NO. SC 89867

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

MICHAEL G. CRAIG,

APPELLANT.

Appeal from the Circuit Court of Clay County, Missouri

Seventh Judicial Circuit

Honorable Michael J. Maloney, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case involves the validity of Appellant's conviction of the Class C felony of driving while intoxicated in violation of MO.REV.STAT. §577.010 and §577.023 wherein the State relied upon three alleged prior intoxication traffic related offenses to enhance the punishment from a Class B misdemeanor to a Class C felony. On February 15, 2007, Appellant filed a Motion To Dismiss Felony Information and To Strike Enhancement Allegations, asserting that all three alleged previous pleas of guilty and/or findings of guilty were invalid for enhancement purposes because the State could not

prove beyond a reasonable doubt that Appellant was a prior offender, persistent offender, or aggravated offender in that the court records affirmatively showed noncompliance with all of the mandates of Rule 24.02 and/or Rule 37.59 or in that the courts did not follow any of the mandates of Rule 24.02 and/or Rule 37.59 before accepting Appellant's plea, and alternatively asserting that one of the alleged previous offenses was invalid because the court records affirmatively established that the court failed to enter a plea and failed to find Appellant guilty as required under MO.REV.STAT. §577.023.

At a hearing on February 16, 2007, Appellant entered a plea of guilty to the charge of driving while intoxicated but only at the Class B misdemeanor level. A hearing on the record then followed on Appellant's motion to dismiss. Both the State and Appellant presented evidence. The trial court took all matters under advisement for further briefing by the State and defense counsel. On March 29, 2007, the trial court overruled Appellant's motion to dismiss, further finding Appellant guilty of driving while intoxicated at the Class C felony level. Appellant timely filed a motion for judgment of acquittal as to the Class C felony, which the trial court overruled on May 1, 2007. The trial court entered judgment and sentenced Appellant on June 21, 2007, and Appellant timely filed his notice of appeal to the Court of Appeals, Western District, on July 2, 2007, July 1 being a Sunday.

Jurisdiction and venue was in the Missouri Court of Appeals, Western District, pursuant to MO.REV.STAT. §477.070 and Article 5, Section 3, of the Missouri Constitution because Clay County is within the territorial boundaries of the Western

District and because the issues did not involve a matter within the exclusive jurisdiction of the Supreme Court. The issues essentially involve the interpretation of court rules and statutes with an application of such interpretation to uncontested facts.

The Court of Appeals issued an Opinion on October 28, 2008. Appellant timely filed motions for rehearing/transfer on November 6, 2008. Pursuant to a request by the Court of Appeals, the State filed suggestions in opposition on December 5, 2008. The Court of Appeals denied the motion for rehearing and overruled the motion for transfer on December 23, 2008, further modifying its Opinion. Appellant timely filed an application for transfer with this Court on January 6, 2009. This Court sustained the application on February 24, 2009. Jurisdiction is in this Court pursuant to Article 5, §10 of the Missouri Constitution and Missouri Rules of Court 83.04. Substitute briefs are permitted under Rule 83.08.

STATEMENT OF FACTS

Appellant will hereinafter also be referred to as Defendant or by name, Craig. The Respondent will also be referred to as the State. References to the trial transcript will be abbreviated as "Tr.", to the legal file as "L.F.", and to any exhibits as "Ex.". As provided in Rule 84.04(h), the appendix "shall be numbered consecutively beginning with page A1."

On September 22, 2006, the State filed an information, charging Defendant in relevant part as follows:

* * * State * * * charges that the defendant, in violation of Section 577.010, RSMo, MO Code 4741804.0, NCIC Code 5404, committed the Class C felony of Driving While Intoxicated punishable upon conviction under Section(s) 558.011, 560.011 & 577.023 RSMo, in that on or about March 10, 2006, in the County of Clay, State of Missouri, at or near 169 Highway and 134th Street, Smithville, Missouri, defendant operated a motor vehicle while under the influence of alcohol, and

On or about March 6, 2002, defendant had pleaded guilty to or was found guilty of driving while intoxicated, for events occurring on November 8, 2001, in the Municipal Division of Smithville, Missouri, and the judge was an attorney and the defendant was represented by an attorney or waived counsel in writing, and

On or about September 15, 1999, defendant had pleaded guilty to or was found guilty of driving with excessive blood alcohol content, for events occurring on April 23, 1999, in the Circuit Court of Clay County, Liberty, Missouri, and

On or about January 30, 1992, defendant had pleaded guilty to or was found guilty of driving while intoxicated, for events occurring on October 20, 1991, in the Circuit Court of Clay County, Liberty, Missouri.

(L.F. 7)

On February 15, 2007, Defendant filed a Motion To Dismiss Felony Information and To Strike Enhancement Allegations and Suggestions In Support. (L.F. 9-18). In this motion, Defendant basically asserted that the State could not prove beyond a reasonable doubt that Defendant was a prior offender, persistent offender, or aggravated offender as defined under MO.REV.STAT. §577.023 because the Defendant's alleged pleas of guilty were invalid for purposes of using such pleas for enhancement to a felony as a result of certain failures to comply with the mandatory provisions of Rule 24.02 (state prosecutions) and former Rule 37.59 (municipal prosecutions).[1] With regard to the state proceedings in 1991/1992, Defendant further noted that "the records reflect Defendant's appearance, defense counsel's appearance, assessment of court costs, and the suspension of the imposition of sentence", but none of the records "reflect a plea of guilty or finding of

guilty". (L.F. 17). The relevant court records involving the absence of a guilty plea or finding of guilty are at pages 47, 54, and 55 of the legal file and in the appendix at A11, A12 and A13.

On February 16, 2007, by agreement of the State and the Defendant, a hearing occurred before the Honorable Michael J. Maloney wherein "a hybrid proceeding was conducted in which the defendant acknowledged his guilt of driving while intoxicated, but only at the class B misdemeanor level of the offense, specifically denying guilty of any greater level of the offense, but knowing that the state contends that he is guilty of

[1] Rule 37.59 was repealed and replaced by Rule 37.58, effective July 1, 2004.

the offense at the class C felony level, and further knowing that the state would present evidence in an effort to prove the elements of their charge of guilt at the class C felony level". (L.F. 3; Tr. 2-42). In the second phase of the hearing, the State introduced evidence in support of the enhancement allegations and Defendant introduced evidence in support of his motion to dismiss.

The State introduced three exhibits. State's Exhibit One was composed of certified records from the municipal court proceedings which culminated on March 6, 2002. (Tr. 23-25). State's Exhibit Two was composed of certified records from the state court proceedings which culminated on September 15, 1999. (Tr. 25). And, State's Exhibit Three was composed of certified records (four pages) from the state court proceedings which culminated on January 30, 1992. (Tr. 25-33).

Defendant introduced four exhibits. Defendant's Exhibit Four was composed of certified records of the entire court file (16 pages) from the municipal court proceedings. (L.F. 19-34). Defendant's Exhibit Five was composed of certified records of the entire court file (12 pages) from the state court proceedings in 1999. (L.F. 35-46). Defendant's Exhibit Six was composed of certified records of the entire court file (9 pages) from the state court proceedings in 1991/1992. (L.F. 47-55). Defendant's Exhibit Seven was composed of three pages, being an affidavit by Defendant as to his recollection of the events occurring at the three court proceedings. (L.F. 56-58). The State did not object to any of the exhibits. (Tr. 33-41). Defendant also attached copies of two "plea petitions",

which defense counsel had obtained during representation of two different defendants. (L.F. 16, 59 & 60; Tr. 40 & 41).

At the conclusion of the hearing, Judge Maloney took the matter under advisement, allowing the prosecutor and defense counsel to file suggestions. (Tr. 41 & 42). The State filed suggestions in opposition (L.F. 62-66) and defense counsel filed a reply. (L.F. 67-70).

On March 29, 2007, Judge Maloney overruled Defendant's motion to dismiss, finding in relevant part as follows:

> The evidence presented by the state in the contested part of the trial proves beyond a reasonable doubt that defendant had three intoxication-related traffic offenses on his record before the one that is the subject of this trial. Those offenses, combined with the present offense, result in the finding that he is an aggravated offender guilty of a class C felony under Section 577.023 RSMo.
>
> The following findings of the court are made beyond a reasonable doubt. On or about March 6, 2002, defendant pleaded guilty to driving while intoxicated, for events occurring on November 8, 2001, in the Municipal Court of Smithville, Missouri. The judge was an attorney. The defendant was represented by an attorney. On or about September 15, 1999, defendant pleaded guilty to driving with excessive blood alcohol content, for events occurring on April 23, 1999, in the Circuit Court of Clay

> County, Missouri. On or about January 30, 1992, defendant either pleaded guilty to, or was found guilty of, driving while intoxicated, for events occurring on October 20, 1991, in the Circuit Court of Clay County, Missouri. State's Exhibit 3, which pertains to this offense, does not show whether defendant pleaded guilty or not guilty. It does show that he received a suspended imposition of sentence and was placed on probation for two years, a probation that was satisfactorily completed in 1994. The law does not allow probation unless and until a defendant has either been found guilty or pleaded guilty.
>
> It is legally concluded that the state is not required to prove strict compliance with the requirements of Rule 24.02 in state courts or Rule 37.58 in municipal courts to be able to use pleas or findings of guilty in prior intoxication-related offenses to increase the severity of driving while intoxicated charges. (L.F. 4; **A3**)

Judge Maloney then allowed Defendant the "full 25 days . . . from the date of this order in which to prepare and file an appropriate motion to seek relief from the finding of guilty and specify the issues for appellate review if the motion is not sustained". (L.F. 4).

Defendant timely filed a Motion For Judgment of Acquittal As To Findings of Prior Intoxication Related Traffic Offenses and Suggestions In Support. (L.F. 71-76). On May 1, 2007, Judge Maloney overruled the motion, setting the sentencing hearing for

June 21, 2007. (L.F. 5). Judge Maloney subsequently entered judgment and sentenced Defendant, which Defendant timely appealed. (L.F. 77 & 78; 79-85).

The Court of Appeals issued its Opinion (Op.) on October 28, 2008. The Court of Appeals did not consider any points of error, instead ruling sua sponte that it did not have jurisdiction because "[t]his case involves a direct appeal from a judgment entered on a guilty plea", because "[t]he only issues cognizable on direct appeal from a guilty plea are the subject matter jurisdiction of the trial court and the sufficiency of the charging instrument", and because "[a]ny appellate claim that does not fall into one of these two categories is unreviewable". (Op. 3). Appellant timely filed motions for rehearing/transfer, disputing the conclusion of the Court of Appeals, pointing out that he only pled guilty to the misdemeanor offense, that he pled not guilty to and contested the enhancement allegations, and that he was only appealing the trial court's finding of guilt beyond a reasonable doubt of being an aggravated offender, a class C felony. Appellant also asserted that the procedures under §577.023 for determining the offender status allowed for an appeal under these circumstances and/or Appellant's appeal involved the trial court's jurisdiction to render a particular judgment, an appealable jurisdictional defect. In its modified Opinion (**A14-A18**), the Court of Appeals rejected Appellant's first assertion, ruling that the statute does not allow "a special right of appeal based solely on the fact that the court heard evidence of his prior offender status after he pled guilty to the charged offense". (Op. 4; **A15**). The Court of Appeals did not address the second assertion.

In his motions for rehearing/transfer (**A19-A22**), Appellant concluded as follows:

> Finally, if this Court decides that it now has jurisdiction to hear the merits of this claim, Appellant would respectfully request the opportunity to brief and/or orally argue a related matter involving the significance of compliance with the mandates of Rule 24.02. As reflected in MO.REV.STAT. §302.020, a violation of §302.020.1(1) or (2) is a class A misdemeanor, but it is a class D felony if the person has been convicted "a third or subsequent time". Prior to 1999, the violation was a class C misdemeanor. In light of Rule 38.06, such a violation was and may still be disposed of through the "Fine Collection Center" (Rule 38.10) or "Local Violation Bureau" (Rule 38.14). If this Court rejects Appellant's claim, the State could and undoubtedly will prosecute such alleged violators if there are any prior convictions.
>
> (**A21**).

Appellant also raised these issues to this Court in his suggestions in support of the Application for Transfer.

In his briefs in the Court of Appeals, Appellant raised two points of error. Those points will be Points Two and Three herein. Appellant will address the jurisdictional issues in Point One.

POINTS RELIED ON

POINT ONE

The Court of Appeals erred as a matter of law and to the prejudice of Appellant when it ruled that it did not have jurisdiction to determine the issues because a direct appeal from a judgment entered on a guilty plea did not occur in that Appellant only pled guilty to the underlying DWI misdemeanor, pleading not guilty to the enhancement allegations and having a hearing as provided under §577.023; in that Appellant was only appealing the trial court's finding beyond a reasonable doubt that Defendant was an aggravated offender; in that it would be unreasonable to require a defendant to plead not guilty to the underlying offense in order to preserve a right to contest and directly appeal a finding of being a prior, persistent, aggravated, or chronic offender; and in that the State's failure to prove the facts warranting a finding of enhanced offender status beyond a reasonable doubt would be a jurisdictional defect.

Turner v. State, 245 S.W. 3d 826(Mo.banc 2008).

Dierkes v. Blue Cross & Blue Shield, 991 S.W.2d 662(Mo.banc 1999).

Harris v. Director of Revenue, 132 S.W.3d 897(Mo.App. S.D. 2004).

State v. Sparks, 916 S.W.2d 234(Mo. App. E.D. 1995).

MO.REV.STAT. §577.023.

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss the felony information and to strike enhancement allegations and when it overruled Defendant's motion for judgment of acquittal as to the findings of three prior intoxication related traffic offenses because the enhancement of the charge of Driving While Intoxicated from a Class B misdemeanor to a Class C felony was based upon invalid pleas of guilty and/or findings of guilty to all three intoxication related traffic offenses in that the evidence, based upon the whole record, did not establish beyond a reasonable doubt that any of the alleged pleas of guilty and/or findings of guilty were knowingly, voluntarily, and intelligently made as mandated by Rule 24.02 (state prosecutions) and Rule 37.59 (municipal prosecutions) and in that the evidence, based upon the whole record, established that the record was invalid on its face.

State v. Quinn, 594 S.W.2d 599(Mo.banc 1980).

State v. Pfeifer, 544 S.W.2d 317(Mo.App. K.C.D. 1976).

Dover v. State, 725 S.W.2d 915(Mo.App. S.D. 1987).

Missouri Rules of Court 24.02.

Missouri Rules of Court 37.59 [now 37.58]

MO.REV.STAT. §577.023(2005).

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss as to the alleged plea of guilty to or finding of guilty of driving while intoxicated in the 1991/1992 state court proceeding because the evidence did not establish beyond a reasonable doubt that Defendant pleaded guilty or was found guilty as required under MO.REV.STAT. §577.023 in that the disposition form in the court records clearly shows that both the line for the plea and the line for a finding of guilty were not checked and in that none of the other court records reflect a guilty plea or finding of guilty.

Estate of Huff, 516 S.W.2d 778(Mo.App. Spr. 1974).

Merriweather v. Grandison, 904 S.W.2d 485(Mo.App. W.D. 1995).

State v. Head, 834 S.W.2d 898(Mo.App. W.D. 1992).

MO.REV.STAT. §577.023(2005).

MO.REV.STAT. §577.011(1979).

ARGUMENT

POINT ONE

The Court of Appeals erred as a matter of law and to the prejudice of Appellant when it ruled that it did not have jurisdiction to determine the issues because a direct appeal from a judgment entered on a guilty plea did not occur in that Appellant only pled guilty to the underlying DWI misdemeanor, pleading not guilty to the enhancement allegations and having a hearing as provided under §577.023; in that Appellant was only appealing the trial court's finding beyond a reasonable doubt that Defendant was an aggravated offender; in that it would be unreasonable to require a defendant to plead not guilty to the underlying offense in order to preserve a right to contest and directly appeal a finding of being a prior, persistent, aggravated, or chronic offender; and in that the State's failure to prove the facts warranting a finding of enhanced offender status beyond a reasonable doubt would be a jurisdictional defect.

Facts and Standard of Review

The facts herein are uncontested. On February 16, 2007, Appellant pled guilty to the DWI offense charged in the information in violation of §577.010. Although the charge was characterized as a class C felony (L.F. 7), a violation under §577.010 is a

class B misdemeanor. In order to attempt to enhance the DWI charge to a class C felony, the State was required to plead "all essential facts warranting a finding that the defendant is" an aggravated offender. See, §577.023.7(1).[2] At the hearing, Judge Maloney clearly acknowledged that Craig was pleading guilty to a class B misdemeanor of DWI. (L.F. 3).

Judge Maloney then accepted Craig's plea of guilty. Thereafter, there was a hearing on Defendant's Motion To Dismiss Felony Information And To Strike Enhancement Allegations. (L.F. 3, 9 & 10). Judge Maloney clearly acknowledged that Craig was "specifically denying guilt of any greater level of the offense" (L.F. 3) and clearly understood that Craig was contesting the "enhancement allegations" as set forth in the Information. (L.F. 3, 7). The State presented evidence in the form of certified court records as to all three previous offenses. (Tr. 23-33). Appellant basically introduced all of the documents attached to the motion and suggestions, which were composed of certified records from the entire court file as to each previous offense and an affidavit by Defendant. (L.F. 19-58; Tr. 33-41). The State did not contest Defendant's evidence. (Tr. 36, 38, 39, 40).

The trial court then took the mater under advisement, allowing the State and the Defendant to further brief the issues. (L.F. 3; Tr. 41). On March 29, 2007, the trial court found Defendant guilty of DWI at the class C felony level of the offense and overruled Defendant's motion to dismiss/strike. Judge Maloney clearly acknowledged "that the

[2] §577.023.7(1) only refers to "a prior offender or persistent offender" but a reasonable construction would surely include "aggravated offender", or "chronic offender".

defendant knew the trial to the court of the only factually disputed issues in his case were issues that would have been tried to the court with or without a jury trial of the basic charge". (L.F. 4; **A3**). Judge Maloney then made specific findings of fact beyond a reasonable doubt as required under §577.023.7(3), further stating that Defendant "prepare and file an appropriate motion to seek relief from the finding of guilty and specify the issues for appellate review if the motion is not sustained". (L.F. 4; A**3**).

Defendant timely filed a Motion For Judgment Of Acquittal As To Findings Of Prior Intoxication Related Traffic Offenses and suggestions in support. (L.F. 71-76). Defendant did not dispute the plea of guilty or the finding of guilty as to a class B misdemeanor offense of DWI. Defendant disputed the trial court's findings as to the validity of the three previous plea proceedings. On April 20, 2007, the trial court overruled the "Motion for Judgment of Acquittal as to findings of prior incarceration [sic] [intoxication] related traffic offenses". (L.F. 5). Appellant appealed this part of the judgment. (L.F. 79-85).

As reflected in its modified Opinion (**A14-A18**), the Court of Appeals initially determined that it did not have jurisdiction, stating as follows:

> This case involves a direct appeal from a judgment entered on a guilty plea. While neither party raises the issue, we must determine *sua sponte* our jurisdiction to consider the merits of the claim on appeal. *Hampton v. Carter Enters, Inc.*, 238 S.W.3d 170, 173(Mo.App. 2007). The only issues cognizable on direct appeal from a guilty plea are the subject

> matter jurisdiction of the trial court and the sufficiency of the charging instrument. *State v. Sharp*, 39 S.W.3d 70, 72(Mo.App. 2001). Any appellate claim that does not fall into one of these two categories is unreviewable. *State v. Sparks*, 916 S.W.2d 234, 238(Mo.App. 1995).
>
> (Op. 3; **A6**).

The Court of Appeals next declared that "Craig does not allege that the circuit court lacked subject matter jurisdiction" or that the information was insufficient "to notify him of the charged offense", instead merely challenging the sufficiency of the evidence to support the enhancement allegations, supposedly a nonjurisdictional defect. (Op. 3; **A6**). The Court of Appeals also rejected Appellant's contentions that the provisions of §577.023, setting forth the procedures for determining offender status, allowed for a direct appeal of a not guilty plea to or contesting of the enhancement allegations when there is a guilty plea to the underlying offense. The Court of Appeals simply declared that a defendant does "not acquire a special right of appeal based solely on the fact that the court heard evidence of his prior offender status after he pled guilty to the charged offense". (Op. 4; **A7**).

Thus, because the facts are uncontested, the issue herein should be limited to determining whether or not the Court of Appeals erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30(Mo.banc 1976). The issue herein also appears to be one of first impression.

Argument

The relevant provisions of §577.023 are as follows:

7. The state, county, or municipal court shall find the defendant to be a prior offender, persistent offender, aggravated offender, or chronic offender, if;

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender or persistent offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

8. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing.

9. In a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a later time, but prior to sentencing.

10. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

11. The defendant may waive proof of the facts alleged.

These procedures are essentially the same as in §588.021 and would undoubtedly apply in a felony prosecution under §302.020 and any other recidivist statute. (**A24**).

Appellant would initially direct this Court to its case of *Turner v. State*, 245 S.W.3d 826(Mo.banc 2008) wherein this Court construed a different provision under §577.023 based primarily on a plain wording of the statute. Clearly, the legislature has provided for a bifurcated hearing procedure. At each stage there are different elements for the State to prove. In one stage, the elements involve driving while intoxicated under §577.010. In the other stage, the elements involve at least the essential facts warranting a finding that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender. See, §577.023.7; Point Two, infra. At both stages, the State's burden of proof is beyond a reasonable doubt. Inherent or implied within this type of procedure is a right to plead guilty in the underlying offense stage and not guilty in the enhanced offender stage. Inherent or implied within this type of procedure should be a right to a direct appeal of the findings of being a previous offender in the second stage regardless of whether the defendant pled guilty or not guilty in the first stage. And, inherent or implied in this procedure is the loss of the right to a direct appeal if the defendant pleads guilty in the first stage and "waives proof of the facts alleged" in the second stage.

This Court should also note that the holding of the Court of Appeals involves an unreasonable or absurd result. See, also, *Dierkes v. Blue Cross & Blue Shield*, 991 S.W.2d 662, 668 & 669[13](Mo.banc 1999)(Supreme Court will not assume legislature intended an absurd or unreasonable result). In light of the fact that Appellant specifically pled guilty to the underlying misdemeanor offense, but pled not guilty to and affirmatively contested the enhancement allegations, and in light of the Court of Appeals' holding, if a defendant wants a direct appeal of an adverse judgment as to the enhancement allegations, the defendant must also plead not guilty to the underlying charged offense, requiring a trial and a finding of guilty as to the charged offense and then a hearing on the enhancement allegations.

Herein, Appellant accepted his guilt as to the offense of driving while intoxicated, but wanted a hearing as to the validity of the enhancement allegations because sustaining his assertions would result in being a misdemeanor offender instead of a felon. Appellant then appealed only that part of the judgment finding him to be an aggravated offender. Such a procedure is very reasonable. It is unreasonable to now require Appellant to file a Rule 24.035 motion to have these issues determined. (Op. 4 & 5; A17 & A18).

In addition, at page 3 of the Opinion, the Court of Appeals cites the *Sparks* case for the proposition that "[u]nless the claims on appeal fall into one of these two categories, they are unreviewable" – the categories being "subject matter jurisdiction of the trial court and the sufficiency of the charging instrument". This conclusion is erroneous.

First, the *Sparks* Court specifically recognized that in "two recent cases, both this court and the Missouri Supreme Court declared a guilty plea made voluntarily and understandingly waives all non-jurisdictional defenses and defects", citing the *Maulhardt* and *Hagan* cases, 916 S.W2d at 236 and discussing the effect of the *Parkhurst* case. Id. at 236 & 237. The *Sparks* Court did not analyze what constitutes jurisdictional defects and defenses, instead recognizing that a "sufficiency of information" issue can be raised at any time during the pendency of the proceeding, but that the scope of review after trial and on appeal is more limited than the scope of review if there is a pretrial or trial objection or motion. Id. at 237.

Second, as reflected in the case of *Jennings v. State*, 631 S.W.2d 361(Mo.App. S.D. 1982), there are at least four types of jurisdictional defects:

> The term "jurisdiction" may bear one of several different meanings. It may be used with the connotation of jurisdiction over the subject matter. [Citation omitted]. Or, it may be used in the sense of the power to render the particular judgment in question. [Citation omitted]. Or, in the sense of venue. [Citation omitted]. Or, the term may refer to jurisdiction of the person. [Citation omitted].
>
> Id.

In *Evans v. St. Louis Comprehensive Neighborhood Health Center*, 895 S.W.2d 124(Mo.App. E.D. 1995), the *Evans* Court also recognized that a judgment is void "only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or

acted in a manner inconsistent with due process of law". Id. at 126. Appellant's challenge involves the "power to render the particular judgment in question", but could also be a due process challenge.

Third, for a recent case analyzing this type of jurisdictional defense, Appellant would refer the Court to the case of *Harris v. Director of Revenue*, 132 S.W.3d 897(Mo.App. S.D. 2004) wherein the *Harris* Court initially recognized the following:

> The Director initially argues that the court lacks subject matter jurisdiction to grant Driver's petition. It has often been noted that "jurisdiction" is a term which is used imprecisely in judicial opinions and other legal writings, depending for its meaning on the context of the matter at issue. [Citation omitted]. In the context of this matter, although Director argues that the trial court did not have subject matter jurisdiction, Director is actually arguing that the court did not have jurisdiction to render the order given. "Jurisdiction has many meanings depending upon the context used. `Jurisdiction' is a loosely employed term but generally it includes three kinds of authority, over the subject matter, over a person, and to render the order given." [Citation omitted]. Thus, in the stricter sense, it means judicial authority over the subject matter and the parties, but in its broader sense, it includes the power to grant specific relief in cases within such authority. If the pleadings state a matter belonging to a general class

over which the authority of the court extends, then the court has subject matter jurisdiction. [Citation omitted].

Id. at 899 & 900.

The *Harris* Court also recognized that under the statute in question, the trial court "clearly had the requisite subject matter jurisdiction to evaluate Driver's petition and determine whether or not he was statutorily eligible for a hardship license" and that when "the trial court heard the application of Driver for the license and reviewed the records, it ruled on his petition with the subject matter jurisdiction". Id. at 900.

However, in determining "whether the court acted in excess of its jurisdiction in granting the hardship driver's license", the *Harris* Court noted that "the burden of proof was upon Driver to prove he was worthy of hardship driving privileges", that the "Director's Answer called into question facts pled by Driver in his petition", and that the driver "offered no evidence to show he was eligible statutorily based on Director's answer". Id. at 901. The *Harris* Court then reversed the finding in favor of the driver because the evidence did not support the trial court's finding of statutory eligibility. See also, *In re Estate of Simmermon*, 601 S.W.2d 691(Mo.App. W.D. 1980)(Probate division did not have jurisdiction or power to enter an order of distribution contrary to the terms of the will admitted to probate following the dismissal of the will contest.

Fourth, this Court should also take note of the case of *State v. LePage*, 536 S.W.2d 834(Mo.App. KCD 1976), cited in the *Sparks* case. 916 S.W.2d at 236. In the *LePage* case, the defendant attacked "the jurisdiction of the circuit court because of alleged

defects in the juvenile court proceedings." 536 S.W.2d at 835. Relying on the case of *Jefferson v. State*, 442 S.W.2d 6(Mo. 1969), the *LePage* Court ruled that the defendant waived those alleged defects because of a failure "to file a motion in the general criminal division requesting dismissal of the information" and because "defendant made no objection to the regularity and propriety of the proceedings in the juvenile court and instead voluntarily entered a plea of guilty." 536 S.W.2d at 835 & 836. It should also be noted that the *Jefferson* Court likened this type of defect to the failure to raise an issue about not being accorded a preliminary hearing prior to entering a voluntary plea of guilty. 442 S.W.2d at 13.

Fifth, Appellant would refer the Court to the case of *State v. Wallace*, 825 S.W.2d 626(Mo.App. E.D. 1992) wherein the defendant was charged with a class D felony of resisting arrest. Looking to the statute in question, the *Wallace* Court noted that resisting arrest was a class A misdemeanor if the conduct involved merely fleeing, whereas it was a class D felony if it involved resisting by means other than flight. Looking to the information and verdict director, the *Sparks* Court recognized that the alleged resisting was based upon flight from the officer and then determined that evidence of a confrontation between the officer and the defendant did not exist. Id. at 632 & 633. On a *sua sponte* basis, the *Wallace* Court declared this defect to be jurisdictional, reversed the conviction, and remanded for sentencing on a class A misdemeanor.

Finally, in the *Sparks* case, the defendant pled guilty, not only to the underlying misdemeanor DWI, but also the felony allegations. 916 S.W.2d at 235. In other words,

the defendant waived proof of the facts alleged as allowed under §577.023.1. Undoubtedly, the ***Sparks*** Court was influenced by this situation, concluding as follows:

> The information was read to defendant at his plea hearing where he was represented by counsel. Knowing the information lacked two allegations as to the persistent offender status, defendant's counsel allowed him to plead guilty to the charge of a class D felony without objecting to the information. Defendant does not allege he was prejudiced by the omission of facts in the state's information and after reviewing the record we find no actual prejudice to defendant.
>
> Id. at 238.

As these standards would apply herein, Appellant properly preserved the felony offender status issue for direct appeal. First, Appellant filed a motion to dismiss the *felony* information. Second, Appellant specifically pled not guilty to and contested the felony enhancement allegations. Third, Appellant clearly objected to the use of the prior pleas or findings of guilty as being invalid because the evidence failed to establish beyond a reasonable doubt that any of the alleged pleas of guilty and/or findings of guilty were knowingly, voluntarily, and intelligently made as mandated by Rule 24.02 (state prosecutions) and Rule 37.59 (municipal prosecutions). Fourth, Appellant presented evidence which clearly supported his objections; the State did not contest any of this evidence. Fifth, after the trial court found Appellant guilty of the enhancement allegations and found appellant guilty of a class C felony, Appellant timely filed a motion

to set aside this judgment and for acquittal of the felony. Finally, although prejudice should not be an issue, if Appellant's claims are meritorious, he is only guilty of a class B misdemeanor, not a class C felony.

Appellant timely preserved all issues. The trial court had subject matter jurisdiction under the statute to hear and determine Appellant's felony offender status, but the trial court simply did not have jurisdiction to render the particular judgment in question. This Court has jurisdiction to rule on the merits.

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss the felony information and to strike enhancement allegations and when it overruled Defendant's motion for judgment of acquittal as to the findings of three prior intoxication related traffic offenses because the enhancement of the charge of Driving While Intoxicated from a Class B misdemeanor to a Class C felony was based upon invalid pleas of guilty and/or findings of guilty to all three intoxication related traffic offenses in that the evidence, based upon the whole record, did not establish beyond a reasonable doubt that any of the alleged pleas of guilty and/or findings of guilty were knowingly, voluntarily, and intelligently made as mandated by Rule 24.02 (state prosecutions) and Rule 37.59 (municipal prosecutions) and in that the evidence, base upon the whole record, established that the record was invalid on its face.

Standard of Review

Initially, Appellant would point out that the issue herein involves an interpretation of Rule 24.02 and former Rule 37.59, now Rule 37.58. See, A4 to A8 for copies of these rules. As in situations involving statutory interpretation, this Court should employ the "cardinal rule of statutory interpretation" wherein the intention of the Supreme Court in enacting the rule must be determined and the rule "as a whole should be looked to in construing any part of it." * * * Words are to be given their plain and ordinary meaning wherever possible. * * * Where words of a [rule] are capable of more than one meaning,

the court gives the words a reasonable reading rather than an absurd or strained reading". See, *J.S. v. Beaird*, 28 S.W.3d 875, 876(Mo.banc 2000); *Turner v. State*; 245 S.W.3d 826(Mo.banc 2008). Words such as "shall" or "must" should generally be construed to be a "mandate calling for compliance" or as "signifying compulsion or necessity". See, *State v. Reece*, 274 S.W.2d 304, 308(Mo.banc 1954). However, this Court should more so be mindful of the reasons for enacting a rule since this Court, not another entity, actually promulgated these rules. See, e.g., MO.REV.STAT. §477.010.

In addition, both the State and Appellant introduced evidence. Appellant's evidence not only included the State's evidence, but also expanded upon it by introducing the entire court files from all three proceedings and Appellant's affidavit as to his recollection of events occurring in each proceeding. (L.F. 19-58; Tr. 23-40). The facts as revealed in Appellant's evidence are uncontested, and thus this Court is not required to defer to the trial court. See, *Furne v. Director of Revenue*, 238 S.W.3d 177, 180-182 (Mo.App. W.D. 2007).

Thus, the issue herein should involve whether the trial court erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30(Mo.banc 1976). In addition, while the issue herein is not necessarily one of first impression, there appears to be some confusion as to whether noncompliance with these court rules in misdemeanor prosecutions will prevent a subsequent felony prosecution based solely upon the misdemeanor guilty plea; and, if it does, there appears to be a lack of clarity as to the State's and the defendant's burden of persuasion and burden of production.

Argument

In 2005, the legislature amended MO.REV.STAT. §577.023, creating two new types of offenders, being the "aggravated offender" and the "chronic offender". (**A9**). The "aggravated offender" is a person who has "pleaded guilty to or has been found guilty of three or more intoxication-related traffic offenses", and the "chronic offender" is a person who has "pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses". See, §577.023.1(1) & (2). An "aggravated offender shall be guilty of a class C felony", while a "chronic offender shall be guilty of a class B felony." See, §577.023.4 & .5. (**A10**). An aggravated offender must also serve a minimum of sixty days imprisonment before being eligible for parole or probation, while a chronic offender must serve a minimum two years. See, §577.023.6. (**A10**). Another very significant change involves removing the "ten year cap" on a felony charge with regard to using prior pleas of guilty or findings of guilty to intoxicated-related traffic offenses. See, former §577.023.1(2)(a)[2001]. Thus, the State can now attempt to use any prior intoxication-related traffic offense which may have occurred during the life of the offender.

To impose the enhancement penalties under §577.023, a plea of guilty to or the conviction of the previous offense must be valid. See, e.g., *State v. Pfeifer*, 544 S.W.2d 317, 319 & 320(Mo.App. K.C.D. 1976); *McDaris v. State*, 843 S.W.2d 369, 374[5](Mo.banc 1992). Pursuant to §577.023.7, the State must plead and prove facts to

warrant a finding beyond a reasonable doubt that a defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

With regard to Rule 24.02 and Rule 37.59/37.58, this Court obviously enacted these rules in response to such cases as ***Burgett v. Texas***, 389 U.S. 109(1967) and ***Boykin v. Alabama***, 395 U.S. 238(1969), wherein the United States Supreme Court recognized that a waiver of the constitutional rights to confront and cross-examine adverse witnesses, to a jury trial, to not be compelled to incriminate oneself, and to counsel cannot be presumed from a silent record and that in the absence of evidence of a voluntary and understanding waiver of such rights, the guilty plea is invalid. Although the wording of each rule is at times different, both rules impose certain requirements upon the judge *before* accepting a plea of guilty:

a. The judge must address the defendant "personally, in open court, and inform him of, and determine that he understands" certain constitutional rights:

1) the nature of the charge to which the plea is offered and the range of punishment, minimum and maximum, provided by law; [Rule 24.02(b)(1); Rule 37.59(b)(1)].

2) the right to be represented by a lawyer; [Rule 24.02(b)(2); Rule 37.59(b)(2)].

3) the right to plead not guilty or persist in a plea of not guilty and the right to a jury trial; [Rule 24.02(b)(3); Rule 37.59(b)(3)].

4) the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; [Rule 24.02(b)(3); Rule 37.59(b)(4)].

5) Rule 24.02(b)(4) also provides that if the defendant "pleads guilty there will not be a further trial of any kind, so that by pleading guilty he waives the right to a trial". See, now, Rule 37.58(b)(4).

b. The judge "shall not accept a plea of guilty" unless the judge finds the plea is "knowingly, voluntarily, and intelligently made" and "not the result of force or threats or promises". [Rule 24.02(c); Rule 37.59(c)]. Rule 24.02(c) further provides that the court shall address "the defendant personally in open court".

c. The judge "shall not enter a judgment upon a plea of guilty unless it determines that there is a factual basis for the plea." [Rule 24.02(e); Rule 37.59(e)].

Both rules also contain mandatory wording such as "shall" and "must". There are two exceptions, the first involving the presence of the defendant being waived. See, Rules 31.03 (misdemeanors only) and 37.57. This exception does not apply herein. Under former Rule 37.59(b) & (c) and current Rule 37.58(b) & (c), there is another exception under Rule 37.49, which involves having a "traffic violations bureau" where designated traffic violations can be paid without appearance in court. However, this rule specifically forbids a designated traffic violation to include certain violations, including "operating a

motor vehicle while intoxicated or under the influence of intoxicants or drugs". See also, Rule 38.06(b). (**A25**).

In addition, although this Court did not cite the *Boykin* case or Rule 24.02 in *State v. Shafer*, 969 S.W.2d 719(Mo.banc 1998), the *Shafer* Court recognized that "[d]ue process requires that a person who wishes to plead guilty must be competent to do so and must enter the plea knowingly and voluntarily". Id. at 731[14]. Upon further recognizing that "a guilty plea is a waiver of several constitutional rights", the *Shafer* Court stated: "These are rights guaranteed by these constitutions of which the *record taken as a whole must show* that a person pleading guilty is aware, understands, and freely relinquishes *before a guilty plea is effective*". Id. at 731 & 732. (Emphasis ours). These principles are fully consistent with the *Boykin* case and Rules 24.02 and 37.59/37.58.

As reflected in *State v. Thomas*, 96 S.W.3d 834(Mo.App. W.D. 2002), citing the *Dean* case, the judge must *personally* address the defendant, determine that the defendant understands all of his or her rights, and must make a finding that the plea was knowingly and voluntarily made. The judge cannot merely rely on the representations of defense counsel or a "plea petition". Id. at 844 & 845. However, the judge need only be an "active participant" in the plea process. See, *State v. Taylor*, 929 S.W.2d 209, 216(Mo.banc 1996).

In a felony plea proceeding, Rule 24.03 also requires a court reporter to accurately record all court proceedings in connections with the plea. A similar rule does not apply

to misdemeanor or municipal ordinance cases, but a "plea petition" should be sufficient when combined with a court record affirmatively showing that the judge verified the sufficiency of the contents of the plea petition, that the defendant read and understood the recitations in the plea petition, and that the judge then made the required findings based thereon. See, *Moore v. State*, 974 S.W.2d 658(Mo.App. E.D. 1998)(plea petition outlining rights reflected in Rule 24.02(b) and court's inquiry of defendant that he reviewed plea petition with his attorney and understood rights outlined in petition was sufficient).

The Court should also take note of the *Pfeifer* case, which involved an offense of DWI and enhancement based on alleged prior offenses. In that case, the defendant asserted that a prior misdemeanor DWI conviction could not be used to enhance the punishment because the court records did not affirmatively disclose that he requested the cause to proceed in his absence as required under former Rule 29.02, now Rules 31.03(a) and 37.57. The *Pfeifer* Court agreed, holding the omission to be a fatal defect which resulted in the prior conviction being "void for purposes of invoking Subsection (2) of §564.440 RSMo. 1969", 544 S.W.2d at 321, the predecessor statute of §577.023. Although the *Pfeifer* case does not involve the same mandatory procedures herein when accepting a plea of guilty, the *Pfeifer* case did involve the attempt to use a prior state misdemeanor DWI proceeding to enhance the underlying offense. The *Pfeifer* Court determined that the procedures set forth under Rule 29.02 [now Rule 31.03(a) and 37.57]

were mandatory, and noncompliance resulted in the prior DWI guilty plea being void for purposes of enhancement. The same reasoning applies herein.

In addition, in the case of *State v. Wimberly*, 700 S.W.2d 167(Mo.App. S.D. 1985), the defendant was convicted of being a DWI prior offender. The proof of the prior conviction made "no reference to representation by or waiver of counsel." Id. at 168. The *Wimberly* Court held that such "proof was inadmissible to enhance punishment upon conviction of the instant offense when imprisonment was to be imposed". Id. Although all felony offenders are required to serve a minimum term of imprisonment before being eligible for parole or probation, see, §577.023.6, Appellant would submit that use of a prior offense should not be conditioned upon whether or not the defendant is subject to imprisonment. Regardless, the *Wimberly* case is consistent with the *Pfeifer* case in that the record must affirmatively disclose compliance with the rules.

Appellant would further point out that the case of *Dover v. State*, 725 S.W.2d 915(Mo.App. S.D. 1987) appears to conflict with Defendant's contentions, but upon review of the *Dover* Court's reasoning, that case cannot be relied upon for a valid statement of the law. In rejecting a position similar to Defendant's contentions herein, the *Dover* Court based its decision on two grounds: one, that the "only way a court record can conclusively demonstrate that a court complied with the multifarious requirements of Rule 24.02 in accepting a plea of guilty is by a transcript of the guilty plea proceeding"; and two, that "no Missouri case, and our independent research finds none, impos[es] such a requirement on the use of a plea of guilty to an intoxication-

related traffic misdemeanor for the purpose of establishing that an accused is a persistent intoxication-related traffic offender". Id. at 918 & 919. With all due respect to the *Dover* Court, its reasoning as to the first ground is simply unreasonable, while as to the second ground, the *Pfeifer* case in combination with the *Boykin*, *Shafer*, *Dean*, *Taylor*, and *Thomas* cases would logically impose such a requirement.

As to the first ground, the *Dover* Court states as follows:

> Movant's arguments, were we to accept it, would, for all practical purposes, bar the use of any plea of guilty to an intoxication-related traffic misdemeanor for the purpose of establishing, in a subsequent prosecution, that an accused is a persistent intoxication-related traffic offender. The only way a court record can *conclusively* demonstrate that a court complied with the multifarious requirements of Rule 24.02 in accepting a plea of guilty is by a transcript of the guilty plea proceeding. Rule 24.03, Missouri Rules of Criminal Procedure (18th ed. 1987), requires the court reporter to prepare and file such a transcript when an accused enters a plea of guilty to a felony and the court imposes a sentence requiring delivery of the accused to the department of corrections, but no such requirement exists in any other circumstances. The position championed by movant would require the State to prove, by court record, that certain dialogue occurred between the accused and the court in a guilty plea proceeding in a misdemeanor case, as to which no verbatim record would exist.

Id. at 918 & 919. (Emphasis ours).

As reflected in Defendant's contentions hereinbefore, the existence of a "verbatim record" is clearly not dependent on a court reporter or tape recording. A "plea petition" and appropriate court docket entries would be sufficient because "on its face" the records would establish compliance with the rules, which then imposes a burden upon the defendant to refute the record or, if correct, establish prejudice. *Moore*, *supra*. A "conclusive demonstration" is thus not required. As also reflected in the *Pfeifer* and *Wimberly* cases, when the record fails to "affirmatively show" any compliance and particularly when the evidence shows noncompliance, then the plea of guilty is deemed invalid and cannot be used for enhancement purposes. 544 S.W.2d at 320 & 321; 700 S.W. 2d at 168.

As to the second ground, the *Dean*, *Taylor*, and *Thomas* cases clearly require *substantial* compliance with the *mandates* of Rule 24.02. While these cases involved felony pleas, Rule 24.02 applies not only to felonies but also all misdemeanors. Former Rule 37.59 and current Rule 37.58 apply to "the procedure in all courts of this state having original jurisdiction of ordinance violations and the disposition of any such violation in a violation bureau". See, Rule 37.01. The plain wording of Rule 24.02 and Rule 37.59/37.58 clearly require compliance. The *Pfeifer* case further establishes that the court record must affirmatively show compliance with the rules. 544 S.W.2d at 321. See, also, *White v. King*, 700 S.W.2d 152, 156[11](Mo.App. W.D. 1985). The Court should also note that if the provisions of these rules are not mandatory, then these rules

are nugatory, which would be an absurd result and in conflict with the intent of this Court and such cases as *Boykin* and *Burgett*. The *Boykin* Court clearly held that if a defendant is not apprised of the constitutional rights involving self-incrimination, right to a jury trial, and confrontation, the guilty plea is not voluntary and knowing, resulting in a violation of due process and the plea being void. 395 U.S. at 243; see, also, *Shafer*, *supra*.

Appellant would also address an argument of Respondent which Respondent did not raise until the filing of Respondent's Suggestions In Opposition To Appellant's Application For Transfer, wherein Respondent asserted that Appellant's interpretation of the *Pfeifer* case would conflict with the case of *State v. Quinn*, 594 S.W.2d 599(Mo.banc 1980). Appellant respectfully submits that the *Quinn* case actually supports Appellant's arguments and may provide insight into the State's and the defendant's burden of persuasion and burden of production.

First, the Court should take note that the defendant was sentenced under the "Second Offender Act", which apparently involved §556.280, RSMo 1969, but which the *Quinn* Court noted was repealed and replaced by §558.016, effective 1979. Id. at 600 & 601, fn. 1. §558.016 also involved §558.021, which prescribed the procedures for pleading and proving the offender status. Both statutes have been subsequently amended. Among various changes, the legislature has created a "persistent misdemeanor offender". See, §558.016.5. The current procedures under §588.021 are essentially the same as the procedures under §557.023.7, .8, .9, .10, .11, .12, and .13. (**A10, A23, A24**).

Second, the Court should note that under the Second Offender Act, the previous offense had to be a felony. The State also introduced a record, reflecting the plea court having ordered "the official court reporter to take notes to preserve the evidence." Id. at 601. Thus, a "verbatim record" apparently existed which would presumably have been in compliance with Rule 24.03 and which would have been readily available to the defendant to determine whether or not there was compliance with Rule 24.02 (then Rule 25.04).

Third, the *Quinn* Court recognized the State's "burden of proof", id, at 601 and 602, which appears to be comparable to §577.023.7(2). Such a burden would appear to not involve proof of compliance with Rule 24.02/25.04. The State was also not required to present "an entire transcript of a previous conviction showing all the circumstances and conditions surrounding that conviction". Id. at 602.

Fourth, the *Quinn* Court clearly placed at least the burden of production upon the defendant to introduce the "whole record" before a defendant can claim "that the 'record' is invalid on its face." Id. With regard to the effect of Rule 25.04, the *Quinn* Court did not directly address that issue because the defendant failed to present any evidence, but did further note as follows:

> It also is interesting to note in this regard that at no time in this case, from the objection at the robbery trial through the briefs and oral arguments before this Court, has appellant claimed that his plea to the earlier charge was involuntary or otherwise violative of his constitutional rights. Instead,

> all he has said is that the part of the record offered by the state was insufficient to show there was a factual basis for the plea, that the plea was voluntary, that appellant understood the consequences of his plea and that he waived his constitutional rights associated with trial by jury. Appellant must lose on this point, both for procedural and substantive reasons.
>
> Id. at 603.

However, the *Quinn* Court left open the issue as to the ability to use the prior proceeding if there was an affirmative showing of noncompliance with Rule 25.04, noting only that a lack of "strict compliance with Rule 25.04 does not require that the guilty plea be set aside or vacated unless it can be established by a preponderance of the evidence that the plea was entered involuntarily or without the defendant understanding the nature of the charge". Id. at 602. This Court should also note that the *Quinn* Court limited its holding "to the facts of this case." Id. at 602[2].

The *Quinn* Court did not mention the *Pfeifer* case. The *Quinn* Court also was not faced with any issue involving the defendant's statutory rights, according "full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings". See, §§577.023.10 and 558.021.4. The *Quinn* Court was further not faced with any statutes which enhanced a misdemeanor offense to a felony offense based on previous misdemeanor offenses, such as §577.023 or §302.020, or with any statute which limited sentencing to the trial court if the defendant is a "persistent misdemeanor offender" – namely, §558.016.1.

With regard to §302.020, the offense basically involves operating vehicles without a valid license or permit. Prior to 1999, the offense was a class C misdemeanor. After 1999, a violation of §302.020.1(1) or (2) is a class A misdemeanor, but it is a class D felony if the person has been convicted "a third or subsequent time." And, in light of Rule 38.06, such a violation was and may still be disposed of through the "Fine Collection Center" (Rule 38.10) or "Local Violation Bureau" (Rule 38.14). Under Rule 38.06(c), a violation cannot be disposed of through the FCC if it involves "[o]perating a vehicle with a counterfeited, altered, suspended or revoked license". (**A25**). However, simply having no license or an expired license would not be included. As a matter of fact, Appellant's attorney currently has a client whose driver's record reflects a conviction for "No Driver License" which was paid through the "Fine Collection Center" in 2007. Thus, if this Court rejects Appellant's claim, the State could and undoubtedly will prosecute such alleged violators if there are any prior convictions.

In light of all of these cases and statutes, Appellant would submit that if the whole record is silent on the issue of compliance with Rule 24.02 or Rule 37.58 or affirmatively shows noncompliance, then a "patent invalidity" exists which bars the use of the previous offense(s) for purposes of enhancement. To establish a *prima facie* case for the use of the previous offense for enhancement purposes, this Court could follow *Quinn*, imposing a burden upon the State to only produce sufficient evidence to satisfy the provisions of §577.023.7(2). A showing of substantial compliance with Rule 24.02 or Rule 37.58

would thus not be required.[3] The burden of production would then shift to the defendant to introduce the whole record and any other evidence showing noncompliance with the rules or that the plea was otherwise involuntary. The burden of persuasion of beyond a reasonable doubt should always remain with the State at least in those cases where the whole record is silent. See, §577.023.7 & .8.

As applied herein, neither the prior municipal prosecution nor the prior state prosecutions are valid for purposes of enhancement.

Initially, the Court should note that Appellant introduced all of the available records in each proceeding. The "whole record" was thus before the trial court. Appellant also submitted an affidavit, essentially reflecting that his pleas were "involuntary or otherwise violative of his constitutional rights." Appellant has complied with the burdens imposed in *Quinn*.

With regard to the municipal prosecution, the whole record reflects Defendant's appearance, defense counsel's appearance, plea of guilty to the charge of driving while intoxicated, finding of guilty, and the suspension of execution of sentence. However, none of these records reflect any compliance with the mandatory provisions of Rule 37.59(b)(1), (3), & (4) and 37.59(c). (L.F. 19-34). As reflected in Appellant's affidavit, Judge Murphy did not address Appellant personally in open court as to informing him

[3] Because there are significantly greater adverse repercussions as to being charged with a felony than being charged with a misdemeanor, Appellant would encourage the Court to impose a greater obligation upon prosecutors to review the records.

and determining that he understood his rights and further did not question him about the plea of guilty not being the result of force or threats or promises. (L.F. 56).

With regard to the 1999 state prosecution, the whole record reflects Defendant's appearance, defense counsel's appearance, plea of guilty to the charge of driving with an excessive blood alcohol content, finding of guilty, and the suspension of the execution of sentence. None of these records reflect any compliance with the mandatory provisions of Rule 24.02(b)1., 3., & 4. and 24.02(c). (L.F. 35-46). As reflected in Appellant's affidavit, Judge Gabbert did not address him personally in open court as to informing him and determining that he understood his rights and further did not question him about the plea of guilty not being the result of force or threats or promises apart from the plea agreement or about a willingness to plead guilty resulting from prior discussions between the prosecuting attorney and his attorney. (L.F. 57).

With regard to the 1991/1992 state prosecution, the whole record reflects Defendant's appearance, defense counsel's appearance, assessment of court costs, and the suspension of the imposition of sentence. None of these records reflect compliance with the mandatory provisions of Rule 24.02(b)1., 3., & 4. and 24.02(c), nor do these records reflect a plea of guilty or finding of guilty. (L.F. 47-55). As reflected in Appellant's affidavit, Judge Brown did not address him personally in open court as to informing him and determining that he understood his rights and further did not question him about the plea of guilty not being the result of force or threats or promises apart from the plea

agreement or about a willingness to plead guilty resulting from prior discussions between the prosecuting attorney and his attorney. (L.F. 57 & 58).

As reflected in the trial court's conclusions, Judge Maloney opined "that the State is not required to prove *strict* compliance with the requirements of Rule 24.02 in state courts or Rule 37.58 in municipal courts to be able to use pleas or findings of guilty in prior intoxications-related offenses to increase the severity of driving while intoxicated charges". (L.F. 4; **A3**). (Emphasis ours). However even if "strict compliance " is not required, there would be a requirement of at least "substantial compliance". The evidence herein establishes "no compliance".

As a result of the complete failures to comply with the mandates of the rules involving "pleas", Defendant's pleas of guilty and the findings of guilty are invalid for purposes of using such pleas and findings of guilty for enhancement purposes. All of the enhancement provisions in the Information must be stricken and the felony portion of the information dismissed. Because the information as to the underlying offense in violation of §577.010 is sufficient and because the Appellant did not challenge the validity of that plea, the judgment of the trial court must be reversed and the case remanded for sentencing and judgment on a class B misdemeanor of driving while intoxicated. See, *Pfeifer*, 544 S.W.2d at 322; MO.REV.STAT. §577.010.

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled Defendant's motion to dismiss as to the alleged plea of guilty to or finding of guilty of driving while intoxicated in the 1991/1992 state court proceeding because the evidence did not establish beyond a reasonable doubt that Defendant pleaded guilty or was found guilty as required under MO.REV.STAT. §577.023 in that the disposition form in the court records clearly shows that both the line for the plea and the line for a finding of guilty were not checked and in that none of the other court records reflect a guilty plea or finding of guilty.

Standard of Review

The issue herein is possibly one of first impression. As reflected in MO.REV.STAT. §577.023.7(2), the State has the burden to prove a defendant is an aggravated offender by introducing evidence "that establishes sufficient facts pleaded to warrant a finding *beyond a reasonable doubt*." (Emphasis ours). The State's burden includes facts establishing that a defendant "pleaded guilty" or "has been found guilty". See, §577.023.1(1)(a). These words are plain and unambiguous. See, *J.S. v. Beaird*, 28 S.W.3d 875(Mo.banc 2000); *Turner v. State*, 245 S.W.3d 826(Mo.banc 2008).

With regard to the evidence, there are three court documents which would have reflected the plea or finding of guilty: one, the criminal docket sheet (L.F. 47; **A11**); two, the back of the Uniform Complaint and Summons (L.F. 54; **A12**); and three, the

disposition form of the Seventh Judicial Circuit of Missouri (L.F. 55; **A13**). None of these records reflect a plea or finding, and instead, such records clearly show that both the line for the plea and the line for a finding of guilty were not checked. The State did not contradict these records, instead asserting as follows:

> Whatever ambiguity there may be as to whether or not the defendant pleaded guilty, there can be no doubt that on January 30, 1992, the court found the defendant guilty of driving while intoxicated. The record is very clear that the court in that case gave the defendant a suspended imposition of sentence and placed the defendant on a two year period of probation, which the defendant successfully completed. Moreover, the record is also clear that the defendant was represented by an attorney throughout the proceedings in the case. It is highly doubtful that any attorney would stand by and allow a court to impose a form of punishment on his client without a finding of guilt by that court.
>
> (L.F. 64).

While the disposition form does show that the lines were checked for "Suspended Imposition of Sentence" and for "Probation Ordered", the facts herein are still uncontested, and thus this Court will not defer to the trial court as to any factual findings. The real issue is whether or not the trial court misapplied the law to the facts. See, *Furne v. Director of Revenue*, 238 S.W.3d 177(Mo.App. W.D. 2007).

Argument

The trial court's relevant findings and conclusions are as follows:

State's Exhibit 3, * * * does not show whether defendant pleaded guilty or not guilty. It does show that he received a suspended imposition of sentence and was placed on probation for two years, a probation that was satisfactorily completed in 1994. The law does not allow probation unless and until a defendant has either been found guilty or pleaded guilty.

(L.F. 4).

Appellant would initially refer this Court to MO.REV.STAT. §557.011.2:

Whenever any person *has been found guilty* of a felony or a misdemeanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to a term of imprisonment as authorized by chapter 558, RSMo;

(2) Sentence the person to pay a fine as authorized by chapter 560, RSMo;

(3) Suspend the imposition of sentence, with or without placing the person on probation;

(4) Pronounce sentence and suspend its execution, placing the person on probation;

(5) Impose a period of detention as a condition of probation, as authorized by section 559.026, RSMo.

(Emphasis ours).

While the trial court was correct that the "law does not allow probation unless and until a defendant" has been found guilty, the trial court erred as to its conclusion that the disposition is not void for the purposes herein. By failing to make a finding of guilt, the disposition was unauthorized, which also involves a jurisdictional defect, depriving the court of any authority to dispose of the case. Appellant is unable to locate any case on point, but would refer this Court to the case of *Merriweather v. Grandison*, 904 S.W.2d 485(Mo.App. W.D. 1995), involving the voidance of a sentence in excess of that authorized by law as being a jurisdictional defect, to the case of *State v. Head*, 834 S.W.2d 898(Mo.App. W.D. 1992), involving the voidance of a suspension of hunting privileges as not being authorized under §557.011, and to the case of *Ex Parte Huff*, 516 S.W.d 778, 779-781(Mo.App. Spr. 1974), involving the court's failure to recite the essential facts being a judicial error which could not be corrected by an order *nunc pro tunc*, particularly after the discharge of the defendants.

The trial court also erred as to its conclusion that "the law does not allow probation unless and until a defendant has . . . pleaded guilty." A defendant could plead not guilty and then be found guilty, which would then implicate the provisions of §557.011. Herein, the record reflects neither a guilty plea nor a not guilty plea.

As applied to the case at bar, although the suspended imposition of sentence and probation was unauthorized, Appellant did satisfactorily complete his probation, and the court file has been closed. (L.F. 47; **A11**). Appellant should be able to waive this jurisdictional defect for this limited purpose, yet preserve the issue as to the absence of a plea or finding of guilty for purposes of barring its use to enhance the class of the crime. The plea and finding of guilty simply either happened or it did not. In light of the court records, there is a rebuttable presumption that the court failed to request a guilty plea and failed to make a finding of guilty. And, the State has failed to introduce any *evidence* which would remotely question this presumption.

The State's arguments are also erroneous for at least three reasons. One, as with the trial court's error, the act of suspending the imposition of sentence and placing Defendant on probation can and apparently did occur without a plea or finding of guilty; the disposition was simply unauthorized, which involves a jurisdictional defect, but one which could be waived by the Defendant as to the suspended imposition of sentence and the probation. Two, as reflected in Rule 24.02, it is the court's responsibility, not defense counsel's responsibility, to make sure that certain procedures are followed. And, three, §577.023 clearly requires the State to establish *beyond a reasonable doubt* that a defendant "pleaded guilty" or "has been found guilty". The record herein is not merely silent, but patently on its face establishes that the court "did not have jurisdiction to render the judgment it did render". *Merriweather*, 904 S.W. 2d at 489.

As a result, the enhancement allegations in the Information as to the 1991/1992 court proceeding should have been stricken, and therefore, the case must be remanded to the trial court to enter a new judgment finding Appellant to be a "persistent offender" guilty of a Class D felony. See, §577.023.1(4) & .3.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the Court to hold that it has jurisdiction to hear the merits of the case at bar and then to reverse the judgment of the trial court and to remand this case to the trial court with directions to enter a judgment finding Appellant guilty of driving while intoxicated at the Class B misdemeanor level (Point Two) or to enter a judgment finding Appellant guilty of driving while intoxicated at the class D felony level (Point Three), and for such other relief as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that one copy of the Appellant's Brief and one copy of the disk thereof were mailed this ____ day of March, 2009, to:

Mr. James B. Farnsworth, Assistant Attorney General
P.O. Box 899
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I further certify that the brief complies with Rule 84.06(b) by not exceeding 31,000 words and that it contains 12,364 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

_____
BRUCE B. BROWN