IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

MATTHEW CARVALHO,

Appellant,

No. ED106655

DIRECTOR OF REVENUE,

Respondent.

APPEAL TO THE MISSOURI COURT OF APPEALS,
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
TWENTIETH JUDICIAL DISTRICT
THE HONORABLE STANLEY WILLIAMS

APPELLANT'S OPENING BRIEF

Matthew D. Fry, #57845
Rosenblum Schwartz & Fry
120 S. Central, Suite 130
St. Louis, Missouri 63105
Phone: (314) 862-4332
Fax: (314) 862-8050
mfry@rsflawfirm.com

ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Appellant Michael Carvalho ("Appellant"), brings this appeal from the judgment of the Circuit Court of Franklin County, Division VII, on March 21, 2018. On that date, Judge Williams found that Respondent Director of Revenue ("Respondent") had sustained its burden of production and persuasion, and sustained the suspension of Appellant's driving privilege pursuant to RSMo.302.505.

This appeal deals with the constitutional validity of a statute of the state of Missouri. The issue was briefed to the trial court, and the trial court ruled on the issue. Therefore, jurisdiction properly lies with the Missouri Supreme Court pursuant to Article 5, Section 3 of the Missouri Constitution. Appellant has contemporaneously filed a request for transfer to the Supreme Court. In the alterative, jurisdiction is vested with this Court as per Article 5, Sections 3 and 15, of the Missouri Constitution, as amended.

STATEMENT OF FACTS

On May 10, 2017, Appellant was arrested by Officer Eric Saavedra of the Washington Missouri Police Department on suspicion of driving while intoxicated. LF Doc. 52 Pg. 14. Officer Saavedra subsequently requested that Appellant provide a breath sample. *Id.* at 16. Officer Saavedra specifically indicated that if Appellant refused to provide a breath sample, then Appellant's driver's license will immediately be revoked for one year. Tr. 11. Appellant testified that he understood the word "immediately" to mean that he would be unable to drive as of that date, "at the very least," and that he would be unable to drive for the remaining year to work and to school. This would result in him losing his job. Tr. 11-12. Appellant provided a breath sample. LF Doc. 52 Pg. 17. The result indicated that at the time of the sample, Appellant's Blood Alcohol Content was .087. *Id.*

Officer Saavedra provided Appellant with a Notice of Suspension, or Form 2385. Appellant requested administrative review of the suspension, and on August 7, 2017, a hearing officer sustained the suspension. LF Doc. 50 Pg. 2. On August 10, 2017, Appellant filed a Petition for Trial De Novo in the Circuit Court of Franklin County. LF Doc. 50.

Prior to the hearing, Appellant filed a combined Motion in Limine and Memorandum of Law which presented the issues contained within this appeal. LF Doc. 42. Respondent presented no live testimony, and only submitted Exhibit A, pursuant to Section 302.312. Appellant testified on his own behalf.

On March 21, 2018, the trial court ruled against Appellant, sustaining the suspension of Appellant's driving privilege. LF Doc. 44. Appellant timely filed his Notice of Appeal on April 2, 2018. LF Doc. 45

POINTS RELIED ON

1. **The trial court erred in admitting the results of the breath test and sustaining the suspension of Appellant's driving privileged, in that Respondent failed to present any evidence sufficient to prove by a preponderance of the evidence that 19 CSR 25-30.031(3), which requires that the periodic maintenance test performed on the breath test machine be put on file with the Department of Health and Human Services within fifteen (15) days of completion.**

   - *Harrell v. Director of Revenue*, 488 S.W.3d 202 (Mo. App. W.D. 2016)
   - *Nesbitt v. Director of Revenue*, 982 S.W.2d 783 (Mo.App. E.D.1998)
   - *Stiers v. Director of Revenue*, 477 S.W.3d 611 (Mo. 2016)
   - *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010).

2. **The trial court erred in finding that RSMo. 577.041, RSMo. 302.505, and RSMo 302.574 were constitutional, in that the coercive and misleading notice provided to Appellant denied him his rights to procedural due process.**

   - *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950)
   - *Smith v. City of St. Louis,* 409 S.W.3d 404 (Mo. App. E.D. 2013)
   - *Stough v. Bregg*, 506 S.W.3d 400 (Mo. App. E.D. 2016)
   - *Teson v. Director of Revenue*, 937 S.W.2d 195 (Mo. 1996)

ARGUMENT

Point I - The trial court erred in admitting the results of the breath test and sustaining the suspension of Appellant's driving privileged, in that Respondent failed to present any evidence sufficient to prove by a preponderance of the evidence that 19 CSR 25-30.031(3), which requires that the periodic maintenance test performed on the breath test machine be put on file with the Department of Health and Human Services within fifteen (15) days of completion.

Standard of Review

The standard of review in a license suspension case is like that of any other court-tried case; 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. When the facts are not contested and the issue is one of law, review is de novo, for both statutes and regulations. *Stiers v. Director of Revenue*, 477 S.W.3d 611, 614 (Mo. 2016).

In his motion in limine, Appellant objected to the admission of Respondent's Exhibit A, on the grounds that 19 CSR. 25-30.031(3) had not been complied with. LF Doc. 42 Pg. 3. At trial, Appellant renewed that objection. Tr. 5. The trial court admitted Exhibit A, overruling the objection. Tr. 6.

In its final judgment, the trial court stated that "Many of Petitioner's legal argument were long ago ruled against Petitioner by appellate courts. Petitioner first argues that Respondent failed to establish that maintenance reports for the subject breathalyzer were filed within 15 days of April 30, 2017. Petitioner's argument is contrary to the records contained in Respondent's Exhibit A and the applicable law." LF Doc. 46 Pg. 1-2.

The trial court's summary misstates Petitioner's objection, which is that Respondent failed to establish that the maintenance reports for the subject breathalyzer were filed *with the Department of Health and Human Services as required by 19 CSR 25-30.031(3)* within 15 days of April 30, 2017. In doing so, and by holding that Appellant's argument had "long ago ruled against" and were "contrary to … the applicable law," the trial court misapplied the law. Thus, the issue was properly preserved and subject to *de novo* review.

Respondent Failed to Carry Its Burden of Production and Persuasion

To establish a prima facie foundation for admission of breath test results, Respondent must demonstrate the breath test was performed: (1) by following the approved techniques and methods of DHSS; (2) by an operator holding a valid permit; (3) on equipment and devices approved by DHSS. *Harrell v. Director of Revenue*, 488 S.W.3d 202, 206 (Mo. App. W.D. 2016). The regulations that must be followed to satisfy the foundational requirements are set forth in 19 CSR 25–30 *et seq*. *Id.* The standard of compliance must be "absolute and literal." *Nesbitt v. Director of Revenue*, 982 S.W.2d 783, 785 (Mo. App. E.D.1998).

In *White v. Director of Revenue*, the Supreme Court of Missouri reiterated Respondent's burdens of both production and persuasion in this type of case, holding "By also placing the burden of 'adduc[ing] evidence on the director, in addition to its assignment of the burden of proof to the director, the legislature emphasized its intention that it is the director who must bear the burden of producing evidence. *See* section 302.535.1." *White v. Director of Revenue*, 321 S.W.3d 298, 305 (Mo. banc 2010).

Respondent may meet their burden of production of evidence via the Rules of Evidence contained within in Section 577.037 and 302.312. Section 577.037 states in

relevant part that evidence of blood alcohol is admissible in license suspension proceedings. Section 302.312 states that "Copies of all papers, documents, and records lawfully deposited or filed in the offices of the department of revenue or the bureau of vital records of the department of health and senior services and copies of any records, properly certified by the appropriate custodian or the director, shall be admissible as evidence in all courts of this state and in all administrative proceedings." Her, Respondent elected to proceed solely on the basis of Exhibit A without presenting any live testimony.

Exhibit A included a certification from the Custodian of Records at the Missouri Department of Revenue, stating that the records contained within Exhibit A comported with Section 302.312, and were "lawfully on deposit" with the Department of Revenue. LF Doc. 52 Pg. 1. This established that Exhibit A was admissible at the proceedings. The next stage in the inquiry is whether Exhibit A presents sufficient evidence to establish absolute and literal compliance with the regulations.

Section 577.031 requires that breath tests be performed "... in accordance with methods and standards approved by the state department of health and senior services." These methods and standards are set out in 19 CSR 25-30.011 to 25-30.080. Amongst these rules is 19 CSR 25-30.031(3), which requires that upon completion, the individual performing the maintenance check "shall retain the original report of the maintenance check and submit a copy of the report so that it shall be received by the [Department of Health and Human Services] within fifteen (15) days from the date the maintenance check was performed." There is nothing within the text of the rule that would differentiate subsection (3) from any other part of the rule, such that a lesser level of compliance would suffice.

Exhibit A contains no evidence that the Calibration Report dated April 30, 2017 was ever received by the Department of Health and Human Services. In fact, Respondent has at no point argued that the records or evidence presented at trial actually demonstrate compliance with 19 CSR 25-30.031(3). At trial, Respondent did not address this objection. In Respondent's Motion in Limine, Respondent instead alleged that the "absolute and literal compliance" standard was not applicable to 19 CSR 25-30.031(3). LF Doc. 43 Pg. 1-2.

While the report has a mark in the upper right-hand corner indicating it was received by Ellen Strawaine, LF Doc. 52 Pg. 10, there is no evidence of who that person is or what entity they represent. To the contrary, the Certification accompanying Exhibit A indicates that the Calibration Report was on file with the Department of Revenue, rather than the Department of Health and Human Services. While Section 302.312 allows documents properly on file with *either* agency to be admitted, it does not follow that any document submitted by either agency is properly on file with both. Without such evidence, Respondent cannot prove that the rules of calibration have been absolutely and literally complied with. Because the rules of calibration have not been absolutely and literally complied with, the result of the breath test is inadmissible.

This Court Should Overrule Roam and Turcotte

It must be acknowledged that this Court has previously held that "absolute and literal compliance" is only required with regards to the conduct of the maintenance check, and that a failure to file the report as required by the regulations does not invalidate the report. *Roam v. Director of Revenue*, No. ED 106142 (Mo. Ct. App. Aug. 14, 2018) (citing *Turcotte v. Director of Revenue*, 829 S.W.2d 494 (Mo. Ct. App. 1992)). That line of rationale should be overruled.

The relevant rule states "A Type II permittee shall perform maintenance checks on breath analyzers under his/her supervision at intervals not to exceed thirty-five (35) days. The permittee shall retain the original report of the maintenance check and submit a copy of the report so that it shall be received by the department within fifteen (15) days from the date the maintenance check was performed." 19 CSR 25-30.031(3). In *Woodall v. Director of Revenue*, 795 S.W.2d 419, 420 (Mo. App. W.D. 1990), this court held that the first sentence was mandatory, and a failure to comply invalidated a breath test. In *Turcotte*, this court held that the second sentence was not mandatory. To distinguish the two, this Court held that "it is undisputed that the breathalyzer had been tested in accord with 19 CSR 20–30.031(3) and was working properly at the time of respondent's test. …respondent has no interest in the maintenance reports being properly filed. Similarly, failure to file timely maintenance reports does not impeach the machine's accuracy, which is the main concern here." *Turcotte*, 829 S.W.2d at 496.

The reference to the respondent's interest in the reports being properly filed and the question of whether the failure to file impeached the machine's accuracy, because these cases predated *Verdoorn v. Director of Revenue,* 119 S.W.3d 543 (Mo. banc 2003) and *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. 2010). Prior to *Verdoorn*, in a license suspension action the Director had the burden of establishing a prima facie case for a suspension, and, having done so, the burden of proof shifted to the driver to establish by a preponderance of the evidence that one of the elements was untrue. *Verdoorn* established that going forward, the Director of Revenue must establish its prima facie case, and then the driver would have the burden of introducing *some* form of rebuttal evidence, but the burden of persuasion would

remain with the Director. *Verdoorn*, 119 S.W.3d at 546. *White* went further, holding that the burdens of production and persuasion would *never* shift; the Director would carry *both* through the entirety of the trial. More importantly, *White* held that in prior cases where the burden shifted "the director's evidence is given a presumption of validity that is not supported by general principles of law applicable to court-tried civil cases or by the language of sections 302.505 and 302.535. … To the extent that these cases or any other prior case applied section 302.535 to create a presumption of validity of the director's evidence, to place a burden on the driver to produce evidence that controverts or contradicts the director's evidence for the trial court to disbelieve the evidence on a contested issue, or to require written factual findings absent a request by a party, the cases are overruled." *White*, 321 S.W.3d at 307.

Put another way, *Turcotte* and its progeny came about in a regime where the Director's evidence had a presumption of validity, and the driver would have to establish the inaccuracy of a breath test. Under that old regime, the failure of the Director to establish that report had been properly placed on file would only matter if a driver could establish that it effected the accuracy of the test. That regime no longer exists. To require a driver to make such a showing now would be to resurrect the pre-*White* and pre-*Verdoorn* requirement that a driver present evidence to rebut the presumptively valid evidence of the Director

POINT II – The trial court erred in finding that RSMo. 577.041, RSMo. 302.505, and RSMo 302.574 were constitutional, in that the coercive and misleading notice provided to Appellant denied him his rights to procedural due process.

Standard of Review

Questions of constitutional interpretation are questions of law, and are reviewed *de novo*. *Fay v. Stephenson*, No. WD 81645, (Mo. Ct. App. June 12, 2018). Constitutional questions must be raised at the earliest possible opportunity that good pleading and orderly procedure will permit. *McDowell v. Missouri Department of Transportation*, 529 S.W.3d 898, 903–04 (Mo. App. S.D. 2017) (internal citation omitted). Appellant's Motion in Limine argued that the suspension of Appellant's license was unconstitutional in that it violated his constitutional right to procedural due process. LF Doc.42 Pg. 7. Respondent took the opportunity to brief the issue prior to trial. LF Doc. 43. The trial court upheld the constitutionality of the suspension in its final judgment. LF Doc. 44 Pg. 2. Thus, the issue is properly preserved for appellate review.

The Notice Provided Appellant was Coercive, Misleading, and Unconstitutional

At trial, Respondent sought to suspend Appellant's driving privilege pursuant to Section 302.505. Under that provision, Respondent must prove by a preponderance of the evidence that there was an arrest upon probable cause, and that the Appellant's blood alcohol content was greater than the legal limit. *Pruessner v. Director of Revenue*, 273 S.W.3d 555, 558 (Mo. Ct. App. 2008). Respondent must also prove Appellant was actually operating the vehicle. *Arnette v. Director of Revenue*, 145 S.W.3d 851, 852 (Mo. Ct. App. 2004).

"The Missouri and United States constitutions both prohibit states from depriving a person of a property interest without due process of law." *Stone v. Missouri Department of Health & Senior Services*, 350 S.W.3d 14, 27 (Mo. banc 2011). A driver's license is a property right that is subject to due process protections. *See Jarvis v. Director of Revenue*, 804 S.W.2d 22,

24 (Mo. banc 1991) ("due process applies to the suspension of a driver's license by the state"). When a driver submits a blood, breath, or urine sample for chemical analysis, the suspension process that follows a purportedly positive chemical test is subject to procedural due process protections. *See Siehndel v. Russell-Fischer,* 114 S.W.3d 449, 451 (Mo. App. W.D. 2003). "Procedural due process encompasses a number of rights, from the basic entitlement to notice and a hearing, to the specifics of what constitutes adequate notice and what manner of hearing is proper in the circumstances." *Colyer v. State Board of Registration For Healing Arts*, 257 S.W.3d 139, 144 (Mo. App. W.D. 2008). In this context, due process requires that the government must give notice in order to deprive a person of their driving privilege. *Whitelaw v. Director of Revenue*, 73 S.W.3d 731, 734 (Mo. App. E.D. 2002). The actual requirements of due process, including what constitutes proper "notice" are not subject to hard and fast rules, rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Jamison v. State Department of Social Services,* 218 S.W.3d 399, 406 (Mo. banc 2007).

There is no case or statute that specifies what constitutes the form of "notice" for a license suspension pursuant to Section 302.312. However, there are only two communications that could be considered notice.

The first is the warning read to Appellant pursuant to Section 577.041, when he was asked for a breath sample. Tr. 11. "Courts, attorneys, and police commonly refer to giving the warnings required by Section 577.041.1 as "reading the Implied Consent Law" to someone." *Zimmerman v. Director of Revenue*, 988 S.W.2d 583, 585 (Mo. App. E.D. 1999). The implied consent law is laid out in Section 577.041, which states that subject to the provisions

of Section 577.019 to 577.041, any driver on Missouri's road has given consent to a chemical test of the driver's breath, blood, saliva, or urine. Once such a test has been performed, it becomes admissible in "any license suspension or revocation proceeding pursuant to the provisions of chapter 302[.]" RSMo. 577.037. In other words, the implied consent warning is a necessary predicate to a breathalyzer test, and it must be given for the results of a breath test to be admissible in a license suspension hearing.

In this case, the implied consent warning read to Appellant was the following statement:

"You are under arrest and I have reasonable grounds to believe you were driving a motor vehicle while you were in an intoxicated or drugged condition. To determine the alcohol or drug content of your blood, I am requesting you submit to a chemical test of your breath. If you refuse to take the test, your driver license will immediately be revoked for one year. Evidence of your refusal to take the test may be used against you in prosecution in a court of law. Having been informed of the reason for requesting the test, will you take the test?" Tr. 11.

Clearly, the Missouri Implied consent warning cannot be considered as providing "notice" that the Respondent may, if the test reveals a blood alcohol content greater than 0.08, seek a suspension pursuant to Section 302.505. The Implied Consent warning is absolutely silent on what will occur if a driver agrees to the test. The only references in the Implied Consent warning is to the consequences of a refusal, which are relatively dire. By its silence on this issue, the Missouri Implied Consent implies that providing a sample is a consequence-free act. Equally clearly, this implication is untrue.

The implied consent warning is also untrue in that it flatly states that the revocation consequences "will" begin "immediately." To the contrary, the revocation does not commence until 15 days after the refusal. RSMo. 302.574.1. Even then, the revocation can be stayed while the driver seeks judicial review. RSMo. 302.574.4. Appellant testified that he only became aware of these facts after he had consented to the breath test, and that he only contested because he believed that by doing so he would avoid the loss of his license. Tr. 14.

In *Teson v. Director of Revenue,* the Missouri Supreme Court examined the issue of the whether the Missouri Implied Consent warning adequately provided procedural due process protections in the context of a revocation for refusal to provide a sample. The Court held that the warning was sufficient unless it failed to inform the arrestee of the consequences of a refusal, or mislead an arrestee into believe the consequences of a refusal were different reality. *Teson v. Director of Revenue*, 937 S.W.2d 195, 197 (Mo. 1996). When the same warning is applied to suspension pursuant to Section 302.505, the warning fails completely to inform the driver of any consequence whatsoever.

Second, after proving a breath sample, Appellant was provided a form styled "Notice of Suspension or Revocation of Your Driving Privilege." LF Doc. 52 Pg. 2. This form has the sub-title "Use Only When BAC Test Results are Obtained." The first two sentences of the body of the form states "You have been stopped and/or arrested upon probable cause that you were driving a vehicle while your blood alcohol level was over the legal limit. Your driving privilege will be suspended or revoked 15 days from the date of this notice if you do not request a hearing." *Id.*

This form is even more misleading then the implied consent warning provided to Appellant. As argued above, Respondent could only suspend Appellant's driving privilege if it could establish that Appellant (1) was arrested upon probable cause for driving while intoxicated, (2) actually had a blood alcohol content of greater than 0.08, and (3) was actually driving. The form, however, makes no mention of the second and third requirements. It also misstates the first requirement, suggesting that a mere "stop" was sufficient.[1]

The core of the notice requirement is that it must permit the recipient to make an intelligent decision as to "appear or default, acquiesce or contest." *Stough v. Bregg*, 506 S.W.3d 400, 404 (Mo. App. E.D. 2016). It follows that if the notice requirement misleads the recipient, then the recipient cannot make an intelligent decision.

The Court of Appeals decision in *Smith v. City of St. Louis,* 409 S.W.3d 404 (Mo. App. E.D. 2013) is instructive. In that matter, City of St. Louis challenged a finding that the notice of violation of the City's red-light camera ordinance (a quasi-civil proceeding) violated the recipient's procedural due process rights. *Id.* at 415. The Court held that the Notice "…as currently enforced is designed to intimidate vehicle owners into paying the fine without challenging their violation, while simultaneously obscuring and undermining their right to do so." *Id.* at 418.

Sections 577.041 and 302.505 suffer from the same problem. The implied consent is used to intimidated drivers into providing a breath sample, while simultaneously obscuring the consequence of doing so. The Notice of Suspension then intimidates the driver into

[1] The "stop" language applies to drivers under 21. RSMo. 302.505. Appellant was 26 years of age. LF Doc. 52 Pg. 4.

accepting the suspension, while simultaneously obscuring the reasons for it and undermining the right to challenge it. Similarly, it violates the principle of *Teson*, in that it misleads the driver; the consequence does not flow from the arrest alone, there are other factors about which the driver is never informed and that the Director would be required to prove.

This is constitutionally intolerable. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). The government cannot trick a driver into providing a breath sample by implying that the act is without consequence, then provide a sham notice that flatly states the suspension will occur upon proof of much less than what the law actually requires.

CONCLUSION

Based on the analysis provided herein, this Court should reverse and remand the decision of the trial court.

/s/ Matthew D. Fry

Matthew D. Fry, #57845
Nathan T. Swanson #62615
Rosenblum Schwartz & Fry
120 S. Central, Suite 130
St. Louis, Missouri 63105
Phone: (314) 862-4332
Fax: (314) 862-8050
mfry@rsflawfirm.com
Attorney for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) I certify that on this August 28, 2018, a true and correct copy of the foregoing brief was served via the efiling system to the counsel for Respondent, Director of Revenue. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Garamond 13-point font, and does not exceed the word limit. The word-processing software identified that this brief contains 4,079 words.

/s/ Matthew D. Fry

Matthew D. Fry, #57845
Rosenblum Schwartz & Fry
120 S. Central, Suite 130
St. Louis, Missouri 63105
Phone: (314) 862-4332
Fax: (314) 862-8050
mfry@rsflawfirm.com
Attorney for Appellant