IN THE
MISSOURI SUPREME COURT

TOMMY DORSEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 85018
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION V
THE HONORABLE CALVIN HOLDEN, JUDGE

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The jurisdictional statement on page 4 of appellant's opening brief is incorporated herein by reference.

STATEMENT OF FACTS

The statement of facts appearing on pages 5 through 7 of appellant's opening brief is incorporated herein by reference.

POINT RELIED ON[1]

The motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the charge was unlawfully enhanced from a class A misdemeanor by use of convictions for burglary, arson, assault, and receiving stolen property, when the pertinent enhancement provision requires proof of four or more prior revocations, suspensions or cancellations of a driver's license.

Alternatively, the motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Section 302.321 is void for vagueness, since the plain language of the final sentence of the statute permits the State to charge driving while revoked as a class D felony by use of any offense, resulting in arbitrary application because it permits the use of

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[1] This Point corresponds to Point I in appellant's opening brief. Appellant does not address Point II of his opening brief in this Reply, but maintains that claim of error.

predicate offenses not related to the subject of the statute and non-counseled convictions, which is an unreasonable application of the statute.

Williams v. State, 800 S.W.2d 739 (Mo. banc 1990);

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

State v. Rice, 887 S.W.2d 425 (Mo. App., W.D. 1994);

Hagan v. State, 836 S.W.2d 459 (Mo. banc 1992);

United States Constitution, Amend. XIV;

Missouri Constitution, Article I, Section 10;

Section 302.321, RSMo 2000;

Section 302.321, RSMo Cum. Supp. 2002;

Section 558.026, RSMo 1986; and

Missouri Supreme Court Rule 24.035.

ARGUMENT

The motion court erred in denying Tommy Dorsey's motion for postconviction relief because his conviction and sentence for class D felony driving while revoked violated his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the charge was unlawfully enhanced from a class A misdemeanor by use of convictions for burglary, arson, assault, and receiving stolen property, when the pertinent enhancement provision requires proof of four or more prior revocations, suspensions or cancellations of a driver's license.

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Appellant's claims that the identified penalty provision of Section 302.321.2 was incorrectly interpreted and applied, or alternatively, that it is void for vagueness, should be reviewed by this Court.

As an initial matter, Respondent urges the Court to decline to review Mr. Dorsey's claim because it does not relate to the voluntariness of his plea (Resp. Br. 11). Respondent quotes **Hagan v. State** for the principle that a knowing and voluntary plea of guilty waives all non-jurisdictional defects. 836 S.W.2d 459, 461 (Mo. banc 1992). But the Court's recognition of the rule in **Hagan** served only to preface its discussion of an exception thereto, when "it can be determined *on the face of the record* that the court had no power to enter the conviction or impose the sentence." *Id*.

Moreover, the plain language of Rule 24.035 reasons against reading the general rule to exclude Mr. Dorsey's claim. The Rule authorizes a person convicted following his plea of guilty to a felony to challenge the validity of his conviction on grounds that, *inter alia*, " . . . the sentence imposed violates the constitution and laws of this state or the constitution of the United States . . ." Rule 24.035 movants have prevailed in cases where sentencing provisions were

misread by the trial court,[2] the trial court inappropriately applied an enhancement statute,[3] and when the trial court failed to recognize a change in the law.[4]

The enhancement provision at issue was misapplied because it is ambiguous, and this Court should construe as proposed to prevent the potential for continuing misapplication.

Respondent argues that the language at issue—"Driving while revoked is a class D felony on . . . a fourth or subsequent conviction for any other offense."--is unambiguous, and even if does need alteration it is the prerogative of the legislature, and not this Court, to do so (Resp. Br. 18-19).

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[2] *See, e.g.*, **Williams v. State**, 800 S.W.2d 739 (Mo. banc 1990) (remanded for resentencing where plea court misconstrued statute to require consecutive sentences.) See further discussion of **Williams** *infra*.

[3] *See, e.g.*, **State v. Rice**, 887 S.W.2d 425 (Mo. App., W.D. 1994) (remanded for resentencing due to plea court's error in sentencing appellant as a class X offender under Section 558.019 when that statute did not apply to class C felony stealing.)

[4] *See, e.g.*, **Searcy v. State**, 784 S.W.2d 911 (Mo. App., E.D. 1990) (remanded for resentencing in light of Section 1.160 after plea court erred in imposing a forty-year sentence after the maximum sentence for second-degree murder was reduced to thirty years between the time that the crime was committed and Searcy was charged.)

Ambiguity in a statutory phrase means "duplicity, indistinctness or uncertainty of meaning of an expression." **J.B. Vending Co. v. Director of Revenue**, 54 S.W.3d 183, 188 (Mo. banc 2001) (*citation omitted*). In **J.B.,** the Court reviewed the operation and structure of the statute as a whole to discern legislative intent concerning the meaning of the word "public." *Id.*

As noted in Appellant's opening brief, the plain language of the provision can be read to permit enhancement of the misdemeanor offense of driving while revoked to a felony by use of offenses not related to the subject matter or purpose of the statute, including convictions for class C misdemeanors, municipal offenses, and other, non-counseled convictions, a group which is not competent for use as predicate offenses under any other statutory scheme. Thus, the provision at issue is unambiguous only if this Court finds that the legislature intended such a result.

Respondent's assertion that even if the statute needs "alteration," it is not appropriate for this Court to do so, is simply wrong when the proposed alteration is construction of an ambiguity. Allowing the continuing misapplication of a statute when the problem can be resolved by interpretation of a single word, in light of the purpose of the entire statute, is not an act of deference to the legislature.

The Court has acted providently to provide guidance to lower courts on applying other criminal statutes. *see e.g.,* **Collins v. Director of Revenue**, 691 S.W.2d 246 (Mo. banc 1985), wherein the Court construed the statute as not requiring the Director of Revenue to prove at a suspension hearing that the officer

had probable cause to stop the licensee for driving while under the influence, because the plain language of the provision at issue ". . . cannot be harmonized with the rest of the act." 691 S.W.2d at 252.

In **Williams v. State**, the Court considered Section 558.026.1, a general sentencing provision that presented interpretation problems similar to the issue raised in this case. 800 S.W.2d 739 (Mo. banc 1990). Robert Williams pled guilty to two counts of rape and two of forcible sodomy. *Id.* The final clause of the subsection directed that sentences imposed for enumerated sexual offenses "shall run consecutively to the other sentences." (See copy of statute in Appendix.) During the plea colloquy, the trial court informed Williams that the court believed it was required to run the sentences consecutively under the statute. **Williams**, 800 S.W.2d at 740.

This Court found the final clause ". . . but the sentence of imprisonment imposed for the felony of rape, forcible rape, sodomy, forcible sodomy or an attempt to commit any of the aforesaid shall run consecutively to the other sentences." to be ambiguous in light of the rest of the statute:

> The statute establishes two kinds of sentences for sentencing purposes—the listed offenses and "other offenses." It states clearly what the court must do if the defendant is convicted oaf an offense in each class. It does not, however, say in explicit language what must be done if there are multiple convictions of those offenses listed.

Id. The Court construed the provision not to deprive a sentencing court of discretion to run sentences for sexual offenses concurrently. *Id.*

Section 302.321was amended in 2002 to restrict the use of prior convictions for driving while revoked as predicates for enhancement to those where the judge was an attorney, the defendant was represented by an attorney or waived his right to one, the defendant served at least ten days in jail on the offense, and other limitations. The amendment highlights the impropriety of the State's interpretation of "a fourth or subsequent conviction for any other offense." Reading the phrase to authorize the use of any conviction permits enhancement to a felony charge by using non-DWR convictions that do not have the procedural protections that the amendment requires for DWR convictions that are pled as predicate offenses.

If the Court chooses not to construe the phrase "fourth or subsequent conviction for any offense" to refer to the fourth or subsequent revocation due to any offense, it should excise the phrase as void for vagueness because it permits the State to exercise discretion in charging the offense as a felony in an arbitrary manner.

Respondent contends that the statute is not unconstitutionally vague because "the language of Section 302.321.2 is so clear that it puts anyone on notice of the felony enhancement.", (Resp. Br. 16), casting the prohibited conduct as driving while revoked while knowing that one has four prior convictions of any type. Appellant strongly disagrees that a person of ordinary intelligence could

read Section 302.321 and understand that he could face a felony charge the first time he is charged with driving while revoked.

But Mr. Dorsey did not argue that the statute fails to give notice of what conduct is prohibited. Rather, his claim is that the statute's provision for enhancement with "four convictions for any other offense" is impermissibly vague as worded because it does not provide adequate guidance to those who decide how the offense of driving while revoked will be prosecuted. Respondent reasons that there is nothing arbitrary about the statute because the disputed provision is not arbitrary, in light of a definition of "arbitrary" as "'[in] an unreasonable manner, as fixed or done capriciously or at pleasure.'" (Resp. Br. 15). But the void-for-vagueness argument speaks to application of the statute, not the language itself. The Due Process Clause of the Fourteenth Amendment requires legislatures to set reasonably clear guidelines to prevent arbitrary enforcement. **Smith v. Goguen**, 415 U.S. 566, 572-573, 91 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974).

A statute or provision therein does not provide sufficiently explicit standards for those who apply it when it "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis." **Grayned v. City of Rockford**, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972). Because the disputed language is an enhancement provision, discretion lies with prosecutors, who decide if and when to plead the predicate offenses, and it is the exercise of that discretion that provides the potential for arbitrary application.

While it is true that enhancements generally are subject to a prosecutor's discretion in charging, it is possible to abuse that discretion when there is inadequate guidance from the statute, as here. For example, if the language is construed to permit enhancement with convictions for any other offenses, as Respondent proposes, a prosecutor can charge driving while revoked as a class D felony when a first time DWR offender has four non-counseled class C misdemeanors.

A prosecutor properly exercises discretion in deciding whether to file felony charges against recidivist offenders under the terms of specific enhancement statutes. But when the plain language of a statute permits him to do so in an unreasonable manner, as here, when it can be applied to convictions that are incompetent to be used in any other enhancement scheme and bear no relation to the purpose of the statute, it permits an arbitrary application, and should be held void for vagueness.

CONCLUSION

Because the final clause of Section 302.321.2 was incorrectly interpreted to permit enhancement of the charge against Tommy Dorsey with four convictions not relevant to the purpose of the statute, Mr. Dorsey respectfully requests this Court to construe the provision at issue to mean four previous convictions for driving while revoked when the underlying revocations are for any offense and remand for resentencing on the charge as a class A misdemeanor. Alternatively, because the provision at issue plainly fails to provide adequate guidance to those who apply it, permitting prosecutors to enhance a misdemeanor driving while revoked charge with convictions that are incompetent to be used in any other enhancement scheme and bear no relation to the purpose of the statute, Mr. Dorsey respectfully requests this Court to excise the phrase at issue and remand for resentencing on the charge as a class A misdemeanor. Alternatively, for reasons set out in Point II of his opening brief, Appellant respectfully requests the Court reverse the motion court and remand the cause for an evidentiary hearing.

Respectfully submitted,

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APPENDIX TO APPELLANT'S REPLY BRIEF

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Certificate of Compliance and Service

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix if any, the brief contains 2,537 words, which does not exceed the number of words allowed for an appellant's reply brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on June 11, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were shipped by United Parcel Service this day of June, 2003, to Andrea Mazza Follett, Assistant Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

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Irene Karns