MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, RESPONDENT,
v.
DAVID SCOTT NOWICKI, APPELLANT.

DOCKET NUMBER WD84851

DATE: February 7, 2023

Appeal From:

Saline County Circuit Court
The Honorable Hugh Craig Harvey, Judge

Appellate Judges:

Special Division: Gary D. Witt, Chief Judge, Presiding, Cynthia L. Martin, Judge, and Timothy J. Flook, Special Judge

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Attorneys:

Zeb Charlton, Jefferson City, MO for respondent.

Samuel E. Buffaloe, Columbia, MO for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, RESPONDENT,
v.
DAVID SCOTT NOWICKI, APPELLANT.

WD84851 Saline County

Before Special Division Judges: Gary D. Witt, Chief Judge, Presiding, Cynthia L. Martin, Judge, and Timothy J. Flook, Special Judge

David Scott Nowicki appeals from the trial court's judgment convicting him of driving while intoxicated as a chronic offender, failure to drive on the right half of the roadway, and operating a motor vehicle without maintaining financial responsibility. Nowicki argues on appeal that there was insufficient evidence admitted to prove beyond a reasonable doubt that his sentence for driving while intoxicated was subject to enhancement because he was a chronic offender.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Special Division holds:

1. Two holdings in *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022), are generally applicable to every case in which the state has the burden to prove beyond a reasonable doubt that the defendant has been convicted of an intoxication-related traffic offense: (1) a prior conviction must qualify as an intoxication-related traffic offense as the term is statutorily defined at the time of the current offense, not at the time of the conduct underlying the prior conviction; and (2) the definition of "driving" at the time of the present offense controls in determining whether a prior offense is an intoxication-related traffic offense.

2. The evidence presented at trial was insufficient to establish beyond a reasonable doubt that three of Nowicki's four prior convictions qualified as intoxicated-related traffic offenses because the offenses could have been committed by merely being in actual physical control of a vehicle and because the evidence in the record did not permit a reasonable inference that Nowicki committed the offenses while physically driving or operating the vehicle.

Opinion by: Cynthia L. Martin, Judge February 7, 2023

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