IN THE
SUPREME COURT OF MISSOURI

No. SC97186

STATE *ex rel*. WILLIS MCCREE,

Relator,

v.

HONORABLE WESLEY DALTON,

Respondent.

Petition for Writ of Mandamus

RELATOR'S REPLY BRIEF

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.[1] 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.*

[1] 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 Sherriff'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. 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. *See* Respondent's Answer, ¶ 18. 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. *See id*. at ¶ 19. Respondent denied McCree's motion to dismiss without hearing any evidence that a dismissal was unwarranted. *See id*. at ¶ 19-20.

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.

Section 577.037, RSMo

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

State ex rel. Farley v. Jamison, 346 S.W.3d 397 (Mo. App. 2011)

Rule 24.04(b)(4)

ARGUMENT

The following critical facts are undisputed: (i) a chemical analysis of McCree's blood demonstrated that it contained less than .08% of alcohol; (ii) McCree filed a motion to dismiss pursuant to section 577.037 and provided notice of a hearing; (iii) a hearing on McCree's motion to dismiss was held; (iv) the State did not adduce any evidence at the hearing; (v) counsel for McCree argued that the motion to dismiss should be granted because the State failed to present any evidence of an evidentiary exception; and (vi) Respondent denied the motion. *See* Respondent's Answer, ¶¶ 14, 16-20. Based on these facts, McCree filed a petition for writ of mandamus requesting the Court to command Respondent to dismiss with prejudice the driving while intoxicated charge in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01. Respondent contends that the preliminary writ issued by this Court should be quashed because section 577.037 does not provide a criminal defendant with a right to a pretrial hearing.

I. Section 577.037 provides Relator McCree with a clear, unequivocal, and specific right to a dismissal with prejudice of the driving while intoxicated charge in *State of Missouri v. Willis L. McCree*, Case No: 16BB-CR00275-01.

A driving while intoxicated charge "*shall* be dismissed with prejudice" when a chemical analysis of the defendant's blood demonstrates 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, RSMo (emphasis added).

Much of Respondent's argument relies on a faulty interpretation of section 577.037. An examination of the language used by the legislature demonstrates that, under these circumstances, McCree is entitled to a pretrial dismissal. For instance, the legislature's use of the word "shall" creates a mandatory action by the trial court.[2] The statute also requires the State to "*cause* the court to find a dismissal unwarranted." Section 570.037 (emphasis added). According to the Merriam-Webster Online Dictionary, the definition of the verb "cause" is "to compel by command, authority, or force."[3]

There are only three "considerations" that the State can utilize to "cause the court to find a dismissal unwarranted." Section 577.037.5. All three "considerations" are evidentiary exceptions that require the State to present evidence at a hearing. If the State fails to cause the trial court to find a dismissal unwarranted (i.e., the State fails to compel by the presentation of an evidentiary exception), the charge shall be dismissed with prejudice. Because the State failed to provide evidence at the hearing, McCree had a clear, unequivocal, and specific right to a dismissal with prejudice of the driving while

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[2] *See, e.g.*, *Jamison*, 346 S.W.3d at 399 ("Generally, the use of 'shall' in a statute will be interpreted as mandatory rather than as directory. When a statute mandates that something be done by stating that it 'shall' occur and also states what results 'shall' occur upon a failure to comply with the statute, it is clear that it is mandatory and must be obeyed.").

[3] https://www.merriam-webster.com/dictionary/cause (last accessed September 24, 2018).

intoxicated charge.

II. Respondent abused its discretion at the hearing on Relator McCree's motion to dismiss when it denied the motion without hearing any evidence that could cause Respondent to find a dismissal unwarranted.

Respondent contends that it did not abuse its discretion by denying the motion to dismiss at the hearing because section 577.037 does not provide a defendant with a right to a pretrial evidentiary hearing. This contention misconstrues the argument asserted in McCree's opening brief. The abuse of discretion occurred when Respondent held a hearing on McCree's motion to dismiss and denied the motion without hearing evidence of an exception. Furthermore, Respondent's interpretation of the statute directly conflicts with the court's interpretation in *Mignone*, which provided in pertinent part that "[t]he 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." 411 S.W.3d at 363 n.2 (emphasis added). The court reached this interpretation because:

> 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." 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. 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. at 364 (quoting section 577.037.5). In a footnote at the end of the above quote, the court found it pertinent to specify that:

> Section 577.037.5 shifts the burden of proof for a motion to dismiss to the

> State. Normally, the burden of proof for a motion to dismiss criminal charges is on the defendant. *See* Rule 24.04(b)(2). Section 577.037.5 relieves the defendant of this burden where a chemical breath analysis demonstrates that there was less than .08% of alcohol in the defendant's blood at the time of the test.

Id. at n.3. The discussion above in *Mignone* regarding the burden of proof for a motion to dismiss would be redundant if, as Respondent argues, the statute intended for a trial court to delay weighing evidence until trial, where it is well established that the State has the burden of proof. Moreover, the court in *Mignone* provided that "it was not necessary for Mignone to produce any evidence." *Id*. at 365.

Respondent argues that McCree does not have a right to a pretrial hearing because it "would result in the State essentially being forced to try its entire case twice." Respondent Brief, page 14. Using that logic, a criminal defendant would not have a right to a preliminary hearing or a motion to suppress hearing before trial. Respondent further argues that an evidentiary hearing on a motion to dismiss pursuant to section 577.037 "essentially amounts to a bench trial." *Id*. This is not the case. At a bench trial, the State has the burden to prove a defendant's guilt beyond a reasonable doubt. At a hearing on a motion to dismiss pursuant to section 577.037, the State has a drastically reduced burden to simply provide: "evidence" that the chemical analysis is unreliable because of a lapse of time between the alleged violation and the time the defendant was driving; "evidence" that the defendant was under the influence of a controlled substance, drug, or both; or "substantial evidence" of intoxication from physical observations. Section 577.037.

Respondent further contends that "[n]othing 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." Respondent's Brief, page 14-15. Respondent cites Rule 24.04(b)(4) as support, which provides that "[t]he motion *shall* be heard and determined before trial on application of the state or the defendant, unless the court orders that the hearing and determination thereof be deferred until the trial." (emphasis added). As previously mentioned, the use of the word "shall" creates a mandatory action on the trial court. The trial court is required to hold a hearing before trial when a defendant (or the State) requests that a motion to dismiss be heard before trial unless the trial court orders that the hearing and its determination be heard at trial. Here, McCree properly requested that his motion to dismiss be heard on a date before trial. *See* Exhibits D and E. At the hearing, Respondent never made any indication that the hearing or its determination was deferred until trial. Respondent simply denied the motion. *See* Exhibit F; Respondent's Answer, ¶ 20.

Even if this Court were to find that a trial court has discretion in when it holds a hearing on a motion to dismiss pursuant to section 577.037, Respondent's argument faces another hurdle: Respondent elected to hear and deny McCree's motion to dismiss. Respondent concedes that a motion to dismiss pursuant to section 577.037 "may be heard by the trial court before a trial on the matter." Respondent's Brief, page 14. At the request of McCree, a hearing was held on his motion to dismiss. *See* Exhibit F. The State did not request a continuance, and Respondent did not defer ruling on the motion until trial. Instead, Respondent held the hearing, accepted arguments from both parties, and denied the motion despite its statutory obligation.

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 above signature certifies that a copy of the foregoing was served via the Court's electronic filing system on all attorneys of record on this 12th day of October, 2018. Furthermore, the above signature certifies that this brief complies with the limitations contained in Rule 84.06(b) and contains 2,668 words determined by the word count of Microsoft Word 2016.