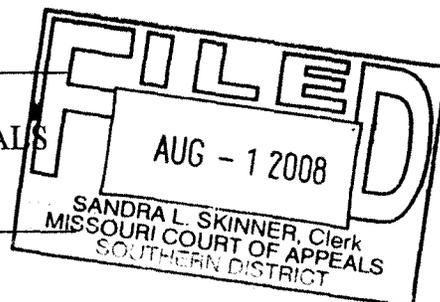


No. S.D. 28871

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT



RAYMOND L. NORRIS,

Respondent

89994

v.

FILED

DIRECTOR OF REVENUE, STATE OF MISSOURI,

APR 6 2009

Appellant

Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Dent County Circuit Court
The Honorable Sanborn N. Ball, Judge

APPELLANT'S REPLY BRIEF

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SCANNED

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ARGUMENT

A. The Eastern District of this Court has declined to follow the Western District's decision in *Schussler v. Fischer*, 196 S.W. 3rd 648 (Mo. App. W.D. 2006), on which Norris relies.

The issue of whether Section 577.041.1, RSMo¹ required Deputy Letchworth to give Norris twenty minutes to contact an attorney after the implied consent notice under the facts of this case was extensively briefed in Appellant's principal brief, so consistent with Rule 84.04(g), we shall not reargue that issue. Appellant does, however, see a need to bring to the Court's attention a decision directly on point which was decided after Appellant's principal brief was filed.

In *Paxton v. Director of Revenue*, No. ED89595, ___ S.W.3d ___, 2008 WL 2416300 (Mo.App. E.D., 6/17/2008) [motion for rehearing or transfer pending], the Missouri Court of Appeals for the Eastern District considered the same issue that faces the Court in the matter at bar – whether to follow *Schussler*, holding that Section 577.041.1 requires that a driver be given twenty minutes to attempt to contact an attorney after reading of the implied consent notice, even if the driver's request to contact an attorney occurred before reading of the implied consent notice.

In *Paxton*, the driver was arrested late at night after testing positive for alcohol on a portable breath test, at which point he asked to call an attorney. The arresting officer

¹ All references are to the 2000 Revised Statutes of Missouri unless otherwise noted.

informed the driver that he would be given an opportunity to call an attorney when they reached the police station. At the police station, the driver was afforded two twenty-minute opportunities to call an attorney, each time with a twenty-minute interval, but was unable to reach one. After these attempts, the officer read the implied consent notice, and the driver then agreed to give a breath sample, which tested above the legal limit for alcohol. Based on the test, the Director suspended Paxton's driver's license.

The driver then filed a petition in the circuit court, claiming that Section 577.041.1 required that he be granted an additional twenty minute period after being read the implied consent notice. As here, the circuit court reinstated the driver's license.

The Eastern District considered whether *Schussler* compelled the Circuit Court's conclusion, and determined that it did not. Specifically, the Eastern District stated:

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.

The Eastern District further found, “Accordingly, by the express language of Section 577.041, Driver was not entitled to a twenty minute allowance in that he did not request an attorney after having been asked to submit to a test. We therefore find that in this instance the provisions of Section 577.041 were satisfied and that the trial court erred in holding Driver's breath test results inadmissible.”

The Eastern District’s decision correctly concluded that the decision of the Western District in *Schussler* departed from the clear meaning of the statute. Like the Eastern District, this court should decline to follow *Schussler* and apply the statute as written. Norris did not respond to Deputy Letchworth’s request for a chemical test with a request to speak to an attorney, and therefore Section 577.041.1 did not require Deputy Letchworth to give Norris twenty minutes to attempt to contact an attorney.

B. The Director met his burden of proving that there were reasonable grounds to believe that Norris was driving while drugged or intoxicated and thus for requesting a chemical test.

The issue of reasonableness of Deputy Letchworth’s stop and the arrest, while part of the Director’s burden of proof, was not separately addressed or determined by the Circuit Court.

Section 571.041.1, RSMo, applies to a person who has been arrested or stopped pursuant Section 577.020.1, which requires that “the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition.” “Within these cases [license suspensions under Section 571.041], ‘reasonable grounds’ is considered ‘synonymous with probable cause.’” *Brown v. Director of Revenue*, 85 S.W.3d 1, 4 (Mo. banc 2002). Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense. “Probable cause is evaluated from the vantage point of a prudent, cautious, and trained police officer at the scene at the time of arrest.” *Wilcox v. Director of Revenue*, 842 S.W.2d 240, 242 (Mo.App. W.D.1992). Conduct which leads an officer to suspect an offense may have been committed need not be illegal in itself; it may be “unusual” as well. *Zummo v. Director of Revenue*, 212 S.W. 3rd 236, 242 (Mo.App.S.D., 2007).

The conduct that led Deputy Letchworth to make the arrest was certainly “unusual.” Respondent attempts to minimize the conduct by suggesting it is not unusual to pull into the parking lot of a fast-food restaurant and sit waiting, but such behavior is certainly “unusual” at 3:00 a.m., at a time when the restaurant was closed (Tr. 6). Indeed, a police officer seeing an occupied vehicle parked on the grounds of a closed business after hours has reason for suspicion that a burglary, vandalism, or other illegal conduct may occur. Deputy Letchworth testified regarding his concern that a burglary might take place (Tr. 36).

Norris’s appearance and behavior provided further reason to suspect he was under the influence of some chemical intoxicant. In addition to the fact that he was parked in a closed

business at 3:00 a.m., Norris's manner was aggressive and nervous, his eyes were constricted and his skin was sweaty and clammy, and he was wearing a coat, although the temperatures were in the mid-60's to 70's (Tr. 18). Norris exited the vehicle, walked up to the patrol car, then walked away and threw his coat on the ground. An examination of the coat revealed that one of the pockets contained a vial of white powder, which Deputy Letchworth field-tested, obtaining a result of positive for methamphetamine (Tr. 12-14). The arrest took place after the substance found in Norris's coat pocket tested positive for methamphetamine (Tr. 14).

Respondent devotes much of his brief on the issue to the proposition that the vertical gaze nystagmus test administered by Officer Chase did not establish that Norris was under the influence of a chemical. However, the instant matter is not an appeal of a conviction for driving under the influence. The question before the Court is not whether Norris was intoxicated, but whether Deputy Letchworth had reasonable grounds to believe that he might be, such that he was justified in requesting that Norris submit to a chemical test. "[A] vast gulf exists between the quantum of information necessary to establish probable cause and the quantum of evidence required to prove guilt beyond a reasonable doubt." *Wilcox*, 842 S.W.2d at 243.

"There is no precise test for determining whether probable cause exists; rather, it is based on the particular facts and circumstances of the individual case." *Guhr v. Director of Revenue*, 228 S.W.3rd 581, 584-585 (Mo. 2007). In *Wilson v. Director of Revenue*, 35 S.W.3d 923 (Mo.App. W.D.,2001), a request for chemical testing was found justified based on observations that the driver was "lethargic" and slow to answer questions, that his eyes

were “watery and bloodshot,” and the officers detected a “moderate chemical odor” of unknown origin on his breath, and that he performed poorly on field sobriety tests, although he passed a breath analyzer test.

Based on these standards, the record shows ample evidence that Deputy Letchworth had sufficient basis that “a prudent, cautious, and trained police officer at the scene at the time of arrest” would conclude that there was a reasonable grounds to believe that Norris may be “in a drugged condition.” Thus his request for a chemical test was authorized under Section 577.041, and Norris’s refusal to submit to the test compels the revocation of his driver’s license.

C. Contrary to a contention in a footnote of Respondent's Brief, the document that mentioned that the search of Defendant's vehicle yielded a weapon was admitted into evidence.

In Footnote 1 on page 7 of Respondent’s brief, Respondent states that “The Director’s brief implies that there was evidence showing that the search of Mr. Norris ‘yielded a fully loaded .357 Magnum pistol.’” The footnote refers to the documentation of this item on Page 17 of the Legal File, and states that “the police report itself was not offered or received into evidence.” This is not correct.

On Page 55 of the hearing transcript, counsel for the Director offered into evidence “Respondent’s Exhibit A.” After some discussion of the hearsay content of the exhibit, the Court clarified that counsel for Respondent was not objecting to the offer, and “Exhibit A” was admitted.

Pursuant to Rule 81.16, Appellant has obtained the original Exhibit A from the custodian of records and deposited it with the Court pursuant to Rule 81.16. Review of “Exhibit A” demonstrates that it consists of nine (9) pages, including the police report, which Respondent claimed was not received into evidence.

The presence of the firearm was mentioned only in passing, and the Director has not asserted it is material to the critical issue in this case. However, Respondent’s assertion that the exhibit was not on the record is incorrect.

II. CONCLUSION

The judgment of the circuit court overruling and setting aside the revocation of Norris’s license should be reversed.

Respectfully submitted,

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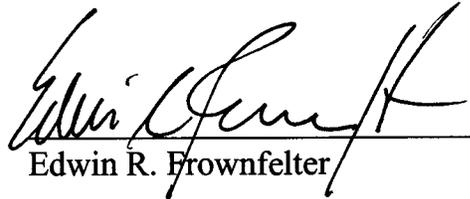
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CERTIFICATION UNDER RULE 84.06(c) and (g)

I certify that the foregoing brief

- (1) Includes the information required by Rule 55.03; and
- (2) States that the brief complies with the limitations contained in Rule 84.06(b); and
- (3) Contains 2,183 words.

I further certify that the floppy disk filed with this brief has been scanned and is virus-free.

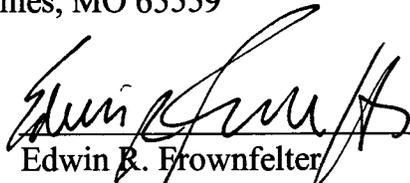


Edwin R. Frownfelter

CERTIFICATE OF SERVICE

I certify that pursuant to Rule 84.06(g), one printed copy of the foregoing Appellant's Brief and one copy on diskette were mailed, postage prepaid, on this 31st day of July, 2008, to:

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