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**IN THE  
SUPREME COURT OF MISSOURI**

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<b>FRANKIE RAY VANDERPOOL, III,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. SC88013</b>
	)	
	)	
<b>DIRECTOR OF REVENUE,</b>	)	
	)	
<b>Appellant.</b>	)	

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**Appeal from the Circuit Court of Benton County, Missouri  
The Honorable Larry M. Burditt, Judge**

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**Appellant's Substitute Brief**

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**STATE OF MISSOURI**

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## **Jurisdictional Statement**

This appeal is from a judgment of the Circuit Court of Benton County, Missouri, ordering the Director of Revenue to reinstate the driving privileges of Frankie Ray Vanderpool after his driving privileges were suspended. After an opinion by the Court of Appeals, Western District, this Court took transfer of the case, on the Director's application. Therefore, jurisdiction lies in this Court. Article V, §10, Missouri Constitution (as amended, 1982).

## **Statement of Facts**

The Director suspended Vanderpool's driving privileges, and on November 19, 2003, Vanderpool filed his petition for trial de novo in the Circuit Court of Benton County (LF 4-5). On March 22, 2004, the court heard the matter (Tr. 2), and Trooper Fennewald testified as follows:

On September 7, 2003, at approximately 1:45 a.m., Trooper Mike Fennewald was traveling southbound on Route U when he observed a northbound vehicle traveling with no headlights (Tr. 4-5). Trooper Fennewald turned his vehicle around and stopped the northbound vehicle (Tr. 5-6). He identified the driver as Frankie R. Vanderpool, III (Tr. 6).

Trooper Fennewald told Vanderpool why he had stopped him; the trooper noticed a strong odor of intoxicants coming from Vanderpool's car (Tr. 6-7). Trooper Fennewald also noticed that Vanderpool's eyes were bloodshot, glassy, and watery (Tr. 7). Trooper Fennewald asked Vanderpool to accompany him to the patrol car (Tr. 7-8). Once Vanderpool was inside the patrol car, the odor of intoxicants became stronger (Tr. 8). Trooper Fennewald asked Vanderpool if he had anything to drink that evening, and Vanderpool confirmed that he "had consumed too much to be driving" (Tr. 8).

Trooper Fennewald performed several field sobriety tests on Vanderpool (Tr. 8-9). Vanderpool tested positive for the presence of alcohol on the portable breath test; hopped and put his foot down more than three times on the one-leg stand test; was unable to keep

his balance and walk heel-to-toe, and he swayed, made an improper turn, and stepped off the line more than three times on the walk and turn test; and he stopped counting at 16 rather than 30 seconds and swayed while performing the Romberg test (Tr. 9-10, 25, 27-33).

At 2:00 a.m., Trooper Fennewald placed Vanderpool under arrest for driving while intoxicated (Tr. 34). He handcuffed Vanderpool and placed him in the patrol car while he moved Vanderpool's vehicle and secured it (Tr. 34-35, 65). Trooper Fennewald then transported Vanderpool and another person to the Benton County Sheriff's Department (Tr. 34-35, 65-66). It took Trooper Fennewald less than five minutes to move Vanderpool's vehicle, and it took about twenty-five or thirty minutes for him to drive from the arrest scene to the Benton County Sheriff's Department (Tr. 65-69). Trooper Fennewald observed Vanderpool while he drove to the sheriff's department (Tr. 75).

At the sheriff's department, at 2:37 a.m., Trooper Fennewald read the implied consent law to Vanderpool and Vanderpool agreed to take a breath test (Tr. 36-37, 69). Trooper Fennewald held a Type III permit to operate the DataMaster on the date in question (Tr. 36). He continued his observation of Vanderpool while putting information into the DataMaster instrument (Tr. 74-75). Trooper Fennewald indicated that he observed Vanderpool for fifteen minutes immediately prior to the test, and during that time Vanderpool did not put anything in his mouth, smoke, or vomit (Tr. 37-38). He administered the test to Vanderpool at 2:39 a.m. (Exhibit B). Vanderpool objected to his

.166 test result on the grounds that the evidence would reflect that there had not been a proper 15-minute observation period (Tr. 41-42).

The Director offered the DataMaster checklist as Exhibit A, which was admitted into evidence subject to the omission of the test result listed on it (Tr. 86-87; LF 22). She then offered the printout from the DataMaster as Exhibit B (Tr. 88; LF 23). The trial court admitted Exhibit B into evidence subject to the exclusion of the test results (Tr. 88).<sup>1</sup> The Director offered the maintenance report as Exhibit C, and Vanderpool then stipulated to the maintenance records; the trial court admitted the exhibit into evidence (Tr. 85-86; LF 24).

Vanderpool did not testify or offer evidence (Tr. 89); his counsel noted, “[w]e have nothing to present, Judge, just arguments” (Tr. 90).

The trial court entered its judgment on May 26, 2004, setting aside the suspension on the grounds that the Director had not proved compliance with the 15-minute observation

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<sup>1</sup> The Director offered, and, subject to Vanderpool’s foundational objection, the court admitted, the printed ticket from the DataMaster as both Exhibit B and Exhibit D (Tr. 43-47, 87-88). Based upon the record, it appears that Exhibit B and Exhibit D are identical DataMaster printouts. To avoid unnecessary duplication, only Exhibit B is included in the appendix.

requirement<sup>2</sup> (LF 39-41).

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<sup>2</sup> Superficially, it looks as if there are two judgments in this case (LF 31, 33-35). Under Missouri Supreme Court Rule 74.01 Missouri Supreme Court Rule 74.01, though, the only final and appealable judgment is signed by Judge Larry Burditt and dated May 26, 2004 (LF 33-35). The other document, entitled “Judgment,” is not dated, and Judge Burditt’s signature is crossed out (LF 31). Furthermore, Judge Burditt reached the same result in both documents. Therefore, neither party is denied a substantial right by denominating the May 26, 2004, document as the only final and appealable judgment. *See Weber v. Director of Revenue*, 137 S.W.3d 563 (Mo.App., S.D. 2004) *Weber v. Director of Revenue*, 137 S.W.3d 563, 565 (Mo.App., S.D. 2004).

## Point Relied On

**The trial court abused its discretion in excluding Vanderpool's BAC result and its decision restoring Vanderpool's driving privileges consequently misdeclares and misapplies the law and is against the weight of the evidence and unsupported by substantial evidence because the Director laid the proper foundation for admission of the BAC result and Vanderpool did not rebut the Director's prima facie case, in that the trooper testified that he observed Vanderpool for 15 minutes and Vanderpool did not engage in any proscribed activity, Vanderpool did not present any evidence that he did anything that might have affected the test result, and while a driver's objection to the breath test results requires the Director to then prove the necessary foundation, an objection does not qualitatively change the nature of that foundation or the type of evidence necessary for a driver to overcome the Director's prima facie case.**

*Coyle v. Director of Revenue*, 181 S.W.3d 62 (Mo. banc 2005)

*Bhakta v. Director of Revenue*, 182 S.W.3d 662 (Mo.App., E.D. 2005)

*Testerman v. Director of Revenue*, 31 S.W.3d 473 (Mo.App., W.D. 2000),

*overruled on other grounds, Verdoorn v. Director of Revenue*,

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*Smith v. Director of Revenue*, 77 S.W.3d 120 (Mo.App., W.D. 2002)

§302.505.1, RSMo Cum.Supp. 2005

19 CSR 25-30.060

## Argument

**The trial court abused its discretion in excluding Vanderpool's BAC result and its decision restoring Vanderpool's driving privileges consequently misdeclares and misapplies the law and is against the weight of the evidence and unsupported by substantial evidence because the Director laid the proper foundation for admission of the BAC result and Vanderpool did not rebut the Director's prima facie case, in that the trooper testified that he observed Vanderpool for 15 minutes and Vanderpool did not engage in any proscribed activity, Vanderpool did not present any evidence that he did anything that might have affected the test result, and while a driver's objection to the breath test results requires the Director to then prove the necessary foundation, an objection does not qualitatively change the nature of that foundation or the type of evidence necessary for a driver to overcome the Director's prima facie case.**

### **Standard of Review**

This Court is to sustain the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). As to admission of evidence, a trial court's decision is reviewed for abuse of discretion. *Vernon v. Director of Revenue*, 142 S.W.3d 905, 909 (Mo.App., S.D. 2004). A trial court abuses its discretion where its ruling "is clearly against the logic of the

circumstances, is so arbitrary and unreasonable as to shock the sense of justice, and shows a lack of careful consideration.” *Id.*, citing *State v. Stottlemyre*, 35 S.W.3d 854, 858 (Mo.App., W.D. 2001). **The Director’s prima facie case**

To properly suspend or revoke a license under §302.505.1, RSMo Cum.Supp. 2005, the Director must establish a prima facie case by a preponderance of the evidence, showing: (1) the driver was arrested upon probable cause to believe that the driver was driving while intoxicated; and, (2) the driver was driving when his blood alcohol concentration was at least .08% by weight. *Walker v. Director of Revenue*, 137 S.W.3d 444, 446 (Mo. banc 2004).

To lay a foundation for a breath test result, the Director must show 1) that the test was performed by following the approved techniques and methods of the Department of Health, 2) that the operator held a valid permit, and 3) that the equipment and devices were approved by the Department of Health. *Sellenriek v. Director of Revenue*, 826 S.W.2d 338, 340-41 (Mo. banc 1992). As to blood alcohol concentration (BAC) in particular, where subjects take a breath test, they must be observed for 15 minutes prior to the test to ensure that they do not smoke, vomit or have any “oral intake.” 19 CSR 25-30.060.

The trial court did not address the probable cause issue in its judgment (LF 33-35). But the observations made by Trooper Fennewald were uncontroverted, and were more than sufficient to establish that he had probable cause to believe that Vanderpool was

driving while intoxicated (Tr. 7-10, 25, 27-33). Indeed, Vanderpool has never contended otherwise. *See* Respondent’s Brief at Argument.

As to whether Vanderpool was driving with a BAC of at least .08% by weight, Trooper Fennewald observed Vanderpool driving (Tr. 6). The only issue, therefore, is whether Vanderpool’s BAC was at least .08%.

The trial court found against the Director on this issue because it sustained Vanderpool’s objection to the breath test result (LF 33). According to the trial court, “the arresting officer did not observe the Petitioner for 15 minutes as required” (LF 33). Because the trooper agreed that he was trained to observe subjects “face to face” to make sure they do not do anything proscribed by regulation, the trial court deemed “face to face” observation to be an approved method or technique of the Department of Health (LF 34). And because during part of the 15-minute period preceding the breath test, the trooper was driving the patrol car, the trial court found that the trooper’s testimony that he observed Vanderpool during this period was “not credible” because the trooper could not have been simultaneously driving and conducting observation that was “face to face” (LF 34).

***Coyle v. Director of Revenue***

This Court last addressed the 15-minute observation period in *Coyle v. Director of Revenue*, 181 S.W.3d 62 (Mo. banc 2005). In *Coyle*, the officer found that Coyle exhibited signs of intoxication and placed Coyle in the front seat of the patrol car. *Coyle*,

181 S.W.3d at 64. The officer then returned to Coyle's car, leaving Coyle in the patrol car, to check on the status of Coyle's wife. *Id.* After the officer determined that Mrs. Coyle could not safely drive either, he escorted her to the patrol car as well. *Id.* The officer then moved the Coyles' vehicle to a safe location. *Id.*

The officer had arrested Coyle at 1:05 a.m. *Id.* Coyle took the breath test at 1:22 a.m. *Id.* Thus, a portion of the 15-minute observation period occurred while Coyle was waiting in the patrol car. *Id.* There was no evidence that Coyle smoked, vomited or had any oral intake during the fifteen minutes, though there was evidence that Coyle belched while waiting in the patrol car. *Id.*

At trial, Coyle objected to the breath test result on foundational grounds, but his specific objection was based on the propriety of a software upgrade to the DataMaster. *Coyle v. Director of Revenue*, 88 S.W.3d 887, 895 (Mo.App., W.D. 2002). But he did not object to the propriety of the officer's administration of the test. *Coyle*, 88 S.W.3d at 895. The Court of Appeals, Western District, found that the software objection was not well-founded, the trial court should have admitted the test result, and the Director had made a prima facie case. *Coyle*, 88 S.W.3d at 896. The Western District remanded so that Coyle could have an opportunity to present rebuttal evidence. *Coyle*, 88 S.W.3d at 896.

Following remand and Coyle's presentation of evidence, the trial court found that Coyle had rebutted the Director's prima facie case, "because the requisite fifteen-minute

observation period was not strictly complied with.” *Coyle*, 2005 WL 405866 (Mo.App., W.D. February 22, 2005). The Director appealed. *Id.* But the Western District, relying heavily on its decision in *Carr v. Director of Revenue*, 95 S.W.3d 121 (Mo.App., W.D. 2002), found that the trial court’s adherence to a rule of strict compliance with the 15-minute observation period was correct:

Because this court unequivocally held in *Coyle*, 2005 WL 405866 at \*3-\*4 (emphasis supplied).

This Court, though, took transfer in *Coyle* and reached a different result. Applying *Verdoorn v. Director of Revenue*, 119 S.W.3d 543 (Mo. banc 2003), this Court set forth three possible scenarios that can arise where “the driver alleges a proper 15-minute observation period did not occur”:

**First**, evidence may be presented that during the relevant 15-minute observation period the subject smoked, had oral intake of any material, or vomited. Since the reason for the 15-minute observation period is to ensure that neither smoking, vomiting nor oral intake of materials occur during the 15 minutes prior to testing the blood alcohol level, the regulation effectively creates a presumption that smoking, vomiting or oral intake of material during the 15-minute period invalidates the test results. Evidence, if believed by the court,

that one of these events occurred during the 15 minutes prior to the test is sufficient to rebut the director's *prima facie* case without presentation of any additional evidence as to the specific effect of smoking, vomiting, or other oral intake of material on the blood alcohol results.

**Second**, the driver may present evidence that during the relevant 15-minute observation period the driver did something or was subject to some factor other than smoke, oral intake of any material, or vomiting that affects the validity of the blood alcohol results. The regulations do not create a presumption that such other factors affect the validity of the test. Therefore, by merely showing that some other factor has occurred, the driver had not rebutted the director's *prima facie* case unless there is also evidence showing, by expert testimony or otherwise, that the new factor raises a genuine issue of fact regarding the validity of the blood alcohol test results.

**Third**, the only evidence presented may be that the 15-minute observation period was not observed. While a failure to observe the driver for the requisite 15-minute period permits

the driver to present evidence that an event occurred during that period that affected the result, if the driver fails to offer such evidence, then the director's *prima facie* case has not been rebutted, as the lack of observation, without more, does not provide a basis to question the validity of the blood alcohol test results.

A few facts separate *Vanderpool* from *Coyle*, but the distance is not great. Like *Coyle*, *Vanderpool* was in the patrol car during a portion of the 15-minute observation period. While the officer in *Coyle* left *Coyle* in the patrol car twice – once to check on Mrs. *Coyle* and once to move the *Coyle* vehicle – Trooper *Fennwald* never left *Vanderpool* alone in the vehicle during the 15-minute observation period – he observed him while he drove. And finally, *Coyle* did not object to the breath test result on the basis that the 15-minute observation was improper, while *Vanderpool* did.

Applying the three-part analytical framework of *Coyle* to *Vanderpool*'s facts shows that *Vanderpool* cannot prevail. Plainly, the first *Coyle* scenario does not apply to *Vanderpool* – there is no evidence whatsoever that *Vanderpool* smoked, vomited or had any oral intake in the 15 minutes preceding the test.

Taking the scenarios out of order, the third scenario – that the 15-minute observation period was not observed – does apply to *Vanderpool*'s facts. In particular,

while Trooper Fennewald testified that he observed Vanderpool for the requisite 15 minutes, Vanderpool objected because part of that observation was not “face to face” and occurred – in part – while the trooper was driving Vanderpool to the sheriff’s department. But under the third *Coyle* scenario, this is not sufficient to rebut the prima facie case. Unless the driver presents evidence that something untoward occurred during the ostensibly flawed observation period, there is no “basis to question the validity of the blood alcohol test results.” *Brandon v. Director of Revenue, State of Missouri*, 161 S.W.3d 909 (Mo. App. 2005)*Coyle*, 181 S.W.3d at 66 (emphasis supplied).

Thus, while Vanderpool objected, “on the grounds that the 15 minute observation period was not properly performed” (Tr. 42), Trooper Fennewald had already testified that he did observe Vanderpool for 15 minutes (Tr. 37-38), and counsel acknowledged that he wanted the “opportunity to cross-examine this officer before making any further objections” since he had a “challenge to the admissibility of this test result” (Tr. 40).

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<sup>3</sup> If the driver does not object to the breath test results, the foundation need not be established and the BAC evidence can be considered. *Reinert v. Director of Revenue*, 894 S.W.2d 162 (Mo. banc 1995)*Reinert v. Director of Revenue*, 894 S.W.2d 162, 164 (Mo. banc 1995); *Sellenriek*, 826 S.W.2d at 341. See also *Mayridis v. Director of Revenue*, 155 S.W.3d 775 (Mo.App., E.D. 2005)*Mayridis v. Director of Revenue*, 155 S.W.3d 775, 778 (Mo.App., E.D. 2005) (same for blood test results).

That later cross-examination having not borne fruit, in a *Coyle* sense anyway, Vanderpool was situated no differently than was Coyle. Vanderpool elicited, on cross, that the trooper conducted a portion of the observation period while driving; this was an attempt to show that “the foundation for the test results was not sound.” *Coyle*), substantively the result is the same. Evidence that an officer may not have conducted the 15-minute observation period properly, by itself, is not enough for the driver to prevail – there simply must be some evidence that the driver did something during the operative 15 minutes, and that it affected the test result.

And Vanderpool elicited evidence on that score that might have worked, had it gone far enough. In particular, Vanderpool elicited testimony on cross-examination of Trooper Fennewald that he did not hear Vanderpool burp or belch, but the trooper acknowledged that burping out loud is generally considered to be rude (Tr. 75). Vanderpool, therefore, at best raised the specter of the notion that he had burped or belched during the observation period. But even if there were definitive evidence on this score, burping is not specifically proscribed by regulation. *Coyle* in precisely this way. In *Bhakta v. Director of Revenue*, 182 S.W.3d 662 (Mo.App., E.D. 2005), Bhakta’s attorney advised the court that “the issue in this case will be whether or not the petitioner was properly observed during the 15-minute period immediately preceding the breath test and therefore, the **admissibility** of the breath test.” *Coyle* decision dictated the outcome:

The recent Supreme Court decision in *Coyle v.*

*Director of Revenue* controls the disposition of this case.

*Coyle*, at \*3.

*Bhakta*. As in *Bhakta*, Vanderpool objected to the test results. But unlike *Bhakta* (and unlike *Coyle*) the trooper never left Vanderpool alone in the vehicle at any point during the observation period. *Cf. Coyle*, 181 S.W.3d at 64 (after placing Coyle in the patrol car, and during the observation period, the officer left to check on Coyle's wife and to move the Coyle vehicle).

The result in *Coyle* and *Bhakta* squares with the way Missouri courts have historically viewed the breath testing observation requirement, even before the burden-shifting analysis of *Weber v. Director of Revenue*, 137 S.W.3d 563, 566-67 (Mo.App., S.D. 2004) (portion of observation period conducted while driver, who was not handcuffed, was being taken to the police station); *Hansen v. Director of Revenue*, 22 S.W.3d 770, 773-74 (Mo.App., E.D. 2000), *overruled on other grounds*, *McKown v. Director of Revenue*, 908 S.W.2d 178 (Mo.App., W.D. 1995) *Daniels v. Director of Revenue*, 48 S.W.3d 42 (Mo.App., S.D. 2001) *Holley v. Lohman*, 977 S.W.2d 310 (Mo.App., S.D. 1998) *State v. Wyssman*, 696 S.W.2d 846 (Mo.App., W.D. 1985) *Testerman v. Director of Revenue*, 31 S.W.3d 473 (Mo.App., W.D. 2000) *Verdoorn*, 119 S.W.3d at 547 (evidence that it was possible for subject to have ingested something within fifteen minutes of the breath test was insufficient to exclude the test results).

The Court of Appeals, Western District, however, clings to its overly strict interpretation of the 15-minute observation requirement and its decision in *Coyle* decision had any relevance to Vanderpool's facts because "*Coyle* does not address the issue presented to the court in this case – the sufficiency of the evidence to comply with the required fifteen-minute observation period, in order to lay a proper foundation for the admission of a driver's BTR [Breath Test Result] in making the Director's prima facie case." *Vanderpool*, slip op. at 19. Yet *Coyle* sets forth the analytical method by which to evaluate those factors – whether they arise in the context of the Director attempting to make a prima facie case or the driver trying to rebut that case.

Finally, the fact that Vanderpool failed to testify that he did anything – proscribed by regulation or otherwise – during the fifteen minutes preceding the test, raises the presumption that anything he may have said would have been unfavorable to him. *Smith v. Director of Revenue*, 77 S.W.3d 120, 122 n.3 (Mo.App., W.D. 2002) ("It is well settled that the failure of a party having knowledge of facts and circumstances vitally affecting the issues on trial to testify in his own behalf . . . raises a strong presumption that testimony would have been unfavorable and damaging to the party who fails to proffer same"), quoting *Stringer v. Reed*, 544 S.W.2d 69, 74 (Mo.App., S.D. 1976) and *Bean v. Riddle*, 423 S.W.2d 709, 720 (Mo. 1968). Here, Vanderpool did not testify as to whether

he ingested anything, smoked, vomited, belched, burped or did anything else prior to taking the breath test.<sup>4</sup>

While the trial court was free to rely on inferences from the evidence, such inferences “must be reasonable in nature, and the trial court cannot rely on guesswork, conjecture and speculation.” *Coyle*, that test result should have been admitted.

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<sup>4</sup> At trial Vanderpool indicated that he had no evidence to present (Tr. 90).

## Conclusion

In view of the foregoing, the Director submits that the decision of the court below should be reversed and the Director's suspension of Vanderpool's driving privileges should be reinstated.

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 22<sup>nd</sup> day of December, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:



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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,552 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.

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Deputy Solicitor

## **Appendix**

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