

IN THE  
SUPREME COURT OF MISSOURI

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No. SC97186

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STATE *ex rel.* WILLIS MCCREE,

*Relator,*

v.

HONORABLE WESLEY DALTON,

*Respondent.*

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Petition for Writ of Mandamus

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**RELATOR'S BRIEF**

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Respectfully Submitted,

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## **JURISDICTIONAL STATEMENT**

This is an original Petition for Writ of Mandamus requesting this Court to issue a permanent writ commanding the Honorable Welsey Dalton of Warren County Circuit Court (“Respondent”) to dismiss with prejudice the driving while intoxicated charge in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01 pursuant to section 577.037.5, RSMo.<sup>1</sup> This Court has jurisdiction over this matter pursuant to Mo. Const. art. V, section 4.1 and Missouri Supreme Court Rule 84.23. No petition for relief sought has been made to any higher court. Adequate relief cannot be afforded by an appeal or by application for such writ to a lower court.

“A litigant seeking ‘relief by mandamus must allege and prove that he or she has a clear, unequivocal, specific right to a thing claimed.’” *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. banc 2015) (quoting *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. banc 2006)). “This right may arise from a statute that creates a right but does not explicitly provide mandamus as a remedy to enforce the right.” *Id.* Mandamus is an appropriate remedy when a statute requires the trial court to dismiss a case. *See, e.g., State ex rel. Farley v. Jamison*, 346 S.W.3d 397, 399 (Mo. App. 2011).

“The standard of review for writs of mandamus . . . is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes.” *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. 2007). “[I]f the respondent's actions are wrong as a matter of law, then he or she has abused any discretion he or she may have had, and mandamus is appropriate.” *State ex rel.*

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<sup>1</sup> All statutory citations are to RSMo Supp. 2016 unless otherwise noted.

*Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012). “Where, as here, the question of whether an abuse of discretion has been committed ‘depends on the interpretation of a statute, this Court reviews the statute's meaning *de novo*.’” *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. banc 2012) (quoting *State ex rel. C.F. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)).

## **STATEMENT OF FACTS**

On April 14, 2016, Deputy Dean Jackson of the Warren County Sheriff's Department placed Relator Willis McCree ("McCree") under arrest for driving while revoked. At some point after Deputy Jackson arrested, handcuffed, and transported McCree to the Warren County Jail, McCree was arrested for driving while intoxicated. No standardized field sobriety tests were conducted at any point. After McCree was transported to the Warren County Jail, Deputy Jackson obtained a search warrant for McCree's blood to determine his blood alcohol concentration. *See* Exhibit A. McCree provided two blood samples that revealed blood alcohol concentration levels of .052% and .039%. *See* Exhibit B.

On August 25, 2016, the State filed an information charging McCree with driving while intoxicated in violation of section 577.010. *See* Exhibit C. On August 28, 2017, McCree filed a motion to dismiss specifically premised on section 577.037.5 and *State v. Mignone*, 411 S.W.3d 361 (Mo. Ct. App. W.D. 2013). *See* Exhibits D and E. On September 5, 2017, a hearing on McCree's motion to dismiss was heard by Respondent. *See* Exhibit F. At the hearing, the State did not call any witnesses or adduce any evidence. Defense counsel for McCree argued that the motion to dismiss should be granted because the chemical analysis of McCree's blood was less than eight-hundredths of one percent (.08%) of alcohol, and the State failed to present any evidence that one of the three evidentiary exceptions enumerated in section 577.037.5 applied. Respondent denied McCree's motion to dismiss without hearing any evidence that a dismissal was unwarranted.

**POINT RELIED ON**

- I. Relator McCree is entitled to an order compelling Respondent to dismiss with prejudice the charge of driving while intoxicated in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01 because Respondent abused its discretion when it denied Relator McCree's motion to dismiss without hearing any evidence that a dismissal was unwarranted in that section 577.037.5 requires dismissal with prejudice of a driving while intoxicated charge when a chemical analysis of the defendant's blood demonstrates that it contains less than eight-hundredths of one percent of alcohol and the State fails to present evidence that an evidentiary exception enumerated in section 577.037.5 applies.

*State v. Mignone*, 411 S.W.3d 361 (Mo. Ct. App. W.D. 2013)

Section 577.037, RSMo

## ARGUMENT

- I. Relator McCree is entitled to an order compelling Respondent to dismiss with prejudice the charge of driving while intoxicated in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01 because Respondent abused its discretion when it denied Relator McCree's motion to dismiss without hearing any evidence that a dismissal was unwarranted in that section 577.037.5 requires dismissal with prejudice of a driving while intoxicated charge when a chemical analysis of the defendant's blood demonstrates that it contains less than eight-hundredths of one percent of alcohol and the State fails to present evidence that an evidentiary exception enumerated in section 577.037.5 applies.

A charge of driving while intoxicated "shall be dismissed with prejudice" when a chemical analysis of the defendant's blood reveals that it contains less than eight-hundredths of one percent (.08%) of alcohol, unless the State causes the court to find that:

- (1) There is evidence that the chemical analysis is unreliable as evidence of the defendant's intoxication at the time of the alleged violation due to the lapse of time between the alleged violation and the obtaining of the specimen;
- (2) There is evidence that the defendant was under the influence of a controlled substance, or drug, or a combination of either or both with or without alcohol; or
- (3) There is substantial evidence of intoxication from physical observations of witnesses or admissions of the defendant.

Section 577.037.5.

"The legislature provided a procedure to file a pretrial motion to dismiss which presumes *evidence will be taken* and factual determinations will be made by the trial court." *State v. Mignone*, 411 S.W.3d 361, 363 n.2 (Mo. Ct. App. W.D. 2013) (emphasis



added). “The plain language of section 577.037.5 calls for the court to *weigh evidence and evaluate witness credibility* in order to decide whether certain ‘considerations’ render dismissal ‘unwarranted.’” *Id.* at 364 (emphasis added). “Clearly, the statute calls upon the trial court to make a judgment about the nature and quality of the evidence, because that evidence must ‘cause the court to find’ something.” *Id.* “Dismissal is the default position, and, although not specifically stated in the statute, the clear implication is that the burden of persuasion is on the State to come forward with evidence to ‘cause the court to find a dismissal unwarranted.’” *Id.* “Section 577.037.5 shifts the burden of proof for a motion to dismiss to the State.” *Id.* at n.3.

Respondent was required by section 577.037.5 to dismiss the charge of driving while intoxicated when the State’s evidence, or lack thereof, failed to establish that a dismissal was unwarranted. McCree properly utilized the legislature-created procedure for the dismissal of his case by filing a motion to dismiss and noticing the motion for hearing. Despite citing section 577.037.5 and *Mignone* in the motion (and at the hearing), Respondent denied the motion without holding the State to its burden. Because section 577.037.5 and *Mignone* mandated that Respondent dismiss the charge with prejudice, and Respondent had no discretion to deny the motion without hearing any evidence of an evidentiary exception, a Writ of Mandamus is the appropriate and necessary remedy to correct Respondent’s abuse of discretion.

McCree has a clearly established statutory right to a dismissal with prejudice as a matter of law because the State failed to reach its burden of proof and persuasion by failing to introduce evidence of an evidentiary exception. This is comparable to a hearing

on a motion to suppress evidence or statements. At a hearing on a motion to suppress, the State has the burden of going forward with evidence and must show by a preponderance of the evidence that the motion to suppress should be overruled. *See* section 542.296.6, RSMo; *see also State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990) (“By its clear language Section 542.296.6 places ‘the burden of going forward with the evidence and the risk of nonpersuasion’ on the state ‘to show by a preponderance of the evidence that the motion to suppress should be overruled.’”). If a defendant makes a colorable objection to the constitutionality of his search or seizure in the form of a motion to suppress, the State is required to introduce evidence that establishes by a preponderance of the evidence that the motion to suppress should be overruled. If the State failed to present any evidence, the defendant’s colorable motion to suppress must be sustained as a matter of law.

Respondent’s argument that McCree cited the wrong version of section 577.037 is a misstatement of the law and a red herring. Respondent contends that section 577.037, RSMo Supp. 2017 “applies retroactively to the date of Relator’s alleged offense because the statute is procedural.” Resp’s Suggestions in Opposition, page 5. However, the operative facts that provided McCree with a vested, statutory right to dismissal occurred in 2016, a time when section 577.037.5 was in effect. “The Missouri Constitution prohibits laws that are retrospective *in operation*.” *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007) (citing Mo. Const. art. I, sec. 13) (emphasis in original). “A law is retrospective *in operation* if it takes away or impairs vested or substantial rights acquired under existing laws . . . .” *Id.* (citation omitted) (emphasis in

original). Section 577.037.5 is substantive in that it provides McCree with a vested and substantial right to dismissal with prejudice. *See also Wilkes v. Mo. Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988) (“[S]ubstantive law creates, defines and regulates rights.”)

Respondent’s argument is also a red herring. Even if this Court were to agree with Respondent that section 577.037, RSMo Supp. 2017 should be applied retroactively, Respondent still abused its discretion when it failed to dismiss with prejudice the driving while intoxicated charge pursuant to the amended statute. The language in section 577.037.2, RSMo Supp. 2017 is virtually identical to the language in section 577.037.5. When a chemical analysis of the defendant’s blood reveals that it contains less than eight-hundredths of one percent (.08%) of alcohol, a charge of driving while intoxicated “shall be dismissed with prejudice” unless the State causes the court to find that:

- (1) There is evidence that the chemical analysis is unreliable as evidence of the defendant's intoxication at the time of the alleged violation due to the lapse of time between the alleged violation and the obtaining of the specimen;
- (2) There is evidence that the defendant was under the influence of a controlled substance, or drug, or a combination of either or both with or without alcohol; or
- (3) There is substantial evidence of intoxication from physical observations of witnesses or admissions of the defendant.

Section 577.037.2, RSMo Supp 2017. Regardless of whether the statute in effect at the time of the offense or the recently amended statute is applied, *Mignone* is equally applicable to either version of the statute.

Because the State failed to present any evidence at the hearing on McCree’s motion to dismiss, Respondent had a duty to dismiss the driving while intoxicated charge

with prejudice. Respondent abused its discretion when it failed to comply with section 577.037 and denied McCree's motion. As a result, McCree was denied a clear, unequivocal, and specific statutory right to dismissal under these circumstances.

## **CONCLUSION**

WHEREFORE, for the foregoing reasons, this Court should grant a permanent Writ of Mandamus commanding Respondent, the Honorable Wesley Dalton, Presiding Judge of Warren County Circuit Court, to dismiss with prejudice the charge of driving while intoxicated in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01 as required by section 577.037.5 and applicable case law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

The below signature certifies that a copy of the foregoing was served via the Court's electronic filing system on all attorneys of record on this 27<sup>th</sup> day of August. Furthermore, the below signature certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 2,340 words determined by the word count of Microsoft Word 2016.

/s/ Dominic R. Cicerelli