

**IN THE
SUPREME COURT OF MISSOURI**

No. SC88159

MARCEL DEAN GUHR,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

**Appeal from the Circuit Court of Morgan County, Missouri
The Honorable Kevin P. Schehr, Judge**

APPELLANT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

This appeal is from the judgment of the Circuit Court of Morgan County, ordering reinstatement of Marcel D. Guhr's driving privileges, originally revoked pursuant to Section 577.041, RSMo,¹ by the Director of Revenue. The trial court reinstated Guhr's driving privileges following a trial de novo, and the Director appealed. After an opinion by the Missouri Court of Appeals, Western District, and upon the Director's motion for rehearing or transfer, the Court of Appeals transferred the case to this Court. Jurisdiction, therefore, lies in this Court under Article V, Section 10, Missouri Constitution (as amended 1982).

¹All statutory citations are to the Revised Statutes of Missouri 2000, as amended, unless otherwise indicated.

Statement of Facts

At approximately 9:55 p.m. on October 25, 2002, Officer William Crossen of the Versailles Police Department saw a pick-up truck leaving a bowling alley in Versailles, Missouri (LF 20). As the truck exited the parking lot, Officer Crossen saw the truck accelerate so that the truck's rear tires lost traction and spun on the pavement (LF 20). As the truck approached the stop sign near the bowling alley, Officer Crossen again saw the truck accelerate so that the truck's rear tires lost traction and spun on the pavement (LF 20).

Officer Crossen attempted to pursue the truck in order to make a traffic stop, but he could not see the truck any longer (LF 20). As Officer Crossen approached Oak Street, he heard a vehicle accelerating from the north (LF 20). As Officer Crossen turned north, he saw the truck turn on its headlights and accelerate traveling south (LF 20). Officer Crossen turned around his patrol car and continued his pursuit of the truck (LF 20). Officer Crossen saw the truck back out of and then pull back into the parking lot of the bowling alley (LF 20). Officer Crossen then stopped the truck in the bowling alley parking lot for traffic violations (LF 16, 20).

As Officer Crossen approached the truck, he saw the driver, Marcel Guhr, exit the truck and place two brown-colored objects in the bed of the truck (LF 20). Guhr began to flee the scene, at which point Officer Crossen told Guhr to return to the truck (LF 20). Guhr refused (LF 20). Officer Crossen again told Guhr to return to the truck, and again,

Guhr refused (LF 20). Officer Crossen advised Guhr that he was under arrest, and instructed Guhr to return to the truck (LF 20). Guhr still refused (LF 20). After repeated refusals by Guhr, Officer Crossen took Guhr's arm, walked Guhr back to the truck, and placed Guhr in handcuffs (LF 16, 20).

Upon coming into contact with Guhr, Officer Crossen smelled an odor of alcohol coming from Guhr (LF 20). The officer observed Guhr's balance and walking (Respondent's W.D. Brief p. 8), and subsequent to and concurrent with the officer's observations of Guhr's balance and walking, Guhr admitted he had consumed two alcoholic drinks upon the officer's inquiry (LF 20). After placing Guhr in the patrol car and calling Officer Yeager for assistance, Officer Crossen returned to the truck driven by Guhr and retrieved the two brown-colored items Guhr placed in the bed of the truck (LF 20). The items were two bottles of tequila (LF 20). Officer Crossen then advised Guhr that he also was under arrest for driving while intoxicated (LF 20).

After transporting Guhr to the Morgan County Jail, Officer Crossen asked Guhr to perform sobriety tests (LF 21). Guhr performed the Walk and Turn, One Leg Stand, and Gaze Nystagmus tests (LF 21). On the Walk and Turn test, Guhr stopped while walking to steady himself and used his arms for balance (LF 16). On the One Leg Stand, Guhr swayed while balancing and again used his arms for balance (LF 16). On the Gaze Nystagmus Test, Guhr did not have smooth pursuit in both eyes (LF 16).

Officer Crossen then read Guhr the Implied Consent warnings from the Alcohol Influence Report form (LF 18, 21). Officer Crossen then requested Guhr submit to a breath test, and Guhr refused (LF 18, 21).

After Guhr's refusal, the Director of Revenue ("Director") gave notice to Guhr that his driving privilege would be revoked, effective 15 days from October 25, 2002, under Section 577.041, RSMo (LF 15).

On November 8, 2002, Guhr appealed the revocation to the Morgan County Circuit Court (LF 2, 4-5). The trial court heard the case on June 10, 2005 (LF 3, 22; TR 2). At trial, the Director offered and the court admitted Respondent's Exhibit A, consisting of certified Director of Revenue records, including the Alcohol Influence Report, the supplementary police report by Officer Crossen, and the Refusal to Submit to Alcohol/Drug Chemical Test form (LF TR 2-3, 15-21). No other evidence was submitted. The trial court found that "there was no probable cause to arrest Mr. Guhr for operating a motor vehicle while in an intoxicated condition. . . . All evidence concerning his intoxication was determined post-arrest. Therefore, it is the court's ruling that there was no establishment of probable cause prior to or pre-arrest" (TR 4). The trial court ordered the Director to reinstate Guhr's license (LF 22; TR 4).

On June 29, 2005, the Director filed a Motion for Reconsideration in the Morgan County Circuit Court, requesting that the court set aside its Judgment.² On July 22, 2005,

² No disposition for the Motion for Reconsideration is in the record.

the Director timely filed a notice of appeal to the Missouri Court of Appeals, Western District. On August 29, 2006, the Court of Appeals issued its opinion. The Court of Appeals, relying on *York v. Director of Revenue*, 186 S.W.3d 267 (Mo. banc 2006), found that the trial court was free to find the evidence insufficient to establish probable cause to believe Guhr was driving while intoxicated and affirmed the trial court's judgment. *Marcel Dean Guhr v. Director of Revenue*, No. WD65762 (Mo.App. W.D. August 29, 2006). On September 13, 2006, the Director filed a Motion for Rehearing or, in the Alternative, Transfer to the Missouri Supreme Court. On November 21, 2006, the Court of Appeals denied the Motion for Rehearing, but it transferred this matter to the Missouri Supreme Court under Rule 83.02.

Point Relied On

The trial court erred in finding no probable cause to believe Guhr was driving while intoxicated because (1) the trial court misapplied the law and its ruling is against the weight of the evidence, in that the trial court did not use the arrest for DWI to measure probable cause and excluded indicia of intoxication; and (2) the officer had probable cause to believe that Guhr was driving while intoxicated, in that *de novo* review shows that Guhr exhibited ample indicia of intoxication at the time of the arrest for DWI.

York v. Director of Revenue, 186 S.W.3d 267 (Mo. banc 2006)

Hinnah v. Director of Revenue, 77 S.W.3d 616 (Mo. banc 2002)

Dixon v. Director of Revenue, 118 S.W.3d 302 (Mo.App. S.D. 2003)

Section 577.041, RSMo

Argument

The trial court erred in finding no probable cause to believe Guhr was driving while intoxicated because (1) the trial court misapplied the law and its ruling is against the weight of the evidence, in that the trial court did not use the arrest for DWI to measure probable cause and excluded indicia of intoxication; and (2) the officer had probable cause to believe that Guhr was driving while intoxicated, in that *de novo* review shows that Guhr exhibited ample indicia of intoxication at the time of the arrest for DWI.

Introduction

The trial court held that no probable cause was established because all evidence concerning Guhr's intoxication was observed post-arrest (TR 4). But there were two arrests. It is clear that the trial court did not use the arrest for DWI from which to measure probable cause, in that there was ample indicia of intoxication that the officer observed prior to that arrest. Because the proper time to measure probable cause is at the arrest for driving while intoxicated, the trial court misapplied the law, and it improperly ignored numerous indicia of intoxication. Thus, the trial court's finding also is against the weight of the evidence.

The Court of Appeals, in its opinion, recognized the fallacy of the trial court's apparent reasoning on this issue and the resulting misapplication of law. *Guhr v. Director of Revenue*, slip op. at 5.

However, the Court of Appeals compounded this error by fundamentally changing the standard of review in driver's license cases where the matter is submitted to the court on uncontroverted written records and no witnesses testify. This change by the Court of Appeals stemmed from its misunderstanding and misapplication of this Court's recent decision in *York v. Director of Revenue*, a case in which the Director offered the trooper's testimony, but that testimony was self-contradictory and contradicted the written report of the incident. Notwithstanding this Court's opinion in *York*, the Court of Appeals concluded that the evidence in *York* was uncontroverted and that *York* requires deference to the trial court's conclusions when reviewing uncontroverted evidence. However, established precedent requires that no deference be given to the trial court's conclusions when reviewing uncontroverted evidence, and *York* does not stand for a shift in that standard of review.

In this case, the sole evidence submitted to the trial court constituted the Director's records, and that evidence was uncontroverted. However, the Court of Appeals deferred to the trial court because it found that the Director's records conflict, in that there was a discrepancy between two entries, one noting a "strong" odor and the other a "moderate" odor of alcohol. But these observations do not contradict each other; they both show a noticeable odor of alcohol that supports the reasonableness of the officer's belief that Guhr was driving while intoxicated.

The real issue here is the legal effect of the uncontroverted evidence of the Director's records, and the Court of Appeals and this Court are as equally well positioned as was the trial court to determine whether the officer had probable cause. The trial court misapplied the law, the trial court's finding is against the weight of the evidence, and the real issue is the legal effect of uncontroverted evidence in its determination of probable cause. Accordingly, *de novo* review is the proper standard of review.

However, the Court of Appeals gave deference to the trial court. This deference resulted in an incorrect outcome and an erroneous foundation that it will continue to use as a basis for future cases. *See, Neer v. Director of Revenue*, 204 S.W.3d 315 (Mo.App. W.D. 2006). Further, because the Eastern and Southern Districts have yet to follow suit, Missouri now has different Districts applying different standards of review when examining uncontroverted evidence.

Accordingly, this Court should provide clarity and uniformity on the proper standard of review to apply when examining uncontroverted evidence. Further, this Court should address this case in light of the proper standard of review, examining and weighing *de novo* all indicia of intoxication that existed at the time of the arrest for driving while intoxicated.

Standard of Review

Introduction

An appellate court must affirm the decision of the circuit court to reinstate a driver's driving privileges unless it is not supported by substantial evidence, 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). If the trial court erroneously declares or applies the law in a civil proceeding, the judgment of the trial court is afforded no deference on appeal. *Knipp v. Director of Revenue*, 984 S.W.2d 147, 151 (Mo.App. W.D. 1998). If the evidence is uncontroverted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002). Only when the evidence is controverted is any deference given to the trial court's judgment. *Id.* Further, determinations of probable cause should be reviewed *de novo* on appeal. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996).

In this case, the sole point on appeal constitutes the determination of probable cause based upon uncontroverted evidence. The trial court's judgment misapplied the law, the trial court's judgment is against the weight of the evidence, and the evidence is uncontroverted so the real issue is the legal effect of that evidence. Accordingly, *de novo* review is the proper standard of review.

Western District Failed to Apply De Novo Review

De novo review means trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Williams v. Department of Social Services*, 978 S.W.2d 491, 494 (Mo.App. S.D. 1998); *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963). Under *de novo* review, the appellate court gives no deference to determinations by the trial court. Here, however, the Court of Appeals gave the trial court deference. *Guhr*, slip op. at 4-5.

In fact, the Court of Appeals' decision in *Guhr*, if followed, effectively abolishes *de novo* review in driver's license revocation cases. Evidence is either controverted or uncontroverted. The Court of Appeals upheld established precedent giving deference to controverted evidence by its use of *Jarrell v. Director of Revenue*, 41 S.W.3d 42 (Mo.App. S.D. 2001) then announced that appellate courts are to defer to the trial court's conclusions even when faced with uncontroverted evidence. *Guhr*, slip op. at 5, 7. Accordingly, if *Guhr* is followed, courts are always to defer to the trial court's conclusions, effectively abolishing *de novo* review in driver's license cases.

The Court of Appeals' basis for giving deference to the trial court's judgment when examining uncontroverted evidence stems from its misunderstanding and misapplication of *York v. Director of Revenue*. In *York*, the Director submitted evidence of indicia of intoxication to establish probable cause. *York*, 186 S.W.3d at 269. However, this evidence was controverted and discredited by the arresting officer's own

equivocation of the existence of probable cause, including discrediting the reliability of the Portable Breathing Test (PBT). *Id.* Accordingly, the trial court weighed this evidence and drew a conclusion, whereby it found that the evidence was insufficient to support probable cause. *Id.* This Court reiterated the trial court's ability to weigh the evidence and draw conclusions, gave deference to the trial court's determination of controverted evidence by following established precedent in *Hinnah*, and it affirmed the trial court's judgment. *York*, 186 S.W.3d at 272.

York differs from this case in that the only evidence submitted in this case constituted Director's Exhibit A, and that evidence was uncontroverted. The evidence in *York* constituted the Director's evidence against the arresting officer's live equivocal testimony.

The Court of Appeals interpreted *York* to say that a court must look at the subjective state of mind of the arresting officer when determining the existence of probable cause. *Guhr*, slip op. at 7. But *York* did not stand for that proposition. In *York*, the Court stated:

Probable cause, for the purposes of section 302.505, will exist when the surrounding facts and circumstances demonstrate to the senses of a reasonably prudent person that a particular offense has been or is being committed. . . . The trial court

must assess the facts by viewing the situation as it would have appeared to a prudent, cautious, and trained police officer.

York, 186 S.W.3d at 270.

What matters is not the subjective state of mind of the arresting officer, but the objective standard of a prudent and trained officer. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *State v. Lane*, 937 S.W.2d 721, 723 (Mo. banc 1997).

In addition, the Court of Appeals concluded that *York* mandates deference to the trial court's conclusions on uncontroverted evidence, and it claimed there had been a shift in the standard of review in the wake of *York*, in direct conflict with *Hinnah*:

The Court, in *York*, gave deference to the trial court's judgment even though considering uncontroverted evidence.

Because this court is bound to follow the latest Supreme Court decision on this issue, this court applies the standard set forth in *York*.

Guhr, slip op. at 7.

Nowhere in *York* did the Court assert such a notion. First, the evidence in *York* was controverted. The Court concluded that the live testimony of the officer “*controverts and discredits the Director's evidence*,” including a PBT, the reliability of which was controverted. *York*, 186 S.W.3d at 272 (emphasis added). Further, the Court determined

that the officer's testimony itself was controverted. The Court found the officer's testimony equivocal, i.e., has "two or more significations: capable of more than one interpretation: of doubtful meaning. . . of uncertain nature or classification." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, 769 (1993). Accordingly, the trial court had to weigh the Director's evidence as found in reports against the officer's testimony, equivocal or uncertain in nature. Thus, the evidence in *York* was controverted.

Indeed, the Court of Appeals quoted the following language from *York* as its basis for deference when examining uncontroverted evidence: "the trial court, in its discretion, was free to draw the conclusion that there was not probable cause based upon its assessment of the evidence and the *officer's own equivocation* of the existence of probable cause.'" *Guhr*, slip op. at 6 (*quoting York*, 186 S.W.3d at 272) (emphasis added). This language shows that the evidence in *York* was controverted, yet the Court of Appeals found that the evidence in *York* was uncontroverted. *Guhr*, slip op. at 6-7.

Further, trial courts always have had the discretion to make conclusions based on the evidence. Whether the evidence is controverted or uncontroverted, the trial court must make conclusions, and a trial court cannot make any conclusions without using its discretion. However, this does not necessitate that appellate courts give the trial court's discretion/conclusions any *deference*. In *York*, the Court did not establish a different standard of review. It merely followed established precedent that deference is given to

the trial court's ability to judge the credibility of live witnesses, including when their testimony contradicts their reports. *York*, 186 S.W.3d at 272 (citing *Hinnah*, 77 S.W.3d at 621).

Moreover, the Court of Appeals makes plain its consternation over *York*. The concurring opinion in *Guhr* best illustrates this confusion:

There are at least several possibilities as to the practical effect of *York*. Perhaps we no longer review *de novo* a trial court's determination of probable cause in driver's license forfeiture cases. Or, when contested evidence has been found not credible, we defer to the trial court's discretion to weigh uncontroverted evidence. Or, we no longer view *de novo* when there is uncontroverted evidence regarding probable cause but the officer equivocates on the issue. Then again, *York* may just be a case, with unusual facts, bearing no intent to reshape our standard of review.

Guhr, slip op. at 7 (Howard, J., concurring).

The Court of Appeals' misapplication of *York* and its evident consternation over *York* is important in this case and contains broader implications. The standard of review constitutes the lens through which an appellate court views all facts, and by way of its

misunderstanding and misapplication of *York*, the Court of Appeals applied the wrong lens.

This erroneous deference resulted in the exclusion of uncontroverted evidence of intoxication and played a decisive role in the outcome of this case. Out of its deference to the trial court, the Court of Appeals stated it must exclude all indicia of intoxication contained in page 1 of the AIR because page 1 of the AIR did not explicitly establish whether the indicia of intoxication contained on that page occurred before or after the arrest for DWI. *Guhr*, slip op. at 4-5. However, the Court of Appeals utilized page 1 of the AIR to manufacture a conflict between a “strong” and a “moderate” odor of alcohol from Guhr, and it used this alleged conflict to exclude all information from page 1 of the AIR. *Id.* The Court of Appeals should not have selectively used page 1 of the AIR. By the exclusion of page 1 of the AIR, Guhr exhibited a “strong” odor of alcohol only (LF 20). Further, even if a conflict exists between “strong” and “moderate,” the Court of Appeals should only have deferred to the trial court on the odor of alcohol, not on all facts contained on page 1 of the AIR, as it did here. *Guhr*, slip op. at 5.

Broader implications also exist from the Court of Appeals’ consternation and misapplication of *York*, in that the Court of Appeals will continue to decide cases with an improper standard of review. Accordingly, the Court of Appeals continues to utilize an erroneous lens, giving deference to the trial court’s conclusions regarding uncontroverted evidence. *See, Neer v. Director of Revenue*, 204 S.W.3d 315 (Mo.App. W.D. 2006).

This standard directly conflicts with *York* and established precedent. This is particularly harmful for fact-intensive cases, such as cases hinging on the determination of probable cause. Further, because the Eastern and Southern Districts have not followed suit, Missouri currently has different Districts applying different standards of review when examining uncontroverted evidence.

**Uncontroverted Evidence, Determination of Probable Cause,
Misapplication of Law and Against Weight of Evidence**

Uncontroverted Evidence

The evidence in this case is uncontroverted so that the real issue constitutes the legal effect of that evidence, necessitating *de novo* review. *Hinnah*, 77 S.W.3d at 620. The sole evidence submitted to the trial court was Director’s Exhibit A, which consists of the arresting officer’s narrative, the Alcohol Influence Report (AIR), and the Refusal To Submit To Chemical Test, all made by the arresting officer the night of the arrest for DWI (LF 15-21).

The Court of Appeals cites *Jarrell*, 41 S.W.3d at 46 for the proposition that deference should be given to the trial court’s conclusions because of alleged conflicts in this evidence. *Guhr*, slip op. at 5. The only “conflict” it identifies, however, is that the officer wrote that Guhr exhibited a “strong” odor of alcohol in the officer’s narrative but then noted that Guhr exhibited a “moderate” odor of alcohol in the AIR. *Id.*

The application of *Jarrell*, however, does not result in deference to the trial court based on that variation. The facts of *Jarrell* present a very different case. There, the driver submitted evidence in the form of an affidavit in which he stated he did not refuse to take the breath test. *Jarrell*, 41 S.W.3d at 46. That evidence directly conflicted with the Director’s Alcohol Influence Report, which stated the driver did refuse. *Id.* Thus, the “trial court had to choose between two conflicting written versions of what happened.” *Id.* at 46-47.

A “strong” odor differs from a “moderate” odor simply in degree. Within the context of probable cause, they both show that Guhr had a noticeable odor of alcohol on his breath which factors into the reasonableness of the arresting officer’s belief that Guhr was intoxicated. The situation in which *Jarrell* mandates deference is when the trial court has to choose between two conflicting versions of what happened, and the choice leads to different results. *Id.* In this case, there are not two conflicting versions of what happened, and the result is the same: both a “strong” odor and a “moderate” odor of alcohol support probable cause.

The evidence is uncontroverted so that the real issue is the legal effect of the evidence. Thus, the proper standard of review is *de novo*.

Determination of Probable Cause

The sole issue on appeal is the determination of probable cause- a question that should be addressed by this Court *de novo*. *Ornelas*, 517 U.S. at 699. The Court of

Appeals, in *Guhr*, cited both *Ornelas* and *Hinnah* for that proposition. *Guhr*, slip op. at 6. But the Court of Appeals held that *York* overruled *Hinnah* and disregarded *Ornelas*. The Court of Appeals believes *York* mandates deference to the trial court even when assessing uncontroverted evidence regarding the determination of probable cause. *Id.*; *see also, Neer v. Director of Revenue*, 204 S.W.3d 315, 324 n.5 (Mo.App. W.D. 2006). That finding and belief is misplaced; in *York*, the Court expressly cited and followed *Hinnah* regarding the rule of deference to apply when viewing controverted as opposed to uncontroverted evidence. *York*, 186 S.W.3d at 272. The determination of probable cause remains a question to be addressed by this Court *de novo*.

Misapplication of Law and Against the Weight of the Evidence

The trial court misapplied the law in that it did not view probable cause up until the time of the arrest for driving while intoxicated (DWI). The proper time to measure probable cause for DWI is at the time of the arrest for DWI, not at the time of an initial arrest for acts other than DWI. *Dixon v. Director of Revenue*, 118 S.W.3d 302, 306 (Mo.App. S.D. 2003).

In this case, the evidence shows an initial arrest for acts other than DWI and a subsequent arrest specifically for DWI (LF 20-21). Several indicia of intoxication existed before and at the time of the initial arrest. The arresting officer observed Guhr accelerate the truck to the point of its rear tires losing all traction and spinning on the pavement numerous times, drive without headlights on at approximately 10 p.m., and

back the truck out of and pull back into a parking lot (LF 20). The arresting officer also observed that Guhr had placed brown-colored objects in the back of the truck, and Guhr attempted to flee the scene and refused the officer's repeated directions to return to the scene (LF 20). Guhr's refusal and attempt to flee required the officer to grab Guhr's arm, walk him back to the scene, and place him in handcuffs (LF 20). This established actual restraint of Guhr and effectuated an initial arrest. *Saladino v. Director of Revenue*, 88 S.W.3d 64, 68 (Mo.App. W.D. 2002). After this initial arrest, the arresting officer observed additional indicia of intoxication. First, an odor of alcohol emanated from Guhr (LF 20). Second, the officer discovered that the objects Guhr placed in the back of the truck before he attempted to flee the scene were tequila bottles (LF 20). The officer observed Guhr's balance and walking (Respondent's W.D. Brief p. 8), and subsequent to and concurrent with the officer's observations of Guhr's balance and walking, Guhr admitted he had consumed two alcoholic drinks upon the officer's inquiry (LF 20). Only after making these observations did the arresting officer place Guhr under arrest specifically for DWI.

Despite these facts, the trial court found that *all* evidence of Guhr's intoxication existed *post-arrest* (TR 4). In reaching that conclusion, the trial court did not use the arrest for driving while intoxicated because of the numerous indicia of intoxication that existed at the time of the arrest for DWI. Indeed, the Court of Appeals gave a list of indicia of intoxication exhibited by Guhr at the arrest for DWI, and it stated:

If the basis for the trial court's judgment was that Officer Crossen lacked probable cause to arrest Mr. Guhr for driving while intoxicated at the time of his initial arrest, the trial court misapplied the law.

Guhr, slip op. at 5.

The trial court misapplied the law by determining probable cause at a time other than the arrest for DWI, and therefore, its judgment, based on undisputed facts, should not be afforded any deference on appeal. *Knipp*, 984 S.W.2d at 151.

The trial court's judgment also is against the weight of the evidence. As shown above, the officer observed ample indicia of intoxication at the arrest for DWI. In fact, all the evidence pointed to that conclusion. Accordingly, the trial court's judgment is against the weight of the evidence, and it should not be given any deference on appeal. *Murphy*, 536 S.W.2d at 32.

The Officer had Probable Cause to Believe Guhr was Driving While Intoxicated

Applying *de novo* review when examining the totality of the indicia of intoxication exhibited by Guhr at the time of the arrest for DWI, even if the indicia of intoxication from page 1 of the AIR is excluded, Officer Crossen had probable cause to believe that Guhr was driving while intoxicated: the officer observed Guhr's erratic driving; Guhr placed tequila bottles in the back of the truck and attempted to flee the scene; Guhr repeatedly refused to return to the scene; a strong odor of alcohol emanated from Guhr;

the officer observed Guhr's balance and walking, and upon inquiry, Guhr admitted he had consumed two alcoholic drinks. (LF 20-21; Respondent's W.D. Brief p. 8).

Further, that Director's Exhibit A includes both a "strong" and a "moderate" odor of alcohol emanating from Guhr does not weaken the case for the existence of probable cause. It only confirms that Guhr exhibited a noticeable odor of alcohol observed by the officer before the arrest for DWI.

Accordingly, the Director established her prima facie case, and the burden then shifted to Guhr to present evidence to rebut the Director's prima facie case. *Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 546 (Mo. banc 2003).

However, Guhr failed to testify, call any witnesses, or submit any evidence at all (TR 3). This raises a presumption that such testimony or other evidence would have been damaging to him. *Smith v. Director of Revenue*, 77 S.W.3d 120, 122 n.3 (Mo.App. W.D. 2002), *citing Bean v. Riddle*, 423 S.W.2d 709, 720 (Mo. 1968). Consequently, Guhr failed to rebut the Director's prima facie case.

Thus, the trial court's judgment should have been reversed.

Conclusion

In view of the foregoing, the Director respectfully requests that this Court reverse the trial court's decision with instructions for the trial court to reinstate the revocation of Guhr's driver's license.

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 24th day of January 2007 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 5,377 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.

Assistant Attorney General