

No. WD64264

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

v.

FRANKIE VANDERPOOL,

Respondent,

**Appeal from the Benton County Circuit Court
The Honorable Larry M. Burditt**

BRIEF OF THE RESPONDENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

After the Missouri Department of Revenue suspended Respondent Frankie Ray Vanderpool's driving privileges, Vanderpool sought a trial de novo on the issue of whether a suspension should have occurred. The Circuit Court of Benton County held a trial and reinstated Vanderpool's driving privileges (L.F. 33-35). Appellant Director of Revenue ("Director") seeks review of the judgment of the Circuit Court for the County of Benton. This appeal does not involve the constitutionality of laws, the construction of revenue laws, or the title to any state office or imposition of the death penalty. Therefore, jurisdiction lies with this Court pursuant to Art. V, Sections 3 and 18 of the Constitution of the State of Missouri (1945), and Section 477.070 RSMo. 2000.

STATEMENT OF FACTS

Vanderpool's driving privileges were suspended by the Department of Revenue on November 20, 2003. (L.F. 10). Subsequently, Vanderpool filed his Petition for Trial De Novo with the Circuit Court for the County of Benton. (L.F. 4-5). On March 22, 2004, a trial was held, and Trooper Fennewald (hereinafter referred to as "Trooper") was called to testify on behalf of the Director.

On September 7, 2003, at approximately 1:45 a.m., Trooper testified that he was traveling southbound on Route U when he observed a northbound vehicle traveling with no headlights. (Tr. 4-5). Trooper testified that he turned his vehicle around and stopped the northbound vehicle. (Tr. 5-6). Trooper testified that he did not see the vehicle commit any traffic violations like weaving or anything like that prior to stopping it, and that when he activated his emergency lights, the vehicle signaled, pulled over and stopped appropriately. (Tr. 56). Upon stopping the northbound vehicle, Trooper testified that he smelled alcohol emitting from the vehicle. (Tr. 7). Trooper testified that there was another individual in the car with Vanderpool. (Tr. 66). Trooper testified that he observed that the driver's eyes were bloodshot, glassy, and watery. (Tr. 7). Trooper identified the driver as Frankie R. Vanderpool III. (Tr. 6). Trooper testified that he could not tell how much somebody's had to drink or if they are intoxicated by smelling their breath. (Tr. 58). Trooper testified that he cannot tell if someone is intoxicated based upon the fact that their eyes are bloodshot, watery or glassy. (Tr. 59). Trooper testified that he could not recall the degree to which Vanderpool's eyes were bloodshot, but said that if he sees any red lines in the eyes or if the eyes are watery or glassy at all, he will check the boxes in his report. (Tr. 59). Trooper

testified that Vanderpool's speech was not slurred. (Tr.59-60). Trooper admitted that the fact that Vanderpool's speech was not slurred was more consistent with sobriety than intoxication. (Tr. 60). Trooper testified that Vanderpool mumbled, but he could not recall how many words he mumbled. (Tr. 84; 85). Trooper testified that when he asked Vanderpool how much he had to drink, Vanderpool said he had too much to be driving. (Tr. 78). Trooper could not recall if he asked Vanderpool what he considered to be too much to be driving, and could not recall if he specifically asked him how many drinks he had consumed or when. (Tr. 84). Trooper testified that he did not know if Vanderpool considers even drinking one or two beers too much to be driving. (Tr. 84-85).

Trooper testified that he administered several field sobriety tests to Vanderpool. (Tr. 8-9). The first test Trooper administered was a portable breath test. Over Vanderpool's objections, Trooper testified that Vanderpool tested "positive" for the presence of alcohol on the portable breath test. (Tr. 9-10). Trooper had been subpoenaed to bring the operator's manual for his portable breath test unit, but testified that he did not have one for it. (Tr. 48-49). Trooper testified that the original one he had been issued had a malfunction and he had turned it back in with that unit and the second one he got did not have one with it. (Tr. 49). When asked if he had any formal training on how to use the device, Trooper testified that "(t)hey went over it in the academy." (Tr. 49). When asked how many minutes they had spent going over it in the academy, Trooper testified that he could not recall. (Tr. 49-50). Trooper testified that he did not know if his PBT utilized an infrared or some other type of detection system. (Tr. 50). Trooper testified that he did not know when his PBT had last

been checked for calibration prior to his using it on Vanderpool. (Tr. 50). Trooper testified that his PBT did not have the ability to distinguish mouth alcohol from alcohol coming from the breath, and that if an individual had recently consumed an alcoholic beverage, the unit would indicate positive. (Tr. 50). Trooper testified that he had pulled Vanderpool over in Mora, Missouri, and that Vanderpool had told him prior to arrest that he was coming from the Cole Camp Fair, which was about four miles away. (Tr. 54-55). Trooper testified that prior to giving Vanderpool the PBT, he didn't believe that he had asked Vanderpool when he had last had anything to drink. (Tr. 50-51). Trooper testified that he had not been with Vanderpool during the 15 minutes prior to stopping him. (Tr. 55).

Trooper attempted to testify concerning the Horizontal Gaze Nystagmus test, but the trial court ruled that Trooper improperly administered the test and sustained Vanderpool's objection to the admission of any testimony by Trooper concerning the results of this test. (Tr. 12-23).

Trooper testified that Vanderpool hopped and put his foot down during the one leg stand test, but testified that he was able to keep his arms down at the side. (Tr. 23). Trooper then testified that Vanderpool missed three points on the test, and that according to his training, that indicated a failure on this particular test. (Tr. 27). Trooper then testified that Vanderpool actually was unable to complete the test, so he missed all four points. (Tr. 27). Trooper testified he could not recall on what count or counts Vanderpool put his foot down during the one leg stand test. (Tr. 60). Trooper testified that he could not recall how far or how long Vanderpool had counted before he put his foot down. (Tr. 60). Trooper testified

that he could not recall the degree to which Vanderpool swayed during the one leg stand test. (Tr. 60). When asked if he knew how many times Vanderpool hopped during the one leg stand test, Trooper testified that he did not count. (Tr. 61). Trooper testified that just because someone can't stand on one leg for 30 seconds without putting their foot down doesn't mean they are drunk. (Tr. 61).

During direct examination, Trooper testified that Vanderpool failed the walk and turn test. (Tr. 29). During cross-examination, Trooper was asked if as part of his training he was taught that one of the requirements for the administration of the walk and turn test is to actually designate a line for the individual to walk on and Trooper said "No, Sir." (Tr. 61). Trooper admitted that he was trained to administer these tests according to National Highway Traffic safety Administration (NHTSA) guidelines. (Tr. 61). Trooper was then asked to read the following from Petitioner's Exhibit 1: "Walk and turn (sic) requires a designated straight line and should be conducted on a reasonably dry hard level, not a slippery surface." (Tr. 62). Trooper then volunteered that his NHTSA manual says something different. (Tr. 62). Vanderpool's counsel had subpoenaed Trooper to bring his manual to court, and he left the stand momentarily to retrieve it. (Tr. 62). Trooper then read from his manual, which states: "Walk-and turn test requires a designated straight line and should be conducted on a reasonably dry hard level, not a slippery surface." (Tr. 63). Trooper admitted that he did not designate a line for Vanderpool to walk on, but instead told him to imagine a straight line and to walk it. (Tr. 63-64). Trooper testified that while Vanderpool stepped off the imaginary line, he did not tell Vanderpool how wide the line was. (Tr. 64). Trooper testified

that he could not recall on what step or steps Vanderpool missed heel-to-toe during the walk and turn test. (Tr. 64). Trooper testified that he could not recall how many steps Vanderpool actually took during his first set of outbound steps on this test. (Tr. 64).

Trooper testified that he had been subpoenaed to produce the video tape of the stop and arrest of Vanderpool. (Tr. 56). Trooper testified that he did not have a tape from this stop because “I did not have a video tape to put into my video recorder.” (Tr. 56). Trooper testified that he “ran out of video tape,” but could not recall when. (Tr. 57). Trooper testified that he gets the video tapes from the zone office at the Sheriff’s Department in Warsaw. (Tr. 57). Trooper testified that he could not recall where he had been that day prior to pulling Vanderpool over. (Tr. 57). Trooper testified that he had worked the 4:00 p.m. to 4:00 a.m. shift that day. (Tr. 57-58). Trooper was then asked: “okay, and you didn’t—you went out at 4:00 and didn’t get any video tapes, is that your testimony?” (Tr. 58). Trooper answered: “I don’t recall.” (Tr. 58). Trooper was then asked if he had a checklist or procedure that he follows when he gets out into his patrol car and starts his shift, and he testified that he did not. (Tr. 58).

Trooper then arrested Vanderpool for DWI at 2:00 a.m. (Tr. 65). He placed Vanderpool in the patrol car and moved Vanderpool’s vehicle about 50 yards away, secured the vehicle, and returned to the patrol car. (Tr. 65). After being on scene for less than 5 minutes after arresting Vanderpool, Trooper transported Vanderpool to the Benton County Sheriff’s Department in Warsaw, Missouri. (Tr. 66). Vanderpool’s passenger also rode to the Sheriff’s Department in the patrol vehicle with the Trooper and Vanderpool. (Tr. 66).

The passenger was not handcuffed. (Tr. 66). Trooper drove from Mora, Missouri, via Cheese Creek Road to Highway 65 to Warsaw. (Tr. 67). The trial court took judicial notice of the distance between Mora, Missouri, and the Sheriff's Department in Warsaw. (Tr. 67-68). That distance is between 27-28 miles. (Tr. 67-68). It was about a twenty-five or thirty minute drive from the arrest scene to the Sheriff's Department. (Tr. 69). Trooper testified that when he was driving the patrol car, he was looking out the front window to see where he were going. (Tr. 70). Trooper testified that when he drives, we watches the turns and the roadway. (Tr. 70). During the trip, Trooper had a conversation with Vanderpool's passenger, but he couldn't remember what the conversation was about. (Tr. 72-73). Trooper also conversed with Vanderpool. (Tr. 71).

One of the first things Trooper did when he arrived at the Sheriff's Department was read Vanderpool his Implied Consent warnings. (Tr. 69). This occurred at 2:37 a.m. (Tr. 69). Trooper then set up the BAC Datamaster. (Tr. 71-74). Vanderpool agreed to take a breath test at the Sheriff's Department. (Tr. 36). The test was administered at 2:39 a.m. Trooper held a valid Type III permit from the Department of Health to operate the DataMaster on the date in question. (Tr. 36).

During direct examination, Trooper testified that he observed Vanderpool for fifteen minutes immediately prior to the breath test, and that during that time he did not observe Vanderpool have anything to eat or drink. (Tr. 37). Trooper also testified that Vanderpool did not smoke or vomit, and to the best of his recollection, Vanderpool did not place any material or have any oral intake during that period of time. (Tr. 37-38). Trooper testified

that Vanderpool's hands were handcuffed behind his back the entire time he was transported to the Sheriff's Department, and he continued to be handcuffed behind his back through the time the breath test was administered. (Tr. 83).

During cross-examination, Trooper testified that when he went through his training on the BAC Datamaster, he was trained to observe the subject face-to-face for 15 minutes before the breath test to make sure the test subject doesn't do anything that would affect the breath test. (Tr. 65). Trooper testified that during the 15 minute period immediately preceding the breath test, he was driving to the Sheriff's office and setting up the BAC Datamaster. (Tr. 74). Trooper testified that he could see Vanderpool out of the peripheral of his vision while he was driving the patrol car and setting up the BAC Datamaster. (Tr. 75). However, Trooper testified that he depended upon his hearing to determine if Vanderpool burped or belched. (Tr. 75). Trooper testified that in his upbringing, he learned that it would not be polite to burp out loud. (Tr. 75). Trooper testified that it's important and critical...to the test result to make sure very clearly that the individual doesn't do anything that would affect the validity of the breath test. (Tr. 75-76). Director never asked Trooper where Vanderpool or Vanderpool's passenger were seated in the patrol car during the drive to the Sheriff's Department. (Tr. 1-95).

During the trial, Vanderpool made an on-going objection to the admission of the breath test result on the grounds that the 15 minute observation period had not been properly performed. (Tr. 42). Trooper was allowed to testify as to the breath test result, subject to a later ruling on Vanderpool's objection, and Vanderpool's objection was taken with the

testimony. (Tr. 43). The Director offered the Datamaster checklist as Exhibit A, which was admitted into evidence subject to Vanderpool's objection relating to the 15 minute observation period and the court's later ruling. (Tr. 87; L.F. 22). Director then offered the printout from the DataMaster as Exhibit B. (Tr. 88; L.F. 23)). The trial court admitted Exhibit B into evidence subject to the Vanderpool's previous objections regarding the test results. (Tr. 88). The Director offered the Maintenance Report as Exhibit C, which was admitted into evidence without objection. (Tr. 86; L.F. 24). Vanderpool offered no evidence. (Tr. 89).

The Honorable Larry Burditt entered judgment on May 26, 2004, setting aside the suspension. In it's Judgment, Vanderpool's objection to the admission of the breath test result was sustained. (LF 40). Judge Burditt specifically found that "any testimony or suggestion by the Trooper that he did, or could have, properly observed Mr. Vanderpool during the 15 minute observation period to make sure nothing occurred which would have affected the test result was not credible." (L.F. 2). Director appeals.

POINT RELIED ON

THE DECISION OF THE TRIAL COURT REFUSING TO ADMIT THE RESULTS OF THE BREATH TEST INTO EVIDENCE ON THE GROUNDS THAT THE PETITIONER WAS NOT PROPERLY OBSERVED AND IN SETTING ASIDE THE SUSPENSION OF PETITIONER'S DRIVING PRIVILEGES MUST BE AFFIRMED FOR THE REASON THAT THE RULING WAS NOT CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES, IT WAS NOT SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE, AND DOES NOT SHOW A LACK OF CAREFUL CONSIDERATION IN THAT (1) THE TRIAL COURT FOUND THAT ANY TESTIMONY OR SUGGESTION BY THE TROOPER

THAT HE DID, OR COULD HAVE, PROPERLY OBSERVED VANDERPOOL DURING THE 15 MINUTE OBSERVATION PERIOD TO MAKE SURE NOTHING OCCURRED WHICH WOULD HAVE AFFECTED THE TEST RESULT WAS NOT CREDIBLE, AND THIS COURT MUST DEFER TO THE TRIAL COURT'S ASSESSMENT OF WITNESS CREDIBILITY, AND (2) THE TROOPER ADMITTED DURING CROSS-EXAMINATION THAT HIS DEPARTMENT OF HEALTH TRAINING REQUIRED HIM TO OBSERVE A SUBJECT "FACE TO FACE" TO MAKE SURE THE SUBJECT DOES NOT DO ANYTHING THAT COULD AFFECT THE VALIDITY OF THE BREATH TEST AND IT WAS APPARENT FROM THE EVIDENCE THAT HE DID NOT, AND COULD NOT, HAVE DONE SO IN THIS CASE BECAUSE DURING MOST OF THE 15 MINUTE PERIOD PRIOR TO CONDUCTING THE BREATH TEST, THE TROOPER WAS TRANSPORTING VANDERPOOL TO JAIL, AND HIS ATTENTION WAS DIVERTED TO OTHER MATTERS SUCH AS DRIVING THE PATROL CAR AND CONVERSING WITH VANDERPOOL'S PASSENGER, WHO HE WAS GIVING A RIDE TO THE STATION, AND WHO HE HAD NOT RESTRAINED PRIOR TO TRANSPORT.

Vernon v. Dir. of Revenue, 142 S.W.3d 905 (Mo. App. S.D. 2004)

Thurmond v. Director of Revenue, 759 S.W.2d 898 (Mo. App. E.D. 1998)

Carr v. Director of Revenue, 95 S.W.3d 121 (Mo. App. W.D. 2002)

Mathews v. Director of Revenue, 8 S.W.3d 237 (Mo. App. E.D. 1999)

State v. Arnold, 80 S.W.3d 27 (Tenn. App. 2002)

ARGUMENT

THE DECISION OF THE TRIAL COURT REFUSING TO ADMIT THE RESULTS OF THE BREATH TEST INTO EVIDENCE ON THE GROUNDS THAT THE PETITIONER WAS NOT PROPERLY OBSERVED AND IN SETTING ASIDE THE SUSPENSION OF PETITIONER'S DRIVING PRIVILEGES MUST BE AFFIRMED FOR THE REASON THAT THE RULING WAS NOT CLEARLY AGAINST THE LOGIC OF THE CIRCUMSTANCES, IT WAS NOT SO ARBITRARY AND UNREASONABLE AS TO SHOCK THE SENSE OF JUSTICE, AND DOES NOT SHOW A LACK OF CAREFUL CONSIDERATION IN THAT (1) THE TRIAL COURT FOUND THAT ANY TESTIMONY OR SUGGESTION BY THE TROOPER THAT HE DID, OR COULD HAVE, PROPERLY OBSERVED VANDERPOOL

DURING THE 15 MINUTE OBSERVATION PERIOD TO MAKE SURE NOTHING OCCURRED WHICH WOULD HAVE AFFECTED THE TEST RESULT WAS NOT CREDIBLE, AND THIS COURT MUST DEFER TO THE TRIAL COURT'S ASSESSMENT OF WITNESS CREDIBILITY, AND (2) THE TROOPER ADMITTED DURING CROSS-EXAMINATION THAT HIS DEPARTMENT OF HEALTH TRAINING REQUIRED HIM TO OBSERVE A SUBJECT "FACE TO FACE" TO MAKE SURE THE SUBJECT DOES NOT DO ANYTHING THAT COULD AFFECT THE VALIDITY OF THE BREATH TEST AND IT WAS APPARENT FROM THE EVIDENCE IN THIS CASE THAT HE DID NOT, AND COULD NOT, HAVE DONE SO IN THIS CASE BECAUSE DURING MOST OF THE 15 MINUTE PERIOD PRIOR TO CONDUCTING THE BREATH TEST, THE TROOPER WAS TRANSPORTING VANDERPOOL TO JAIL, AND HIS ATTENTION WAS DIVERTED TO OTHER MATTERS SUCH AS DRIVING THE PATROL CAR AND CONVERSING WITH VANDERPOOL'S PASSENGER, WHO HE WAS GIVING A RIDE TO THE STATION, AND WHO HE HAD NOT RESTRAINED PRIOR TO TRANSPORT.

Standards for Review

The general standards for review in a civil case are found in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless

it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.* at 32.

In addition, “(i)n assessing if there is substantial evidence, we must defer to the trial court on factual issues and cannot substitute our judgment for that of the trial judge.” Thurmond v. Director of Revenue, 759 S.W. 2d at 899 (Mo. App. 1988). Such deference is not limited to the issue of credibility of witnesses, but also to the conclusions of the trial court.” Hawk v. Director of Revenue, 943 S.W.2d 18, 20 (Mo. App. 1997). “On appeal, the judgment of the trial court is presumed to be correct and shall be affirmed under any reasonable theory supported by the evidence.” Keller v. Director of Revenue, 947 S.W.2d 478, 479 (Mo. App. E.D. 1997); Jarrell v. Director of Revenue, 41 S.W.3d 42 (Mo. App. E.D. 2001).

Appellate courts view the evidence in the light most favorable to the trial court's judgment. Thurmond, 759 S.W.2d at 899. All facts are deemed to have been found in accordance with the result reached by the trial court. Askins v. James, 642 S.W.2d 383, 386 (Mo. App. 1982). Trial courts are accorded wide discretion even if there is evidence that would support a different result. Thurmond, 759 S.W.2d at 899. “Indeed, we must disregard all contrary evidence and permissible inferences that could have been drawn therefrom.” Kidd v. Wilson, 50 S.W.3d 858, 862 (Mo. App. 2001). See also, M.F.M v. J.O.M, 889 S.W.2d 944, 957 (Mo. App. W.D. 1995), cited by Kidd, *supra*. “In a driver's license revocation case, a trial court has the prerogative when weighing witness credibility, to accept or reject all, part, or none of the testimony of any witness.” Hawk, at 20.

An appellate court will set aside a judgment on the basis that it is against the weight of the evidence "only when this court has a firm belief that the judgment is wrong." Waddell v. Director of Revenue, 856 S.W.2d 94, 95 (Mo. App. 1993). The power to set aside a judgment on the basis that it is against the weight of the evidence should be exercised "with caution and with a firm belief that the decree or judgment is against the weight of the evidence and is wrong." Hatfield v. Director of Revenue, 907 S.W.2d 207, 208 (Mo. App. 1995) (quoting Murphy, *supra*). "Weight of the evidence' means its weight in probative value, not the quantity or amount of evidence. The weight of the evidence is not determined by mathematics, but on its effect in inducing belief." Waddell v. Director of Revenue, 856 S.W.2d 94, 95 (Mo. App. 1993) (citations omitted).

Finally, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Vernon v. Dir. of Revenue, 142 S.W.3d 905, 909 (Mo. App. S.D. 2004). "We will find an abuse of discretion only when the trial court's 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." Vernon, at 909.

The Decision of Judge Burditt to Exclude Breath Test Was Not Clearly Against the Logic of the Circumstances, Was Not So Arbitrary and Unreasonable as to Shock the Sense of Justice, and Does Not Show a Lack of Careful Consideration and Must Be Affirmed.

The issue in this case is whether or not the Judge Burditt abused his discretion by excluding the breath test and in finding that Trooper did not properly observe Mr.

Vanderpool for 15 minutes prior to administering the breath test. Judge Burditt indicated in his judgment that Vanderpool's objection to the admission of the breath test was sustained. (LF 33). Judge Burditt had reserved ruling on Vanderpool's objection to the admission of the breath test for failure to properly observe Vanderpool and took Vanderpool's objections with the case. (LF 33; Tr. 42, 43, 87, and 88). Judge Burditt then found that Trooper "did not observe the Petitioner for 15 minutes as required." (LF 33). Judge Burditt's specific findings will be discussed later.

In order to reverse Judge Burditt's judgment herein regarding the exclusion of the breath test evidence, this court must find that Judge Burditt's ruling was "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." Vernon, supra, at 909. A review of the "Findings and Judgment of Court" demonstrates that the decision of the trial court should be affirmed. Vanderpool first submits that Judge Burditt's ruling that face-to-face observation is an approved "technique" and/or "method" of the Department of Health was reasonable in light of Trooper's own testimony and the critical nature of the fifteen minute observation period. Judge Burditt first looked to the foundational requirements for the admission of a breath test in Missouri. To lay a proper foundation for admission of the results of a breathalyzer test to prove a driver's BAC, the Director must demonstrate the test was performed: (1) by following the approved techniques and methods of the Department of Health; (2) by an operator holding a valid permit; and (3) on equipment and devices approved by the Department of Health. Jannett v. King, 687 S.W.2d 252 (Mo. App. 1985). In that

case, the court of appeals noted that the provisions of Sec. 577.020 and 577.026 constitute a legislative standard for admission of such evidence superseding the common law requirements and that these sections deal solely with the testing methods necessary to validate the results of such tests, whether the proceeding is criminal or civil.

Judge Burditt then refers to RSMo. Section 577.026. Subsection 1 provides that:

“Chemical tests of the person's breath, blood, saliva, or urine to be considered valid under the provisions of sections 577.020 to 577.041, *shall be performed according to methods and devices approved by the state department of health and senior services* by licensed medical personnel or by a person possessing a valid permit issued by the state department of health and senior services for this purpose.” Id. (Emphasis added).

Subsection 2 further provides that:

“The state department of health and senior services *shall approve satisfactory techniques, devices, equipment, or methods to conduct tests required by sections 577.020 to 577.041*, and shall establish standards as to the qualifications and competence of individuals to conduct analyses and to issue permits which shall be subject to termination or revocation by the state department of health and senior services.” Id. (Emphasis added).

In this case, Trooper testified that he was trained that he must observe the subject “*face to face*” to make sure that nothing occurs which would affect the validity of the test result. (Tr. 65). As a result, Judge Burditt reasonably concluded that “face to face” observation was an approved “technique” and/or “method” of the Department of Health that was included in the Trooper’s training to operate the BAC Datamaster and which must be followed. (L.F. 40). Specifically, Judge Burditt found that:

“Here, the Trooper, by his own admission, failed to properly observe Mr. Vanderpool. Specifically, the Trooper testified that he was trained that he must observe the subject “*face to face*” to make sure that nothing occurs which would affect the validity of the test result. The court finds that “face to face” observation is therefore an approved “technique” and/or “method” of the Department of Health that was included in the Trooper’s training to operate the BAC Datamaster and which must be followed.”

(LF 40).

Director would argue that this court should disregard the Trooper’s own testimony that his training requires that the test subject be observed in a face- to-face manner to make sure that nothing occurs that could affect the validity of the test. Using Director’s logic, if any part of the procedure for administering a breath test isn’t spelled out in the Department of Health regulations, then it either doesn’t exist, or it need not be followed.

As previously seen, neither 577.020 nor 577.026 even use the word “regulations,” but rather, require that tests shall be performed according to “methods” and “devices” approved by the Department of Health. However, the Department of Health regulations do not set forth all of the procedures a breath test operator must follow when administering a breath test in Missouri. Rather, many, if not most of these procedures, are necessarily learned as part of a breath test operator’s training.¹ The clearest example can be seen when reviewing the breath test checklist. (L.F. 17). The checklist appears to require the operator to start over with the 15 minute observation *only if the subject vomits*.

“1. Subject observed for at least 15 minutes by _____ . No smoking or oral intake of any material during this time. If vomiting occurs, start over with the 15 minute observation period.” (L.F. 17).

¹Missouri 19 CSR 25-30.041 (2) provides that before a Type III permit shall be issued, the applicant “shall have successfully completed a training course approved by the department for operation of breath analyzers or shall offer proof of equivalent qualifications to the satisfaction of the department.” Id. Thus, the Department of Health is responsible approving all training programs for breath test operators and maintenance supervisors. There, they would necessarily learn the approved “techniques” and “methods” for operating and maintaining breath test instruments.

While it does not appear to require the operator to start over with the observation period if the subject were to smoke , eat a bourbon-laced cherry cordial, or drink a can of Budweiser during this time, common sense dictates that breath test operators are trained by the Department of Health to restart the observation period if the test subject were to smoke, eat or drink within 15 minutes of the breath test.

There are numerous other examples of the regulations providing no guidance to breath test operators (Type III permit holders) and maintenance supervisors (Type II permit holders) with respect to testing and maintenance issues, and in such cases, it is clear that the required “methods” and “techniques” are part of their Missouri Department of Health (“MDH”) approved training. For example, in Stuart v. Director of Revenue, 761 S.W.2d 234 (Mo. App. S.D. 1988), although the maintenance report form (L.F. 24) does not specify the proper temperature of the “Heaters Sample Chamber,” and this information is required to be completed by the maintenance supervisor during the monthly calibration check, the Type II was permitted to testify as an expert witness with respect to acceptable temperature tolerances of a breathalyzer, and the effects of temperature differences, based upon information told to him by his instructors as part as his education and study of the machine. Similarly, in Bradford v. Dir. of Revenue, 72 S.W.3d 611 (Mo. App. E.D. 2002), the Type II testified as to the Type III’s utilization of the sample control override function, or “NV” button, on the BAC DataMaster, and the effect of it’s use on the breath sample. The regulations to not address the use of this button; therefore, when to use this button, and the

effect of using it, are necessarily part of the Type II and/or Type III's training regarding the proper methods and techniques of the MDH.

In Kennedy v. Dir. of Revenue, 73 S.W.3d 85 (Mo. App. 2002), the breath test operator testified that he was trained to let a maintenance person know as soon as he could when the machine indicated it has malfunctioned. In that case, the breath test operator gave Kennedy a breath analysis test, which indicated a blood alcohol concentration ("BAC") of .152 percent. After the initial test, however, the breath analyzer machine gave a status code reading, "system won't zero." As a result, three minutes later the breath test operator gave Kennedy a second test which showed Kennedy's BAC as .144 percent. The Type II testified that one of the explanations why the machine could have malfunctioned was that it was not working correctly. Neither the meaning of a "system won't zero" message code, nor the procedures to be followed when such a message code appears, are specifically addressed by the Department of Health regulations. These matters are necessarily learned by the Type III's and Type II's are part of their Department of Health approved training regarding.

Similarly, in Lasley v. Director of Revenue, 17 S.W.3d 174 (Mo. App. W.D. 2000), the driver objected to the admission of the breath test result on the grounds that the instrument had not been properly maintained because the Type II had written on the maintenance report that he had used a simulator solution that had expired to conduct his monthly calibration check. The regulations in effect at the time only required that the simulator solution utilized be from an approved supplier. Even though the MDH regulations did not specify that the simulator solution had to be used prior to the expiration date of the

manufacturer, this Court upheld the trial court's decision excluding the breath test. Since Lasley had timely objected to the admission of the test result, this court found that: "The Director bore the burden of proof and the burden of presenting evidence that the simulator solution was not deficient and, thus, that the breath analyzer did not provide a false reading when the issue of whether the solution's effectiveness was raised." *Id.* Again, it can be reasonably presumed that Type II's, as part of their training regarding the methods and techniques of the MDH, are being taught not to use expired or contaminated simulator solution when performing monthly calibration checks. The Lasley court also properly left the burden of proving compliance with the approved methods and techniques of the MDC where it belongs - with the Director.

In Martin v. Dir. of Revenue, 142 S.W.3d 851 (Mo. App. S.D. 2004), the first test reported an "invalid subject sample." Less than five minutes later, the officer gave the motorist a second test, which showed the motorist's blood alcohol level higher than the legal limit. The DOH regulations are silent as to what procedure should be followed when an "invalid sample" reading is obtained or what an "invalid sample" is. Experts testified on both sides regarding what is the likely cause of an invalid sample and what procedures must then be followed to insure a reliable sample.

Finally, in Vernon v. Dir. of Revenue, 142 S.W.3d 905 (Mo. App. S.D. 2004), the "blank test" following Vernon's breath test showed the presence of alcohol. Although the MDH regulations do not indicate what a "blank test" is, let alone what procedures must be followed when the operator is faced with this situation of alcohol in the blank test, the court

of appeals nevertheless upheld the decision of the trial court excluding the breath test from evidence. Again, apparently relying upon his Type III training, the breath test operator testified that the breath analysis test itself is composed of a blank test immediately before a subject's breath sample, a test of the subject's breath sample, and a blank test immediately after the subject's breath sample. He further explained that the purpose of the blank test is to ensure the instrument does not give a false reading for alcohol when no alcohol is present in the machine. The Type II also testified. He explained that the purpose of the blank test is to ensure that the instrument is functioning properly at that time of the test and that during a blank test the instrument should give a reading of .000. Furthermore, he related that any reading other than .000 would indicate that the instrument was picking up some type of sample of alcohol in the chamber, and that while he would not be concerned over a very minor deviation, he did affirm that if the instrument is not functioning properly you take it out of service. *Id.*

In addition to the fact Trooper Fennewald himself testified that his training required him to observe the test subject in a face- to-face manner, Vanderpool would point out that if Director had any doubt as to what type of observation is required per Department of Health training, Director could have called the Type II to testify on her behalf. Even though the parties stipulated as to the maintenance of the breath test instrument, Trooper Campbell was present in the courthouse during the trial. (Tr. 48; 85).

After concluding that “face-to-face” observation was an approved “method” or “technique” of the Director which must be followed, Judge Burditt next resorted to the

meaning of the words “observe.” Since neither the statutes or regulations define “observe,” Judge Burditt resorted to the dictionary for guidance. As Judge Burditt noted, New Webster’s Dictionary and Thesaurus of the English Language 693 (1993) defines the word “observe” as meaning “to look at with attention.” Id. See also, The American Heritage Dictionary of the English Language 1213 (4th Ed. 2000), which defines observe as: “1. To be or become aware of, especially through *careful and directed attention*; notice. 2. To *watch attentively*.....3. To make a systematic or scientific observation of....” Id. (Emphasis added). See also, Merriam Webster’s Collegiate Dictionary 802 (10th ed. 1993), which defines observe as: “4a: *to watch carefully, esp. with attention to details* or behavior for purposes of arriving at a judgment; b. to make a scientific observation on or of....” Id. (Emphasis added). See also, Random House Webster’s Dictionary of American English 509 (1st ed. 1997) - “2. To look at with attention.” Id. Finally, see Encarta World English Dictionary 1248 (1st ed. 1999), which defines observe as: “1. Notice or see or notice something, especially *while watching carefully*. 2. Watch attentively *to watch somebody or something attentively, especially for scientific purposes.*” Id. (Emphasis added). In addition to fact that these definitions are consistent with the Trooper’s testimony that he was trained to utilized “face-to-face” contact during the 15 minute observation period, Judge Burditt noted that anything other than face-to-face observation would be inconsistent with the definition of the word observe. (LF 34).

In addition to considering the foundational requirements for the admission of the breath test, the applicable statutes, and the definition of the word observe, the trial court

wisely looked for guidance to this court's learned decision in Carr v. Director of Revenue, 95 S.W.3d 121 (Mo. App. W.D. 2002). In Carr, supra, this Court loudly and clearly stated that:

“It is our belief that the "observation requirement" is critical to determining whether in fact an individual has driven while illegally intoxicated. The results of a breathalyzer test are given much weight, as they should be, in our judicial system. However, in order to insure the veracity and precision of this testing device does not become undermined, it is imperative for the police to follow minimum administrative guidelines in observing the driver before the test is given. We believe that such a requirement imposes a relatively insignificant administrative burden on the police, and in any event, that its benefits in instilling confidence in the testing results far outweigh any inconvenience.” Id at 129.

In light of the critical purpose of the observation period, it was not unreasonable for Judge Burditt to require that a law enforcement officer follow his or her Department of Health approved training and to observe the subject face-to-face to make sure that nothing occurs which might affect the validity of the test. At most, this requirement would delay the testing process by only 15 minutes. When weighed against the ramifications of a falsely high

breath test result, the administrative inconvenience of waiting the additional time is insignificant.

Both Judge Burditt, and this court in Carr, supra, emphasized the critical importance of proper observation:

“Drinking and driving experts are resolute that this fifteen minute waiting period plays a critical role to insure that the breathalyzer test achieves an accurate result. See 3 DONALD H. NICHOLS & FLEM K. WHITED III, DRINKING/DRIVING LITIGATION CRIMINAL AND CIVIL § 19:9 (2d ed. 1998) (“The arresting officer or Breathalyzer operator must continuously observe the subject during the fifteen to twenty minutes prior to the test. This waiting period is necessary to reduce interference from alcohol or other substance that may have been present in the mouth... The presence of such compounds in the mouth at the time of breath collection will produce an extremely high breath alcohol value that is far from indicative of alveolar breath alcohol concentration.”); 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE, § 33-2.3.2© (2002) (“Some foreign objects in the mouth, such as chewing tobacco, may trap alcohol and affect the breath test . . . If the above are ruled out by observation, and the 15 minute

waiting period is observed and documented, any interference with a valid test should not have occurred."); HARVEY M. COHEN & JOSEPH B. GREEN, APPREHENDING AND PROSECUTING THE DRUNK DRIVER § 7.04(11)(e) (2002) ("The defendant should be observed for 15 to 20 minutes prior to blowing into the breath-alcohol analyzer to ensure that he or she ingests nothing and brings nothing up from the stomach (by burp, belch, regurgitation, etc.), since these can affect the accuracy of the test.")” (Carr, supra, at 129; LF 34.)

Judge Burditt also looked to a Tennessee case for guidance. In State v. Arnold, 80 S.W.3d 27 (Tenn. App. 2002), the Tennessee Court of Appeals held that during the observation period, the officer must be watching the defendant and not performing other tasks and that an officer’s belief that he would have heard or smelled anything he did not see does not satisfy the prerequisite that the defendant must be observed. “As we stated before, a belch or regurgitation sufficient to skew the results of a breath analysis may not produce a sound loud enough to be heard by another person.” *Id*

Trooper testified that he was raised that burping or belching out loud is rude. (Tr.) According to experts, courts, and other government agencies, even a simple burp or belch can adversely affect the results of a breath test. For example, in addition to the authorities cited by this Court in Carr, supra, and the opinion of the Tennessee Court of Appeals in Arnold, supra, the federal government, the Missouri Public Service Commission, and the

Missouri Department of Natural Resources have also recognized that belching can adversely affect the result of a evidentiary breath test. See 49 CFR 40.251 (a)(2), which requires a breath test operator to specifically tell the employee:

“(I) Not to eat, drink, put anything (e.g., cigarette, chewing gum) into his or her mouth, *or belch*;

(ii) The reason for the waiting period (i.e., to prevent an accumulation of mouth alcohol from leading to an artificially high reading);” Id. (Emphasis added).

This regulation has been adopted by the Missouri Public Service Commission with respect to breath alcohol testing standards for gas utility workers. See 4 CSR 240-40.080. It has also been adopted by the Missouri Department of Natural Resources with respect to the transporters of hazardous waste. See 10 CSR 25-6.263 (2004).

Judge Burditt reasonably concluded that the 15 minute observation period was not properly conducted. Judge Burditt noted that:

“In this case, during most of the 15 minute period prior to the breath test, the Trooper was busy driving the patrol vehicle to the station. The court notes that Mr. Vanderpool’s passenger was given a ride by the Trooper and was present in the patrol car during this time as well. This individual had not been searched and was not handcuffed. Was Mr. Vanderpool’s passenger riding in the back seat of the patrol car with Mr.

Vanderpool? The Director presented no evidence to suggest otherwise or to establish that Mr. Vanderpool did not have access to or ingest foreign substances during this critical time. *The court finds that any testimony or suggestion by the Trooper that he did, or could have, properly observed Mr. Vanderpool during the 15 minute observation period to make sure nothing occurred which would have affected the test result was not credible.* It is not the burden of the Petitioner to establish that nothing occurred during this time. It was the Director's burden to prove it." (LF 40).

See also, State v. Carson, 988 P.2d 225 (Idaho App. 1999). There, the Idaho Court of Appeals found that during the trip to the Sheriff's office, the officer's attention necessarily was devoted primarily to driving, and that he visually observed Carson only intermittently through glances at the rearview mirror. The court noted that common sense would tell us that an officer's ability to use his hearing as a substitute for visual observation will be impeded by such things as noise from the automobile engine, tires on the road surface, rain, windshield wipers, etc., and that under such circumstances, the State's foundational evidence did not demonstrate a mode of observation that would be likely to detect belching, regurgitation into the mouth, or the like. The same can be said of Trooper's "observation" of Vanderpool in this case.

Vanderpool is not asking this court to adopt a rule which requires the officer to “fixedly stare” at the test subject during the 15 minute observation period, nor does Vanderpool suggest that an officer may not rely upon other senses like hearing and smell. Vanderpool also recognizes that in many instances, the officer will be alone and will necessarily have to set up the breath testing instrument and spend a couple of minutes. Vanderpool argues only that the Director’s foundational evidence must demonstrate a mode of observation that would be likely to detect any activity by the test subject which may adversely affect the test result, and that this was not demonstrated in Vanderpool’s case. Clearly, the officer should not be attempting to operate a patrol car at night on a two lane, unmarked county road or on a major Interstate Highway during the 15 minute period immediately preceding the breath test. This type of “back- to-face” “observation” is not a mode of observation that is consistent with the Trooper’s training and it is not reasonable given the critical nature of the observation period. “The State has specifically adopted a fifteen-minute observation period. This court is not at liberty to vary or alter this mandate.” Coyle v. Director of Revenue, Slip Op. W.D. 63399, decided February 22, 2005. The record supports the inference that Vanderpool was not in Trooper’s line of sight for the requisite fifteen minutes, that the circumstances and mode of observation were not of the type that would be likely to detect any activity that may adversely affect the test result, and that the observation period was not strictly complied with. In this case, the mandate could have been complied with by merely having the officer start the observation period from the time he arrived at the Benton County Sheriff’s Department. Trooper did not do so. A finding

that proper observation was not made, alone, is sufficient to allow the trial court to reinstate a drivers license. Coyle, supra, and Carr, supra.

In any event, Director seems to have completely disregarded the fact that Judge Burditt specifically found that “any testimony or suggestion by the Trooper that he did, or could have, properly observed Mr. Vanderpool during the 15 minute observation period to make sure that nothing occurred which would have affected the test result was not credible.” (LF 40). Vanderpool suggests that Judge Burditt determined that under the circumstances, Trooper could not have observed or heard Vanderpool during the critical observation period, in spite of any testimony by Trooper to the contrary. Where a trial court makes a specific finding that it did not believe the arresting officer’s testimony in a driver’s license case, the appellate court must defer to the trial court’s prerogative to determine credibility. Thurmond v. Director of Revenue, 759 S.W.2d 898, 899 (Mo. App. E.D. 1998) and Mathews v. Director of Revenue, 8 S.W.3d 237 (Mo. App. E.D. 1999). The trial court was in a superior position to have “listened to, watched and digested the testimony in person and considered its inflections, subtleties and nuances.” Thurmond, supra. Thus, the trial court was free to disbelieve the testimony of the Trooper that he “observed” Vanderpool, peripherally or otherwise, or to disbelieve his testimony that Vanderpool did not smoke or ingest any material or do anything that would have affected Vanderpool’s breath test.

Director cites Weber v. Director of Revenue, 137 S.W.3d 563 (Mo.App.S.D. 2004), Testerman v. Director of Revenue, 31 S.W.3d 473, 481 (Mo.App.W.D.2000), State v. Wyssman, 696 S.W.2d 846, 848 (Mo.App.W.D. 1985) and McKown v. Director of Revenue,

908 S.W.2d 178, 179-180 (Mo.App.W.D. 1995), in support of her argument that Vanderpool was properly observed. These cases are not controlling. In Weber, the driver failed to object to the admission of the breath test result, as contained in the arrest report, on the grounds of improper observation. As a result, the need for the Director to establish that the officer adhered to the waiting period before administering the test was obviated. The issue before the court was then whether or not the Director had made a prima facie case, and whether or not the driver had produced evidence in rebuttal. Vanderpool's case stands in a different posture. Vanderpool timely objected to the admission of the breath test and his objection was sustained. Judge Burditt determined that it was the Director's burden to establish that Vanderpool was properly observed, and that the Director failed to do so. Given the Trooper's own testimony that he was trained to observe the suspect in a face-to-face manner to insure that nothing occurs which would affect the validity of the breath test, the fact that most of the so-called "observation" occurred while the Trooper's attention was focused on driving the patrol car to the Sheriff's Department, and the presence of an unrestrained passenger in the car, it cannot be said Judge Burditt's decision to exclude the test result from evidence was clearly against the logic of the circumstances and was so arbitrary and unreasonable as to shock the sense of justice and show a lack of careful consideration. Stated another way, the trial court was free to conclude that the record was insufficient to give adequate assurance that Vanderpool did not do something during the 15 minute period immediately preceding the breath test which would skew the test results.

Similarly, in Testerman v. Director of Revenue, 31 S.W.3d 473, 481 (Mo.App.W.D.

2000), driver did not object to admission of breath test result on basis of failure of 15 minute observation; rather, the test result was admitted and driver attempted to rebut director's prime facia case. The same is true with respect to Daniels v. Director of Revenue, 48 S.W.3d 42 (Mo. App. 2001). Again, this is not the posture of Vanderpool's case.

Nor is Wyssman, supra, controlling. The issue in that case was whether an officer had to himself physically observe the person to whom the breath test was to be administered for the entire 15 minute period or if someone else could participate in the observation to supply the required time. The parties had stipulated that the trooper's brother would testify that Wyssman did not smoke or take anything into his mouth or vomit while the trooper was away from the car for one minute, and there was no testimony from the trooper to the effect that he had been trained to conduct the observation period in a face-to-face manner.

Finally, in McKown v. Director of Revenue, 908 S.W.2d 178, 179-180 (Mo.App.W.D. 1995), it is not entirely clear from the record whether or not an objection was made to the admission of the breath test result based on the 15 minute observation rule or whether the issue was simply whether or not the director established a prima facie case. That case is distinguishable for the reason that there was only a period of one minute where officer was not looking directly at McKown while he was putting information into a computer. Unlike in Vanderpool's case, Trooper necessarily spent most of the 15 minute period driving the patrol car to the police station at night, and conversing with an unrestrained passenger, whose location in the patrol car was not established by the Director during the trial. Again, Vanderpool understands that there will be cases where an officer may

be alone and will necessarily have to input the required information into the breath test instrument. Vanderpool suggests that in such cases, the test subject should be sitting right next to the officer and the breath test instrument so that the officer can both see and hear the test subject at all times.

Director cites decisions from Arkansas and Colorado. In Williford v. State, 683 S.W.2d 228 (Ark. 1985), the observation time included time driving from the scene with the subject in the back seat. The trial court accepted the testimony of the arresting officer that for a period of 26 minutes he observed Williford at the scene of the arrest, in the patrol car's rear view mirror as Williford sat on the passenger side of the back seat while he was being taken to the police station, and at the station itself. He said that he would have been aware of Williford's having put anything in his mouth. The decision of the trial court in admitting the breath test was upheld. In Vanderpool's case, however, Judge Burditt specifically found that "any testimony or suggestion by the Trooper that he did, or could have, properly observed Mr. Vanderpool during the 15 minute observation period to make sure nothing occurred which would have affected the test result was not credible." (LF 34). Nor was any credibility determination made by the trial court concerning the observation period in Glasman v. Dep't of Revenue, 719 P.2d 1096, 1097 (Colo.App. 1986) or any of the other cases cited by the Director.

The Director, not Vanderpool, is required to lay a proper foundation for the admission of the breath test. In addition to the fact that Judge Burditt had credibility issues with Trooper's testimony, Vanderpool submits that Director's foundational evidence with respect

to the 15 minute observation period did not demonstrate a mode of observation that would be likely to detect any activity by the test subject which may adversely affect the test result. As a result, the breath test was not admitted into evidence, and Vanderpool's testimony, or non-testimony, is irrelevant to Judge Burditt's consideration of whether or not the Director established a proper foundation for the admission of the breath test result. See, e.g., State v. McCaslin, 894 S.W.2d 310, 312 (Tenn. Crim. App. 1994), holding that "it is the State's burden, not the defendant's, to present testimony through the testing officer that the (foundational requirements for the admission of the breath test) were met. Therefore, a claim that the defendant either presented or failed to present testimony of regurgitation is irrelevant in this case." Id.²

At this point in time, the Missouri Department of Health still does not require the breath test operator to obtain duplicate breath samples from a driver who has been arrested for DWI. Duplicate testing - that is, obtaining two samples between 2-10 minutes apart, both of which must agree within .02, greatly reduces the risk of obtaining a falsely high breath sample resulting from a burp, belch or regurgitation. In such a state, simply being in the presence of the driver, in the same car or the same room, and exercising reasonable

² Requiring the test subject to remember whether or not he burped, belched, regurgitated, or even put anything in the mouth during the critical 15 minute observation period is not practical, especially when he or she is never warned that such activity may adversely affect the test result.

care to insure that the subject does not place anything into the mouth, might otherwise be sufficient . See, e.g., the administrative regulations for Texas - 37 TAC § 19.3 (2005). (AB Appendix-A8). Until such time as duplicate testing is implemented, however, it is

imperative that

Missouri drivers be watched closely and attentively to insure that no citizen is falsely convicted of DWI.

CONCLUSION

For the above stated reasons, the respondent requests that this Court affirm the decision of the Circuit Court reinstating the Respondent's driving privileges.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court rule 84.06(b) and contains 9,920 words, including this certification, as determined by WordPerfect 12 software; and,
2. That the attached brief includes all information required by Supreme Court Rule 55.03; and,
3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and,
4. That true and correct copies of the foregoing brief, and a floppy disk containing a copy of this brief, were mailed, via UPS Next Day Air, this 23rd day of February, 2005, to:
Diane F. Peters, Assistant Attorney General, 221 West High Street, 6th Floor, Jefferson City, Missouri 65102, ATTORNEYS FOR APPELLANT.

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