

2010 Annual Case Law Update

Missouri Municipal and Associate Circuit Judges Association

Prepared for the 2010 Regional Continuing
Judicial Educational Seminars

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2010 Annual Case Law Update

MMACJA Regional Educational Seminar

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SEARCH AND SEIZURE – Permissible search of vehicle following driver’s arrest is significantly curtailed

Arizona v. Gant, ____ U.S. ____, 129 S.Ct. 1710 (2009)

Rodney Gant was stopped by the Tucson police for a traffic offense. The officers knew that Gant’s driving privileges were suspended. Gant was arrested for that offense, handcuffed, and locked in a patrol car. By this time, several police officers were on the scene. The arriving officers searched Gant’s car and found cocaine in Gant’s jacket pocket. This was all done after Gant had been placed in the locked patrol car. The Arizona trial court denied Gant’s motion to suppress the evidence, and he was convicted of drug offenses. Reversing the conviction, the Arizona Supreme Court distinguished *New York v. Belton*, 453 U. S. 454 (1981). *Belton*, which is well known and oft relied upon by most police officers, had held that the police may search the passenger compartment of a vehicle, and any containers therein, as a contemporaneous incident of a recent occupant’s lawful arrest.

The Arizona Supreme Court’s reversal of the conviction in *Gant* was based on the ground that, while *Belton* was concerned with the scope of a search incident to arrest, it did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel v. California*, 395 U. S. 752 (1969), requires that a search incident to arrest be justified by either (1) the interest in officer safety or (2) the interest in preserving evidence; and because the circumstances of Gant’s arrest demonstrated neither of those interests, the State Supreme Court found the search unreasonable. On *certiorari*, the United States Supreme Court agrees, and affirms the state court reversal of Gant’s conviction.

The Supreme Court holds that police may search the passenger compartment of a vehicle incident to a recent occupant’s arrest *only* if it is reasonable to believe that the arrestee might access the vehicle at the time of the search, or that the vehicle contains evidence of the offense of arrest. Warrantless searches “are per se unreasonable,” and they are “subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U. S. 347, 357 (1967). The exception for a search incident to a lawful arrest applies only to “the area from within which [an arrestee] might gain possession of a weapon or destructible evidence.” *Chimel*, 395 U. S. at 763. The Supreme Court applied that exception to the automobile context in *Belton*, the holding of which rested in large part on the assumption that articles inside a vehicle’s passenger compartment are “generally . . . within ‘the area into which an arrestee might reach.’ ” *Belton*, 453 U. S. at 460.

In *Gant* the Supreme Court rejects a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant’s arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel*’s exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Thornton v. United States*, 541 U. S. 615, 632 (2004). Neither *Chimel*’s reaching-distance rule nor *Thornton*’s allowance for evidentiary searches authorized the search in *Gant*. In point of fact,

Gant and the two other suspects were all safely handcuffed and locked in the back seat of nearby police cars when the officers searched Gant's vehicle. This was a far cry from the situation in *Belton*, which involved a single officer confronted with four unsecured arrestees. Officer safety was a large consideration in *Belton*. There was clearly no such concern in *Gant*.

In addition to an absence of concern for officer safety, an *evidentiary basis* for the search was also lacking. *Belton* and *Thornton* both involved arrests for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car. Cf. *Knowles v. Iowa*, 525 U. S. 113, 118 (1998)(once the traffic citation is issued, and the driver has not been arrested, a subsequent search of the vehicle is unlawful). The Court therefore holds that the search in *Gant* was unreasonable.

The Court in *Gant* was not persuaded by the State's argument that its expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The Court notes that the prosecution seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrower and more appropriate reading of *Belton* and *Thornton*, says the Court, together with the Court's other Fourth Amendment decisions, e.g., *Michigan v. Long*, 463 U. S. 1032 (1983), and *United States v. Ross*, 456 U. S. 798 (1982), permit an officer to search a vehicle when safety or evidentiary concerns demand. And the doctrine of *stare decisis* does not require adherence to a broad reading of *Belton*. The Court observes that the experience of the 28 years since *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorize myriad unconstitutional searches. The Arizona Supreme Court's decision at 216 Ariz. 1, 162 P. 3d 640, is affirmed.

SELF INCRIMINATION – Admissibility of statements made after request for attorney

***State v. Myers*, 291 S.W.3d 292 (Mo.App. S.D. 2009)**

Facts: Defendant was convicted of murder in the first degree. The victim (Russell) had been using methamphetamine. She and defendant argued. The victim grabbed a crossbow and tried, unsuccessfully, to cock it. When she was unable to do so, she came toward defendant with a kitchen knife. Defendant struggled with the victim, "had her around the throat" and "strangled her."

Defendant was taken into custody and interviewed by Officer Jennings. Officer Jennings testified that defendant said he killed Russell. Defendant told Officer Jennings that "rather than let her stab him he strangled her." Officer Jennings further testified that defendant strangled Russell physically, and that she went to the ground gasping for air. Defendant got a dog leash and wrapped it around her throat to keep her from breathing any further, and then went outside and smoked a cigarette.

Defendant told Officer Jennings that after this occurred, he thought he needed to establish an alibi; that "he went to two different businesses, one adult shop and bought some

lotion, and then went to Wal-Mart and bought some time for his cell phone." Defendant also told about burying Russell. Defendant said he took his fishing pole and pretended to be fishing. He would fish awhile and then dig for awhile so that if someone came by they would see him fishing.

Holding: Defendant contends the trial court erred in denying his motion to suppress the statements and in admitting them in evidence; that they were obtained in violation of his ***Miranda*** rights because they were made to Officer Jennings after defendant invoked his right to counsel and his right to be free from self-incrimination. The statement defendant made to Officer Jennings was videotaped and admitted in evidence at the suppression hearing. The videotape was filed with the appellate court.

After defendant began talking to Officer Jennings, he asked for an attorney. Questioning stopped at that point. However, defendant made additional statements. The issue presented is whether defendant reinitiated the interrogation process of his own volition and, if he did, whether the statements he then made were the basis of a knowing, intelligent, and voluntary waiver.

Defendant had been advised of his ***Miranda*** rights prior to his interrogation by Officer Jennings. Defendant responded by asking whether if he told the truth right then, he could walk away and be with his children. Officer Jennings replied that defendant was not walking out of there either way. Defendant then said he wanted a lawyer.

Officer Jennings then remarked that what he wanted to know was whether what occurred was self-defense. Defendant said he wanted to talk to him. Defendant was asked if he was changing his mind about talking to the officers. He said, "Yes." The other officer who was in the room, Officer Rick Geller, asked defendant if he was going to talk to them. The video shows defendant nodding his head. The interview then continued.

The trial court found defendant's acts were voluntary. The evidence before the trial court was sufficient, gleaned from the record as a whole, to support the trial court's decision and its decision was not clearly erroneous. The judgment is affirmed.

ELEMENTS OF THE OFFENSE – Possession shown where defendant was alone in vehicle and drugs were found on floorboard near him

State v. Watson, 290 S.W.3d 103 (Mo. App. S.D. 2009)

Overview: There is sufficient evidence to prove beyond a reasonable doubt that Defendant knowingly and intentionally possessed methamphetamine in a car owned by two other people where (1) Appellant was distinctly nervous when interacting with the arresting officer, (2) the methamphetamine was located in the “floorboard” possibly partially under the seat, (3) Appellant was alone in the vehicle and (4) there was additional evidence connecting Appellant to the methamphetamine found in the floorboard of the vehicle.

Facts: At about 9:15 p.m. on the evening of February 21, 2006, arresting officer observed a blue 1992 Cadillac DeVille traveling approximately fifteen miles per hour over the speed limit. The officer stopped the vehicle, and when he approached the vehicle, he noticed Appellant was the only occupant. When the officer engaged Appellant in conversation, Appellant “acted very nervous, stuttering his words somewhat.” The officer also noticed Appellant was “somewhat fidgeting with his hands in his lap.” The officer also observed Appellant had “some papers laying on his lap,” and that “he kept sticking his hand underneath the papers on his lap.” While defendant was shuffling the papers, the officer noticed what looked “like a baggie under the papers.”

The officer then had Appellant place his hands on the steering wheel and he retrieved the baggie from Appellant’s lap. According to the officer, the baggie contained “a green leafy substance,” which he believed to be marijuana. At that time, Appellant informed the officer that he did not have a valid driver’s license. The officer then had Appellant step out of the vehicle and placed him under arrest.

After arresting Appellant, the officer searched the vehicle. “In the driver’s floorboard” within Appellant’s reach, the officer discovered “a small baggie with a white crystal powdery substance in it that field tested positive for methamphetamines.”

At the close of all the evidence, Appellant moved for a judgment of acquittal and this motion was denied by the trial court. The jury found Appellant guilty of possession of methamphetamine and, having already been found by the trial court to be a prior and persistent drug offender, Appellant was sentenced to fourteen years in prison. The appeal followed.

Holding: Appellant maintains there was insufficient evidence to prove beyond a reasonable doubt that he “knowingly and intentionally possessed methamphetamine or that he had an awareness of the drug’s presence and nature” In his sole point relied on, Appellant challenges the trial court’s denial of his motion for judgment of acquittal filed at the close of all the evidence. Appellant asserts this ruling was in error in that there was insufficient evidence to support his conviction beyond a reasonable doubt because the evidence revealed “the car was owned by two other people, one of whom came from a family associated with illegal drugs; the small baggie of methamphetamine was possibly hidden under the seat; and there was no evidence presented that Appellant could see the methamphetamine or knew it was there.”

Section 195.202.1 states “[e]xcept as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.” Section 195.010(34), Cum. Supp. 2001, states that in relation to possessing a controlled substance, “a person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint[.]”

Accordingly, to convict Appellant of possession of methamphetamine, the State must prove two elements: (1) that Appellant had conscious and intentional possession of the controlled substance, either actual or constructive, and (2) that he was aware of the presence and nature of the substance.

In cases involving joint control of an automobile, as here, where Appellant was not the owner of the vehicle, the State is required to show additional facts that “buttress the inference of [constructive] possession.” *State v. Metcalf*, 182 S.W.3d 272, 274 (Mo.App. 2006).

Accordingly, the State had the burden to prove Appellant had actual or constructive possession of the methamphetamine found in the floorboard of the vehicle. “The State is not required to show actual, physical possession of the substance to establish possession, but may show constructive possession by circumstantial evidence.” *State v. Powell*, 973 S.W.2d 556, 558 (Mo.App. 1998).

As explained in *State v. Fields*, 181 S.W.3d 252, 255 (Mo.App. 2006), a person who has exclusive control of property is deemed to have possession and control of any substance found on the property. The exclusive possession of premises rule has been modified, however, where automobiles are involved because of the reality of the contemporary use of the automobile as a means of social accommodation. In the case of automobiles, the full effect of the exclusive possession rule is tempered by evidence of equal access by persons, other than the owner, to the vehicle. Thus, in cases involving joint control of an automobile, a person is deemed to have possession and control over a controlled substance found in the automobile only where sufficient additional evidence connects him to the controlled substance. Even if one is the owner or renter of a vehicle, constructive possession will not be inferred in circumstances where others have had equal access to the vehicle unless there is evidence of additional incriminating circumstances implicating the person.

Additional circumstances which will support an inference of knowledge and control include the defendant being in close proximity to the drugs seized, *State v. Mickle*, 164 S.W.3d 33, 43 (Mo.App. 2005); “statements or actions indicating consciousness of guilt, routine access to the place where the drugs were found, . . . or the drugs were in plain view;” *State v. Driskell*, 167 S.W.3d 267, 269 (Mo.App. 2005); and “nervousness exhibited during the search of the area . . .” *Fields*, 181 S.W.3d at 255.

Other such additional evidence includes the presence of a large quantity of contraband at the scene of the arrest; the commingling of the controlled substance with personal belongings; and inculpatory conduct and statements made by the defendant. *Id.* “The totality of the circumstances is considered in determining whether sufficient additional incriminating circumstances have been proved.” *State v. Ingram*, 249 S.W.3d 892, 896 (Mo.App. 2008) (quoting *State v. Chavez*, 128 S.W.3d 569, 574 (Mo.App. 2004)).

This case is not akin to *State v. Bristol*, 98 S.W.3d 107 (Mo.App. 2003), as urged by Appellant. In comparing *Bristol* to the present matter the following differences emerge: in

Bristol there were several occupants of the vehicle and in this case Appellant was alone; in *Bristol* the police officer testified that the controlled substance at issue in that case was located far under the driver's seat and was definitely not in plain view while in the instant case Officer Howard testified the methamphetamine was located in the "floorboard" possibly partially under the seat; in *Bristol* the defendant did not act nervous and in this case Appellant was distinctly nervous when interacting with the officer; and in *Bristol* there was evidence the vehicle had been in the defendant's possession for a short period of time. The only similarity between *Bristol* and this matter is primarily the fact that both of the subjects charged with possession were not the registered owners of the vehicle in which they were arrested. Furthermore, the present matter does not suffer the evidentiary issues of *Bristol* in that here there was additional evidence connecting Appellant to the methamphetamine found in the floorboard of the vehicle.

The court agreed with Appellant's assertion in his brief that proximity to the contraband, alone, even as to a substance in plain sight, does not tend to prove ownership or possession as among several persons who share the premises. However, in the present matter Appellant was the only occupant of the car at the time; there was evidence that he routinely utilized this particular vehicle; he had routine access to the area where the methamphetamine was found; and the methamphetamine was clearly located within easy reach of his position as the driver of the vehicle. This is not a situation where there were multiple occupants of a vehicle and the controlled substance was located in an area where any number of people could have been the owner of the drugs.

There was sufficient evidence upon which the jury could have found beyond a reasonable doubt that Appellant was in possession of the methamphetamine found in the baggie and that he knew of its nature and presence. Accordingly, the judgment and sentence of the trial court is affirmed.

D.O.R. REVOCATION CASES – Lawfulness of vehicle stop not relevant in administrative revocation proceeding

***Jones v. Director of Revenue*, 291 S.W.3d 340 (Mo.App. S.D. 2009)**

In *Jones v. Director of Revenue* Trooper Creasey observed a red Dodge pick-up truck directly in front of him. He stated the truck was traveling between sixty-five and seventy miles per hour in a sixty miles per hour speed zone, that it was weaving within its own lane of traffic, and that "it crossed over the . . . right side of the road on one occasion . . . onto the white line onto the rumble strips." Trooper Creasey could not recall how many times the truck weaved within its lane.

After making these observations, Trooper Creasey initiated a traffic stop and asked Jones for his driver's license and proof of insurance. Jones had to be asked twice for proof of insurance, but he did produce it. Trooper Creasey told Jones the reason he had stopped him was because he had driven onto the rumble strip. Trooper Creasey did not provide Jones with any other reason for the stop. Trooper Creasey observed that Jones's eyes were "bloodshot and glassy", that an odor of intoxicants was coming from inside his vehicle, and that when Jones spoke, "he just kind

of stared." Because of these observations, Trooper Creasey asked Jones to exit his truck and sit in the passenger seat of Trooper Creasey's patrol car.

From his patrol car, Trooper Creasey radioed for a computer check of Jones's driving status. While waiting for a response to that inquiry, Jones stated: "I've had a couple of drinks but I'm okay." In response, Trooper Creasey asked Jones how many drinks he had consumed and Jones replied "four or five." Trooper Creasey then had Jones exit the patrol car and perform a series of field sobriety tests consisting of the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn. Jones failed all three. Trooper Creasey also asked Jones to recite the alphabet. Jones recited it correctly up to the letter L, but Trooper Creasey could not "understand the rest of the letters until he got to X, Y and Z." Trooper Creasey then had Jones blow into a portable breath tester ("PBT"). The PBT detected the presence of alcohol in Jones's breath. From all of this, Trooper Creasey concluded Jones was intoxicated and placed him under arrest. He handcuffed Jones and transported him to the sheriff's department. In route to the sheriff's department, Jones stated: "I knew when you turned the lights on I wasn't going to pass." At the sheriff's department, Trooper Creasey informed Jones of the implied consent law and asked him to consent to a chemical test of his breath. Jones refused to take the test. Trooper Creasey then continued to ask Jones standard questions from the alcohol influence report. When Creasey asked Jones what day of the week it was, Jones responded: "I might be drunker than I think."

In its judgment, the trial court stated: "Upon the evidence offered, adjudged and adduced the Court finds the expressed reason for the [t]rooper's stop of [Jones's] motor vehicle to be insufficient and the [o]fficer lacked reasonable suspicion therefor." As mentioned above, the trial court was limited to determining three issues: 1) whether Jones was arrested; 2) whether Trooper Creasey had reasonable grounds to believe Jones was driving while intoxicated; and 3) whether Jones refused to submit to the chemical breath test. The Director appeals.

The Court of Appeals reverses, stating that whether Trooper Creasey had a reasonable suspicion for a lawful stop is irrelevant in a civil driver's license revocation proceeding. Because of its improper application of the exclusionary rule to this civil proceeding, the trial court erred by failing to consider all the evidence related to whether Jones was driving while intoxicated. The trial court is directed to enter a judgment reinstating the Director's revocation of Jones' driving privileges.

ELEMENTS OF THE OFFENSE – Whether “cocaine” or “crack cocaine,” both are controlled substances under the statute

State v. Lemons, 294 S.W.3d 65 (Mo.App. S.D. 2009)

Appellant was arrested and, before placing him in the patrol car, Officer Rogers searched Appellant at which time he found a prescription pill bottle in Appellant's front left pocket. Inside the bottle were "two small white rock like substances" After Appellant was transported to the police station, Officer Rogers conducted a field test on the two rock-like substances found in the prescription bottle and the substances tested positive for the presence of cocaine base which is also referred to as crack cocaine.

Amy Nix (“Ms. Nix”), a forensic chemist with the Missouri State Highway Patrol, testified that she tested two rocks which were in the form of crack cocaine. However, her testing was unable to conclusively determine whether the rocks were “cocaine” or whether they were “crack cocaine.” She also related that cocaine base was the active ingredient in what is typically called crack cocaine, but she was unable to “determine [if the sample submitted to her] was cocaine or cocaine base. [She] had to report it as cocaine.”

In the instant matter, whether the substance was cocaine or crack cocaine it is clear that it was a controlled substance the possession of which is prohibited by section 195.211.1. Conviction affirmed.

CRIMINAL PROCEDURE – Breathalyzer maintenance reports are non-testimonial under *Crawford v. Washington*

***State v. Marrone*, 292 S.W.3d 577 (Mo.App. S.D. 2009)**

Frank Marrone was found guilty of DWI and sentenced to seven years as a chronic offender. He appeals. One of his appeal points was that the admission of the Datamaster results violated his 6th Amendment right to confrontation of the witnesses against him. The Datamaster maintenance report had been offered for admission into evidence under the Business Records Act, Section 490.680. Section 490.692 allows the business record to be authenticated through the custodian’s affidavit rather than direct testimony at trial. *Tebow v. Director of Revenue*, 912 S.W.2d 110, 113 (Mo. App. W.D. 1996).

Marrone contends that the admission of the maintenance report violated his 6th Amendment right to confront the witnesses against him because the report constituted testimonial evidence and he did not have the opportunity to cross examine the witness who prepared it.

The Southern District rejects that contention stating that the United States Supreme Court has defined “testimonial” statements as those where the “primary purpose” of the interrogation is not to respond to an ongoing emergency but “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006).

The Court notes that the maintenance report in this case was not created in preparation for trial and that Missouri courts have stated that breathalyzer maintenance reports are considered to be non-testimonial. See *Olivo v. Director of Revenue*, 950 S.W.2d 327, 328-29 (Mo. App. E.D. 1997). The breathalyzer maintenance reports are mandated by regulations issued by the Department of Health and Senior Services, and the purpose of those regulations is to ensure the Datamaster’s accuracy by conducting maintenance reports prior to its use.

The Southern District points out that appellant’s reliance on *State v. March*, 216 S.W.3d 663 (Mo. banc 2007) and similar cases from Florida and North Dakota is misplaced. All of those cases involved drug offenses and the admission of a lab report that was prepared after the substances had been tested, and which report was offered to prove that the substances were in

fact drugs. In other words, the document at issue in those cases represented an essential element of the State's case and was accusatory in nature. Unlike those cases, breathalyzer maintenance reports do not prove that the defendant's blood alcohol content was above the legal limit but rather, establish only that the required maintenance check had been conducted on the machine in order to ensure that the test results were accurate. Thus, the report here was not accusatory and is quite unlike the testimonial evidence that *Crawford* intended to exclude. Conviction affirmed.

STATUTORY INTERPRETATION – Probation revocation statute requires court to make a reasonable effort to conclude the probation revocation hearing on a timely basis

***State v. Conklin*, 294 S.W.3d 106 (Mo.App. S.D. 2009)**

On September 18, 2000, Relator/Defendant entered a guilty plea. The execution of the sentence was suspended based on Relator's successful completion of five years supervised probation, which included payment of restitution and court costs. On July 1, 2005, Missouri Probation and Parole filed a field violation report with Respondent/Judge for Relator's failure to pay restitution and costs. On July 6, 2005, Respondent, on his own motion, ordered Relator's probation tolled, and the State later filed a Motion to Revoke Probation and Toll Probation Period on July 21, 2005.

Relator appeared for the Probation Violation Arraignment on July 22, 2005, and Respondent made a docket entry indicating that restitution was the issue. Respondent set the case for a Probation Violation Hearing on September 9, 2005. Relator was present for the September 9th hearing, and appeared four other times throughout 2005 and early 2006, but each time Respondent would reset the hearing. The probation remained tolled throughout each appearance of Relator and a Probation Violation Hearing did not take place.

On January 18, 2006, Respondent noted in the docket that a second field violation report was filed. In response to the second violation, the State filed a second motion to revoke probation on March 7, 2006. Additionally, two other field violation reports were filed against Relator, one in March 2007 and one in June 2007.

On June 27, 2007, the State filed its third motion to revoke probation. The Probation Violation Hearing was finally held on August 22, 2008, and Respondent imposed a sentence of three years in the DOC. By that time, Respondent had continued the matter for almost three years. After the hearing, Relator filed a writ of prohibition with this Court based on Respondent's imposition of the sentence.

As to whether the trial court exceeded its statutory authority to hold a revocation hearing on August 22, 2008, three years after Relator's probation had expired, the court found that it had. Statutory authority to revoke probation generally ends on the date the probation period expires.

Section 559.036.6 states:

The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

The State's first Motion to Revoke Probation and Toll Probation Period was filed on July 21, 2005, and was based on a probation violation report dated June 23, 2005, which was before the September 18, 2005 expiration date. This is the only relevant motion in this case because the other motions to revoke are based on violations that occurred after the probation expiration date, which means that any actions by the trial court on those motions may be considered "voidable." Relator does not dispute that Respondent and the State manifested an intent to revoke his probation nor that they made reasonable efforts to bring Relator into court. Instead, Relator argues that Respondent and the State failed to make every reasonable effort to conduct the hearing before the probation expiration date.

In this case, Respondent extended Relator's probationary period, per section 559.036, from June 30, 2005 through August 22, 2008, which extended Relator's probation from five years to almost eight years.

Because Respondent failed to complete probation revocation proceedings within a reasonable time following the end of the probationary period on September 18, 2005, the trial court exceeded its statutory authority to act as intended when it revoked Relator's probation. Preliminary order made absolute.

STATUTORY INTERPRETATION – Absent specific legislative authority for same, administrative proceeding to hear municipal traffic charges violates Chapter 479

City of Springfield v. Belt, ___ S.W.3d ___ (Mo. banc 2010) SC90324, March 2, 2010

Adolph Belt received a notice of violation under the Springfield red light camera ordinance. He requested an administrative hearing and participated, without challenge, in the procedure set forth in the city ordinance. The administrative hearing examiner ruled that Belt had not rebutted the presumption that Belt, as the registered owner of the vehicle, was driving at the time of the red light violation. Belt filed an application for trial *de novo*, but the trial court denied the same and dismissed the case. Belt appealed the dismissal. The Court of Appeals, after noting that Belt did not make any constitutional or other challenge to the procedures utilized by the city, held that Belt had willingly and actively proceeded under the administrative procedures adopted by the city. Thus, he could not be heard to complain because he did not like the conclusion reached by the Hearing Examiner. He could not now argue he was entitled to a

trial *de novo*. The trial court's dismissal of the application for trial *de novo* was affirmed by the Southern District. The Supreme Court granted Belt's application for transfer.

The Supreme Court declares that the administrative proceeding outlined above is void as being in violation of Section 479.010, which provides that municipal ordinance violations must be heard by divisions of the circuit court. The Court notes that Section 479.040 outlines the choices from which a city such as Springfield may choose to have violations heard and determined. All relate to municipal or associate judicial proceedings. There is no provision made for a city of Springfield's size to have an administrative tribunal hear and determine moving violations. The only administrative procedures authorized by the legislature for the hearing of municipal ordinance violations relate to the cities of Kansas City and St. Louis. Thus, the Springfield administrative proceeding is void, and Belt's penalty for violating the city's red light camera ordinance is vacated.

SEARCH AND SEIZURE – Defendant's refusal to speak to officer, followed by mumbled responses, establishes probable cause to suspect an effort to conceal contraband in mouth

State v. Graham, 294 S.W.3d 61 (Mo.App. S.D. 2009)

A police officer pulled Graham over for speeding and expired tags. Graham silently offered his driver's license. Realizing that Graham had just gotten out of prison, the officer asked about his car. Still without speaking, Graham handed over rental papers in someone else's name, which the officer recognized as a rising practice among local criminals. These circumstances, including Graham's unusual refusal to speak, made the officer "a little bit suspicious." He was an experienced drug investigator who had encountered persons hiding drugs in their mouths ten to twenty times before this case. After stepping to his patrol car to check for warrants (there were none), he returned and asked Graham to step out of his car and talk.

When Graham's mumbled speech suggested something in his mouth, the officer asked him to open his mouth. Graham parted his lips slightly, revealing the corner of a plastic baggie containing marijuana.

Defendant asserts the trial court erred in not suppressing the marijuana. Graham's refusal to speak, coupled with his criminal history and operation of a car rented under another name, reasonably aroused the officer's suspicion in their initial contact. His response was progressive and measured. He dealt with silence by asking questions, and with mumbled replies by asking Graham to open his mouth. The court did not err in refusing to suppress the marijuana.

Defendant also asserts that there was insufficient evidence to support the conviction for tampering with evidence. When the officer caught a glimpse of the baggie, he ordered Graham to open his mouth. Graham refused and tried to swallow the evidence instead. The officer had to squeeze the sides of Graham's neck "to keep him from destroying the evidence," and only with help from additional officers was Graham forced to disgorge the baggie. This was "conceal[ment] ... with purpose to impair [the marijuana's] ... availability in any official proceeding or investigation" as much as the initial act of hiding. Conviction affirmed.

ELEMENTS OF THE OFFENSE – Assault, serious physical injury, sufficiency of evidence

State v. Oliver, 291 S.W.3d 324 (Mo. App. S.D. 2009)

In *State v. Oliver* defendant was convicted of assault in the second degree. Defendant attacked the victim and caused the victim to have three or four broken or cracked ribs. The attack also jarred defendant's kidneys seriously and caused numerous abrasions. Defendant was "laid up" for about "three weeks" and "passed blood" when urinating for "a few days."

A conviction under Section 565.060 requires a showing that the defendant recklessly caused serious physical injury. Defendant asserts that there was insufficient evidence. Serious physical injury is "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body. . . ." Section 565.002(6)(*emphasis added*). "Physical injury" is defined as "physical pain, illness, or any impairment of physical condition." "Protracted" means something short of permanent but more than of short duration.

There was sufficient evidence to support the conviction, and the judgment is affirmed.

ELEMENTS OF THE OFFENSE – Resisting arrest conviction upheld even without a specific declaration from officer that defendant is under arrest

State v. Stewart, 296 S.W.3d 5 (Mo.App. S.D. 2010)

Kendal Lane Stewart ("Defendant") appeals his felony conviction for resisting arrest. On October 19, 2006, the Springfield Police Department received information that Defendant was located inside a "fifth wheel" trailer at 2918 West Hovey, in Greene County, Missouri. The police had been looking for Defendant as a result of receiving several calls to the department regarding Defendant and a particular victim. Additionally, there were two outstanding warrants for Defendant's arrest, one of which was for aggravated stalking, a felony.

Officer Michael Stroud was dispatched to the location on West Hovey and contacted three or four other officers to accompany him to that location. Officer Stroud gave each officer an assigned location on the property and then approached the trailer with Officer Curtis Ringgold. All of the officers were in uniform.

Officers Stroud and Ringgold could hear voices through an open window, and Officer Ringgold spoke through that window to the individuals inside, announcing his presence as a police officer and asking those inside to exit the trailer. At that point, one of the individuals--not Defendant--came to the door and identified himself, and he was escorted by another officer to the opposite end of the trailer. Through the open door, Officer Stroud could see another individual curled up into a ball underneath a table, with his hands in front of his face. Officer Stroud repeatedly asked the individual to show his face and hands; at some point, the individual moved his hands enough so that Officer Stroud was able to identify the individual as Defendant.

When Defendant refused to comply with Officer Stroud's orders, Officer Stroud directed Officer Ringgold to lean into the trailer and grab Defendant's feet and pull him out from underneath the table. Officer Ringgold continued to order Defendant to show his hands while he moved toward Defendant, and when Officer Ringgold reached for Defendant's feet, Defendant began kicking and hid his hands underneath his body.

Throughout the entire ordeal, Officer Ringgold continued to order Defendant to show his hands and to stop resisting the officers, but it was only after Defendant was in handcuffs and the officers stood him up that he completely stopped pulling away from and fighting with them.

"It is not necessary for the police to tell a suspect he is under arrest where the circumstances show that an officer is attempting an arrest." 296 S.W.3d at ___ (Slip. Opn., p. 13. Quoting *State v. Nichols*, 200 S.W.3d 115, 121 (Mo.App. 2006).

Here, the officers identified themselves as police officers and ordered the occupants of the trailer to exit with their hands up. When Defendant did not comply with that order, Stroud looked inside the trailer and, seeing Defendant hiding underneath the table concealing his face, repeatedly ordered Defendant to move his hands and show his face so that Stroud could identify Defendant. Defendant's noncompliance with this order prompted Ringgold to enter the trailer and try to forcibly remove Defendant from underneath the table. The officers repeatedly demanded that Defendant show his hands and stop resisting, while Defendant continued to kick at the officers and avoid their attempts to restrain him. Similar actions have been found sufficient to support a resisting arrest conviction.

The trial court's judgment is affirmed.

EVIDENCE – Photographic evidence of re-creation of the crime scene is admissible if it accurately and fairly represents the scene and bears on the crime charged

State v. Stevens, ___ S.W.3d ___ (Mo.App. S.D. 2009) SD29393

Damathan L. Stevens ("Appellant") appeals from his conviction for the class B felony of distribution of a controlled substance, a violation of section 195.211;1 he complains that the trial court should not have admitted three photographs that were taken just prior to trial.

Appellant's conviction came about as a result of a drug transaction that occurred in a park. A drug informant arranged a "buy" with someone she knew only as "Dee;" a man, identified as Appellant, arrived at the location that had been arranged in the park. Two law enforcement officers had followed the drug informant and parked one hundred thirty feet away from the transaction; they identified Appellant as the seller after observing him through a telescope and binoculars. One of the police officers had previously observed Appellant in the same car that was at the drug scene. Despite the above-stated testimony, Appellant contends that he was prejudicially affected by the admission of three photographs that recreated the patrol car

in the park on the day of the drug deal. He contends that there was an insufficient foundation that the photographs accurately depicted the scene at the time of the offense.

The trial court has broad discretion in the admission of the photographs, and this Court will not overturn the lower court's decision absent an abuse of discretion. *State v. Strong*, 142 S.W.3d 702, 715 (Mo. banc 2004). To be admissible, a photograph must accurately and fairly represent the scene that it depicts and bear on an element of the charged offense. *State v. Jaco*, 156 S.W.3d 775, 778 (Mo. banc 2005). Generally, discrepancies between the conditions existing at the time of the offense and the time of the photographs are taken impact only the weight and not the admissibility of the evidence.

Appellant's argument that the photos inaccurately showed the distance between the drug deal and the law enforcement automobile and were, therefore, prejudicial is not valid as we further note both officers testified that they identified Appellant through the use of optical equipment. The judgment is affirmed. *Case disposed. Mandate issued November 6, 2009.*

ELEMENTS OF THE OFFENSE – Conviction upheld in joint possession of premises case where additional circumstantial evidence tied defendant to the contraband

***State v. Richardson*, 296 S.W.3d 21 (Mo.App. S.D. 2010)**

Randon Scott Richardson ("Appellant") appeals from his conviction of two counts of felony possession of a controlled substance in violation of section 195.2021.

The drug task force, Taney County Sheriff's Department, and Branson Police Department executed a drug search warrant at Appellant's home. Methamphetamine and cocaine were discovered, along with items used to ingest drugs.

At the time of the search, Appellant admitted to smoking marijuana occasionally and to using methamphetamine about a month prior. Appellant also admitted to frequently using the computer desk to conduct business and record music, including on the night of the raid.

In order to show that a person unlawfully possessed a controlled substance under section 195.202, the State must demonstrate that the person, with knowledge of the presence and nature of the substance, had actual or constructive possession of it. Section 195.010(34), RSMo Cum. Supp. 2001. Both knowledge and possession may be proven by circumstantial evidence, which need not be conclusive of guilt nor show the impossibility of innocence.

Where joint control over an area exists, the State must produce additional evidence to connect the accused to the controlled substance. This additional evidence may include routine access to areas where the controlled substance was being kept, presence of large quantities of the controlled substance at the scene of the arrest, an admission by the accused, the accused being in close proximity to the substance or paraphernalia in plain view of law enforcement officers, commingling of the substance with the defendant's personal belongings, or the flight of the defendant upon realizing the presence of law enforcement officers.

While Appellant and his wife had joint control over the premises, additional evidence was produced to connect Appellant to the methamphetamine. Law enforcement officers found a wooden box containing .07 grams of methamphetamine in a safe under a desk in the attic of Appellant's home. Appellant's birth certificate was found in the safe along with the methamphetamine; thus, the methamphetamine was 'commingled' with his personal belongings. This commingling, combined with Appellant's presence at the scene, is enough for a reasonable fact-finder to infer Appellant's access to and control over the safe containing the methamphetamine and is, therefore, sufficient to establish constructive possession.

Furthermore, Appellant's admission to using methamphetamine one month prior to the execution of the warrant, combined with the discovery of a separate baggie containing methamphetamine and a pouch containing items commonly used to ingest methamphetamine in the computer desk frequently used by Appellant, supports the inference that Appellant had knowledge of the presence and nature of the methamphetamine found in his home.

D.O.R. REVOCATION CASES – Grounds for refusal of driving privileges based on Driver's License Compact are strictly construed

Schroeder v. Director of Revenue, 295 S.W.3d 890 (Mo.App. S.D. 2010)

The Director of Revenue (the Director) denied a Missouri driver's license to Lee Schroeder (Schroeder) because his California driving privileges had been suspended for failure to pay child support. The Director relied upon § 302.600, the Driver's License Compact (the Compact), as the basis for the denial. Schroeder challenged that decision, and the trial court entered a judgment ordering the Director to issue Schroeder a Missouri driver's license.

Because the suspension of a person's driving privileges in another state for failure to pay child support is not a violation relating to the operation of a motor vehicle as required by the Compact, the judgment is affirmed.

SEARCH AND SEIZURE – Search after traffic stop was concluded is invalid where there was no objectively reasonable suspicion that defendant had committed a crime

State v. Vogler, 297 S.W.3d 116 (Mo.App. S.D. 2010)

After a bench trial, Defendant was found guilty of possession of methamphetamine and sentenced to serve five years in prison. On appeal, Defendant contends the trial court erred in overruling his motion to suppress and admitting evidence that methamphetamine was found on Defendant's person during a warrantless search by a police officer. Defendant argues that the search of his person and the seizure of the controlled substance were unlawful because those events occurred after Defendant's traffic stop was completed without the officer having an objectively reasonable suspicion that Defendant had committed a crime.

At 6:40 p.m., the officer observed a 1991 Cadillac make a left turn without signaling. A traffic stop was initiated at 6:41 p.m. Defendant exited the Cadillac and handed over his license and insurance documents. Defendant was advised that, although he would not be issued a ticket for the violation, the officer did need to check Defendant's driving status. The radio check revealed that Defendant had a valid license and no warrants.

The officer handed Defendant his license and insurance card and immediately asked if there was anything illegal in the car, such as drugs or weapons. Defendant said he did not have any of those items, and Defendant did not appear to be under the influence of a controlled substance. The officer then asked if he could search the vehicle for weapons or drugs, and Defendant agreed. He exited the vehicle and stood away from it. The officer asked Defendant if he had any weapons on his person. He said he did not have any. The officer asked if he could pat Defendant down for the officer's safety, and Defendant agreed. During the pat-down, the officer felt something in Defendant's pants pocket. When the officer asked what it was, Defendant said he had "a little bit of weed," which the officer understood to be marijuana. Defendant removed the substance from his pocket and gave it to the officer.

After confirming that the substance appeared to be marijuana, the officer conducted a further search of Defendant's person. The officer looked inside of Defendant's wallet, which had been in his back pants pocket, and found a plastic baggie containing a small amount of what appeared to be methamphetamine.

The officer placed Defendant under arrest. At this point, only seven minutes had elapsed since the initial stop occurred. Defendant was transported to the Phelps County jail.

After Defendant was charged with possession of methamphetamine, defense counsel filed a motion to suppress all of the evidence that resulted from Defendant's search. After conducting a hearing, the trial court denied the motion. The court concluded that the search of Defendant's person occurred consensually after the traffic stop had concluded because a reasonable person in Defendant's position would have felt free to go. At trial, the court also overruled Defendant's objections when the State presented evidence concerning the results of the officer's search of Defendant's person. After Defendant was convicted and sentenced, the appeal followed.

The Southern District declares "A routine traffic stop based on the violation of state traffic laws is a justifiable seizure under the Fourth Amendment." *Barks*, 128 S.W.3d at 516. Such a seizure, however, "may only last for the time necessary for the officer to conduct a reasonable investigation of the traffic violation." *State v. Granado*, 148 S.W.3d 309, 311 (Mo. banc 2004). The reasonable actions taken by an officer during such a stop may include: (1) asking for the driver's license, registration and proof of insurance; (2) questioning the driver about his purpose and destination; (3) running a record check on the driver and his vehicle; and (4) issuing a citation or warning.

The trial court decided, and the appeals court agrees, that the traffic stop ended when the officer handed Defendant his license and insurance card. At that point, the investigation of the traffic violation was over. Thus, the crux of the controversy is whether the subsequent encounter

between the officer and Defendant was consensual. The trial court concluded that it was. The Southern District disagrees.

Considering the totality of the circumstances, the officer's conduct would have communicated to a reasonable person that he or she was not free to decline the officer's requests or terminate the encounter. Although the officer received the results of his radio check, he never conveyed that information to Defendant or told him he was free to go.

From the stop to arrest, this seven-minute encounter between the officer and Defendant was one seamless event. There was nothing to give a reasonable person any clear demarcation between the end of the traffic stop and the purported new, consensual encounter between officer and detainee. Conviction reversed.

EVIDENCE – No hearsay violation where the declaration is offered only to prove that such statement was made, but not for the truth of the matter asserted

State v. Newsom, ___ S.W.3d ___ (Mo.App. S.D. 2010) SD29461

Appellant was convicted of second-degree murder and armed criminal action. He appeals, alleging that the trial court plainly erred in overruling Appellant's objections to hearsay testimony, said objections having not been properly preserved for appellate review.

Hearsay evidence is in-court testimony regarding an out-of-court statement used to prove the truth of the matter asserted therein that derives its value from the veracity of the out-of-court statement. Hearsay testimony is inadmissible unless it either fits into a recognized exception or it is offered for a non-hearsay purpose. If the relevance of a statement rests on the fact that it was made, and not in the content of the statement, it is not hearsay.

When in-court testimony regarding an out-of-court statement is used to explain the conduct of the witness rather than as proof of the facts asserted in the statement, the testimony does not constitute hearsay. When a party inquires into part of an act, occurrence, or transaction they have "opened the door" to testimony regarding that act, occurrence, or transaction, and the opposing party is entitled to inquire into other parts of it in order to rebut possible inferences that may be drawn from an incomplete version presented by the adversary or to prove the party's own version of events.

Appellant argues that the playing of an answering machine message from Amanda Jones constituted inadmissible hearsay because the recording was offered to prove that Jones (who lived in the apartment where the crime occurred) was not present when the victim was killed. Defendant argued that the recorded message did not fall under a recognized exception to the hearsay rule. The State argues that the recording is not hearsay because it was offered merely to prove that the statement was made, and its value is not derived from the truth of Jones's statement. The recorded message was not introduced for the truth of the matter asserted. Appellant's hearsay claim does not present facially substantial grounds to lead the appeals court

to believe that the trial court committed plain error in allowing the jury to hear it. Furthermore, the tape was cumulative to the unobjected-to testimony of Corporal Higdon that Jones had called the house at 1:16 a.m.

Appellant next complains that Corporal Higdon should not have been allowed to testify to what Jones had told him regarding Hunt's car being at the apartment on the morning of the murder. The State argues that Appellant had opened the door by implying that Corporal Higdon had no information about the car when he informed Appellant during the initial interview that Hunt's car had been seen at Jones's apartment. The Southern District agrees. When Appellant inquired about the factual support Corporal Higdon had for his statements in the interview, it raised the inference that he had none, and thus entitled the State to elicit testimony to rebut that inference. Furthermore, the testimony was sought in order to explain the conduct of the witness, and therefore was not hearsay. Affirmed. *Case disposed. Mandate issued January 8, 2010.*

D.O.R. REVOCATION CASES – “Minor visibly intoxicated” is established where officer observes traffic violation and then indicia of intoxication during contact with driver

Barrett v. Director of Revenue, 286 S.W.3d 840 (Mo.App. E.D. 2009)

Minor driver was stopped for a license plate violation and officer detected alcohol on his breath. Officer administered field sobriety tests and registered a BAC of .04 at the scene. Driver was arrested pursuant to 302.505.1 RSMo (Supp. 2001) for “minor visibly intoxicated” and at the station, his BAC was taken again, this time registering .06.

Section 302.505.1, provides that the DOR shall suspend or revoke an individual's driver's license if: “such person was less than twenty-one years of age when stopped and was stopped upon probable cause to believe such person was driving while intoxicated in violation of section 577.010, RSMo, ...or upon probable cause to believe such person violated a state, county or municipal traffic offense and such person was driving with a blood alcohol content of two-hundredths of one percent or more by weight.”

Driver's license was suspended and he appealed the suspension. The trial court concluded that the probable cause for the stop was an “equipment” violation, not a moving violation, and concluded the language of section 302.505 did not support suspension of Barrett's license.

The Eastern District reversed. The court concluded that probable cause exists if an officer observes the illegal operation of a motor vehicle and also observes indicia of intoxication when he comes in contact with the driver. The court also found that the trial court's conclusion that this case did not include any “erratic driving” was erroneous. There is no requirement that an officer observe “erratic” driving to establish probable cause to believe the individual driving was intoxicated.

STATUTORY INTERPRETATION – Section 577.041.1 precludes evidence of defendant’s breathalyzer refusal only in cases where defendant is charged under D.W.I. statutes

State v. Dvorak, 295 S.W.3d 493 (Mo.App. E.D. 2010)

Police responded to a disturbance call and found Defendant sitting on the ground wearing only a pair of shorts. Defendant tried to stand up but could not do so. Defendant told police that he had been drinking that day. Police smelled an odor of alcoholic beverage on defendant. Police asked defendant if he had any weapons, and Defendant stated that he had a 9mm Smith & Wesson tucked in his waistband. Police removed the fully loaded weapon from Defendant. Defendant was arrested and taken to the station. There, Defendant was asked if he would take a breathalyzer test and Defendant refused. Defendant was charged with unlawfully possessing a firearm while intoxicated.

Thereafter, at trial, defendant filed a motion *in limine* to preclude the admission of evidence that he refused to submit to a breathalyzer test. Trial court sustained the motion. However, after defense counsel cross-examined the police officer, prosecutor argued to the trial court that because defense counsel had asked the Detective about his failure to administer field sobriety tests, the defense had opened the door for the State to question the Detective about his request for the Defendant to take a breathalyzer. Despite the trial court’s prior ruling on Defendant’s motion *in limine*, the trial court permitted the prosecutor to elicit testimony from the Detective regarding Defendant’s refusal to submit to a breathalyzer. The jury found Defendant guilty.

Section 577.041.1 provides in part:

If a person under arrest . . . refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then none shall be given and evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024 (involuntary manslaughter), 565.060 (assault in the second degree), or 565.082, RSMo (assault of a law enforcement officer in the second degree), or section 577.010 (driving while intoxicated) or 577.012 (driving with excessive blood content).

Section 577.020 provides in pertinent part:

“Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person’s breath . . .”

The Eastern District held that because Defendant was not arrested in connection with his unlawful operation of a motor vehicle as defined by Section 577.020, the breathalyzer test offered to him did not fall within Section 577.041.1’s reference to “any test allowed pursuant to section 577.020”. Consequently, Section 577.041.1 does not govern the admissibility of evidence of Defendant’s refusal in this case.

Defendant also claimed that evidence of his refusal of the breathalyzer test violated his due process rights under the fourth amendment because he refused to submit to the test after being read his *Miranda* rights. Eastern District holds the admission of Defendant's refusal to submit to a breathalyzer test did not infringe upon his federal due process rights, and notes that in this case, the prosecution only revealed the fact of Defendant's refusal, not his post-*Miranda* silence. The court also stated that even though Defendant was not expressly warned that his refusal could be used against him at trial, there is no evidence that Defendant was implicitly promised or unfairly tricked into believing that evidence of his refusal would not later be used against him.

D.W.I. – Expungement statute now includes expungement of D.O.R. records

***S.S. v. Mitchell*, 289 S.W.3d 797 (Mo.App. E.D. 2009)**

On October 17, 1996, Defendant pled guilty to a misdemeanor DWI and received an SIS and two years probation. On October 23, 1996, DOR suspended Defendant's license for 30 days under 302.505.

On October 24, 2007, (10 years later), Defendant filed an application pursuant to Section 577.054 for an order expunging from all official records all recordations of her 1996 arrest and guilty plea. DOR filed a motion to dismiss the application as it related to her administrative alcohol suspension, which the trial court denied.

At the hearing on Defendant's application for expungement, it was undisputed that Defendant met all of the requirements for expungement as set forth in 577.054.1. The trial court entered a judgment granting Defendant's application for expungement which stated that all records and files related to Defendant's arrest and guilty to the plea to the charge of driving while intoxicated are expunged and shall be confidential as provided in Section 577.054. The trial court also ordered DOR to expunge all records of any administrative action. . . DOR appealed.

Eastern District affirms stating that the 2005 amendment to Section 577.054.1 authorizes courts to expunge records of a driver's administrative alcohol suspension and to make those records confidential.

SELF INCRIMINATION – Admissibility of subsequent statements following prior statements made in absence of *Miranda* warnings

***State v. Gaw*, 285 S.W.3d 318 (Mo. banc 2009)**

Defendant was found guilty after a bench trial felony DWI. Defendant was charged as, found to be, and sentenced as a chronic offender. The issue presented was whether the trial court improperly admitted statements made by Defendant in violation of *Miranda*. Missouri Supreme Court affirms the conviction.

Defendant made incriminating statements after his arrest, but prior to being given his *Miranda* warnings. The questions by the Highway Patrol Trooper elicited the Defendant's statements that he had been driving in the pickup when it ran off the roadway. Missouri Supreme Court states that Defendant's *Miranda* rights were in fact violated by the initial series of questions, and the State conceded that those questions violated Defendant's *Miranda* rights. However, the State argues that Defendant's statements made after his *Miranda* rights were explained, rendered the earlier violation of *Miranda* rights harmless. Here, the Missouri Supreme Court adopts the approach set out in Justice Anthony Kennedy's concurring opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). (This case was discussed extensively in a prior seminar.) The trial court overruled Defendant's motion to suppress and admitted the testimony regarding his statements about driving the vehicle. The record, reviewed in the light most favorable to the trial court's ruling, supports the admission of Defendant's statement. The record contains testimony from the Highway Patrol Trooper that the unwarned testimony was not part of a deliberate plan to undermine Defendant's understanding of his *Miranda* warnings. By adopting Justice Kennedy's subjective test, as opposed to an objective test, the role of trial courts in this state is heightened to insure that the accused's *Miranda* rights are protected. This is because the accused's *Miranda* rights protections turn on whether the trial court finds an arresting officer's questioning prior to the advisement of *Miranda* rights was inadvertent or rather intended to acquire an advantage in the interrogation process.

NOTE: In a concurring opinion, Justice Wolff states: ■An appellate court should strive to express - in a single cogent majority opinion - what the law is. If a law declaring appellate court is unable to achieve that modest goal, the court should decline to decide the case and let the decision of the lower court stand. Society is better off, I believe, with no legal principle than with one that is incoherent or difficult to discern. . . Perhaps, with other great constitutional pronouncements, *Miranda* is being subjected to death by a thousand subsequent distinctions.●

D.W.I. – Probable cause to arrest must be based on officer's *current* knowledge of the facts, not what he *later* came to learn

***Mullen v. Director of Revenue*, 288 S.W.3d 319 (Mo.App. W.D. 2009)**

DOR appeals the Circuit Court's judgment setting aside DOR's suspension of Mullen's driver's license for driving while intoxicated. Trial Court found that the Director did not establish that the arresting officer had probable cause to believe that Mullen was driving while intoxicated. Facts are as follows:

Trooper responds to a radio call regarding a vehicular accident involving injuries in Henry County. Twenty minutes later Trooper arrived and sees a white Ford Pickup lying on its top in a hay field. Several emergency vehicles and paramedics were already on the scene and tending to Mullen, who was lying on a backboard near the passenger side of the overturned truck. Trooper walks directly from his vehicle to Defendant and did not stop to talk to anyone before approaching Defendant. Trooper speaks to Defendant while Defendant is lying on a backboard. Trooper notices the Defendant's eyes are bloodshot and watery, that his speech was slurred and mumbled, and that a strong odor of intoxicates was present on or about his person.

Defendant told Trooper he had consumed six margaritas. Trooper then placed Defendant under arrest for DWI. Prior to arrest, Trooper did not ask Defendant whether or not he had been driving nor did he ask any witnesses if Defendant had been driving at the time of the accident. After arresting Defendant, Trooper learns from witnesses that Defendant had in fact been driving the truck.

Defendant is flown to Research Hospital in Kansas City where a blood test indicates that his BAC is in excess of the legal limit. DOR held an administrative hearing and suspended Defendant's driving license. Defendant filed a *trial de novo* and the case was tried to the court. Trial court concluded that Defendant was not arrested upon probable cause to believe he was driving a motor vehicle while the blood alcohol concentration in his blood, breath or urine was .08% or more by weight. DOR appeals.

Western District affirms trial court, stating: probable cause must be based on information in the Officer's possession *at the time of the arrest, not on information acquired after the fact*. Here, prior to placing Defendant under arrest, Trooper did not ask whether or not he was operating the vehicle at the time of the accident. Defendant never admitted or gave any indication he was operating the vehicle. Prior to placing Defendant under arrest, Trooper did not ask any other individuals whether or not Defendant was driving the vehicle at the time of the accident. Prior to placing Defendant under arrest, Trooper did not undertake any effort to determine whether or not there were any other individuals involved in the accident or if there was anyone else who had been driving or occupying by the overturned vehicle. Prior to placing the Defendant under arrest, Trooper was not told by any individual that Defendant was operating the vehicle at the time of the accident. In short, before arresting Defendant, Trooper did nothing to confirm who was driving the vehicle and did nothing to confirm whether anyone else was involved in the accident. Given all these factors, Western District holds that the *evidence did not establish that Trooper had sufficient information at the time of the arrest* to have probable cause to believe Defendant was driving.

STATUTORY INTERPRETATION - Untimely arrest of driver for D.W.I. does not preclude administrative sanctions

Ross v. Director of Revenue, ___ S.W.3d ___ (Mo. banc 2010) SC90317

Highway Patrol Trooper received a report of a female standing on the shoulder of I-435 at the Missouri River bridge at 1:58 a.m. Officer arrived and approaches the vehicle at 2:14 a.m. and sees Defendant in the front passenger seat and a male lying across the rear seat. Trooper opened the driver's side door and immediately detects a strong odor of intoxicants. Neither person in the car was injured. Defendant denies driving the vehicle. Based on footprints in the snow, Trooper determined the male passenger had only been on the passenger side of the wrecked vehicle, and footprints consistent with Defendant's shoes were found only on the driver's side of the vehicle and up the embankment. At the scene, Trooper places Defendant under arrest for the possession of drug paraphernalia and careless driving. Trooper then transports Defendant to the Platte County Jail where field sobriety tests are conducted. Defendant performs poorly and was advised that she is also under arrest for DWI. Immediately

following the arrest, Trooper reads the implied consent advisory at 3:54 a.m. and Defendant refuses to take the test.

The record indicates that Trooper came into contact with Defendant at the accident scene at 2:14 a.m., but he did not arrest her for DWI until 1 hour and 40 minutes later at 3:54 a.m. This is in violation of Section 577.039 which requires a DWI arrest within 90 minutes of the violation.

The Director revoked Defendant's driving privileges for the refusal. The Platte County Circuit Court upheld the revocation. On appeal, Defendant contends DOR did not present evidence of a lawful arrest and thus, failed to establish a key element of the revocation case. She argues that DOR did not have authority to revoke her license for refusing to take a chemical test because the officer was untimely in arresting her for a DWI under the provisions of a warrantless DWI arrest statute, Section 577.039 (which requires that the arrest be made within one and one half hours after the claimed violation occurred.) Appellant argues that this unlawful DWI arrest provided no basis for the breathalyzer test that she refused.

The Supreme Court affirms the trial court's judgment upholding the revocation of Defendant's driving privileges, stating that there is nothing in the plain language of Section 577.039 which compels the application of the ninety minute time limitation to the revocation of driving privileges under 577.041. Section 577.039 is a statute applicable to criminal matters and by its own terms it applies to violations for DWI (577.010) and BAC violations (577.012). The lawfulness of the Defendant's DWI arrest under 577.039 had no impact on whether she was "arrested" in satisfaction of the revocation statute.

The court goes on to state that regardless of the Defendant's contentions of the impropriety of her arrest under the warrantless DWI arrest statute, she was also "arrested" in satisfaction of the revocation statute because she was under arrest for possession of drug paraphernalia as well as careless and imprudent driving. Nothing in Section 577.041.4(1) of the revocation statute requires the court to find that a person was arrested **for a DWI**. The implied consent law applies to any motor vehicle operator "arrested **for any offense** arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition." Judgment affirmed.

D.O.R. REVOCATION CASES – Statute dispensing with requirement for non-alcoholic blood draws is to be applied retrospectively

***Roberson v. Vincent*, 290 S.W.3d 110 (Mo.App. W.D. 2009)**

DOR appeals judgment of the trial court setting aside suspension of driving privileges of Defendant. Director argues that the trial court erred in setting aside the suspension of Defendant's privileges because the trial court improperly excluded certain evidence.

Defendant is involved in a single car roll-over accident. Defendant is arrested for DWI and transported by helicopter to a hospital for medical treatment. Officer goes to hospital where Defendant admits he had been drinking. Officer obtained Defendant's consent for a blood draw.

First nurse tries to draw blood, but is unsuccessful in obtaining an amount sufficient for a sample. Officer then gets second nurse, to draw blood samples. Second nurse successfully draws one sample, and draws a second one 1 hour later. Second nurse is unaware of any previous attempts to draw Defendant's blood by first nurse.

At trial, second nurse testifies he was able to obtain two sufficient blood samples and that he used a non-alcohol antiseptic. The court then questioned second nurse expressing concern about the first unsuccessful blood draw by first nurse. During the court's examination, second nurse states he was not present during any prior blood draw attempts, and therefore had no knowledge of first nurse's attempt to draw blood, and was unable as to whether first nurse used a non-alcohol antiseptic during that attempt. Defendant objects to testimony of the blood test results arguing that the Director failed to show a non-alcohol antiseptic was used in the first attempted blood draw. In response, Director argues that the newly amended Section 577.029 which became effective June 30, 2007, had been revised and no longer required the use of a non-alcoholic antiseptic during blood draws to admit blood tests results into evidence. The court, however, sustained Defendant's objection holding that the law in existence at the time of the blood draw applied, and the law in existence at the time of the blood draw required that a non-alcoholic antiseptic be used. The court then excluded all evidence of Defendant's blood test results. At the close of DOR's evidence, the trial court found that there was insufficient evidence that Defendant's BAC was .08% or more, and therefore Director failed to meet its burden of establishing a *prima facie* case. Defendant requested permission to present further evidence, but the court refused, stating that further evidence was unnecessary. Director appeals.

Western District reverses trial court: In excluding the blood test results, the trial court erroneously applied the version of Section 577.029 in effect on the date of Defendant's arrest. Case law is clear that procedural statutes and administrative rules apply retrospectively unless the enactment reveals contrary intent. Section 577.029 (2007) relates to the admissibility of blood test results into evidence and as such, it is procedural and is subject to retrospective application. Accordingly, the trial court should have applied the new version of the statute in effect at the time of trial. The Director was not required to demonstrate that a non-alcoholic antiseptic was used and the trial court should not have excluded testimony with respect to the blood draw results. Case was remanded for further proceedings with instructions to allow the Director to establish its case and permit Defendant to rebut the Director's case.

D.O.R. REVOCATION CASES – Petition for review effectively precludes DOR suspension action

Vandewiele v. Director of Revenue, 292 S.W.3d 397 (Mo.App. W.D. 2009)

DOR appeals Circuit Court's determination that it unlawfully suspended Defendant's base driving privilege and disqualified his commercial driver's license.

On January 23, 2006, Defendant is arrested for DWI in Johnson County, Missouri, where he resides. Arresting officer serves notice of suspension revocation on Defendant pursuant to Section 302.520. Defendant timely requests an administrative hearing. DOR acknowledges

receipt of hearing request on February 2, 2006 but indicates it had not received the arrest report for the incident and issued a temporary driving permit to Defendant pending receipt of the arrest report.

On February 10, 2006, DOR sends Defendant 2 pages of documents: First page is a Notice of Disqualification from operating a Class A, B or C Commercial Motor Vehicle and is unambiguously limited to action against his CDL. In fact, it states that Defendant can continue to drive Class E, F and M vehicles. Second page is just as clear that Defendant's base driving privilege was being suspended simultaneously for operating a motor vehicle with a blood alcohol content exceeding the limits provided in Section 302.505. According to computer records submitted by DOR, both the suspension of his base driving privilege and the disqualification of his CDL, were stayed on December 10 pending the administrative hearing which was later held. DOR acknowledges, however, that nothing in the record indicates that Defendant was ever informed that the license actions described in the February 10, 2006 notice had been stayed.

Defendant files a petition in the Johnson County Circuit Court on February 16, 2006 seeking review of the February 10, 2006 action. Defendant alleges that the Director's action in suspending and revoking his driving privilege without a hearing not only violated his constitutional rights, but also the statute providing for an administrative hearing required by Chapter 302 RSMo. Director holds an administrative hearing on March 15, 2006. DOR's counsel admitted in oral argument that no notice of this hearing is contained in the record nor has a transcript of the hearing been submitted.

On March 16 the administrative hearing officer issues ■Findings of Fact and Conclusions of Law (Sustained)• notifying Defendant again of the decision to suspend his base driving privileges pursuant to Section 302.505 and 302.525. The decision advises Defendant of his right to file a trial *de novo*. Defendant files a second petition in Johnson County Circuit Court on March 28, 2006. In that petition, Defendant alleges that the DOR had already rendered a final decision on February 10 which was the subject of an existing judicial review proceeding and that DOR accordingly lacked jurisdiction to render a second final decision on March 16. Circuit Court holds that DOR's February 10, 2006 notice disqualifying his CDL privileges for a year and notifying him of the suspension revocation of his base driving privileges was unlawful since it was rendered without any hearing, evidence or opportunity to present and therefore contrary to Section 302.505. Trial court further decides that the March 16, 2006 actions were made without statutory authority and were in violation of Defendant's due process rights because Director of Revenue had already made a final decision on February 10 and that decision of the Director of Revenue was timely and successfully appealed in the first case. The trial stated that ■There is no statutory authority for the Director of Revenue to make multiple disqualifications or suspensions of a driving privilege for the same alleged event.• DOR appeals both cases.

Section 302.525.1 provides that if a request for an administrative hearing is properly made ■The effective date of the suspension or revocation shall be stayed until a final order is issued following the hearing.• Where a hearing is properly requested, there can be no lawful suspension or revocation unless and until a hearing is held. The Director's attempt to convene an administrative hearing following the February 10th notice, and following Defendant's filing of his judicial review proceeding, is ineffective, and cannot alter the lawfulness of its actions. The

same result holds for the disqualification of Defendant's CDL. Section 302.755.1 provides that ■A person is disqualified from driving a Commercial Motor Vehicle for a period of not less than one year if convicted of a first violation of: 1) driving a motor vehicle under the influence of alcohol or a controlled substance.● The term ■conviction● is statutorily defined as an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or authorized administrative proceeding.● See Section 302.700.8. DOR's counsel conceded at oral argument that no grounds existed as of February 10, 2006 to disqualify Defendant's CDL since there had been no adjudication of any kind, in a courtroom or administrative proceeding, that Defendant had violated relevant law. Western District affirms judgment of the trial court. ■The belated offer of an administrative hearing, after taking action to suspend the driver's license, came too late.● 292 S.W.3d at 402.

EVIDENCE – Testimony as to defendant's appearance on a DNA "hit list" does not constitute prohibited evidence of other crimes

State v. McMilian, 295 S.W.3d 537 (Mo.App. W.D. 2010)

Blake McMilian appeals his conviction for murder in the first degree and for forcible rape. He asserts several points on appeal, only one of which is reported in the opinion. That point relates to the State's reference to a DNA sample from the victim as matching defendant's DNA found in a state database. Defendant claims on appeal that the State's reference to the presence of his DNA in a state database constituted evidence of other crimes.

The rape and murder for which McMilian was convicted occurred in 1984. McMilian was identified 20 years later when DNA from the victim matched that of McMilian in the database. Prior to trial McMilian had filed a motion *in limine* requesting that the State be barred from making any reference to the statewide DNA database, otherwise known as "the CODIS¹ system." His argument was that if the State were allowed to refer to a "cold hit" through the CODIS system, the jury would infer that McMilian has one or more prior convictions. The trial court denied the motion on the basis that "there has to be some explanation how this [DNA] match occurred," and that "the general public is [not] aware of the DNA requirements for convictions or for convicts." The trial court did, however, preclude the State from making any direct reference to the fact that McMilian's DNA was in the statewide system as the result of his prior criminal convictions. The trial court also required the State to elicit testimony from its prosecution witnesses that the statewide system contained DNA from individuals other than just convicted felons.

The Western District affirms the conviction, relying primarily on *State v. Morrow*, 968 S.W.2d 100, 111-12 (Mo. banc 1998). In *Morrow* the Supreme Court held that fingerprint cards, in and of themselves, do not constitute evidence of a prior crime and the trial court does not abuse its discretion in allowing their admission when those cards do not mention any specific crimes.

¹ This acronym is a reference to the Combined DNA Index System, originally developed by the FBI Laboratory.

The Court of Appeals observes that DNA profiles are difficult to distinguish from fingerprint cards in this context. In both cases, the State has compiled databases containing certain identifying information. In both cases, identifying evidence from an unknown perpetrator can be compared to the database, enabling police to find a lead where none previously existed. In cases where a “hit” or a match is made, the State needs to be able to explain how a particular individual became a suspect. And this is especially true where, as in this case, a considerable period of time has passed since the date of the offense. Thus, given the State’s limited and neutral reference to the presence of McMilian’s DNA profile in the statewide database, the trial court did not abuse its discretion in admitting such evidence at trial. Conviction affirmed.

MISCELLANEOUS – Prosecuting Attorney has “absolute and well settled” immunity in pursuing charges against individuals

Carden v. George, 291 S.W.3d 852 (Mo.App. S.D. 2009)

Carden, acting pro se, appeals the dismissal of his malicious prosecution suit against the Phelps County Prosecuting Attorney for initiating and pursuing criminal proceedings against him. Southern District affirms dismissal of case saying that a prosecutor has a common law immunity from civil liability for initiating and pursuing a criminal case, which is considered ■both absolute and well settled. ■To be sure, this immunity does leave the genuinely wronged Defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. The alternative of qualifying a prosecutor’s immunity would disserve the broader public interest. ■

SEARCH AND SEIZURE – Evidence insufficient to establish that minor was “visibly intoxicated”

State v. J.D.L.C., 293 S.W.3d 85 (Mo.App. W.D. 2009)

State appeals the judgment of the trial court granting J.D.L.C.’s motion to suppress a breathalyzer sample. State charged J.D.L.C. (■Minor) with misdemeanor MIP, as a person under the age of 21 years, having a detectable blood alcohol content of more than two-hundredths of one percent or more by weight.

On May 3, 2008, Cole County Deputy Sheriff stops an extended cab pickup for speeding on Highway 50. As he approaches the vehicle, he sees two cases of Bud Light Beer in the bed of the truck. Four people are in the truck. Two in the front seat and two, including minor, who is 20 years old, in the back seat. Driver was the only person in the truck who was 21. There was no alcohol in the backseat where minor was seated. Deputy orders all occupants out of the truck. Deputy smells a ■faint to ■mild odor of alcohol on minor’s breath. Minor did not have glassy or bloodshot eyes, and was not belligerent. Deputy arrests all 3 passengers in the truck for MIP - being visibly intoxicated. Minor is transported to the county jail. Deputy administers a BAC and the result is .058%. At trial, trial court suppresses the BAC sample taken from minor finding

that the arresting officer lacked probable cause to arrest and that the search of minor's breath was not conducted under any exception to the warrantless requirement.

Deputy testified at the suppression hearing that he arrested minor for minor in possession for being visibly intoxicated. However, the facts and circumstances were not sufficient for Deputy to believe that minor was committing the crime of minor in possession. Minor did not own or drive the truck. He was sitting in the backseat, and the beer and other liquor were found in the bed and front seat of the truck. While minor had a faint to mild odor of alcohol on his breath, he displayed no visible signs of intoxication. His eyes were not glassy or bloodshot and he was not belligerent. In short, the Deputy did not have probable cause to arrest minor. Here, the breathalyzer sample was so closely tied to the illegal arrest that it cannot be purged of the primary taint. The breathalyzer sample was obtained in close temporal proximity to the illegal arrest, and the likelihood that the breathalyzer test results would have been obtained absent the illegal arrest is not substantial. Trial court did not err in granting the motion to suppress. Judgment affirmed.

CRIMINAL PROCEDURE – State's failure to locate and produce victim's criminal record for defense discovery and impeachment requires reversal

***Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009)**

After jury trial, Defendant is found guilty of forcible sodomy based solely on the testimony of the complaining witness, who said Defendant ordered her into his car at gunpoint and forced her to perform oral sodomy on him. Defendant said complaining witness flagged down his car and offered to exchange oral sex for drugs. Complaining witness and Merriweather were the only witnesses to the encounter; there was no physical evidence.

State failed to disclose complaining witness's criminal record, which included convictions for theft. Upon Defendant's Rule 29.15 post-conviction motion, the motion court ruled that Merriweather did not receive a fair trial and vacated the conviction. The State appeals, claiming that its efforts to locate the criminal record were sufficient and therefore, it was not obligated to disclose complaining witness's criminal record.

There was no contention the State acted in bad faith. It appears that the record check made by the prosecutor's investigator failed to reveal the record, perhaps because of a technological glitch. There is no question that the record existed at the time of trial; the prosecutor testified that she found the record on the morning of the Rule 29.15 motion hearing. The issue is whether the State or Defendant must bear the consequences of the error.

At the post-conviction motion hearing, the investigator for the prosecutor testified that he ran the complaining witness through the REJIS system, but that records check did not reveal the prior convictions. The investigator also testified that at the time of Defendant's trial in 2005, he had access to MULES and NCIC, but that he ran criminal history checks only on REJIS.

This evidence was sufficient to support a finding that State failed to make a diligent effort to provide Defendant with the favorable evidence. Here, the State's case depended entirely on the credibility of the victim. The State had no physical evidence, there was no circumstantial evidence to support the allegations, and there were no witnesses who could offer any direct evidence of Defendant's guilt. The case hinged on which witness; the victim or the Defendant; the jury chose to believe. If the jury disbelieved the victim's version of the events, then an acquittal more likely to occur. In view of the importance of the impeaching information about the victim, the State's indefinite and incomplete efforts to check her criminal record failed to fulfill Rule 25.03's requirement of diligence. The State did not meet its burden. Motion court's judgment vacating the conviction is affirmed.

ELEMENTS OF THE OFFENSE – Testimony from good faith purchaser of stolen property sufficient to establish value in excess of \$500.00

State v. Isgriggs, ___ S.W.3d ___ (Mo.App. S.D. 2009) SD29594

After a trial to the court, defendant was found guilty of stealing copper wire valued at over \$500.00. The sole issue raised on appeal is whether the state met its burden to prove beyond a reasonable doubt that the property stolen by the defendant had a value of \$500.00 or more.

The owner of the stolen property said the missing copper wire and brass fittings together were valued at approximately \$4,000.00. The state's amended information only charged defendant with the theft of the copper wire. The owner was never asked to value the copper wire *separately*. According to the salvage dealer who bought the copper wire, defendant sold the copper wire at the recycling center in two transactions receiving \$315.90 on March 21 and \$432.25 on March 22, 2007, for a total of \$748.15.

The trial court found the testimony of Ms. Brinker (the salvage dealer) as to the aggregate value of the copper wire to be credible and of such weight as to support the trial court's finding of this element of the charge beyond a reasonable doubt.

Southern District affirms, holding that the evidence presented was sufficient to allow a reasonable fact finder to find beyond a reasonable doubt that the copper wire stolen by defendant had value of at least \$500.00. The trial court did not err in overruling defendant's motion for judgment of acquittal. *Case disposed. Mandate issued December 24, 2009.*

MISCELLANEOUS – Court's duty of neutrality and impartiality requires judge to refrain from involvement in presentation of the case by either party

Watson v. Tenet Healthsystem, ___ S.W.3d ___ (Mo.App. E.D. 2009) ED91997

NOTE: Although this is a civil case, it bears some examination in the context of the several *pro se* trials that are seen in Municipal Court, and in particular, the possible temptation of

the trial court to “help” the *pro se* litigant, either to simply move the trial along or, worse yet, to offer assistance or guidance to the citizen litigator. There might be some temptation to do that, but we must not do it. There are many appellate opinions in which the court of appeals dismisses the appeal because the court cannot discern the points or issues in the appeal because a *pro se* litigant has so badly botched up the brief. The appellate courts usually say that if they even try to figure it out, it makes them advocates for that side, and they cannot do that. *See, e.g.* “We hold *pro se* appellants to the same standards as attorneys.” *Pointer v. State, Dept. of Social Services*, 258 S.W.3d 453, 454 (Mo. App. E.D. 2008). “All appellants must comply with the Supreme Court Rules, including Rule 84.04, which governs the content of appellate briefs. *Id.* We are mindful of the problems that a *pro se* litigant faces; however, judicial impartiality, judicial economy, and fairness to all parties necessitate that we do not grant a *pro se* appellant preferential treatment with regard to complying with the rules of appellate procedure. *Id.* Failure to conform with the mandates of Rule 84.04 results in unpreserved allegations of error and can constitute grounds for the dismissal of an appeal. *Kuenz v. Walker*, 244 S.W.3d 191, 193 (Mo. App. E.D. 2007) (citing *Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978)).

So if that rule applies to the appellate courts, it would seem there is no reason for trial judges to be expected to take any different position. With that background, consider the reversible actions of the trial court here:

In *Watson*, Plaintiffs brought an action for wrongful death based on medical malpractice against Doctors, claiming negligence in the care and treatment of their mother, Jannette Robinson (“Decedent”), following complications which arose after placement of a central line. While the facts in this case are largely undisputed, the specific theory of liability under which Plaintiffs were pursuing their claims is unclear from a review of the evidentiary record. This jury-tried case was further complicated by the trial judge's interference with Plaintiffs' presentation of their evidence.

Over defense counsel's objection, the trial judge asked questions of the Plaintiffs' expert, basically taking over Plaintiffs' counsel's direct examination. Then, without asking any questions regarding the issue of causation, the court tendered the witness for cross-examination by the defense. The opinion makes it fairly clear that the court's motive for taking that action was a desire to let the case go to the jury without further delay. “A couple of the jurors have some serious time issues.” Slip opn., p. 2.

The jury ruled for plaintiffs, and motions for a directed verdict were denied. On appeal, the Eastern District agrees that an essential element was not proven; namely, that of causation. However, instead of outright reversal as urged by defendants, the case is remanded for a new trial due to the trial court's interference with plaintiffs' case. Eastern District rules that the trial judge's limitations on Plaintiffs' evidence effectively precluded Plaintiffs from making a submissible case. *Application for transfer filed in the Supreme Court on February 8, 2010.*

CRIMINAL PROCEDURE – Failure to raise statute of limitations defense at trial constitutes a waiver of that defense on appeal

***State v. Cotton*, 295 S.W.3d 487 (Mo.App. E.D. 2010)**

The issue in this case is whether a criminal defendant waives his or her protest regarding the expiration of the statute of limitations by failing to raise the issue in the trial court. The Eastern District rules that there is such a waiver.

Marvin Cotton was convicted for a number of sexual offenses, plus a count for kidnapping. He was sentenced as a persistent offender to a life term plus two additional consecutive terms of years, one of which was for the kidnapping. On appeal he challenges that portion of the consecutive term related to the kidnapping conviction, claiming that the three year statute of limitations for that offense had run prior to the filing of the complaint. The Eastern District notes that for many years the statute of limitations in criminal cases was considered as creating a bar to prosecution that deprived the court of jurisdiction. *State v. McKinney*, 768 S.W. 2d 178, 180 (Mo. App. E.D. 1989). Therefore it had previously been held that the statute of limitations could be raised at any time either before or after judgment, and even for the first time on appeal. Also, it simply could not be waived.

However, this is no longer the case. The Supreme Court in *Longhibler v. State*, 832 S.W. 2d 908 (Mo. banc 1992) overruled *McKinney* and those cases following it, and explicitly ruled that “The statute of limitations is non-jurisdictional and can be waived.” 832 S.W. 2d at 911.

Even so, Defendant still argued on appeal that there was no evidence of waiver because he did not affirmatively waive the defense. In other words, since he did *nothing* on that issue, there can be no waiver. Eastern District rejects defendant’s argument in that regard. The burden is on the defendant to *affirmatively act to raise the defense* in the first place, as opposed to an affirmative act to waive the defense. Such is the essence of an affirmative defense. An affirmative defense by definition requires some action by the defendant to raise that defense. By doing nothing (as Cotton did here), he has failed to assert any affirmative defense. Conviction affirmed.

D.O.R. REVOCATION CASES – Revocation upheld based on Wyoming conviction where Wyoming statute broader than Missouri’s

***Schnitzer v. Director of Revenue*, 297 S.W.3d 604 (Mo.App. E.D. 2010)**

Robert Schnitzer received notice from the Department of Revenue that he was being assessed eight points against his driver’s license for an out of state DWI conviction and, therefore, his license was to be suspended for 30 days. Schnitzer filed a petition to review the suspension of his driver’s license.

At the hearing, the Director put into evidence the report from the Wyoming Department of Transportation showing Schnitzer’s conviction for “driving while under the influence of alcohol in the state of Wyoming.” Schnitzer put into evidence Wyoming’s DUI statute along

with the Judgment entered against him by the Circuit Court of Sublette County, Wyoming, for “DWI, misdemeanor, W.S. Section 31-5-233(b).” The trial court entered an order denying Schnitzer’s petition for review and Schnitzer appeals.

The Eastern District notes that the Director based the suspension of Schnitzer’s license on notice that he had been convicted of violating Section 31-5-233(b) of the Wyoming statutes which provides that no one shall either drive or have actual physical control of a vehicle when they are under the influence of alcohol or a controlled substance. The Court observes that Schnitzer has correctly pointed out that Wyoming’s DWI statute is broader than Missouri’s because in addition to prohibiting “driving” while under the influence, it also prohibits “having actual physical control” of a vehicle while under the influence. It is clear that Missouri courts have held that merely being in actual physical control of a vehicle does not constitute “driving” for purposes of Missouri’s driving while intoxicated statutes. *Cox v. Director of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003).

The Court observes that since Schnitzer was convicted under a statute that covers two distinct offenses, only one of which is prohibited by Missouri law, the Director was required to establish that he was convicted of driving and not merely having physical possession of a vehicle. The Eastern District holds that the Director presented competent and substantial evidence that Schnitzer was convicted of driving rather than being in actual physical control because the report from the Wyoming Department of Transportation reads, “convicted of driving while under the influence of alcohol in the State of Wyoming on 11/13/2007 at the Sublette County Circuit Court as a result of a guilty plea.” Once the Director had satisfied the burden of producing evidence to support the suspension, the burden of going forward then shifted back to the driver who offered no contrary evidence. Suspension of driving privileges upheld.

STATUTORY INTERPRETATION – No limited driving privilege available while driver serves “10 year minimum denial”

***State ex rel Director of Revenue v. Hyde*, 295 S.W.3d 918 (Mo.App. E.D. 2010)**

Court upheld Writ of Prohibition where Trial Judge had granted Defendant’s request for a limited driving privilege while Defendant was serving a “10 year minimum denial” of his driving privileges under Section 302.060(9), RSMo Cum. Supp. 2007.

The Court cited Section 302.309.3(5)(b) which provides, in pertinent part “. . . no person is eligible to receive a limited driving privilege [if] at the time of application for a limited driving privilege . . . [his or her] license has been suspended or revoked for the following reasons . . . [a] conviction of any felony in the commission of which a motor vehicle was used.”

CONSTITUTIONAL LAW – No double jeopardy violation for essentially simultaneous crimes where differing elements of proof are required

State v. Nibarger, ___ S.W.3d ___ (Mo.App. W.D. 2009) WD68834

Defendant appeals the trial court's judgment convicting him of one count of attempted statutory sodomy in the first degree and two counts of child molestation in the first degree. The defendant contends on appeal, among other things, that the trial court erred in overruling his motion for judgment of acquittal at the close of all the evidence contending that the two convictions of child molestation in the first degree amounted to double jeopardy. The defendant claimed that there should only have been one count of child molestation because there was only one event.

Western District disagrees saying: The trial court found Nibarger guilty on one count of child molestation in the first degree for touching the victim's genitals. The trial court also found Nibarger guilty on a second count of child molestation in the first degree for touching the victim's breasts. Although the alleged offenses occurred in the same episode on October 27, 2005, each alleged offense required proof of facts not required by the other. Each count required proof that Nibarger touched different and distinct part of the victim's body. As such, defendant was properly convicted of multiple violations and the double jeopardy claim fails. In short, separate touches equal separate offenses. *Application for transfer filed in the Supreme Court on February 16, 2010.*

EVIDENCE – Best Evidence Rule is applied only where the challenged evidence is directly in issue

State v. McDaniel, ___ S.W.3d ___ (Mo.App. W.D. 2010) WD69892

This is a garden variety constructive possession case. Defendant was convicted of possession of a controlled substance and sentenced to 10 years. He appeals contending that the State's evidence did not prove possession. Western District affirms conviction stating that the State showed Defendant's constructive possession of contraband, because it showed his routine access to a place where the contraband was found, through statements that such place was the Defendant's bedroom. Defendant's denial of distribution, consisting of a statement of personal use, supported his possession of the contraband.

However, another point on appeal resulted in an examination of the Best Evidence Rule. During the trial, and to help establish that the contraband and paraphernalia found at the scene belonged to defendant, the State offered testimony by a detective that he had found mail addressed to defendant at that particular address in close proximity to the contraband. The trial court allowed the evidence over defense objection that such admission violated the Best Evidence Rule. Generally, the rule provides that in proving the terms of a writing, where the terms are material, the original usually must be produced. However, if the contents of a writing are not directly in issue, even though the evidence contained in the writing may bear upon a

fundamental issue in the case, the rule does not apply, and secondary evidence may be used without accounting for the original document.

The Western District observes that defendant never disputed that the mail was addressed to him at that address. Thus, the court holds that although the content of the writing bore on the fundamental issue of McDaniel's possession of the cocaine in the adjoining bedroom, the writing on the envelope was not *directly in issue*, and therefore, the Best Evidence Rule did not apply. Conviction affirmed. *Case disposed. Mandate issued January 20, 2010.*

SEARCH AND SEIZURE – No valid expectation of privacy in a structure where lawful presence is prohibited

State v. Snow, ___ S.W.3d ___ (Mo.App. W.D. 2010) WD69443

Defendant appeals the jury verdict convicting him of one count of possession of a controlled substance. Western District affirms.

In 2004, Defendant rented a house in Clay County from his father. In 2005, due to the unfit condition of the house, the father consented to the City of Kansas City condemnation of the house. The City ordered the Defendant to vacate the house and posted a notice on the door which stated it was illegal for anybody to occupy the house. Thereafter, in April, 2006, a Kansas City Police Sergeant drove by the house and observed several people, including the Defendant, in the yard. The police officer detained them on the basis that the City had condemned the house and prohibited people from living in it. By this time, other police officers had arrived on the scene. The other officers heard other people in the house and entered the house to remove them. While searching for the people, the police found evidence of controlled substances and drug paraphernalia. The police then asked Defendant if they could search the rest of the house. He told them to ask his father because it was his house. The police contacted the father and requested his consent. The father signed the consent form. During the search, the police seized plastic baggies containing methamphetamine. The police arrested the Defendant and he was charged.

Prior to trial, Defendant filed, among other things, a motion to suppress. After a hearing, the trial court denied the motion, saying that Defendant lacked standing to challenge the search. Defendant argued on appeal that he had a legitimate expectation of privacy in the condemned house because he had a "rent to own agreement" with his father, and therefore was the owner.

"To demonstrate that he has standing to challenge a search and seizure, the Defendant must show that he has a legitimate expectation of privacy in the place or thing that the police searched." *State v. Toolen*, 945 S.W.2d 629 (Mo. App. E.D. 1997). To prove that Defendant had a legitimate expectation of privacy in the place searched, the Defendant must establish that (1) he had a subjective expectation of privacy in the place or thing searched, and (2) his expectation is reasonable. Under this test, a Defendant normally has standing to challenge a search of a house he is legally occupying. However, in this case, Defendant did not have standing to challenge the police's search and seizure of items from the house because he was not

the owner of the house, and he had no possessory or occupational right to the premises by virtue of the condemnation of the house at the request of the owner, his father.

Even assuming that the Defendant did have a subjective expectation of privacy in the house, the trial court found that he lacked standing because his subjective expectation was objectively unreasonable. *See, U.S. v. Washington*, 573 F.3d 279 (6th Cir. 2009) (stating that it is certainly true a person cannot acquire an expectation of privacy in a structure that has been legally condemned because any presence is forbidden.) *Case disposed. Mandate issued January 28, 2010.*

CONSTITUTIONAL LAW – Statute prohibiting possession of firearm while intoxicated is unconstitutional neither on its face nor as applied

State v. Richard, ___ S.W.3d ___ (Mo. banc 2009) SC89832

State appeals from a judgment dismissing an information charging Defendant one felony count of possession of a loaded firearm while intoxicated. The Circuit Court dismissed the charge on the grounds that 571.030.1(5) violates the Second Amendment to the United States Constitution, and Article I, Section 23 of the Missouri Constitution. Missouri Supreme Court reverses and remands case to the trial court.

Defendant is in a dispute with his wife, is intoxicated, and threatens to kill himself by “blowing his head off.” He tells his wife if she calls the police, he will go outside and make the police shoot him. Defendant then ingests an unknown amount of morphine and amitriptyline. When the police arrived, Defendant was seated in his home, unconscious, intoxicated, and in possession of a loaded handgun and extra ammunition. Defendant filed a motion to dismiss the information asserting that 571.030.1(5) is unconstitutional, asserting that the statute “effectively bans the possession of firearms in the home by anyone who is present in his or her home while intoxicated” and therefore violates his federal and state constitutional right to possess a firearm within his home for self-defense.

Supreme Court holds statute is not facially unconstitutional nor unconstitutional as applied. The U.S. Supreme Court has never held that the Second Amendment to the U.S. Constitution applies to the states. As such, Defendant’s claim must be analyzed under the Missouri constitution. State constitutional right to keep and bear arms, like the Second Amendment, is not absolute. The State has inherent power to regulate the carrying of firearms as a proper exercise of police power. Supreme Court points out that the ultimate facts of the case have yet to be established because the Circuit Court sustained Defendant’s motion to dismiss the information prior to trial. However, the probable cause affidavit filed by the State alleges facts indicating that Defendant was intoxicated and in possession of loaded firearm, which constituted a violation of Section 571.030.1(5). “Although 571.030.1(5) sets out a specific exception to the rule barring possession or discharge of a firearm while intoxicated, whether the person is defending himself or others, Defendant argues that the statute could be applied in a manner that effectively would prohibit an intoxicated person from possessing a firearm in a home for lawful self-defense. There is, at this point, no self-defense issue in this case. Defendant has no standing

to raise hypothetical instances in which the statute might be applied unconstitutionally.” *Case disposed. Mandate issued December 22, 2009.*

ELEMENTS OF THE OFFENSE – Submitting false urine sample constitutes felony forgery

State v. Smothers, 297 S.W.3d 626 (Mo.App. W.D. 2010)

Defendant was charged with one count of forgery and one count of possession of a forging instrumentality. The court found that the evidence contained in the State’s information and probable cause statement did not meet the statutory requirements of forgery as a matter of law and granted Defendant’s motion to dismiss. State appeals.

Defendant was subject to a valid court ordered drug test as a condition of his bond in an unrelated matter. Circuit Court ordered a police officer to administer a drug test to defendant. The police officer observed what appeared to be Defendant urinating into a sample jar, however, the police officer became suspicious when he heard a snapping noise and observed Defendant acting “very nervous and shaky.” Defendant handed the police officer the urine sample. The police officer told Defendant that he had reason to believe the urine sample was fake. Defendant then allegedly admitted to giving a false urine sample using a Whizzinator device and dehydrated urine.

State filed a felony information charging Defendant with forgery, and possession of a forging instrumentality. Count I charged that Defendant, “with the purpose to defraud, used and/or transferred as genuine a urine sample, knowing that it had been made or altered so that it had a genuineness or ownership that it did not possess.” Count II charged that Defendant, “with the purpose of committing forgery, possessed a whizzinator used for making a false urine sample.” Defendant filed a motion to dismiss both charges arguing that the forgery statute did not apply because the urine sample did not qualify as “any writing or other thing including receipts and universal product codes,” as required by the statute - Section 570.090.1(3). Western District says “in order to prove the elements of forgery under Section 573.090.1(3) the State must prove that the accused (1) had the purpose to defraud and (2) made or altered *anything other than a writing* so that it purported to have a genuineness, antiquity, rarity, ownership, or authorship which it did not possess. By contrast, in order to prove the elements of forgery under Section 570.090.1(4), the State must prove that the accused (1) had a purpose to defraud and (2) used as genuine, possessed for the purpose of using as genuine, or transferred with the knowledge or belief that it would be used as genuine, (3) a writing or other thing that the actor knew had been made or altered so that it purported to have a genuineness, antiquity, rarity, ownership, or authorship that it did not possess.” Subsections 3 and 4 both require a purpose to defraud and a “thing” that purports to have a genuineness, antiquity, rarity, ownership or authorship that it does not possess. Subsection 3 requires the State to prove the accused actually made or altered the inauthentic item; subsection 4, however, does not require the State to prove that the accused made or altered anything himself, but *merely that he knew the inauthentic item had been made or altered so that it purported to have a genuineness it did not possess.* The State

could meet its burden by proving that Defendant, with a purpose to defraud with the knowledge that the inauthentic item had been made or altered so that it purported to have a genuineness or ownership that it did not possess, *used* an inauthentic item as genuine, *possessed* an inauthentic item for the purpose to use it as genuine, or *transferred* an inauthentic item with the knowledge or belief that it would be used as genuine. In order to prove that Defendant had a “purpose of defraud” the State need not prove the specific intent to defraud some particular person. Rather, the State must only prove a general intent to defraud. Forgery against the government or the public need not deprive them of money or property; so long as the accused has the purpose to frustrate the administration of justice, the “purpose to defraud” element is met. Here, Defendant was subject to a lawful court ordered drug test. Instead of complying with the court’s order to provide the police officer with a sample of his own urine, Defendant allegedly used the Whizzinator device and transferred a false urine sample to the police officer. These facts permit an inference that Defendant had the purpose of frustrating the administration of justice.

Finally, Defendant argues that a urine sample cannot form the basis of a forgery charge because it is not a writing. Section 570.090.1(4) covers “any writing *or other thing* including receipts and universal product codes.” Clearly, the statute is not confined to a writing.

Western District remands for further proceedings holding that (1) the State could prove that Defendant had a purpose to defraud in that he intended to frustrate the administration of justice; (2) under section 570.090.1(4), the State need not prove that Defendant personally made or altered anything; and (3) under the circumstances of this case, the forgery statute is broad enough to cover a false urine sample.

D.O.R. REVOCATION CASES – Driver has no standing to object to representation of Director by D.O.R. staff attorney rather than by county Prosecuting Attorney

Campbell v. Director of Revenue, 297 S.W.3d 656 (Mo.App. W.D. 2010)

Driver receives notice that his privilege to drive a motor vehicle would be denied for 10 years pursuant to 302.060 due to his being convicted more than twice for offenses relating to driving while intoxicated. Campbell files a petition to review in Andrew County under Section 306.311, RSMo. Jane Laughlin, senior counsel for Director, enters her appearance for Director and files an answer. Campbell moves to prohibit Laughlin from representing the Director on the ground that only the Andrew County Prosecuting Attorney should provide legal representation for the Director under Section 56.060.1, Section 56.090, and Section 302.311 RSMo. Section 302.311 RSMo provides in part: “. . . the prosecuting attorney of the county where such appeal is taken, shall appear in behalf of the director, and shall prosecute or defend, as the case may require.”

Western District affirms the trial court’s judgment denying Campbell’s driving privileges for 10 years saying, “We need not decide, however, whether the prosecuting attorney was required to represent the Director in this case because Campbell does not articulate any reason is why he is aggrieved by the staff attorneys representation of the Director, or why he is aggrieved by not having the prosecuting attorney represent the Director.” Campbell simply has no standing

to challenge the staff attorney's representation of the Director. In addition, Campbell made no showing of how he might have been prejudiced by such representation. Hence, no prejudice, no reversal.

ELEMENTS OF THE OFFENSE – Constructive possession of contraband in a jointly occupied vehicle

State v. Wood, ___ S.W.3d ___ (Mo.App. S.D. 2010) SD29471

Defendant appeals his convictions for unlawful use of drug paraphernalia and unlawful use of a weapon. He contends the evidence was insufficient to support his conviction on either offense. During a pursuit, the driver was wearing a dark blue hat, and the passenger was wearing a red and black hat. The trooper never lost sight of the vehicle, and when it stopped, both occupants exited and were pursued on foot. Both were located within a short time and defendant was wearing the dark blue hat. A search incident to arrest revealed a used syringe. An inventory search revealed other drug paraphernalia, a black jack and a knife in a sheath tucked between the two front seats. The handle was facing up, and the blade was seven inches long. The knife was within the driver's easy reach and control.

Defendant chose to represent himself at trial. During closing argument, he said, "It's been stated there was a syringe found in my inside coat pocket. You want me to admit it? I'll tell you right here right now, that was mine." Defendant also admitted that the syringe was drug paraphernalia as defined by § 195.233. Finally, he told the jury that "I throughout my life have used drugs. I will not deny it."

The items of paraphernalia were in a red duffel bag in the bed of the truck. Since it was not in defendant's actual possession, the issue is whether there was proof beyond a reasonable doubt that defendant had constructive possession. The stolen pickup truck was jointly controlled by defendant and passenger.

In cases involving joint control of an automobile, as here, a defendant is deemed to have both knowledge and control of items discovered within the automobile, and, therefore, possession in the legal sense, where there is additional evidence connecting him with the items. Additional incriminating circumstances that will support an inference of knowledge and control include: (1) being in close proximity to drugs and drug paraphernalia in plain view of the police; (2) finding a defendant's personal belongings with the paraphernalia; (3) the presence of weapons in the vehicle; (4) consciousness of guilt; and (5) admissions by the defendant.

The charge of unlawful use of a weapon concerned the knife between the seats. *State v. Howard*, 973 S.W.2d 902, 906-07 (Mo. App. 1998), held that a weapon wedged between a crevice of the front seat cushions directly to the right of the defendant-driver was accessible to him, and therefore, there was sufficient evidence to prove that the weapon was concealed. Convictions affirmed. *Case disposed. Mandate issued January 27, 2010.*

ELEMENTS OF THE OFFENSE – Forgery conviction reversed where there is no proof that defendant either stole or altered the forged instrument

State v. Simpkins, ___ S.W.3d ___ (Mo.App. S.D. 2010) SD29376, SC90715

Defendant was convicted of forgery for attempting to cash a check filled in only with the amount, the date and the purported signature of the account holder, who denied signing the check. The payee and memo sections were not filled in, and the check was not endorsed.

Where defendant merely had unexplained possession of a forged instrument (but with no proof of how he came into such possession), took the check to the bank, waited thirty minutes, produced identification after it was explained to him that the check was on a closed account, and told the detective he took the check to the bank to see if the bank would cash it, there was insufficient evidence to convict defendant of forgery. Reversed and remanded with directions to enter judgment of acquittal. *Application for transfer filed in the Supreme Court on February 19, 2010. SC90715*

STATUTORY INTERPRETATION – Under Missouri Human Rights Act, is Municipal Judge position that of employee or independent contractor?

Howard v. City of Kansas City, ___ S.W.3d ___ (Mo.App. W.D. 2010) WD69803

In *Howard v. City of Kansas City* the Western District examined the question of the status of the Kansas City’s Municipal Judges as either employees or independent contractors. The question was presented in the context of reviewing the sustainability of a judgment in Howard’s favor against the city based on alleged violations of unlawful employment practices in violation of the Missouri Human Rights Act (MHRA).

In August of 2006 there existed a vacancy on the municipal bench in Kansas City. Howard and others submitted applications to the Municipal Judicial Nominating Commission for the City of Kansas City. In October the Commission submitted a panel of three nominees (one of whom was Howard) to the City Council. All three of the candidates were Caucasian females. In November the City Council rejected the panel by a seven to six vote, stating that the all-Caucasian female panel lacked diversity. No one was selected from that panel.

In January 2007 the Commission again submitted a panel which consisted of the same three nominees. The Council again declined to fill the vacancy within the allotted time period.

In July 2007 Howard filed suit against the city alleging that the city engaged in race discrimination and retaliation in violation of the MHRA. The city responded that the MHRA did not apply to the city’s municipal judge appointment process.

In March 2008 the case was tried to a jury. At the close of all the evidence the City moved for a directed verdict on the ground that the MHRA does not apply to the City Council’s

decision not to appoint Howard as a municipal judge. The motion was overruled, the jury returned a verdict in Howard's favor, and the city appeals.

The city's first point on appeal is its contention that the trial court erred in failing to direct a verdict for the city because the MHRA applies only to employees. The city argues that the city's municipal court judges are not employees within the meaning of the statute.

After analyzing the facts and the case law, the Western District agrees that common law principles should be utilized to determine who is an employee for the purposes of the MHRA. *Sloan v. Banker's Life and Casualty*, 1 S.W.3d 555 (Mo. App. 1999). *Sloan* held that the MHRA only applies to employer-employee relationships. In coming to a determination on that score, the Court observes that "Control is the pivotal factor in distinguishing between employees and other types of workers. If the employer has a right to control the means and manner of a person's service – as opposed to controlling only the results of that service – the person is an employee rather than an independent contractor." Citing *Leach v. Board of Police Commissioners of Kansas City*, 118 S.W.3d 646, 649 (Mo. App. 2003).

There are several factors to be considered in determining whether the requisite level of control exists to establish an employer-employee relationship, and the Court analyzes all of those points before coming to a conclusion that Kansas City's municipal judges are independent contractors because the city lacks the right to control the means and manner of their services. Because of the absence of an employer-employee relationship, the MHRA has no application to the appointment process. Thus, the trial court erred in failing to direct a verdict in the city's favor on Howard's MHRA claim. Judgment reversed and the case remanded.

SEARCH AND SEIZURE – Curtilage includes out buildings where reasonable expectation of privacy is shown

State v. Kruse, ___ S.W.3d ___ (Mo.App. W.D. 2010) WD70481

Conrad Kruse was charged with several narcotics offenses based on evidence that had been seized by police officers from a number of buildings on his residential property. He filed a motion to suppress the evidence resulting from the search of his home and storage shed and, after a hearing, the motion was granted. The State appeals the order of suppression.

Police officers had received a tip that an individual known as Jeremy Beel was involved in the nearby theft of some anhydrous ammonia and that he was planning to prepare a methamphetamine batch in Pettis County. The officers knew that Beel had an outstanding warrant, and they concluded that he would be trying to sell the anhydrous ammonia quickly. Therefore, they were looking in places known to be involved with methamphetamine. The Kruse property was one such place. The officers also knew the type of vehicle (and its license number) that Beel would be driving.

They arrived at the Kruse residence around midnight and found the van they were looking for. It was registered to Beel's father. They then went onto the property for the purpose

of executing the arrest warrant. During the search for Beel, they went into the shed trying to find him. There they found the incriminating narcotics evidence instead of Beel. All of this was done without any kind of warrant and with no real showing of exigent circumstances.

In the motion to suppress, Kruse argued that all of the evidence obtained from the search should be suppressed because of violation of his Fourth Amendment rights. The trial court found that the officers had conducted a warrantless search of Kruse's back yard and structures that were part of the curtilage and without the existence of exigent circumstances. Therefore, the trial court suppressed the evidence.

On appeal, the Western District upholds the suppression order, stating that the Fourth Amendment prohibition against unreasonable searches and seizure protects Defendant's home, which includes the curtilage, and the nearby outbuildings. "No trespassing" signs in the front side, and the location of the out building in the back yard, showed a reasonable expectation of privacy in that out building. Neither present danger, nor imminent destruction of evidence, nor any other exigent circumstance which might support a search of the outbuilding without a warrant were present regarding the police officers' effort to find and arrest Beel. *Case not yet disposed.*

ELEMENTS OF THE OFFENSE – Burden of proof as to weight of contraband remains with State

State v. McClain, ___ S.W.3d ___ (Mo.App. W.D. 2010) WD70253

David McClain appeals his conviction for the Class C felony of possession of marijuana in an amount exceeding 35 grams. His sole point on appeal is that the trial court erred in overruling his motion for acquittal on the felony charge because the State had failed to establish an element of its *prima facie* case; i.e., that the marijuana indeed weighed over 35 grams. The Western District reverses and remands for resentencing.

McClain had been caught by the authorities in possession of a brown paper bag of marijuana plus 11 individually wrapped baggies of marijuana. He was charged with the C felony of possession in an amount exceeding 35 grams. At trial the State's expert testified that the total substance weight of the challenged substance was 38.30 grams. But during cross examination he admitted that the substance he weighed included the stems and seeds as well as the leafy contraband. The expert did not know the separate weight of the stems or the seeds.

Because Section 195.010(24) excludes stems and seeds from the definition of marijuana, McClain argued on appeal that the State's case was fatally deficient in that there was no clearly defined showing of possession of more than 35 grams of contraband.

The Eastern District observes that there are some cases holding that the defendant has the burden to produce evidence that the weighed substance contains a portion of the marijuana plant excluded from the definition of marijuana, but the appellate court concludes that those cases do

not relieve the State of its ultimate burden of proving that the amount of marijuana was over the statutory limit. *State v. Hyzer*, 811 S.W.2d 475, 480 (Mo.App. S.D. 1991). Therefore, the Eastern District rules that elements of the Class C felony possession of a controlled substance include weight of marijuana, but does not include stems and seeds, which were part of the weight that State's expert assigned to the marijuana in the case. The statute providing that the Defendant has the burden of proving exceptions to the controlled substance definition, is satisfied when the Defendant offers such evidence, and does not require the Defendant to prove how much of the substance was controlled and how much was not. "It is not the Defendant's burden to establish that the removal of the non-controlled substances reduces the weight of the substance below the statutory limit . . . to hold otherwise would eliminate one of the State's proof elements." Court of Appeals enters guilty judgment for Class A misdemeanor possession of marijuana, and remands to the trial court for sentencing on that lesser charge. *Case not yet disposed.*

STATUTORY INTERPRETATION – What constitutes “serving a sentence” in prosecution for failure to return to confinement

State v. Moore, ___ S.W.3d ___ (Mo. banc 2010) SC90125

Defendant Moore had two prior DWI convictions for which he had received suspended execution of sentence along with a term of probation. He violated the terms of his probation and at the revocation hearing the Court revoked his probation and ordered execution of the previously imposed sentences. He was ordered held in the Warren County jail until he could be transported to the Department of Corrections.

Moore requested a stay on his sentence so he could spend Christmas with his family. The sentencing judge denied the request for a stay but instead granted to him what the judge termed as a "furlough." Moore was released from jail with orders to return to confinement by noon 20 days later. The Court warned Moore that if he did not return to jail at the designated time he could be charged with the crime of failing to return to confinement. Despite such warning, Moore returned to jail six days late.

Moore was thereafter charged with the Class D felony of failure to return to confinement in violation of Section 575.220. The jury found Moore guilty of felony failure to return to confinement, and he appeals. Moore argued on appeal that a criminal defendant can only be guilty of felony failure to return to confinement after he has physically been received by the Department of Corrections. Since Moore had technically not been taken into custody by the D.O.C., but rather, had simply been held in the local jail and thereafter "furloughed," he claimed that he could not be guilty of the charge of felony failure to return.

The Supreme Court rejects that argument, stating that the sentencing court had already ordered his previously imposed DWI sentences to be executed. Pursuant to that order, Moore had been taken into custody, transported to the county jail, and booked into custody. The plain language of Section 575.220 contemplates such a circumstance. Thus, there was sufficient

evidence to find that Moore was serving a sentence to the Department of Corrections when he was booked into custody at the Warren County Jail. For that reason, his failure to return to that facility as ordered by the Court constituted felony failure to return to confinement. Affirmed. *Case not yet disposed.*

ELEMENTS OF THE OFFENSE – Tampering with witness may occur both before and after the offense

State v. Brashier, ___ S.W.3d (Mo.App. W.D. 2010) WD70077

Defendant was convicted of two counts of first degree assault, one count of first degree burglary, and two counts of victim tampering. On appeal, the Defendant challenges the sufficiency of the evidence to support the convictions for victim tampering.

Brashier and two others had a personal grudge against Singleton and her boyfriend. The threesome went to Singleton's place late one night bent on doing them harm. Before entering the abode, they cut the telephone wire outside the apartment so as to prevent the eventual victims from calling for help. They then burst into the apartment and assaulted the two victims. During the attack, and while Singleton was dialing 911 on her cell phone, the attackers knocked the phone from her hand, terminating the call for help.

At trial, the State sought to prove the victim tampering charges by presenting evidence that the Defendant and his accomplices engaged in the above described conduct to prevent the assault victims from reporting the crime. Brashier was convicted on all counts.

The Western District affirms the victim tampering convictions stating that Section 575.270.2 does not necessarily require that the tampering occur *after* the victim of a crime has been victimized. It merely states that the person who was prevented or dissuaded from reporting the crime must have been a victim of the crime or acting on behalf of the victim. The purpose of the victim tampering law is to criminalize conduct that would deter victims from reporting crimes to which they have been subjected, *regardless of when* the conduct occurred. This means that misconduct both before *and* after the crime can be considered victim tampering. *Case not yet disposed.*

STATUTORY INTERPRETATION – Time for start of 20 minute time period to contact an attorney

Norris v. Director of Revenue, ___ S.W.3d ___ (Mo. banc 2010) SC89994

In this case the Supreme Court has addressed and answered the question presented by the divergence of opinions in the courts of appeal regarding the calculation of the 20-minute time period for a driver to contact an attorney as provided by Section 577.041. This issue was discussed in considerable detail in the 2009 regional seminar materials in *Paxton v. Director of*

Revenue, 258 S.W.3d 68 (Mo. App. E.D. 2008) and *Williams v. Director of Revenue*, 277 S.W.3d 318 (Mo. App. S.D. 2009). See, 2009 Regional Seminar Handbook, pp. 40-42.

The Supreme Court recognizes the conflicting results in the courts of appeal, observing that in *Paxton* and *Williams* those courts held that the plain language of Section 577.041 provides that the 20-minute waiting period for purpose of contacting an attorney is triggered *only* if the driver asks to speak to an attorney after he or she has been asked to submit to a chemical test. Conversely, in *Schussler v. Fischer*, 196 S.W.3d 648, 652 (Mo. App. 2006), the court held that “Whether the request to speak to an attorney comes before or after the implied consent law is read, Section 577.041.1’s twenty minute waiting period begins running immediately after the officer has informed the driver of the implied consent law.” The Supreme Court observes that the *Schussler* court predicated its holding on the recognition that most drivers are probably not aware of the 20-minute rule in the statute. Therefore, a driver who requests to speak to an attorney after being given a *Miranda* warning but before being read the implied consent law is likely unaware that he or she has the right to request an attorney after being read the implied consent law.

The Supreme Court finds the reasoning in *Schussler* to be persuasive. The purpose of the statute is to provide the driver with a reasonable opportunity to contact an attorney to make an informed decision as to whether to submit to a chemical test. When the driver requests to speak to an attorney after the *Miranda* warning has been given, but before being read the implied consent law, the driver has not been informed of the consequences of refusing to submit to a chemical test. This lack of information makes it difficult for the driver to make an informed decision, particularly in light of the fact that the officer has no legal obligation to inform the driver of his or her rights under the statute.

Therefore, the Supreme Court affirms the trial court, establishing what appears to be the bright line rule that even when a person has already requested an attorney, the 20-minute time period under Section 577.041.1 begins immediately *after* the officer has informed the driver of the implied consent law, irrespective of whether the driver requested an attorney before or after the officer informed the person of the implied consent law. “To hold otherwise would place an undue burden on the driver, defeat the purpose of the statute, and wholly invalidate a driver’s clear and potential repeated requests to contact a lawyer.” Slip opn., p. 5. *Case not yet disposed.*

STATUTORY INTERPRETATION – Method of counting “convictions” under Section 302.060(9)

Akins v. Director of Revenue, ___ S.W.3d ___ (Mo. banc 2010) SC90181

In July of 2006 Justin Akins was driving while intoxicated when he had a collision with another vehicle and injured three people in the crash. He was charged with and pleaded guilty to three separate counts of second degree vehicular assault. All of these convictions were consolidated into one criminal case number. Thereafter the Director of Revenue denied Akins’ driving privileges because Akins had been “convicted more than twice for offenses relating to

driving while intoxicated” pursuant to Section 302.060(9). Akins sought judicial review of that denial, and the circuit court affirmed the Director’s actions. Akins appeals claiming that the trial court erred because his three convictions for vehicular assault all arose out of *one incident* and therefore, should be considered as only one conviction under Section 302.060(9).

In applying a plain language analysis of the statute in question, the Supreme Court observed that the definitive concept expressed in the words “conviction” and “convict” is that there has been a judicial determination that the defendant is guilty of an offense or crime. What matters is the number of *convictions* and not the number of *separate incidents* resulting in those convictions. Consequently, the phrase “has been convicted” as used in the statute refers to the number of offenses or crimes committed, quite irrespective of the number of separate incidents resulting in the convictions. Citing *Clare v. Director of Revenue*, 64 S.W.3d 877, 879-880 (Mo. App. 2002). The same rationale was also utilized in *Timko v. Director of Revenue*, 86 S.W.3d 132, 133 (Mo. App. 2002) where the appellate court affirmed a ten year denial of driving privileges based on four felony convictions resulting from one motor vehicle accident.

Therefore the Supreme Court concludes that Akins clearly has three convictions for violating state law relating to driving while intoxicated, and he is therefore ineligible for driving privileges. Hence, the circuit court did not err in affirming the Director’s denial of those privileges.

The Supreme Court acknowledges the contrary result reached in *Harper v. Director of Revenue*, 118 S.W.3d 195 (Mo. App. 2003). The Court examines the rationale of *Harper* and concludes that *Harper’s* finding of ambiguity in the statute is not persuasive. The Supreme Court declares that the plain language of Section 302.060(9) reflects a clear legislative determination that is in harmony with the Director’s actions and therefore, *Harper* is overruled.

In overruling *Harper*, the Supreme Court also offers an interesting footnote appearing on page 6 of the slip opinion addressing the matter of conflicting decisions from the different districts of the courts of appeal. In summary, the Supreme Court regards the three districts of the courts of appeal as not being separate courts “but simply different districts of a unitary court of appeals. There is no provision in the Missouri Constitution requiring a circuit court to follow a decision from a particular district of the court of appeals.” Slip Opn., pp. 6-7, footnote 4.