**IN THE MISSOURI SUPREME COURT**

**SC 90317**

**NATALIE R. ROSS,**
**APPELLANT,**

**vs.**

**DIRECTOR OF REVENUE,**
**RESPONDENT.**

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**IN THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI**
**HONORABLE DANIEL M. CZAMANSKE, JUDGE**

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# SUBSTITUTE BRIEF OF APPELLANT

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## JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the Circuit Court of Platte County, Missouri, wherein the trial court affirmed the Respondent Director's decision to administratively sanction Appellant Natalie R. Ross' operating privilege pursuant to the provisions of § 577.041 R.S.Mo. (2005). At issue is whether the trial court's judgment is supported by the evidence, is against the weight of the evidence, and whether it is an erroneous application or interpretation of the law.

Platte County lies within the territorial jurisdiction of the Missouri Court of Appeals, Western District. §§ 477.050-477.070 R.S.Mo. (1996). This appeal does not involve the validity of a treaty or statute of the United States or any statute or provision of the Missouri Constitution, the title to any office of this state, the construction of a revenue law, or the imposition of the death penalty. This appeal is, therefore, within the general appellate jurisdiction of the Missouri Court of Appeals, Western District. Mo. Const. Art. 5, § 3 (1945).

After Opinion by the Missouri Court of Appeals, Western District, this Court ordered transfer.

## STATEMENT OF FACTS

On February 8, 2008 at approximately 0158 hours, Corporal Sims of the Missouri Highway Patrol was dispatched regarding a female subject standing on the shoulder of northbound Interstate 435 at the twenty-one mile marker. [TR. 6,18,19, Director's Ex. A] When Sims arrived, he was unable to locate the pedestrian. [TR. 6, Director's Ex. A] He did however observe what appeared to be fresh scrape marks on the roadway. [TR. 7, Director's Ex. A] The marks extended from the left bridge rail, across the northbound lanes and onto the right shoulder. [TR. 6, Director's Ex. A] He then saw a white passenger car which had traveled off the right side of the roadway and down an embankment. [TR. 6,7, Director's Ex. A]

As he approached the vehicle he observed extensive damage to the vehicle's front end and driver's side. Inside the vehicle, seated in the right passenger seat he found Appellant Natalie Ross. [TR. 7, Director's Ex. A] Lying across the rear seat was another individual, Ryan Newbury. [TR. 7, Director's Ex. A]

When Sims opened the driver's door, he immediately detected a strong odor of intoxicants emitting from the passenger compartment. [TR. 9, Director's Ex. A] Upon inquiring of each as to their condition, he learned that neither was injured. [TR. 8, Director's Ex. A]

Sims asked Ross if she had been walking on the shoulder referencing the dispatch he had previously received. [TR. 8, Director's Ex. A] According to Sims, Ross denied having walked along the shoulder; she also denied driving. [TR. 8, Director's Ex. A] Ross identified a friend as the driver but was unable to provide Sims with her name. [TR. 11, Director's Ex.

A]

Sims requested Ross exit the vehicle. As she did, he noticed she was only wearing one silver high heeled shoe. When Sims inquired as to the whereabouts of her other shoe, Ross said she couldn't find it. [TR. 9, Director's Ex. A] Per Sims, Ross elected to leave the one shoe in vehicle walking up the embankment in bare feet. [TR. 15,16, Director's Ex. A]

Once on the shoulder, Sims placed Ross under arrest for possession of drug paraphernalia and placed her inside his patrol car. [TR. 10, Director's Ex. A] Sims then spoke with Newbury. According to Sims, Newbury didn't know the cause of the accident. [Director's Ex. A]

When Sims inspected the snow in the area around the passenger side of the vehicle, he observed footprints consistent with the shoe style worn by Newbury. [TR. 10, Director's Ex. A] He did not observe any pattern matching those of Ross. [TR. 10, Director's Ex. A]

Upon returning to his patrol car, Sims advised Ross that she was also being placed under arrest for careless and imprudent driving. [TR. 12, Director's Ex. A]

Sims testified he did not administer any field sobriety tests to Ross at the scene given the temperature and Ross' lack of shoes. [TR. 12, Director's Ex. A] Instead, he transported her to the Platte County Detention facility. [TR. 12, Director's Ex. A] There she was given a battery of exercises to perform. [TR. 12-15, Director's Ex. A] Upon completion, Sims placed Ross under arrest again, this time for driving while intoxicated. [TR. 17, Director's Ex. A]

According to Sims, his initial contact with Ross was at 0214 hours. [TR. 10,

Director's Ex. A] He first placed her under arrest for possession of paraphernalia at approximately 0220 hours, followed shortly thereafter with an arrest at the scene for careless and imprudent driving. [TR. 12, Director's Ex. A] It was only after administering the battery of field exercises at the Platte County Detention Facility that he placed Ross under arrest for driving while intoxicated as well. [TR. 17, 20, Director's Ex. A] This third and final arrest occurred just prior to Sims reading Ross the implied consent advisory at 0354 hours. [TR. 20, Director's Ex. A] Thus, no less than one hour and forty minutes elapsed between Sims' initial contact with Ross and her under arrest for driving while intoxicated.

## POINT I

**THE TRIAL COURT'S JUDGMENT AFFIRMING THE DIRECTOR'S REVOCATION OF APPELLANT'S PRIVILEGE TO OPERATE A MOTOR**

**VEHICLE FOR REFUSING TO SUBMIT TO A CHEMICAL ANALYSIS OF A BODILY SUBSTANCE IS NOT SUPPORTED BY THE EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW BECAUSE THE CONSENT IMPLIED UNDER SECTION 577.020 TO SUBMIT TO SUCH ANALYSIS IS, PURSUANT TO SECTION 577.039, SUBJECT TO APPELLANT HAVING BEEN ARRESTED FOR A VIOLATION OF SECTION 577.010 WITHIN ONE AND ONE-HALF HOURS OF THE TIME OF THE CLAIMED VIOLATION IN THAT THERE WAS NO EVIDENCE THAT APPELLANT WAS ARRESTED FOR VIOLATING SECTION 577.010 WITHIN ONE AND ONE HALF HOURS.**

*Section 577.020 R.S.Mo*.

*Section 577.039 R.S.Mo.*

*Section 577.041 R.S.Mo.*

*Reed v. Director of Revenue*, 184 S.W.3d 564 (Mo. 2006)

**POINT II**

**THE TRIAL COURT'S JUDGMENT AFFIRMING THE DIRECTOR'S REVOCATION OF APPELLANT'S PRIVILEGE TO OPERATE A MOTOR VEHICLE FOR REFUSING TO SUBMIT TO A CHEMICAL ANALYSIS OF HER**

**BREATH IS NOT SUPPORTED BY THE EVIDENCE BECAUSE THE CONSENT IMPLIED UNDER SECTION 577.020 TO SUBMIT TO SUCH CHEMICAL ANALYSIS IS SUBJECT TO APPELLANT HAVING BEEN ARRESTED FOR AN OFFENSE ARISING OUT OF ACTS WHICH THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE WERE COMMITTED WHILE APPELLANT WAS DRIVING A MOTOR VEHICLE WHILE IN AN INTOXICATED OR DRUGGED CONDITION BECAUSE APPELLANT WAS NOT ARRESTED FOR ANY OFFENSE WHICH THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE WAS COMMITTED WHILE APPELLANT WAS DRIVING A MOTOR VEHICLE WHILE IN AN INTOXICATED OR DRUGGED CONDITION.**

*Section 577.020 R.S.Mo.*

*Section 577.041 R.S.Mo.*

*Mullin v. Director of Revenue,* 288 S.W.3d 319 (Mo.App W.D. 2009)

**POINT I**

**THE TRIAL COURT'S JUDGMENT AFFIRMING THE DIRECTOR'S REVOCATION OF APPELLANT'S PRIVILEGE TO OPERATE A MOTOR VEHICLE FOR REFUSING TO SUBMIT TO A CHEMICAL ANALYSIS OF A BODILY SUBSTANCE IS NOT SUPPORTED BY THE EVIDENCE, IS AGAINST**

**THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW BECAUSE THE CONSENT IMPLIED UNDER SECTION 577.020 TO SUBMIT TO SUCH ANALYSIS IS, PURSUANT TO SECTION 577.039, SUBJECT TO APPELLANT HAVING BEEN ARRESTED FOR A VIOLATION OF SECTION 577.010 WITHIN ONE AND ONE-HALF HOURS OF THE TIME OF THE CLAIMED VIOLATION IN THAT THERE WAS NO EVIDENCE THAT APPELLANT WAS ARRESTED FOR VIOLATING SECTION 577.010 WITHIN ONE AND ONE HALF HOURS AND NO STATUTORY EXCEPTION TO THE SUCH TIME REQUIREMENT APPLIED.**

"Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood, . . . if the person is arrested for any offense arising out of acts which 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." 577.020.1.1 R.S.Mo. (2006).

The consent "deemed" given is expressly "subject to the provisions of §577.019 to §577.041." §577.020 R.S.Mo. (2006) Within the referenced statutory range is §577.039 R.S.Mo. which provides,

An arrest without a warrant by a law enforcement officer,

> including a uniformed member of the state highway patrol, for a violation of section 577.010 or 577.012 is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer and when such arrest without warrant is made within one and one-half hours after such claimed violation occurred, unless the person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment, in which case such arrest without warrant may be made more than one and one-half hours after such violation occurred.

Ross' arrest for driving while intoxicated was without warrant. [TR. 18, Director's Ex. A] Her arrest for driving while intoxicated was more than one and one-half hours after she allegedly violated §577.010. [TR. 19-20, Director's Ex. A]

On review, an 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." *Flaiz v. Dir. of Revenue*, 182 S.W.3d 244, 247 (Mo.App. W.D. 2005) *citing Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002). While a judgment will be set aside on the basis that it is against the weight of the evidence only when there is a firm belief that the judgment is wrong, there is no need to defer to the trial court's judgment when the evidence is uncontradicted. *Wilson v. Dir. of Revenue*, 35

S.W.3d 923, 926 (Mo.App. W.D. 2001).

§577.020 is unambiguous in its qualifying language. The consent implied is "subject to the provisions of sections 577.019 to 577.041." The legislature 'is presumed to have intended what the statute says. Consequently, when legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. *State v. Bass,* 81 S.W.3d 595, 602 (Mo.App. W.D. 2002). "(C)ourts must give effect to a statute as written." *Straight v. Straight,* 195 S.W.3d 461, 467 (Mo.App. W.D. 2006).

Giving effect to the qualifying language in §577.020 mandates that Ross have been arrested for driving while intoxicated within ninety minutes of when she alleged drove while intoxicated as a condition precedent to implying her consent to a chemical analysis of her breath. In the absence of a timely warrantless arrest, consent is not implied and there can thus be no sanction for refusing to do that which is not required.

Courts "presume that the legislature intends that every word, clause, sentence, and provision of a statute have effect." *Connelly v. Dir. of Revenue,* 2009 WL 1851188, 3 (Mo.App. E.D. 2009) "Unless constitutionally infirm, the courts of this state are obligated to follow and apply the law as written by the legislature." *State ex rel. Bush-Cheney 2000, Inc. v. Baker,* 34 S.W.3d 410, 412 (Mo.App. E.D. 2000).

The trial court failed Ms. Ross in fulfilling this obligation. It did not apply the law as written. It ignored the statute's qualifying clause. It gave no effect to the limiting language.

Any trial court finding that Ross was arrested for driving while intoxicated within one and one-half hours of the time she allegedly violated §577.010 is simply not supported by the evidence as the testimony and the director's exhibit unequivocally established that the arresting officer's initial contact with Ross occurred no earlier than 0214 hours [LF. 7, Director's Ex. A] and that her driving while intoxicated arrest was at 0354 [LF. 16, Director's Ex. A] or one hour and forty minutes later.

Indeed any finding that she was arrested for violating §577.010 within one and one-half hours is against the weight of the evidence as it is uncontradicted that the time span between Sim's initial contact and his subsequent alcohol related arrest of Ross was no less than one hour and forty minutes.

While the time restraints of §577.039 R.S.Mo. admit of certain exceptions, none are applicable here. Ross did not leave the scene of the accident; she was found at the scene. [TR. 7, Director's Ex. A] Ross was not removed from the scene to received medical attention; she was removed and later "field" tested at the Platte County detention facility. [TR. 12, Director's Ex. A]

The director suggests that Ross' driving while intoxicated arrest did not occur within ninety minutes because the officer took her safety into consideration. [TR. 12, Director's Ex. A] The director notes, "Instead of having her perform the field sobriety tests at the scene, in the dark early morning hours, on the side of the interstate, in the winter cold, on the snowy ground, barefooted; he [Sims] waited until they got back to the station. The Petitioner would have us believe that instead of acting for her safety, Corporal Sims should have had her

perform those tests barefoot on the side of the interstate to guarantee that the arrest be made within 90 minutes." [LF. 8, Director's Ex. A]

In reality, the vast majority of field testing occurs at the scene, most generally in the dark, often during the early morning hours. Frequently the testing is on the side of the interstate. And, it is not unusual from November through February for the weather to be inclement.

Only atypical was Ross' bare feet. While such might possibly have had an affect on her ability to perform the walk and turn test or the one leg stand test, it would have no bearing on any one of a number of other available tests such as the horizontal gaze nystagmus test, the alphabet test, the counting test, a preliminary breath test, etc. Frequently, these alternative procedures are utilized when an individual is incapable of performing the traditional balancing tasks. *See e.g. Smither v. Dir. of Revenue*, 136 S.W.3d 797, 798 (Mo. 2004) and *Fick v. Dir of Revenue*, 240 S.W.3d 688, 690 (Mo. 2007).

Adopting the director's argument rewrites §577.020 engrafting a third exception upon the enactment's mandate that a §577.010 or 577.012 arrest occur within one and one-half hours. "No court may engraft upon the express language of the statute, exceptions not contained within the enactment. We cannot add to a statute provisions which do not appear explicitly or by implication from the words in the statute." *Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Pemiscot County*, 217 S.W.3d 393, 399 (Mo.App. S.D. 2007).

Section 577.020 to §577.041 comprise a comprehensive system such that all the

sections must be read *in pari materia*, similar to the interpretation given §302.500 to §302.541. *See e.g. State ex rel. Dir. of Revenue v. Kinder*, 861 S.W.2d 161, 163 (Mo.App. W.D. 1993) rehearing and/or transfer denied (1993).

"The doctrine of in pari materia is a cardinal tenet of statutory construction. '*In pari materia*' means 'upon the same matter or subject,' Blacks Law Dictionary, 711 (5th Edition, 1979); the doctrine requires statutes relating to the same subject matter to be construed together though the statutes are found in different chapters and were enacted at different times." *Covera Abatement Technologies, Inc. v. Aire Conservation Commission*, 973 S.W.2d 851, 859-860 (Mo. 1998).

In *Reed v. Dir. of Revenue*, 184 S.W.3d 564 (Mo. 2006) Reed argued that his driving privileges were not subject to administrative sanction under §302.500 et seq. in that his arrest for violating §577.010 occurred more than one and one-half hours after it was alleged he drove while intoxicated. This Court agreed.

> A failure to comply with the provisions of sections 577.020 to 577.041 means that the chemical analysis is not admissible in civil proceedings to suspend or revoke a driver's license. Section 577.039 is among the provisions regulating the performance of a chemical analysis of a person's blood alcohol content. As determined above, Reed was arrested in violation of section 577.039. Accordingly, the blood alcohol test results obtained

> from the arrest in violation of section 577.039 are not admissible.

*Reed v. Dir. of Revenue*, 184 S.W.3d 564, 568 (Mo. 2006).

Likewise, in this proceeding, there is "a failure to comply with the provisions of sections 577.020 to 577.041." Ross' arrest for violating §577.010 was made more than one and one-half hours after she alleged drove while intoxicated.

If this court affirms the trial court's judgment, it will create the illogical situation where one who submits to a chemical test resulting in a concentration in excess of the statutory limit but outside the statutory time frame may not experience an administrative sanction of her license, yet one similarly situated who refuses such testing will have her privilege revoked.

Statutes relating to the same subject matter must be read together and, if possible, in harmony. *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. 1997). There is no harmony, only acrimony, created by the trial court's disposition. The trial court erred in affirming the director's revocation.

## POINT II

**THE TRIAL COURT'S JUDGMENT AFFIRMING THE DIRECTOR'S REVOCATION OF APPELLANT'S PRIVILEGE TO OPERATE A MOTOR VEHICLE FOR REFUSING TO SUBMIT TO A CHEMICAL ANALYSIS OF HER BREATH IS NOT SUPPORTED BY THE EVIDENCE BECAUSE THE CONSENT IMPLIED UNDER SECTION 577.020 TO SUBMIT TO SUCH CHEMICAL ANALYSIS IS SUBJECT TO APPELLANT HAVING BEEN ARRESTED FOR AN OFFENSE ARISING OUT OF ACTS WHICH THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE WERE COMMITTED WHILE APPELLANT WAS DRIVING A MOTOR VEHICLE WHILE IN AN INTOXICATED OR DRUGGED CONDITION BECAUSE APPELLANT WAS NOT ARRESTED FOR ANY OFFENSE WHICH THE ARRESTING OFFICER HAD REASONABLE GROUNDS TO BELIEVE WAS COMMITTED WHILE APPELLANT WAS DRIVING A MOTOR VEHICLE WHILE IN AN INTOXICATED OR DRUGGED**

**CONDITION.**

On review, an 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." *Flaiz v. Dir. of Revenue*, 182 S.W.3d 244, 247 (Mo.App. W.D. 2005) *citing Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002).

"The legislature 'is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction." *State v. Bass*, 81 S.W.3d 595, 602 (Mo.App. W.D. 2002). "Courts must give effect to a statute as written." *Straight v. Straight* 195 S.W.3d 461, 467 (Mo.App. W.D. 2006).

"We presume that the legislature intends that every word, clause, sentence, and provision of a statute have effect. *State ex rel. Vincent v. D.C., Inc.*, 265 S.W.3d 303, 308 (Mo.App. E.D. 2008). Where a statute has clear and unambiguous language, there is no room for construction. *Connelly v. Dir. of Revenue*, 2009 WL 1851188, 3 (Mo.App. E.D. 2009). "We approach the task of statutory interpretation mindful that it is the function of the courts to construe and apply the law and not to make it." *State v. Meggs*, 950 S.W.2d 608, 610 (Mo.App. 1997).

Missouri's Implied Consent Law is codified as §577.020.1. R.S.Mo. (2006)**.** It

provides,

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood, . . . if the person is arrested for any offense arising out of acts which 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.

When consent is implied and a driver thereafter refuses to submit to a chemical test, the director revokes the offender's privilege to operate a motor vehicle. §577.041 R.S.Mo. A driver, such as Appellant Ross may challenge the director's decision as set forth in §577.041 R.S.Mo.

The circumstances under which consent is implied are statutorily enumerated in §577.020.1 R.S.Mo. As relevant to this Point, consent is implied "if the person is arrested for any offense arising out of acts which 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." §577.020.1(1) Thus, not only must there be an arrest, such arrest must be for an offense arising out of acts which the officer had reasonable grounds to believe were committed while the person was driving while intoxicated.

The director's evidence failed to support any finding that Ross' arrest for possession of paraphernalia or for careless and imprudent driving were acts which Sims had probable cause to believe were committed while she was driving while intoxicated.

Sims was dispatched not because of a report of erratic driving, but rather because a female was reported to be standing on the shoulder of the interstate. [TR. 6,18,19, Director's Ex. A] When Sims arrived, there was no pedestrian, only fresh scrape marks on the roadway. [TR. 6-7, Director's Ex. A] Sims then noticed a white passenger car off` the roadway and down an embankment. [TR. 6,7, Director's Ex. A] As he got closer, he observed extensive damage to the vehicle. [TR. 7 , Director's Exhibit A]

When Sims opened the driver's door, he immediately detected a strong odor of intoxicants emitting from the passenger compartment. [TR. 9, Director's Ex. A] Ross was in the passenger's seat. [TR. 7, Director's Ex. A] A second individual, Ryan Newbury, was lying across the back seat. [TR. 7, Director's Ex. A] Neither complained of injuries. [TR. 8, Director's Ex. A] Sims never associated the odor with either individual, only a generalized reference as "emitting from the passenger compartment." [TR. 9, Director's Ex. A]

Ross told Sims she hadn't been driving nor could she tell him who had been other than to say it was a friend. [TR. 8, 11 Director's Ex. A] When Ross stepped from the vehicle, she was only wearing one shoe. When asked, she couldn't tell Sims the whereabouts of the other one. [TR. 15,16, Director's Ex. A]

Once out of the car and on the shoulder, Sims arrested Ross for possession of drug paraphernalia. [TR. 10, Director's Ex. A] He then returned to the damaged vehicle and spoke

with Newbury regarding the accident. Newbury didn't know the how it happened. [Director's Ex. A] When Sims returned to his patrol car and Ross, he told her she was also being arrested for careless and imprudent driving. [TR. 12, Director's Ex. A]

Such comprised the totality of the evidence presented. Other than an odor emitting from the passenger compartment, no evidence associated Ross with possible impairment at the time of her arrests at the scene. There were no field tests as they were given later at the Platte County detention facility. [TR. 12, Director's Ex. A] There was no testimony as to her gait, her speech or other characteristics possibly associating her with alcohol or drug induced impairment.

It is well established that for purposes of a license sanction, "'Reasonable grounds' is virtually synonymous with probable cause." *Jones v. Dir. of Revenue*, 2009 WL 1988408, 3 (Mo.App. S.D. 2009) *quoting Hawkins v. Dir. of Revenue*, 7 S.W.3d 549, 551 (Mo.App. E.D. 1999). "In determining whether an officer has probable cause to believe that a person is driving while intoxicated, the courts must evaluate the evidence from the viewpoint of a cautious, trained, and prudent police officer at the scene at the time of the arrest. *York v. Dir. of Revenue*, 186 S.W.3d 267, 270 (Mo. banc 2006). Probable cause, therefore, must be based on information in the officer's possession at the time of the arrest, not on information acquired after the fact." *Mullen v. Dir. of Revenue*, 288 S.W.3d 319, 322 (Mo.App. W.D. 2009) *quoting Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 621 (Mo. banc 2002).

After Ross had been arrested at the scene and transported to Platte County, she was then asked to perform a battery of sobriety tests. [TR. 12-15, Director's Ex. A] It was only

after the results of her sobriety tests were known that she was arrested for violating Section 577.010 as well. [TR. 17, Director's Ex. A] Because of the timing of the administration of those exercises, they could not be relied upon to support reasonable grounds to believe Ross had been driving while intoxicated when arrested at the scene for possession and careless and imprudent driving. "An officer cannot bootstrap and use facts learned after the arrest to show that he had probable cause to effect the arrest." *Howard v. McNeill*, 716 S.W.2d 912, 915 (Mo.App. E.D. 1986). The focus is on what knowledge an officer possessed at the time of arrest. *Domsch v. Dir. of Revenue,* 767 S.W.2d 121, 123 (Mo.App. W.D. 1989)

The penal sanction occasioned under §577.041 R.S.Mo. is to be imposed upon one who refuses "to submit to any test allowed pursuant to §577.020." A test allowed pursuant to §577.020 is one where an arrest has been made for an offense where the arresting officer has reasonable grounds to believe such offense was committed while the person was driving in an intoxicated condition. The uncontradicted evidence established that Sims did not begin his investigation for driving while intoxicated until after the arrests at the scene and after transporting Ms. Ross to the Platte County Detention Facility. Under such circumstances no consent is implied and therefore no sanctions may follow.

## CONCLUSION

Appellant Natalie Ross respectfully suggests the trial court erred in affirming the director's revocation of her privilege to operate a motor vehicle by incorrectly interpreting and applying the law, that the trial court's judgment is not supported by the evidence and is

against the weight of the evidence. She prays this Court reverse the trial court's decision, reinstate her privilege to operate a motor vehicle and remove any and all indicia of the sanction from her driving history.

Respectfully submitted,

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I hereby certify:

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