IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

RYAN YORK,	)	
	)	
Respondent,	)	
	)	
v.	)	**Case No. SD26339**
	)	
	)	
DIRECTOR OF REVENUE,	)	
STATE OF MISSOURI,	)	
	)	
Appellant.	)	

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

RESPONDENT'S 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 (hereinafter referred to as "York") after his driving privileges were suspended. Pursuant to §302.311, RSMo 2000, appeals from drivers license cases are taken as in civil cases. This appeal does not involve the validity of a treaty or statute[1] of the United States, or of a statute or provision of the Constitution of this state, the construction of the revenue laws of this state, or the title to any state office. Therefore, this Court has jurisdiction. Article V, §3, Missouri Constitution (as amended 1982); §477.060, RSMo 2000.

[1]While Section 577.021 says a PBT is admissible for probable cause purposes, the trial court below determined that due process precludes admission where the test is given using a device that has not been checked for calibration, and which is improperly administered by one who is not competent to administer it. York says that because of the trial court's ruling, the application of the statute to him, thus far, has been constitutional.

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. 2). At the hearing, the Director presented testimony from Trooper Rhonda Shanika,[2](hereinafter referred to as "Trooper") of the Missouri State Highway Patrol, who testified as follows:

On May 23, 2003, York was stopped at a sobriety checkpoint (Tr. 6-7). There were "checkpoint ahead" signs set up in advance of the checkpoint, and a street where someone could turn off if they didn't want to go through the checkpoint. (Tr. 29). York made no attempt to avoid the checkpoint. (Tr. 29). Trooper did not recall observing any problems with York's driving as he pulled up to the checkpoint. (Tr. 31). When Trooper approached York's vehicle and asked for his license and insurance card, York was able to produce those items without any difficulty. (Tr. 29). Trooper Shanika testified that in her experience, sometimes people who are under the influence will have difficulty or will fumble around looking for those items. (Tr. 29).

Trooper Shanika testified that when she asked York if he had been drinking, he replied that he had one or two beers. (Tr. 7-8; 29). Trooper Shanika testified that she had

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[2] 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 Respondent uses the latter spelling here.

no idea when York had last consumed any alcoholic beverages prior to the stop or prior to her administering the portable breath test ("PBT") to York. (Tr. 29). Trooper Shanika testified that she noticed a strong odor of alcohol on York's person, and that his eyes were watery, bloodshot, and glassy (Tr. 7). Trooper Shanika agreed that she could not tell if someone was intoxicated simply by smelling their breath or by just generally looking at their eyes. (Tr. 30).

Trooper Shanika testified that she administered field sobriety tests to York because she can't tell if someone is drunk simply by smelling his breath or looking at his eyes. (Tr. 30). She testified that the reason she administered field sobriety tests in this case was to develop probable cause to make an arrest if that was appropriate. (Tr. 31). Trooper Shanika testified that she considered herself to be a reasonably prudent, cautious trained police officer. (Tr. 15). She testified that a reasonably prudent, cautious trained police officer would not rely upon the results of an improperly administered field sobriety test when making a probable cause determination. (Tr. 15).

Trooper Shanika had attempted to administer the Horizontal Gaze Nystagmus test to York, but the test was improperly administered and the trial court excluded any evidence concerning the results of that test following voir dire by York's counsel. (Tr. 9-16; Tr. 51). Among other things, Trooper Shanika had checked for equal tracking and smooth pursuit of the eyes at the same time instead of separately, she only checked for each of the clues one time, instead of twice, and she could not recall how many seconds she took when checking each eye for smooth pursuit. (Tr. 14-16). Trooper Shanika, who was trained to administer

the HGN test according to NHTSA guidelines, admitted that she did not do so in this case. (Tr. 9; 15).

Trooper Shanika also administered a PBT test to York. (Tr.17-24). During voir dire by York's attorney, Trooper Shanika testified that she had no formal training in how to operate her portable breath test unit. (Tr. 17). She testified that she had not personally checked her instrument for calibration and had not observed anyone else do so. (Tr. 17-18). Trooper Shanika testified that there are operating guidelines for using her PBT device, including a 15-20 minute observation period before administering the test. (Tr. 18). Trooper Shanika testified that she initially contacted York at the checkpoint at 19:43 hours and arrested him at 19:46 hours and that she did not have York under her observation for 15 or 20 minutes prior to administering the PBT test. (Tr. 18-19). Trooper Shanika testified that she did not have any understanding of how her PBT worked internally at the time she administered the test to York, and she did not know if it was a fuel-cell or infrared-type device. (Tr. 19). She testified that a portable breath test is like any other field sobriety test, in that it is used to help develop probable cause to arrest. (Tr. 19). Trooper Shanika testified that a reasonably prudent, cautious trained police officer should know how to properly administer a PBT test, that such an officer should have some basic understanding of how the instrument works, and how to utilize it, and should follow the proper operating guidelines for the use of the instrument. (Tr. 20). Trooper Shanika testified that in this case, she did not follow the operating guidelines. (Tr. 20). Trooper Shanika testified that an officer should not rely upon the results of an improperly administered field sobriety test

when making a probable cause determination. (Tr. 20).

Following voir dire examination, York moved to strike and prohibit any further testimony by Trooper Shanika concerning the results of the PBT test. (Tr. 20). York argued that the test was improperly administered and the result should not be admitted. (Tr. 20). Director argued that the portable breath test was admissible under Section 577.021, and that no foundation is required. (Tr. 21). Judge Howald overruled York's objection. (Tr. 21). Trooper Shanika then testified she had used her PBT for seven years. (Tr. 21). When asked if she had any idea how many times she had used it, she responded: "I couldn't give you a number. Several." (Tr. 21). Trooper Shanika testified that based upon her experience with her PBT, she had come to rely upon it when making probable cause determinations. (Tr. 22). She testified that she has found it to be a reliable indicator of a subject's BAC. (Tr. 22). However, she testified that when she administered the PBT test on past occasions, she would normally wait 15 minutes before giving the test. (Tr. 33). Later, while completing the interview portion of the A.I.R., Trooper asked York when he last consumed any alcoholic beverages and he answered that it was "Not too long ago." (Tr. 37; LF 13). When Director attempted to elicit Trooper's testimony concerning the results of the portable breath test, York objected that due process requires that before the portable breath test is admitted, the State or Director should be able to lay a foundation under common law. (Tr. 22-23). York argued that the State or Director should establish that the officer knew how to properly administer the test and did so. (Tr. 23). York argued that the testimony established that she didn't. (Tr. 23). York further argued that there should be evidence that the instrument

was properly maintained and calibrated, and there was none. (Tr. 23). Finally, York argued that there must be evidence that the instrument was in proper working order at the time it was administered and there was none. (Tr. 23). York's objections were overruled. (Tr. 23). In addition, York argued that even if the court admitted the test result, under Brown, supra, it could give the Trooper's testimony no weight or consideration whatsoever because there was substantial evidence that the PBT was improperly administered. (Tr. 23). Director argued that Brown did not involve a PBT test, and that the PBT is admissible under the statute. (Tr. 24). York's objection were overruled, but Judge Howald allowed York's objections to be continuing objections. (Tr. 24). Trooper Shanika then testified that York failed the test, in that his result was .08 or higher. (Tr. 24).

During Direct examination, Trooper Shanika was asked if she had the opportunity to hear York's voice, and she testified that it was slurred and mumbled. (Tr. 24-25). Director did not ask Trooper when she made this observation. (Tr. 1-55). During cross-examination, Trooper Shanika was asked if she could recall anything York said that was slurred, and she responded: "Just the statement that he had consumed one or two beers." (Tr. 34-35). Trooper Shanika testified that her memory concerning the facts of this case was better back in September, when she testified at York's administrative hearing.[3] At that time,

[3]This case was initially heard by an administrative hearing officer appointed by the Director of Revenue. See RSMo. 302.530. York appealed the decision of the administrative hearing officer suspending his license to the Circuit Court pursuant to

Trooper Shanika had been asked if she could recall an example of a letter, word or sentence that York slurred prior to arresting him, and she had responded, "I don't recall that, sir." (Tr. 35). At that time, she was also unable to recall anything York said after arrest that was slurred, and she could not recall how many words he slurred either before or after arrest. (Tr. 35). Trooper Shanika testified that she only had contact with York for 3 minutes from the time she first contacted him until the time she arrested him. (Tr. 36). When asked during trial whether she could recall anything York mumbled prior to arresting him, she testified that: "I don't recall any of our conversation, sir." (Tr. 36).

During direct examination, when asked if she observed anything unusual about York's balance, Trooper Shanika testified that York was "swaying and wobbling — or stumbling, I'm sorry," and that he had trouble making turns. (Tr. 16). During cross-examination, Trooper Shanika testified she could not recall whether or not York had any problems with his balance prior to the field sobriety tests, or prior to arrest. (Tr. 32-33). She could not recall whether or not he swayed while balancing, walking or turning prior to arrest. (Tr. 33-34). She could not recall whether or not she saw him wobble while balancing prior to arresting him. (Tr. 34). She could not recall whether York stumbled while walking prior to arresting him. (Tr. 34). She could not recall whether she saw York stagger while walking or turning prior to arresting him. (Tr. 34). Trooper Shanika testified that with respect to the general observation section of the A.I.R., some of the observations indicated

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RSMo. 302.535.

could come before arrest and some could come after. (Tr. 38; See LF 12).

Trooper Shanika asked York to perform the walk and turn and one leg stand field sobriety tests (Tr. 8, 39). Over York's objection for lack of foundation, Trooper Shanika testified that during these tests, York had trouble with walking and he swayed. (Tr. 40-41). During cross-examination, Trooper Shanika acknowledged that she had very specific instructions she has to give on the walk and turn and one leg stand tests. (Tr. 42). She testified that if she leaves out any of the instructions, she may be the one that causes the individual to have a problem with the tests. (Tr. 42). Trooper Shanika testified that with respect to the one leg stand test, one of the required instructions is to instruct the individual to focus on the foot while they're doing the test. (Tr. 42). After reviewing her testimony at the previous administrative hearing, Trooper Shanika agreed that according to that testimony, she did not give that instruction to York. (Tr. 43). Trooper Shanika testified that under the guidelines, if you fail to properly administer, interpret and score these tests, she may be the one that causes problems for the subject, as opposed to intoxication being the cause. (Tr. 44).

With respect to the walk and turn test, Trooper Shanika testified that there are specific instructions she must give on that test. (Tr. 44). She testified that she believed that one of the instructions for the test is to tell the subject to watch their feet while walking. (Tr. 44). Trooper testified that she did not give York that instruction for this test. (Tr. 44-45). She also testified that she is required to stand 3-4 feet away and remain motionless while the subject is performing this test, and that if she gets too close, or does any excessive motion,

it will make the test more difficult for the subject to perform, even if sober. (Tr. 45). Trooper testified that while York was performing this test, she was walking along side of him, between one and a half and three feet away. (Tr. 46). She testified that she learned in her training that if she fails to follow the proper procedures for administering, interpreting and scoring the tests, the validity of the tests are compromised. (Tr. 46). Trooper Shanika testified that based on her prior testimony at the administrative hearing, because she did not follow the proper procedures for administering, interpreting and scoring the tests, she compromised the validity all of the tests she administered in York's case. (Tr. 46-47). When Director offered the A.I.R. into evidence, the court sustained York's objection to the admission to all of the field sobriety test information included in the Sobriety Test section of the A.I.R., including sobriety tests, as well as observations and results from the tests, on the grounds that all tests were improperly administered, interpreted and scored. (Tr. 50-51).

Respondent subsequently submitted to a breath test, which revealed a BAC in excess of the legal limit. (Tr. 28; LF 25).

The trial court entered lengthy findings and a judgment proposed by York (LF 43-54). Judge Howald found that Trooper Shanika did not properly administer, interpret and score the walk and turn, one leg stand, Horizontal Gaze Nystagmus and PBT tests. (Tr. 44-51). He found that although she was trained to administer these tests according to the NHTSA guidelines, by her own testimony, she did not follow her training, and seriously compromised the validity of each of these tests. (LF 44). As a result, Judge Howald noted that he was disregarding any evidence relating to these tests under Brown v. Director of Revenue, 85

S.W.3d 1 (Mo. 2002). (Tr. 45-46). With respect to the PBT test, Judge Howald found that this test was also improperly administered. (LF. 46). Specifically, he found, among other things, that Trooper Shanika had no formal or specific training in the use of the device, that she did not know how it worked, or when, if at all, it was last checked for calibration. (LF 47). He found that she did not wait 20 minutes before administering the test to York, and she did not ask him, prior to administering the test, when he had last consumed any alcoholic beverages. (LF 47). Judge Howald found that York had affirmatively established that the PBT was improperly administered and that Trooper Shanika was not competent and qualified to administer the test. (LF 49). The court found that admitting the PBT result into evidence, under the facts and circumstances of this case, would serve to deny York due process of the law. (LF 49). The court found that in any event, it would give no weight to the PBT evidence because of the fact that Trooper Shanika did not receive any training in the use of this device and that she did not properly administer the test. (LF 50). The court found that even though the statute says the result is admissible, the court found that a reasonably prudent, cautious trained police officer would not rely upon the results of a PBT under the circumstances of this case. (LF 51). The court made a similar finding with respect to all tests administered by Trooper Shanika. (LF 52). "As a result, the court declines to consider any testimony by the Trooper as to the results of these tests as well as any observations allegedly made by the Trooper during the tests." (LF 53). The court also specially noted that "the Trooper spent less than three minutes attempting to administer four field sobriety tests to the petitioner." (LF 53).

With respect to Trooper Shanika's general observations, the court found that she could not recall whether or not she heard any slurred or mumbled speech, or whether York had any problems with his balance, prior to placing York under arrest. (LF 52-53). The court found that "there is insufficient evidence to establish that any of the general observations made of petitioner concerning his balance, walking, turning and speech were made prior to arrest." (LF 53). The court stated that it could consider only facts known by the officer at the time of arrest when making the probable cause determination. (LF 53). The court found that the Director "had the burden to show that these observations were made prior to arrest and she has failed to do so." (LF 53).

Finally, the court concluded that:

> "As a result of the improper administration of these tests, the limited time spent with the petitioner prior to arrest, and the trooper's inability to recall when she made her observations concerning petitioner's balance, speech, etc., the court specifically finds that the Trooper's testimony that she had either probable cause to believe, or did believe, that the petitioner was intoxicated, was not credible." (LF 53).

Director appeals.

Points Relied On

The judgment of the trial court must be affirmed because the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law

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

Dabin v. Director of Revenue, 9 S.W.3d 610 (Mo. banc 2000)

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

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

Fourteenth Amendment, U.S. Const. amend. XIV.

Argument

The judgment of the trial court must be affirmed because the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law.

Standard of Review

The general standards for review in a civil case are found in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Id. at 32.

Where a trial court makes a finding that it does not find the testimony of a police officer to be credible in a drivers license case, the appellate court must defer to the trial court's prerogative to determine credibility. Thurmond v. Director of Revenue, 759 S.W.2d 898, 899 (Mo. App. 1998); Hawk v. Director of Revenue, 943 S.W.2d 18, 22 (Mo. App. 1997); and Mathews v. Director of Revenue, 8 S.W.3d 237 (Mo. App. 1999).

In addition, in assessing if there is substantial evidence, this court must defer to the trial court on factual issues and cannot substitute its judgment for that of the trial judge. Thurmond, supra, at 899. Such deference is not limited to the issue of credibility of witnesses, but also to the conclusions of the trial court. Hawk , supra, at 20.

"On appeal, the judgment of the trial court is presumed to be correct and shall be

affirmed under any reasonable theory supported by the evidence." Keller v. Director of Revenue, 947 S.W.2d 478, 479 (Mo. App. E.D. 1997); Jarrell v. Director of Revenue, 41 S.W.3d 42 (Mo. App. E.D. 2001).

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

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

by mathematics, but on its effect in inducing belief." Waddell, supra, at 95 (citations omitted).

Finally, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Vernon v. Dir. of Revenue, 142 S.W.3d 905, 909 (Mo. App. S.D. 2004). "We will find an abuse of discretion only when the trial court's ruling is clearly against the logic of the circumstances, is so arbitrary and unreasonable as to shock the sense of justice, and shows a lack of careful consideration." Vernon, at 909.

B. Director never established a prima facie case for probable cause

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. Mayberry v. Director of Revenue, 983 S.W.2d 628 (Mo. App. 1999). Any determination of whether an officer had probable cause to make an arrest has to be made by viewing the situation *as it would have appeared to a prudent, cautious, and trained police officer*. Id, at 631. In examining the existence of probable cause, courts consider the information possessed by the officer *before the arrest* and the reasonable inferences drawn therefrom. State v. Stokes, 710 S.W.2d 424, 426 (Mo. App. 1986). "Probable cause must exist at the time of the arrest. *An officer cannot bootstrap and use facts learned after the arrest to show that he had probable cause to effect the arrest.*" Domsch v. Director of Revenue, 767 S.W.2d 121, 123 (Mo. App. 1989) (Emphasis added). Finally, where there is substantial evidence that field sobriety tests have been improperly

administered, interpreted, and/or scored by the arresting officer, a trial court may disregard the officer's testimony regarding the test results. Brown v. Director of Revenue, 85 S.W.3d 1 (Mo. 2002).

Respondent concedes that at the time of the breath test, his BAC exceeded the legal limit. However, the judgment of the trial court that there was not probable cause to arrest York must be affirmed.

Director apparently believes that the Director automatically establishes her prima facia case at the instant she completes direct examination of the arresting officer and offers the arrest report into evidence.[4] Apparently, it doesn't matter to Director what happens during cross-examination of her witnesses...the case is made, and driver loses unless driver takes the stand and rebuts every single alleged indicia of intoxication. In this case, Director has elected to disregard important testimony elicited by York's counsel during cross-examination and which would otherwise support the trial court's conclusion that there wasn't probable cause to arrest in this case.

Citing Saladino v. Director of Revenue, 88 S.W.3d 64, 71 (Mo. App. W.D. 2002), Director first argues that the strong smell of an alcoholic beverage on the breath provides

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[4]If director fails to make a prima facie case, then whether or not the respondent testified is irrelevant. Given Trooper Shanika's testimony, it is clear that the trial court determined that Director's case failed. Director, not York, has the burden of proving all of the elements in this case. (LF 69).

"sufficient probable cause to believe" that a subject is intoxicated. If that is a true statement of the law, York loses, and all citizens of the State of Missouri lose. Such a conclusion is not supported in the law, is not logical, and is the kind of conclusion that can lead to the illegal arrest of law-abiding citizens.

In Saladino, it is highly doubtful that the Western District Court of Appeals intended to suggest that all that is necessary to arrest a motorist for DWI in this State is the smell of alcoholic beverages on the breath. Indeed, in addition to having a strong odor of intoxicants his breath, Saladino was involved in an unexplained single vehicle accident. He had difficulty standing on his own, refused to stand up, and he was "not very coherent." Mr. Saladino slurred his speech, and his attitude fluctuated from combative, uncooperative, fighting, and sleepy. These observations were made prior to arrest. Similarly, in Rain v. Dir. of Revenue, 46 S.W.3d 584, 589 (Mo. App. E.D. 2001), relied upon by the Saladino court as a probable cause case, Rain drove through a city intersection at 80 miles per hour, collided with a parked car, and thereafter exhibited glassy, bloodshot eyes, slurred speech, an unsteady gait, and had trouble concentrating. In neither case, was the driver arrested solely because his breath smelled of intoxicants. In both cases, the drivers were involved in accidents. In both cases, the Director established that the observations were made prior to arrest.

If Director's argument is accepted that the smell of an alcoholic beverage on the breath alone is sufficient to establish probable cause to arrest, then anyone consuming any amount of alcohol prior to driving would be subject to arrest, so long as the smell of

intoxicants was detectable by a police officer at the time of the stop. *Common sense dictates that the recent consumption of a single alcoholic beverage can produce a strong smell of an alcoholic beverage on the breath, yet the smell is no more indicative of intoxication than the strong smell of food on the breath is indicative of gluttony.* What Trooper says she smelled is indicative only of alcohol consumption, not alcohol intoxication. Even Trooper Shanika admitted that she cannot determine if someone is intoxicated by smelling their breath. (Tr. 30). *For better or worse, the law prohibits drunk driving, not driving after a drink!*

Citing Clark v. Director of Revenue, 132 S.W.3d 272, 275-276 (Mo. App., S.D. 2004), Director also argues that York had watery, glassy, and bloodshot eyes, symptoms that are commonly found in persons who have consumed intoxicants. (AB 13). Those are also symptoms of lack of sleep, fatigue, allergies, coughing, sneezing, and any of dozens of other causes. Furthermore, the Clark case does not compel a finding of probable cause to arrest in York's case. In Clark, the Trooper noticed a moderate odor of intoxicants on driver's breath, driver's speech was slurred, driver's eyes were bloodshot and glassy, and driver's pupils were dilated. Driver admitted that he had "had a couple of beers." Driver performed three field sobriety tests and driver failed all three of them. There was no evidence that the tests were improperly administered. In addition, two witnesses stated they observed driver's vehicle "swerving all over the road" immediately prior to the accident. The Clark court found that this evidence was sufficient to support a finding that the Trooper had probable cause to arrest driver.

Similarly, in Melvin v. Director of Revenue, 130 S.W.3d 11, 13-14 (Mo. App. E.D. 2004), also cited by Director, Melvin stopped his vehicle in the right lane of traffic and remained there for several minutes, impeding the flow of traffic. The police officer detected a moderate odor of alcohol on Melvin's breath, noticed that Melvin's eyes were watery and bloodshot, and that Melvin's speech was slurred. The officer then asked Melvin to perform the one-leg stand test during which Melvin swayed and put his foot down for balance. There was nothing in the record to suggest that the officer improperly administered that test. Melvin also admitted to the officer that he had consumed four to six cups of beer. The Melvin court found that this evidence was sufficient to warrant probable cause to arrest Melvin for driving while under the influence of alcohol.

Director also says that York told Trooper Shanika that he had consumed one or two beers, and that he slurred his words when he disclosed this. (AB 13). While York may have admitted to consuming one or two beers, Director ignores critical parts of Trooper Shanika's testimony and her arrest report which would support the trial court's finding that Trooper Shanika could not recall whether or not she heard any slurred or mumbled speech *before she placed York under arrest*. (LF 52; 53). During direct examination, Trooper Shanika was asked if she had the opportunity to hear York's voice, and she testified that it was slurred and mumbled. (Tr. 24-25). Director never asked Trooper Shanika at what point during her dealings that she made these observations. (Tr. 24-26). During cross-examination, Trooper Shanika was asked if she could recall anything York said that was slurred, and she responded: "Just the statement that he had consumed one or two beers."

(Tr. 34-35). Trooper Shanika then admitted that she had been asked at York's administrative hearing if she could recall an example of *anything* that York had said that was slurred prior to arresting him, and that she had responded, *"I don't recall that, sir."* (Tr. 35). She also admitted that she had previously testified that she was unable to recall anything York said after arrest that was slurred, and she could not recall how many words he slurred either before or after arrest. (Tr. 35). Trooper Shanika also admitted that her memory concerning the facts was not as good as it was the previous September, when she testified at York's administrative hearing. (Tr. 47).

In addition, Trooper Shanika testified that she only had contact with York for 3 minutes from the time she first contacted him until the time she arrested him. (Tr. 36). In light of this fact, it is highly doubtful that York said enough for Trooper Shanika to even be able to gauge whether or not his speech was abnormal. Indeed, when asked whether she could recall anything York mumbled prior to arresting him, she testified that: *"I don't recall any of our conversation, sir."* (Tr. 36).

In addition, in her narrative, Trooper Shanika says nothing about detecting slurred or mumbled speech prior to arresting York, but only indicates that he stated that he had consumed one or two beers prior to driving. (LF. 17).[5] Finally, Trooper Shanika testified

[5]In the interview section of the report, conducted *after the arrest*, Trooper Shanika indicates that York mumbled his answer when she asked him when he last worked. (LF 13). There is nothing in the report that he ever mumbled or slurred his speech *before*

that with respect to the general observation section of the A.I.R., some of the observations indicated could come before arrest and some could come after. (Tr. 38; LF 12).[6]

In York's case, Judge Howald found that there was insufficient evidence to establish that York had slurred or mumbled speech or balance problems prior to being arrested. (LF 69). "Probable cause must exist at the time of the arrest. An officer cannot bootstrap and use facts learned after the arrest to show that he had probable cause to effect the arrest." Domsch, supra at 123. From Trooper Shanika's testimony and the evidence, Judge Howald could and did reasonably find that "there was insufficient evidence to establish that any of the general observations made of the petitioner ...were made prior to arrest." (LF 53).

After completely disregarding those portions of Trooper's testimony supporting the trial court's conclusions regarding York's speech, Director goes on to say that slurring is the type of event that accords with ordinary experiences of everyday life such that a witness may testify in "conclusional" terms about it, without having to document the particular words on which a subject did or did not slur, or the manner in which those words were slurred, mispronounced or poorly articulated. (AB 15). 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. Stl. D. 1976). Besides the fact that neither Singer or Morrow involved a witness'

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being arrested. (LF 12-17).

[6]As this court is probably aware, the observation section of the A.I.R. form has recently been revised to require the officer to list all observations "made prior to arrest." Trooper Shanika did not utilize the new form in York's case.

"conclusions" regarding slurred speech, Director completely ignores the fact that in a case such as this, probable cause must be determined based upon facts known by the police officer *at the time of arrest.* Domsch, supra. The Director has the burden of proving which "facts" were known by Trooper Shanika *at the time of the arrest.* The trial court reasonably concluded from the evidence that Trooper Shanika could not remember or did not know whether York slurred his speech prior to arrest. (LF 52). In short, Director did not meet her burden of proving that York slurred his speech prior to arrest so that this factor could be included in the probable cause determination. See Domsch, supra.

Nor do Soest v. Director of Revenue, 62 S.W.3d 619 (Mo. App. E.D. 2001) or Peters v. Director of Revenue, 35 S.W.3d 891(Mo. App. S.D. 2001) compel a finding of probable cause to arrest. In Soest, there was uncontroverted evidence that driver's vehicle left the roadway momentarily, was continually weaving as the officer was following her, she was sleepy and carefree, she admitted to drinking, and she failed the horizontal gaze nystagmus test. In Peters, the uncontroverted evidence was that driver was speeding, driver's eyes were watery and glassy, he smelled moderately of intoxicants, he admitted to drinking a whole pitcher of beer, his balance was "not exactly surefooted,"and he failed the horizontal gaze nystagmus test.[7]

Over York's objection, without first laying any sort of foundation whatsoever as to

[7]Again, there was nothing in Soest or Peters to suggest that the field sobriety tests were improperly administered. Also, York was not driving erratically when he approached the checkpoint. (Tr. 37).

the instructions given, how the tests were administered, or whether they were properly administered, Director elicited testimony from Trooper Shanika that she observed that York swayed when he performed the walk and turn and one leg stand tests. (Tr. 40-42). Director says that the trial court ultimately excluded the results of the field sobriety tests, based upon York's concern that they were improperly "administered, interpreted, and scored," and acknowledges that 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. (AB 13). Director says that 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 towards probable cause. (AB 13-14).

There are several problems with Director's reasoning. First, in this case, there is sufficient evidence from which the trial court could conclude that any supposed difficulty York had with his balance during the walk and turn and one leg stand tests was attributable to Trooper Shanika's improper test administration. During cross-examination, Trooper Shanika acknowledged that she has very specific instructions she has to give on the walk and turn and one leg stand tests, and she conceded that if she leaves out any of the instructions, she may be the one that causes the individual to have a problem with the tests. (Tr. 42). Trooper Shanika testified that with respect to the one leg stand test, one of the required instructions is to instruct the individual to focus on the foot while they're doing the test. (Tr.

42). After reviewing her testimony at the previous administrative hearing, Trooper Shanika agreed that according to that testimony, she did not give that instruction. (Tr. 43). Logically, that instruction is important to both focus the suspect's attention on the task at hand, avoid distractions, especially those that may be present at a busy DWI checkpoint, and for purposes of maintaining balance. Trooper Shanika testified that under the guidelines, if you fail to properly administer, interpret and score these tests, she may be the one that causes problems for the subject, as opposed to intoxication being the cause. (Tr. 44).

With respect to the walk and turn test, Trooper Shanika testified that there are also specific instructions she must give on that test. (Tr. 44). She testified that she believed that one of the instructions for the test is to tell the subject to watch their feet while walking. (Tr. 44). Trooper testified that she did not give York that instruction for this test. (Tr. 44-45). Again, common sense tells us that this instruction would be important to focus the suspect's attention on what he or she is doing, to avoid distractions, to make sure they stay on the line, touch heel-to-toe, and to maintain balance.

Trooper Shanika also testified that she is required to stand 3-4 feet away and remain motionless while the subject is performing the walk and turn test, and that if she gets too close, or does any excessive motion, it will make the test more difficult for the subject to perform, even if sober. (Tr. 45). See, e.g, National Highway Traffic Safety Admin., U.S. Dep't of Transp., DWI Detection and Standardized Field Sobriety Testing, Student Manual VIII-21 (1995), which provides that an officer must:

> "Observe the suspect from 3 or 4 feet away and remain

> motionless while the suspect performs the test. Being too close or excessive motion on your part will make it more difficult for the suspect to perform, even if sober." Id.

See also National Highway Traffic Safety Admin., U.S. Dep't of Transp., DWI Detection and Standardized Field Sobriety Testing, Student Manual VIII-12 (2000), which provides that: "Observe the suspect from a safe distance and limit your movement which may distract the subject during the test." Id. Trooper Shanika testified that while York was performing this test, she was walking along side of him, between one and a half and three feet away. (Tr. 46). She testified that she learned in her training that if she fails to follow the proper procedures for administering, interpreting and scoring the tests, the validity of the tests are compromised. (Tr. 46). According to NHTSA, the validity of the standardized field sobriety tests apply:

> **<u>ONLY</u> WHEN THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER; AND <u>ONLY</u> WHEN THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE; AND, <u>ONLY</u> WHEN THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE. IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.**"

See National Highway Traffic Safety Admin., U.S. Dep't of Transp., DWI Detection and Standardized Field Sobriety Testing, Student Manual VIII-12 (1995). "These tests need to be administered in accordance with the NHTSA standards, or the results may not be viewed as reliable by the courts." CHENAULT, JAMES A. III, MISSOURI DWI HANDBOOK, page 82 (2004).

Trooper Shanika testified that based on her prior testimony at the administrative hearing, she did not follow the proper procedures for administering, interpreting and scoring the tests, and that she compromised the validity all of the tests she administered in York's case. (Tr. 46-47). Brown, supra, stands for the proposition that a trial court may disregard a police officer's testimony concerning the results of improperly administered field sobriety tests when making a probable cause determination. In Brown, evidence of improper administration came from Brown's field sobriety expert, as well as the officer's own testimony. Here, substantial evidence of improper administration came from Trooper Shanika's own testimony.

The rationale underlying Brown is that reasonably prudent, cautious, trained police officers know how to properly administer, interpret and score field sobriety tests, and that they would not rely upon the results of improperly administered tests when drawing conclusions about whether or not there is probable cause to arrest someone, or whether or not someone is intoxicated. Brown, at 4-5. In York's case, Trooper Shanika even testified that a reasonably prudent, cautious trained police officer would not rely upon the results of an improperly administered field sobriety test when making a probable cause determination.

(Tr. 15).

On the one hand, Director agrees that the test "results" may be disregarded by the courts if not administered properly. (AB 13). At the same time, she says that the court must consider testimony by Trooper Shanika that York supposedly had difficulty walking and swayed during the walk and turn and one leg stand tests. (Tr. 39-41).[8] Assuming, arguendo, that was Trooper Shanika's only testimony in the case relating to balance problems, are these not "results?" Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures. See, e.g., 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Section 10.06[4]; Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01. Here, Judge Howald reasonably concluded that the reliability of the

[8]Trooper Shanika was asked if she observed *"Mr. Ryan"* having any trouble with his balance when she administered the walk and turn and one leg stand tests, and she said she did. (Tr. 40-41). She was then asked if he swayed, and she said yes. (Tr. 41). She was then asked if she observed any trouble with his walking, and she said yes. York then objected to Director leading the witness and Director ultimately withdrew the question, and presumably, the Trooper's answer. (Tr. 40-41). During cross-examination, Trooper Shanika also admitted she could recall whether or not York had any problems with his balance prior to the field sobriety tests, *or prior to arrest.* (Tr. 32-33).

tests were seriously compromised by Trooper Shanika's improper administration. (LF 60).

York suggests that because the Brown Court initially determined that there was substantial evidence to support the trial court's decision to disregard the officer's testimony concerning the results of the field sobriety tests, it was *Brown's own "uncontroverted" testimony* that he put his foot down during the one leg stand test, not the officer's testimony, that the Supreme Court considered when making the probable cause determination. The Supreme Court noted that it was *Brown* that *admitted* making an illegal left turn and that he did not immediately pull over when he saw Reid's flashing lights behind him. It was *Brown* that admitted that he had bloodshot eyes and it was *Brown* who testified at trial that when he started the one leg stand test, he did not feel comfortable, and "resituated" his foot and "restarted" the test. Brown, at 7.

All of this may otherwise be academic, because the trial court below did make a credibility determination in this case. Specifically, Judge Howald found that:

> "As a result of the improper administration of these tests, the limited time spent with the petitioner prior to arrest, and the trooper's inability to recall when she made her observations concerning petitioner's balance, speech, etc., the court specifically finds that the Trooper's testimony that she had either probable cause to believe, or did believe, that the petitioner was

intoxicated, was not credible." (LF 53).

When a trial court makes a specific finding that all or part of the testimony of the police officer was not credible in a drivers license case, the appellate court must defer to the trial court's prerogative to determine credibility. Thurmond, supra, at 899; Hawk, supra, at 22; and Mathews, supra. Here, Trooper Shanika was grossly incompetent in the way she administered every field sobriety test in this case, including the PBT. Unbelievably, she claimed to have administered not one, but four, field sobriety tests in a period of three minutes. She claimed she could not recall her conversations with York, and claimed on several occasions that she could not remember her prior testimony. (Tr. 13, 14, 15, 35, 36). This court should "recognize the trial court's superior ability to scrutinize the arresting officer's demeanor" in this case and affirm the trial court's decision. Thurmond, at 899. The trial judge was the one who in the position of "having listened to, watched and digested the testimony in person and considered its inflections, subtleties and nuances" of the Trooper's testimony. Id.

Finally, even assuming, arguendo, that York's speech was slurred, and that he had trouble with his balance at some point prior to arrest, the trial court was not compelled to find probable cause under the circumstances of York's case. See, e.g., Hinnah v. Dir. of Revenue, 77 S.W.3d 616 (Mo. 2002). There, the driver struck a concrete barrier, was found sleeping inside the vehicle, and when awakened, admitted to drinking and falling asleep at the wheel, smelled of alcohol, had bloodshot, watery, glassy eyes, and used the door to maintain his balance when exiting the vehicle. The Supreme Court found that upon these

facts, the trial court could have concluded that there was *not* probable cause to arrest. Id.

C. Trial court could and did properly disregard Trooper's testimony concerning results of the PBT test in this case because of improper administration, etc.

The trial court clearly indicated in the judgment that it was disregarding any testimony by Trooper Shanika relating to the PBT. (LF 53). This decision was sustainable on the basis of the fact that the test was improperly administered, and it was sustainable on the premise that under the facts of this case, reliance on the PBT to establish probable cause in a case where it otherwise doesn't exit would invoke due process concerns.

There can be no doubt that the Petitioner has a constitutionally protected property interest in his driver's license and its deprivation or suspension by the government implicates the Due Process clause. As our Supreme Court recognized in Dabin v. Director of Revenue, 9 S.W.3d 610 (Mo. 2000):

> "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, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). Due process applies to the suspension or revocation of a driver's license by the state. "Licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." Dixon v. Love, 431 U.S. 105, 112, 52 L. Ed. 2d

172, 97 S. Ct. 1723 (1971). Id. at 614.

Thus, the Missouri Supreme Court has recognized that York has a constitutionally protected property or liberty interest in his drivers license.[9]

"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, at 615 (Mo. banc 2000).

"It is clear that the Due Process Clause applies to the deprivation of a driver's license by the State[.]" Dixon v. Love, 431 U.S. 105, 112 (1977); Dabin, 9 S.W.3d at 615. 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

[9]Missouri's "due process" clause is found in Article I, §10, Missouri Constitution (as amended 1982).

Revenue, 804 S.W.2d 22, 24 (Mo. banc 1991). (emphasis added).

Here, even though the Trooper had no training to use the device, had only used it "several times" in the past seven years and readily admitted that she did not properly administer the test, the Director is apparently arguing that the results of the PBT establish *conclusively* that there was nevertheless probable cause to arrest the petitioner for DWI. *If this argument is accepted, then York is denied a meaningful hearing on one the issues or elements essential to the decision, i.e., the probable cause issue.* York submits this would be a denial of due process. See Dabin and Jarvis and cases cited therein.

In Mathews v. Eldridge, the United States Supreme Court set forth the balancing test to be employed in determining what process is due whenever there is governmental deprivation of a constitutionally protected interest. The Mathews v. Eldridge balancing test identifies three factors to 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 function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335; See also State ex rel. Williams v. Marsh, 626 S.W.2d 223, 230 (Mo. banc 1982).

With respect to the first factor, the private interest involved, York loses his driving privileges in the State of Missouri, and will thereafter be required to maintain an SR-22 filing with the Director for at least two years. RSMo. Sections 302.540. It is common

knowledge that anyone having their driving privileges administratively suspended for DWI will be considered "high risk" drivers by their insurance companies, and will pay more for their insurance. (LF 81). In addition, there is a substantial risk to everyone, including York, of an illegal arrest, should law enforcement officers elect to rely upon the results of improperly administered PBT tests when deciding whether or not arrest for DWI. Motorists could simply be told to blow into the PBT as they roll into the DWI checkpoint, and then be told to exit the vehicle because they are under arrest for DWI. God forbid that the driver had consumed any alcoholic beverages, smoked, chewed gum, etc., within 15-20 minutes prior to running into the roadblock. In sum, the private (and public) interest in proper administration of PBT tests is substantial.

As to the second factor, the risk of erroneous deprivation, Judge Howald found that at the time the portable breath test was administered to Mr. York, Trooper Shanika had no formal training in its use, that she did not know how the unit worked internally, that the test was improperly administered, and that she did not know when, if at all, the instrument had been last checked for accuracy. (LF 51). If Director's arguments are accepted by this court, any driver stopped by a police officer will now be subject to immediate arrest based solely upon the results of a PBT test, regardless of whether or not the test was properly administered, and regardless of the accuracy of the device used.

York submits that there is absolutely no excuse for an officer to ignore the basic operating guidelines when using a PBT device. The National Highway Traffic Safety Admin., U.S. Dep't of Transp., DWI Detection and Standardized Field Sobriety Testing,

Student Manual VII-8-9 (1995), which describes the limitations of PBT devices. NHTSA says:

> "PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonably accurate, they are subject to the possibility of error, especially if they are not used properly. There are some factors that can affect the accuracy of preliminary breath test devices. Some of these factors tend to produce "high" test results...There are two common factors that tend to produce high results on a PBT.
>
> Residual mouth alcohol. After a person takes a drink, some of the alcohol will remain in the mouth tissues. If the person exhales soon after drinking, the breath sample will pick up some of the left-over mouth alcohol. In this case, the breath sample will contain an additional amount of alcohol and the test result will be higher than the true BAC.
>
> It takes approximately 15 minutes for residual alcohol to evaporate from the mouth. Evaporation cannot be speeded up significantly by having the suspect gargle with water or in any other way.
>
> The only sure way to eliminate this factor is to make sure the suspect does not take any alcohol for at least 15 to 20

> minutes before conducting a breath test. Remember, too, that most mouthwashes, breath sprays, cough syrups, etc., contain alcohol and will produce residual mouth alcohol. Therefore, it is always best not to permit the suspect to put anything in their mouth for at least 15 to 20 minutes prior to testing.
>
> Breath contaminates. Some types of preliminary breath tests might react to certain substances other than alcohol. For example, substances such as ether, acetone, acetaldehyde and cigarette smoke conceivably could produce a positive reaction on certain devices. If so, the test would be contaminated and its results would be higher than the true BAC..." Id at VII-8. (Emphasis added).

The citizens of this State also expect that a police officer using a PBT device should at least have some basic understanding about how the device works, and should take the steps necessary to assure the device is accurate. Since PBT devices are not covered under the requirements of the Department of Health guidelines, there would be nothing to prohibit an officer from maintaining his or her own PBT unit, regardless of whether the officer holds a Type II or Type III permit. Similarly, PBT training could be easily included in the field sobriety testing training courses and/or Type II and Type III courses currently being taught

to police officers, breath test operators, and maintenance supervisors.

In State v. Hanway, 973 S.W.2d 892, 896 (Mo. App. 1998), the court noted that the rationale for not allowing municipal and county officers to rely on PBT's in making arrest decisions was because "in the case of highway patrol members.....the state can ensure there are uniform levels of training and maintenance of the machines used." Id. Apparently, since that time (1998), the state has made *absolutely no effort* to establish standards for either, as evidenced by Trooper Shanika's testimony.

Judge Howald noted that at least one court has held that due process requires the Director to lay a proper foundation for the admission of PBT evidence. In Coniglio v. Department of Motor Vehicles (1995) 39 Cal. App.4th 666, 677 (Cal. App. 1995), the California Court of Appeals found that "(e)ven though the Legislature has authorized the use of the PAS test (in zero tolerance cases - to establish that a minor's BAC exceeded a level of .01%), when a PAS test is used to subject the licensee to administrative penalties, it seems clear that there must be some basis for believing in the accuracy of the particular PAS device used to screen that licensee's blood for the presence of alcohol." Id. Judge Howald noted that although the California Court had determined that the California Department of Health regulations did not apply to PBT devices, it nevertheless held that due process requires the state to establish the following foundational prerequisites for admissibility of PBT test results in zero tolerance cases: (1) the particular apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified. (LF 49; Coniglio, at 682). Judge Howald went on to find that the Director had

not established any of these facts. (LF 49).

Judge Howald also noted for the record that he would otherwise give no weight to the PBT evidence because of the lack of training and improper use of the device by Trooper Shanika. (LF 50). Surely, neither the legislature, nor this court, can compel a trial court to consider what weight, if any, to assign to a particular piece of evidence. "Weight of the evidence" means its weight in probative value, not the quantity or amount of evidence. Goodnight v. Curry, 618 S.W.2d 278, 279 (Mo.App. 1981). The weight of the evidence is not determined by mathematics, but on its effect in inducing belief. Id. Here, because of the fact that the test was improperly administered within 3 minutes after Trooper Shanika contacted York, the fact that she had no formal training to use the device, had only used it "several times" in seven years, knew nothing about how it worked, and did not know when, if at all, it had been checked for calibration, Judge Howald in effect determined that the results had *no probative value* whatsoever. This he was entitled to do.

Judge Howald cited Bokor v. Dept. Of Licensing, 874 P. 2d 168 (Wash. App. 1994), which simply supports the proposition that no reasonably prudent, cautious trained police officer would rely upon the results of a PBT test under the circumstances of this case. The rationale behind this proposition is that: "An officer cannot reasonably rely on data obtained from a technical device unless he has some understanding of how it works or assurances of its reliability from an expert knowledgeable about the underlying principles on which the device is based; and a reasonable basis for believing the device will produce reasonably reliable results under the circumstances in which it is used, including adequate maintenance

and correct operation." Id, at 169. Furthermore, in that case, as in York's case, the State attempted to establish the reliability of the unit based upon the officer's past experience with the instrument. [10] The Bokor court noted:

> "The State presented no evidence which would permit the trier of fact to conclude the trooper reasonably relied on the results of the portable testing device.....The sole evidence of reliability was that of the trooper who testified the device had given comparable results to a BAC in the past. There is no evidence past performance would be a reliable predictor of correct results in the present case. There was no evidence the trooper had any training or expertise in statistical analysis. *The trial court quite properly gave this evidence no weight in determining whether the trooper had probable cause to believe Mr. Bokor was intoxicated.*" Id at 526. (Omissions).

In short, Trooper Shanika's reliance on the results of the PBT in this case was not reasonable, and there was no reasonable basis for any belief or suggestion that the PBT is a reliable indicator of a subject's BAC. (Tr. 28).

Everyone seems to be in agreement that the PBT is too unreliable to prove

[10]Trooper Shanika in effect admitted that since she usually waits 15 minutes before giving the PBT, but didn't do so in York's case, she had no basis to determine whether the PBT and the breath test were going to be in any way comparable. (Tr. 33).

intoxication. State v. Duncan, 27 S.W.3d 486, 488 (Mo. App. E.D. 2000). Yet, after going on and on about how the PBT is not admissible to prove BAC, Director nevertheless wishes to use a number (Trooper's testimony that York's PBT result was "over .08%") to conclusively establish that Trooper had probable cause to arrest, regardless of her lack of training, and regardless of the fact that the test was improperly administered.[11]

In State v. Hill, 865 S.W.2d 702, 704 (Mo. App. 1993), overruled on other grounds by State v. Carson, 941 S.W.2d 518 (Mo. banc 1997), the Western District Court of Appeals held "when properly administered by adequately trained personnel, the HGN test is admissible as evidence of intoxication." In Duffy v. Director of Revenue, 966 S.W.2d 372 (Mo. App. W.D. 1998), the same court held that *a scientific test for intoxication that is*

[11]Director does not, nor could she, contest the fact that the PBT test was improperly administered. This was admitted to by the Trooper. (Tr.19-20). Director's response to this problem is to suggest that this court should disregard Trooper's admissions that she improperly administered the field sobriety tests, as well as her testimony that she should not have relied upon the results when making a probable cause determination, on the basis that her opinions were "*subjective intentions*." This testimony had nothing to do with her "intentions." Rather, it involved statements of fact directly related to Trooper's training, and the trial court had every right to consider her testimony in this regard. Furthermore, arguably, nearly all of Trooper Shanika's testimony in this case was "subjective" in nature...e.g., her determination that York's eyes were abnormally watery, bloodshot, or glassy, or that the odor was "strong."

improperly administered does not tend to prove intoxication under a probable cause or reasonable doubt standard, and is not admissible for purposes of establishing probable cause. Id at 379. Is not a PBT device a "scientific test" for intoxication? As such, in order for the test to prove intoxication under a probable cause or reasonable doubt standard, should not the test at least be properly administered by one properly trained in its use? Of course it should! The logic of Duffy is clearly applicable to York's case.

The Director argues that the case of State v. Stottlemyre, 35 S.W.3d 854 (Mo. App. 2001) is controlling. It is not. In that case, the only issue argued and decided was whether or not the State was required to show that a portable breath test *met the standards of Section 577.026* before the test could be admitted into evidence. After engaging in statutory construction analysis, the court found that it did not. However, the court noted that:

> "Mr. Stottlemyre does not challenge the admissibility of the portable breath test results on any ground other than his assertion that the State was required to show that the test met the standards of § 577.026 in order to lay a proper foundation...Therefore, this court is ruling only on the narrow issue raised by Mr. Stottlemyre, *and does not decide whether the test results were inadmissible on any other bases.*" Id at 861. (Emphasis added).

In other words, York's due process claims and complaints of improper administration were not addressed by Stottlemyre, and Stottlemyre is not controlling.

Director also says that because PBT tests don't fall under the Department of Health guidelines and rules, there aren't any guidelines or rules for training, use or maintenance of PBT devices, and it matters not at all that the police officer administering the test has had no formal training in the use of the device, or that the device has never been checked for calibration, or that the police officer doesn't understand how it works, or that the police officer does not follow the proper procedures when administering the test. In other words, regardless of how unreliable the PBT test evidence is in a particular case, Director seems to take the position that it is admissible and that it conclusively establishes one of the elements of Director's case - *probable cause to arrest.* Gain, York submits that if that is the law, then he is deprived of 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." Dabin, at 614, citing Jarvis, at 24. (Emphasis added).

Director cites State v. Orvis, 465 A.2d 1361, 1362 (Vt. 1983), State v. Johnson, 503 N.E.2d 431, 433 (Ind. App. 1987), People v. Rose, 643 N.E.2d 865, 869-70 (Ill. App. 1994), and State v. Deshaw, 404 N.W.2d 156 (Iowa 1987). Unlike in those cases, Judge Howald found that the PBT test in York's case was improperly administered and maintained and given by one who was not adequately trained to administer it. (LF 65). Under those facts, York suggests that these foreign courts would have been hard-pressed to find that the PBT result could provide the reasonable grounds to believe a person is under the influence of intoxicating liquor required by their respective state statutes. In addition, no constitutional issues were raised in any of these foreign cases.

Director also says that because there are already considerable procedural safeguards in place for driver's license revocations, including the fact that BAC testing is required to be conducted in "absolute and literal compliance" with the provisions of Chapter 577, RSMo and the regulations promulgated by the Department of Health and Senior Services, the risk that a drivers license will be suspended or revoked because of a PBT result is almost non-existent.[12] Aside from the questionable reliability of the "safeguards" of Missouri's breath test program, how will those safeguards protect a motorist who is indignant about being arrested based solely upon the erroneous results of a PBT, given to him as soon as he pulls into a DWI checkpoint, and only 5 minutes after finishing a single glass of wine with dinner... After being told that he or she is drunk, when he or she is not, and that his or her BAC is *over .08%*, when it could not be, will this motorist then willingly submit to another test, or will he or she tell the officer what he or she should do with the breath test devices and decline the invitation?

York's counsel also wishes that Director would remember she is now saying that *"absolute and literal compliance"* is required under the Department of Health regulations the next time he has a breath test case. Contrary to Director's assertions, Director consistently argues that only *"substantial compliance"* is necessary when it comes to breath (or blood) testing regulations and procedures. See e.g., Shine v. Director of Revenue, 807 S.W.2d 160 (Mo. App. E.D. 1991). And, whenever a driver attempts to rebut the Director's prima facie

[12]If this court adopts Director's arguments, York's case will presumably be one of those "non-existent" cases.

case by challenging the reliability of his blood or breath test, or by establishing that his BAC was under the statutory limit at the time of driving, one can rest assured that Director will fight the driver at every turn in the road. See, e.g., Walker v. Dir. of Revenue, 137 S.W.3d 444(Mo. 2004); Kisker v. Dir. of Revenue, 147 S.W.3d 875(Mo. App. 2004); Booth v. Director of Revenue, 34 S.W. 3d 221 (Mo. App. 2000); Verdoorn v. Director of Revenue, 119 S.W. 3d 543 (Mo. 2003); Lasley v. Director of Revenue, 17 S.W.3d 174 (Mo. App. W.D. 2000); Martin v. Dir. of Revenue, 142 S.W.3d 851 (Mo. App. S.D. 2004), Vernon, supra.; Carr v. Director of Revenue, 95 S.W.3d 121 (Mo. App. W.D. 2002); and Kennedy v. Dir. of Revenue, 73 S.W.3d 85 (Mo. App. 2002), to name a few.

While York agrees that use of the PBT might be convenient for the police, allowing the police to use the device to arrest a citizen under the circumstances of this case not only rewards incompetent police investigations, but puts all citizens of the state at risk of an erroneous deprivation of the precious liberty millions of Americans have fought to protect. It doesn't matter that the driver may have recently finished a beer, smoked a cigarette, chewed gum, or did any number of other things that would seriously affect the reliability of the PBT test results. It doesn't matter that the PBT has never been checked for calibration (because the legislature hasn't gotten around to authorizing the Department of Health to adopt any regulations regarding maintenance and use of the devices) or that the police officer doesn't know how to use it.

"Erosions of liberty do not come in giant leaps, they come in minuscule encroachments often hidden to the trained and educated mind. Like a thief in the night, language can steal

a liberty deeply ingrained in the fabric of the American way of life. I am afraid of each little encroachment on the liberty of my fellow Americans on the highway." State v. Anderson, 331 N.W.2d 568, 573 (S.D. 1983). Mandating that trial courts must admit and accept as true, reliable and conclusive proof of probable cause, the results of improperly maintained, improperly administered PBT tests, given by improperly trained police officers, is such an encroachment of liberty and a denial of due process. And while the carnage on the highways caused by drunk driving accidents is a serious concern to us all, perhaps director should remember that "Carnage on the highways, and all other crimes, are subservient to the carnage at Valley forge, Yorktown, and Gettysburg, where the civil liberties now hanging in the balance were carefully shaped and hammered into rights so clean and pure that they stand the test of time and resist encroachment." McDonnell V. Com'r of Public Safety, 460 N.W.2d 363 (Minn. App. 1991).

Conclusion

In view of the foregoing, York submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b)

The undersigned hereby certifies that on this 29th day of March, 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 12,912 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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Carl M. Ward