No. SC84192

IN THE SUPREME COURT OF MISSOURI

MARK J. HINNAH

Respondent,

v.

DIRECTOR OF REVENUE

Appellant.

Appeal from the Circuit Court of St. Louis County
The Honorable, Judge Robert S. Cohen

APPELLANT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

Table of Authorities 2

Jurisdictional Statement 5

Statement of Facts 6

Argument: The trial court erred in reinstating Hinnah's driving privileges because the arresting officer had probable cause to believe Hinnah was driving while intoxicated and there is no legislative exception for those not actually driving 8

A. Standard of Review 8

B. Probable cause existed to arrest Hinnah 9

C. Revocation pursuant to § 577.041 is predicated upon the refusal to submit to a breath test, not the act of driving while intoxicated, and the statute does not require proof of actual driving 13

Conclusion 22

Certificate of Service and Compliance 23

TABLE OF AUTHORITIES

CASES

BCI Corporation v. Charlebois Construction Co., 673 S.W.2d 774 (Mo. banc. 1984) 16

Baptist v. Lohman, 971 S.W.2d 366 (Mo. App. E.D. 1998) 10

Berry v. Director of Revenue, 885 S.W.2d 326 (Mo. banc 1994) 9, 13

Bertram v. Director of Revenue, 930 S.W.2d 7 (Mo.App. W.D. 1996) 17, 20

Chancellor v. Lohman, 984 S.W.2d 857, 858 (Mo. App. W.D. 1998) 10

City of St. Joseph v. Johnson, 539 S.W.2d 784 (Mo. App. W. D. 1976) 19

Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. banc 1985) 19, 20

Duffy v. Director of Revenue, 966 S.W.2d 372 (Mo. App. W.D. 1998) 12

Gooch v. Spradling, 523 S.W.2d 861 (Mo. App. W.D. 1975) 14, 19

Hampton v. Director of Revenue, 22 S.W.3d 217 (Mo. App. W.D. 2000) 18, 19

Hawkins v. Director of Revenue, 7 S.W.3d 549 (Mo. App. E.D. 1999) 10, 12

House v. Director of Revenue, 997 S.W.2d 135 (Mo. App. S.D. 1999) 18

Howard v. McNeill, 716 S.W.2d 912 (Mo.App. E.D. 1986) 11, 16, 20

Kearney v. Special Road District v. County of Clay, 863 S.W.2d 841 Mo. banc 1993) 15

Kinsman v. Director of Revenue, 58 S.W.3d 27 (Mo. App. W.D. 2001) 13, 15, 16, 18, 19, 20

McCabe v. Director of Revenue, 7 S.W.3d 12 (Mo. App. E.D. 1999) 10

McFarland v. Wilson, 33 S.W.3d 691 (Mo. App. W.D. 2000) 18, 19

Meyers v. Director of Revenue, 9 S.W.3d 25 (Mo. App. E.D. 1999) 9

Miller v. Director of Revenue, 719 S.W.2d 787 (Mo. banc 1986) 20

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 9

Peeler v. Director of Revenue, 934 S.W.2d 329
(Mo. App. E.D. 1996) 13, 14, 17, 20

Pendergrass v. Director of Revenue, 4 S.W.3d 599
(Mo. App. E.D. 1999) 11

State ex. rel Metropolitan St. Louis Sewer District v. Sanders,
807 S.W.2d 87 (Mo. banc 1991) 16

State v. Tokar, 918 S.W.2d 753 (Mo. banc 1996),
cert. denied, 117 S.Ct. 307 (1996) 10

State v. Trumble, 844 S.W.2d 22 (Mo. App. W.D. 1992) 15, 19, 20

Tuggle v. Director of Revenue, 727. S.W.2d 168
(Mo. App. W.D. 1987) 9

Wilcox v. Director of Revenue, 842 S.W.2d 240
(Mo. App. W.D. 1992) 10, 11, 12

STATUTES

Section 302.505, RSMo 2000 . . . . . 18, 19, 20

Section 302.530.4, RSMo 2000 . . . . . 19, 20

Section 577.020, RSMo 2000 . . . . . 14, 17, 18, 19, 20

Section 577.041, RSMo 2000 . . . . . 8, 9, 10, 12, 13, 15, 16, 18, 19, 20, 21

Section 577.041.1, RSMo 2000 14

Section 577.041.4, RSMo 2000 . . . . . 5, 13, 14, 16, 17, 18, 19, 21

Section 577.041.5, RSMo 2000 . . . . . 13, 21

JURISDICTIONAL STATEMENT

Hinnah filed a petition for hearing pursuant to § 577.041.4, RSMo Cumm. Supp. 1998, after the Director of Revenue revoked his driving privileges for one year for refusing to submit to a chemical test following his arrest for driving while intoxicated. The trial court reinstated Hinnah's driving privileges and the Director appealed. After an opinion by the Court of Appeals, Eastern District, this Court took transfer of the case. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. Art. V, § 10 (as amended 1976).

STATEMENT OF FACTS

In the morning hours of New Year's Day, 1999, Chesterfield Police Officer Steve Borawski observed a pick-up truck parked on the shoulder of Highway 40 with the engine running (Tr. 4-5, L.F. 24, 28-29). The officer approached the vehicle and saw the lone occupant, the respondent, Mark Hinnah, sleeping in the passenger seat. (Tr. 5-6, 18; L.F. 24, 28).

The officer knocked on the window to wake Hinnah and ask him if he was okay (Tr. 6; L.F. 28-29). When Hinnah responded that he was okay, the officer smelled a very strong odor of an alcoholic beverage, and noticed Hinnah's eyes were watery, glassy and bloodshot (Tr. 7-9; L.F. 29). Hinnah exited the pickup truck, using the door to maintain his balance (Tr. 9; L.F. 29). Hinnah did not have a driver's license, but instead he presented a passport for identification (Tr. 6, 38; L.F. 29). He explained that while looking for the Chesterfield Police Station, he became sleepy so he pulled over on the shoulder to take a nap (Tr. 6; L.F. 29) Having noticed that the front passenger-side tire was flat and the rim of the wheel was heavily damaged, the officer asked Hinnah if he had been involved in an accident (Tr. 10; L.F. 29). Hinnah said he fell asleep and struck the concrete barrier about a half mile back. *Id.* Based on his observations and Hinnah's admissions, the officer placed Hinnah under arrest for driving while intoxicated (Tr. 10, 34; L.F. 29).

Because of extremely cold weather and heavy snow on the busy interstate roadway, the officer did not perform any field sobriety tests until after he arrested Hinnah and transported him to the police station (Tr. 11; L.F. 29). At the police station, the officer advised Hinnah of

his Miranda rights, the Missouri Implied Consent Law, and asked him to submit to a breath test (Tr. 11; L.F. 25-26, 29). Hinnah refused to take the test (Tr. 12; L.F. 26, 29).

The Director revoked Hinnah's license for one year (L.F. 23). Hinnah filed a petition for trial de novo by the circuit court and the court assigned the petition to a commissioner for hearing (L.F. 31). Hinnah did not allege in his petition that he was not actually driving (L.F. 3-5). The officer testified on behalf of Director, and two of Hinnah's friends testified on his behalf (Tr. 4-35, 37-46; L.F. 31). One friend testified that he, not Hinnah, had been driving the pick-up truck, but he left the scene to obtain assistance before the officer arrived (Tr. 37-46). Neither friend testified that the officer was told, on the day of the arrest, that anyone but Hinnah had driven the truck (Tr. 37-46). Hinnah did not testify (Tr. 1-46).

The commissioner concluded that the officer did not have probable cause to arrest Hinnah for driving while intoxicated and recommended that Hinnah's driving privileges be reinstated (L.F. 31). Without issuing findings of fact or conclusions of law, the circuit court adopted the commissioner's recommendation and entered a judgment ordering Director to reinstate Hinnah's driving privileges. *Id.* The Director appeals from that decision.

ARGUMENT

The trial court erred in setting aside the revocation of Hinnah's driving privilege under § 577.041, RSMo[1], for refusing a chemical test because it misinterpreted the law and its decision was against the weight of the evidence in that the Director proved a prima facie case showing that: 1) Hinnah was arrested; 2) the arresting officer had reasonable grounds to believe Hinnah was driving while intoxicated; and 3) Hinnah refused to submit to a breath test. There is no legislative exception for those not actually driving.

The issues presented are whether § 577.041 requires proof of actual driving and whether an arresting officer has reasonable grounds to believe a driver was driving while intoxicated when he finds a lone occupant sleeping inside a truck with its engine running, parked along a major interstate on New Year's morning; the lone occupant has a strong odor of alcohol on his breath, watery, glassy and bloodshot eyes, and difficulty maintaining his balance; and the lone occupant admits to driving the vehicle, crashing it into a concrete barrier along the road, heavily damaging the wheel rim, and flattening the tire.

A. Standard of Review

"When reviewing the revocation of a driver's license for a refusal to submit to a chemical test, the trial court shall determine only the following: (1) whether the person was arrested; (2) whether the arresting officer had reasonable grounds to believe that the person

[1]All citations are to RSMo 2000 unless otherwise stated.

was driving while intoxicated; and (3) whether the person refused to submit to the test." Section 577.041.4, RSMo; *Berry v. Director of Revenue,* 885 S.W.2d 326, 327 (Mo. banc 1994). The trial court's decision must be affirmed unless it is unsupported by substantial evidence, is against the weight of the evidence, or misstates or misapplies the law. *Id.*; *See Murphy v. Carron,* 536 S.W.2d 30 (Mo. banc 1976). However, that standard of review does not permit a reviewing court to disregard uncontroverted evidence that supports the contention that all three elements were proven. *Meyers v. Director of Revenue,* 9 S.W.3d 25, 28 (Mo. App. E.D. 1999). The trial court's decision to set aside Director's revocation was a misapplication of law and against the weight of the evidence.

B. Probable cause existed to arrest Hinnah

Hinnah does not dispute, and Director produced uncontroverted evidence, that Hinnah was arrested for driving while intoxicated and that he refused the chemical breath test (Tr. 10, 12, 34, 47-50; L.F. 26, 29). At trial, Hinnah argued that the evidence available to the officer did not support probable cause and the fact that a friend was actually driving meant that the implied consent law did not apply to him (Tr. 47-50). The commissioner simply noted on the judgment form that the officer "did not have" probable cause and the judge signed the judgment (L.F. 31). Therefore, the issues are whether the officer had reasonable grounds to believe that Hinnah was driving while intoxicated and whether the statute requires proof of actual driving.

"Reasonable grounds" and "probable cause" are virtually synonymous. *Tuggle v. Director of Revenue,* 727. S.W.2d 168, 170 (Mo. App. W.D. 1987). "Probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is

sufficient to warrant a prudent person's belief that a suspect has committed an offense." *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996), *cert. denied*, 117 S.Ct. 307 (1996). The court must evaluate the situation from the vantage point of a cautious, trained, and prudent police officer at the scene at the time of the arrest. *Hawkins v. Director of Revenue,* 7 S.W.3d 549, 551(Mo. App. E.D. 1999)*; Wilcox v. Director of Revenue,* 842 S.W.2d 240, 243 (Mo. App. W.D. 1992). "The issue is whether a reasonably diligent and observant officer had sufficient reason for concluding under the circumstances that the driver had been driving while intoxicated." *Chancellor v. Lohman,* 984 S.W.2d 857, 858 (Mo. App. W.D. 1998).

Hinnah argued at trial that there was insufficient evidence to show the officer had probable cause to arrest him for driving while intoxicated. However, the uncontroverted evidence was that at the time of the arrest, Hinnah made two unequivocal statements to the officer that he had been driving the vehicle (Tr. 6, 10; L.F. 29). Section 577.041 requires that an officer have probable cause to believe the driver was driving while intoxicated. *Baptist v. Lohman*, 971 S.W.2d 366, 368 (Mo. App. E.D. 1998). But an officer need not observe a person driving a motor vehicle in order to have probable cause to arrest such person for driving while intoxicated. *McCabe v. Director of Revenue*, 7 S.W.3d 12, 14 (Mo. App. E.D. 1999). Hinnah's admissions alone provided sufficient reasonable suspicion that he was driving. "The uncontroverted testimony of a police officer that an individual admitted to driving a vehicle constitutes reasonable grounds to believe that the individual was driving." *Pendergrass v. Director of Revenue*, 4 S.W.3d 599, 601 (Mo. App. E.D. 1999).

Beyond Hinnah's admissions, the officer knew that Hinnah was the sole occupant of a truck parked with its engine running on the shoulder of a busy interstate highway, and that Hinnah admitted the truck had been damaged after he collided with a concrete barrier (Tr. 4-6, 10, 18; L.F. 24, 28-29). Hinnah's admission that he struck the concrete barrier was also corroborated by the officer's observation of the damage to the wheel and tire of the truck. "Admission of driving and recent involvement in a driving accident have led to affirmances of *convictions.*" *Wilcox v. Director of Revenue,* 842 S.W.2d 240, 243 (Mo. App. W.D. 1992)(emphasis added).

In light of the uncontroverted evidence supporting probable cause that Hinnah was driving, it appears the trial court's decision that the arresting officer did not have probable cause was based on the testimony of Hinnah's friend, who said Hinnah was not actually driving. That was an erroneous application of the law. *See Howard v. McNeill,* 716 S.W.2d 912, 915 (Mo. App. E.D. 1986)(it is an erroneous application of law to consider evidence not available to the officer at the time of the arrest). If the trial court thought evidence of actual driving properly rebutted the Director's case, that was also a misapplication of the law, as explained below in section C.

Neither of Hinnah's friends were at the scene when the officer discovered Hinnah and arrested him. The trial court ignored well-settled law that "[i]n examining the existence of probable cause, courts are to consider the information possessed by the officer before the arrest and by the reasonable inferences drawn therefrom." *Duffy v. Director of Revenue,* 966 S.W.2d 372, 380 (Mo. App. W.D. 1998). At no time prior to his arrest did Hinnah claim

anyone else was driving. A reviewing court must look solely at the evidence from the perspective of the officer at the time he made the arrest. *Hawkins*, 7 S.W.3d at 551. No one who testified at the hearing voiced to the officer at the time of the arrest, or prior to it, any fact concerning who was driving; and, thus, the only facts before the officer when the arrest was made were the driver's undisputed admissions and the absence of anyone else at the scene.

The officer observed that Hinnah had a strong odor of alcohol on his breath, watery, glassy and bloodshot eyes, and difficulty maintaining his balance (Tr. 7-9, L.F. 29). The decision to arrest Hinnah was made at the roadside (Tr. 10, 35; L.F. 29). Any evidence after the arrest is irrelevant to the question of whether the officer had probable cause at the time he made the arrest. *Hawkins*, 7 S.W.3d at 551; *Wilcox*, 842 S.W.2d at 243.

Standing in the shoes of the officer on New Year's morning 1999, it is clear he made the decision that a cautious, prudent, and trained officer would have made. The evidence at trial was not in conflict on the issue of whether the officer had probable cause to arrest Hinnah for driving while intoxicated. Director proved a prima facie case under § 577.041, to revoke Hinnah's driving privilege. The Director was not required to prove Hinnah was driving while intoxicated, but only that there was probable cause to arrest him for driving while intoxicated, that he was arrested, and that he refused the test. Section 577.041.4, RSMo; *Berry*, 885 S.W.2d at 327. The inquiry ends there and the trial court's reinstatement of Hinnah's driving privileges should be reversed.

C. Revocation pursuant § 577.041.4 is predicated upon the refusal to submit to a breath test, not the act of driving while intoxicated, and the statute does not require proof of actual driving

In a case where a person refuses a breath test, the plain language of § 577.041 prohibits a trial court from determining any issues other than whether probable cause supported the arrest of a person who refused the test. *Peeler v. Director of Revenue,* 934 S.W.2d 329 (Mo. App. E.D. 1996). The "court shall determine only" (1) whether or not the person was arrested; (2) whether or not the officer had "reasonable grounds" to arrest the person for driving while intoxicated; and (3) whether the person refused the test. Section 577.041.4, RSMo; see *Berry v. Director of Revenue*, 885 S.W.2d 326, 327 (Mo. banc 1994). The trial court is only given the power to reinstate the license if it determines one of these issues "not to be in the affirmative." Section 577.041.5 RSMo; *Berry*, 885 S.W.2d at 327.

The Court of Appeals, Western District, recently acknowledged that express statutory language, but then construed the language to permit a person to shift the inquiry from the Director's prima facie case to the issue of whether he was actually driving, holding that the purported driver had an "implied right" to show he was not in fact driving. *Kinsman v. Director of Revenue,* 58 S.W.3d 27, 31 (Mo. App. W.D. 2001). The court remarkably characterized § 577.041 as "loosely drawn," and justified the discovery of this "implied right" by explaining it was necessary to avoid what it considered to be an "absurd" result: The Director revoking the license of a person who was arrested upon probable cause for driving while intoxicated and

who refused a breath test, even if she could later show she had not actually been driving at the time. *Id.* at 32.

But such a result is not "absurd," it is precisely what the legislature intended, and it is precisely the interpretation of the law under which state officials, law enforcement, and the public have been operating for decades. Section 577.020, RSMo, states that any person who operates a motor vehicle shall be deemed to have given consent to a chemical test. Thus, all those who apply for and accept an operator's license "impliedly consent" to submission to such a test. *Peeler v. Director of Revenue*, 934 S.W.2d 329, 330 (Mo. App. E.D. 1996); *Gooch v. Spradling*, 523 S.W.2d 861, 865 (Mo. App. W.D. 1975). If such a person refuses to take a breath test, the legislature requires immediate revocation of the person's driver's license. Section 577.041.1, RSMo (the person's license "shall be immediately revoked upon refusal to take the test"). The legislature expressly limited this remedy of revocation to a very narrow class of individuals -- those who have been arrested upon probable cause to believe they were driving while intoxicated. Section 577.041.4, RSMo.

The result is not "absurd" because the revocation is predicated on the acceptance of the license and the refusal to take the test. A person's license is immediately revoked if he refuses a test after an arrest based on probable cause, because he accepted the license conditioned on consent to such a test. That is the effect of the plain language of the statute as written. Courts must give effect to the language as written, and are without authority to read into a statute legislative intent contrary to intent made evident by plain language. *Kearney v. Special Road District v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). "There is no room for

construction even when the court may prefer a policy different from that enunciated by the legislature." *Id.* at 843.

The *Kinsman* court did not give effect to the language as written. In effect, the court added its own language to the statute, deciding that the statute ought to apply to an even narrower class of individuals than the class identified by the legislature. Under the holding of the *Kinsman* court, the Director may only revoke licenses of those *who were actually driving* at the time they were arrested upon probable cause to believe they were driving while intoxicated and who refused a breath test. The *Kinsman* court was not entitled to make a legislative policy decision to narrow the statutory class even further, as they did when they "assume[ed] there is an implied right of the purported driver to show that he or she was not in fact driving . . ." *Kinsman*, 58 S.W.3d at 32.

If the legislature intended to grant that right to the suspected driver, it could easily have done so. The general assembly wants motorists to provide officers with breath tests when arrested for driving while intoxicated. Section 577.041 is "more consistently read as providing a resource for the state in the prosecution of drunk [drivers] . . . " *State v. Trumble*, 844 S.W.2d 22, 24 (Mo. App. W.D. 1992). The legislature established a scheme requiring breath tests for those who refuse. It clearly chose to limit courts that are reviewing suspensions of those who refuse, to determining "only" probable cause, arrest, and refusal. Section 577.041.4, RSMo. In § 577.041 the legislature established a policy that is easy to enforce and administer by revoking the licenses of apparent drunk drivers who refuse breath tests. The cardinal rule of statutory construction requires the court to ascertain the true intention of the legislature,

giving reasonable interpretation in light of the legislative objective. *BCI Corporation v. Charlebois Construction Co.,* 673 S.W.2d 774, 780 (Mo. banc. 1984). It is the responsibility of the court to ascertain and effectuate the intent of the legislature, and in doing so, the court should look first to the language of the statute and the plain and ordinary meaning of the words employed. *State ex. rel Metropolitan St. Louis Sewer District v. Sanders*, 807 S.W.2d 87, (Mo. banc 1991). *Kinsman's* holding was contrary to the plain terms of the statute.

The *Kinsman* decision is also contrary to prior case law applying these statutes and rejecting the very arguments the *Kinsman* court embraces. In *Howard v. McNeill,* 716 S.W.2d 912 (Mo.App. E.D. 1986), the court rejected a claim that a person, having been arrested upon probable cause for driving while intoxicated and refusing a chemical test, could have his license reinstated by showing that he had not, in fact, been driving while intoxicated. In that case, the trial court found that the officer did not have probable cause to arrest the person, because the person claimed, at trial, that he had not been intoxicated at the time he had an accident, and he had only become intoxicated later that night. *Id.* at 914. The court held the facts before the officer provided him with "'reasonable grounds' to believe that respondent had been intoxicated at the time of the collision and authorized the arrest. *Id.* at 915. Respondent's refusal to submit to a blood alcohol content test thereafter warranted the Director's order of revocation." *Id.* The court then reversed the trial court's decision and remanded the case with orders to reinstate the revocation because the trial court improperly considered evidence that the arrestee wasn't actually driving while intoxicated; evidence that the arrestee failed to offer the officer at the time of the arrest *Id.* Similarly, in the case at bar,

the testimony Hinnah presented at trial to show that he was not, in fact, driving while intoxicated had no bearing on any of the limited issues the trial court was allowed to consider. Therefore, the testimony was irrelevant, and the proper remedy is to reinstate the revocation.

Nothing in the implied consent law contained in § 577.020 modifies § 577.041.4 to make testimony about actual driving relevant. In fact, prior cases have rejected such a construction. In *Peeler v. Director of Revenue*, 934 S.W.2d 329 (Mo.App. E.D. 1996), the court considered a claim that § 577.020 required the Director to prove that a person had been driving on a public highway before the Director could revoke the person's license for failing to submit to a breath test. The court rejected that claim, finding that the language in that section meant that only those holding driver's licenses were subject to the implied consent law. *Id.* at 330-31. The court held, "There is no dispute in this case that driver held a Missouri driver's license, granting him the privilege of operating his motor vehicle on Missouri streets and highways. Whether driver operated his vehicle on the public highways and whether Director proved as much at trial was immaterial." *Id.* at 330. *See also Bertram v. Director of Revenue*, 930 S.W.2d 7 (Mo.App. W.D. 1996) (finding that the language in § 577.020 did not modify § 577.041.4, and where officer arrested Bertram upon probable cause for driving while intoxicated and she refused the test, license would not be reinstated even if she showed that she was not operating a motor vehicle on a "public highway" at the time). Thus, any interpretation of the language in § 577.020 to modify the language in § 577.041.4, in order to

overcome the express dictates of the latter section, is a misinterpretation of the statute itself, and has been expressly rejected by the courts.

The *Kinsman* court buttressed its discovery of the "implied right" to prove actual driving by looking to *McFarland v. Wilson,* 33 S.W.3d 691, 695 (Mo. App. W.D. 2000). *Kinsman,* 58 S.W.3d at 31. The court explained *McFarland* was wrong because it relied on cases dealing with § 303.505 RSMo, where the person consented to a breath test. "This court, in discussing the issues to be tried under § 577.041, states that in addition to the issues listed in the statute, the court 'must also determine whether the State has proved that the person was in fact driving the automobile.'" *Kinsman,* at 31. The *Kinsman* court noted that *McFarland* cited *Hampton v. Director of Revenue,* 22 S.W.3d 217 (Mo. App. W.D. 2000) and *House v. Director of Revenue,* 997 S.W.2d 135 (Mo. App. S.D. 1999), and acknowledged that *Hampton* and *House* involved suspensions under § 302.505 rather than § 577.041. *Id.* at 31. The court then conceded that "[t]o the extent that McFarland implies that the Director has the initial burden of proving by a preponderance of the evidence that the person in question was actually driving in a § 577.041 proceeding, we disapprove McFarland." *Id.*

Thus, the *Kinsman* court correctly held that the *McFarland* court went too far. But *Kinsman* did not go far enough. For the same reason it disapproved of *McFarland,* it should have recognized that in a refusal case not only does the Director not have the *initial* burden to prove actual driving, she *never* has such a burden. *Kinsman* should have overruled the rest of *McFarland* because *McFarland* relied on cases that involved suspensions under § 302.505 RSMo. The only reason that proof of actual driving is required in suspensions pursuant to that

section is because another statute, § 302.530.4 RSMo, requires it. *Collins v. Director of Revenue*, 691 S.W.2d 246, 252 (Mo. banc 1985). There is no similar provision in § 577.041. Section 577.041.4 explicitly states that the Director only has to prove three things, none of which are whether the arrestee was actually driving. Therefore, *Kinsman* should have overruled the rest of *McFarland*.

In creating from § 577.041 the "implicit right" of the driver to require proof of driving, the *Hampton* and *Kinsman* courts failed to recognize the real options created by the legislature when they enacted the implied consent law. *See State v. Trumble,* 844 S.W.2d 22 (Mo. App. W.D. 1992). "When the Missouri legislature enacted the implied consent law, it made § 577.020 'subject to' § 577.041, a 'refusal' statute." *Id.* at 24. "[Section 577.041] has been interpreted to mean a motorist 'has the present, real option either to consent to the test or refuse it.'" *Id.* citing *Gooch v. Spradling,* 523 S.W.2d 861, 865 (Mo. App. W.D 1975); *City of St. Joseph v. Johnson,* 539 S.W.2d 784, 786 (Mo. App. W. D. 1976). "On the other hand, the statute provides that if one chooses not to comply with the arresting officer's request, by refusing to take a chemical test, then evidence of that refusal may be admissible in a proceeding against a motorist and further that the motorist's license may be subject to revocation." *Trimble,* at 24.

In other words, under the scheme established by the legislature the arrestee has two options. He can consent to the test. If it reveals an excessive alcohol concentration, an appeal of any suspension or revocation is heard pursuant to § 302.530.4, and the sole issue at the hearing is whether the person was driving the vehicle under the circumstances set out in §

302.505. *Collins v. Director of Revenue,* 691 S.W.2d 246, 251-52 (Mo. banc 1985); *Miller v. Director of Revenue,* 719 S.W.2d 787, 789 (Mo. banc 1986). Or he can refuse the test. If he does, the Director must only prove probable cause supported the arrest of a person who refused the test. Section 577.041, RMSo; *Howard v. McNeill,* 716 S.W.2d 912 (Mo. App. E.D. 1986); *Peeler v. Director of Revenue,* 934 S.W.2d 329 (Mo. App. E.D. 1996); *Bertram v. Director of Revenue,* 930 S.W.2d 7 (Mo. App. 1996).

In expressly limiting the remedy of revocation under § 577.041 to a narrow class of individuals -- those who choose to refuse the test after an arrest based on probable cause -- the legislature provided a resource for the state in the prosecution of drunk driving cases. *See Trumble,* 844 S.W.2d at 24 (refusal may be admissible in a proceeding against any person and the person's license may be subject to revocation). Section 577.041 breathes life into the implied consent law established in § 577.020. The decision in *Kinsman* squeezes the life out of it. The "implied right" to prove actual driving created in *Kinsman* may equally be used in future cases to require the Director to prove that the person was actually intoxicated. If the "implied right" continues to be perpetuated, the "probable cause" standard -- plainly and unambiguously established in § 577.041 -- will slowly be put to death by drunk driving arrestees who will refuse the test, and plead and claim at trial that they were neither intoxicated nor driving. The courts will have failed in their responsibility to ascertain and effectuate the clear legislative intent evidenced by the plain language of § 577.041.4 and 5. The purpose of the implied consent law, to protect the public by expeditiously removing the most dangerous drunk drivers from Missouri roadways, will be frustrated.

That would be a truly absurd result.

CONCLUSION

The trial court erred in setting aside Director's revocation of Hinnah's driving privilege. Its judgment should be reversed and Director's revocation of Hinnah's driving privilege should be reinstated.

Respectfully submitted,

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CERTIFICATION 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 4,959 words, excluding the cover, and this certification, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 25th day of March, 2002, to

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