IN THE
SUPREME COURT OF MISSOURI

RYAN YORK,	)	
	)	
Respondent,	)	
	)	
v.	)	**Case No. SC87159**
	)	
	)	
DIRECTOR OF REVENUE,	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Crawford County, Missouri
The Honorable J. Kent Howald, Judge

Appellant's Substitute Brief

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Jurisdictional Statement

This appeal is from a judgment, obtained in the Circuit Court of Crawford County, Missouri, ordering the Director of Revenue (Director) to reinstate the driving privileges of Ryan York (York) after his driving privileges were suspended under § 302.505, RSMo Supp. 2003. The trial court reinstated York's driving privileges and the Director of Revenue appealed. After an opinion by the Court of Appeals, Southern District, this Court took transfer of the case, on York's motion. Jurisdiction consequently lies in this Court. Article V, Section 10, Missouri Constitution (as amended 1982).

Statement of Facts

The Director suspended York's driving privileges and on October 14, 2003, York filed a "Petition for Trial de Novo of License Suspension/Revocation" in the Circuit Court of Crawford County (LF 4-5). On April 27, 2004, the trial court heard the matter (Tr. i). At the hearing, the Director presented testimony from Corporal Steven Childers and Trooper Rhonda Shanika,[1] both with the Missouri State Highway Patrol (Tr. i, 4, 6). The evidence adduced at hearing showed the following:

On May 23, 2003, York stopped at a sobriety checkpoint (Tr. 6-7). Trooper Shanika noticed a strong odor of alcohol on York's person, and his eyes were watery, bloodshot, and glassy (Tr. 7). York said that he had consumed 1 or 2 beers; the trooper testified that his speech was slurred when he admitted this (Tr. 7-8, 24-25, 34-35). Trooper Shanika also noted that York's balance was swaying and stumbling, and he had trouble making turns (Tr. 16).

Trooper Shanika asked York to perform the walk and turn and one leg stand field sobriety tests (Tr. 8, 39).[2] Trooper Shanika testified that during these tests, York had trouble

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[1] In the trial transcript, the trooper's name is spelled "Shannaka," but in the trooper's reports, she spells it "Shanika" (LF 14), so the Director uses the latter spelling here.

[2] The trooper also administered the horizontal gaze nystagmus test, but following voir dire by York's counsel, counsel for the Director elected to proceed without relying upon the results of that test (Tr. 9-16).

with walking and he swayed (Tr. 40-41). Trooper Shanika also indicated that she administered a portable breath test (PBT) to York at the scene, and the test indicated that York had a blood alcohol content (BAC) of greater than .08% (Tr. 24).

Trooper Shanika arrested York and read him Missouri's implied consent law (Tr. 25-26). She is permitted to administer breath tests on a Datamaster instrument and she followed the Missouri Department of Health approved checklist in administering the test to York (Tr. 26-27). Corporal Childers indicated that he had properly maintained the instrument (Tr. 4-5; LF 26-30). York's breath test revealed a BAC of .119% (Tr. 28; LF 25).

York cross-examined Trooper Shanika, who confirmed that York did not attempt to avoid the sobriety checkpoint and did not have difficulty producing his license (Tr. 29). Trooper Shanika admitted that she also did not recall if her general observation of York's swaying while balancing and walking was before or after arrest (Tr. 32-34). Trooper Shanika did note, however, that York swayed and had trouble with walking during the walk and turn and one leg stand tests, which were administered prior to arrest (Tr. 40-41).

York cross-examined Trooper Shanika extensively regarding her administration of the walk and turn and one leg stand tests and York objected to the results of those tests (Tr. 42-47, 50-51). Counsel for the Director argued, however, that the Director was not offering the walk and turn and one leg stand test results

> as the NHTSA tests with the various NHTSA certifications and percentages and whatnot. I do think that regardless, though, some of the commonplace observations contained therein that

> don't require any specialized training, such as noting a person having difficulty with their balance, swaying, stumbling, or whatever, should still be admissible

(Tr. 49).

The trial court sustained York's objection, and excluded "anything that's in the sobriety test portion of Exhibit A" (Tr. 50). York's counsel clarified that he was objecting because "the tests were improperly administered, interpreted, and scored" and the court, likewise, clarified, "that's why I ruled like I did and sustained your objection" (Tr. 51) and "[t]o make the record clear, Exhibit A is admitted, except for the portion of Exhibit A that is in the portion entitled, 'Sobriety Tests.' That portion of Exhibit A is excluded, and the balance of Exhibit A is admitted" (Tr. 52).

York offered documentary evidence, to which the Director objected and the court sustained the objection (Tr. 53-54). Otherwise, York did not offer any evidence or testify in his own behalf (Tr. 53-54).

The trial court entered lengthy findings and a judgment proposed by York (LF 43-54). The trial court found that York was not arrested upon probable cause to believe that his BAC was .08% or more by weight (LF 43). Notable among its many findings, which were requested by York, is the trial court's pronouncement that in order to comport with due process, the Director must lay a common law foundation for the admission of the PBT results (LF 46-53). Despite its lengthy findings, the trial court did not explicitly reach a conclusion as to York's BAC while driving (LF 43-54).

The Director timely appealed (LF 56-71).

Points Relied On

I

The trial court erred in excluding York's PBT result on due process grounds, because this ruling misapplies and misdeclares the law, in that § 577.021 provides that breath test results administered prior to arrest, like PBT results, "shall be admissible as evidence of probable cause to arrest," and due process does not require the proponent of such evidence to establish a foundation for its admission insofar as the chance of an erroneous deprivation of driving privileges is almost non-existent, there are numerous procedural protections in place regarding suspension or revocation of driving privileges, PBT results, by themselves, do not and cannot result in license suspension or revocation, and the state has a paramount interest in maintaining the safety of Missouri's roadways.

State v. Stottlemyre, 35 S.W.3d 854 (Mo.App., W.D. 2001)

State v. Duncan, 27 S.W.3d 486 (Mo.App., E.D. 2000)

Justice v. Director of Revenue, 890 S.W.2d 728 (Mo.App., W.D. 1995)

State v. Burns, 978 S.W.2d 759 (Mo. banc 1998)

§ 302.505.1, RSMo Supp. 2003

§ 577.021, RSMo Supp. 2003

II

The trial court erred in reinstating York's driving privileges because this ruling is not supported by substantial evidence and is against the weight of the evidence, in that the Director's evidence showed that York drove with a BAC of greater than .08 and that the trooper had probable cause to arrest York for driving while intoxicated based on York's strong odor of alcohol, his watery, glassy, and bloodshot eyes, his slurred speech, his admission of drinking one or two beers, his swaying and difficulty walking, and his result of .08 or greater on a PBT, and York presented no evidence to contradict or otherwise rebut the Director's prima facie case.

Brown v. Director of Revenue, 85 S.W.3d 1 (Mo. banc 2002)

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

Saladino v. Director of Revenue, 88 S.W.3d 64 (Mo.App., W.D. 2002)

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

§ 302.505.1, RSMo Supp. 2003

Argument

I

The trial court erred in excluding York's PBT result on due process grounds, because this ruling misapplies and misdeclares the law, in that § 577.021 provides that breath test results administered prior to arrest, like PBT results, "shall be admissible as evidence of probable cause to arrest," and due process does not require the proponent of such evidence to establish a foundation for its admission insofar as the chance of an erroneous deprivation of driving privileges is almost non-existent, there are numerous procedural protections in place regarding suspension or revocation of driving privileges, PBT results, by themselves, do not and cannot result in license suspension or revocation, and the state has a paramount interest in maintaining the safety of Missouri's roadways.

Standard of Review

In a bench trial, the judgment of the trial court will be upheld unless it is not supported by substantial evidence, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Eskew v. Director of Revenue*, 17 S.W.3d 159, 160 (Mo.App., E.D. 2000).

In her brief before the Court of Appeals, Southern District, the Director asserted this standard as the only governing standard in her sole Point Relied On (Appellant's Brief at 10). But in its opinion below, the Southern District took the Director to task for briefing the issue

of the admissibility of the PBT results and the issue of whether the Director actually made a prima facie case as to the probable cause element in one point, rather than two. *York v. Director of Revenue*, 2005 WL 2128961 at *3 (Mo.App., S.D. 2005). Briefing the two issues in one point was problematic, said the Southern District, because "[o]ne of the problems with addressing multiple allegations of error is that each of these allegations involves a different standard of review as well." *Id.* The Southern District then explained that while the issue of whether the Director made a prima facie case is governed by the familiar *Murphy v. Carron* standard, set forth immediately above, evidentiary issues are decided under an abuse of discretion standard. *Id., citing Thurmond v. Director of Revenue*, 759 S.W.2d 898, 899 (Mo.App., E.D. 1988).

Thurmond, however, did not involve admissibility of a PBT result. Rather, there the Director had urged, incorrectly, that the trial court abused its discretion in discrediting the police officer's testimony; in that context, the credibility of witnesses is certainly the prerogative of the trial court, as finder of facts. But the abuse of discretion standard is not so obviously applicable here. While admission of PBT test results is, generally speaking, an evidentiary matter, the admission of those results, as will be explained below, is governed specifically by a statute that says that PBT results "shall be admissible" for a very specific purpose – to show probable cause. *See* § 577.021, RSMo Supp. 2003.

And "shall," on its face, does not connote discretion like the discretion involved where a trial court, sitting as finder of facts, determines the credibility of witnesses. *See Thurmond*, 759 S.W.2d 899. Nor, for that matter, is an evidentiary ruling excluding a PBT result that,

by statute, "shall be admissible" to show probable cause, equivalent to the types of evidentiary rulings where courts must weigh the competing probative value versus prejudicial effect of various types of evidence. *See, e.g., State v. Feltrop*, 803 S.W.2d 1, 10-11 (Mo. banc 1991), *cert. denied*, 501 U.S. 1262 (1991) (court has broad discretion in admitting photographs, which involves weighing the photographs' probative value against their prejudicial effect); *State v. Lawson*, 50 S.W.3d 363, 366 (Mo.App., S.D. 2001) (court has discretion regarding admission of evidence of other crimes and determination as to whether such evidence falls within a recognized exception to the general bar against evidence of other crimes and is otherwise logically and legally relevant).

Likewise, that PBT results "shall be *admissible*" to show probable cause connotes that the PBT evidence should come in for that purpose, without any discretion or weighing of the evidence. *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998). In *Burns*, this Court found that § 566.025, RSMo 1994, violated the Missouri Constitution. That section had decreed that evidence of other charged and uncharged crimes "shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged." In discussing this language, and in striking down the statute, this Court noted that the language "makes no provision for consideration of whether evidence is logically or legally relevant. Rather, its language is mandatory." *Burns*, 978 S.W.2d at 761. So it is here – the language of § 577.021 is mandatory, and there is nothing discretionary about it.

As a result, the Director disagrees with the Southern District that the admissibility of the PBT result is governed by a separate, abuse of discretion standard. As explained more

fully below, the statute at issue is explicit and mandatory, and the trial court's failure to admit the PBT result to show probable cause in the face of a statute that says exactly the opposite is a simple misapplication of the law that is therefore encompassed within the *Murphy v. Carron* standard. Out of an abundance of caution, however, and because the Southern District's discussion of the standard of review issue merited and, indeed, required discussion of the applicable standard here, we break out this issue of the admissibility of the PBT into this separate point.

The Director's prima facie case

In order for the Director to revoke or suspend driving privileges for an alcohol-related offense, the Director must prove, by a preponderance of the evidence, that 1) the officer had probable cause to arrest the driver for an alcohol-related offense, and 2) the driver was driving with a BAC at or above the legal limit. *Hill v. Director of Revenue*, 985 S.W.2d 824, 827 (Mo.App., W.D. 1998).

Pre-arrest breath test results, like PBT results, "shall be admissible as evidence of probable cause"

The Missouri legislature has passed a statute regarding the admissibility of PBT's. The text of § 577.021, RSMo Supp. 2003, is not complicated; indeed, it could hardly be more explicit:

> Any state, county or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified pursuant to chapter 590, RSMo,

> may prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 or 577.012. **A test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content.** The provisions of section 577.020 shall not apply to a test administered prior to arrest pursuant to this section.

(emphasis supplied).

As explained, the text of the statute, which indicates that PBT results "shall be admissible as evidence of probable cause" is mandatory. *Burns*, 978 S.W.2d 761. Here, the trooper administered such a pre-arrest test, a PBT, to York, which showed that York's BAC was greater than .08% (Tr. 24). This result was thus supportive of the trooper's probable cause and should have been admitted for that purpose.

The administration of a PBT does not invoke due process protections

The trial court did not dispute the existence of § 577.021 – in fact, it cited the statute, though it did not discuss or analyze it in any measure. Rather, the trial court found that the trooper administered the PBT improperly (LF 46). Then, citing a case from California, the trial court found that "Due Process requires the Director to lay a proper foundation for the admission of PBT evidence" (LF 48, *citing Coniglio v. Department of Motor Vehicles*, 39 Cal. App. 4th 666, 667 (Cal App 1995)). The trial court ruled that before the results of a PBT

could be admitted, the statute notwithstanding, due process required the Director of Revenue to establish: 1) that the PBT was functioning properly; 2) that the PBT was properly administered; and 3) that the operator was competent and qualified (LF 49). Ultimately, therefore, the trial court concluded that, "[a]dmitting the PBT test result, under the facts and circumstances of this case, would be to deny the petitioner Due Process" (LF 49).

Coniglio, however, has little application here, in Missouri. In that case, the California Court of Appeals held that although California Department of Health regulations did not apply to PBT's, due process required that the state establish certain foundational prerequisites prior to the admission of PBT results. 39 Cal.App.4th at 682. But in so holding, the California court was construing a California statute that was different from the applicable Missouri statute in at least three ways. Most significantly, the statute at issue in *Coniglio* was a zero tolerance statute that permitted PBT results to be used as proof of the presence of alcohol concentration, subjecting the driver to the loss of his or her license under the zero tolerance law. *Id.* at 673-74. In Missouri, in contrast, PBT results cannot be used to determine a driver's BAC and do not subject the driver to a loss of license based upon the results. Section 577.021; *State v. Duncan*, 27 S.W.3d 486, 488 (Mo.App., E.D. 2000). Secondly, a Missouri appellate court has already held, in the criminal context, that no foundation need be established for admission of PBT results to show probable cause for arrest. *State v. Stottlemyre*, 35 S.W.3d 854, 858-61 (Mo.App., W.D. 2001). Finally, our legislature has already taken the relative unreliability of PBT's into account by rendering the results inadmissible to prove BAC, and admissible only as supportive of probable cause, or

a lack thereof. Section 577.021; *Duncan*, 27 S.W.3d at 488. *Coniglio*, therefore, is neither binding nor persuasive.

Putting *Coniglio* aside, York fares no better when considering due process generally. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id., quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Moore v. Board of Education*, 836 S.W.2d 943, 948 (Mo. banc 1992). "Due process also requires that in order to deprive a person of a property interest, the government must give notice and provide an opportunity for a hearing appropriate to the nature of the case." *Dabin v. Director of Revenue*, 9 S.W.3d 610, 615 (Mo. banc 2000).

The Due Process Clause applies to state deprivation of an individual's driver's license. *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Dabin*, 9 S.W.3d at 615. Thus, in cases involving the suspension or revocation of issued driver's licenses, "the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). "The due process clause requires a 'meaningful' hearing in which consideration of all elements essential to the decision as to whether a license to operate a vehicle may be suspended are considered." *Jarvis v. Director of Revenue*, 804 S.W.2d 22, 24 (Mo. banc 1991).

In *Mathews v. Eldridge*, the United States Supreme Court set forth a balancing test (the *Mathews* Test) to determine what process is due when there is a governmental deprivation of a liberty or property interest. The *Mathews* Test identifies three factors that must be considered in determining the process due: 1) "the private interest that will be affected by the official action;" 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and" 3) "the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Under the *Mathews* Test, the private interest that could be affected here is the suspension or revocation of a granted driver's license. Turning to the second prong of the *Mathews* Test, there is almost no risk of an erroneous deprivation of a driver's license due to the results of a PBT as there are already considerable procedural safeguards in place for driver's license suspensions and revocations, and PBT results, by themselves, do not trigger suspension or revocation proceedings.

Section 302.505 contains a number of procedural protections for a driver facing the possibility of a license suspension or revocation. First, a suspension or revocation cannot occur unless the Department of Revenue determines "that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight." Section 302.505, RSMo Supp. 2003. Under this statutory scheme, the

Department is required to make two determinations: 1) that the officer had probable cause to arrest the driver for violating an alcohol-related offense; and 2) that the driver's BAC equaled or exceeded .08%. *Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 545 (Mo. banc 2003).

The results of a PBT can only be used in the probable cause determination. Section 577.021, RSMo Supp. 2003; *Duncan*, 27 S.W.3d at 488. The PBT cannot be used to determine BAC. Section 577.021, RSMo Supp. 2003; *Duncan*, 27 S.W.3d at 488. A determination of BAC under § 302.505 can only be based upon testing conducted under §§ 577.020 and 577.026, and the regulations promulgated by the Missouri Department of Health and Senior Services, 19 CSR 25-30.011-30.080. *Coyle v. Director of Revenue*, 88 S.W.3d 887, 895 (Mo.App., W.D. 2002). Therefore, in order to satisfy the BAC requirement of § 302.505, there must be: 1) a test performed by following the techniques and methods approved by the Department of Health and Senior Services; 2) conducted by licensed medical personnel or by a person possessing a valid permit; and 3) using approved equipment and devices. *Id.*; *Coyle v. Director of Revenue*, 2005 WL 3112128 at *1 (Mo. banc November 22, 2005).

PBT results, accordingly, cannot be used to determine BAC because § 577.021 explicitly prohibits it and PBT's have not been approved by the Department of Health and Senior Services as testing devices. *See* 19 CSR 25-30.050. And because of the BAC requirement of § 302.505, PBT results cannot cause an erroneous deprivation of a driver's license, and drivers have protections against unreliable BAC readings, because of the

extensive requirements of Chapter 577 and the regulations. Adding foundational requirements to the admission of PBT results would add little value and would be needlessly duplicative of the requirements for admission of evidential BAC tests.

Indeed, the BAC testing requirements are not the only procedural protections against erroneous deprivations of driver's licenses. The legislature has enacted a statutory scheme that provides a number of procedural protections, including a pre-deprivation hearing and trial de novo. Sections 302.500-302.540, RSMo. Given the requirements for the determination of a driver's BAC and the fact that a driver can request a pre-deprivation hearing, there is almost no likelihood that a driver's license could be erroneously suspended or revoked, and the foundational requirements imposed by the trial court have little additional value.

Under the final prong of the *Mathews* Test, the State's interest, the State has a paramount interest in preserving the safety of its highways by removing drunken drivers from the roads. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979). States have been traditionally afforded great leeway in adopting procedures to protect public health and safety. *Id.* To that end, the PBT is a valuable time saver because it precludes extensive investigation in determining probable cause. *Justice v. Director of Revenue*, 890 S.W.2d 728, 730 (Mo.App., W.D. 1995). Certainly, the convenient use of the PBT for determination of probable cause "serves the state's legitimate interest in suspending or revoking driver's licenses 'to prevent the slaughter on our highways which might occur if intoxicated persons were permitted to

drive.'" *Richie v. Director of Revenue*, 987 S.W.2d 331, 337 (Mo. banc 1999), *quoting Collins v. Director of Revenue*, 691 S.W.2d 246, 250 (Mo. banc 1985).

Given the extent of procedural protections already in place, that the chance of an erroneous deprivation is almost nonexistent, and the state's interest in preserving the safety of its roads and highways, due process does not require that the foundational elements espoused by the trial court be laid for PBT results to be admissible for the narrow purpose of supporting probable cause. Therefore, the trial court erroneously declared and applied the law when it extended due process protections to PBT results and must be reversed.

Reasonably prudent, cautious, trained police officers rely on PBT results when making probable cause determinations

The trial court also excluded the PBT result on the theory that no reasonably prudent, cautious, trained police officer would rely on the PBT in making probable cause determinations unless she: 1) had received formal training in how to use the PBT and knew exactly what make and model was being used; 2) knew how the PBT worked internally; 3) knew the last time the PBT had been checked for accuracy; and 4) observed the subject to insure that nothing occurred that would affect the accuracy of the test (LF 51). But Missouri law contains no such requirements, and in making its ruling the trial court ignored the purposes of utilizing PBT's and erroneously declared and applied the law.

Reaching once again into the non-binding jurisprudence of other states, the trial court based its ruling on *Bokor v. Department of Licensing*, 874 P.2d 168 (Wash. App. 1994) (LF 50-51). The trial court's reliance on *Bokor* was misplaced, however, because unlike

Missouri, Washington courts do not consider the results of a PBT for any purpose. *Thompson v. State Department of Licensing*, 960 P.2d 475, 477 (Wash. App. 1998) (holding that "the results of a portable breath test are not admissible as evidence at trial or to establish probable cause for arrest"). Missouri, on the other hand, has a statute that expressly governs the admissibility of PBT results. And, at the risk of being repetitive, § 577.021 provides, plainly and explicitly, that "[a] test administered pursuant to this section **shall** be admissible as evidence of probable cause to arrest and as exculpatory evidence, and **shall not** be admissible as evidence of blood alcohol content" (emphasis added).

Section 577.021 does not contain any foundational prerequisites to the admission of PBT evidence. Furthermore, the legislature chose not to require that PBT's meet the dictates of §§ 577.020 and 577.026 or the regulations promulgated by the Department of Health and Senior Services. *Stottlemyre*, 35 S.W.3d at 860-61. Notably, compliance with §§ 577.020 and 577.026 and the Department of Health regulations serves as "a substitute for the common law foundation for the introduction of analysis for blood alcohol" and yet the legislature has chosen to exempt PBT's from those foundational requirements. *State v. Regalado*, 806 S.W.2d 86, 88 (Mo.App., W.D.1991), *quoting State v. Peters*, 729 S.W.2d 243, 245 (Mo.App., S.D. 1987). PBT's are treated differently from approved testing devices that can be used to prove BAC because, as noted, PBT's have a different purpose. *Stottlemyre*, 35 S.W.3d at 860-61.

While post-arrest evidential tests can be introduced to establish the driver's actual BAC, PBT's are not considered tests within the scope of § 577.020, and are admissible only

as evidence of probable cause or as exculpatory evidence. *Id.* The legislature has already addressed the trial court's reliability concerns by determining that PBT's are too unreliable to be used to prove intoxication. *Duncan*, 27 S.W.3d at 488. In adding further foundational requirements, the trial court ignored the purposes of utilizing PBT's in the field.

As explained, the PBT is a time saver that relieves the officer from having to make an extensive examination to determine probable cause. *Justice*, 890 S.W.2d at 730. Other jurisdictions that allow PBT results to be used as evidence of probable cause have endorsed a similar rationale. "In enacting this section the legislature's underlying purpose was to provide peace officers with the tool of a quick, convenient test to assist officers in determining whether an arrest should be made." *State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987). The "primary purpose [of the PBT] is to aid police officers in assessing probable cause to arrest. [The Illinois statute] addresses the problem when a police officer *incorrectly believes* a person's blood-alcohol content meets the statutory standard for intoxication, and the officer then *wastes his or her valuable law enforcement time* driving to the test site only to find the person is not intoxicated." *People v. Rose*, 643 N.E.2d 865, 869-70 (Ill. App. 1994)(emphasis in original). "We view the alco-sensor as a quick and minimally intrusive investigative tool which performs a valuable function as a screening device." *State v. Orvis*, 465 A.2d 1361, 1362 (Vt. 1983). "Further, we see no difference in the officer's use of the alco-sensor test than in the use of manual dexterity tests such as the finger-to-nose test, to determine probable cause, the use of which tests are unquestioned.

Thus the trial court erred in not admitting the alco-sensor test to establish probable cause." *State v. Johnson*, 503 N.E.2d 431, 433 (Ind. App. 1987).

Trooper Shanika testified that she had used her PBT for over seven years and had used it several times during that period (Tr. 21). Trooper Shanika also testified that she had found the PBT to be a reliable indicator of subjects' BAC readings, and that she relied on it in making probable cause determinations (Tr. 22).

Under such circumstances, a prudent, cautious and trained police officer would rely on PBT results in determining probable cause. And, while York got the trooper to concede that she did not follow the PBT's "operator guidelines," and that in her opinion, an officer should not rely on an improperly administered field sobriety test (Tr. 20), manufacturer's guidelines hardly constitute the force of law. And, ultimately, the trooper's subjective opinion in that regard is not relevant. As to the latter in particular, "[c]onstitutionally sound probable cause is not dependent upon the subjective intentions of the officer. 'Subjective intentions play no role in ordinary, probable-cause Fourth Amendment Analysis.'" *State v. Lane*, 937 S.W.2d 721, 723 (Mo. banc 1997), *quoting Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

In sum, the trial court erred in excluding York's PBT result because such results, by statute, "shall be admissible" to show probable cause to arrest. The trooper here, and law enforcement officers, generally, can and should rely on PBT results in ascertaining probable cause because the statute says so, and because the PBT provides a quick, minimally intrusive tool for law enforcement to quickly separate impaired drivers from non-impaired drivers.

The admission of PBT results does not implicate due process protections because of the numerous procedural protections already in place as pertains the revocation or suspension of driving privileges, because the PBT, by itself, does not result in license consequences, and because the state has a paramount interest in preserving the safety of its roadways. The trial court, having misdeclared and misapplied the law, should be reversed.

II

The trial court erred in reinstating York's driving privileges because this ruling is not supported by substantial evidence and is against the weight of the evidence, in that the Director's evidence showed that York drove with a BAC of greater than .08 and that the trooper had probable cause to arrest York for driving while intoxicated based on York's strong odor of alcohol, his watery, glassy, and bloodshot eyes, his slurred speech, his admission of drinking one or two beers, his swaying and difficulty walking, and his result of .08 or greater on a PBT, and York presented no evidence to contradict or otherwise rebut the Director's prima facie case.

Standard of Review

In a bench trial, the judgment of the trial court will be upheld unless it is not supported by substantial evidence, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *Eskew v. Director of Revenue*, 17 S.W.3d 159, 160 (Mo.App., E.D. 2000).

If the disputed question is not a matter of contradiction by different witnesses, this Court is not required to defer to the trial court's findings of credibility. *Hopkins-Barken v. Director of Revenue*, 55 S.W.3d 882, 885 (Mo.App., E.D. 2001). "In addition, our standard of review does not permit us to disregard uncontroverted evidence that support[]s the Director's contention that all elements were proved." *Id.* "Deference to the trial court's findings is not required when the evidence is uncontroverted and the case is virtually one of

admitting the facts or when the evidence is not in conflict." *Marsey v. Director of Revenue*, 19 S.W.3d 176, 177 (Mo.App., E.D. 2000). On review, the appellate court does not accord any deference to the trial court's declarations or applications with respect to issues of law. *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994). Therefore, questions of law are reserved for the independent judgment of the reviewing court. *Id.*

As discussed in Point I above, the Court of Appeals, Southern District, took the Director to task for not briefing multiple points; in particular, here, the Southern District would have the Director brief the probable cause issue on the one hand, and whether York rebutted it on the other, as two separate points. *York v. Director of Revenue*, 2005 WL 2128961 at *3 (Mo.App., S.D. 2005). According to the Southern District, while the probable cause issue is analyzed under the *Murphy v. Carron* framework, the issue of whether York met his burden of production and rebutted the Director's prima facie case should be analyzed using the standard of review set forth in *Verdoorn v. Director of Revenue*, 119 S.W.3d 543, 546 (Mo. banc 2003).

The Director disagrees. The familiar standard of *Murphy v. Carron* presents the standard of review on both issues; whether the Director met her burden of proof at trial, and whether York rebutted the Director's prima facie case, are viewed in terms of whether the trial court's decision (as pertains probable cause here) was against the weight of the evidence or unsupported by substantial evidence. Indeed, in *Verdoorn* itself, this Court sets out the standard of review as the standard articulated in *Murphy v. Carron*. *Verdoorn*, 119 S.W.3d

at 545. After that, this Court, in *Verdoorn*, discussed the burden of proof and production issues – issues that pertain to the burdens that the parties must shoulder *at trial*, not the standard of review *on appeal*. *Verdoorn*, 119 S.W.3d at 546. *Verdoorn*, therefore, no more sets forth a standard of review on appeal than does, for example, the reasonable doubt standard in a criminal context.

For this reason, it is not necessary to set out two separate points as pertains the probable cause issue – one as to whether the Director made a prima facie case and one as to whether York rebutted it – because the standard of review is the same. Further, in a case like York's, where the driver presents no evidence whatsoever, the analysis is not terribly complicated in terms of whether the driver has rebutted the case, and it seems a needless exercise to set forth a separate point that states that the driver simply could not have rebutted the Director's prima facie case because he did not put on any evidence at all.

The Director's prima facie case

In order for the Director to revoke or suspend driving privileges for an alcohol-related offense, the Director must prove, by a preponderance of the evidence, that 1) the officer had probable cause to arrest the driver for an alcohol-related offense, and 2) the driver was driving with a BAC at or above the legal limit. *Hill v. Director of Revenue*, 985 S.W.2d 824, 827 (Mo.App., W.D. 1998); § 302.505.1, RSMo Supp. 2003.

Driving with a BAC at or above the legal limit

To introduce evidence of the driver's BAC, the Director generally "must show that the breath analyzer test was performed (1) by following the approved techniques and methods of the Division of Health, (2) by an operator holding a valid permit, and (3) using equipment and devices approved by the division." *Id.*; *Coyle v. Director of Revenue*, 2005 WL 3112128 at *1 (Mo. banc November 22, 2005).

As noted, the trial court did not make any specific finding as to York's BAC (LF 43-54). But this element was not in controversy. Trooper Shanika testified that York's BAC was .119, and York did not object (Tr. 28). York presented no evidence at all, much less any evidence that would raise a genuine issue of fact as to the validity of the BAC test results. *See generally, Verdoorn,* 119 S.W.3d at 546. There cannot be any dispute but that York's BAC exceeded the legal limit.

Probable cause

"Probable cause for arrest exists when an officer possesses facts which would justify a person of reasonable caution to believe that an offense has been committed or is being committed and that the individual to be arrested committed it." *Misener v. Director of Revenue*, 13 S.W.3d 666, 668 (Mo.App., E.D. 2000), *overruled on other grounds by Verdoorn*, 119 S.W.3d at 547.

This probable cause element is distinct from proving actual intoxication, which the Director does not have to show. *Brown v. Director of Revenue*, 85 S.W.3d 1, 3-4 (Mo. banc 2002), *citing Soest v. Director of Revenue*, 62 S.W.3d 619, 622 (Mo.App., E.D. 2001). And, "[t]here is a 'vast gulf' between the quantum of information necessary to establish probable

cause and the quantum of evidence required to prove guilt beyond a reasonable doubt." *Brown*, 85 S.W.3d at 4, *quoting Rain v. Director of Revenue*, 46 S.W.3d 584, 588 (Mo.App., E.D. 2001). "The standard for determining probable cause is the probability of criminal activity, not a prima facie showing of guilt." *Wilcox v. Director of Revenue*, 842 S.W.2d 240, 243 (Mo.App., W.D. 1992).

Here, when Trooper Shanika encountered York at the sobriety checkpoint, she noticed that York had a strong odor of alcohol on his person, "one of the classic indicia of intoxication" which provides "sufficient probable cause to believe" that a subject is intoxicated. *Saladino v. Director of Revenue,* 88 S.W.3d 64, 71 (Mo.App., W.D. 2002). York also had watery, glassy, and bloodshot eyes (Tr. 7) symptoms that are commonly found in persons who have consumed intoxicants. *See Clark v. Director of Revenue*, 132 S.W.3d 272, 275-276 (Mo.App., S.D. 2004); *Melvin v. Director of Revenue*, 130 S.W.3d 11, 13-14 (Mo.App., E.D. 2004). He told Trooper Shanika that he had consumed one or two beers, and he slurred his words when he disclosed this (Tr. 7-8, 24-25, 34-35). York's BAC tested above .08% on a PBT (Tr. 24). These kinds of observations would normally be more than sufficient to establish probable cause to believe that York was driving while intoxicated. *See Soest*, 62 S.W.3d at 621-622; *Peters v. Director of Revenue*, 35 S.W.3d 891, 896 (Mo.App., S.D. 2001).

Further, Trooper Shanika administered field sobriety tests to York (Tr. 8, 39). The trial court excluded the results of the field sobriety tests, based upon York's concern that they were improperly "administered, interpreted, and scored" (Tr. 51). But while it is true that

the results of these types of tests may be disregarded by this Court if they were not administered pursuant to NHTSA's standards, commonplace observations of behavior unique to intoxicated persons may still support an officer's probable cause. Put another way, while incorrect administration of the tests may impugn NHTSA's validation of the tests as indicators of intoxication such that the results are rendered inadmissible, an officer's observations of such things as swaying and difficulty with walking can still provide information supportive of probable cause. *See Brown*, 85 S.W.3d at 5-6 (even though the trial court and this Court disregarded the field sobriety tests because an expert indicated that the trooper had administered them incorrectly, this Court still considered the fact that Brown put his foot down during the one leg stand test as a factor supportive of the trooper's probable cause). Here, Trooper Shanika testified that during the walk and turn and one leg stand tests, York had difficulty walking and swayed (Tr. 39-41).

Moreover, even if the trooper's observations in this regard are disregarded, that does not otherwise vitiate her probable cause; probable cause can be found without "any pronounced impairment of . . . balance, walking, or turning." *Peters*, 35 S.W.3d 896-897. And that probable cause, as noted, was supported by numerous other facts, notably the strong odor of alcohol, York's watery, glassy, and bloodshot eyes, and the result of the PBT.

York also admitted that he had consumed one to two beers (Tr. 7-8). In *Soest*, 62 S.W.3d at 621, Soest merely admitted that she had one beer, several hours earlier, but the Court of Appeals, Eastern District held, "[t]his admission justified the officer in offering her the chance for an accurate measuring of her alcohol level so that it could be compared to the

statutory standard." Plus, when York admitted imbibing, he slurred his speech (Tr. 7-8, 24-25, 34-35). And, while it is true that York impeached the trooper with the fact that, at the administrative hearing, the trooper could not remember which word or words York slurred (Tr. 34-35), York did not otherwise controvert that his speech was slurred. But in any event, the arrest report does not call for that information, *i.e.*, the particular word or words slurred (Tr. 39).

Further, "[w]hen a witness has personally observed events, he may testify to his 'matter of fact' comprehension of what he has seen in a descriptive manner which is actually a conclusion, opinion, or inference, if the inference is common and accords with the ordinary experiences of everyday life." *Singer v. Director of Revenue*, 771 S.W.2d 375, 377 (Mo.App., E.D. 1989), *quoting State v. Morrow*, 541 S.W.2d 738, 742 (Mo.App. 1976). Slurring is the type of event that accords with ordinary experiences of everyday life such that a witness may testify in conclusory terms about it, without having to document the particular words or syllables on which a subject did or did not slur, or the manner in which those words were slurred, mispronounced, or poorly articulated.

Finally, York produced a PBT test result of greater than .08% (Tr. 24). York objected to this test result on the basis that the Director failed to lay a proper foundation, and the trial court, in its extensive findings, agreed, finding that such a foundation was required in order to comport with due process (LF 48). For the reasons explained in Point I of this brief, however, the trial court's ruling was simply wrong, and the PBT result should have been considered, under § 577.021, as yet another fact supporting the trooper's probable cause.

York did not rebut the Director's prima facie case

York presented no evidence to rebut the Director's prima facie case (Tr. 53-54). Indeed, because York did not testify in his own behalf, this raises the presumption that anything he might have said would have been unfavorable to him. *McCarthy v. Director of Revenue*, 120 S.W.3d 760, 763 (Mo.App., E.D. 2003); *Smith v. Director of Revenue*, 77 S.W.3d 120, 122 (Mo.App., W.D. 2002). This presumption, together with the evidence outlined above and the erroneously excluded PBT result that showed that York's BAC was greater than .08%, provided the trooper with probable cause to arrest York for driving while intoxicated.

Conclusion

In view of the foregoing, appellant Director submits that the judgment of the trial court should be reversed and the cause remanded for the trial court to reinstate the Director's action against York's driving privileges.

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 12th day of December, 2005, 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 8,250 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Deputy Solicitor

Appendix

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