IN THE MISSOURI SUPREME COURT

Case No. SC99655

DAVID P. WILMOTH,

Plaintiff / Appellant,

vs.

DIRECTOR OF REVENUE,

Defendant / Respondent.

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, FOLLOWING APPEAL FROM THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

Respondent's Statement of Facts correctly notes that Deputy Mazer testified that Mr. Wilmoth's eyes were bloodshot and watery. At various points in Respondent's argument, however, Respondent contends that Mr. Wilmoth also exhibited "glassy" eyes. *E.g.*, Respondent's Substitute Brief at 23, 25 & 27. That statement is not true, and not supported by the record. *See*, Transcript at 10; L.F. Doc. 7 at pp. 2 & 16.

ARGUMENT - POINT I

The trial court erred in allowing Deputy Mazer to testify that a preliminary breath test result was in excess of .08 because (1) such evidence was inadmissible in that, pursuant to § 577.021, R.S.Mo., the results of such tests "shall not be admissible as evidence of blood alcohol content," and, on the specific evidence presented in the present case, there was no foundation for such test results, and (2) such evidence was prejudicial in that it was the only evidence presented at trial which could be even arguably be construed as substantial evidence of impairment, as opposed to lawful consumption.

The Director concedes that § 577.021.3 provides that a PBT "shall not be admissible as evidence of blood alcohol content," and that "section 577.020 'represents a legislative conclusion that the portable breath test is too unreliable to be used *to prove intoxication*.'" Respondent's Substitute Brief at 16, *citing State v. Duncan,* 27 S.W.3d 486, 488 (Mo. App. 2000) (emphasis added by the Director). The Director nonetheless argues that allowing an officer to testify that a result was "above .08" is not evidence of blood alcohol content, but only evidence of "probable cause." This contention is sophistry, and in fact inconsistent with other portions of the Director's argument.

Specifically, the Director acknowledges that § 302.505.1 requires a finding that the arresting officer had probable cause to believe the driver was operating a motor vehicle with an alcohol concentration of eight-hundredths of one percent or more. He then argues that "[t]estimony that the result of a PBT was over .08-percent goes directly to the probable

cause determination that section 302.505.1 requires." Respondent's Substitute Brief at 17. Similarly, with respect to the sufficiency of the evidence point, the Director argues that "Appellant willingly took a PBT test and the result of that test was above the legal limit of .08-percent." Respondent's Substitute Brief at 23.

These arguments, that testimony of a PBT result over .08 "goes directly" to the issue of whether the driver's blood alcohol content was over .08, and that the officer could consider the PBT result as evidence that Mr. Wilmoth's blood alcohol content was "above the legal limit," are valid only if the test result is relied upon as evidence of blood alcohol content. That is precisely what the statute prohibits.

Interpreting the statute to prohibit testimony as to a result "over .08" does not, as the Director suggests, render the statutory language surplusage. The Director's obligation is to prove that (1) the driver was arrested upon probable cause of committing and alcohol-related traffic offense, and (2) that the driver's blood alcohol content exceeded .08%. *White v. Director of Revenue*, 321 S.W.3d 298, 309 (Mo. banc 2010). The "alcohol-related traffic offense" at issue in Mr. Willmoth's case was driving while intoxicated. Pursuant to § 577.010.1, R.S.Mo., "A person commits the offense of driving while intoxicated if he or she operates a vehicle while in an intoxicated condition." An "intoxicated condition" occurs "when a person is under the influence of alcohol, a controlled substance, or drug, or any combination thereof." § 577.001(13), R.S.Mo. Thus, § 577.010 requires merely that a person be intoxicated, but § 302.505 limits license suspension to when the intoxication is caused by alcohol. The Director is therefore required to establish probable cause both

that a person was "under the influence," and that the influence was of alcohol, rather a controlled substance or drug. The result of a PBT as merely "positive," as opposed to a specific level, is relevant to the determination of the presence of alcohol as a cause of impairment.

The significance of a "positive," as opposed to a numerical result, is reflected by the Department of Revenue's Alcohol Influence Report, Form 2389, as it existed prior to the Southern District's decision in *State v. Roux*, 554 S.W.3d 416 (Mo. App. 2017). The Alcohol Influence Report is prepared by an arresting officer and submitted to the Department of Revenue. In its post-*Roux* form, and as used in this case, PBT results are reported with checkboxes for "Yes," "No" or "Refused," followed by the word "Result," with a blank left for a numerical result, followed by the "%" symbol. LF Doc. 7 at p. 2, Form 2389 (Revised 04-2018). Prior to *Roux*, Form 2389 contained only the checkboxes for "Yes," "No," or "Refused," without any option for filling in a specific numerical value.[1]

The modification to Form 2389 is significant because, as in this case, it is typically offered into evidence pursuant to § 302.312, a business records statute specifically applicable to the Department of Revenue. Unlike the general business records statute, § 490.462, R.S.Mo., which alleviates only a hearsay objection, § 302.312 provides that "all papers, documents, and records lawfully deposited or filed in the offices of the department

[1] *Compare*, https://oa.mo.gov/sites/default/files/860-0153s.pdf (August 2018), with https://archive.oa.mo.gov/gs/form/pdfs/860-0153s%20(11-12).pdf (November, 2012 version of Form 2389).

of revenue … shall be **admissible** as evidence in all courts of this state and in all administrative proceedings." (Emphasis added). Section 302.312, applied to the current Form 2389, is therefore in direct conflict § 577.021.3.

The evolution of Form 2389 establishes the Director's acknowledgment, for years prior to 2018, that a positive test itself has evidentiary value. It is evidence of alcohol consumption, one of the necessary elements in showing impairment by alcohol. This relevance is not negated by the fact that additional evidence is required to bridge the gap from lawful consumption to impairment.

In response to Mr. Wilmoth's separate objection that no foundation was laid for evidence that the test result was over .08, the Director suggests only that the Deputy had been trained to operate the machine. That argument fails to recognize that Missouri law requires that a person attempting to testify regarding scientific or technical knowledge be qualified by knowledge, skill, experience, training, or education prior to testifying. § 490.065.1(1), R.S.Mo. The Deputy conceded he had no such expertise regarding the test itself. Coupled with prior judicial determinations that the PBT is too unreliable to be considered for blood alcohol content, *State v. Duncan*, 27 S.W.3d 486, 488 (Mo. App. 2000); *State v. Eisenhour*, 410 S.W.3d 771, 776 (Mo. App. 2013), no foundation was laid for admission of the test.

Finally, the Director argues that admission of testimony that the PBT result was over .08 is not prejudicial. Mr. Wilmoth does not dispute, in principle, that this Court may presume that the trial court did not rely on improperly admitted evidence. This point relied

on was nonetheless necessary to preserve the claim of error, and advance arguments under Points II and III that, absent such evidence, the trial Court's judgment was not supported by substantial evidence, and was against the weight of the evidence.

ARGUMENT – POINT II

The trial court erred in entering Judgment sustaining the Director of Revenue's revocation of Mr. Wilmoth's driving privilege for being arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more because said Judgment is not supported by substantial evidence, in that there was not substantial evidence to support a finding Mr. Wilmoth was arrested upon probable cause to believe he was driving a motor vehicle while impaired by alcohol, as opposed to having engaged in lawful consumption.

The thrust of Mr. Wilmoth's argument is that there was no substantial evidence of probable cause to believe Mr. Wilmoth was *impaired*, as opposed to having engaged in lawful consumption. "The issue is not whether [the driver] had consumed alcohol before he operated his vehicle, the 'relevant inquiry is whether or not the arresting officer had reasonable ground for believing that the arrested perons was driving while in either an intoxicated or drugged condition'". *Rocha v Director of Revenue*, 557 S.W.3d 324, 327 (Mo. App. 2018), *quoting Hill v Director of Revenue*, 424 S.W.3d 495, 499 (Mo. App. 2014. *See also, State v. Schroeder*, 330 S.W.3d 468, 475 (Mo. banc 2011); *State v. Pickering*, 473 S.W.3d 698, 704 (Mo. App. 2015); *Langley v. Director of Revenue*, 467

S.W.3d 870 (Mo. App. 2015). There is no issue in this case that there was evidence of consumption- Mr. Wilmoth admitted prior consumption. Providing additional evidence of consumption, such as an odor of alcohol, without additional evidence such as a specific volume of consumption or impaired physical ability, does nothing to warrant an inference of intoxication, or being under the influence.

The Director states the evidence of intoxication as (1) failure to use a turn signal, (2) making "excited utterances," (3) bloodshot and glassy eyes, (4) the smell of alcohol on Mr. Wilmoth's breath, (5) admission of drinking a couple of beers three and one-half hours earlier, (6) a PBT test with a result above the legal limit of .08%, and (7) that the deputy was responding to a domestic violence call. Respondent's Substitute Brief at 23-24. Failure to use a turn signal, even on a rural gravel road, is admittedly a traffic violation, but not one which indicates impairment, such as weaving or erratic speed. There is no evidence in the record indicating the content of the "excited utterances," and the Director cites no cases supporting an inference that excited utterances are indicative of alcohol impairment. To the contrary, Missouri cases have long recognized that alcohol is a depressant. *E.g.*, *State v. Brown*, 996 S.W.2d 719, 724 (Mo. App. 1999); *Cardenas v. Director of Revenue*, 339 S.W.3d 608, 609 (Mo. App. 2011); *State v. Byers*, 551 S.W.3d 661, 665 n. 1 (Mo. App. 2018). As previously noted, the evidence was not that Mr. Wilmoth had bloodshot and *glassy* eyes, but that he had bloodshot and watery eyes. The Deputy conceded that neither of those would indicate impairment. Admission of drinking a couple of beers three and one-half hours earlier is not an admission of a sufficient volume

of alcohol to warrant an inference of impairment. For reasons stated under Point I, above, the PBT result of "above .08" should not be admissible. As set forth at length in Appellant's Substitute Brief, that fact that the officer was responding to a domestic violence call does not warrant a probable cause belief the Mr. Wilmoth in particular was impaired by alcohol.

The Director cites only *Terry v. Director of Revenue*, 14 S.W.3d 722 (Mo. App. 2000), to support his conclusion that the facts of this case warrant a probable cause determination of impairment. *Terry*, and the cases up which it relies, in fact involved considerable additional evidence to warrant an inference of impairment. The evidence in *Terry* included failure of the HGN test, a strong odor of intoxicants, bloodshot, glassy and watery eyes, slurred speech, swaying as the driver stood and walked, admission of drinking, uncooperative attitude and difficulty following instructions. *Id.* at 724. In *Eggleston v. Lohman*, 954 S.W.2d 696 (Mo. App. 1997), the driver exhibited an odor of alcohol, his speech was slurred, he failed the horizontal gaze nystagmus test and the finger-to-nose-test, and had a positive preliminary breath test. *Id.* at 697. The driver in *Lewis v. Lohman*, 936 S.W.2d 582, 584 (Mo. App. 1996), exhibited bloodshot and glassy eyes, his breath smelled of alcohol, he admitted consuming "a few beers that night," and performed poorly on the walk and turn test, balancing test and HGN test. In *Knipp v. Director of Revenue*, 984 S.W.2d 147, 152 (Mo. App. 1998), Mr. Knipp's speech was slurred, his eyes were bloodshot and glassy, his breath smelled of intoxicants, he failed a horizontal gaze nystagmus test and he had been involved in an accident, in which the "scene was littered

with beer cans, both empty and full." Finally, in *Wilcox v. Director of Revenue*, 842 S.W.2d 240, 241 (Mo. App. 1992), a*brogated on other grounds by Cox v. Dir. of Revenue*, 98 S.W.3d 548 (Mo. 2003), the driver was parked in a traffic lane on the Lewis and Clark Viaduct of Interstate 70, where the speed limit was 55 m.p.h. The driver was asleep or passed out behind the wheel, and difficult to rouse. He exuded a strong odor of alcohol, his eyes were very bloodshot. He was uncooperative and refused to answer the officer's questions. He needed the officer's assistance in removing his driver's license from his back pocket, and could barely stand upon exiting the vehicle, leaning on the officer for support. *Id.*

As discussed in Appellant's Substitute Brief, *Rocha v. Director of Revenue*, 557 S.W.3d 324 (Mo. App. 2018), is virtually identical to the present case, the Director's attempt to distinguish it notwithstanding. The Director contends that "Unlike the driver in *Rocha*, Appellant here failed to operate his vehicle in accordance with traffic laws, admitted that he had consumed alcohol within the past four hours, and had bloodshot and glassy eyes." Respondent's Substitute Brief at 25.

In fact, the driver in *Rocha* also failed to operate his vehicle in accordance with traffic laws in that he was speeding and operating a vehicle with expired registration. 557 S.W.3d at 327. Rocha also admitted drinking prior to the stop, albeit 15 hours rather than 4. *Id.* Rocha also exhibited not only bloodshot eyes, but "extremely" bloodshot eyes. *Id.* There was no evidence that Mr. Wilmoth had glassy eyes. The Deputy did testify that Wilmoth had watery eyes, which he conceded did not indicate impairment.

Appellant's Substitute Brief argued at length that refusal of field sobriety testing did not constitute evidence of impairment. The Director cites several cases indicating that refusal of the implied consent test (post arrest) may be considered as evidence of impairment. Mr. Wilmoth does not dispute that argument, which is in fact mandated by statute. § 577.041.1 ("evidence of the refusal shall be admissible in any proceeding related to the acts resulting in such detention, stop, or arrest"). Mr. Wilmoth contests those cases which have seemingly applied that statute to pre-arrest PBTs, without analysis. His argument is not, as the Director appears to suggest, that § 577.041.1 prevents the admission of PBTs. The argument is that post-arrest refusals are admissible because of the statute and, since there is no such statute applicable to PBTs, the analysis of their admissibility should be based upon traditional notions of relevance. That analysis was undertaken in *City of St. Joseph v. Johnson*, 539 S.W.2d 784 (Mo. App. 1976), and discussed at length in Appellant's Substitute Brief. It has not been refuted by Respondent's Substitute Brief.

ARGUMENT - POINT III

The trial court erred in entering Judgment sustaining the Director of Revenue's revocation of Mr. Wilmoth's driving privilege for being arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more because said Judgment is against the weight of the evidence, in that the trial court could not have reasonably found, from the record at trial, that Mr. Wilmoth was arrested upon probable cause to believe he was driving a motor vehicle while impaired by alcohol, as opposed to having engaged in lawful consumption.

The Director argues that Mr. Wilmoth disputes the trial court's credibility determination by asserting that the cause of his bloodshot and watery eyes was contested. The Director states that since the Deputy testified that he "considered Appellant's bloodshot and watery eyes when deciding to arrest Appellant," he "therefore determined that Appellant's bloodshot and watery eyes were not caused by dust, but by appellant's consumption of alcohol." Respondent's Substitute Brief at 36. Apart from the lack of evidentiary support for this conclusion, it is irrelevant to the weight of the evidence regarding the evidence of impairment. Whether the bloodshot and watery eyes were caused by dust or alcohol, or whether that issue was contested, the Deputy testified as follows regarding impairment:

> Q. And again, even if there is some indication that watery and bloodshot eyes had been caused by alcohol consumption, those things alone wouldn't

tell you anything about the number of drinks a person had had or when he had them, correct?

A. Correct.

Q. So the bloodshot eyes by themselves, again, wouldn't tell you anything about impairment in the sense that of the inability to operate a motor vehicle, correct?

A. By themselves, no.

Transcript at 31. Thus, the Director's witness, which the trial court expressly found credible, conceded that the bloodshot and watery eyes did not constitute evidence of impairment (as opposed to consumption).

Finally, Mr. Wilmoth does not, as the Director suggests, contend that the Director is required to rule out all potentially innocent explanations. He does suggest the Director is required to provide some evidence, beyond conjecture, to warrant an inference of impairment as opposed to mere consumption.

CONCLUSION

For the foregoing reasons, Appellant respectfully suggests that the trial court's judgment is not supported by substantial evidence, and is against the weight of the evidence. Appellant prays for this Court's Order reversing the judgment of the trial court, and granting such other and further relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

COMES NOW Michael S. Shipley, attorney David Wilmoth and states that the foregoing Appellant's Brief was filed and served via the electronic filing system on October 28, 2022.

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CERTIFICATE OF COMPLIANCE

Comes now the undersigned counsel for Appellant and certifies that this brief complies with the limitations contained in Rule 84.06(b) that the brief contains 3,418 words. This Brief was prepared using Microsoft © Word 2016.

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