IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	**Case No. ED82604**
	)	
CAROL SUE SMITH,	)	
	)	
Defendant/Respondent.	)	

Appeal from the Associate Circuit Court of Cape Girardeau County, Missouri
Honorable Michael J. Bullerdieck, Associate Circuit Judge

BRIEF OF RESPONDENT CAROL SUE SMITH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases (cont'd) **Page(s)**

Jurisdictional Statement

This action is an interlocutory appeal from a Judgment and Order on Motion to Suppress entered on February 27, 2003 by the Honorable Michael Bullerdieck, Associate Circuit Judge. (L.F. 4, 20-24) The trial court sustained the Defendant's motion to suppress and ordered the evidence obtained by the search warrant suppressed. (L.F. 4, 20-24). The State appealed pursuant to section 547.200.1(3) RSMo. The issue for appeal is whether section 577.041 RSMo 2000 prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test under the implied consent law.

This appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, as provided by Article V, Section 3 of the Constitution of the State of Missouri. This appeal does not involve the construction of the Constitution of the State of Missouri, nor the validity of a present statute of this State, nor the construction of a revenue law. As the judgment in this case was entered in the Associate Circuit Court of Cape Girardeau County, this appeal lies with the jurisdiction of the Missouri Court of Appeals, Eastern District, as provided by section 477.050 RSMo 2000.

Statement of Facts

This Motion to Suppress was submitted to the trial court on a Stipulation of Facts. (L.F. 18-19) The stipulated facts have been accurately set forth in Appellant's brief.

Argument

Standard of Review

The State appeals to this Court challenging the trial court's ruling on a motion to suppress. Appellate review of a motion to suppress evidence is limited to a determination of whether the trial court's decision was supported by substantial evidence. *State v. Watkins*, 73 S.W.3d 881, 883 (Mo.App.E.D. 2002). The appellate court will reverse the trial court's ruling only if it is clearly erroneous. *Id.*

Issue: Whether section 577.041 RSMo prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test under the implied consent law.

The trial court found that the blood sample taken from the defendant, following her arrest for driving while intoxicated and her refusal to submit to a chemical test under the implied consent law, was obtained in violation of section 577.041 RSMo 2000[1] and therefore was illegally obtained and ordered it suppressed. The State challenges the trial court's decision to suppress the evidence of the blood sample arguing that the evidence was obtained by a valid search warrant and that the implied consent law is irrelevant.

Respondent argues, and the trial court found, that once a law enforcement officer places a person under arrest for driving while intoxicated and the person refuses to submit

[1] All citations to section 577.041 are to RSMo 2000, which was in effect at the time of Respondent's arrest on August 12, 2002. *See* Appendix A5-A9.

to a chemical test under the implied consent law, any other option to obtain a blood sample, including a search warrant, is foreclosed by section 577.041 The issue before the trial court, and before this Court, is whether section 577.041 prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test pursuant to the implied consent law. [2]

Missouri case law

The issue of whether section 577.041 prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test under the implied consent law has not been directly addressed by the appellate courts of this state. The trial court noted that the limitation expressed in section 577.041 was commented on in dicta in *State v. Trumble*, 844 S.W.2d 22 (Mo.App.W.D. 1992) wherein the appellate court stated "law enforcement officers are significantly limited by section 577.041 which states that when a motorist declines to comply with the request for a test, none shall be given." *Trumble*, 844 S.W.2d at 24.

This issue was addressed in the context of an involuntary manslaughter case in *State v. Stottlemyre*, 752 S.W.2d 840 (Mo.App.W.D. 1988). In *Stottlemyre*, the appellate

[2] Respondent is aware that this issue is being presented to this Court in another case, *State v. Timothy L. Scholl*, ED82159, set before Division 4 of this Court on June 4, 2003. Respondent would note that research on this issue has been shared and that the attorneys of record for the defendants acknowledge any similarities in the arguments or writing.

court held that a blood sample could be obtained by a search warrant in an involuntary manslaughter case despite a person's refusal to submit to a chemical test. The *Stottlemyre* decision was based on the court's finding that the implied consent law and the refusal statute applied only to traffic offenses and not involuntary manslaughter cases based on the language of the implied consent law.[3] The implication from *Stottlemyre* is that when section 577.041 does apply, such as in a DWI case, then a chemical test cannot be obtained by a search warrant once an arrestee refuses to submit to a chemical test.

The State contends that Missouri case law is "replete with cases affirming the use of search warrants for the drawing of blood for alcohol analysis." However, the cases cited by the State – *State v. Stottlemyre*, *State v. Trice*, *State v. Willis,* and *State v. Waring* – do not address the issue raised in this case. *Stottlemyre*, as previously explained, excludes DWI cases from its holding. *Stottlemyre*, 752 S.W.2d at 842. *Trice* deals with an unrelated issue of a search warrant when the defendant had not been arrested – the implied consent law was never an issue in that case. *State v. Trice*, 747 S.W.2d 243 (Mo.App.W.D.1988). In *Waring,* the implied consent law was not at issue because the blood sample was not taken at the direction of a law enforcement officer, but rather was taken in the course of medical treatment. *State v. Waring*, 779 S.W.2d 736, 741

[3] *Stottlemyre* has arguably been overruled due to amendments in sections 577.020 and 577.041. At the time *Stottlemyre* was decided sections 577.020 and 577.041 did not include involuntary manslaughter cases as it now does. This, however, is an issue for another case.

(Mo.App.S.D. 1989). In *Willis*, the appellate court addressed only the issue of whether there was probable cause to issue the search warrant for defendant's blood in a murder/involuntary manslaughter case. *Willis*, 97 S.W.3d 548, 554-556 (Mo.App.W.D. 2003) The implied consent law was not an issue in any of these cases, and therefore, the cases are not relevant to the question raised by this case.

Appellant also cites *State v. Ikerman*, 698 S.W.2d 902 (Mo.App.E.D. 1985) and *State v. Todd*, 935 S.W.2d 55 (Mo.App.E.D. 1996) in support of its position that the blood sample and the results of the testing on the blood sample are admissible. In *Ikerman*, this Court held that a blood sample may not be taken without a warrant where the defendant is under arrest and has invoked his right to refuse. *Ikerman*, 698 S.W.2d at 906. Contrary to Appellant's suggestion, *Ikerman* does not stand for the proposition that a blood sample may be obtained by search warrant after a refusal under the implied consent law. In *Todd*, a blood sample was taken during medical treatment, and later the State offered the results of the blood test as a business record during trial. The only issue in *Todd* was whether the blood alcohol test admitted as a business record was improper because there was no foundation laid that the test was taken in compliance with the Department of Health provisions. In *Todd* there was no issue regarding the implied consent law or the refusal statute.

Plain language of section 577.041 RSMo

The Missouri implied consent law is set forth in sections 577.020 to 577.041. Section 577.020 provides that any person who operates a motor vehicle upon the public

highways of this state is deemed to have given consent to a chemical test of the person's breath, blood, saliva, or urine for the purpose of determining alcohol or drug content of the person's blood when the person is arrested for driving while intoxicated. *State v. Ikerman*, 698 S.W.2d 902, 905-906 (Mo.App.E.D. 1985). This Court has recognized section 577.041 as the codification of a person's right to refuse to submit to any chemical test. *Ikerman*, 698 S.W.2d at 906. Section 577.041.1 RSMo states:

> If a person under arrest … refuses upon the request of the arresting officer to submit to a chemical test, … **then none shall be given**…." (emphasis added)

Once a person refuses to submit to a chemical test, section 577.041.1 clearly mandates that no test shall be given. The consequence is that the refusal is admissible in evidence in a proceeding on the driving while intoxicated charge and the revocation of the person's driving privileges for one year. Section 577.041.1 and 577.041.3 RSMo. 2000.

The explicit language of section 577.041 provides that once the driver has refused to submit to a chemical ***no test shall be given*** and there are no exceptions stated. The State argues that this does not mean that a test cannot be taken through the execution of a validly issued search warrant. The State's argument flies in the face of the plain language of that statute. The State claims that when the legislature stated "then none shall be given" what they really meant was "then none shall be given unless a search warrant is issued." However, this is not what section 577.041 states.

"Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). "Where the words are clear and unambiguous, rummaging among the

statutory canons of construction to devise a different meaning is impermissible." *State ex rel. Missouri Pacific RR Co. v. Koehr*, 853 S.W.2d 925, 926 (Mo. banc 1993). The "presumption is that words in a rule or statute are not intended to be meaningless." *Id.*

This Court should reject the State's argument to read words into section 577.041 that are not there. If the legislature wanted there to be an exception it would have included the exception in the statute. It did not. The statute must be read and applied in accordance with its clear language. The statute is clear – if an arrestee refuses a chemical test, then "**none shall be given**." Nothing in section 577.041 authorizes the issuance of a warrant to extract blood from an arrestee. Missouri's implied consent law precludes forcibly administering a chemical test against the will of the driver.

Does section 577.041 "trump" a search warrant and/or other statutes?

The State contends that obtaining a blood sample by search warrant is a separate and distinct issue from obtaining a blood sample via the implied consent law that is not foreclosed (or "trumped") by the implied consent law. The State argues that the search warrant was based on sufficient probable cause and properly issued and executed. The State's argument misses the point. The issue in this case is not about probable cause or the Fourth Amendment. Evidence may be ***illegally obtained and/or inadmissible*** for any number of evidentiary or statutory reasons. In this case, the evidence was illegally obtained in violation of a statute, section 577.041. So, contrary to the State's position, section 577.041 does in fact "trump" the search warrant in a manner of speaking.

The State also argues that section 577.037 provides for the admission of chemical tests as evidence in DWI prosecutions and that section 577.041 does not "trump" that

statute. Section 577.037 is part of the implied consent law, which is found in sections 577.020 to 577.041. All of the statutes of the implied consent law must be read in harmony or *in pari materia*, not in contradiction of one another. *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 405 (Mo. banc 2001). Section 577.037 merely provides that chemical tests obtained pursuant to the implied consent law are admissible in DWI prosecutions. There is no "trumping" of one statute over another – they are merely different parts of the implied consent law.

In addition, the State's argument that Missouri Supreme Court Rule 34 is dispositive on the issue of whether section 577.041 would "overrule" the statutes dealing with search and seizure in Chapter 542 is without merit. First, Rule 34 states that the provisions of chapter 542 RSMo shall govern ***procedure*** in search and seizures. This is not a procedural issue. Second, just because a warrant may properly issue under Chapter 542 does not mean that the evidence it procures is legally obtained and/or admissible. Certainly, rules of evidence and other statutes can affect the admissibility of the evidence. It is clear that the State's focus on this issue is as a search and seizure issue. This is not a search and seizure issue – it is an implied consent law issue.

The plain language of the statute and the majority of other jurisdictions that have addressed this issue with regard to their own implied consent laws support the interpretation of section 577.041 and its interplay with other statutes offered herein.

Case law from other jurisdictions

All fifty states have some version of an implied consent law. *See generally State v. Adee*, 241 Kan. 825, 740 P.2d 611, 829 (1987). Several states have addressed the issue

raised in this case in the context of their own implied consent laws. While some might say that the jurisdictions are split on this issue, the more accurate statement is that the language of the various implied consent laws differs from state to state. The "split" in the decisions is due to the difference in the language of the statutes, not differing interpretations of the same language (with the exception of one jurisdiction). The decisions fall into three categories: (1) jurisdictions prohibiting chemical tests following refusal; (2) jurisdictions allowing chemical test following refusal based on language differing from section 577.041; and (3) jurisdictions allowing chemical test following refusal based on language similar to section 577.041. It should be noted that some jurisdictions have implied consent laws that apply to DWIs and also more serious alcohol related offenses such as involuntary manslaughter. However, the underlying charge does not change the analysis of what "then none shall be given" means in an implied consent law refusal statute when it is clear that the statutes apply to that charge. A review of various decisions from other jurisdictions and their implied consent laws follows.

(1) Jurisdictions prohibiting chemical tests following refusal

The majority of states that have interpreted implied consent laws with language similar to section 577.041 support the trial court's interpretation, including *State v. DiStefano*, 764 A.2d 1156 (R.I. 2000), *Combs v. Commonwealth*, 965 S.W.2d 161 (Ky.1998), *State v. Kutz*, 622 N.E.2d 362 (Ohio Ct.App. 1993), *Collins v. Superior Court*, 158 Ariz. 145, 761 P.2d 1049 (1988), *State v. Adee*, 241 Kan. 825, 740 P.2d 611 (1987), *Pena v. State*, 684 P.2d 864 (Alaska 1984), *State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980), *State v. Steele*, 601 P.2d 440 (N.M.Ct.App. 1979), *State v. McClead*, 566 S.E.2d

652 (W.V. 2002) and *State v. Bellino*, 390 A.2d 1014 (Maine 1978).

Rhode Island

In *State v. DiStefano*, 764 A.2d 1156 (R.I. 2000) the Rhode Island Supreme Court addressed this issue. In its opinion, the court set out the pertinent provisions of the Rhode Island implied consent law including that "[a]ny person who operates a motor vehicle within this state shall be deemed to have given his or her consent, to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath," and "[i]f a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests, … *none shall be given*…" *DiStefano*, 764 A.2d at 1162 (emphasis in original). The court found that the language is clear and unambiguous and that after a suspect refuses a chemical test, then none shall be given, with or without a warrant. *Id.* at 1163.

Kansas

In *State v. Adee*, 241 Kan. 825, 740 P.2d 611 (1987) the Kansas Supreme Court held that the Kansas implied consent law does not permit the issuance of a search warrant for a blood sample of a DUI suspect over the person's refusal to submit to alcohol concentration testing. *Adee*, 740 P.2d at 617. The court stated that this prohibition was included by the Kansas legislature as a means of avoiding violence that would often attend forcible tests upon a rebellious drunk. *Id.* at 616.

West Virginia

In *State v. McClead*, 566 S.E.2d 652 (W.V. 2002) the West Virginia Supreme Court held that a defendant's consent to a blood alcohol test was not voluntary because it

was secured by a coercing threat that blood could be obtained by search warrant when the implied consent law precluded compelled blood testing. *McClead*, 566 S.E.2d at 655-656. The West Virginia refusal statute provides that "[i]f any person under arrest [for DUI] refuses to submit to any secondary chemical test, the tests shall not be given…." *Id*. at 655. The court stated:

> The statute is clear. If an arrestee refuses a chemical test, it 'shall not be given.' Nothing in [the statute] authorizes the issuance of a warrant to extract blood from an arrestee. … '[o]ur [DUI] statute, unlike some, precludes forcibly administering the test against the will of the driver.'

Id. at 655.

Maine

In *State v. Bellino*, 390 A.2d 1014 (Maine 1978) the Maine Supreme Court held that blood test results obtained in violation of the Maine implied consent law were inadmissible. *Bellino*, 390 A.2d 1024. In so doing, the court noted: "The Legislature has simply made a policy decision that upon an arrested driver's refusal to submit to the test, the State should forego the use of force to obtain the specimen and, instead, should rely upon the sanction of suspension to persuade arrested drivers to submit and to influence other drivers to maintain sobriety." *Id*. at 1021 (citations omitted).

Kentucky

In *Combs v. Commonwealth*, 965 S.W.2d 161 (Ky.1998), the Kentucky Supreme Court addressed the issue of "whether police may use a search warrant in order to take a suspected drunk driver's blood after the driver has refused to submit to a blood alcohol

test pursuant to the Implied Consent Statute, … in a case not involving death or physical injury." *Combs*, 965 S.W.2d at 162. The court found that the plain language of the implied consent law "prohibits compelled body searches of a DUI suspect following a refusal to take a blood test, unless death or serious injury are involved." *Id.*at 164. Kentucky's implied consent law provides that upon refusal "[n]o person shall be compelled to submit to any test or tests" with the exception that "[n]othing in this subsection shall be construed to prohibit a judge … from issuing a search warrant …requiring a blood test … when a person is killed or suffers physical injury … as a result of the incident in which the defendant has been charged." *Id.* at 163.

In its opinion, the Kentucky Supreme Court rejected the argument that the implied consent law was an unconstitutional infringement on the powers of the judiciary to the extent that it limited when a search warrant may be issued. The court stated:

> The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution assure the people that they will be free from all unreasonable search and seizure. To support such an assurance, these constitutional provisions mandate that the executive branch must first obtain a warrant based on probable cause before it conducts any search or seizure. Neither constitution grants the executive branch the right to seek a search warrant nor the judiciary the right to issue one, but rather the constitutional sections place restrictions on when the executive branch of the government can conduct any search or seizure.

Combs, 965 S.W.2d at 163. The court found that it was statutorily acceptable for the

legislature to establish reasonable conditions upon the issuance of a search warrant in a non-injury DWI case. *Id.* at 164-165. The court pointed out that there was no technical or procedural Fourth Amendment violation as the search warrant was issued based on probable cause. However, the court held that "[t]he ordinarily legitimate action of obtaining a search warrant when a suspect refuses cannot be used to avoid the standard set by the General Assembly…." *Id.* at 165.

Iowa

In *State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980), the Iowa Supreme Court addressed the issue of whether a blood test obtained by search warrant after the defendant refused pursuant to the implied consent law was admissible in a prosecution for involuntary manslaughter. *Hitchens*, 294 N.W.2d at 687. The Iowa Supreme Court held the plain language of Iowa's implied consent law prohibits the taking of a blood sample after the driver has refused to submit to testing. *Id.* The Iowa statute provided "[i]f a person under arrest refuses to submit to the chemical testing, no test shall be given …." *Id.* The Iowa court stated that its decision was supported on two bases. *Id.* at 688. First, it pointed to the plain language of the statute noting that there are no qualifying words such as "unless a warrant is obtained." *Id.* Second, the purpose behind the implied consent law of avoiding physical confrontations between the police and motor vehicle drivers. *Id.* The court pointed out that there is a trade-off – on the one hand, the state recognizes a driver's "right" to refuse testing but, on the other hand, the state imposes a penalty for exercising that right by revocation of the driver's license and allowing the refusal to be used as evidence in court. *Id.* The court found that the majority of other

jurisdictions that had addressed the issue supported its interpretation of the Iowa implied consent law. Although *Hitchens* is 1980 case, it is still good law as recognized in *State v. Rains*, 574 N.W.2d 904 (Iowa 1998)("[w]e have previously held that our implied consent statute prohibits the taking of a blood sample pursuant to a warrant after a driver has refused police requests to submit to testing. *Hitchens,* 294 N.W. 2d at 687").

Alaska

In *Pena v. State,* 684 P.2d 864 (Alaska 1984), the Alaska Supreme Court held that the Alaska implied consent law "preclude[s] the admission into evidence of chemical sobriety test results obtained pursuant to a search warrant after the arrestee has refused to take such a test." *Pena*, 684 P.2d at 866-867. The Alaska Supreme Court took the *Pena* case up after the court of appeals had ruled that the tests were properly admitted and rejected the appellate court's reasoning. *Id.* at 867. The Alaska statute provided, in pertinent part: "If a person under arrest refuses … to submit to a chemical test of his breath … a chemical test shall not be given. *Id.* at 866. Although *Pena* is a 1984 case, it has been recognized as still good law in *Sosa v. State*, 4 P.3d 951 (Alaska 2000).

Ohio

In *State v. Kutz*, 87 Ohio App. 3d 329, 622 N.E.2d 362 (1993) the Ohio appellate court held that a blood test taken by search warrant over a driver's refusal under the implied consent law is not admissible in prosecutions for driving under the influence. *Kutz,* 622 N.E.2d at 365. Based on the language of their statute, the Ohio appellate court found that it would be admissible in other criminal actions such as vehicular homicide. *Id.* The language of the Ohio statute provided, in pertinent part: "If a person under arrest

for operating a vehicle while under the influence of alcohol … refuses … to submit to a chemical test … no chemical test shall be given." *Id.* at 364-365.

New Mexico

In *State v. Steele*, 93 N.M. 470, 601 P.2d 440 (App. 1979), a New Mexico appellate court upheld the trial court's suppression of the results of a blood alcohol test obtained by a search warrant following the defendant's refusal under the New Mexico implied consent law. *Steele*, 601 P.2d at 440-442. The New Mexico implied consent law refusal statute provided, in pertinent part: "If a person under arrest refuses … to submit to chemical tests … none shall be administered." *Id*. at 441. Following *Steele*, the New Mexico legislature amended the refusal statute to prohibit testing after a refusal except where a search warrant is properly issued based on probable cause to believe that a driver under the influence of alcohol or drugs has caused death or great bodily injury or has committed a felony. *State v. Chavez*, 96 N.M. 313, 629 P.2d 1242 (App. 1981); *State v. DuQuette*, 128 N.M. 530, 994 P.2d 776 (App. 1999).

Arizona

The Arizona Supreme Court addressed this issue in *Collins v. Superior Court*, 158 Ariz. 145, 761 P.2d 1049 (1988) and held that "blood taken solely as a result of a search warrant after the defendant has refused to submit to the taking of a blood sample is inadmissible." *Collins*, 761 P.2d at 1051. The Arizona statute provided, in pertinent part: "Any person who operates a motor vehicle within this state gives consent … to a test … of his blood, breath or urine for the purpose of determining the alcohol content of his blood …. If a person under arrest refuses to submit to a test … none shall be given."

Id. Following *Collins*, the Arizona legislature amended their implied consent law to allow an officer to obtain a blood sample pursuant to a search warrant after a driver's refusal to submit to a blood alcohol test. *See State v. Clary*, 196 Ariz. 610, 2 P.3d 1255, 1257 (App. 2000). The amendment provided that if an arrested person refuses to submit to a test "the test shall not be given, except … pursuant to a search warrant." *Id.*

Following the amendment to the Arizona implied consent law, in *State v. Clary*, 2 P.3d 1255 (Arizona Ct.App. 2000), the Arizona appellate court addressed the issue of the amount of force that may reasonably be used to forcibly extract a blood sample pursuant to a search warrant. In an indignant dissent, the dissenting judge noted the highly offensive nature of that force necessary "to restrain an accused to the degree necessary to allow a needle to be inserted into [and maintained within] a vein." *Clary*, 2 P.3d at 1263 (Fidel, P.J. dissenting). He pointed out that some [wiser] legislatures, including Missouri in section 577.041, had declined to permit any forcible extraction of blood following a refusal, and others permitted it only where the intoxicated driver had caused death or serious bodily injury. *Id.* at 1265.

(2) Jurisdictions allowing chemical test following refusal based on language differing from section 577.041

In general, cases that have upheld the admission of chemical tests obtained by a search warrant or other means following a refusal under the implied consent law have done so on the basis that their statutes include language to create exceptions to the prohibition of taking a test after a refusal, primarily in circumstances involving death or physical injury. *See*, *DiStefano*, 764 A.2d at 1164-1166; *see also Pena v. State*, 684 P.2d

864, 867-868 (Alaska 1984); *People v. Sloan*, 538 N.W.2d 380 (Michigan 1995); *State v. Davis*, 542 S.E.2d 236 (N.C. Ct.App. 2001); *State v. DuQuette*, 128 N.M. 530, 994 P.2d 776 (App. 1999). At least one court upheld the admission of a chemical test following a refusal on the basis that their statute did not include the "then none shall be given" language. *See Brown v. State*, 774 N.E.2d 1001 (Indiana Ct.App. 2002).

Michigan

The Michigan implied consent law provides that following a refusal no test shall be given without court order. *See People v. Snyder*, 449 N.W.2d 703 (Michigan Ct.App. 1990); *see also People v. Sloan*, 538 N.W.2d 380 (Michigan 1995).

North Carolina

In *State v. Davis*, 542 S.E.2d 236 (N.C. Ct.App. 2001) a North Carolina appellate court held that results of blood tests obtained pursuant to a search warrant following the defendant's refusal to submit to a blood test were admissible. *Davis*, 542 S.E.2d at 238-240. The North Carolina implied consent law did not include language that no test shall be given following a refusal. *Id.* at 238-239.

Indiana

In *Brown v. State*, 774 N.E.2d 1001 (Indiana Ct.App. 2002) the Indiana appellate held that the Indiana implied consent law did not preclude the use of a search warrant to obtain a blood sample after the defendant refused to submit. *Brown*, 774 N.E.2d at 1007. The court distinguished its decision from cases in other jurisdictions – including *State v. Adee*, *State v. DiStefano*, and *State v. Hitchens* – by pointing out that Indiana's implied consent law does not include any language that "when a driver refuses to consent to a

chemical test, no test shall be given." *Id.* In distinguishing those cases, the court stated: "[w]e decline to interpret the implied consent law's silence concerning search warrants as a prohibition against them." *Id.*

(3) Jurisdictions allowing chemical test following refusal based on language similar to section 577.041

Respondent found only one case interpreting a statute with similar language in its implied consent law that would support the State's position. It should be noted that the State referred to a "split of authority" on this issue in other states and cited *Beeman v. State*, 86 S.W.3d 613 (Tex.Crim.App.2002), *Brown v. State*, 774 N.E.2d 1001 (Ind.App.2002), *State v. Zielke*, 403 N.W.2d 427 (Wis. 1987), *Pena v. State*, 664 P.2d 169 (Alaska App. 1983) and *Dye v. State*, 2003 WL 361289 (Tex.App. El Paso 2/20/03) as supporting its position. However, *Brown* and *Zielke* interpreted implied consent laws that did not include the "then none shall be given" language in their refusal statutes. The Alaska Supreme Court reversed the *Pena* case cited by Appellant on this very issue and later Alaska cases actually support Respondent's position. *See Pena v. State*, 684 P.2d 864 (Alaska 1984); *see also Sosa v. State*, 4 P.3d 951 (Alaska 2000). That leaves only the two Texas cases, *Beeman* and *Dye*.

Texas

In *Beeman v. State*, 86 S.W.3d 613 (Tex.App. 2002) the Texas appellate court allowed the admission of a blood sample taken pursuant to a search warrant after the defendant had refused to submit a blood sample under the implied consent law. The *Beeman* court cited cases from Michigan and Wisconsin in support of its position.

However, the Michigan and Wisconsin cases were based on statutes that included different language and do not actually support the holding of *Beeman*. The Michigan implied consent law provides that following a refusal no test shall be given without court order. *See People v. Snyder*, 449 N.W.2d 703 (Michigan Ct.App. 1990). The Wisconsin implied consent law does not include language to the effect that no test shall be given after a refusal. *See State v. Zielke*, 403 N.W.2d 427, 429 (Wisconsin 1987). As a result, it would appear that *Beeman* stands alone in its interpretation of its implied consent law and its decision to ignore the clear language of that law.

The *Beeman* majority took the same position as the State and drew a vigorous dissent. *Dye* merely followed *Beeman*'s authority without further discussion. *Dye*, -- S.W.3d --, 2003 WL 361289 (Tex.App.El Paso 2/20/03). This does not constitute much of a "split of authority" on this issue but instead would place the overwhelming majority as supporting the trial court's interpretation of Missouri's implied consent law.

Purpose/Policy of Implied Consent Laws

In *Schmerber v. California*, 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908, 920 (1966), the U.S. Supreme Court upheld the warrantless extraction of a blood sample under the exigent circumstances exception to the warrant requirement. The Missouri implied consent law has been recognized as the legislature's response to *Schmerber*. *See State v. Ikerman*, 698 S.W.2d 902, 905 (Mo.App.E.D. 1985). "However, when the Missouri legislature enacted the implied consent law, it made § 577.020 [the implied consent statute] "subject to" § 577.041, a refusal statute." *State v. Trumble*, 844 S.W.2d 22, 24 (Mo.App.W.D. 1992). The refusal statute has been interpreted to mean

that a motorist "has the present, real option either to consent to the test or refuse it." *Id. citing Gooch v. Spradling*, 523 S.W.2d 861, 865 (Mo.App. 1975); *City of St. Joseph v. Johnson*, 539 S.W.2d 784, 786 (Mo.App. 1976).

Implied consent laws were enacted to combat the increasing problem of drunk driving. *See State v. Adee*, 241 Kan. 825, 740 P.2d 611, 616 (1987). The implied consent laws, while serving the purpose of assisting in the prosecution of driving while intoxicated defendants, are not without their limits. *See State v. Palmer*, 554 N.W.2d 859, 863 (Iowa 1996). The Supreme Court of Iowa acknowledged that the implied consent law is the product of competing concerns stating:

> On one hand, the legislature wanted to provide an effective mechanism to identify intoxicated drivers and remove them from the highways. On the other hand, the legislature was aware implied consent procedures invade a cherished privacy interest of the public. Therefore [the implied consent law] contains limitations on the power of the State to invoke these procedures.

Palmer, 554 N.W.2d at 863.

Courts have recognized implied consent laws as the legislature's policy decision to forego the use of force to obtain a blood sample and instead rely upon the sanction of suspension and the use of the evidence of the refusal in DWI prosecutions. *See State v. Bellino*, 390 A.2d 1014, 1021 (Maine 1978). In *State v. Vandegrift*, 535 N.W.2d 428 (S.D.1994), the South Dakota Supreme Court stated:

> The purpose for enacting implied consent statutes is 'to avoid physical confrontations between the police and motor vehicle drivers.' Implied consent statutes protect suspects from the physical dangers of forcibly extracting blood samples. In return for granting drivers the right to refuse chemical testing of their bodily substances, implied consent statutes provide the State 'with several benefits in its efforts to identify, prosecute and remove intoxicated drivers from our highways.' This includes the ability to revoke driving privileges …. In addition, the State may introduce evidence of the driver's refusal to take the test.

Vandegrift, 535 N.W.2d at 430 (citations omitted). In *State v. Adee* the Kansas Supreme Court noted:

> The very purpose of the implied consent law is to coerce a motorist suspected of driving under the influence to 'consent' to chemical testing, thereby allowing scientific evidence of his blood alcohol content to be used against him in a subsequent prosecution. For drivers who refuse, the purpose of the statute is to provide an effective means short of physical force to overcome the refusal. The nonphysical means consist of the statutory penalties of license revocation and the admission into evidence in a DUI proceeding of the fact of the refusal.

Adee, 740 P.2d at 616 (citations omitted).

As stated by the Iowa Supreme Court "[a]though the laudable goal of reducing deaths caused by drunk drivers could be most easily accomplished by the State's

unfettered ability to invoke the implied consent law, the legislature has, nevertheless, placed limitations" on the implied consent law and the forcible extraction of a blood sample from a citizen. *See State v. Palmer*, 554 N.W.2d 859, 860 (Iowa 1996). Where legislatures have felt suspension an insufficient penalty for refusing to submit to a blood sample due to the gravity of the crime, they have modified the implied consent law to allow for the forcible extraction of blood in cases involving injury or death. *See, e.g. State v. Thompson*, 674 P.2d 1094 (Montana 1984); *State v. Clary*, 2 P.2d 1255 (Arizona Ct.App. 2000); *State v. Chavez*, 629 P.2d 1242 (N.M.Ct.App. 1981).

The cases set forth above evidence the balance that has been drawn between policy versus privacy interests by the legislature in drafting the implied consent law. Appellant offers its own version of the policy behind the implied consent law without any balancing of privacy interests. Whether the Appellant's arguments of policy have merit is not the question. It is not the court's role to legislate. The Appellant attempted to dismiss those cases from other jurisdictions that support the trial court's interpretation by noting that the cases "prompted vigorous dissents from the more learned members of the court." However, as noted by Judge Weisberger in his concurring opinion in *State v. DiStefano*:

> … [the] dissenting justices have expended more than twenty pages of enunciation of policy that could have been implemented by less than a paragraph of legislation had the General Assembly been inclined so to provide. …. …these statements should be addressed to the Legislature and not to this Court.

DiStefano, 764 A.2d at 1170 (Weisberger, C.J. concurring).

"Appellate courts must be guided by what the legislature said, not by what the courts think it might have meant to say." *State v. Cox*, 836 S.W.2d 43, 48 (Mo.App.S.D. 1992). This Court cannot rewrite section 577.041 under the guise of legislative intent. *See State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). Any changes in the language of the statute are left to the legislature. *Id.*

Legislative changes to section 577.041

Since the enactment of the implied consent law it has undergone many changes by the legislature. *See, e.g. Section 577.020 VAMS Historical and Statutory Notes, Section 577.041 VAMS Historical and Statutory Notes*. Section 577.041, as the "refusal statute," has been amended numerous times. *Section 577.041 VAMS Historical and Statutory Notes*. However, the "then none shall be given" language has not been removed and no exceptions have been added. *Id.*

Cases in the late 70's and early 80's from other jurisdictions have interpreted similar language in their implied consent laws to mean that a search warrant cannot be used to compel a blood sample from a DWI arrestee following a refusal under the implied consent law. *See e.g. State v. Bellino*, 390 A.2d 1014 (Maine 1978); *State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980); *Pena v. State*, 684 P.2d 864 (Alaska 1984) and *State v. Steele*, 601 P.2d 440 (N.M.Ct.App. 1979). In 1998, the issue was raised in *Stottlemyre* in the context of an involuntary manslaughter case. While *Stottlemyre* avoided the issue by finding that the implied consent law did not apply to manslaughter cases, it left the implication that if section 577.041 does apply, such as in a DWI case, then a chemical

test cannot be obtained by a search warrant once an arrestee refuses to submit to a chemical test. Despite all of this, the legislature has not deleted the "then none shall be given" language and has not added any exceptions. *Section 577.041 VAMS Historical and Statutory Notes*. Arizona Appellate Judge Fidel was right when he pointed to Missouri as an example of a wise legislature that has declined to permit any forcible extraction of blood following a refusal. *Clary*, 2 P.3d at 1263 (Fidel, P.J. dissenting).

Section 577.041 and the facts of this case

The application of section 577.041 to this case is clear. Deputy Winchester placed Respondent under arrest for driving while intoxicated and requested that she submit to a breath test pursuant to the implied consent law. (L.F. 18) She refused. (L.F. 18) Deputy Winchester then obtained a search warrant and took the blood sample despite the refusal. (L.F. 118-19) This is a clear violation of section 577.041. A violation of the implied consent law is a proper subject for suppression because the evidence is illegally obtained. *State v. Jenkins*, 946 S.W.2d 12, 13 (Mo.App.S.D. 1997). As a result, the blood sample was obtained in violation of the law and was properly suppressed by the trial court.

Based on the foregoing, Respondent respectfully requests this Court to hold that section 577.041 prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test under the implied consent law. Further, Respondent respectfully requests this Court to find that the blood sample obtained by search warrant from Respondent was obtained in violation of section 577.041 and that the trial court did not err in sustaining the motion to suppress the blood sample.

Good Faith Exception

Finally, the State argues that the good faith exception should apply to this case to render the evidence procured pursuant to the search warrant admissible. The good faith exception is not applicable to these circumstances. The good faith exception applies where the exclusionary rule renders evidence inadmissible because the warrant has been held to be invalid ***based on Fourth Amendment violations***. *State v. Pattie*, 42 S.W.3d 825, 827 (Mo.App.E.D. 2001). Here, the evidence is illegally obtained and inadmissible because of a violation of section 577.041, *not because of a Fourth Amendment violation*. The good faith exception does not apply to make evidence admissible when a ***statute*** has been violated.

Further, this Court should reject the Appellant's arguments in support of this position. Appellant's statement that "[e]very court of appeals case ever considering the issue in Missouri has ruled that search warrants may issue for blood" is disingenuous. ***No appellate court has ever addressed the issue raised in this case.*** No officer or prosecutor should be allowed to successfully argue that because he does not know how to read the plain language of a statute or how to properly discern the holding of an appellate case, in light of the issues addressed and the circumstances of the case, that a defendant should be punished for his error. The good faith exception requires a reasonable good faith belief that it not present here.

For these reasons, Respondent respectfully requests that this Court decline to apply the good faith exception to allow the admission of the blood sample obtained by the search warrant.

Conclusion

This case raises the question of whether section 577.041 prohibits a compelled blood sample from being obtained by a search warrant after a person's arrest for driving while intoxicated and refusal to submit to a chemical test under the implied consent law. This issue has not been previously addressed by any appellate court in Missouri. The answer to this question requires only a look at the clear language of section 577.041 that states "[i]f a person under arrest … refuses … to submit to a chemical test, … **then none shall be given**." Based on the plain language of that statute, the trial court found that a DWI arrestee who has refused to submit to a chemical test cannot be compelled to submit by a search warrant.

The trial court's finding is supported by the plain language of section 577.041 and the policies behind the implementation of the implied consent law. As stated by the Maine Supreme Court "[t]he Legislature has simply made a policy decision that upon an arrested driver's refusal to submit to the test, the State should forego the use of force to obtain the specimen and, instead, should rely upon the sanction of suspension to persuade arrested drivers to submit and to influence other drivers to maintain sobriety." *Bellino*, 390 A.2d at 1021.

Respondent respectfully requests that this Court find that the blood sample obtained from her by search warrant, following her arrest for DWI and her refusal to submit to any chemical tests under the implied consent law, was taken in violation of section 577.041 and further, that this Court affirm the trial court's findings and judgment sustaining the motion to suppress the blood sample.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

Stephen C. Wilson, counsel for Respondent Carol Sue Smith, pursuant to Rule 84.06(c) hereby certifies to this Court that:

1. The brief filed herein on behalf of Respondent contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 30.06 and 84.06 (a) and (b).

3. The brief complies with the page limits of Rule 360.

4. The number of words in this brief, according to the word processing system used to prepare the brief, is 7918, exclusive of the cover, certificate of service, this certificate, the signature block and the appendix.

5. In compliance with Rule 84.06(g) and Rule 361 a floppy disk is filed with the brief that complies with Rule 84.06(g) and Rule 361 and said disk has been scanned for viruses and, according to the program used to scan for viruses, the disk is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of Respondent's Brief and one (1) floppy disk was served upon the following attorney of record by sending same by U.S. Mail, first class postage pre-paid, to the attorney's address of record in this cause, this 8th day of May, 2003:

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APPENDIX

Table of Contents