

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**NICK R. HARVEY,
RESPONDENT
vs.**

**DIRECTOR OF REVENUE,
APPELLANT**

DOCKET NUMBER WD72606

DATE: MAY 9, 2012

Appeal from:

The Circuit Court of Johnson County, Missouri
The Honorable R. Michael Wagner, Judge

Appellate Judges:

Court En Banc: Lisa White Hardwick, C.J., James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin and Gary D. Witt, JJ.

Attorneys:

Laurie Ward for Respondent

Jonathan H. Hale, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

NICK R. HARVEY, RESPONDENT

v.

DIRECTOR OF REVENUE, APPELLANT

WD72606

Johnson County, Missouri

Before Court En Banc: Lisa White Hardwick, C.J., James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt, JJ.

The Director of Revenue (“the Director”) appeals from a judgment entered in the Circuit Court of Johnson County, Missouri reinstating the driving privileges of Nick R. Harvey. Harvey had whiskey-soaked chewing tobacco in his mouth when he was arrested, where it remained while he was given a breath test. Following trial *de novo*, the circuit court entered a general judgment in favor of Harvey and against the Director.

In her sole point on appeal, the Director contends that the circuit court erred as a matter of law in following *Hurt v. Director of Revenue*, 291 S.W.3d 251 (Mo. App. S.D. 2009), which the Director claims was improperly decided. The Director makes that claim based upon oral comments made by the circuit court following closing argument. No reference to *Hurt* was contained in the judgment.

AFFIRMED.

Court En Banc holds:

(1) While an appellate court may consider oral comments made by the trial court to aid in interpreting an ambiguous judgment, where the language of the judgment is plain and unambiguous, we do not look outside the four corners of the judgment for interpretation. The judgment in this case was an unambiguous, general judgment in favor of Harvey. Accordingly, the trial court’s gratuitous oral comments will not be considered to limit the judgment.

(2) Because no written findings of fact or conclusions of law were requested by the parties or gratuitously provided by the trial court, the evidence must be viewed as being found in accordance with the result reached and the judgment must be affirmed on any basis supported by the record.

(3) The Director incorrectly argues that she presented a *prima facie* case and that Harvey bore the burden of rebutting her *prima facie* case with evidence

calling into question the validity of the blood alcohol test, relying on *Coyle v. Director of Revenue*, 191 S.W.3d 62 (Mo. banc 2005). That aspect of *Coyle* was reversed in *White v. Director of Revenue*, 321 S.W.3d 298, 306 (Mo. banc 2010). Under *White*, there is no presumption that the Director's evidence establishing a *prima facie* case is true, and there is no burden shifted to the driver to produce evidence to rebut such a presumption.

(4) Because the validity of the breath test results was contested through argument and cross-examination, the trial court was free to assess the credibility and weight to be afforded to the evidence related to chewing tobacco and breath tests. Since all fact issues upon which no specific written findings are made must be considered as having been found in accordance with the result reached, the trial court is deemed to have found the test results to be unreliable in this particular instance and that the Director, therefore, failed to prove that element of her case. Accordingly, this Court need not address whether the judgment could or should also be affirmed under the rationale expressed in *Hurt*.

DISSENTING OPINION BY JUDGE AHUJA:

Judge Ahuja dissents from the affirmance of the judgment, which is achieved by presuming that the trial court found the breath test results unreliable, because it is clear, for two separate reasons, that the trial court made no such factual finding.

First, the trial court explicitly stated from the bench that it was ruling in Harvey's favor only because it considered itself bound by *Hurt v. Director of Revenue*, 291 S.W.3d 251 (Mo. App. S.D. 2009), not because of a factual finding that the breath test results were unpersuasive. Those comments were unambiguous, they were expressed at the conclusion of the proceeding, and they plainly reflect the trial court's definitive, ultimate conclusion, as opposed to preliminary or tentative views. Consistent with prior caselaw, and in particular this Court's en banc decision in *Gholson v. Director of Revenue*, 215 S.W.3d 229 (Mo. App. W.D. 2007), we can, and should, consider the trial court's oral explanation of its judgment in this appeal. Notably, Harvey acknowledged at oral argument that the trial court had not made a factual finding concerning the breath test results, and that he was not arguing for affirmance on the basis of such a presumed finding.

The second reason we know the trial court made no finding concerning the reliability of the breath test results is that it would have been prohibited from doing so under *Coyle v. Director of Revenue*, 181 S.W.2d 62 (Mo. banc 2005). Under *Coyle*, the trial court could not find otherwise admissible breath test results unpersuasive unless the driver presented "additional evidence showing that [the extraneous factor, here chewing tobacco] affected the validity of the blood alcohol test results." 181 S.W.3d at 66. Harvey presented no such evidence here. While *Coyle* was later overruled by *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010), *Coyle* was the controlling

decision at the time of trial, and we cannot presume that the trial court in this case made a finding contrary to this then-controlling Supreme Court decision.

Opinion by Joseph M. Ellis, Judge

Date: May 9, 2012

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