, but does not do so after?

The twenty-minute notice at issue is a statutory creation, not a Constitutional concept. As such, it must be construed with strict attention to the wording of the statute. The primary rule of statutory construction requires the Court to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute. Where the language of the statute is clear and unambiguous, there is no room for construction. *Jones v. Director of Revenue*, 832 S.W.2d 516 (Mo. banc, 1992); *Hunt v. Director of Revenue*, 10 S.W.3<sup>rd</sup> 144, 149 (Mo.App., E.D.1999); *Harper v. Director of Revenue*, 118 S.W.3<sup>rd</sup> 195, 199 (Mo.App., W.D.2003).

The wording of Section 577.041.1 is clear and unambiguous:

If a person **when requested to submit to any test** allowed pursuant to section 577.020 **requests to speak to an attorney**, the person shall be granted twenty minutes in which to attempt to contact an attorney.

This sentence creates a procedure which is triggered only when the driver is requested to take a chemical test, and then requests an attorney. The officer reads the notice. If at that point the driver requests an attorney, the officer must wait twenty minutes. If not, the officer may proceed with the revocation. Law enforcement officers attempting to follow the procedure established by the statute are entitled to rely on that sequence. If the legislature had intended to create a status of drivers merely who at some point in their interaction with the police had requested counsel, it could have chosen words that say so. But the legislature chose words that contain a particular sequence, and both drivers and law enforcement officers must follow it.

Although the sequence created by the statute seems clear, the districts of the Court of Appeals have reached different results when applying the statute to situations where the driver had previously requested to speak to counsel, but did not do so when the Implied Consent warning was read.

### **1. The Western District – *Schussler***

The first appellate court to address the issue was the Court of Appeals for the Western District in the case of *Schussler v. Fischer*, 196 S.W.3d 648 (Mo. App. W.D.,

2006). There, the driver had been read a Miranda warning, had requested a chance to contact an attorney, and had been unsuccessful in doing so. Forty minutes later, the officer read him the Implied Consent notice, and he refused to take the test without asking for an attorney. The officer immediately confiscated his license.

Because the driver in *Schussler* did not request an attorney when read the Implied Consent warning, the Western District considered whether his response to the earlier Miranda warning operated as a request for counsel for purposes of Section 577.041.1, RSMo. The Western District correctly noted that it is a well-recognized principle that if the language of the statute is clear, the court must give effect to the language as written. *Harper v. Dir. of Revenue*, 118 S.W.3d 195, 199 (Mo. App. W.D.2003)(citing *Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356, 361 (Mo. App. W.D.2003)). Nonetheless, rather than giving effect to the language as written, the Western District speculated about the effect of sequential warnings:

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. Most drivers are probably not aware of section 577.041.1's twenty minute provision and the statute does not require officers to inform drivers that if they request an attorney after being read the Implied Consent Law they will be given twenty minutes to attempt to contact an attorney. . . . the average citizen would likely be more

aware of the Miranda rights ... [and] may view his rights and the consequences of exercising those rights under section 577.041 in the same manner that the exercise of those rights would be applied under Miranda.

196 S.W.3d at 652.

The Western District goes on to state:

Due to this confusion and lack of awareness, this court has stated that whether the request to speak to an attorney comes before or after the Implied Consent Law is read, section 577.041.1's twenty minute waiting period begins running immediately after the officer has informed the driver of the Implied Consent Law. *Brown*, 34 S.W.3d at 174; *McMaster*, 941 S.W.2d at 817. This is consistent with the legislature's purpose. To hold otherwise would place an undue burden on the driver and defeat the purpose of the statute.

196 S.W.3d at 652.

Although the Western District cites *Brown v. Director of Revenue*, 34 S.W.3d 166 (Mo.App. W.D.2000) and *McMaster v. Lohman, Dir. of Revenue*, 941 S.W.2d 813, 817 (Mo.App. W.D.1997) in support of the proposition that the twenty-minute requirement applies whether the request to speak to counsel is made before or after the reading of the notice, both of those were cases in which the request was made after the reading of the

notice. *Schussler* was the first reported case in which the twenty-minute rule was invoked in reliance upon a request made before the reading of the notice. The Western District declares that its extension of the rule beyond the unambiguous statutory language is “consistent with the legislature's purpose,” 196 S.W.3d at 652, but that extension is not consistent with the language the legislature actually used. If the legislature had sought to create a special status for persons who have at some point requested counsel, and extended the requirement of a twenty-minute wait to such individuals, it could have done so. The statute could have been written to state, “If a person requests or has requested to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney.” But that language was not chosen.

The decision of the Western District in *Schussler* adopts a status approach rather than a sequence approach. It declares that once a driver requests to speak to an attorney, even in response to another question, or in a different place, or to a different officer, that person has a protected status and is entitled to the twenty-minute warning. But the statute speaks in terms of sequence, not status, and the declaration of the Western District that it does not matter whether the request for counsel is made before or after the reading of the Implied Consent notice is supported neither by the language of the statute, nor by the cases the Western District cites.

The Western District itself declined to make a similar extension “consistent with the legislature’s purpose” just ten months after the *Schussler* decision. In *Staggs v. Director of Revenue*, 223 SW 3d 866 (Mo. App.W.D. 2007), the driver argued that the courts should recognize that an inebriated driver is more in need of advice and guidance

about his rights, and should be advised of his right to counsel. The Western District rejected this argument, stating, “Arguments based on the concept of being fair to the less informed person are arguments to be addressed to the legislature. It is not our job to provide a different ‘bright line’ rule from that already provided by the General Assembly.” *Id.* at 874. In *Staggs*, the Western District declined to extend the coverage of the legislative mandate to incorporate protections drawn from the criminal law, but not expressed in the statute. The same approach should have been applied in *Schussler*.

## **2. The Eastern District – *Paxton***

The Court of Appeals, Eastern District, was considered the same issue in the case of *Paxton v. Director of Revenue*, 258 S.W.3d 68 (Mo.App. E.D., 2008). There, the driver, after being arrested on suspicion of driving while intoxicated, had made several requests to speak to counsel, had been given a twenty-minute interval to do so, and had tried to contact lawyers prior to the reading of the Implied Consent notice. When the notice was read, he did not make any further request consult an attorney and agreed to give a breath sample, which yielded a result well over the legal limit. His license was revoked, and he filed a petition for judicial review. The trial court held the results of the breath test inadmissible under Section 577.037.4, RSMo, as the twenty-minute waiting period had not been given, and reversed the revocation.

The majority reviewed the *Schussler* decision and declined to follow it, with the following commentary:

We decline to follow Schussler and find its holding contrary to the express language of Section 577.041.1. Where language of a statute is clear and unambiguous, there is no room for construction, and we must give effect to the language as written. *Hunt v. Director of Revenue*, 10 S.W.3d 144, 149 (Mo.App.E.D.1999); *Harper v. Director of Revenue*, 118 S.W.3d 195, 199 (Mo.App.W.D.2003). Courts “are without authority to read into a statute legislative intent contrary to intent made evident by plain language.” *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). Here, Section 577.041.1's language is clear and unambiguous: “If a person when requested to submit to any test ... requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney.” Thus, it is a driver's request to speak to an attorney after having been asked to submit to a test that triggers a driver's allowance of twenty minutes to reach an attorney.

258 S.W.3<sup>rd</sup> at 72-73.

The Eastern District thus held that the legislature meant what it said: that the right to a twenty-minute waiting period arises only when a driver indicates a desire to speak to counsel *after* the Implied Consent notice is read.

### 3. The Southern District – *Williams*

The Court of Appeals, Southern District, was called upon to decide the same issue in *Williams v. Director of Revenue*, 277 S.W.3d 318 (Mo.App. S.D., 2009), decided the same day as the case before the Court.

In *Williams*, the driver had been arrested for driving while intoxicated and given a Miranda warning, upon which she requested to speak to an attorney. She was given a telephone and a telephone directory and made an attempt to call an attorney. After about five minutes, she was told she had fifteen minutes, and she stated that she was not going to speak to an attorney. The Implied Consent notice was read, and the driver, without making any further request for counsel, refused to take the test. Her license was then revoked. She filed a petition for administrative review, and the trial court upheld the revocation. She filed an appeal, raising as her sole point that the arresting officer failed to allow her twenty minutes to contact an attorney after he read the Implied Consent Law to her.

The Southern District reviewed the *Schussler* and *Paxton* decisions and concluded that the statute could not be read to extend the requirement of the twenty-minute waiting period to the situation as the *Schussler* court had done:

As even *Schussler* seemingly conceded, section 577.041.1 itself is not ambiguous: "If a person when requested to submit to any test ... requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney." A request to contact counsel

"when requested to submit" to testing (or after such request, per Paxton, 258 S.W.3d at 72) invokes the twenty-minute rule. 277 S.W.3d at 322.

The Southern District went on to note that the Western District's determination to reach a result "consistent with the legislature's purpose" was not within its mandate to apply the statute as written:

Nonetheless, Schussler foresaw "confusion and lack of awareness" vis-à-vis Miranda rights, and deemed its remedy "consistent with the legislature's purpose." 196 S.W.3d at 651-52. Yet legislative intent for an unambiguous law "can only be derived from the words of the statute itself." *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). In our view, the statutory language does not suggest legislative intent to treat a Miranda request in the field as also triggering a twenty-minute wait under section 577.041.1.

277 S.W.3d at 322.

In conclusion, the majority found that that statutory interpretation was unnecessary and Section 577.041.1 was satisfied, because the driver did not request to speak to an attorney when requested to submit to a chemical test.

One judge concurred with the decision, noting only that the driver had been given a twenty-minute period to contact an attorney, and chose not to continue with the effort.

#### **4. The Decision Below**

The decision below was handed down the same day as the Southern District's decision in *Williams*. Here, the Southern District did not discuss the Section 577.041.1 issue at length, but cited its decision in *Williams* in support of its determination that the requirements of Section 577.041.1 had been met. Accordingly, it reversed the trial court's decision restoring Norris's license because of the failure to allow a twenty-minute waiting period.

This case follows the *Williams* case and does not present any unique facts or circumstances that distinguish it from *Schussler*, *Paxton*, and *Williams*. This appeal calls upon the Court to resolve the common issue on which the three Districts have reached different results. As explained above, the Eastern and Southern Districts reached the correct result in *Paxton* and *Williams*, reading the statute as written, while the Western District extended the requirements of the statute beyond its intended goals in the *Schussler* case. Thus the Court should affirm the decision of the Southern District, and adopt the reasoning of *Paxton* and *Williams*.

#### **D. Reasonable Cause Issue**

On appeal, Norris raised an additional issue as to whether the officer had reasonable grounds to make the original stop which resulted in the request to take a chemical test. This was also an element of the Director's burden of proof. The issue of reasonable cause was argued and briefed at the trial issue, but the trial court's decision made no findings as to credibility or reasonable cause, and did not address the issue at all.

The Southern District concluded that without findings at the trial court level, it could not resolve the reasonable cause issue, and accordingly remanded the case to the trial court for findings on the issue.

The reasonable cause issue was not mentioned by Norris in the application for transfer, and counsel for the Director agreed at oral argument that the issue would probably have to be remanded to the lower court for decision. Under the standard of *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), the appellate court must affirm the judgment of the trial court 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. Since the Circuit Court made no judgment on the reasonable cause issue, it is not possible for the appellate court to determine whether it is supported by the evidence or correctly applies the law. Therefore, remand to the Circuit Court for findings and decision on the issue of reasonableness was necessary, and this Court should affirm the decision of the Southern District to do so.

## VI. CONCLUSION

The Southern District's decision to reverse the determination of the Circuit Court should be affirmed.

Respectfully submitted,

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**Certificate of Service and Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certified that on this 17th day of April, 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

David Simpson, Attorney at Law  
113 North Jefferson  
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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,694 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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