

No. SC85124

IN THE
MISSOURI SUPREME COURT

ROSS S. SWANBERG

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

Appeal from the Taney County Circuit Court
The Honorable Michael Merrell, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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Statutes and Rules

Section 577.041 RSMo8, 10, 11

Rule 73.01(c)8

JURISDICTIONAL STATEMENT

Respondent adopts Appellant's jurisdictional statement.

STATEMENT OF FACTS

On July 1, 2001, at approximately 3:30 a.m., Ross Swanberg was operating his automobile on East Highway 76 in Taney County, Missouri (LF 17-20). Swanberg testified at trial that he was messing with the radio, took a corner a little too fast and landed in the ditch (Tr. 4, 5). After unsuccessfully attempting to put his car in gear and pull out of the ditch, Swanberg got a ride from a passing vehicle and was taken to Prime Time Convenience Store (Tr. 5). Officer Windle of the Missouri Highway Patrol arrived at the accident scene at 4:46 a.m. and listed the accident time as 4:20 a.m., but no testimony or other evidence was presented at trial regarding the basis for this conclusion (LF 17). Swanberg was not present when the officer arrived at the scene (LF 17).

Once inside the store, Swanberg contacted the clerk on duty, Jason Bright, and solicited his assistance in trying to find a tow service for his vehicle (Tr. 5, 6, 10). Swanberg conversed with Bright for twenty or thirty minutes (6, 10). Bright estimated Swanberg's time of arrival at the store as between 3:00 and 3:30 a.m. and indicated Swanberg did not smell of intoxicants or appear to be intoxicated (Tr. 10-12). Swanberg testified he had nothing to drink and was not intoxicated at the time of the accident (Tr. 5, 8).

After attempting to obtain tow service, Bright witnessed an individual named Isaac enter the store and Mr. Swanberg thereafter left with him and another individual (Tr. 6, 11). At approximately 5:23 a.m., Bright saw Mr. Swanberg re-enter the store and saw a police officer come in almost directly behind him (Tr. 11, 13). The officer made contact with

Swanberg at 5:23 a.m. and arrested him for driving while intoxicated at 5:27 a.m. (LF 13, 16). Bright indicates that Mr. Swanberg's demeanor had changed since the first time he was in the store and he appeared to be intoxicated (Tr. 11, 12). Swanberg admits that he became intoxicated after he left the store and was intoxicated at the time of his arrest (Tr. 7, 8). Swanberg then refused to submit to a chemical test of his blood alcohol content (LF 17).

Swanberg was given notice that the Director of Revenue intended to revoke his license for one year for allegedly failing to submit to a chemical test to determine his blood alcohol content and Swanberg then filed a Petition for Review on July 11, 2001 (LF 3, 4). On January 31, 2002, a hearing was held (Tr. 2-17). The certified records of the Director were admitted into evidence over Swanberg's objection (Tr. 16). No witnesses were called on behalf of the Director. Swanberg and Jason Bright testified at the hearing. The trial court entered judgment in favor of Swanberg, finding no probable cause existed at the time of his arrest (LF 1, 23). After an appeal by the Director, the Southern District reversed and remanded in a per curiam decision, holding that probable cause to arrest did exist. This Court then granted Swanberg's Application for Transfer.

POINT RELIED ON

The trial court did not err in setting aside the suspension of Respondent’s driving privilege because the Director did not meet his burden of showing that the officer had sufficient probable cause to arrest Respondent for driving while intoxicated at the time the arrest occurred in that there was insufficient evidence that Respondent was intoxicated at the time he operated his vehicle, due to the lapse in time between the accident and contact with the arresting officer.

Domsch v. Director of Revenue, 767 S.W.2d 121 (Mo. App. W.D. 1989)11, 14

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Statutes and Rules

Section 577.041 RSMo8, 10, 11

Rule 73.01(c)8

ARGUMENT

The trial court did not err in setting aside the suspension of Respondent's driving privilege because the Director did not meet his burden of showing that the officer had sufficient probable cause to arrest Respondent for driving while intoxicated at the time the arrest occurred in that there was insufficient evidence that Respondent was intoxicated at the time he operated his vehicle, due to the lapse in time between the accident and contact with the arresting officer.

Standard of Review

With respect to appellate review of judgments relating to the revocation of driving privileges, the trial court will be affirmed unless there is no substantial evidence to support its decision, its decision is against the weight of the evidence or it erroneously declares or applies the law. *Hawk v. Director of Revenue*, 943 S.W.2d 18, 19-20 (Mo. App. S.D. 1997) citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This standard applies equally in cases that are submitted “on the records” and the appellate courts will defer to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence. *Reece v. Director of Revenue*, 61 S.W.3d 288, 291 (Mo. App. E.D. 2001). In determining whether the trial court's decision is based on substantial evidence, the reviewing court must defer to the trial court on factual issues and cannot substitute its judgment for that of the trial judge. *Hawk* at 20. Deference to the trial judge applies equally to his determination of the credibility of witnesses and to his conclusions. *Id.* The

reviewing court should review the evidence in the light most favorable to the trial court's judgment and should deem all facts to have been found in accordance with the result reached by the trial court. *Id.*

Burden of Proof and Probable Cause

When reviewing a suspension under Section 577.041.4 RSMo for refusing to take a chemical test, a trial court shall determine:

- (1) Whether or not the person was arrested or stopped;
- (2) Whether or not the officer had:
 - (a) Reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated or drugged condition; ...
- (3) Whether or not the person refused to submit to the test.

If the court determines any of these issues not to be in the affirmative, the court shall order the director to reinstate such person's driving privilege, **which means the director bears the burden of proof at the hearing.** *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002)(emphasis added). When the trial court does not issue findings of fact and conclusions of law, "All fact issues upon which no specific finding are made shall be considered as having been found in accordance with the result reached." *Hinnah* at 621, citing *rule 73.01(c)*. Even if the evidence presented at the hearing could support a finding of probable cause, the trial court is free to draw the conclusion that there was no probable cause based on the court's assessment of witness credibility or upon the

assessment of the evidence of probable cause as to intoxication. *Hinnah* at 622.

In this case, the trial court found the second requirement of Section 577.041 RSMo to be lacking, specifically that there was no probable cause to believe Swanberg was driving a vehicle *while* intoxicated (emphasis added). Since no witnesses testified on behalf of the Director, the certified records are the only evidence upon which the Director relies in asserting that the decision of the trial court was in error.

"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." *Hinnah* at 621. Mere suspicion is insufficient to establish probable cause, but absolute certainty is not required. *State v. Wilcox*, 842 S.W.2d 240, 244 (Mo.App. W.D. 1992). Probable cause is a fluid concept which turns on the assessment of probabilities applied to particular facts. *Id.* Facts needed for probable cause are found in the definition of the offense and in case law dealing with the sufficiency of evidence to convict a person of that offense. *Id.* at 243.

In order to satisfy the second part of Section 577.041.4, the Director bears the burden of demonstrating probable cause to believe Swanberg was driving *while* in an intoxicated condition (emphasis added). The plain language of the statute shows that it is not simply sufficient for the arresting officer to acquire knowledge of driving, but to also acquire knowledge that the driver was intoxicated *at the time* he was driving.

The Officer Lacked Probable Cause to Arrest

The narrow question presented to this Court is essentially whether probable cause

exists to arrest a driver for driving while intoxicated when he leaves the scene of an accident and is later found intoxicated at another location, without any evidence he was intoxicated at the time of the accident. It is undisputed that Swanberg drove the vehicle and was intoxicated when found almost two hours later by the officer, but there was no evidence that the driver was intoxicated prior to the accident.

This Court's decision in *Hinnah v. Director of Revenue*, 77 S.W.3d 616,622 (Mo. banc 2002) states that the relevant question under Section 577.041 RSMo is:

“...whether the officer who requested the test had reasonable grounds to believe that [Driver] was driving *while* intoxicated.” (emphasis added).

The Southern District in its opinion actually emphasizes that the record is devoid of any evidence that the officer had knowledge of any alcohol consumed after the accident. (p.6). Using this logic, one could also state that the record is devoid of any evidence that the officer had knowledge that the driver consumed alcohol *before* the accident. Therefore, the Southern District essentially would not require that the officer acquire or attempt to acquire any knowledge, after a driver leaves the scene of an accident, of when the alcohol was consumed, citing the Eastern District's decision in *Howard v. McNeill*, 716 S.W.2d 912, 914-15 (Mo. App. E.D. 1986). Instead, the court would place the burden on the driver to show there was not probable cause to believe his intoxication occurred at the time he was driving, in other words, that he was *not* driving while intoxicated. As previously stated,

this is directly contrary to the wording of Section 577.041 RSMo., which states that the burden is on the Director to establish probable cause to believe the driver drove *while* intoxicated.

The Western District's decision in *Domsch v. Director of Revenue*, 767 S.W.2d 121 (Mo. App. W.D. 1989) is almost identical factually and directly contradicts the Southern District's holding in the case at bar and the Eastern District's holding in *Howard*. In *Domsch*, the driver had an accident with another party and then left the scene. An hour and forty minutes later, the driver was found by the officer in a restaurant eating a meal and he appeared to be intoxicated. The Court upheld the trial court's determination that no probable cause existed for the arrest of the driver.

“The Director must prove that Officer Harris had probable cause to believe that respondent was operating his vehicle while under the influence at the time of the traffic accident.” *Id.* at 123.

The Court goes on to state:

“Simply put, at the time of respondent's arrest, Officer Harris could not have known of respondent's condition at the time of the accident.” *Id.* at 123, 124. “The fact remains that there was no evidence that the respondent was intoxicated at the accident scene some one hour and forty minutes earlier.”

Id.

In another Western District case, *Nightengale v. Director of Revenue*, 14 S.W. 3d (Mo. App. W.D. 2000) the Court found the officer did not have probable cause to arrest for driving while intoxicated where no evidence was offered regarding the length of delay between the accident from which driver purportedly fled and her arrest or where she was and what she was doing when arrested.

The language in these cases is almost identical to the language found in *Hinnah* wherein this Court points out that the officer did not have knowledge of the “recency, quantity or quality of the alcohol” on the driver’s breath. *Id.* at 619. See also *State v. Liebhart*, 707 S.W.2d 427 (Mo.App. W.D. 1986), overturning a conviction for driving while intoxicated based on the lack of any evidence establishing the time or place of consumption of alcohol, even though the officer arrived at the scene of a one car accident, found one set of tire tracks in the snow leading to the vehicle and found defendant alone behind the wheel.

The Southern District’s decision is also in conflict with the Western District’s recent decision in *Verdoorn v. Director of Revenue*, — S.W.3d —, WD 60784, 2002 WL 31452804 (Mo. App. 2002). *Verdoorn* overruled prior decisions in the Western District and declined to follow decisions in both the Southern and Eastern district regarding the improper shifting of the burden of persuasion to the driver after the Director presented a prima facie case. Although not decided upon probable cause, *Verdoorn*’s significance in

the case at bar is the reaffirmation that under Section 302.500 RSMo, the Director has the burden of production to present evidence that the driver was arrested upon probable cause to believe he was driving while intoxicated. *Id.* at 3. This burden is an identical requirement under Section 577.041 RSMo.

Hinnah is similar to the case at bar. Both cases involve an officer who encounters a licensee who is not driving at the time of the initial encounter. Both involve a significant or unknown lapse of time between the alleged driving, and the time the officer makes any observation of the licensee. Both involve an admission by licensee that he was driving at an earlier time. Finally, both involve an officer who believed, based on his observations of the licensee's demeanor, that there was probable cause to believe licensee was intoxicated. This Court emphasized the wording of Section 577.041 and the fact that the Director bears the burden of proof. *Hinnah* at 620.

Taken to the extreme, the Director's attempt to shift the burden to the driver would mean that after a driver, suspected of being in an accident, is found at his home or other location two days afterward and is found to be intoxicated, the driver is subject to arrest for driving while intoxicated and a license revocation, whether he refuses to submit to a chemical test or tests in excess of the legal limit. Obviously, when there is an unknown lapse of time or a known significant period of time between when the driver was alleged to have driven and when he is found in an intoxicated state, evidence must be found by the officer to establish what the driver was doing between the time he was deriving and then subsequently found to be intoxicated, otherwise the evidence fails to establish probable

cause. *Domsch* at 123; *Nightengale* at 270. The Director failed to meet his burden.

Controverted Facts

The Director has also argued that the facts are uncontroverted and therefore there is no need to defer to the trial court's judgment, citing *Hinnah*. The Southern District also attempts, in footnote 4, to distinguish the holding in *Hinnah* by stating that the basis of the holding was that the identity of the driver in *Hinnah* was a controverted fact. However, *Hinnah's* holding states that the record supported the conclusion that the officer lacked probable cause based "upon the trial court's assessment of the credibility of the officer's testimony that Hinnah said he was driving *or* upon the court's assessment of the evidence of probable cause as to intoxication." (emphasis added). *Id.* at 622. Respondent contends that the principal controverted fact in the case at bar is that he was not intoxicated when he operated his vehicle. In addition, the officer's report contains unanswered questions that were left for the trial judge to determine.

First, there is absolutely no evidence indicating how the officer determined an accident time. At the time of Swanberg's arrest, there is no indication he ever questioned Swanberg regarding this. Therefore, for all the officer knew at the time of arrest, Swanberg's vehicle had been in the ditch since the previous day. The fact he received a dispatch regarding the car does nothing to establish when the accident occurred. With no definite time of the accident established, the trial court was free to consider that fact as it related to his assessment of probable cause. *Hinnah* at 622.

Second, as the case at bar was submitted on the certified record of the Department

of Revenue and the officer did not testify, the trial court could have determined that the officer's probable cause assessment of intoxication set out in the report was not credible based on the fact that officer arrested Swanberg within four (4) minutes after making contact with him, yet within this time frame purportedly questioned him about how the accident occurred, questioned him about the identity of the driver, demonstrated and administered the one-leg stand test, demonstrated and administered the finger-to-nose test, administered the HGN test and administered the ABC test. Submission of cases on records alone poses risks, including "the inability to explain discrepancies or to rehabilitate 'witnesses' ..."

Jarrell v. Director of Revenue, 41 S.W.3d 42, 46 (Mo. App. S.D. 2001).

Although Swanberg admitted at trial he was intoxicated when the officer arrived, there is no indication that he told the officer this. Since the trial court could have believed that the officer did not have sufficient time to either complete the sobriety tests or make a probable cause assessment of intoxication within four (4) minutes, this fact is controverted. Thus under *Hinnah*, the trial was "free" to draw the conclusion that there was no probable cause for the arrest. *Id.* at 622.

CONCLUSION

Based on the foregoing, there was substantial evidence to support the decision of the trial court to reinstate Swanberg's driving privilege and the decision is not against the weight of the evidence, nor did the trial court misapply the law; therefore the judgment of

the Southern District should be reversed and the decision of the trial court to reinstate Swanberg's driving privilege should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and one disk containing the forgoing brief were placed in the U.S. Mail, postage prepaid, to State Solicitor James Layton, P.O. Box 899, Jefferson City, Missouri 65102-0899, on this

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I hereby certify that this brief complies with the limitations contained in Rule 84.06(b), this document contains 3,412 words and that the enclosed disk has been scanned for viruses.

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David S. Akers