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No. SC99655

In the Supreme Court of Missouri

DIRECTOR OF REVENUE,

Respondent,

v.

DAVID PRIOR WILMOTH

Appellant.

Appeal from Circuit Court of Clinton County
Forty-Third Judicial Circuit
The Honorable Teresa L. Bingham, Judge

RESPONDENT'S SUBSTITUTE BRIEF

ERIC S. SCHMITT
Attorney General

ZEB J. CHARLTON
Assistant Attorney General
Missouri Bar No. 73665

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-8774
Fax: (573) 751-5391
Zeb.Charlton@ago.mo.gov
ATTORNEYS FOR RESPONDENT DIRECTOR OF REVENUE

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STATEMENT OF FACTS

On November 19, 2019, at approximately 10:16 P.M., Clinton County Deputy Cole Mazer was dispatched to Appellant's residence. (Tr. 8; L.F. D7, p. 24). Clinton County Dispatch told Deputy Mazer that Appellant's Wife (Wife) had called 9-1-1 and said that Appellant had "pointed a gun in her face." (L.F. D7, p. 24). While in route, Deputy Mazer was informed that Appellant had fled the scene in a red Honda Pioneer utility vehicle. (Tr. 9; L.F. D7, p. 24).

Deputy Mazer observed two red tail-lights headed south on Southeast Perrin Road. (Tr. 9; L.F. D7, p. 24). Deputy Mazer caught up to the vehicle "through the cloud of dust its tires had kicked up on the gravel roadway." (L.F. D7, p. 16). Deputy Mazer saw the vehicle make a left turn without the driver using a light or hand signal. (L.F. D7, p. 16). At approximately 10:30 P.M., Deputy Mazer activated his emergency lights and siren and conducted a felony vehicle stop. (Tr. 9; L.F. D7, p. 16). The driver abruptly pulled over. (Tr. 36).

Deputy Mazer ordered the driver to exit the vehicle at gunpoint. (L.F. D7, p. 16). He then told the driver to lay flat on the ground with his hands visible. (L.F. D7, p. 16). Deputy Mazer handcuffed the driver and conducted a frisk search. (L.F. D7, p. 16). Deputy Mazer identified the driver as Appellant based on Appellant's statement and his driver's license. (Tr. 9; L.F. D7, p. 16).

Appellant spoke to Deputy Mazer in an excited manner. (Tr. 37; L.F. D7, p. 16). Deputy Mazer detected an "intoxicating beverage odor" on Appellant's

breath when he spoke. (Tr. 9-10; L.F. D7, p. 16). Deputy Mazer also noticed that Appellant's eyes were bloodshot and watery. (Tr. 10; L.F. D7, p. 16). After being read his *Miranda* rights, Appellant admitted that he had "a couple beers around 7:00 P.M. with dinner." (Tr. 11-12).

Appellant agreed to Deputy Mazer's request that he take a portable breath test (PBT). (Tr. 12; L.F. D7, p. 16). The result of the PBT was above .08-percent. (Tr. 14; L.F. D7, p. 16). Appellant refused to perform any additional field sobriety tests. (Tr. 14; L.F. D7, p. 16).

Appellant was placed under arrest and taken to the Clinton County Jail. (Tr. 22). Appellant agreed to take a breath test. (Tr. 23). The first test showed a blood-alcohol content of .082-percent. (Tr. 27). Five minutes later, Appellant performed another breath test. (Tr. 27). That test showed a blood alcohol content of .086-percent. (Tr. 27).

The Director of Revenue revoked Appellant's driver's license following an administrative hearing on March 5, 2020. (L.F. D2, p. 2). Appellant filed a petition for trial de novo in Clinton County Circuit Court on March 27, 2020. (L.F. D1, p. 4). A hearing on the petition was held on September 15, 2020. (L.F. D1, p. 8). The court, over Appellant's objection, admitted into evidence Director's Exhibit 3, which contained certified records relating to Appellant's arrest and the administration of Appellant's breath tests. (Tr. 27; L.F. D7). Exhibit 3 contained the actual numerical result of Appellant's preliminary

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breath test. In admitting the exhibit, the court noted that it would "disregard the actual numeric number of [the PBT] and take instead the officer's testimony that it was above .08-[percent]." (Tr. 28). The Court also admitted Director's Exhibit 2, which contained documents relating to the verification and calibration of the specific breath analyzer used to obtain Appellant's breath sample. (Tr. 26; L.F. D6).

The trial court issued its Findings of Fact, Conclusions of Law, and Judgment on October 23rd, 2020. (L.F. D9). The court first concluded that the Director's evidence was credible. (L.F. D9). The court determined that there was probable cause to arrest Appellant for an alcohol-related traffic offense. (L.F. D9). The trial court's reasoning in the judgment stated, "No use of signal and PBT as positive for alcohol- along with other statements and conditions as stated in reports and testimony." (L.F. D9). The court further found that Appellant was driving with a blood-alcohol content of .08 or higher. (L.F. D9). The court sustained the Director's revocation of Appellant's driving privileges. (L.F. D9).

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ARGUMENT

I. The trial court did not err in admitting Deputy Mazer's testimony that the result of Appellant's PBT was over .08-percent. The result of a PBT test is admissible in an administrative license proceeding for the limited purpose of establishing probable cause to arrest.

A. The Record Regarding This Claim

At trial, Deputy Mazer testified that Appellant agreed to submit to a PBT. (Tr. 12). Before Deputy Mazer could testify to the result of the PBT, Appellant objected on the ground that Deputy Mazer was not permitted to testify about the specific numerical result of the PBT:

> MR. BAKER: Do you recall the result of the preliminary breath test?
>
> MR. SHIPLEY: Your Honor, I'm going to object if he's intending to testify to any specific numerical result. Under Section 577.021, a preliminary breath test may be admissible if it's positive as to probable cause but not admissible as to the evidence of blood alcohol content.
>
> MR. BAKER: Well, that's exactly why I'm asking, Your Honor, to establish probable cause. This is prearrest and I'm not trying to elicit the result necessarily for the evidential breath test post-arrest. This is to establish that the officer did have probable cause to arrest, and I believe the case of *State v. Roux*, R-o-u-x, states in part that the result, the actual result of the preliminary breath test, is relevant in establishing probable cause.

THE COURT: Relevant in that if it was under a certain number then he wouldn't have probable cause.

MR. BAKER: Essentially, yes.

MR. SHIPLEY: Your Honor, I'm objecting on the -- the statute specifically says that the evidence of blood alcohol content is not admissible. And beyond that, I think he could just testify if he says it was positive because I think that, you know, positive or negative, that the statute allows for that but just to the alcohol content it doesn't. And moreover, as to this particular case and I think distinguishes it from the *Roux* case is you're basically talking about a scientific test for which there is no foundation or evidence to how the test works, how it's qualified, that it's a legitimate test. So I object on that basis as well.

(Tr. 12-13).

The trial court sustained Appellant's objection, but only with regard to the specific numerical result of the PBT. (Tr. 13). Deputy Mazer testified that Appellant's PBT resulted in a positive test for alcohol. (Tr. 13). The Director then asked Deputy Mazer if the result of Appellant's PBT was "above or below .08[-percent]." (Tr. 13). Appellant's counsel again objected, arguing that Deputy Mazer's answer would be indicative of the "exact number of the test":

MR. BAKER: Was it above or below .08?

MR. SHIPLEY: Objection, Your Honor, as to -- that's getting to the exact number of the test, which I think is the same thing you sustained the objection as to.

MR. BAKER: Your Honor, *State v. Roux* applies directly to this. The Southern District stated that a result above .08 is -- is essential -- not

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> essential -- is evidence of probable cause. A result below .08 would not necessarily lead to probable cause.
>
> MR. SHIPLEY: Your Honor, also, that case did not deal, again, with the foundation objection I've made that whether it could ultimately be relevant or not there's no foundation for the reliability of that test or that it's scientifically accurate.
>
> MR. BAKER: There's numerous case law that says foundation for a preliminary breath test is not required in a license suspension case.
>
> MR. SHIPLEY: Well, Your Honor, I think foundation, again, is to -- whether it's positive or negative, I think that's true and that's what the statute says, but I'm talking about the foundation as to a specific number, the reliability of the test to give a value.

(Tr. 14). The trial court overruled Appellant's objection. (Tr. 14). Deputy Mazer stated that the result of Appellant's PBT was above .08-percent. (Tr. 14).

Later, the Director offered Respondent's Exhibit 3 into evidence. (Tr. 27). That exhibit included, among other documents, a certified copy of Appellant's Alcohol Influence Report prepared by Deputy Mazer. (Tr. 27-28; L.F. D7, p. 2). The report noted that Appellant had tested positive for alcohol on the PBT. (L.F. D7, p. 2). It also contained the specific numerical result of Defendant's PBT: .11-percent. (L.F. D7, p. 2).

Appellant objected to the admission of Respondent's Exhibit 3 because the Alcohol Influence Report contained the result of Appellant's PBT "as to a specific level." (Tr. 28). The Director responded that he was only offering "that

portion of the document for probable cause" and asked the trial court "to not recognize the actual numerical result when considering this document." (Tr. 28). The trial court admitted Respondent's Exhibit 3, but specifically "disregard[ed] the actual numeric number of [the PBT] and [took] instead the officer's testimony that is was above .08." (Tr. 28).

Deputy Mazer admitted during cross-examination that he did not know "the science of how the PBT test works." (Tr. 35). He said that he reads the result of the PBT and puts the specific numeric value in his report. (Tr. 35). Deputy Mazer later testified during redirect examination that he used an Alco-Sensor FST to administer Appellant's PBT. (Tr. 40). Deputy Mazer stated that he had received practical on-the-job training with the Alco-Sensor FST during his field training, and that he had completed the online course for that PBT model in approximately June 2019. (Tr. 40).

The trial court's judgment indicated that the trial court only considered Deputy Mazer's testimony that Appellant's PBT was "positive for alcohol." (L.F. D9).

B. Standard of Review

The trial court's decision as to the admission of evidence in a license suspension or revocation case is reviewed for abuse of discretion. *Vanderpool v. Dir. of Revenue*, 226 S.W.3d 108, 109 (Mo. banc 2007) (citing *Vernon v. Dir. of Revenue*, 142 S.W.3d 905, 909 (Mo. App. S.D. 2004)). A ruling constitutes an

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abuse of discretion only if it is "'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Cox v. Kan. City Chiefs Football Club*, 473 S.W.3d 107, 114 (Mo. banc 2015) (quoting *Lozano v. BNSF Ry. Co.*, 421 S.W.3d 448, 451 (Mo. banc 2014)). Additionally, statutory interpretation is an issue of law that an appellate court reviews de novo. *Stiers v. Dir. of Revenue*, 477 S.W.3d 611, 614 (Mo. banc 2016) (quoting *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008)).

C. Analysis

1. The result of a PBT test—that is, whether the result is above or below .08-percent—is admissible in an administrative license revocation or suspension proceeding to establish probable cause to arrest.

To revoke or suspend a license under section 302.505, the Director is required to establish "that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight, based on the definition of alcohol concentration in section 302.500." § 302.505.1, RSMo. Cum. Supp. 2017. "Alcohol concentration" is defined as "the amount of alcohol in a person's blood at the time of the act

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alleged as shown by chemical analysis of the person's blood, breath, saliva, and urine." § 302.500, RSMo. Cum. Supp. 2017.

Similarly, "[d]uring review of a license suspension or revocation under section 302.505.1, the trial court is to determine whether the suspension is supported by evidence that: (1) the driver was arrested on probable cause for violating an alcohol-related offense; and (2) the driver's blood alcohol concentration exceeded the legal limit of .08[-]percent." *White v. Dir. of Revenue*, 321 S.W.3d 298, 309 (Mo. banc 2010) (citing *Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543, 545 (Mo. banc 2003)).

The portable breath test is used prior to the arrest of a person suspected of driving while intoxicated and "is designed for use by police officers to assist them in determining whether they have probable cause to arrest a suspect." *State v. Robertson*, 328 S.W.3d 745, 751 (Mo. App. W.D. 2010) (quoting *State v. Duncan*, 27 S.W.3d 486, 488 (Mo. App. E.D. 2000)).

The admissibility of the results of a PBT is governed by section 577.021. Section 577.021 permits any state, county, or municipal law enforcement officer who has the power of arrest and who is certified as a peace officer to, prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 ("driving while intoxicated)" or section 577.012 ("driving with excessive blood alcohol content"). "A test administered pursuant to this section shall be admissible as evidence of

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probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content." § 577.021.3, RSMo. Cum. Supp. 2017. This section is exempt from the provisions of sections 577.019 and 577.020. *Id.*

Section 577.020 provides that Missouri drivers give implied consent to submit to chemical tests of the persons breath, blood, saliva or urine for the purposes of determining the alcohol or drug content of the person's blood, and that such chemical analysis "shall be performed according to methods approved by the state department of health and senior services by licensed medical personnel or by a person possessing a valid permit issued by the state department of health and senior services for this purpose." § 577.020.1 &.3, RSMo. Cum. Supp. 2017. As such, the PBT "is not subject to the same Department of Health Regulations that govern breath analysis tests admissible to prove that a defendant was intoxicated." *Robertson*, 328 S.W.3d at 751; *see also* Mo. Code Regs. 19, §§ 25-30.011-.060 (2010). Proof of calibration of the PBT is not required for the admissibility of the results of the portable breath test under section 577.021 to establish probable cause. *Id.*

The exemption of portable breath tests from section 577.020 "represents a legislative conclusion that the portable breath test is too unreliable to be used *to prove intoxication*." *Duncan*, 27 S.W.3d at 488 (emphasis added). But the plain text of section 577.021.3 permits the result of a PBT to come into evidence

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for the purpose of establishing "probable cause to arrest." § 577.021.3, Cum. Supp. 2017. The only limitation on this evidence is that it may "not be admissible as evidence of blood alcohol content." § 577.021.3, RSMo. Cum. Supp. 2017.

In the context of an administrative license or revocation proceeding, the relevant question is whether the arresting officer had probable cause to believe that a person was driving a vehicle while over the legal limit of .08-percent. Section 302.505.1 specifically requires that an arresting officer had "probable cause to believe such person was driving a motor vehicle *while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight*." § 302.505.1, RSMo. Cum. Supp. 2017. Testimony that the result of a PBT was over .08-percent goes directly to the probable cause determination that section 302.505.1 requires. Therefore, Deputy Mazer's testimony was admissible for this limited purpose.

Further, this analysis is consistent with section 577.021.3's limitation that a PBT may "not be admissible as blood alcohol content." This language only means that the Director may not offer the result of the PBT to establish that the driver's blood alcohol concentration exceeded the legal limit of .08-percent. This bifurcated analysis means that the trial court can admit the result of a PBT for establishing probable cause, but must ignore that result for

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determining whether the Director established that the driver's blood alcohol concentration did in fact exceed the legal limit of .08-percent.

Appellant's interpretation of Section 577.021 would allow a court to ignore relevant evidence of impairment. "A reasonable officer, when faced with a portable breath test result of .08 percent or more would be justified in believing the driver was impaired so as to support a finding of probable cause." *State v. Roux*, 554 S.W.3d 416, 418 (Mo. App. S.D. 2017). "In contrast, the result of the test might be 'positive' for alcohol but show a blood alcohol content of less than .08 percent. Under such circumstances, an inference of intoxication might not be justified." *Id.* Ignoring such evidence would allow a court to second-guess an arresting officer's probable cause determination without the full knowledge available to the arresting officer.

Appellant's reliance on criminal cases where the trial court only permitted an officer to testify that the result of the PBT was "positive" is misplaced. "The purpose of Missouri's suspension and revocation proceeding as set forth in section 302.505 is entirely distinct from criminal punishment of drunken drivers." *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 335 (Mo. banc 1999). This argument also ignores that Section 302.505 specifically contemplates that an arresting officer must have probable cause to believe that a person was driving with an alcohol concentration above .08-percent. Appellant's interpretation would render the phrase "while the alcohol

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concentration in the person's blood breath, or urine was eight-hundredths of one percent or more by weight" completely meaningless. "[A] court should not interpret a statute so as to render some phrases mere surplusage." *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. banc 2009) (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998)).

An officer's testimony that the result of the PBT was over the legal limit of .08-percent for the sole purpose of establishing probable cause to arrest at an administrative license proceeding is not evidence of blood alcohol content and is therefore admissible.

Appellant also challenges the foundation for the admission of Deputy Mazer's testimony that the result of Appellant's PBT was over .08-percent. Appellant argues that "the Director did not elicit any testimony regarding foundation for the reliability as to a specific result, or a result above a certain level." (App. Sub. Br. at 22). But the requirements for the validity of a chemical test contained in 577.020 do not apply to a PBT. § 577.021.3; *see also Robertson*, 328 S.W.3d at 751.

Deputy Mazer was also qualified to testify to the result of the PBT under section 490.065.1(1). Deputy Mazer testified that he was trained to operate an Alco-Sensor FST, and had been certified to perform field sobriety tests with that exact machine. Deputy Mazer's admission that he did not know how the PBT worked would only go to the credibility of the test results, not the

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admissibility. *See York v. Dir. of Revenue*, 186 S.W.3d 267, 272 (Mo. banc 2006) (overruled on other grounds by *White*, 321 S.W.3d at 298)).

2. Appellant was not prejudiced by Deputy Mazer's testimony that the result of the PBT was over .08-percent.

Even if the trial court erred in admitting Deputy Mazer's testimony that the result of the PBT was over the legal limit of .08-percent, Appellant cannot demonstrate how this error was prejudicial. "In a bench trial, error in admitting evidence is generally not prejudicial, unless the trial court relies on the inadmissible evidence in making its findings." *State v. Norman*, 618 S.W.3d 570, 575 (Mo. App. W.D. 2020) (quoting *State v. Dixon*, 586 S.W.3d 304, 316-17 (Mo. App. W.D. 2018)). "On appeal, we presume that any improper or inadmissible evidence admitted in a bench-tried case was not prejudicial and that the trial court was not influenced by it in reaching its judgment unless it is apparent from the record that the trial court considered and relied on the improper or inadmissible evidence." *Id.*

Here, the trial court's judgment reflects that it only considered Deputy Mazer's testimony that the PBT was positive for alcohol. As Appellant concedes this testimony was proper, he cannot show prejudice.

This point should be denied.

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II. The trial court did not err in sustaining the revocation of Appellant's license because the Director offered substantial evidence that the arresting officer had probable cause to believe that Appellant was driving a motor vehicle while intoxicated.

A. Standard of Review

In an appeal from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against-the-weight-of-the-evidence, or it erroneously declares or applies the law. *White v. Dir. of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010). A trial court's judgment is not supported by substantial evidence when "there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). Under this standard, an appellate court views the evidence in the light most favorable to the judgment and must defer to the circuit court's credibility determinations. *Id.* at 200. Additionally, "no contrary evidence need be considered on a substantial-evidence challenge." *Id.*

In reviewing a particular issue that is contested, the nature of the appellate court's review is directed by whether the matter contested is a question of fact or law. *White*, 321 S.W.3d at 308. Questions of law are reviewed *de novo*. *Id.* When the question is one of fact and the relevant facts are contested, the appellate court defers to the trial court's assessment of the

evidence. *Id.* It is only when the evidence is uncontested that no deference is given to the trial court's findings. *Id.* Evidence is uncontested in a court-tried civil case when the issue before the court involves only stipulated facts and does not involve resolution by the trial court of contested testimony. *Id.* In that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated. *Id.* Evidence is also uncontested when a party has admitted by its pleadings, by counsel, or through the party's individual testimony the basic facts of the other party's case. *Id.* In such cases, the issue is legal, and there is no finding of fact to which to defer. *Id.*

B. Analysis

1. The Director offered substantial evidence that the arresting officer had probable cause to believe that Appellant was driving a motor vehicle while intoxicated.

The Director shall suspend a driver's license if the arresting officer had probable cause to believe the person was driving a vehicle with a blood alcohol concentration of at least eight-hundreths of one percent by weight. § 302.505.1, RSMo. Cum. Supp. 2001. Probable cause is a level of proof substantially less than that required to establish guilt beyond a reasonable doubt. *White*, 321 S.W.3d at 309. Probable cause exists when a police officer observes unusual or

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illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with the motorist. *Id.*

Here, the Director provided sufficient evidence for the trial court to find that Appellant's arrest was supported by probable cause. Deputy Mazer observed Appellant fail to signal when turning. Failure to use a signal when turning constitutes illegal operation of a motor vehicle. *See Renfro v. Dir. of Revenue*, 927 S.W.2d 945 (Mo. App. S.D. 1996); *Terry v. Dir. of Revenue*, 14 S.W.3d 722 (Mo. App. W.D. 2000); *Griggs v. Dir. of Revenue*, 344 S.W.3d 739 (Mo. App. S.D. 2011).

Upon stopping Appellant, Deputy Mazer noticed several indicia of intoxication in his two minutes of observing Appellant. Appellant made "excited utterances." Appellant's eyes were bloodshot and glassy, and Deputy Mazer noticed a smell of alcohol on Appellant's breath. Appellant also admitted to having drunk "a couple beers" approximately three-and-a-half hours prior to his stop. Appellant willingly took a PBT test and the result of that test was above the legal limit of .08-percent. Standing alone, this evidence would have been sufficient for Deputy Mazer to find probable cause. *See Terry*, 14 S.W.3d at 724 ("This court has previously held that probable cause for arrest for driving while intoxicated exists where an officer stops a vehicle for a traffic violation, observes the driver's eyes to be bloodshot and glassy, detects the odor

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of alcohol on the driver's breath, the driver admits to drinking, and fails one or more field sobriety tests.")

Deputy Mazer also said that he formed his belief that Appellant was intoxicated because he was responding to a domestic-violence call. This was an entirely appropriate factor for Deputy Mazer to consider. "In determining whether probable cause existed for an arrest, "the reviewing court also should consider background facts such as "the distinctive features and events of the community" and the police officer's "lens of his police experience and expertise," that inform the trial court's assessment of the historical facts." *White*, 321 S.W.3d at 310 (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). Deputy Mazer testified, "When I go on domestic assault calls, I expect there to be either drugs or alcohol involved. It's that frequent, around here, at least." (Tr. 42).

Further, it is irrelevant to the issue of probable cause that Wife later recanted her allegation of domestic violence against Appellant. "Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officers, and of which they have reasonably trustworthy information, are sufficient to warrant a belief by a person of reasonable caution that the person to be arrested has committed the crime for which he is being arrested." *Smith v. State*, 467 S.W.3d 303, 309 (Mo. App. S.D. 2015). Deputy Mazer was informed by dispatch that Wife had reported a domestic assault at her home.

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A "prudent, trained, and cautious" officer could have relied on this information in determining that Appellant was intoxicated.

Appellant argues that his case is "essentially identical to *Rocha v. Dir. of Revenue*, 557 S.W.3d 324 (Mo. App. W.D. 2018)" "with the exception of the PBT test." (App. Sub. Br. at 26). But disregarding the positive result of the PBT is contrary to the applicable standard of review, which views the evidence in the light most favorable to the judgment.

Rocha is distinguishable on its facts even if the result of Appellant's PBT is ignored. In *Rocha*, the Western District found that the driver's arrest for driving under the influence was not supported by substantial evidence. *Id.* at 328. The arresting officer in *Rocha* testified that he had followed the driver for nearly two miles, and saw no signs of impairment. *Id.* at 327. After pulling the driver over, the officer testified only that the driver had bloodshot eyes and had an odor of alcohol on his person. *Id.* The driver admitted that he had been drinking approximately fifteen hours before he was stopped, and claimed that his eyes were bloodshot because he was tired. *Id.* The driver refused to submit to a PBT test. *Id.* 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.

Appellant also argues that "[t]he factors the officer [in *Rocha*] did *not* observe are virtually identical" to his case. (App. Sub. Br. at 26). But the

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absence of certain factors of intoxication is evidence contrary to the trial court's decision that cannot be considered in a substantial-evidence challenge.

2. A driver's refusal to undergo field-sobriety tests is the kind of information a reasonably prudent officer could consider in determining whether the driver was intoxicated.

Appellant also argues that the trial court erred in admitting evidence that he refused to submit to field sobriety testing into evidence. The failure to undergo field sobriety tests can be used as evidence to establish probable cause in administrative license proceedings. *Turner v. Dir. of Revenue*, 609 S.W.3d 492, 498 (Mo. App. W.D. 2020). Appellant acknowledges that a driver's refusal to submit to field sobriety testing has been admissible in license revocation or suspension proceedings for over 20 years. (App. Sub. Br. at 37). Nevertheless, he urges this Court to reconsider that firmly established precedent on two grounds: *First*, that the refusal of a field sobriety test when there is no other evidence of impairment is not substantial evidence of intoxication; and *Second*, that prior cases' rationale for admitting such evidence are "premised on a faulty construction of the applicable statutes and prior case law." (App. Sub. Br. at 37).

Appellant's first argument fails simply because it is completely inapplicable to his case. As discussed previously, the trial court found the Director's evidence credible. Appellant exhibited several physical symptoms of

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intoxication. His eyes were bloodshot and glassy, and Deputy Mazer noticed a moderate smell of alcohol of Appellant's breath. Deputy Mazer observed Appellant fail to signal when making a turn. Appellant also admitted to having drank alcohol that night and tested positive for alcohol on a PBT. Further, Deputy Mazer was allowed to rely on his personal experience that domestic violence incidents frequently involve alcohol in his area. The Director provided ample evidence of impairment.

Appellant's second argument assumes that license-revocation proceedings are indistinguishable from criminal proceedings. They are not. *See Tarwater v. Dir. of Revenue*, 637 S.W.3d 383, 388-89 (Mo. App. W.D. 2021); *Pagano v. Dir. of Revenue*, 927 S.W.2d 948, 950-51 (Mo. App. E.D. 1996). "The purpose of Missouri's suspension and revocation proceeding as set forth in section 302.505 is entirely distinct from criminal punishment of drunken drivers." *Riche*, 987 S.W.2d at 335.

In administrative-revocation cases, the Director is required to prove either that the driver had a blood alcohol test in excess of the legal limit or that the driver refused to submit to a blood or breath test. *White*, 321 S.W.3d at 309 n.11; § 577.041, RSMo. 2016. Accordingly, the results of field sobriety tests, or the refusal to take the same, are limited to the issue of whether the arresting officer had reasonable grounds to believe that the driver was intoxicated. *Calicotte v. Dir. of Revenue*, 20 S.W.3d 588, 593 (Mo. App. S.D. 2000). A driver's

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refusal to undergo field-sobriety tests, absent an explanation of a physical condition that prevents them from successfully completing the test, is the kind of information a reasonably prudent officer could consider in determining whether the driver was intoxicated.

Appellant relies heavily on *City of St. Joseph v. Johnson*, 539 S.W.2d 784 (Mo. App. 1976) (superseded by statute as stated in *State v. Cox*, 836 S.W.2d 43 (Mo. App. S.D. 1992)). That case, however, only analyzed whether the refusal of a breath test was admissible at the guilt phase of a criminal proceeding.

Appellant's argument regarding the implied-consent law also lacks merit. Under Missouri law, an officer requesting a chemical test of the arrested person's blood "shall inform the person that evidence of refusal to take the test may be used against such person and that the person's license shall be immediately revoked upon refusal to take the test." § 577.041.1, RSMo. 2016. If a person refuses a chemical test, the law mandates the Director of Revenue to revoke that person's driver's license for one year. § 577.041.3, RSMo. 2016. The fact-finder could infer from Defendant's refusal to take the breath test that he was driving his vehicle while intoxicated – in both criminal and civil cases. *See State v. Baker*, 499 S.W.3d 730, 734 (Mo. App. W.D. 2016) ("Refusal to take a breathalyzer test can constitute evidence from which a reasonable inference can be drawn that the driver was intoxicated at the time of the operation of his

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vehicle."); *State v. Rastorfer*, 574 S.W.3d 282, 286 (Mo. App. W.D. 2019) (holding that the defendant's "refusal to submit to a chemical breath test can be interpreted as evidence that he was conscious of his guilt for driving while intoxicated"); *State v. Barac*, 558 S.W.3d 126, 132 (Mo. App. W.D. 2018) (holding that the defendant's refusal to take a breath test "permit[ed] the inference that [he] was the driver of the vehicle and was intoxicated when the vehicle was parked"); *State v. Knifong*, 53 S.W.3d 188, 194 (Mo. App. W.D. 2001) (holding that "the jury could also consider [the defendant]'s refusal to submit to a breathalyzer exam as evidence supporting her guilt" on a DWI charge); *see also South Dakota v. Neville*, 459 U.S. 553, 561 (1983) (finding "considerable force" in the argument that refusal to take a "a potentially incriminating [breath] test is similar to other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence," but choosing not to rest its decision on this ground).

Appellant's argument is essentially that because the law allows refusal to take a breath or blood test to be admitted as evidence in court it necessarily excludes evidence of the refusal to submit to field sobriety tests. This is not the rare case where *expressio unius est exclusio* (or, in English, omissions shall be understood as exclusions) should apply. That maxim "is to be used with great caution" and applies "only when it would be natural to assume by a strong contrast that that which is omitted must have been intended for the opposite

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treatment." *Six Flags Theme Park, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 269-70 (Mo. banc 2005) (citing *Pippins v. City of St. Louis*, 823 S.W.2d 131, 133 (Mo. App. E.D. 1992); *Springfield City Water Co. v. City of Springfield*, 182 S.W.2d 613, 618 (Mo. 1944)).

Neither the text nor the purpose of the statute supports Appellant's argument. The purpose of the implied-consent statute is to prevent a driver from avoiding the consequences of an excessive blood alcohol result by simply refusing to be tested. The statute is in no way designed to restrict the scope of evidence that law enforcement can rely on to establish probable cause to believe that a driver is intoxicated. Accepting Appellant's argument would also be directly contrary to the legislative intent of section 302.505 – which is "designed to protect the public by quickly removing drunken drivers from Missouri's roads and highways." *Riche*, 987 S.W.2d at 336.

Appellant also attempts to link the refusal to submit to field-sobriety testing with the proposition that refusal to consent to a search cannot be used to evade the Fourth Amendment by manufacturing a reason to conduct an otherwise illegal warrantless search. *See State v. Slavin*, 944 S.W.2d 314, 319 (Mo. App. W.D. 1997). The limited use of the refusal to submit to field sobriety tests in civil administrative revocation cases does not implicate that concern. The exclusionary rule does not apply in license suspension or revocation proceedings. *Riche*, 987 S.W.2d at 331.

In sum, the Director produced substantial evidence that Deputy Mazer had probable cause to arrest Appellant for driving while intoxicated. This point should be denied.

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III. The trial court's judgment that Deputy Mazer had probable cause to arrest Appellant for driving while intoxicated was not against-the-weight-of-the-evidence.

A. Standard of Review

In an appeal from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against-the-weight-of-the-evidence, or it erroneously declares or applies the law. *White v. Dir. of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010). In reviewing a particular issue that is contested, the nature of the appellate court's review is directed by whether the matter contested is a question of fact or law. *Id.* at 308.

Questions of law are reviewed *de novo*. *Id.* When the question is one of fact and the relevant facts are contested, the appellate court defers to the trial court's assessment of the evidence. *Id.* It is only when the evidence is uncontested that no deference is given to the trial court's findings. *Id.* Evidence is uncontested in a court-tried civil case when the issue before the court involves only stipulated facts and does not involve resolution by the trial court of contested testimony. *Id.* In that circumstance, the only question before the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated. *Id.* Evidence is also uncontested when a party has admitted by its pleadings, by counsel, or through the party's individual

testimony the basic facts of the other party's case. *Id.* In such cases, the issue is legal, and there is no finding of fact to which to defer. *Id.*

A "'judgment is against the weight of the evidence only if the circuit court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment.'" *Laut v. City of Arnold*, 491 S.W.3d 191, 197 (Mo. banc 2016) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). An appellate should exercise "caution" and only decide that the circuit court's judgment is against-the-weight-of-the-evidence when it has "a firm belief that the decree or judgment is wrong." *Id.* (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

B. Analysis

In order to succeed in challenging a judgment as against-the-weight-of the-evidence, an appellant must complete a four-step analysis:

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
> (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
> (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value,

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> when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition.

Massey v. Massey, 464 S.W.3d 577, 580 (Mo. App. S.D. 2015) (quoting *Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. S.D. 2010)).

Appellant asserts that the arresting officer did not have reasonable grounds to believe that he was driving a vehicle in an intoxicated condition. Probable cause is a level of proof substantially less than that required to establish guilt beyond a reasonable doubt. *White*, 321 S.W.3d at 309. Probable cause exists when a police officer observes unusual or illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with the motorist. *Id*

Defendant's second part of the *Massey* analysis, however, fails to identify all of the evidence supporting Deputy Mazer's probable cause determination. Defendant notes that "[t]he evidence in the record supporting the existence of that proposition was that the Deputy noticed a moderate odor of alcohol, bloodshot and watery eyes, that [Appellant] admitted prior consumption, and a positive [PBT]."

Appellant did not acknowledge that Deputy Mazer stopped him after witnessing him fail to properly signal at a turn. Throughout the duration of the traffic stop, Appellant made "excited utterances" to Deputy Mazer. Deputy Mazer testified that he expects drugs or alcohol to be involved when responding

to domestic-violence calls. And Appellant refused to conduct any field sobriety tests after the PBT. Further, Appellant understates the result of the PBT. Deputy Mazer testified at trial that the result of the PBT was over the legal limit of .08-percent.

Appellant's third-step analysis asserts that there is "significant uncontradicted evidence" contrary to the trial court's judgment. But Appellant's analysis ignores the standard of review and fails to resolve contradictory testimony in favor of the trial court's explicit credibility determination.

Instead, Appellant views the Director's evidence as if the trial court found that it was not credible. For instance, Appellant argues that his bloodshot and watery eyes "could have been from driving an open-air vehicle down a gravel road." (App. Sub. Br. at 42). But the cause of Appellant's bloodshot and watery eyes was contested at trial:

> MR. SHIPLEY: So driving an open-air vehicle down a gravel road could certainly cause watery and bloodshot eyes, right?
> [DEPUTY MAZER]: Potentially.
> MR. SHIPLEY: Okay. Certainly, watery and bloodshot eyes have causes other than just somebody has been drinking, right?
> [DEPUTY MAZER]: Sure.
> MR. SHIPLEY: And so, somebody that has watery and bloodshot eyes may not have been drinking at all?
> [DEPUTY MAZER]: Potentially.

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> MR. SHIPLEY: And particularly in [Appellant's] case there's a likely alternative that driving down a gravel road with all that dust flying in your eyes could give you watery and bloodshot eyes, correct?
>
> [DEPUTY MAZER]: I wouldn't attest to whether it's likely but it's a possibility if one wants to make that argument.

(Tr. 30-31).

Deputy Mazer later testified that he considered Appellant's bloodshot and watery eyes when deciding to arrest Appellant. (Tr. 37). Deputy Mazer therefore determined that Appellant's bloodshot and watery eyes were not caused by dust, but by Appellant's consumption of alcohol. In light of the trial court's credibility determination, the trial court accepted this conclusion.

Further, even though Deputy Mazer said that he didn't see any signs of physical impairment, he later testified that a suspect does not "have to be falling down drunk to be arrested for DWI." (Tr. 41).

Appellant also identified several factors from the Alcohol Influence Report "which were not present." (Tr. 43). But "not every item on the list of potential observations on the Missouri Department of Revenue's Alcohol Influence Report must be recorded for a trained officer to make a determination of whether an individual was intoxicated." *Peters v. Dir. of Revenue*, 35 S.W.3d 891, 897 (Mo. App. S.D. 2001). "[A]lthough the presence of dirt, urine, vomit, or saliva on one's clothing are observations an officer could make on the report, an officer could determine that an individual who did not

exhibit any of those criteria was intoxicated." *Id.* Deputy Mazer also did not have an opportunity to observe some of the factors of the Alcohol Influence Report because Appellant refused to submit to a field-sobriety test. Deputy Mazer testified that he based his decision to arrest based on the totality of the circumstances – not certain factors on the Alcohol Influence Report. (Tr. 41).

Finally, Appellant's fourth-step analysis views the evidence supporting the trial court's determination in isolation rather than the totality of the circumstances standard for probable cause. "The 'totality of the circumstances' requires courts to consider 'the whole picture.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 588 (2018) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

Appellant asserts that nearly all of the Director's evidence—the smell of alcohol, bloodshot and watery eyes, Appellant's admitted consumption of alcohol, and positive PBT test—can be evidence of lawful consumption. But "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Id.* A court, likewise, cannot disregard evidence of potential criminal activity merely because it is equally consistent with lawful activity. *See Wesby*, 138 S.Ct. at 588.

The relevant inquiry is whether a reasonable officer could conclude that there was a "substantial chance of criminal activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). Viewed together, the evidence established that the trial

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court could have reasonably determined that Deputy Mazer had probable cause to arrest Appellant. Appellant also failed to cite a single case where an appellate court set aside an arresting officer's probable cause determination on a weight-of-the-evidence challenge.

In sum, Appellant's argument ignores a substantial amount of evidence favorable to the Director, and views all contested evidence contrary to the trial court's explicit credibility determination. Appellant has not demonstrated that the trial court could not have reasonably found that his arrest was supported by probable cause.

This point should be denied.

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CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ Zeb J. Charlton
ZEB J. CHARLTON
Assistant Attorney General
Missouri Bar No. 73665

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-8774
Fax: (573) 751-5391
Zeb.Charlton@ago.mo.gov

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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CERTIFICATE OF COMPLIANCE

The attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 contains 7,258 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2016 software; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

/s/ *Zeb J. Charlton*
ZEB J. CHARLTON
Assistant Attorney General
Missouri Bar No. 73665

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-8774
Fax: (573) 751-5391
Zeb.Charlton@ago.mo.gov

ATTORNEY FOR RESPONDENT
DIRECTOR OF REVENUE