

IN THE MISSOURI SUPREME COURT

SC 90317

**NATALIE R. ROSS,
APPELLANT,**

vs.

**DIRECTOR OF REVENUE,
RESPONDENT.**

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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In her brief, Respondent argues that in a §577.041 refusal proceeding a court “shall only determine” the three issues identified in §577.041.4. Respondent avers that a trial court may not delve into matters other than those specifically enumerated. Respondent ignores substantial precedent to the contrary as appellate courts of this state have properly considered matters beyond those statutorily referenced and, necessarily so.

In *Allen v. Director of Revenue*, 59 S.W.3d 636, 638 (Mo. App. W.D. 2001) quoting *Bass v. Director of Revenue*, 793 S.W.2d 923, 926 (Mo. App. S.D.1990) the Western District recognized that, “Although § 577.041.4 provides circuit courts with limited statutory review, the courts should not be powerless to act where the director ignores statutory requirements. “The jurisdiction of the circuit court to hear [a case] de novo includes the authority to construe the statutes and determine if the action of the Director was authorized.” In *Allen*, the Court went beyond the three issues referenced and considered the director’s authority to sanction in the absence of an officer’s signed and notarized report. In its opinion the Court held, “The director, therefore, did not have the authority to revoke Allen's license. Because the director could not revoke Allen's license, the director's subsequent actions were void.” *Id.* at 638.

In *Floyd v. Director of Revenue*, 140 S.W.3d 165, 169 (Mo. App. E.D. 2004) the Court considered the statutory requirement that notice of the sanction be served “personally upon the person” pursuant to the provisions of Section 577.041. Such issue is not amongst the enumerated three.

Cates v. Director of Revenue, State of Mo., 943 S.W.2d 281, 283 (Mo. App. E.D.

1997), *Bennett v. Director of Revenue*, 889 S.W.2d 166 (Mo. App. W.D. 1994) and *Akers v. Director of Revenue*, 193 S.W.3d 325, 328 (Mo. App. W.D. 2006) all considered inadequacies in the reading of the implied consent advisory. Again, a matter not expressly referenced as a matter for the trial “to determine.”

The *Burdynski v. Director of Revenue*, 192 S.W.3d 483, 486 (Mo. App. S.D. 2006) Court discussed the statutory right to confer with counsel in the context of refusal proceeding. *Kotar v. Director of Revenue*, 169 S.W.3d 921, 926 (Mo. App. W.D. 2005) elaborated on the personal nature of that right. *Forste v. Benton*, 792 S.W.2d 910, 915-916 (Mo. App. S.D. 1990) addressed the authority of a non-certified reserve officer to effect an arrest, again in the context of a refusal sanction. According to Respondent, such “determinations” could never be made in a refusal proceeding.

In *Sparling v. Director of Revenue*, 52 S.W.3d 11, 13-14 (Mo. App. E.D.2001) the director sought to sanction Sparling’s license, not because she had refused a blood test, but because she had refused to be responsible for the associated costs, not an item specifically mentioned as one to be determined.

Even the director has sought judicial relief outside the three issues. Maybe she forgot. In *McInerney v. Director of Revenue*, 12 S.W.3d 403, 405 (Mo. App. E.D. 2000) she challenged the trial court’s subject matter jurisdiction because relief was not sought within the appropriate statutory time frame.

Contrary to Respondent’s suggestion, courts have and must necessarily consider issues beyond the three referenced.

The enactment states,

If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then none shall be given and evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMo, or section 577.010 or 577.012. The request of the officer shall include the reasons of the officer for requesting the person to submit to a test and also shall inform the person that evidence of refusal to take the test may be used against such person and that the person's license shall be immediately revoked upon refusal to take the 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.

§577.041.1.

By its terms , the section only applies to a “person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020.” §577.041.1. It is the request “to submit to any test allowed pursuant to section 577.020” which triggers

the statutory right to attempt to contact counsel. §577.041.1. Respondent reads and interprets the statute in the absence of these express qualifiers.

While the consent to chemical testing is implied, such consent is limited or “subject to the provisions of sections 577.019 to 577.041.” §577.020.1. Had the legislature intended otherwise, it could and would have included no restrictions, no qualifiers. There would be no “subject to” clause restraining the provision’s applications.

Respondent correctly represents that an officer’s subjective belief as to the existence of probable cause is not controlling. “Whether there is probable cause to arrest depends on the information in the officers’ possession prior to the arrest.” *Guhr v. Director of Revenue*, 228 S.W.3d 581, 584 (Mo.2007). Like *Guhr*, there were two arrests in this case. *Id.* at 584. Unlike *Guhr*, in this case, Judge Czamanske was not required to speculate as to the reasons for the initial arrests. *Id.* at 584.

Respondent proffers various “facts known to the officer at the time of the first arrest” supportive of probable cause to believe Ross was driving while intoxicated at the time of this arrest. While “Exhibit A”, particularly page one thereof, memorializes certain observations and Ross’ performance on certain sobriety tasks, it represents such observations and testing occurred *prior to her arrest or custody*. [Exhibit A].

Ross had been arrested and in custody for nearly ninety minutes before she was asked to perform any agility testing or physical gymnastics. To suggest that all of these observations and tests provided the predicate foundation for probable cause is an egregious distortion of the evidence. Many of the observations on page one of Exhibit A are

observations made in association with the administration of testing which occurred at the Platte County Detention Facility post first arrest, post second arrest and pre-final arrest, the final arrest for driving while intoxicated.

“Probable cause is based upon the facts viewed by a prudent, cautious and trained police officer and not the officer's subjective belief.” *Steele-Danner v. Director of Revenue*, 229 S.W.3d 607, 610 (Mo. App. S.D.2007). Is there *any* evidence to suggest that Corporal Sims of the Missouri Highway Patrol is anything other than a a prudent, cautious and trained law enforcement officer? Is there any evidence to suggest that a prudent, cautious and trained police law enforcement officer would have made a decision to arrest for driving while intoxicated based upon the information available to that officer at the scene? Or, as it happened, would a prudent, cautious and trained law enforcement officer feel it necessary to conduct additional testing *before* making a decision to arrest for driving while intoxicated?

“In dealing with probable cause we deal with probabilities, not certainties. ‘These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act’.” *State v. Henry*, 292 S.W.3d 358, 364 (Mo. App. W.D.2009) *quoting Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (U.S. Ill.1983). Is Respondent suggesting that Corporal Sims, in not arresting Ross at the scene, was someone other than a reasonable and prudent person?

Finally, Respondent makes abundant references to the impropriety of Point II of Ross’ Substitute Brief. Certainly she takes issue with this Point. But, instead of simply asking this Court to strike the Point, or reject it under Rules 84.04 and 83.03, she wants this Court to

speculate as to Ross' motivations. Well Ross's motivations are not those assumed.

Contrary to her assumptions, Point II was not added as a belated attempt to develop an alternative theory of relief. Rather, it was responsive to the questions asked in oral argument before the Western District and an observation made in its Opinion. Nothing more, nothing less.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03 and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 1598 words, excluding the cover, table of contents, table of authorities, the signature block, certification and appendix, as determined by WordPerfect 12.0 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on the 13th day of November, 2009, to:

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