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 Robert S. Cohen, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference her jurisdictional statement in Appellant's Substitute Brief (App. Sub. Br. at 5).

STATEMENT OF FACTS

Appellant adopts and incorporates by reference her statement of facts in Appellant's Substitute Brief (App. Sub. Br. at 6-7).

POINT RELIED ON

The trial court erred in setting aside the revocation of Hinnah's driving privilege under § 577.041, RSMo, 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.

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

Messer v. King, 698 S.W.2d 324 (Mo. banc 1985)

Soest v. Director of Revenue, 62 S.W.3d 619 (Mo. App. E.D. 2001)

Brown v. Director of Revenue, 772 S.W.2d 398 (Mo. App. W.D. 1989)

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.

1. There is no merit to Hinnah's argument that the issue is unpreserved.

Hinnah contends the Director failed to preserve the issue before this Court because she did not object to the testimony of Hinnah's friends, who said Hinnah was not driving (Resp. Sub. Br. at 29). The Director is not complaining about the admission of the evidence -- although she could have. The Director is complaining about the incorrect application of the law to the facts, a rule of law that contradicts the plain terms of a statute, and the fact that the trial court's decision is contrary to the weight of the evidence (App. Sub. Br. at 9). Furthermore, the Director likely did not object at trial because Hinnah did not allege in his petition that he was not actually driving, so at the time the evidenced was adduced there was no reason to believe it was offered for that purpose. That is especially true because the trial

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

was held on July 6, 2000, more than a year before *Kinsman v. Director of Revenue,* 58 S.W.3d 27 (Mo. App. W.D. 2001) was decided, and nearly six months before *McFarland v. Wilson,* 33 S.W.3d 691 (Mo. App. W.D. 2000) was decided. Hinnah presented his friends' testimony in the context that it refuted probable cause, not that it was relevant to prove he was not actually driving (Tr. 37-50). Hinnah continues to make the same argument before this Court (Resp. Sub. Br. at 18, 19, 27).

2. There is no merit to Hinnah's argument that he presented evidence that rebutted the Director's prima facie case.

As shown in the Director's Substitute Brief and as Hinnah concedes, the Director made a prima facie case that Hinnah refused a test after an arrest based on probable cause (App. Sub. Br. at 6-7, 9-12; Resp. Sub. Br. at 18, 28, 30). But Hinnah argues he "contradicted and challenged" the Director's evidence that the officer had probable cause to believe he drove a vehicle while intoxicated (Resp. Sub. Br. at 19, 20, 23, 27, 28); he also argues the trial court resolved the witnesses credibility issue in his favor, and that finding must be given deference (Resp. Sub. Br. 17, 19). Hinnah is mistaken.

Hinnah presented no evidence disputing that, at the time of arrest, the officer observed Hinnah alone inside a truck with its engine running, parked alongside the interstate, that he had a strong odor of alcohol on his breath, watery, glassy, bloodshot eyes, difficulty maintaining his balance, and, most importantly, that he admitted to driving the vehicle, striking a concrete barrier, heavily damaging the wheel rim, and flattening the tire.

None of those facts, adduced through the officer's testimony, the narrative report and the Alcohol Influence Report entered into evidence (L.F. 24-29, Tr. 3), were controverted by Hinnah's cross-examination of the officer. Furthermore, Hinnah presented no other witnesses or evidence to contest any of those facts.

Hinnah cites *Kearney v. Director of Revenue*, 999 S.W.2d 310 (Mo. App. E.D. 1999), arguing he could rebut Director's prima facie case solely through cross-examination (Resp. Sub. Br. at 23). While a driver may rebut Director's prima facie case solely through cross-examination, that is not what happened here. Hinnah did not create a legitimate credibility dilemma with respect to whether, at the time of arrest, it was reasonable for the officer to believe Hinnah was driving while intoxicated.

In *Kearney*, the court affirmed the trial court's reinstatement of driving privileges, holding that, because there was conflicting testimony as to whether the driver's blood alcohol content was at least .10 percent, it was clearly within the trial court's discretion to determine that there was no probable cause to arrest the driver. *Id.* at 313-14. In that case, the officer arrived after the emergency personnel were extracting the driver from a vehicle following a collision. *Id.* at 311. The driver admitted he was driving, but denied drinking; he submitted to a blood test. *Id.* at 311-12. Through cross-examination, the driver demonstrated there was conflicting testimony about which of the driver's arms was swabbed with alcohol and from which arm blood was taken for the blood alcohol test; testimony was adduced that drawing blood from the arm swabbed with alcohol could cause an inaccurate result. *Id.* at 312-13. The court ruled that "[b]ecause Director's evidence was challenged and contradicted, it was clearly

within the discretion of the trial court to determine that there was no probable cause to arrest Driver or that the driver's BAC was not at least .10 percent." *Id.* at 313-314.

The present case is not, however, a case where cross-examination revealed two witnesses could not agree on a material issue. In Director's initial brief, she cited specific uncontroverted facts that constituted probable cause (App. Sub. Br. at 6-7, 9-12). Hinnah claims that Director "asks the court to ignore the cross examination of the police officer . . ." (Resp. Sub Br. at 18). To the contrary, Director asks the court to carefully review the cross-examination. Throughout his brief, Hinnah argues generally that on cross-examination he "challenged and contradicted" Director's evidence of probable cause (Resp. Br. at 19, 20, 23, 27, 28). Rarely does Hinnah specifically cite how he "challenged and contradicted" Director's evidence.

Hinnah claims he adduced contradictory evidence on the issue of driving because the officer admitted on cross-examination that at the police station Hinnah denied driving the vehicle (Resp. Sub. Br. at 21). A careful review of the cross-examination question and response (Tr. 15-16), together with the Alcohol Influence Report (L.F. 24-26), demonstrate that Hinnah's "denial of driving" was a response to a series of ten questions on page two of Form 2389. Hinnah answered "no" to every question, including question number six ("Were you involved in an accident today?") and seven ("Were you operating the vehicle?")(L.F. 15). Hinnah argues that answer creates a dispute about whether Hinnah admitted to driving, and thus Hinnah controverted the officer's testimony (Resp. Br. at 19, citing Tr. at 17).

But Hinnah only denied driving the vehicle *after* he refused to take the test, which was long after his arrest. The Alcohol Influence Report reveals that Hinnah refused to take the test at 10:09 a.m., and he did not deny operating the vehicle until some time after 10:16 a.m. (L.F. 25-26). Because Hinnah's denial occurred long after the arrest and after his refusal, it is irrelevant to the probable cause determination made by the officer at the time of arrest.

Furthermore, bare denials do little to undermine an officer's probable cause. *Kinsman,* 58 S.W.3d at 34. "Officers are usually not highly impressed with bare denials in the midst of factual circumstances strongly indicating a proposition is true." *Id.* at 33-34. Where there is evidence strongly indicating probable case, overcoming a revocation for refusal should not be as simple as a conclusory denial; for example, Hinnah answering "no" in response to a rote question, especially after making a detailed admission at the scene, corroborated by other observable facts, such as the damage caused by striking the concrete barrier. Such a result would undermine the purpose of § 577.041.

When Hinnah does cite a specific example of how he "challenged and contradicted" the Director's evidence, he points to a portion of cross-examination that is irrelevant to a material issue; for example, that the officer did not perform the horizontal gaze nystagmus exam (Resp. Sub. Br. at 20), or that the officer performed various field tests "out of approved enforcement sequence" (Resp. Sub. Br. at 20-21), or that the officer "could not tell from the odor the number, recency, quantity or quality of any alcohol imbibed" (Resp Sub. Br. at 24). But none of those "contradictions" refute the officers observations that supported probable cause.

Not once in his brief does Hinnah point to any part of cross-examination, or any other part of the record, where he adduced evidence that contradicted those facts specifically enumerated in Director's brief (see App. Sub. Br. 6-7, 9-12) . He cannot point to any such evidence.

Hinnah contends the officer's testimony was conflicted in several areas, but none relate to the facts cited by Director as evidence of probable cause. Hinnah's cross-examination did not create a legitimate credibility dilemma with respect to a material element. A driver must rebut with proof or evidence and not merely point out inconsistencies. *Hurley v. Director of Revenue,* 982 S.W.2d 694, 697 (Mo. App. E.D. 1998).

The Missouri Court of Appeals, Eastern District, recently distinguished *Kearney v. Director of Revenue, supra,* explaining that while a driver may rebut Director's prima facie case solely through cross examination, "it is insufficient to merely point out 'inconsistencies' that do not effectively rebut a material element of Director's case." *Phelps v. Director of Revenue*, 47 S.W.3d 395, 401-402 (Mo. App. E.D. 2001). "[C]ross-examination must at a minimum create a legitimate credibility dilemma with respect to a material aspect of the Director's case." *Id*. at 402.

In *Phelps*, the police officer over pulled over the driver for weaving within her own lane, following another car too closely, and failing to signal prior to a lane change. *Id.* at 39-400. The officer approached and noticed a strong odor of intoxicants, watery and bloodshot eyes and mumbled speech. *Id.* Phelps then failed four of six field sobriety tests, and refused a personal breath test. *Id.* The officer arrested her for driving while intoxicated. *Id.* At the

station Phelps agreed to take a test; the test indicated she had a .104 percent blood alcohol content. *Id.*

The Director suspended Phelps' driving privileges pursuant to §302.505 and she appealed to the St. Louis County Circuit Court. *Id.* at 399. Director called one witness at the hearing and Phelps called none. *Id.* at 398. Adopting the finding by the traffic commissioner, the circuit court reinstated Phelps' privileges. *Id.* at 399. On appeal, the Director alleged the trial court erred because she demonstrated probable cause for arresting Phelps, that Phelps had a BAC of .10 percent or higher, and Phelps failed to rebut the Director's prima facie case. *Id.*

As Hinnah does here, Phelps argued the appellate court had to assume the trial court found that the officer was not credible. *Id.* at 399; (Resp. Sub. Br. at 17, 19). But the court noted the trial court did not specifically find the officer to be incredible, and "'[w]hen the evidence supporting revocation is uncontroverted and the trial court has not specifically found the director's witness incredible, appellate courts will not presume that the trial judge found a lack of credibility and will not affirm on that basis.'" *Id. at* 399, *citing Mathews v. Director of Revenue,* 8 S.W.3d 237, 238 (Mo. App. E.D. 1999). Like Hinnah, Phelps contended he contradicted the Director's case, arguing the officer's testimony was "unclear, uncertain, and conflicted in several areas." *Id.* at 401. However, the *Phelps* court recognized that Phelps' cross-examination of the officer "focused on non-essential aspects of officer's testimony, and Phelps offered no evidence to support the contention that the BAC analysis was unreliable." *Id.* Because merely pointing out inconsistencies that do not "effectively

rebut a material element of Director's case" is insufficient to meet the driver's heavy burden to rebut the prima facie case by a preponderance of the evidence, the court found the trial court's judgment was against the weight of the evidence. *Id.* at 402.

The alleged "inconsistencies" to which Hinnah directs this Court's attention are insufficient to meet Hinnah's heavy burden in rebutting the prima facie case. A review of the direct and cross-examination of the officer, and the officer's reports, show Hinnah did not effectively rebut a material element of Director's case. Hinnah's cross-examination focused on non-essential aspects of officer's testimony. Hinnah did not create a legitimate credibility dilemma with respect to whether, from the perspective of the officer at the time of the arrest, probable cause existed for the arrest. The trial court's judgment finding a lack of probable cause was against the weight of the evidence.

Hinnah argues his witnesses, who testified that Hinnah was not driving, contradicted the officer's testimony (Resp. Sub. Br. at 21-22). They did not. Nothing those witnesses said controverted the observations made by the officer at the scene prior to arrest. A reviewing 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's witnesses were not present at the scene when the officer made his observations. They could not, and did not, dispute what the officer observed or was told by Hinnah.

The testimony of Hinnah's witnesses -- that Hinnah was not driving the vehicle -- was not relevant to a material aspect of the issue in question: Whether from the vantage point of the arresting officer there was probable cause to believe Hinnah was driving while intoxicated. Hinnah argues in his brief that no objection was lodged to the testimony so that the trial court was free to consider it (Resp. Sub. Br. at 17-18). But the trial court was not free to use this explanation, produced for the first time months after the arrest, and conclude the officer did not have probable cause *at the time of the arrest*. The trial court was required to evaluate the situation from the officer's shoes on January 1, 1999, as he stood on the roadside observing and listening to Hinnah, the only person present at the scene. To the extent the trial court relied on the testimony of Hinnah's witnesses, the decision was a misapplication of the law.

3. There is no merit to Hinnah's argument that because § 302.530.4 requires proof of actual driving, so must § 577.041.

Hinnah acknowledges the trial court found the Director made a prima facie case that Hinnah refused a test after an arrest based on probable cause (Resp. Sub. Br. at 18, 28, 30), but he mistakenly argues both that he had a right to litigate the factual issues of driving and intoxication, and that the trial court properly applied the law by basing its decision on those

factual issues (Resp. Sub. Br. at 28-29, 39).[2] Hinnah's mistaken belief is part of a common misconception of the trial court's role in refusal cases that has sometimes led courts to apply the wrong standard, and undermined the very purpose behind the refusal statute. This misconception -- the right to litigate the factual issues of intoxication and driving -- gave birth to *Kinsman v. Director of Revenue,*58 S.W.3d 27 (Mo. App. W.D. 2001), which has squeezed the life out of the implied consent law.

The genesis of the common misperception that the refusal arrestee has the right to prove he was not driving appears to be this Court's opinion in *Collins v. Director of Revenue,* 691 S.W.2d 246 (Mo. banc 1985). Collins was suspended for driving with excessive blood alcohol content under § 302.505. The Court noted that in such cases the Director was required, pursuant to § 302.530.4, to prove not only whether the arresting officer had probable cause but also whether the person had an excessive amount of blood alcohol concentration while he or she was driving. *Collins* at 252. Sections 302.505 and 302.530.4 are inextricably intertwined. Suspensions for driving while intoxicated and with excessive blood alcohol content cannot be reviewed without relying on both statutes. *See Collins* at 252. But § 577.041 has no provision akin to § 302.530.4, and there is nothing in § 577.041 that requires

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[2]Hinnah claims he had the right to plead and prove that proposition (Resp. Sub. Br. at 33). Interestingly, he did not plead that proposition in his petition, he only alleged he was not arrested, did not refuse the test, and the officer had no reasonable grounds to arrest him (L.F. 3-5).

or permits a reviewing court to graft § 302.530.4's requirement proof of actual driving onto it.

Kinsman acknowledged as much when it disapproved the implication in *McFarland v. Director* that in a refusal case pursuant to § 577.041 the Director has the burden of proving the person in question was actually driving. *Kinsman,* 58 S.W.2d at 31. The court explained that the Director's burden in a refusal case under § 577.041 is different from the burden in a hearing under § 302.535 or § 302.530. *Id.* 31. In fact, the *Kinsman* court stopped just short of entirely extinguishing the misconception that the arrestee has a right to litigate the factual issues of driving and intoxication.

The *Kinsman* court stoked the remaining embers of that misconception, by concluding that § 577.041 was "loosely drawn" and "assum[ing] there is an implied right" of the arrestee to prove he was not in fact driving. *Kinsman*, 58 S.W.3d at 32. "Otherwise," the court explained, "we would be faced with the anomalous and unjust result that someone who was not actually driving might have a revocation affirmed even after proving that he or she was not in fact driving at the time in question." *Id.* In other words, it might result in what the court would consider to be an unreasonable result. But this Court has plainly stated that a court cannot look at the reasonableness of the result rather than the language of the statute: "Where the statutory language is clear, the matter of reasonableness is for the legislature." *Messer v. King,* 698 S.W.2d 324, 325 (Mo. banc 1985). That case involved the construction of § 302.060(10), which prohibited the director from issuing any person a license if the application showed within the last five years prior to the application he was convicted a

second time for a DWI offense. The driver argued that the five-year ineligibility dated from the first conviction, not the second, and the trial court agreed. This Court reversed, explaining that "[t]he statutory language is crystal clear . . . [b]y the plain language of the statute [the driver] was ineligible to apply." *Id.* at 325.

The statutory language in § 577.041 is crystal clear. In fact, this Court and the Court of Appeals have consistently explained the statute is not loosely drawn: "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 was driving while intoxicated; and (3) whether the person refused to submit to the test." *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 the issues "not to be in the affirmative." *Id.*

Facing statutory language that was crystal clear, the *Kinsman* court was left to "assume" there is an "implied right" to litigate the issue of actual driving. *Kinsman* at 32. But the court did not cite authority or explain from where this "implied right" arises, or why it is proper to "assume" it exists. The court does try and contort the use of the word "only" in 577.041 to explain its rationale ("the use of the word 'only' makes clear the officer need not show more than probable cause"). That is certainly not the way this Court viewed the word in *Berry v. Director of Revenue, supra.* In § 577.041 and in this Court's opinion in *Berry*, the word "only" comes before three enumerated elements, which clearly shows a trial court is limited

to determining only those three issues. The *Kinmsan* court performed a feat of legal jujitsu by concluding that the word "only" applied only to the probable cause element.

More importantly, the rationale expressed in *Kinsman* does not honor the principle that "statutes which are not criminal statutes but rather remedial statutes should be enforced as written." *Messer,* 698 S.W.2d at 325. Remedial statutes must be construed to effect their beneficial purpose and should not be interpreted in a way that thwarts legislative intent to protect the public. *Appleby v. Director of Revenue,* 851 S.W.2d 540 (Mo. App. W.D. 1993). The United States Supreme Court has recognized the compelling interest states have in suspending those who refuse tests because it acts as a deterrent to drunk driving, provides an inducement to take the breath-analysis test, permits the state to obtain a reliable form of evidence for use in criminal proceedings, and summarily removes from the road licensees arrested for drunk driving who refuse to take the test. *Mackey v. Montrym,* 443 U.S. 1, 18-19, 99 S.Ct. 2612, 2621, 61 L.Ed.2d 321, 334-35 (1979).

That is, perhaps, what is most troubling about the *Kinsman* decision. It does not recognize the remedial purpose behind the refusal statute and why the legislature clearly stated that in a refusal case the Director must only prove probable cause supported the arrest of a person who refused the test.

In a recent refusal case in the Eastern District, the court acknowledged that remedial purpose, and confronted head on the "common misconceptions of the court's role" in refusal cases. *Soest v. Director of Revenue,* 62 S.W.3d 619, 621 (Mo. App. E.D. 2001). Soest presented evidence that she was not intoxicated, and the trial court in a detailed order set aside

the Director's suspension of her license for refusing a test. *Id.* at 620. On appeal the court noted that although the trial court demonstrated careful consideration, it applied the wrong standard. *Id.* at 621. "The proceeding is civil rather than criminal, and is not a trial on the issue of intoxication." The issue, the court explained, is "whether the officer had reasonable grounds to believe the arrestee was driving while intoxicated." *Id.* More precisely, "[t]he issue is one of the officer's 'reasonable grounds' rather than a factual determination of the issue of intoxication." *Id.* at 622. The court reinstated the suspension, concluding the trial judgment was not only an incorrect application of the law, but was contrary to the weight of the evidence. *Id.*

Soest demonstrates Hinnah is incorrect when he argues "[i]n both administrative suspension and refusal areas, the person arrested has a right and a duty to present evidence that he was not driving if he wishes to shift the inquiry away from the probable cause issue" (Resp. Sub. Br. at 39). The proceeding is "not a trial of the issue of intoxication . . . the issue is one of reasonable grounds" -- the arrestee never has the right to shift the inquiry away from the probable cause issue. *Soest* at 621-622.

The *Soest* court focused on the remedial purpose of the statute when they explained the refusal procedure. If reasonable grounds appear, the driver may be properly offered the test to determine whether an intoxicating level of alcohol is present; but "if the driver refuses to permit a more accurate determination of the question of intoxication by taking the test, the license may be revoked for one year." *Soest*, 62 S.W.3d at 621. "The procedure balances the right to privacy against the public's interest in controlling the menace of drunken driving." *Id.*

Collins v. Director of Revenue, supra, has led to the misperception that revocations for refusals and for driving while intoxicated offenses are reviewed using the same standard. But "[d]riving while intoxicated and refusing to take the chemical test [a]re separate transgressions occurring at separate times and places." *Brown v. Director of Revenue,* 772 S.W.2d 398, 400 (Mo. App. W.D 1989).

What the *Soest* and *Brown* courts recognize, and the *Kinsman* court ignores, is that the arrestee's license is revoked for *refusing the test* when reasonable grounds appear. The reason why "[t]he issue is one of 'reasonable grounds' rather than a factual determination on the issue of intoxication" and driving is because "[t]he "driver has rejected the opportunity to demonstrate that she was not impaired. She is privileged to reject the test, insofar as criminal charges are concerned, but it is appropriate to impose an administrative sanction for her failure to take the test when arrested on reasonable grounds." *Soest,* 62 S.W.3d at 622.

The legislature spoke clearly in establishing the sanction for refusal in 577.041. If the legislature has spoken clearly and Constitutionally on a subject, judicial determinations of what constitutes good policy must give way to that of the legislature. *Messer v. King,* 698 S.W.2d at 325.

It is time for this Court to fully extinguish the misconception that in a refusal case there is a right to litigate factual issues of driving and intoxication, and recusitate the implied consent law by enforcing the crystal clear statutory language in § 577.041, which the legislature enacted to protect the public.

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 4,801 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 29th day of April, 2002, to

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