

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT..... 3

IN SUMMATION 5

CONCLUSION 6

CERTIFICATION OF SERVICE AND
OF COMPLIANCE WITH RULE 84.06(b) AND (c) 7

TABLE OF AUTHORITIES

Cases

Hopkins-Barken v. Director of Revenue,

55 S.W.3d 882 (Mo. App. E.D. 2001)..... 3

Martin v. Director of Revenue,

248 S.W.3d 685 (Mo. App. W.D. 2008) 3

Murphy v. Carron,

536 S.W.2d 30 (Mo. banc 1976) 6

Rain v. Dir. of Revenue,

46 S.W.3d 584 (Mo. App. E.D. 2001)..... 3

Testerman v. Director of Revenue,

31 S.W.3d 473 (Mo. App. W.D. 2000) 6

Verdoorn v. Director of Revenue,

119 S.W.3d 543 (Mo. banc 2003) 6

ARGUMENT

Respondent White contends that the evidence presented to the trial court was “contrary and inconsistent” and supports the trial court’s conclusion that Sgt. Bremer did not have probable cause to arrest White.

In determining whether probable cause existed at the time of arrest, the trial court views the facts as they “would have appeared to a prudent, cautious, and trained police officer.” *Hopkins-Barken v. Director of Revenue*, 55 S.W.3d 882, 885 (Mo. App. E.D. 2001). And “[t]he ultimate test is satisfied “when a police officer observes an unusual or illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with the motorist.” *Martin v. Director of Revenue*, 248 S.W.3d 685 (Mo. App. W.D. 2008) quoting *Rain v. Director. of Revenue*, 46 S.W.3d 584, 587 (Mo. App. E.D. 2001). In this case, the facts do not support the trial court’s judgment.

Respondent White contends that the following facts are contrary and inconsistent and support the judgment:

- Sgt. Bremer was driving in the left lane as opposed to the right lane (Tr. 25)
- Sgt. Bremer did not observe any abnormal operation of White’s vehicle, other than Mr. White was passing him in the right lane when [Sgt. Bremer] was driving the speed limit (Tr. 26);
- Sgt. Bremer did not stop Mr. White for speeding (Tr. 27);
- Sgt. Bremer did not note any deviation in the vehicle to the left or right that he felt was abnormal (Tr. 27);

- Sgt. Bremer observed brake lights, but no turn signal when White turned into a parking lot (Tr. 28);
- Sgt. Bremer did not activate his emergency equipment immediately, and when he did, he did so only for purposes of safety (Tr. 28);
- Sgt. Bremer did not observe White have difficulties exiting the vehicle (Tr. 29);
- Sgt. Bremer did not observe White stumble (Tr. 29);
- Sgt. Bremer did not observe White use the vehicle to stabilize himself (Tr. 29);
- Sgt. Bremer offered White assistance to locate the cause of the turn signal failure (Tr. 30);
- Sgt. Bremer noticed a slight odor of alcohol on White (Tr. 32);
- Sgt. Bremer noticed empty beer cans in White's vehicle (Tr. 31);
- Sgt. Bremer noticed that White swayed during the gaze nystagmus test (Tr. 41);
- Sgt. Bremer did not indicate if White swayed, used his arms for balance, hopped, or put his foot down during the one leg stand test (Tr. 44-45);
- Sgt. Bremer noticed that White "turned incorrectly" during the walk and turn test (Tr. 49);
- Sgt. Bremer noticed that White completed the alphabet, but in an unusually "slow and deliberate fashion" (Tr. 49);

But there are no inconsistencies among the facts, nor are any of them contrary;

meanwhile, White ignores the following facts (which were not rebutted by any evidence) that Sgt. Bremer observed:

- White initially lied about drinking (Tr. 6);
- When given a preliminary breath test, the machine indicated that alcohol was present in White (Tr. 8-9);
- White exhibited 5 out of 6 clues during the horizontal gaze nystagmus test (Tr. 20); and
- White had a strong odor of intoxicants and his eyes were bloodshot; (Tr. 23)

Again, none of the facts are inconsistent with each other, and none of the facts support any reasonable inference that supports the trial court's judgment finding that probable cause did not exist when Sgt. Bremer arrested White.

The facts in this case show that Sgt. Bremer observed an illegal operation of a motor vehicle which was driven by White, and that Sgt. Bremer observed numerous "indicia of intoxication" during the consensual encounter with White which supported Sgt. Bremer's conclusion that probable cause existed to arrest White.

IN SUMMATION

Do any of the indicia observed by Sgt. Bremer, separately, establish probable cause? Probably not. Do they, in the aggregate, establish probable cause to believe White was operating a motor vehicle while intoxicated? Yes. Respondent's arguments, to the contrary, are based largely upon conjecture and speculation. While the trial court is free to rely on inferences from the evidence, such inferences "must be reasonable in nature, and the trial court cannot rely on guesswork, conjecture and speculation."

Testerman v. Director of Revenue, 31 S.W.3d 473, 483 (Mo. App. W.D. 2000),
overruled, *Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 547 (Mo. banc 2003) to the
extent that it did not apply standard announced.

When considering the actual evidence before this Court, and the case law on point,
it is clear that the court below erroneously applied the law by finding that there was not
probable cause, and its judgment is unsupported by the evidence. As such, its judgment
should be reversed. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

CONCLUSION

This Court should reverse the trial court's judgment.

Respectfully submitted,

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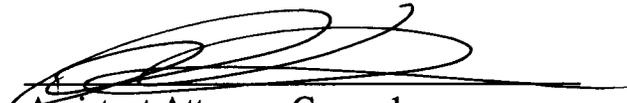
**CERTIFICATION OF SERVICE AND
OF COMPLIANCE WITH RULE 84.06(b) AND (c)**

The undersigned hereby certifies that on this 18th day of February, 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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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 912 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.


Assistant Attorney General