IN THE SUPREME COURT OF MISSOURI

Case No. SC88501

DARRELL J. FICK,

Respondent,
v.
DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

Appeal from the Circuit Court of Callaway County, Missouri
The Honorable Joe D. Holt, Judge

Appellant's Substitute Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Jurisdictional Statement

The Director of Revenue revoked Darrell J. Fick's driving privileges under § 577.041, RSMo. Fick filed a petition for review of the revocation in the circuit court of Callaway County. After a hearing, the circuit court entered a judgment ordering the Director to reinstate Fick's driving privileges. The Director appealed to the Court of Appeals, Western District. The Court of Appeals (with a dissent) issued an opinion affirming the circuit court's judgment, and the Director filed a motion for rehearing or transfer. The Court of Appeals denied the Director's motion for rehearing, but granted her motion for transfer. Jurisdiction therefore lies in this Court. Art. V, § 10, Mo. Const. (as amended, 1982).

Statement of Facts

After receiving notice that Darrell Fick had been arrested upon reasonable grounds to believe that he was driving while intoxicated, and that he had refused to submit to a blood test, the Director of Revenue revoked Fick's driving privileges under § 577.041, RSMo. (LF 8). Fick filed a petition for a trial de novo, and at the circuit court hearing on Fick's petition, Sergeant Jerry Arnold of the Missouri State Highway Patrol, who had arrested Fick, testified. (TR 2-30). Fick also testified, although he could not remember the crash or anything that happened shortly afterwards, so his testimony did not provide much information. (TR 31-38). The information that Fick's testimony did provide was consistent with Sergeant Arnold's testimony. (TR 2-30; TR 31-38). Neither party offered any exhibits. (TR 1-39).

Sergeant Arnold's testimony

Both the Director and Fick called Sergeant Arnold as a witness. Sergeant Arnold testified as follows:

Reasonable grounds. On March 20, 2005, around 6:30 p.m., Sergeant Arnold responded to the scene of a single-vehicle crash. (TR 3). A pickup truck, which had been pulling a trailer that was carrying an ATV, was in the ditch. (TR 3). The driver

of the truck had failed to negotiate a left-hand turn, driven off of the right side of the road, struck a culvert, and overturned in the ditch. (TR 4).

Sergeant Arnold surveyed the crash scene. (TR 6). Inside the truck, he found an empty 12-pack of beer. (TR 6). Outside the truck, amidst the debris from the crash, Sergeant Arnold found a single, cold, unopened can of beer. (TR 6).

Sergeant Arnold went over to Fick, the driver of the truck, who had been injured in the crash and was already being treated by medical personnel. (TR 4, 5). Sergeant Arnold spoke with Fick and noticed a moderate odor of alcohol coming from Fick. (TR 5). Although Fick was in an ambulance, strapped to a backboard, and was wearing a neck collar and an oxygen mask, Sergeant Arnold was able to perform one standard field sobriety test on Fick, the horizontal gaze nystagmus test (HGN). (TR 17-20). Sergeant Arnold performed the test on Fick's left eye, because performing the test on Fick's right eye would have been difficult, as the oxygen mask was partially covering Fick's face, and Sergeant Arnold did not want to move the mask. (TR 6, 20). The HGN test consists of three clues per eye, for a total of six clues, and Fick had two of three clues in his left eye: lack of smooth pursuit, and distinct nystagmus at maximum deviation. (TR 6, 20).

Fick admitted to Sergeant Arnold that he had been drinking, and Fick also told the medical personnel that he had drunk three beers. (TR 7).

Sergeant Arnold heard the medical personnel ask Fick questions, which Fick answered appropriately; Fick appeared to understand what was going on. (TR 26-27). And although Fick's spinal cord was severely injured in the crash, there is no indication that Fick suffered a head injury or any other injury that affected his cognitive abilities. (TR 1-38; LF 4, 4-32).

Arrest and refusal. Sergeant Arnold told Fick that he was under arrest for driving while intoxicated, read Implied Consent to him, and asked him if he would submit to a blood test. (TR 6-8, 22, 24). Fick seemed to understand what Sergeant Arnold was saying to him, but Fick refused to submit to the test, replying "no" to Sergeant Arnold's request. (TR 8, 22, 25). When arresting Fick, Sergeant Arnold did not handcuff or further physically restrain Fick, who was already in an ambulance, strapped to a backboard, and wearing a neck collar and an oxygen mask. (TR 17-20, 23-24).

Sergeant Arnold mailed Fick's refusal notice to the Department of Revenue, along with a note asking that the notice be mailed to Fick. (TR 22-23).

Fick's testimony

Fick's testimony did not contradict Sergeant Arnold's testimony. (TR 2-30, 31-37). Fick testified that his was the only vehicle involved in the crash, and that he could not remember the crash or talking with Sergeant Arnold, or anyone else, afterwards. (TR 31-32). Nor could Fick remember anything that happened in the ambulance, or that he had been airlifted to the hospital by helicopter. (TR 22-23, 32). Fick's first memory after the crash was waking up in the hospital the next day. (TR 32).

Fick also testified that, earlier on the day of the crash, he had been riding ATVs with friends, had brought a few of his own beers (everyone had brought their own), and had been drinking. (TR 34, 35, 37). Fick did not – and apparently could not, due to his lack of memory – dispute that he had told Sergeant Arnold at the crash scene that he had been drinking that day. (TR 34). Also due to his lack of memory, Fick could not dispute Sergeant Arnold's testimony that Sergeant Arnold had told Fick he was under arrest, and that Fick had refused to submit to a blood test. (TR 33-34).

The trial court's judgment

On November 18, 2005, the trial court entered judgment in favor of Fick, holding that the Director had not proven any of the three elements of a *prima facie* refusal case: that Sergeant Arnold had reasonable grounds to believe that Fick was driving while intoxicated, that Trooper Arnold arrested Fick, and that Fick refused the test. (LF 25-26). The judgment states:

> Upon due consideration of the evidence, the Court finds: 1) the only test used by Sergeant Arnold is a Horizontal Gaze Nystagmus test of one eye that showed a failure in two of three points. Sgt. Arold could not remember any person arrested for DWI on such limited testing 2) The "field of debris" at the scene shows no clear evidence of alcohol consumption; i.e. empty bottles or cans of alcohol. There is a full can and an empty box. Understandably there is no way to conduct a walk and turn test, or a test of stability of standing, but no counting, no alphabet or other mental dexterity tests were made. These seem crucial when the individual is so restrained. The officer indicates "moderate odor of intoxicants" but the petitioner's mouth is covered and an oxygen mask covers his lower face. This odor may not – likely is not

coming from his breath, as it is not released where the Sergeant can smell it. There simply is not enough grounds for the officer to conclude the petitioner was driving while in an intoxicated condition. The arrest is also troubling. No evidence shows that the Petitioner knew he was "arrested". He was not in any manner restrained by the officer and his understanding of what was said to him in that regard seems never to have been tested. Clearly, he must know he is under arrest for DWI before he can refuse the test. No clear evidence shows that understanding. Court finds Petitioner did not knowingly refuse the test offered or asked by Sergeant Arnold and may not have refused the test. In fact, there was not reasonable grounds to believe the petitioner was driving while intoxicated. Defendant, Director of Revenue, ordered to reinstate the Petitioner's license, where proper testing due to expiration of license has been completed.

The Director appealed, and after an opinion by the Missouri Court of Appeals, Western District, the Court of Appeals granted the Director's motion for transfer to this Court. (LF 28).

Point Relied On

The circuit court's judgment reinstating Fick's driving privileges is wrong because it is against the weight of the evidence, is unsupported by any evidence, and is a misdeclaration and misapplication of the law, in that Sergeant Arnold's unrebutted testimony – all of which the circuit court believed, save Sergeant Arnold's testimony that he smelled the odor of alcohol coming from Fick – establishes all three elements of the Director's *prima facie* refusal case: (1) Sergeant Arnold arrested Fick – who was not free to leave, in that he was already in an ambulance, strapped to a backboard, and wearing a neck collar and an oxygen mask – by telling Fick that he was under arrest; (2) Sergeant Arnold had reasonable grounds to believe that Fick was driving while intoxicated because Fick was involved in a single-vehicle crash; had two out of three clues of intoxication in his left eye on the HGN test; and admitted to Sergeant Arnold and the medical personnel that he had been drinking; and an empty 12-pack was found in Fick's truck, while a single cold, unopened can of beer was found amidst the debris from the crash; and (3) Fick refused to submit to a blood test by saying "no" to Sergeant Arnold's request, and a refusal is not required to be "knowing," although the evidence establishes that Fick's refusal was knowing.

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

Cartwright v. Director of Revenue, 824 S.W.2d 38 (Mo. App. W.D. 1991).

Lyons v. Director of Revenue, 36 S.W.3d 409 (Mo. App. E.D. 2001).

Smither v. Director of Revenue, 136 S.W.3d 797 (Mo. banc 2004).

Argument

The circuit court's judgment reinstating Fick's driving privileges is wrong because it is against the weight of the evidence, is unsupported by any evidence, and is a misdeclaration and misapplication of the law, in that Sergeant Arnold's unrebutted testimony – all of which the circuit court believed, save Sergeant Arnold's testimony that he smelled the odor of alcohol coming from Fick – establishes all three elements of the Director's *prima facie* refusal case: (1) Sergeant Arnold arrested Fick – who was not free to leave, in that he was already in an ambulance, strapped to a backboard, and wearing a neck collar and an oxygen mask – by telling Fick that he was under arrest; (2) Sergeant Arnold had reasonable grounds to believe that Fick was driving while intoxicated because Fick was involved in a single-vehicle crash; had two out of three clues of intoxication in his left eye on the HGN test; and admitted to Sergeant Arnold and the medical personnel that he had been drinking; and an empty 12-pack was found in Fick's truck, while a single cold, unopened can of beer was found amidst the debris from the crash; and (3) Fick refused to submit to a blood test by saying "no" to Sergeant Arnold's request, and a refusal is not required to be "knowing," although the evidence establishes that Fick's refusal was knowing.

I. Introduction

In a proceeding in which a person's driver's license has been revoked for refusing to submit to a chemical test, the circuit court shall determine only (1) whether the person was arrested; (2) whether the arresting officer had reasonable grounds to believe that the person was driving while intoxicated; and (3) whether the person refused to submit to the test. § 577.041.4, RSMo, Cum. Supp. 2006; *Berry v. Director of Revenue*, 885 S.W.2d 326, 327 (Mo. banc 1994).

In this case, Sergeant Arnold's testimony established that Sergeant Arnold arrested Fick upon reasonable grounds to believe that Fick was driving while intoxicated, and that Fick refused to submit to a blood test. And the circuit court's judgment shows that the circuit court believed Sergeant Arnold's testimony, save that he smelled the odor of alcohol coming from Fick. But even disregarding Sergeant Arnold's testimony that he smelled the odor of alcohol coming from Fick, all of the remaining evidence proves that Sergeant Arnold had reasonable grounds to believe that Fick was driving while intoxicated, that Fick was arrested, and that he refused the test. Indeed, Fick did not present any evidence to enable the trial court to find in his favor; all Fick presented was his testimony, which established only that he could not remember the crash or anything that happened shortly

afterwards. This Court should therefore reverse the trial court's judgment and reinstate the revocation of Fick's driver's license.

II. Standard of Review

As in all court-tried civil cases, the standard of review in this case is the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976): the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* at 32. So long as the trial court's judgment is supported by substantial evidence, the appellate court will affirm the judgment, regardless whether the appellate court would have reached the same result. *Hampton v. Director of Revenue*, 22 S.W.3d 217, 220 (Mo. App. W.D. 2000). But if the evidence is uncontroverted or admitted, so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 620 (Mo. banc 2002), citing *Hampton*, 22 S.W.3d 217 at 220.

It bears noting that the Court of Appeals' opinion in this case seems to incorrectly focus on *York v. Director of Revenue*, 186 S.W.3d 267 (Mo. banc 2006), and *Guhr v. Director of Revenue*, SC88159,[1] and the issue of deference to trial courts'

[1] *Guhr* is currently pending before the Court.

determinations of uncontroverted evidence. But a careful reading of the circuit court's judgment reveals that the circuit court did not disregard the Director's uncontroverted evidence. Instead, the circuit court misdeclared and misapplied the law regarding arrest, refusal, and reasonable grounds. In fact, the circuit court's judgment makes plain that the circuit court believed Sergeant Arnold's testimony, except as to the odor of alcohol coming from Fick. The judgment acknowledges that Fick failed HGN in his left eye, and that Sergeant Arnold found an empty 12-pack and a single, cold, unopened beer at the scene. The judgment also acknowledges, implicitly, that Sergeant Arnold told Fick that he was under arrest. And the judgment would have no need to acknowledge that the crash only involved one vehicle – Fick's – because Fick admitted that during his testimony. The only evidence supporting reasonable grounds that the judgment does not mention is Fick's admissions to Sergeant Arnold and the medical personnel that he had been drinking. But when the evidence supporting revocation is uncontroverted and the trial court has not specifically found the Director's witness not credible, appellate courts will not presume that the trial judge found a lack of credibility and will not affirm on that basis." *Brown v. Director of Revenue*, 85 S.W.3d 1, 7 (Mo. banc 2002).

In any event, the circuit court's judgment should be reversed because it misdeclares and misapplies the law regarding arrest, refusal, and reasonable grounds, and it is not supported by any evidence.

III. Sergeant Arnold's testimony established that Fick was arrested upon reasonable grounds to believe that he had driven while intoxicated, and that he refused to submit to a blood test. (And Fick did not rebut the Director's case.)

A. Fick was arrested

Because Fick was in an ambulance, strapped to a backboard, and wearing a neck collar and an oxygen mask, Fick was arrested when Sergeant Arnold told Fick that he was under arrest. (TR 17-20, 23, 24). The trial court misdeclared and misapplied the law when it held that something more was required, under the circumstances.

A person is "arrested" if he is actually restrained, or if he submits to the custody of an officer. § 544.180, RSMo 2000. Usually, merely informing a person that he is under arrest is insufficient to effectuate an arrest; proof of physical restraint of the person, or of the person's submission, is required. *Saladino v. Director of Revenue*, 88 S.W.3d 64, 68 (Mo. App. W.D. 2002). But in the case of an injured suspect who is already immobilized or incapacitated, it is impractical to require an

officer to physically restrain the suspect further. *Id.* at 68-69. "Applying additional restraints in such a case is redundant at best; at worst, it may interfere with medical treatment or aggravate the suspect's injuries." *Smither v. Director of Revenue*, 136 S.W.3d 797, 798-799 (Mo. banc 2004), quoting *Saladino*, 88 S.W.3d at 69.

In *Smither*, this Court recently considered what is required to effectuate an arrest of an injured driver, and this Court held that Smither had been arrested, even though, unlike Fick, Smither was not actually physically restrained in any way. Smither suffered serious injuries in a crash. *Smither*, 136 S.W.3d at 799. A trooper arrived at the crash scene and stayed with Smither until an ambulance arrived and took Smither to the hospital. *Id.* at 798. The trooper followed the ambulance to the hospital and then interviewed Smither, who was on a bed in the emergency room. *Id.* There, the trooper told Smither that he was under arrest, read him the *Miranda* warning and Implied Consent, and stayed with him for about an hour, before issuing him a summons. *Id.* This Court noted that, at the time the trooper told Smither that he was under arrest, Smither was not free to leave, if for no other reason, because of his apparent injuries. *Id.* at 799. This Court held that, under those circumstances, an arrest had occurred. *Id.*

Here, Fick, unlike Smither, was actually physically restrained when Sergeant Arnold told Fick that he was under arrest and read him Implied Consent: Fick was in an ambulance, in addition to being strapped to a backboard and wearing a neck collar and an oxygen mask. (TR 17-20, 23, 24). But like Smither, Fick was not free to leave. And it would have been impractical, if not dangerous, for Sergeant Arnold to try to further restrain Fick, who, as it turned out, had suffered a severe spinal cord injury in the crash. (LF 4). The trial court therefore misdeclared and misapplied the law when it held that Sergeant Arnold did not arrest Fick because Sergeant Arnold did not further restrain Fick. (LF 25).

The trial court also misdeclared and misapplied the law when it characterized the arrest as "troubling," i.e., ineffective, because "[n]o evidence shows that [Fick] knew he was 'arrested'" and "[Fick's] understanding of what was said to him [regarding being arrested] seems never to have been tested." (LF 25). There is no requirement that a driver know or understand that he is being arrested, in order for an arrest to occur. (And even if there was such a requirement, there is no evidence here that Fick did not know or understand that he was being arrested. Sergeant Arnold's uncontroverted testimony establishes that Fick answered the medical personnel's questions appropriately, and that Fick appeared to understand what

was going on. [TR 26-28].) Again, as set forth in *Smither*, all that is required for an arrest to occur, in the case of an injured driver like Fick, is that the driver be immobilized or incapacitated, such that he is not free to leave. *Smither*, 136 S.W.3d at 799. That requirement is met here, and the trial court was wrong to conclude that Sergeant Arnold did not arrest Fick.

Furthermore, the trial court's judgment indicates that the trial court believed Sergeant Arnold's testimony that he told Fick he was under arrest. And Fick did not present any evidence to discredit Sergeant Arnold's testimony. Indeed, Fick testified only that he could not remember anything about the crash or the events shortly afterwards; his first memory after the crash was waking up in the hospital the next day. (LF 31-32). That Fick does not remember being arrested does not mean that he was not arrested. And because the circuit court believed Sergeant Arnold's testimony that he told Fick he was under arrest, there is no support in the record for a finding that Fick was not arrested.

The circuit court simply misdeclared and misapplied the law when it held that Sergeant Arnold did not arrest Fick, and its judgment should be reversed.

B. When Sergeant Arnold arrested Fick, he had reasonable grounds to believe that Fick had driven while intoxicated

When he arrested Fick, Sergeant Arnold's knowledge of the particular facts and circumstances were sufficient to warrant a prudent person's belief that Fick had driven while intoxicated. Nothing more is required, in order to prove reasonable grounds.

"Reasonable grounds," as used in the refusal context, is virtually synonymous with probable cause. *Rain v. Director of Revenue*, 46 S.W.3d 584, 587 (Mo. App. E.D. 2001). "Probable cause exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." *Hinnah*, 77 S.W.3d at 621, quoting *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996). Whether probable cause exists is based upon the totality of the circumstances known to the arresting officer. *Eskew v. Director of Revenue*, 17 S.W.3d 159, 162 (Mo. App. E.D. 2000). "The standard for determining probable cause is the probability of criminal activity, not a prima facie showing of guilt." *Wilcox v. Director of Revenue*, 842 S.W.2d 240, 243 (Mo. App. W.D. 1992). There is no precise test for determining whether probable cause exists; rather,

it is based on the particular facts and circumstances of the individual case. *Hinnah*, 77 S.W.3d at 621, citing *State v. Pruitt*, 479 S.W.2d 785, 788 (Mo. banc 1972).

Here, the evidence shows that the facts and circumstances were more than sufficient to warrant Sergeant Arnold's belief, and any other prudent person's belief, that Fick drove while intoxicated. First, Fick was involved in a single-vehicle crash, for which there has been no explanation, other than Fick's apparent intoxication. (TR 3, 31). Second, when Sergeant Arnold surveyed the crash scene, he found an empty 12-pack of beer inside Fick's truck. (TR 6). Third, outside Fick's truck, amidst the debris from the crash, Sergeant Arnold found a single, cold, unopened can of beer. (TR 6). Fourth, Sergeant Arnold spoke with Fick and noticed a moderate odor of alcohol coming from Fick. (TR 5). Fifth, Fick had two of three clues of intoxication in his left eye on the HGN test: lack of smooth pursuit, and distinct nystagmus at maximum deviation. (TR 6, 20). Sixth, Fick admitted to Sergeant Arnold that he had been drinking. (TR 7). And seventh, Sergeant Arnold knew that Fick told the medical personnel that Fick had drunk three beers. (TR 7).

In *Berry v. Director of Revenue*, 885 S.W.2d 326, a case very similar to this one, this Court held that there were reasonable grounds. Berry was in a one-vehicle crash in which he drove his pickup truck off the road and into an embankment,

where the truck flipped over. *Id.* at 326. Berry was arrested for DWI and his license was revoked for refusing a blood test. *Id.* Berry appealed the revocation, and both Berry and the arresting officer testified at trial. *Id.* at 326-327. The arresting officer testified that, when he arrived at the scene of the crash, he smelled alcohol on Berry's breath; that Berry's eyes were watery; that Berry was uncooperative and resisted giving information to the officer and medical personnel; and that there were seven beer cans, four of them full, in Berry's truck. *Id.* at 326. The officer also testified that Berry appeared coherent and engaged in normal conversation with medical personnel. *Id.* at 327. Berry testified that he crashed only after a car in front of him cut him off. *Id.* He also testified that he had no vivid recollection of the accident scene, and that he did not remember having talked with the officer. Nor did he remember being asked to take a blood test, or that he had refused the test. Berry further testified that he was treated for an injury to his arm that resulted from the crash, but that he was not treated for any head injuries. *Id.* at 327.

The trial court held in favor of Berry. But this Court reversed, holding that the officer had reasonable grounds to arrest Berry, because there was no support in the record for a finding that the officer lacked reasonable grounds; after all, Berry had testified that he had no vivid memories of the accident scene, while the officer

had testified to facts that supported reasonable grounds. The trial court's judgment, this Court held, could not be affirmed because there was no support in the record for a judgment that the officer lacked reasonable grounds. *Id.* at 328. Here, as in *Berry*, there is no support in the record for the circuit court's judgment that Sergeant Arnold lacked reasonable grounds.

Aside from being inconsistent with *Berry*, the circuit court in this case misdeclared and misapplied the law in other respects regarding reasonable grounds. First, although the circuit court believed that Sergeant Arnold performed HGN and found that Fick had two of three clues of intoxication in his left eye, the circuit court complained that Sergeant Arnold did not do a counting or alphabet test, or other "mental dexterity test." But reasonable grounds may exist, regardless of whether any field sobriety tests – standard or otherwise – have been performed, as such tests are not mandatory; they merely supplement the officer's other observations, and aid in the determination of whether there is probable cause. *Howdeshell v. Director of Revenue*, 184 S.W.3d 193, 198-199 (Mo. App. W.D. 2002). Further, that Sergeant Arnold only performed the HGN test on one of Fick's eyes is not problematic. The test consists of six clues – three in each eye. The test is not, therefore, invalid, merely because it was only performed on one eye – particularly

where, as here, there is no evidence that the test was improperly performed. *Cf. Brown*, 85 S.W.3d at 3-4 (driver presented expert testimony that police officer failed to properly administer standardized field sobriety tests; a prudent, trained, cautious officer would not rely on results of improperly administered tests to develop probable cause; trial court correctly excluded test results).

The circuit court also found fault with Sergeant Arnold's testimony that "[he] could not remember any person arrested for DWI on such limited testing." (LF 25). But what Sergeant Arnold actually testified was that he has never arrested anybody for DWI solely because the person scored two clues on HGN, and that he did not do that with Fick, either. (TR 29). Sergeant Arnold's testimony is consistent with the principle that reasonable grounds is determined based upon the totality of the circumstances. *Eskew*, 17 S.W.3d at 162. Fick's failure of the HGN test is merely one of the many factors contributing to the totality of the circumstances supporting Sergeant Arnold's determination that there were reasonable grounds to arrest Fick. And cases have held that reasonable grounds existed where there were fewer factors than are present here. *See, e.g., Soest v. Director of Revenue*, 62 S.W.3d 619 (Mo. App. E.D. 2001) (reasonable grounds existed where driver was pulled over for weaving; failed the HGN, walk-and-turn, and one-leg stand tests; and had watery eyes).

Next, the trial court misdeclared and misapplied the law by holding that the empty 12-pack in Fick's truck and the single, cold, unopened beer found amidst the debris do not contribute to probable cause because they are not "clear evidence of alcohol consumption, i.e. empty bottles or cans of alcohol." While an empty 12-pack and a single, cold, unopened beer do not conclusively establish that Fick had been drinking before he crashed, the Director is not required to conclusively establish that Fick had been drinking; the Director is only required to establish that Sergeant Arnold had reasonable grounds to believe that Fick was driving while intoxicated. And the standard for determining reasonable grounds is the probability of illegal activity, not a conclusive showing of a suspect's guilt. *Wilcox*, 842 S.W.2d at 243.

In its judgment, the circuit court did not mention that Fick was involved in a one-vehicle accident – the cause for which Fick gave no explanation – and that Fick told both Sergeant Arnold and the medical personnel that he had been drinking that day. (Cases have noted that one-car crashes are a factor supporting reasonable grounds. *See, e.g., Rinne v. Director of Revenue*, 13 S.W.3d 658 (Mo. App. W.D. 2000)). But there is no indication that the circuit court found Sergeant Arnold's testimony not credible as to those facts, which contribute to the totality of the circumstances supporting Sergeant Arnold's determination that he had reasonable grounds to

arrest Fick. Because the circuit court did not specifically find that Sergeant Arnold's testimony was not credible, this Court should not presume that the trial court found a lack of credibility in order to affirm the circuit court's judgment on that basis. *See Brown v. Director of Revenue*, 85 S.W.3d at 7, quoting *Matthews v. Director of Revenue*, 8 S.W.3d 237, 237 (Mo. App. E.D. 1999).

The only portion of Sergeant Arnold's testimony that the circuit court apparently did not believe was that Sergeant Arnold could smell a moderate odor of alcohol "coming from [Fick's] breath, as it is not released where [Sergeant Arnold could] smell it," because Fick was wearing an oxygen mask. The odor of alcohol on a person's breath is one of the classic indicia of intoxication. *Saladino*, 88 S.W.3d at 71. But the odor of alcohol is not required to be present on a person's breath, in order for reasonable grounds to exist. *See Rain v. Director of Revenue*, 46 S.W.3d 584, 586, 588 (Mo. App. E.D. 2001) (reasonable grounds existed, although the officer did not smell alcohol on Rain's breath). The odor of alcohol is merely one of many factors that may contribute to probable cause.

Furthermore, there is no evidence that the oxygen mask did, or even could have, actually prevented Sergeant Arnold from smelling alcohol on Fick's breath; the circuit court merely surmised that it must have. It is perhaps just as likely that

the oxygen mask, by covering part of Fick's face, caused the odor to appear moderate when, absent the mask, the odor may have appeared strong. And in any event, Sergeant Arnold's testimony that he smelled an odor of alcohol coming from Fick was consistent with Fick's statements to Sergeant Arnold and the medical personnel at the scene, that Fick had been drinking that day.

C. Fick refused to submit to the test

Because Fick said "no" when Sergeant Arnold asked him to submit to a blood test, Fick refused the test, and the trial court misdeclared and misapplied the law by concluding that Fick did not refuse the test.[2]

As this Court explained in *Spradling v. Deimeke*, 528 S.W.2d 759, 766 (Mo. 1976), there is no mysterious meaning to the word "refusal." A refusal occurs when an arrestee, of his own volition, refuses to take the test. *Id.* A refusal may be accomplished in a variety of ways, including by orally saying, "I refuse," or by vocalizing some sort of qualified or conditional consent or refusal. *Id.* And even though a driver may not later remember that he refused a test, whether a driver remembers refusing the test is immaterial to whether he refused, particularly where,

[2] The trial court's judgment is equivocal on this point, stating that Fick "may not have refused" the test. (LF 25).

as here, the sole evidence of refusal came from Sergeant Arnold, and there is no evidence in the record to support a finding that Fick did not refuse the test. *Cartwright v. Director of Revenue*, 824 S.W.2d 38, 41 (Mo. App. W.D. 1991). *See also Berry*, 885 S.W.2d at 327-328 (relying on *Cartwright* in holding that Berry refused the test, even though Berry could not remember refusing the test, where the only evidence regarding refusal was the officer's testimony that Berry had refused).

Spradling, *Cartwright*, and *Berry* apply here. After Sergeant Arnold read Implied Consent to Fick and asked him to submit to a blood test, Fick said "no." (TR 7-8). Under *Spradling*, that was a refusal, and there is no clearer a form of refusal than saying "no." Under *Cartwright* and *Berry*, because Fick does not remember refusing the test, there is therefore no evidence to support the circuit court's conclusion that Fick did not refuse the test.

Furthermore, contrary to the circuit court's judgment, § 577.041 does not require a refusal to be "knowing." Cases have considered that issue, and have explicitly held that a refusal is not required to be knowing. *Lyons v. Director of Revenue*, 36 S.W.3d 409, 411 (Mo. App. E.D. 2001), quoting *Cartwright*, 824 S.W.2d at 41. To hold otherwise would allow intoxicated people to avoid the consequences of refusing to take the test; all they would have to do is later claim that they were too

intoxicated to understand the arresting officer's request. *Cartwright*, 824 S.W.2d at 40, citing *Corum v. McNeill*, 716 S.W.2d 915, 917 (Mo. App. E.D. 1986). That result would violate the intent of § 577.041. *Id.*

The Missouri Court of Appeals, Western District, has carved out a narrow exception to the rule that a driver's refusal need not be knowing, although that narrow exception does not apply here. In *Nace v. Director of Revenue*, 123 S.W.3d 252 (Mo. App. W.D. 2003), Nace was injured in a one-car crash. *Id.* at 254. One of the troopers who responded to the crash scene indicated in his report that Nace was unable to respond to questions, due to her medical condition. *Id.* At the hearing, Nace presented medical records and testimony from family members establishing that, after the crash, when Nace was in the hospital, she was semi-conscious, incoherent, and non-responsive to questions. *Id.* at 254, 257-258. Under those limited circumstances, where the evidence supported a conclusion that Nace's cognitive abilities were severely compromised, she was deemed not to have refused the test. *Id.* at 258.

But, again, *Nace* does not apply here, because there is no evidence suggesting that Fick's injuries affected his cognitive abilities. Instead, the evidence establishes the opposite – that, even though Fick was injured in the crash, his cognitive abilities

remained in tact. Sergeant Arnold's testimony established that Fick appeared to understand what was going on, as evidenced by Fick's appropriate responses to Sergeant Arnold's and the medical personnel's questions. (TR 7, 26-27; LF 4). So, even if a refusal were required to be "knowing" – and it is not – Fick's was.

The judgment should be reversed because the circuit court misdeclared and misapplied the law regarding refusal, as well as arrest and reasonable grounds.

Conclusion

The circuit court's judgment should be reversed, and the Director's revocation of Fick's driver's license should be reinstated.

Respectfully submitted,

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Certificate of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 21st day of May, 2007, 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 6,259 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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Associate Solicitor

Appendix

Appendix Index