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## JURISDICTIONAL STATEMENT

This is the state's appeal from the dismissal of a charge of the class D felony of resisting a lawful stop, § 575.150, RSMo Supp. 2005.<sup>1</sup> After the Missouri Court of Appeals, Western District, affirmed the dismissal, this Court granted transfer pursuant to Rule 83.04. Therefore, this Court has jurisdiction of the appeal.

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<sup>1</sup> Statutory references are to RSMo Cum. Supp. 2005 unless otherwise noted.

## STATEMENT OF FACTS

On April 3, 2008, respondent Gail Daws was charged in Platte County Circuit Court with the class D felony of resisting a lawful stop, § 575.150, and one count of driving while revoked, § 302.321, RSMo Supp. 2007 (L.F. 7-8).<sup>2</sup> The information alleged that law enforcement officers “were attempting to make a lawful stop of a vehicle being operated by the defendant, and the defendant knew or reasonably should have known that the officers were making a lawful stop;” and that for the purpose of preventing that stop respondent resisted by fleeing (L.F. 7).

Respondent had previously been charged with failure to yield to an emergency vehicle, § 304.022, RSMo Supp. 2007, as a result of her failure to pull over when the officers attempted to stop her (L.F. 12-14). The information in that charge alleged that she “failed to yield to emergency vehicle sounding audible siren signal and displaying lighted visible red & blue light” (L.F. 14). Respondent pled guilty to that offense on March 5, 2008 (L.F. 14).

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<sup>2</sup> Respondent cites (L.F.) to denote the original legal file in Cause No.

WD 69785, which has been transferred to this case. (Supp. L.F.) refers to the legal file that was filed in the instant cause.

Respondent filed a motion to dismiss the resisting charge, claiming that failure to yield was a lesser included offense of resisting a lawful stop and further prosecution violated the Fifth Amendment guarantee against double jeopardy as well as § 556.041, RSMo 2000 (L.F. 9). The cause came to a hearing at which respondent pled guilty to driving while revoked (Tr. 11). The court imposed a one-year sentence (Tr. 11). It granted respondent's motion to dismiss the resisting count after hearing argument (Tr. 10). The state brought this appeal (Supp. L.F. 3).

**POINT RELIED ON**

**The trial court properly dismissed the charge of resisting a lawful stop because the state's prosecution violated respondent's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and § 556.041, in that respondent had previously pled guilty to failing to yield to an emergency vehicle, an offense that was included in the charge of resisting a lawful stop as it included the same elements, failure to pull aside for the approaching emergency vehicle.**

*State v. Clark*, 263 S.W.3d 666 (Mo. App., W.D. 2008);

*Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002);

*State v. McLemore*, 782 S.W.2d 127 (Mo. App., E.D. 1989);

*Illinois v. Vitale*, 447 U.S. 410 (1980);

U.S. Const., Amends. V and XIV;

§ 304.022 RSMo Cum. Supp. 2005;

§ 556.041, RSMo 2000;

§ 556.046.1(1), RSMo 2000; and

§ 575.150, RSMo 2005.

## ARGUMENT

The trial court properly dismissed the charge of resisting a lawful stop because the state's prosecution violated respondent's right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and § 556.041, in that respondent had previously pled guilty to failing to yield to an emergency vehicle, an offense that was included in the charge of resisting a lawful stop as it included the same elements, failure to pull aside for the approaching emergency vehicle.

After respondent pled guilty to failure to yield to an emergency vehicle, any subsequent prosecution for resisting a lawful stop violated her right to be free from double jeopardy. This prosecution subjected her to multiple convictions and sentences for offenses arising from the same conduct and with similar elements.

### *Standard of Review*

Interpretation of the Double Jeopardy Clause is a legal question; accordingly, this Court reviews the claim *de novo*. *State v. Dravenstott*, 138 S.W.3d 186, 191-92 (Mo. App., W.D. 2004). The judgment of the trial court

will be affirmed if the court's ruling was correct, regardless of its reasoning. *State v. Harris*, 620 S.W.2d 349, 353 fn. 3 (Mo. banc 1981).

### ***Double Jeopardy***

The Double Jeopardy Clause of the Fifth Amendment provides that no person "be subject for the same offense to be twice put in jeopardy of life or limb." This provision applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Double jeopardy analysis involves determining what punishment the legislature intended be imposed, and whether the legislature intended to permit prosecution of more than one offense arising out of the same conduct. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Thus analysis begins with Section 556.041(1), RSMo 2000, which prohibits multiple convictions for offenses arising from the same conduct when one offense is "included in the other, as defined in Section 556.046." *Peiffer v. State*, 88 S.W.3d 439, 443 (Mo. banc 2002).

Section 556.046.1(1) defines an included offense as one "established by proof of the same or less than all the *facts* required to establish the commission of the offense charged." (emphasis added). This statute does not permit a general comparison of the evidence, but does require the Court to determine what facts are necessary to establish the elements of the

offense. Section 556.041 is a codification of the *Blockburger* test, known as the same elements test. *Id.* Offenses are the same for purposes of double jeopardy analysis unless each “requires proof of an additional fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The Double Jeopardy Clause prohibits a successive prosecution for a greater offense after a previous conviction of a lesser offense. *Brown v. Ohio*, 432 U.S. 161, 169 (1977). This occurs when the conviction of the greater necessarily depends upon reestablishing all the facts that were established at the earlier trial. *Illinois v. Vitale*, 447 U.S. 410, 420 (1980). If a greater offense cannot be proven without also proving the lesser offense, the offenses are the “same” under *Blockburger*. *Id.* at 419-20.

In reviewing a double jeopardy claim after a guilty plea has already been entered, the courts consider the transcript from the guilty plea and the information or indictment. *Yates v. State*, 158 S.W.3d 798, 801 (Mo.App. E.D. 2005). The court focuses upon the proof necessary to establish the statutory elements of each offense, rather than upon the evidence actually adduced at trial. *Illinois v. Vitale*, *supra*; *State v. McLemore*, 782 S.W.2d 127, 128 -129 (Mo. App., E.D. 1989). If each statute requires proof of a fact that the other does not, the offenses are separate, despite a substantial overlap in

the proof offered to establish the crimes. *Ianelli v. United States*, 420 U.S. 770, 785 (1975).

Nevertheless, the Court must consider the statutory elements of the offenses "as charged..." *Peiffer*, 88 S.W.3d 439 at 443 (emphasis added). The question is whether failure to yield is a lesser included offense "on the facts of [this] case...." *Id.* The Court examines the charging documents to determine whether, given the means of committing the offenses, they each contain different elements. *Id.*<sup>3</sup>

In analyzing the different elements of the statutes, Missouri law does not require that the elements of both offenses be absolutely identical. There may be "slight differences" in the wording of the two statutes. *McLemore*, 782 S.W.2d at 129 (Mo. App., E.D. 1989). The question is whether the language is "functionally equivalent...in all material respects." *Id.* It is not decisive that one statute may be written more generally than another; "[n]either law nor logic warrants such a mechanical application of double jeopardy principles." *Id.* at 130.

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<sup>3</sup> Therefore, it is irrelevant that the offense of resisting arrest can be committed without the involvement of a vehicle. *Peiffer* requires that the comparison be based upon how the offense was charged. It is impossible to resist a vehicle stop without a vehicle.

### *Resisting a Vehicle Stop and Failure to Yield*

Resisting arrest has three elements: 1) the defendant is aware that a law enforcement is making an arrest or stop of a person or vehicle; 2) the defendant resists or flees; 3) the defendant does so to prevent the officer from making the arrest or stop. *State v. Ondo*, 231 S.W.3d 314, 316 (Mo. App., S.D. 2007). *See* § 575.150. The information charged that Kansas authorities were attempting to make a lawful stop of a vehicle operated by respondent; respondent knew or reasonably should have known they were making a stop; and respondent resisted the stop by fleeing (L.F. 7).

Failure to yield to an emergency vehicle involves: 1) the approach of an emergency vehicle sounding a siren or flashing a light, and 2) failure to drive to the right and remain until the emergency vehicle has passed, unless otherwise directed by a police officer. § 304.022.

Here, despite more technical wording in the traffic statute, the two statutes are "functionally similar" in their provisions. Furthermore, all of the elements of failing to yield to the officer are also included in resisting a lawful stop. This is specifically provided for in § 575.150.3, which creates a presumption as to the defendant's intent in disobeying a traffic stop: "A person is presumed to be fleeing a vehicle stop if that person continues to operate a motor vehicle after that person has seen or should have seen

clearly visible emergency lights or has heard or should have heard an audible signal emanating from the law enforcement vehicle pursuing that person."

Appellant claims that subsection 3 is merely a statutory presumption that certain facts support the element of the defendant's flight (App. Br. 18). Those "certain facts" that form the basis of the presumption are the offense of failure to yield. Section 575.015.3 converts the defendant's failure to yield to a basis for establishing the first two elements of resisting a lawful stop. The presumption defines and incorporates a failure to yield as evidence of elements of resisting arrest.

Every fact required to prove respondent's failure to yield is also *required* to prove resisting a lawful vehicle stop. A police vehicle is an emergency vehicle. A vehicle stop is necessarily effected through siren and lights, the show of force used by the authorities in effecting a traffic stop. Finally, flight necessarily entails a failure to yield. Because the elements of failure to yield are the first two elements of resisting a stop, it is a lesser included offense. *State v. Clark*, 263 S.W.3d 666, 673-74 (Mo. App., W.D. 2008).

### *Included Offenses*

In *Peiffer*, the Court examined whether stealing was a lesser included offense of first degree tampering. The charging documents accused the defendant of tampering by possessing the automobile, and of stealing by retaining possession. The Court noted that

"... in this case to establish his guilt for stealing, the state would have been required to prove all of the elements of first-degree tampering augmented by proof that [the defendant's] unlawful possession of the vehicle occurred "with the purpose to deprive" the owner of the property...Because first-degree tampering under these facts "is established by proof of the same or less than all the facts required to establish the commission of" stealing, first-degree tampering is a lesser-included offense of stealing for double jeopardy purposes in this case. [citation omitted]

*Peiffer*, 88 S.W.3d at 444.

The statutes in *Peiffer* were straightforward. A more complex situation was presented in *McLemore*, which involved prosecution for violation of both a city ordinance prohibiting carrying a firearm and the concealed weapons statute, § 571.030.1(1). The city ordinance required the city to prove, as an element of the offense, that the weapon was loaded and

unsecured. In the statute, by contrast, this was set out as a special negative defense to be proven by the state only if the defendant injected the issue. 782 S.W.2d at 129. Furthermore, § 571.030 prohibited only concealed weapons but the city ordinance contained no such limitation. *Id.*

The court held that even though the ordinance required proof of matters that were not set out as elements under the statute, and even though only the statute required proof of concealment, labeling them as different offenses would “require a hypertechnical process bordering on sophistry.” *Id.* at 130. The statute always required the existence of all the facts constituting the conduct proscribed by the ordinance. *Id.* Under § 571.030.1(1), the state bore the burden of proving all the elements of the city offense when those elements were placed in dispute. *Id.* at 131. This made the two offenses the same for double jeopardy purposes.

Here, to establish respondent's guilt of resisting a stop, the state would be required to prove all the elements of failure to yield to an emergency vehicle. Failure to yield to an emergency vehicle is *required* to prove resisting a lawful stop of a vehicle.

Although the statute in *McLemore* involved special defenses and this case involves a statutory presumption, the distinction is not relevant to the issue of whether the statutes are “functionally similar.” The statute codifies

the failure to yield as a predicate for resisting arrest. Section 575.150 by its terms always requires the existence of all facts constituting the conduct proscribed in § 304.022. The facts come within § 556.046.1(1), in that failure to yield is established by proof of the same or less than all the facts required to establish resisting a vehicle stop. “[T]he prosecutor who has established [resisting a lawful stop of a vehicle] necessarily has established [failure to yield] as well.” *Brown v. Ohio*, 432 U.S. at 168.

In *Illinois v. Vitale, supra*, the Court faced a successive prosecution for involuntary manslaughter after the defendant had been convicted of failure to reduce speed to avoid an accident. The Court held that “[i]f, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the ‘same’ under *Blockburger...*” 447 U.S. at 420. The question was whether the greater offense “could be proved without also proving a careless failure to reduce speed...” *Id.* at 419.

The analysis used in *Peiffer, McLemore and Vitale* is not application of the "same conduct" test. That test is solely based upon the conduct of the defendant. The elements of the offense are immaterial. Under the “same conduct test” the elements of the offense may be different but if the state uses the same conduct to prove both offenses, successive convictions

constitute double jeopardy. *See, Grady v. Corbin*, 495 U.S. 508 (1990) (the mere fact that each charge arose out of the same conduct constituted successive prosecution for the same offense). As respondent notes, that is not the law. *United States v. Dixon*, 509 U.S. 688 (1993).

Finally, the court in *Clark, supra*, was faced with a situation similar to the instant case. The defendant was charged with resisting arrest after having been convicted of a municipal violation of failure to yield. The court applied § 556.046(1) and examined the elements of the offenses, concluding that although the provisions used different terminology, the city ordinance was essentially the first two proof elements of resisting arrest. 263 S.W.3d at 673-74.

#### *"Facts" versus "Elements"*

To the extent that confusion between "facts" and "elements" exists, the answer is not to reinterpret § 556.046.1(1) to mean the exact opposite of what it plainly says. The plain meaning of the statute is to be given effect wherever possible. *State v. Ewanchen*, 799 S.W.2d 607, 609 (Mo. banc 1990).

This Court in *Peiffer* outlined the correct interpretation of § 556.046.1. The statutory elements are not analyzed in the abstract, but rather with respect to the particular case before the Court. *Peiffer* compared the

elements in the context of the specific charges filed against the defendant, while not examining the facts in any detail.

The Court only compared the elements that constituted the offenses in the specific prosecutions before it, distinguishing between the various ways of committing both tampering and stealing to determine the exact manner that was charged. It then applied § 556.046(1) to decide what facts were required to prove each offense. *Accord, Illinois v. Vitale, supra.*

The memorandum of the Court of Appeals below stated the case succinctly: "Ms. Daws could not have committed resisting arrest as charged without having failed to yield to the emergency vehicle (police car), thus making failure to yield, Section 304.022, a lesser-included offense of resisting arrest, Section 575.150, in this particular case."

There is no reasonable scenario in which a person can commit the offense of resisting a lawful traffic stop without committing the elements of failure to yield to an emergency vehicle. "An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo.2002). Applying this test, comparing the two statutes here, it is evident that every element necessary to prove failure to yield is also a required element for

proving resisting a vehicle stop. The trial court ruled correctly in dismissing the information, and its judgment should be affirmed.

## CONCLUSION

For the reasons set forth above, respondent submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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### Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,124 words, which does not exceed the 13,950 words allowed for a respondent's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 2<sup>nd</sup> day of March, 2010, to Jayne T. Woods, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Rosalynn Koch

# **APPENDIX**

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