Summary of SC100041, *State of Missouri v. David Scott Nowicki*
Appeal from the Saline County circuit court, Judge Craig Harvey
Argued and submitted November 8, 2023; opinion issued January 30, 2024

Attorneys: Nowicki was represented by Samuel Buffaloe of the public defender's office in Columbia, (573) 777-9977. The state was represented by Zeb Charlton of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A defendant appeals from his driving while intoxicated conviction for which he was sentenced as a chronic offender. In a 4-3 decision written by Judge Paul C. Wilson, the Supreme Court of Missouri vacates the circuit court's judgment and remands (sends back) the case for resentencing. There was insufficient evidence the defendant's prior convictions involved conduct that now would constitute driving while intoxicated. Accordingly, the state failed to prove beyond a reasonable doubt the defendant was a chronic offender.

Judge Ginger K. Gooch dissents. She would affirm the circuit court's judgment, finding there was sufficient evidence the man's prior convictions were intoxicated-related traffic offenses because the evidence offered of his in-state, prior convictions was of the type of evidence statutorily permitted to prove a defendant's chronic offender status. She would conclude there is no additional statutory requirement that the state prove the defendant's prior Missouri convictions were for conduct that currently would constitute an intoxicated-related traffic offense.

Facts: In 2019, law enforcement officers found David Nowicki unconscious in his vehicle, which was partially off the roadway in a ditch. The officers administered field sobriety tests and advised Nowicki of his rights. He refused to submit to a chemical blood test. Nowicki was charged with driving while intoxicated as a chronic offender. Prior to trial, the state offered records from the Missouri uniform law enforcement system of Nowicki's four prior convictions – from 1986, 1990, 1994 and 2005 – as evidence they constituted intoxicated-related traffic offenses. The circuit court found the state proved beyond a reasonable doubt that Nowicki was a chronic offender as a result of his four prior convictions. A jury found Nowicki guilty, and the circuit court sentenced him as a chronic offender to five years in prison. Nowicki appeals.

VACATED AND REMANDED.

Court en banc holds: (1) Sufficiency of the evidence is the appropriate standard of review. Although Nowicki did not challenge the circuit court's finding he was a chronic offender in his motion for new trial, a sufficiency of the evidence challenge does not need to be included in a motion for a new trial to preserve the claim for appeal. This is true even though Nowicki is challenging the sufficiency of the evidence to support the sentencing enhancement as opposed to the evidence to support his offense.

(2) There is insufficient evidence to support the circuit court's finding that Nowicki is a chronic offender. A chronic offender is a person who has been found guilty of four or more intoxication-related traffic offenses committed on separate occasions, allowing the state to enhance to present charge to a class C felony. A prior conviction can qualify as an intoxication-related traffic offense only if the conduct involved constituted driving while intoxicated as defined at the time of the current offense for which the state seeks enhancement, not the time of the conduct underlying the prior conviction. The state failed to offer any evidence that Nowicki's prior convictions involved conduct that now would constitute driving while intoxicated. Nothing in this Court's prior opinion limited such evidentiary requirement to evidence of out-of-state convictions. The fact that Nowicki also was convicted of moving violations on the same dates of two of his driving while intoxicated offenses does not establish he was physically driving the vehicles at the time of the offenses.

Dissenting opinion of Judge Gooch: The author would affirm the circuit court's judgment. She would find the driving records the state offered to establish Nowicki's prior convictions constituted *prima facie* evidence to support his enhanced sentence as a chronic offender, shifting the burden to Nowicki to refute. She would distinguish this case from the Court's precedent requiring further evidence of conduct on the basis Nowicki's prior convictions were in-state convictions for which section 577.023.4, RSMo, specifically allows the types of records the state offered to prove chronic offender status. She would further find no language in the chronic offender enhancement statute requires additional evidence that the conduct on which the prior convictions are based currently constitute an intoxicated-related traffic offense.