

SC90403

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IN THE  
SUPREME COURT OF MISSOURI

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MICHAEL R. STRUP

Respondent,

v.

DIRECTOR OF REVENUE,  
STATE OF MISSOURI

Appellant.

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APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

This is an appeal of a Johnson County circuit court judgment ordering the Director of Revenue to reinstate Mr. Strup's commercial driving privilege, which the Director disqualified for one year under § 302.755.1 after Mr. Strup drove while intoxicated in violation of § 302.505.<sup>1</sup> This Court transferred the appeal after opinion by the Court of Appeals, Western District. This Court thus has jurisdiction under Article V, § 10 of the Missouri Constitution.

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<sup>1</sup> All statutory cites are to the 2000 Missouri Revised Statutes, as amended, unless otherwise noted.

## STATEMENT OF FACTS

This appeal pertains to Mr. Strup's commercial driving privilege, not his base driving privilege, the suspension of which the circuit court upheld and Mr. Strup did not appeal. (Legal File ("LF") 40-44; Supplemental Legal File ("Supp. LF") 6). But because of the relationship between the commercial driving privilege and the base driving privilege, we discuss both below.

The facts are not in dispute.

In 2006, Michael R. Strup had a base driving privilege and a commercial driving privilege. (LF 5, 13). On July 22, 2006, he was arrested in Johnson County for driving while intoxicated. (LF 25).

On August 23, 2006, the Director of Revenue notified Mr. Strup that, because of his arrest for driving while intoxicated, his commercial driving privilege would be disqualified for one year, beginning September 24, 2006. (LF 6, 13). *See* § 302.755.1.

On September 21, 2006, Mr. Strup filed a petition for review of the disqualification in Cass County, his county of residence. (LF 5-7, 13). *See* § 302.311. The petition alleges, among other things, that the disqualification "was made without a hearing and without giving [Mr. Strup] an opportunity to be personally present to offer testimony in evidence on his own behalf, and to

cross-examine opposing witnesses.” (LF 6). The petition does not mention any constitutional provisions. (LF 5-7).

Regarding his base driving privilege, Mr. Strup requested an administrative hearing.<sup>2</sup> (LF 10; Supp. LF 3-4). *See* § 302.530. A hearing was held on September 27, 2006. (Supp. LF 3-4). After the hearing, on September 28, 2006, the hearing officer sustained the suspension of Mr. Strup’s base driving privilege. (LF 10; Supp. LF 4).

Also on September 28, 2006, the Director notified Mr. Strup that, as a result of the outcome of his administrative hearing, his commercial driving privilege would be disqualified for one year, beginning October 30, 2006. (LF 12).

On October 13, 2006, regarding his base driving privilege, Mr. Strup timely filed a petition for trial de novo in the circuit court of Johnson County, the county where he was arrested. (Supp. LF 1, 3-4). *See* § 302.535.1. The petition does not contain any constitutional claims. (Supp. LF 3-4).

On October 27, 2006, regarding his commercial driving privilege, Mr. Strup filed a second petition for review under § 302.311 in the circuit court

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<sup>2</sup> When a driver requests an administrative hearing, the effective date of the suspension is stayed until a final order is issued following the hearing – in this case, September 28, 2006. § 302.525.1. *See also* § 302.530.2.

of Cass County. (LF 2, 9-10). The petition alleges, among other things, that Mr. Strup “did not have an opportunity to cross-examine opposing witnesses.” (LF 10). The petition does not mention any constitutional provisions. (LF 9-11).

In late May 2007, Mr. Strup filed a motion to consolidate the Cass County cases – the two petitions for review of the disqualification of his commercial driving privilege – and transfer the consolidated case to Johnson County, where the petition for trial de novo of his base driving privilege was pending. (LF 17-20). The Director consented to the motion, and the Cass County circuit court granted it. (LF 19, 20, 21-23).

The Johnson County circuit court received the case, and on November 9, 2007, held one hearing on the petition for trial de novo regarding Mr. Strup’s base driving privilege and the petition for review regarding his commercial driving privilege. (TR 5; LF 3, 23, 40; Supp. LF 2, 6). At the hearing, Mr. Strup did not mention any constitutional provisions.<sup>3</sup>

After the hearing, the circuit court entered judgment for the Director on the petition for trial de novo, holding that Mr. Strup’s base driving privilege

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<sup>3</sup> He testified that he was not given notice and an opportunity for a hearing before his commercial driving privilege was disqualified. (TR 62). His pleadings acknowledge, however, that he did receive notice that his commercial driving privilege would be disqualified. (LF 6, 9-10).

must be suspended under § 302.505. (Supp. LF 6). Specifically, the court held that Mr. Strup was arrested upon probable cause to believe that he was driving while intoxicated, and his blood alcohol content was .08% or more. (Supp. LF 6).

A few days later, the circuit court entered judgment for Mr. Strup on the petition for review, ordering the Director to remove the one-year disqualification of his commercial driving privilege. (LF 41). Specifically, the court held:

Since the September 28, 2006 “final decision” of the Director of Revenue [disqualifying Mr. Strup from driving a commercial motor vehicle for one year] appealed from herein was rendered without any hearing, evidence, or opportunity to present evidence, the decision was contrary to the provisions of Chapter [sic] 302.505 [sic] and also a denial of the due process protection provided to [Mr. Strup] by Section 10 of Article I of the Constitution of the State of Missouri.

(LF 40-41).

The Director timely appealed the judgment reversing the disqualification of Mr. Strup’s commercial driving privilege; this is that appeal. (LF 40-44). Mr. Strup did not appeal the judgment affirming the suspension of his base driving privilege.

## POINTS RELIED ON

### POINT I

The circuit court erred in ordering the Director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because the disqualification is required by § 302.755.1(1) in that, as a result of his arrest on July 22, 2006, Mr. Strup was "convicted" of a first violation of "driv[ing] under the influence of alcohol" as defined in §§ 302.700.2(8) and 302.700.2(13)(b) and (e).

§ 302.700.2(8).

§ 302.700.2(13)(b) and (e).

§ 302.755.1(1).

## POINT II

The circuit court erred in holding that the one-year disqualification of Mr. Strup's commercial driving privilege violates Article I, § 10 of the Missouri constitution because courts do not decide constitutional issues that have not been properly raised, and here, Mr. Strup never raised a constitutional issue in that he never specifically designated any constitutional provisions claimed to have been violated, never expressly referenced any article and section of the constitution, and never quoted any constitutional provision.

*State v. Knifong*, 53 S.W.3d 188 (Mo. App. W.D. 2001).

MO CONST. Art. I, § 10.

### POINT III

The circuit court erred in holding that the one-year disqualification of Mr. Strup's commercial driving privilege violates Article I, § 10 of the Missouri constitution because, although due process applies to driver's license suspensions, due process does not require a pre-suspension hearing so long as a post-suspension hearing is available, and here, due process was satisfied in that Mr. Strup received a post-disqualification hearing.

*Dixon v. Love*, 431 U.S. 105 (1977).

*Jarvis v. Director of Revenue*, 804 S.W.2d 22 (Mo. banc 1991).

## ARGUMENT

### POINT I: Commercial drivers license disqualification

The circuit court erred in ordering the Director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because the disqualification is required by § 302.755.1(1) in that, as a result of his arrest on July 22, 2006, Mr. Strup was "convicted" of a first violation of "driv[ing] under the influence of alcohol" as defined in §§ 302.700.2(8) and 302.700.2(13)(b) and (e).

#### A. Standard of Review

This Court will affirm the trial court's judgment 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. *Fick v. Director of Revenue*, 240 S.W.3d 688, 690 (Mo. banc 2007). Here, the trial court's judgment misdeclares and misapplies the law regarding the disqualification of commercial driving privileges under § 302.755.1(1). And because the facts are not in dispute, the issue is a legal one, so there is no need for this Court to defer to the trial court's judgment. *Martin v. Director of Revenue*, 248 S.W.3d 685, 687 (Mo. App. W.D. 2008).

#### B. Statutory background: Two types of administrative decisions, two routes to judicial review

The Director appeals the circuit court’s judgment ordering him to remove the one-year disqualification of Mr. Strup’s commercial driving privilege under § 302.755.1. (LF 40-44). Mr. Strup did not appeal the circuit court’s judgment (Supp. LF 6) upholding the Director’s decision to suspend his base driving privilege. We begin by looking at the distinct, yet related, statutory schemes pertaining to base and commercial driving privileges.

**1. Administrative suspension or revocation of base driving privilege.**

In 1983, the General Assembly passed a law providing an administrative procedure for suspending and revoking drivers’ licenses. S.B. 318 & 135, A.L. 1983 pp. 584-87. That law now comprises §§ 302.500-.540. Under that law, the Department of Revenue “shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person’s blood, breath, or urine was eight-hundredths of one percent or more by weight.” § 302.505.1.

The law requires that “a law enforcement officer who arrests any person” for such driving “shall forward to the department a certified report of all information relevant to the enforcement action.” § 302.510.1. When the Department receives such a report, it “shall make a determination” of the facts

relating to driving with excessive blood alcohol content “on the basis of the report of [the] law enforcement officer.” § 302.505.2. The statute then sets out an opportunity for a hearing, and specifies that the decision is not “final” until a decision is made based on a hearing, if the driver requests one: “[T]his determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of the evidence received at the hearing.” *Id.*

The hearing procedure is set out in § 302.530. That statute requires that the person who receives a notice of suspension make a request for a hearing within fifteen days of receipt of the notice. § 302.530.1. The hearing may be held by telephone, but if the person asks, the hearing is held “in the county where the arrest was made.” § 302.530.3. The sole issue in the hearing is whether, by a preponderance of the evidence, the person was arrested upon probable cause to believe he was driving while intoxicated. § 302.530.4; § 302.505. The statute requires notice of the post-hearing decision. § 302.530.6.

The statute also addresses judicial review of the administrative decision. The driver has fifteen days from the date the Director’s notice was mailed, to request judicial review. § 302.530.6. If the driver does not request judicial review within fifteen days, “the decision of the department shall be final.” § 302.530.7.

The discussion of judicial review continues in § 302.535. That section begins with a statement that both establishes a “trial de novo” right and sets out to whom it is available: “Any person aggrieved by a decision of the department may file a petition for trial de novo by the circuit court.” § 302.535.1.

In this case, the Director suspended Mr. Strup’s base driving privilege, and Mr. Strup requested review of that decision under the scheme set forth in §§ 302.500-.540. Mr. Strup received an administrative hearing under § 302.530 (LF 10; Supp. LF 3-4), and a trial de novo of the resulting decision under § 302.535 (LF 9-10; TR 5-75). After the trial de novo, the circuit court upheld the Director’s decision to suspend Mr. Strup’s base driving privilege. (Supp. LF 6; TR 5). Mr. Strup did not appeal the circuit court’s judgment in that case. Thus, he has no base driving privilege.

## **2. Disqualification of commercial driving privileges.**

This appeal is not from a suspension made under §§ 302.500-.540, nor from a judicial review of it. Rather, this appeal is from a disqualification under Missouri’s Commercial Driver’s License Act (§§ 302.700-.780, “CDL Act”), specifically § 302.755. Under the CDL Act, “[a] person is disqualified from driving a commercial vehicle for a period of not less than one year if convicted of a first violation” of various sorts. § 302.755.1.

The CDL Act gives “conviction” a broader meaning than its usual

limitation to a criminal conviction. It includes adjudications in administrative proceedings:

2. When used in sections 302.700 to 302.780, the following words and phrases mean: ...

(8) “Conviction”, an unvacated adjudication of guilt, including pleas of guilt and *nolo contendere*, or *a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative proceeding*, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether the penalty is rebated, suspended or prorated; ...

§ 302.700.2(8) (emphasis added).

Among the “violations” that impose upon a “convicted” person a disqualification is “[d]riving a motor vehicle under the influence of alcohol.”

§ 302.755.1(1). That is a recent change; before 2005, the disqualification was limited to “[d]riving *a commercial motor vehicle* under the influence of alcohol.”

§ 302.755.1(1), RSMo 2000 (emphasis added).

“Driving under the influence of alcohol,” too, is defined in the CDL Act. It includes “[d]riving a commercial or noncommercial motor vehicle while intoxicated in violation of any federal or state law, or in violation of a county or municipal ordinance.” § 302.700.2(13)(b). Again, that is broader than the pre-2005 version, which was limited to such an offense “in a commercial motor vehicle.” § 302.750.2(13)(b), RSMo 2000.

Finally, “driving under the influence” also has a specific statutory definition – again, one that is broader than common usage. In § 302.700.2(13)(e), the General Assembly defined “driving under the influence” as “the commission of any one or more of the following acts: ... (e) Having any state, county or municipal *alcohol-related enforcement contact*, as defined in subsection 3 of section 302.525....” (Emphasis added.) Section 302.525.3, RSMo 2000, in turn, provides that “alcohol-related enforcement contacts’ shall include any suspension or revocation under sections 302.500 to 302.540.”

Under the CDL Act, then, a person who has had their driving privileges suspended or revoked in an unvacated administrative adjudication is disqualified from driving a commercial vehicle for at least one year. As the Court of Appeals observed, “Loss of this additional privilege would rationally follow revocation of the underlying privilege.” *Jones v. Director of Revenue*, 237

S.W.3d 624, 625 (Mo. App. E.D.2007); quoted with approval, *Miller v. Director of Revenue*, 277 S.W.3d 290, 293 (Mo. App. W.D. 2009).

The decision of the Department to disqualify such a driver qualifies for judicial review under § 302.311.

**C. Section 302.755.1(1) requires disqualification of Mr. Strup’s commercial driving privileges.**

The circuit court erred in reversing the disqualification of Mr. Strup’s commercial driving privilege because Mr. Strup was “convicted” for purposes of § 302.755.1.

The suspension of Strup’s base driving privilege, which the circuit court upheld and Strup did not appeal, was a suspension under § 302.505. That suspension was an “alcohol-related enforcement contact, as defined in subsection 3 of section 302.525,” thus constituting “driving under the influence” under § 302.700.2(13)(e). Far from being vacated, the suspension was upheld by the circuit court. Thus it constitutes a “conviction” under § 302.755 and is a sufficient basis for CDL disqualification.

That is consistent with the conclusion that the General Assembly has determined that something serious enough to require suspension of a base driving privilege is *per se* serious enough to disqualify a driver from permission to operate large trucks and other commercial vehicles on Missouri highways for

a year.

**POINT II: Timely assertion of a constitutional claim**

The circuit court erred in holding that the one-year disqualification of Mr. Strup's commercial driving privilege violates Article I, § 10 of the Missouri constitution because courts do not decide constitutional issues that have not been properly raised, and here, Mr. Strup never raised a constitutional issue in that he never specifically designated any constitutional provisions claimed to have been violated, never expressly referenced any article and section of the constitution, and never quoted any constitutional provision.

**A. Standard of review.**

In apparently concluding that Mr. Strup raised a constitutional issue or, the trial court misapplied the law regarding raising constitutional issues. This Court will not affirm a trial court's judgment that misapplies the law. *Fick v. Director of Revenue*, 240 S.W.3d at 690.

**B. Mr. Strup never raised a constitutional issue.**

“To properly raise a constitutional issue, a party must (1) raise it at the first available opportunity, (2) specifically designate the constitutional provision claimed to have been violated[,] by express reference to the article and section of the constitution or by quoting the provision itself, (3) state the facts showing the

violation[,] and (4) preserve the constitutional question throughout for appellate review.” *State v. Knifong*, 53 S.W.3d 188, 192 (Mo. App. W.D. 2001).

Here, Mr. Strup did not raise a constitutional issue in either of his petitions for review of the disqualification of his commercial driving privilege, nor at any later time. (Nor did he in his petition for trial de novo of his base driving privilege, which is not at issue in this appeal.) In his first petition for review, filed on September 21, 2006, Mr. Strup merely alleged that the disqualification “was made without a hearing” and without giving him “an opportunity to be personally present to offer testimony” and “to cross-examine opposing witnesses.” (LF 6). Mr. Strup did not specifically designate any constitutional provision by express reference to the article and section. *See Knifong*, 53 S.W.3d at 192. (LF 5-7). Nor did he quote the constitutional provision – “[t]hat no person shall be deprived of life, liberty, or property without due process of law” – that is the basis of the circuit court’s judgment. MO CONST. Art. I, § 10. *See Knifong*, 53 S.W.3d at 192. (LF 5-7).

In his second petition for review, filed on October 27, 2006, Mr. Strup merely complained that he “did not have an opportunity to cross-examine opposing witnesses.” (LF 10). Again, Mr. Strup’s petition did not mention any

constitutional provisions, much less specifically designate, expressly reference, or quote any constitutional provisions. (LF 9-11).<sup>4</sup>

Courts should not resolve constitutional issues that are not essential to the court's decision. *Motor Control Specialties, Inc. v. Petelik*, 258 S.W.3d 482, 487 (Mo. App. W.D. 2008). Here, because no constitutional issue was raised, it was not essential to the circuit court's decision. In the absence of a constitutional issue, the court should merely have decided whether the disqualification of Mr. Strup's commercial driving privilege was required by § 302.755. As set forth in Point I, the disqualification is required.

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<sup>4</sup> Lack of confrontation is not a valid objection in a civil case in any event. *See Krieg v. Director of Revenue*, 39 S.W.3d 574, 576 (Mo. App. E.D. 2001).

### POINT III: Due process claim

The circuit court erred in holding that the one-year disqualification of Mr. Strup's commercial driving privilege violates Article I, § 10 of the Missouri constitution because, although due process applies to driver's license suspensions, due process does not require a pre-suspension hearing so long as a post-suspension hearing is available, and here, due process was satisfied in that Mr. Strup received a post-disqualification hearing.

#### A. Standard of review.

Even if Mr. Strup had raised a due process claim (he did not; see Point II), the circuit court erroneously declared and applied the law in holding that the disqualification of Mr. Strup's commercial driving privilege violates due process. This Court will not affirm a circuit court judgment that erroneously declares or applies the law. *Fick*, 240 S.W.3d at 690.

#### B. Due process requirements.

Due process applies to the suspension of driver's licenses by the state. *Jarvis v. Director of Revenue*, 804 S.W.2d 22, 24 (Mo. banc 1991), citing *Dixon v. Love*, 431 U.S. 105, 112 (1977). Generally speaking, due process requires notice – not at issue here – and an opportunity to be heard. *Conseco Fin. Servicing Corp. v. Missouri Dept. of Revenue*, 195 S.W.3d 410, 415 (Mo. banc 2006). The

hearing should be “appropriate to the nature of the case.” *Bell v. Burson*, 402 U.S. 535, 542 (1971). But due process does not require an opportunity to be heard before a state suspends a person’s driver’s license based on objective statutory criteria involving public safety, so long as a full, post-suspension hearing is available to challenge the suspension. *Jarvis*, 804 S.W.2d at 24, citing *Dixon*, 431 U.S. at 115. *See also Mackey v. Montrym*, 443 U.S. 1, 17 (1979).

**C. Mr. Strup received due process.**

In this case, the circuit court reversed the disqualification of Mr. Strup’s commercial driving privilege because Mr. Strup did not receive a hearing regarding his commercial driving privilege before the Director disqualified Mr. Strup’s commercial driving privilege. (“[Because] the September 28, 2006 ‘final decision’ of the Director . . . appealed from herein was rendered without any hearing, evidence, or opportunity to present evidence, the decision was . . . a denial of [due process].” LF at 40-41) But as this Court has stated, due process does not require that a person receive a hearing before his license is disqualified; the availability of a full, post-disqualification hearing is sufficient. *Jarvis*, 804 S.W.2d at 24. And here, Mr. Strup received a full, post-disqualification hearing on November 9, 2007. (LF 3, 9, 40; Supp. LF 2, 6; TR 5).

Of course, regarding Mr. Strup’s commercial driving privilege, the only issue to be determined at the hearing was whether he had been adjudicated in a

court of original jurisdiction or an authorized administrative proceeding to have driven while intoxicated. § 302.755; § 302.700.2(8). *See* Point I. And he had been – at the administrative proceeding on September 27, 2006. That there was only one issue to be determined does not make the post-disqualification hearing any less “full,” as required by due process. Moreover, the hearing was “appropriate to the nature of the case,” *Bell*, 402 U.S. at 542, in that, again, it provided for a determination of the only relevant issue – whether Mr. Strup had been adjudicated to have driven while intoxicated.

In effect, Mr. Strup received a pre-disqualification hearing, too. Although the administrative hearing on September 27, 2006, statutorily pertained only to the suspension of his regular driving privilege (not the disqualification of his commercial driving privilege), if Mr. Strup had prevailed at that hearing, there would not have been a basis for disqualifying his commercial driving privilege under § 302.755.1, because he would not have been “convicted” of driving while intoxicated.

Before holding in *Dixon* that due process does not require a pre-suspension hearing, the United States Supreme Court considered three factors: first, the private interest that would be affected by the suspension; second, the risk of an erroneous suspension through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the

government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would impose. *Dixon*, 431 U.S. at 113. Here, the second and third factors weigh heavily in favor of a post-disqualification hearing being sufficient to satisfy due process. Indeed, a pre-disqualification hearing would be of no value because, again, whether the commercial driving privilege will be disqualified depends solely upon the disposition of the regular driving privilege. For the same reason, the risk of erroneous deprivation in not having a pre-disqualification hearing is virtually none. And the government's interest in not holding an additional, useless, pre-disqualification hearing is strong. *See Crum v. Vincent*, 493 F.3d 988, 993 (8<sup>th</sup> Cir. 2007) ("So long as one hearing will provide the affected individual with a meaningful opportunity to be heard, due process does not require two hearings on the same issue.").

## CONCLUSION

This Court should reverse the trial court's judgment and reinstate the one-year disqualification of Mr. Strup's commercial driving privilege.

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 7<sup>th</sup> day of December, 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Lauri J. Laughland  
Attorney at Law  
1102 Main St., Suite B  
Grandview, MO 64030

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,316 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.

\_\_\_\_\_  
Solicitor General

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