

SC90403

**IN THE
SUPREME COURT OF MISSOURI**

MICHAEL STRUP,

Respondent,

v.

**DIRECTOR OF REVENUE
STATE OF MISSOURI,**

Appellant.

RESPONDENT'S SUBSTITUTE BRIEF

**LAURI J. LAUGHLAND
Missouri Bar No. 32064
1102 Main St., Suite B
Grandview, Missouri 64030
(816) 765-5666
(816) 765-5679 Facsimile
Llaughland@aol.com
ATTORNEY FOR RESPONDENT**

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Johnson County, Missouri, the Honorable Joseph P. Dandurand, Judge. After an appeal to the Missouri Court of Appeals, Western District, this Court granted transfer and, therefore, has jurisdiction under Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

On July 16, 2006, Michael Strup, the Respondent herein was arrested by the Missouri Highway Patrol for driving while intoxicated (TR 17, 18). The undisputed facts are that Mr. Strup was involved in a one-vehicle accident wherein he was the driver of the vehicle (TR 15, 16). After the accident, Strup obtained a ride from a passerby back to the residence in Holden, Missouri where he had been helping roof a house (TR 58). At 8:25 p.m., Trooper McCrary of the Missouri Highway Patrol appeared at the residence in Holden, questioned Strup, and performed field sobriety tests (TR 15-19). McCrary then arrested Strup at 8:34 p.m. and transported him for booking (TR 20-21). Strup tested .095 on the BAC DataMaster at 9:01 p.m. (TR 22-23).

The criminal charge against Strup for driving while intoxicated was dismissed (TR 62). However, Strup received a “final decision” from Appellant dated August 23, 2006 stating that on September 24, 2006, his privilege to drive a commercial motor vehicle would be disqualified for a period of one year for receiving a driving while intoxicated traffic offense. In response, Strup filed a Petition for Review in the county of his residence, Cass County, Missouri on September 21, 2006 (LF 5). The basis of Strup’s Petition for Review was that the

disqualification was made without a hearing and without giving Strup an opportunity to be personally present to offer testimony in evidence on his own behalf; and to cross-examine opposing witnesses; and further that the decision to deny Strup's driver's license was arbitrary, capricious, and an abuse of discretion and based on hearsay and other incompetent evidence (LF 5-7).

Thereafter, Strup again received a second "final decision" dated September 28, 2006, indicating that his privilege to drive a commercial motor vehicle would be disqualified on October 30, 2006 based on the outcome of his administrative hearing for driving with a blood alcohol content which exceeded the legal limits (LF 12). Strup then filed another Petition for Review in Cass County, Missouri on October 27, 2006 so as not to forfeit his right to a review of the second "final decision" of the Director of Revenue to disqualify his commercial driver's license (LF 9). Strup alleged due process deficiencies in his second Petition for Review and stated that the decision by the administrative agency was arbitrary, capricious, and an abuse of discretion and based on hearsay and other incompetent evidence where Strup did not have an opportunity to cross-examine opposing witnesses. (LF 9-10).

Both Cass County Petitions for Review were consolidated with a Petition for

Trial de Novo filed in Johnson County, Missouri on October 13, 2006 (LF 21, 22).

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The Petition for Trial de Novo was filed (Supp. LF 3) after an adverse administrative ruling on the suspension of Strup's class F driving privilege for probable cause to believe that he was driving a motor vehicle pursuant to the circumstances set out in Mo. Rev. Stat. § 302.505 R.S.Mo.

Evidence was presented on November 8, 2007 (TR 5) and the case taken under advisement for the filing of written briefs (TR75). On February 11, 2008, the Court entered its Final Judgment finding in favor of Strup on the constitutional issues contained in both of his Petitions for Review relating to the disqualification of his commercial driver's license (LF 40-42). Subsequent to thereto, on February 27, 2008, judgment for Appellant was entered on the trial de novo action relating to Strup's class F driving privilege (Supp. LF 6). Notice of Appeal was filed herein

on

March 28, 2008 (LF 43).

POINTS RELIED ON

POINT I

The circuit court did not err in ordering the director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because Mr. Strup had not yet been convicted of a first violation of driving under the influence of alcohol as defined in § 302.700.2(8).

Danner v. Director of Revenue, 919 S.W.2d 285 (Mo. App. W.D. 1996);

Jenkins v. Director of Revenue, 858 S.W.2d 257 (Mo. App. W.D. 1993);

Mo. Rev. Stat. § 302.700.2(8)

POINT II

The Circuit Court did not err in ordering the Director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because the final decision of the Director of Revenue appealed from in the Petition for Review was rendered without any hearing, evidence, or opportunity to present evidence, the decision was contrary to the provisions of § 302.505 and also a denial of the due process protection provided to Respondent by Section 10 of Article I of the Constitution of the State of Missouri and no affirmative defenses were pleaded or presented by Appellant to explain or justify its "Final Decision".

Article I, Section 10 of the Constitution of Missouri;

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

Johnson v. Allstate Ins. Co., WD 68169 (Mo. App. W.D. 7-29-2008);

Smith v. Thomas, 210 S.W.3d 241 (Mo. App. W.D. 2006).

POINT III

The Circuit Court did not err in holding that the one-year disqualification of Mr. Strup’s commercial driving privilege violates Article I, Sec. 10 of the Missouri constitution because Appellant issued a “final decision” without a hearing and that decision deprived Mr. Strup of his commercial driver’s license.

Art 1, § 10 of the Constitution of Missouri

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

Whitelaw v. Director of Revenue, 73 S.W.3d 731 (Mo. App. E.D. 2002);

Moore v. Board of Educ., 836 S.W.2d 943 (Mo. banc. 1992).

ARGUMENT**POINT I: COMMERCIAL DRIVER'S LICENSE DISQUALIFICATION**

The circuit court did not err in ordering the director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because Mr. Strup had not yet been convicted of a first violation of driving under the influence of alcohol as defined in § 302.700.2(8).

A. Standard of Review

In reviewing a decision from a trial court, “the trial court’s ruling must be upheld unless it is unsupported by substantial evidence, it is against the weight of evidence or misstates or misapplies the law. *Fick v. Director of Revenue*, 240 S.W. 3d 688, 690 (Mo. banc 2007). All evidence and reasonable inferences must be viewed in the light most favorable to the trial court’s decision and all other

evidence or inferences must be disregarded. *West v. Director of Revenue*, 184 S.W.3d 578 (Mo. App. S.D. 2006). Since the facts are not in dispute and, as can be ascertained from the argument that follows, the circuit did not misstate or misapply the law, the trial court's judgment should be affirmed.

B. When the trial court ordered that the Director remove the one-year disqualification from Mr. Strup's commercial driving privilege, Strup had not

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yet been "convicted" of a first violation of "driv[ing] under the influence of alcohol" as defined in § 302.700.2(8).

This appeal is not from a suspension of a base driving privilege under §§ 302.500-.540, nor from a judicial review of such a suspension. This appeal is from the circuit court's decision to require the Director to remove a disqualification of Respondent's commercial driving privilege pursuant to § 302.755. Pursuant to § 302.755 and as pointed out by Appellant, "[a] person is disqualified from driving a commercial motor vehicle for a period of not less than one year if convicted of a first violation" of various sorts. A conviction includes any unvacated determination that a person has violated the law in a court of original jurisdiction or an administrative proceeding. § 302.700.2(8).

Appellant points out that it is not a requirement that one be driving a commercial motor vehicle in order to be disqualified from driving a commercial motor vehicle pursuant to § 302.755. Respondent agrees that it makes no difference if one is driving a commercial or a non-commercial vehicle in order to be disqualified from a CDL pursuant to that section. Rather, Respondent's argument is that he had not been convicted of a first violation under § 302.700.2(8) when the

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circuit court issued its ruling on the CDL disqualification.

The date on the face of the judgment is February 11, 1007. On that date, Respondent had clearly did not have a first conviction for driving under the influence. The General Assembly has enacted a comprehensive series of statutes that address alcohol-related suspensions and revocations by DOR. *Owen v. Director of Revenue*, 256 S.W.3d 605, 608 (Mo. App. S.D. 2008). Section 302.530 provides that the Department of Revenue shall notify the person of its decision to suspend or revoke a base driving privilege based on alcohol-related circumstances. Unless the person, within fifteen days after being notified of the department's decision, files an appeal for judicial review pursuant to § 302.535, the decision of the Department of Revenue shall be final. § 302.535. See also *Danner v. Director of Revenue*, 919 S.W.2d 285, 286 (Mo. App. W.D. 1996). It follows then that, if

the person timely files an appeal for judicial review, the decision of the Department of Revenue is not a final decision.

The circuit court has original jurisdiction to conduct a trial de novo of an alcohol-related suspension or revocation. See *Jenkins v. Director of Revenue*, 858 S.W.2d 257, 260-61 (Mo. App. 1993); *Owen v. Director of Revenue*, 256 S.W.3d 605, 608 (Mo. App. 2008). Missouri courts have consistently held that § 302.535.1

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expressly withholds from circuit judges the power to review the administrative decision made as to the driver's license suspensions after hearings are conducted pursuant to § 302.530. The statute authorizes trial de novo, meaning a trial anew, Black's Law Dictionary (5th Ed., 1979), and states in part: 'Such trial shall be conducted pursuant to the Missouri rules of civil procedure and not as an appeal of an administrative decision pursuant to Chapter 536, R.S.Mo.' The trial de novo had under § 302.535 is an original proceeding and is an exercise of an original and not a review jurisdiction. *Dove v. Director of Revenue*, 704 S.W.2d 713, 715 (Mo. App. W.D. 1986). See also *Collins v. Director of Revenue*, 691 S.W.2d 246 (Mo. banc 1985).

If a timely Petition for Trial de Novo is filed, the administrative decision can only become a final decision if the Petition for Trial de Novo is dismissed. In the

present case, Appellant agrees that Mr. Strup timely filed his Petition for Trial de Novo concerning his base driving privilege. The petition had not been dismissed, but was in fact heard by the court on November 9, 2007. The circuit court had not made a decision regarding the base driving privilege when it ruled on the CDL issue on February 11, 2008. The decision was made on the base driving privilege on February 27, 2008. As a result, Respondent had not been convicted of a first

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violation of driving under the influence when the circuit court found in his favor on the commercial driving privilege.

Even if a determination were to be made that the date of both judgments, the judgment concerning Strup's base driving privilege and the judgment concerning his CDL, was the same date, February 27, 2008, it cannot be ascertained from the record which judgment was, in fact, entered first. Therefore, it cannot be unequivocally stated that Respondent had been convicted of a first offense of driving under the influence when the Court entered the judgment ordering the Director to remove the disqualification from his CDL.

POINT II: LACK OF PRESENTATION OF AFFIRMATIVE DEFENSES

The Circuit Court did not err in ordering the Director to remove the one-year disqualification from Mr. Strup's commercial driving privilege because the final decision of the Director of Revenue appealed from in the Petition for Review was rendered without any hearing, evidence, or opportunity to present evidence, the decision was contrary to the provisions of § 302.505 and also a denial of the due process protection provided to Respondent by Section 10 of Article I of the Constitution of the State of Missouri and no affirmative defenses were pleaded or presented by Appellant to explain or justify its "Final Decision".

A. Standard of Review

In reviewing a decision from a trial court, "the trial court's ruling must be upheld unless it is unsupported by substantial evidence, it is against the weight of

evidence, or misstates or misapplies the law. *Fick v. Director of Revenue*, 240 S.W.3d 688, 690 (Mo. banc 2007). All evidence and reasonable inferences must be viewed in the light most favorable to the trial court's decision and all other evidence or inferences must be disregarded. *West v. Director of Revenue*, 184 S.W.3d 578 (Mo. App. S.D. 2006). Appellant argues only that the judgment of the trial court

misapplies the law. Since that is not the case, as is clear from the argument which

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follows, the trial court's judgment must be affirmed.

B. Respondent was denied due process of law when Appellant declared him to be CDL disqualified without a hearing and Appellant raised no affirmative defenses to the due process claims which were the bases of Respondent's Petitions for Review.

Article I, Section 10 of the Missouri Constitution states that "no person shall be deprived of life, liberty or property without due process of law." In the present case, the Director issued a "Final Decision" disqualifying Mr. Strup's CDL privileges without holding a hearing or even providing for the opportunity to be heard. Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Missouri

courts have held that a due process right to a hearing is required in cases involving the suspension or revocation of a driver's license. *Whitelaw v. Director of Revenue*, 73 S.W.3d 731 (Mo. App. E.D. 2002); *Stiens v. Director of Revenue*, 19 S.W.3d 695 (Mo. App. E.D. 2000) because a driver's license is a statutorily protected property interest. *Dixon v. Love*, 431 U.S.105 (1977). Likewise, Section 302.505 Mo. Rev. Stat. requires that the Department of Revenue provide an opportunity for a hearing and that a final decision shall be issued only after a hearing is held on the

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basis of the evidence received at the hearing. Mo. Rev. Stat. § 302.505.2 (2008).

Mr. Strup was never afforded the opportunity to be heard regarding his CDL qualification by the Director of Revenue. Both Petitions for Review filed in the circuit court raised due process issues. The very basis of both petitions alleged that the disqualification of Mr. Strup's commercial driving privilege violated due process requirements, although the denial of due process was admittedly spelled out more fully in the first Petition for Review. Appellant chooses to argue that Respondent did not comply with the law in terms of specifically making his constitutional arguments despite the fact that the very basis of each Petition for Review included allegations of due process deficiencies.

On the other hand, Appellant never made any argument that the

constitutional right to due process had been afforded Respondent. The record is totally devoid of any such articulation as stated in the circuit court's judgment – “that no affirmative defenses were pleaded or presented by Appellant to justify its ‘Final Decision’”. Mo. R. Civ. Pro. 55.08 requires a party to plead affirmative defenses in its responsive pleading by setting forth “a short and plain statement of the facts showing that the pleader is entitled to the defense.” *Johnson v. Allstate Ins.*

Co., WD 68169 (Mo. App. W.D. 7-29-2008). Affirmative defenses which are not

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properly pleaded are deemed waived. *Smith v. Thomas*, 210 S.W.3d 241, 243 (Mo. App. W.D. 2006). Therefore, any complaint about constitutional deficiencies was waived by Appellant at the circuit court level.

POINT III: DUE PROCESS CLAIM

The Circuit Court did not err in holding that the one-year disqualification of Mr. Strup’s commercial driving privilege violates Article I, Sec. 10 of the Missouri constitution because Appellant issued a “final decision” without a hearing and that decision deprived Mr. Strup of his commercial driver’s license.

A. Standard of Review

“The trial court’s ruling must be upheld unless it is unsupported by substantial evidence, it is against the weight of evidence, or misstates or misapplies

the law. *Fick v. Director of Revenue*, 240 S.W.3d 688, 690 (Mo. banc 2007). All evidence and reasonable inferences must be viewed in the light most favorable to the trial court's decision and all other evidence or inferences must be disregarded. *West v. Director of Revenue*, 184 S.W.3d 578 (Mo. App. S.D. 2006). The trial court did not misstate or misapply the law and therefore, should be affirmed.

B. Mr. Strup never received a pre- or post-suspension hearing at the administrative level regarding his commercial driving privilege and due to that fact, the circuit court found that Mr. Strup's did not receive due process.

Due process applies to the suspension of driver's licenses by the state, *Jarvis*

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v. Director of Revenue, 804 S.W.2d 22, 24 (Mo. banc 1991) in that a driver's license is a statutorily protected property interest. *Dixon v. Love*, 431 U.S. 105, 112 (1977). "Licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment," *Dixon* at 112. "The due process clause requires a 'meaningful' hearing in which consideration of all elements essential to the decision as to whether a license to operate a vehicle may be suspended are considered. *Jarvis v. Director of Revenue*, 804 S.W.2d 22, 24 (Mo. banc 1991). Due process requires the opportunity to be heard "at a reasonable time and in a meaningful manner". *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); see also *Stiens*

v. Director of Revenue, 19 S.W.3d .695, 696 (Mo. App. E.D. 2000). Due process also requires that in order to deprive a person of a property interest, the government must give notice and provide an opportunity for a hearing appropriate to the nature of the case. *Moore v. Board of Educ.*, 836 S.W.2d 943 (Mo. banc. 1992).

In the present case, Mr. Strup received notice on two separate occasions that his commercial driver's license had been disqualified. The first one was dated August 23, 2006 and indicated that his CDL would be disqualified on September 24, 2006. The second one was dated September 28, 2006 and indicated that his CDL would be disqualified on October 30, 2006. There was no opportunity for a

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hearing or for requesting a hearing on the disqualification of his CDL at the administrative level. As a result, Respondent's only remedy was to file two separate Petitions for Review, one in response to each of the disqualification notices he received. The basis of each petition was the denial of due process resulting from the Director of Revenue's actions.

Due to the court's schedule, procedural issues and the schedule of the attorney for the Department of Revenue, the hearing was not held in circuit court on Mr. Strup's Petitions for Review until November 9, 2007, more than a year after

the effective date of the second disqualification of his CDL. By that time, the total period of disqualification from each notice had already been served by Mr. Strup. The post-disqualification hearing which Mr. Strup received at the circuit court level was certainly not one which was within a reasonable time and within a reasonable manner as required under *Goldberg v. Kelly*, Id. at 267 and *Moore*, Id. at 947.

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CONCLUSION

WHEREFORE, based on the foregoing, Respondent respectfully requests that the judgment of the Circuit Court of Cass County, Missouri be affirmed.

Respectfully submitted,

LAURI J. LAUGHLAND #32064
1102 Main St., Suite B
Grandview, Missouri 64030
(816) 765-5666

(816) 765-5679 Facsimile
E-Mail: Llaughland@aol.com
ATTORNEY FOR RESPONDENT

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

The undersigned hereby certifies that on this 11th day of January, 2010, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid to:

James R. Layton
Solicitor General
Post Office Box 899

Jefferson City, Missouri 65102

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 3,785 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.

LAURI J. LAUGHLAND
Attorney for Respondent