# SUPREME COURT OF MISSOURI
## en banc

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| STATE OF MISSOURI, | ) | *Opinion issued February 24, 2026* |
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| Respondent, | ) | |
| | ) | |
| v. | ) | No. SC101218 |
| | ) | |
| JAMES WILLIS PETERS, | ) | |
| | ) | |
| Appellant. | ) | |

**APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY**
**The Honorable Dean G. Dankelson, Judge**

James Willis Peters appeals his judgment of conviction for driving while intoxicated in which he was sentenced as a chronic offender. Peters argues he should have been sentenced as an aggravated offender because the state failed to prove beyond a reasonable doubt one of his four prior offenses was an intoxication-related traffic offense (IRTO). This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution. Because the state failed to prove beyond a reasonable doubt that Peters' 2002 offense was an IRTO, the judgment is vacated, and the case is remanded for resentencing.

## Factual and Procedural Background

On August 8, 2021, Peters was charged with one count of driving while intoxicated as a chronic offender under section 577.010.[1] During pretrial proceedings, the state sought to prove Peters was a chronic offender by offering Exhibits 3, 4, 5, and 6 to show he had four prior IRTOs.

Peters objected to the introduction of Exhibit 5, arguing "it is not sufficient to prove beyond a reasonable doubt the prior." Counsel stated Exhibit 5 is "basically a printout on a computer screen" and is "not very clear on what the actual charge was." Exhibit 5 shows Peters pleaded guilty on May 2, 2002, to a municipal offense listed as "DRIVING WHILE INTOXICATED" (the 2002 offense). The document is certified by the Joplin municipal court clerk. Upon review, the circuit court determined the charge "is driving while intoxicated under the Joplin City Code."

The circuit court overruled Peters' objection and admitted Exhibit 5. The circuit court found Peters had four prior IRTOs and was a chronic offender beyond a reasonable doubt.

The jury found Peters guilty of the present offense of driving while intoxicated. As a chronic offender, the circuit court sentenced him to seven years in the department of corrections. Peters appeals, arguing the evidence was insufficient to prove beyond a reasonable doubt he was a chronic offender with four prior IRTOs.

[1] All statutory citations are to RSMo Supp. 2017 unless otherwise noted.

## Standard of Review

"When reviewing a claim challenging the sufficiency of the evidence, this Court must make a *de novo* determination whether the evidence is sufficient to permit a reasonable fact-finder to find the necessary facts beyond a reasonable doubt." *State v. Nowicki*, 682 S.W.3d 410, 414 (Mo. banc 2024). This Court "accept[s] as true all evidence tending to prove those facts and will draw all reasonable inferences in favor of finding those facts." *Id.* This Court, however, "may not supply missing evidence or give the [s]tate the benefit of unreasonable, speculative or forced inferences." *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001) (alteration and quotations omitted).

## Analysis

Absent enhancement, driving while intoxicated is a class B misdemeanor. § 577.010.2(1). If the state proves the defendant has one or more prior IRTOs, however, the sentence may be enhanced. § 577.010.2. If the state proves the defendant is an aggravated offender – a person with three or more IRTOs, § 577.001(1)(a), RSMo Supp. 2020 – the offense is enhanced to a class D felony. § 577.010.2(4)(a).[2] When the state proves the defendant is a chronic offender – a person with four or more IRTOs, § 577.001(5)(a), RSMo Supp. 2020 – the DWI offense is enhanced to a class C felony. § 577.010.2(5)(a).

[2] Peters concedes the circuit court properly found he had three prior IRTOs. On appeal, he challenges only the finding that his 2002 offense (contained in Exhibit 5) was an IRTO.

In *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022), this Court interpreted the definition of an IRTO, found in section 577.001(15), RSMo Supp. 2020, to create four categories of IRTOs:

> (1) driving while intoxicated; (2) driving with excessive blood alcohol content; (3) driving under the influence of alcohol or drugs in violation of a [state law,[3]] county or municipal ordinance; and (4) operating a vehicle while intoxicated and another person was injured or killed in violation of any state law, county or municipal ordinance, any federal offense, or any military offense.

*Shepherd*, 643 S.W.3d at 349 (footnote omitted).

The state must prove beyond a reasonable doubt each IRTO on which it relies to enhance the present offense. § 577.023.1(2), RSMo 2016. Further, the state must plead "all essential facts" warranting a finding that the defendant is a prior, persistent, aggravated, or chronic offender. § 577.023.1(1), RSMo 2016.

There is no allegation that Peters' 2002 offense involves the injuring or killing of another person. Accordingly, this Court assesses whether his 2002 offense qualifies as an IRTO under any of the first three categories outlined by section 577.001(15), RSMo Supp. 2020, each of which requires the conduct of "driving."

"Because IRTOs are defined in chapter 577, the definition of 'driving' provided in section 577.001(9) applies to the use of that term in the IRTO definition provided in section

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[3] In *Shepherd*, the Court examined a prior version of section 577.001(15) that did not include the phrase "of a state law" in the third category of IRTOs. 643 S.W.3d at 349 n.4. At the time of Peters' present offense in 2021, however, section 577.001(15), RSMo Supp. 2020, included the phrase "of a state law." *See id.* at 349 (holding "a prior conviction qualifies as an IRTO only if the conduct involved constituted [an IRTO] 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").

577.001(15), including its use in the phrases '*driving* while intoxicated' and '*driving* with excessive blood alcohol content.'" *Shepherd*, 643 S.W.3d at 350 (emphasis in original). At the time of Peters' present offense, the term "driving" was defined as "physically driving or operating a vehicle or vessel." § 577.001(9), RSMo Supp. 2020. This definition does not include merely being in "actual physical control" of a vehicle – conduct that was included in Missouri's pre-1996 definition of driving. *Nowicki*, 682 S.W.3d at 415; *see also Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) ("Until 1996, the statutory definition was 'physically driving or operating ***or*** being in actual physical control of a motor vehicle[,]'" but, "[b]y removing 'actual physical control' from the statute [in 1996], the legislature narrowed its scope." (citing § 577.001.1, RSMo Supp. 1994)). "As a result, a prior offense that was based solely on … being in physical control of a vehicle while intoxicated cannot qualify as an IRTO … because it did not involve 'driving' as that word was defined at the time of [Peters'] present offense." *Shepherd*, 643 S.W.3d at 350.

When the definition of "driving" at the time of the present offense is limited to physically driving or operating a vehicle, this Court has repeatedly held the state must prove each potential IRTO involved physically driving or operating a vehicle while in a state contemplated by any of the first three categories of IRTOs outlined by section 577.001(15). *Id.* at 351; *see also Nowicki*, 682 S.W.3d at 415 (Because the definition of "driving" in effect at the time of Nowicki's present offense did not include merely being in actual physical control of a vehicle, "the state must prove each of Nowicki's potential IRTOs was for physically driving or operating a vehicle while intoxicated.").

Peters asserts Exhibit 5 was insufficient to prove his 2002 offense involved physically driving or operating a vehicle. This Court agrees. Exhibit 5, the state's only proof as to the 2002 offense, does not describe any of the conduct giving rise to the offense, nor does it list the elements or provide the language of the offense of "driving while intoxicated" under the Joplin city code.[4] The only relevant information this Court can glean from the document is that Peters pleaded guilty in 2002 to a Joplin municipal offense named "driving while intoxicated." This is not enough to permit a reasonable inference that the 2002 offense was for physically driving or operating a vehicle. The offense might have been for physically driving or operating a vehicle while intoxicated, but it also might have been for being in physical control of a vehicle while intoxicated. While the former conduct would qualify the 2002 offense as an IRTO, the latter would not. Without any evidence as to the conduct involved, there is no basis to conclude the 2002 offense was limited to physically driving or operating a vehicle while intoxicated.[5] *See Draper v. Louisville & N.R. Co.*, 156 S.W.2d 626, 630 (Mo. 1941) ("[C]onjecture based on the possibility that a thing could have happened" or "an idea or a notion founded on the

[4] It is important to emphasize the 2002 offense involved the violation of a municipal ordinance rather than a Missouri statute, a key distinction in this case. "[A] court may not take judicial notice of a municipal enactment that is not introduced properly into evidence." *City of Joplin v. Marston*, 346 S.W.3d 340, 342 (Mo. App. 2011); *see also St. Joseph v. Roller*, 363 S.W.2d 609, 611 (Mo. 1963) (Courts may "take judicial notice of statutes but not of ordinances.").

[5] The fact the offense occurred after Missouri's state-level definition of driving changed in 1996 is irrelevant. What matters is what was prohibited by ***the ordinance***, which is entirely unclear from the record. The Joplin city code's 2002 definition of "driving" may have mirrored Missouri's definition at that time, but it may not have. There is no basis to make either conclusion without evidence of the text of the ordinance or some other evidence of the conduct underlying the offense.

probability that a thing may have occurred, but without proof that it did occur[,]" is not a permissible inference but rather a "supposition."). The state failed to prove beyond a reasonable doubt that Peters' 2002 offense was an IRTO.

The state argues *Shepherd*'s requirement that the state prove each IRTO involves physically driving or operating a vehicle is limited to the circumstances of that case, in which the prior out-of-state offense expressly criminalized a broader range of conduct than that specified by Missouri's definition of "driving" at the time of enhancement. The state asserts *Shepherd* should not apply here, when it would be speculative to assume the 2002 offense encompassed conduct beyond driving or operating a vehicle.

This argument only illustrates the deficiency of the state's proof. True, it is speculative to assume the 2002 offense encompassed being in mere physical control of a vehicle; but, for the same reason, it is also speculative to assume the offense was limited to physically driving or operating a vehicle. There is simply ***no evidence*** from which a court may draw a reasonable conclusion as to what conduct the offense encompassed. As such, ***any*** conclusion as to the conduct involved would be entirely speculative. The reasoning in *Shepherd* applies with equal force to these circumstances. In both situations, "the state failed to show that [the alleged IRTOs] were for conduct that qualifies as 'driving' … under the definition[] of an IRTO … in effect at the time of [the] present offense." *Shepherd*, 643 S.W.3d at 352. In this regard, there is no meaningful distinction

between a record that shows a prior offense encompassed acts broader than driving or operating and a record that is silent as to the conduct involved – neither record permits an inference as to whether the prior offense was for physically driving or operating a vehicle. *Shepherd* is directly applicable.

Indeed, the Court recognized this concept in *Nowicki* by applying *Shepherd's* reasoning to a record that, like the instant case, was silent as to the conduct encompassed by a purported IRTO. To prove a prior municipal offense was an IRTO, the state introduced a MULES record showing Nowicki was arrested for a "local BAC offense" and was convicted of the charged offense in municipal court. *Nowicki*, 682 S.W.3d at 417. "The state offered no evidence as to what the essential elements of the 'local BAC offense' were, and the county or municipal ordinance Nowicki violated was not offered into evidence." *Id.* "[T]herefore, just as in *Shepherd*, … the state's evidence … [was] 'utterly silent' as to whether the conduct underlying the conviction would constitute 'driving while intoxicated' as defined in Missouri law at the time of Nowicki's present offense" and failed to prove beyond a reasonable doubt that the "local BAC offense" was an IRTO. *Id.* at 417-18.

The state argues *Nowicki* is distinguishable because Exhibit 5 specifies the 2002 offense was for "***driving*** while intoxicated," when the offense at issue in *Nowicki* was more broadly proven as "a local BAC offense." The state argues the use of the word "driving" in the title of the offense alone supports a reasonable inference that the underlying conduct

involved physically driving or operating a vehicle. To support its argument, the state relies on a string of pre-*Shepherd* court of appeals cases. *See, e.g., State v. Sallee*, 554 S.W.3d 892 (Mo. App. 2018); *State v. Cordell*, 500 S.W.3d 343 (Mo. App. 2016).

In *Cordell*, the state offered the defendant's Missouri driver record showing three prior convictions for "driving while intoxicated" as evidence of prior IRTOs to support aggravated offender status. 500 S.W.3d at 344. Two of the three convictions were for municipal offenses, and nothing in the driver record showed the elements of those offenses or the conduct giving rise to them. *Id.* The court of appeals held the driver record alone was sufficient circumstantial evidence from which the circuit court could reasonably infer the conduct giving rise to the municipal convictions involved physically driving. *Id.* at 347. Specifically, the court of appeals could not say it was "unreasonable for the [circuit] court to infer that a conviction for 'driving while intoxicated' was a conviction for *driving* while intoxicated." *Id.; see also Sallee*, 554 S.W.3d at 898 (citing *Cordell* to hold the mere designation of the defendant's prior municipal convictions of "***driving*** while intoxicated" was sufficient to permit an inference that the conduct giving rise to those offenses involved physically driving).

*Cordell* and *Sallee* contradict the reasoning in *Shepherd* and *Nowicki*. The title of a municipal offense does not constitute evidence of the conduct it encompasses. A municipal offense utilizing the term "driving" in its title might be limited to actually driving or operating a vehicle, but it also might encompass being in mere physical control of the vehicle without actually driving it. Without entering the municipal ordinance ***language***

into evidence or providing some other ***evidence*** to show the conduct involved in the offense, there is simply no basis to make a conclusion as to whether the offense qualifies as an IRTO. *See Shepherd*, 643 S.W.3d at 353 (explaining, when a driving record shows only that the alleged prior IRTO ***might*** have been for driving ***or*** being in actual physical control of a vehicle and there is no other evidence to tip the scales in favor of either conclusion,[6] such evidence gives rise to "***no*** inference, and certainly no reasonable inference," as to whether the offense qualifies as an IRTO). The title of a municipal offense is not self-proving – the state must introduce some evidence to show the conduct giving rise to the offense involved physically driving or operating a vehicle. *Cordell*, *Sallee*, and similar cases should no longer be followed.

Alternatively, the state argues *Shepherd* and *Nowicki* were wrongly decided. The state asserts any Missouri offense denominated "driving while intoxicated" or "driving with excessive blood alcohol content," regardless of the conduct giving rise to the offense, constitutes an IRTO under the first two categories of section 577.001(15), RSMo Supp. 2020, respectively. This Court disagrees.

Focusing solely on the title of the purported IRTO would require this Court to ignore the legislature's definition of "driving" in section 577.001(9), RSMo Supp. 2020. The

[6] The Court distinguished some of Shepherd's prior offenses, which involved accidents. *Shepherd*, 643 S.W.3d at 352 n.11. The Court explained the fact that the record showed those offenses involved accidents "breaks the silence" as to whether they involved driving or mere physical control. *Id.* There was no such evidence in *Cordell* or *Sallee*, and there is no such evidence in Peters' case.

Court may not do so. By expressly defining "driving" to encompass only physically driving or operating a vehicle, and by utilizing that term in its definition of an IRTO a mere five subdivisions later, this Court must assume the legislature intended to limit qualifying IRTOs to offenses for physically driving or operating. *See State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. banc 2013) ("[T]he lawmaking body's own construction of its language by means of a definition of the terms employed should be followed in the interpretation of the statute to which it relates and is intended to apply and supersedes the commonly accepted dictionary or judicial definition and is binding on the courts." (alteration in original) (quotation omitted)). Under the state's proposed construction, prior convictions for being in actual physical control of a vehicle while in a proscribed state could constitute IRTOs so long as they are designated "driving while intoxicated" or "driving with excessive blood alcohol content." This would ignore the legislature's express language and assumed intent.

Moreover, this Court noted in *Nowicki*:

> *Shepherd* was simply a matter of statutory construction, and the General Assembly has not overruled that construction. "[When] a court of last resort construes a statute, and that statute is afterwards re-enacted, or continued in force, without any change in its terms, it is presumed that the legislature adopted the construction given to it by the court."

682 S.W.3d at 415 n.5 (alteration in original) (quoting *State v. Harris*, 675 S.W.3d 202, 205 (Mo. banc 2023)). Absent any indication from the General Assembly, this Court declines to disturb its recent precedent in *Shepherd* and *Nowicki*.

## Conclusion

For the reasons set forth above, the state failed to meet its burden of proving beyond a reasonable doubt that Peters had four or more prior convictions that qualify as IRTOs. Because the circuit court erred in sentencing Peters as a chronic offender, its judgment is vacated, and the case is remanded to resentence Peters as an aggravated offender.[7]

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Robin Ransom, Judge

Powell, C.J., Fischer, Wilson,
and Russell, JJ., concur;
Gooch, J., dissents in separate opinion
filed; Broniec, J., concurs in opinion
of Gooch, J.

[7] The state argues Peters is not entitled to resentencing because his seven-year sentence is within the range of the sentence he could have received as an aggravated offender. As a chronic offender, Peters could have received a sentence between three and ten years. § 558.011.1(3), RSMo 2016. If the circuit court found Peters was an aggravated offender, however, it could have sentenced him to no more than seven years. § 558.011.1(4), RSMo 2016. This Court is not inclined to exercise the sentencing discretion belonging to the circuit court. *See Williams v. State*, 800 S.W.2d 739, 740-41 (Mo. banc 1990) (acknowledging, given the sentencing discretion afforded trial judges, it would be inappropriate for the Court to assume how the circuit court would have sentenced the defendant under different circumstances). The circuit court should have the opportunity to sentence Peters as an aggravated offender, upon consideration of all relevant factors, within the full range of a class D felony.

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## DISSENTING OPINION

I respectfully dissent. I would affirm the circuit court's judgment of conviction. The state presented sufficient evidence to prove beyond a reasonable doubt James Peters' sentence was subject to enhancement because he was a chronic offender in that his four Missouri prior convictions were qualifying intoxication-related traffic offenses ("IRTOs").

In *State v. Nowicki*, 682 S.W.3d 410 (Mo. banc 2024), this Court expanded the holding in *State v. Shepherd*, 643 S.W.3d 346 (Mo. banc 2022), a case involving enhancement based on prior out-of-state convictions, to apply to any Missouri defendant with a sentence subject to enhancement based only on ***Missouri*** prior convictions for qualifying IRTOs. I dissented in *Nowicki*, arguing the expansion of *Shepherd* was not

supported by the plain language of the relevant statutes or by common law.[1] *Nowicki*, 682 S.W.3d at 419-23 (Gooch, J., dissenting). I dissent for the reasons I stated in *Nowicki*.[2]

The principal opinion now again relies on *Shepherd* and *Nowicki* to assert the state had no right to rely on Peters' prior conviction from 2002, ***some six years after the legislature amended the state-level definition*** of "driving" in 1996 to eliminate the phrase "or being in actual physical control of." *See* sec. 577.001(9); *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) (noting, "[u]ntil 1996, the statutory

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[1] The dissenting opinion in *Shepherd*, 643 S.W.3d at 356-58 (Draper, J., dissenting), warned of this unsupported expansion of *Shepherd* to Missouri prior convictions.

[2] In my dissenting opinion in *Nowicki*, I observed:

> [T]he enhancement provision in section 577.010.2(6)(a) and the definition in section 577.001(15) speak only to the time of enhancement because enhancement occurs only before the current offense's submission to the jury, as explicitly set out in section 577.023.2. The plain words of the relevant statutes govern. Nowhere in any relevant statute did the General Assembly specify that the circuit court, as the entity charged in section 577.023.2 with making the chronic offender determination, must review every Missouri prior conviction to determine: 1) the elements of the offense at the time of the conviction, 2) whether those elements qualify or might qualify as an IRTO under current statutes, and 3) whether the offered proof not challenged by the defendant establishes a conviction (even a conviction occurring decades prior) meeting the current definition of IRTO, all before enhancement is permitted. The principal opinion places burdens on the state and circuit courts not found in the plain language of the relevant statutes.

682 S.W.3d at 422 (footnote and internal citation omitted). Unless otherwise noted, all statutory references are to RSMo Supp. 2020. In this case, as in *Nowicki*, the principal opinion places burdens on the state and circuit court not found in the plain language of the relevant statutes.

definition was 'physically driving or operating or being in actual physical control of a motor vehicle[,]'" but, "[i]n 1996, the General Assembly removed the phrase 'or being in actual physical control of'" and that "[b]y removing 'actual physical control' from the statute, the legislature narrowed its scope" (quoting sec. 577.001.1, RSMo 1994, and citing 1996 Mo. Laws 593, 617)). The principal opinion again thwarts the legislature's intent of keeping chronic offenders off Missouri's roadways. Under *Shepherd* and *Nowicki*, the state will continue to be tasked with meeting burdens not required by the relevant statutes or the common law until the legislature specifies prior convictions qualify as IRTOs if those convictions qualified as IRTOs at the time of conviction.[3]

The state presented sufficient evidence to prove beyond a reasonable doubt Peters is a chronic offender as defined in section 577.001(5) when it introduced Peters' four Missouri prior convictions qualifying as IRTOs as defined in section 577.001(15). The state met its burden under the plain language of the relevant statutes, and the circuit court correctly sentenced Peters as a chronic offender under section 577.001(5). For these reasons, I dissent. I would affirm the circuit court's judgment.

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Ginger K. Gooch, Judge

[3] To the extent the principal opinion's analysis creates confusion as to whether a judge or jury makes the required determinations in light of *Erlinger v. United States*, 602 U.S. 821 (2024), handed down after *Nowicki*, neither party raised this issue, so it is beyond the scope of this opinion and the principal opinion.