IN THE
SUPREME COURT OF MISSOURI

STATE *ex. rel.* WILLIS MCCREE,	)	
	)	
Relator,	)	
	)	
vs.	)	No. SC97186
	)	
HONORABLE WESLEY DALTON,	)	
	)	
Respondent	)	

PETITION FOR WRIT OF MANDAMUS

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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STATEMENT OF FACTS

As asserted in the probable cause statement, on April 14, 2016, Deputy Dean Jackson of the Warren County Sheriff's Department responded to 184 Gainsborough Drive in Warren County. (Resp. Ex. 1). Upon arriving, Deputy Jackson spoke with Willis McCree (Relator), who advised that he drove his vehicle to the location from his residence, when it broke down. (Resp. Ex. 1). Upon asking Relator to exit the vehicle, Deputy Jackson could smell a heavy odor of intoxicants and observed Relator having difficulty standing. (Resp. Ex. 1). Deputy Jackson further observed Relator to have watery eyes and to be swaying and staggering as he spoke with Relator. (Resp. Ex. 1). Relator admitted to Deputy Jackson that he had consumed three to four beers. (Resp. Ex. 1). Relator refused to complete any field sobriety tests and refused to submit to a chemical test of his breath. (Resp. Ex. 1).

Deputy Jackson obtained a search warrant for Relator's blood. (Rel. Br. Ex. A). The tests of Relator's blood by the Missouri State Highway Patrol revealed a blood alcohol concentration level of .052% for the first sample taken and .039% for the second sample. (Rel. Br. Ex. B).

On August 25, 2016, the State charged Relator by information with one count of the class B felony of Driving While Intoxicated- Chronic Offender under Section 577.010, RSMo (2000), and one count of Driving While Revoked under Section 302.321, RSMo (2000). (Rel. Br. Ex. C). On July 19, 2017, the matter was set for jury trial on September 28, 2017. On August 28, 2017, Relator filed his Motion to Dismiss pursuant to Section 577.037.5 RSMo. (Rel. Br. Ex. D and E). On September 5, 2017, Relator's

Motion to Dismiss was denied by Hon. Wesley Dalton (Respondent) and the matter remained set for trial. (Rel. Br. Ex. F).

POINT RELIED ON

I. Relator is not entitled to a writ of mandamus because the statute he relies upon does not afford him a clear and unequivocal right to a pretrial evidentiary hearing, and therefore Respondent did not abuse his discretion when he denied Relator's motion to dismiss and delayed weighing evidence on the motion to dismiss until trial.

State ex rel. Peavey Co. v. Corcoran, 714 S.W.2d 943 (Mo. App. E.D. 1986)

State ex rel. Gamble Const. Co. v. Enright, 556 S.W.2d 726 (Mo. App. 1977)

Lemay Fire Prot. Dist. v. St. Louis Cty., 340 S.W.3d 292 (Mo. App. E.D. 2011)

Section 577.037, RSMo. (2016)

Supreme Court Rule 24(b)(4)

ARGUMENT

I. Relator is not entitled to a writ of mandamus because the statute he relies upon does not afford him a clear and unequivocal right to a pretrial evidentiary hearing, and therefore Respondent did not abuse his discretion when he denied Relator's motion to dismiss and delayed weighing evidence on the motion to dismiss until trial.

Standard of Review

The extraordinary relief provided by a writ of mandamus has limited application. *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo. App. W.D. 1998). Mandamus will lie only when there is a clear, unequivocal, and specific right to the thing claimed. *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). "Mandamus may not be used to establish a legal right; it may only be used to compel performance of a right that already exists." *Lemay Fire Prot. Dist. v. St. Louis Cty.*, 340 S.W.3d 292, 295 (Mo. App. E.D. 2011).

"Ordinarily, mandamus is inappropriate as a means of controlling or directing how [a trial court's] discretion shall be exercised." *State ex rel. Peavey Co. v. Corcoran*, 714 S.W.2d 943, 945 (Mo. App. E.D. 1986); see also *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. 2006). "An appellate court may intervene through mandamus only to remedy a clear abuse of discretion." *Corcoran*, 714 S.W.2d at 946.

Finally, mandamus is inappropriate where there lies remedy through an appeal. *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 159 (Mo. banc 2007); S. Ct. R. 84.22(a). An inconvenient delay to the complaining party does not justify issuance of a

writ of mandamus. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 268 (Mo. banc 1980).

Analysis

Relator is charged with the class B felony of Driving While Intoxicated in the Circuit Court of Warren County. Relator's motion to dismiss pursuant to Section 577.037 RSMo. (2016) was denied by Respondent Hon. Wesley Dalton on September 5, 2017. Relator has filed this Writ of Mandamus seeking an order compelling Respondent to dismiss Relator's criminal case with prejudice.

When a criminal defendant has been charged with Driving While Intoxicated and a chemical analysis of his blood, breath, or urine is under 0.08%, he may file a motion to dismiss pursuant to Section 577.037.2 RSMo. (2016). Under Section 577.037.2, to prevent dismissal of the case with prejudice, the State must demonstrate either: 1) that the chemical test was unreliable due to lapse of time, 2) that the defendant was under the influence of a controlled substance or drug, either alone or in combination with alcohol; or 3) that there is substantial evidence of intoxication from physical observations of witnesses or admissions of the defendant.

Relator argues that the State was required to present evidence at a pretrial hearing wherein he had noticed up his motion to dismiss. Relator argues that because the Court denied the motion without the State presenting evidence, he is now entitled to an order dismissing the case. For the reasons set forth below, Relator is mistaken.

A. Relator does not have a clear and unequivocal right to a pretrial evidentiary hearing on his motion to dismiss

For an appellate court to issue a writ of mandamus, "there must be an existing, clear, unconditional, legal right in relator, and a corresponding present, imperative, unconditional duty upon the part of respondent, and a default by respondent therein." *State ex rel. Pub. Serv. Comm'n of Mo. v. Missouri Pac. R. Co.*, 280 Mo. 456, 218 S.W. 310, 311 (Mo. 1919). "Mandamus may not be used to establish a legal right; it may only be used to compel performance of a right that already exists." *Lemay Fire*, 340 S.W.3d at 295.

Relator in this case claims to have a clear and unconditional right to a pretrial evidentiary hearing on his motion to dismiss. Relator has not, and cannot establish the existence of such a right.

1. A right to a pretrial evidentiary hearing cannot be read into the language of the statute

First, and most importantly, Section 577.037 RSMo. (2016) does not impose a duty upon the trial court to hold an evidentiary hearing before a trial on the matter. The statute sets forth what evidence the State must present to avoid dismissal, but makes no mention of when the State must present said evidence. Nowhere in Section 577.037 do the words "pretrial" or "hearing" appear.

If the legislature intended for Section 577.037 to operate so as to require an evidentiary hearing before a trial on the matter, it could have done so. For example, Section 559.115 RSMo. (2016) provides that a circuit court must hold a hearing *prior to* denying a defendant probation following successful completion of a 120-day program in

the Department of Corrections. Under the plain language of that statute, a circuit court must hold the hearing prior to making a ruling denying the defendant probation. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538-41 (Mo. 2012). Section 577.037 contains no such language. The absence of similar language in Section 577.037 indicates that the legislature did not intend to *require* an evidentiary hearing prior to trial on the matter.

A court should not "add words by implication to a statute that is clear and unambiguous." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008), *quoting Asbury v. Lombardi*, 846 S.W.2d 196, 202 n. 9 (Mo. banc 1993). Despite the clear language of the statute, Relator is asking this Court to read into the statute a mandate to hold an evidentiary hearing prior to trial. This Court should refuse to do so. "The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Wood*, 254 S.W.3d at 872–73.

The opening phrase of Section 577.037 RSMo.,"[u]pon the trial," demonstrates a clear legislative intent that matters contained within the section be resolved at a trial. This intent is further demonstrated by other parts of Section 577.037, particularly the language stating that a chemical analysis equal to or in excess of eight-hundredths of one percent of alcohol shall serve as prima facie evidence of intoxication. The prima facie evidence of intoxication rule can only be utilized at a trial as it would serve no purpose at a pretrial hearing.

It is also important to note that in revising Section 577.037 RSMo. (2016), the legislature moved the language regarding the prima facie rule into the same subsection as the rule requiring dismissal if the chemical analysis of a person's blood, breath, saliva or

urine is less than eight-hundredths of one percent. Read together, these two provisions of Section 577.037.2 work as two halves of a whole in cases with a chemical analysis of blood alcohol content. If at trial, the State's evidence includes a test that is higher than .08, then it serves as prima facie evidence of intoxication. If at trial, the State's evidence includes a test that is lower than .08, it must provide further evidence to demonstrate one of the statutory considerations enumerated to avoid dismissal. The legislature's decision to combine these two provisions into a single subsection in Section 577.037.2 RSMo. (2016) makes evident the legislative intent that the issues be resolved at trial.

Moreover, Relator's motion to dismiss is governed by Section 577.037.2 RSMo. (2016), as it was the statute in effect at the time the motion was filed and it applies retroactively to the date of Relator's alleged offense because the statute is procedural. A statutory provision that is procedural is to be given retroactive application unless the legislature specifically provides to the contrary. *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 661 (Mo. banc 1986). Procedural law prescribes a method of enforcing a right or obtaining redress or provides the "machinery" for carrying on a suit. *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27, 28 (Mo. banc 1988).

Section 577.037.2 RSMo. (2016) deals with how evidence is to be weighed and provides a mechanism for the accused to seek dismissal of the suit. The plain text of the statute indicates that it provides a criminal defendant with the "machinery" by which they can enforce their right to dismissal of a criminal suit at a trial. Because it is procedural in nature, it applies retroactively to Relator's motion to dismiss.

Finally, to read into the statute an absolute right to a pretrial evidentiary hearing would result in the State essentially being forced to try its entire case twice. In felony driving while intoxicated cases, such as the case at bar, a defendant is to be tried by a jury, unless he waives said jury trial. S. Ct. Rule 27.01. If this Court were to follow Relator's reading of the statute, a criminal defendant in a felony DWI case could file a motion to dismiss pursuant to Section 577.037.2 and force an evidentiary hearing that essentially amounts to a bench trial, prior to his jury trial. No criminal defendant is afforded a right to both a bench and jury trial on the same matter. Relator's reading of the statute would lead to an absurd and unfair result. *State v. Kinder*, 122 S.W.3d 624, 631 (Mo. App. E.D. 2003) (a court must "presume a logical result, as opposed to an absurd or unreasonable one").

2. A trial court is afforded discretion as to when to hold an evidentiary hearing on pretrial motions

Supreme Court Rule 24.04(b)(4) explicitly provides a trial court with discretion to hear evidence on a motion to dismiss before or during the trial.

Relator cites to *State v. Mignone* in support of his argument that a pretrial evidentiary hearing must be held. However, Relator's reliance on *Mignone* is misplaced. Although in *Mignone* a pretrial evidentiary hearing was held, nowhere in the published opinion did the Court of Appeals hold that a pretrial evidentiary hearing **must** be held. Relator is certainly correct that a motion to dismiss pursuant to Section 577.037.2 may be heard by the trial court before a trial on the matter. However, the simple fact that something may be done does not mean that it must be done. Nothing in *Mignone* can be

construed as to abrogate a trial court's discretion to delay weighing evidence on a motion to dismiss until the trial. Given the discretion afforded to the trial court, Relator's asserted right to a pretrial evidentiary hearing cannot be said to be unconditional, nor clearly established.

Relator has failed to demonstrate an unconditional and clearly established right to a pretrial evidentiary hearing on his motion to dismiss. Because of this failure, the preliminary writ should be quashed.

B. Respondent did not abuse his discretion in refusing to hear evidence on the motion to dismiss before trial

"An appellate court may intervene through mandamus *only* to remedy a clear abuse of discretion." *Corcoran*, 714 S.W.2d at 946 (emphasis added). If any reasonable grounds exist upon which respondent acted, there is no abuse of discretion and an appellate court "must quash the preliminary writ." *State ex rel. Gamble Const. Co. v. Enright*, 556 S.W.2d 726, 728 (Mo. App. 1977); see also *Corcoran*, 714 S.W.2d at 946. When a trial court makes no formal findings or formal expression of its reasoning, the issue before the trial court is considered in the light most favorable to the result reached. *Enright*, 556 S.W.2d at 728-29, citing *Stark v. Stark*, 539 S.W.2d 779, 781 (Mo. App. 1976).

Relator argues that Respondent abused his discretion when he refused to hold an evidentiary hearing on Relator's Motion to Dismiss before trial. (Rel. Br., pg. 8). As argued above, Relator's argument ignores the discretion vested in the trial court to hear evidence on pretrial motions at trial. S. Ct. R. 24(b)(4). Because the issues raised by the

defendant's motion to dismiss are identical to the issues at trial, the interests of judicial economy are served by hearing evidence on both matters at the same time, at trial. Furthermore, as argued above, requiring the State to put on evidence at a pretrial hearing under Section 577.037 effectively allows a criminal defendant to force a bench trial and jury trial on the same matter. Both of these reasons are sufficient to justify Respondent's decision to refuse to hear evidence on Relator's motion to dismiss before trial.

Furthermore, Relator has failed to provide this Court with any record of the pretrial hearing or any record of what occurred at the pretrial hearing, other than the bare assertion that no evidence was presented by the State. "Failure to file a transcript of a pretrial hearing with this Court 'results in a presumption that its contents were favorable to the judgment entered, and not favorable to the movant.'" *State v. Keeth*, 203 S.W.3d 718, 722 (Mo. 2006), quoting *Ludwig v. State*, 771 S.W.2d 373, 374 (Mo. App. S.D. 1989). Without the transcript of the pretrial hearing, this Court must presume that Respondent exercised his discretion in good faith in refusing to hear evidence on Relator's motion. Because Relator cannot establish a clear abuse of discretion, the preliminary writ should be quashed.

Conclusion

Relator has failed to establish a clear and unequivocal right to an evidentiary hearing on his motion to dismiss before trial, as Section 577.037 RSMo. (2016) does not create such a right and Supreme Court Rule 24(b)(4) provides a trial court with discretion to hear evidence on pretrial motions with the trial. Furthermore, Respondent did not abuse his discretion in refusing to hear evidence on Relator's motion to dismiss at a pretrial date because the interests of judicial economy and fundamental fairness demanded that the issues be taken up together, at trial.

For the reasons stated above Respondent respectfully requests this Court quash the Preliminary Writ.

Respectfully submitted,

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Certificate of Compliance and Service

I, Kelly L. King, hereby certify to the following. The attached brief contains the information required by Rule 55.03. Additionally, the attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 font. Excluding the cover page, signature block, and this certificate of compliance and service, the brief contains 2,970 words, which is less than the 27,900 words allowed for Respondent's brief.

On this 24th day of September, 2018, electronic copies of Respondent's brief were placed for delivery through the Missouri e-filing system to Dominic R. Cicerelli, Attorney for Relator.

/s/ Kelly L. King

Kelly L. King