IN THE SUPREME COURT
OF MISSOURI

JUSTIN AKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	SC90181
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jefferson County

The Honorable Dougherty Lee, Circuit Judge

Transfer from Missouri Court of Appeals, Eastern District

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant filed, in the Circuit Court of Jefferson County, a petition for review of the denial of his drivers license for ten years by the Director of Revenue under Section 302.060(9) RSMo. The cause was submitted on a stipulation of facts and the trial court entered Judgment for the Director of Revenue on November 6, 2008. Akins filed his Notice of Appeal to the Missouri Court of Appeals, Eastern District. Said appeal was heard on May 7, 2009. The Missouri Court of Appeals, Eastern District, filed its Opinion affirming the Judgment of the Trial Court and transferred this cause to the Missouri Supreme Court pursuant to Rule 83.02 on June 2, 2009.

STATEMENT OF FACTS

On July 20, 2006, Appellant, Justin Akins, was operating his vehicle in Jefferson County, Missouri, while in an intoxicated condition. Akins' vehicle collided with one other vehicle, injuring three people in the accident. Akins was charged with three counts of second-degree vehicular assault in Jefferson County, Missouri, arising out of that accident. Akins pled guilty to three counts of vehicular assault and was sentenced. L.F. 17. By letter of May 22, 2008, Akins was notified by the Director of Revenue that his privilege to drive a motor vehicle in Missouri would be "denied for ten years for being convicted more than twice for offenses relating to driving while intoxicated...." L.F. 12.

Akins filed a petition with the Circuit Court of Jefferson County seeking judicial review of the Director's decision on June 19, 2008. L.F. 3-5. Akins asserted that the denial of his license arose out of a single accident that occurred on July 20, 2006. Akins asserted that this denial was an erroneous interpretation of Section 302.060(9) RSMo, citing Harper v. Director of Revenue, 118 S.W.3d 195 (Mo. App.W.D. 2003).

The Director of Revenue filed it's Answer on July 29, 2008, and included eight pages of records from the Department of Revenue; including Appellant's Missouri Driver Record, showing three vehicular assault convictions all committed on July 20, 2006. L.F. 6-15. The Director of Revenue included a Certification of Record of

Conviction Report with its Answer which showed all three vehicular assault convictions arose out of the same criminal case; Case No. 07JE-CR0257301. L.F. 13-15. Appellant's Missouri Driver Record indicates that other than the conviction on Case No. 07JE-CR0257301, Akins had not had any other driving while intoxicated related offenses, nor in fact any other driving offenses. L.F. 9-11.

On November 6, 2008, Associate Circuit Judge Dougherty Lee affirmed the Director's ten-year denial of Akins' driving privileges. L.F. 18-19. Judge Dougherty-Lee found that the Director of Revenue assessed three separate convictions for vehicular assault "... even though all three counts arose out of one act of driving while intoxicated." L.F. 18. The Judge noted that there was a split of authority on the issue as to whether multiple counts of vehicular assault arising out of one act constituted multiple convictions, citing Harper v. Director of Revenue, 118 S.W.3d 195 (Mo. App. W.D. 2003) out of the Western District, and Timko v. Director of Revenue, 86 S.W.3d 132 (Mo. App. E.D. 2002) from the Eastern District. The trial court found the reasoning from the Western District in the Harper case persuasive but denied the petitioner's request for relief based on the Timko case decided by the Eastern District Court of Appeals and urged that the Court of Appeals revisit this issue or transfer the matter to the Supreme Court.

The Missouri Court of Appeals, Eastern District, on June 2, 2009, affirmed the trial court, and transferred the case to the Supreme Court pursuant to Rule 83.02.

POINT RELIED ON

I. The trial court erred as a matter of law in affirming the Director of Revenue's ten year denial of Petitioner's driving privileges because all three charges of vehicular assault in the second-degree arose out of one act of driving while intoxicated and should only be considered one conviction and therefore, Petitioner was not convicted more than twice of offenses related to driving while intoxicated pursuant to Section 302.060(9) RSMo.

Harper v. Director of Revenue, 118 S.W.3d 195 (Mo. App. W.D. 2003)

Appleby v. Director of Revenue, 851 S.W.2d 540 (Mo.App. W.D. 1993)

Eaton v. Director of Revenue, 929 S.W.2d 282, 284 (Mo. App. S.D. 1996)

White v. King, 700 S.W.2d 152 (Mo. App. W.D. 1985)

ARGUMENT

I. The trial court erred as a matter of law in affirming the Director of Revenue's ten year denial of Petitioner's driving privileges because all three charges of vehicular assault in the second-degree arose out of one act of driving while intoxicated and should only be considered one conviction and therefore, Petitioner was not convicted more than twice of offenses related to driving while intoxicated pursuant to Section 302.060(9) RSMo.

A. Standard of review This court should reverse the trial court's judgment in this judge-tried case if it erroneously declared or applied the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The issue in this case is a question of law. The issue is whether the Director of Revenue erroneously applied §302.060(9) RSMo to the Appellant, Justin Akins.

B. The trial court erred in affirming the Director of Revenue's ten-year denial of Appellant's driving privileges.

This case concerns the interpretation of Missouri Statute § 302.060. The statute provides that the Director of Revenue, "…shall not issue any license and shall immediately deny any driving privilege: . . (9) To any person who has been convicted more than twice of violating state law . . . relating to driving while intoxicated . . . ." §302.060(9) RSMo.

Appellant was involved in a motor vehicle accident while he was intoxicated.

Three people were injured in the accident and Petitioner was charged with three counts of second degree assault. Appellant pled guilty to those charges and was sentenced. The question now is whether a judgment of conviction to three counts from one case amounts to three convictions and therefore mandates that the Director deny Appellant a drivers license for ten years.

The Department of Revenue is an agency of government. As such, it only has the authority conferred upon it by the legislature. State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 S.W.2d 792, 794 (Mo. App. W.D. 1949). The agency is only authorized to interpret a statute in such a way as the legislature intended — the agency is but an instrumentality of the legislature. *Id.*

A conflict exists between the law as interpreted by the Court of Appeals, Western District, and its holding in Harper v. Director of Revenue, 118 S.W.3d 195 (Mo. App. W.D. 2003) and the Court of Appeals, Eastern District, and its decisions in Clare v. Director of Revenue, 64 S.W.3d 877 (Mo. App. E.D. 2002) and Timko v. Director of Revenue, 86 SW3rd 132 (Mo. App. E.D. 2002).

In Clare v. Director of Revenue, supra, Robert Clare was found guilty of four counts of second-degree assault arising out of a motor vehicle accident as a result of Mr. Clare's intoxication. The trial court held that the four counts all arising from one accident did not amount to four convictions. The Eastern District reversed the trial court, holding that the four counts were four convictions relying on the dictionary definitions of the word "conviction." *Id.* at 880. Timko v. Director of Revenue was

handed down by the Eastern District nine months after the Clare decision. The Court, in Timko, followed the reasoning and holding in the Clare decision.

In Harper vs. Director of Revenue, supra, Stephen Harper was found guilty of five counts of second-degree assault arising out of a motor vehicle accident as a result of Mr. Harper's intoxication. He pled guilty to five counts of second-degree assault and the Director of Revenue denied his license for ten years under §302.060(9) RSMo. Mr. Harper appealed the action, and the Western District Court of Appeals reversed. The Court held that the single judgment resulted in one conviction, not five. *Id.* at 202. The Court in Harper discussed the Eastern District's rulings in Clare and Timko, and declined to follow them. The decision in Harper was reviewed and approved by the Court en banc for the Western District. Harper at 202.

The Department of Revenue clearly cannot follow Harper on one side of the state and Clare on the other. A variance of a one-year suspension imposed for five counts of second-degree assault arising out of one accident in the Western District and a ten-year denial for four counts of second-degree assault arising out of one accident in the Eastern District is a result that could not have been intended by the legislature.

At the heart of both Clare and Harper, is the purpose of §302.060(9) and the definition of conviction. The cardinal rule of statutory construction requires the Court to ascertain the true intention of the legislature, giving reasonable interpretation in light of legislative objective. BCI Corporation v. Charlebois Construction Co., 673 S.W.2d 774, 780 (Mo. banc 1984). In determining the legislature's intention, the

provisions of the entire legislative act must be construed together, and if reasonably possible, all of the provisions must be harmonized. Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc. 1983).

Both the Western District and the Eastern District did agree on one thing: that the definition of "conviction" found in §302.010 (3) RSMo does not resolve the issue. Harper at 201, Clare at 879.

It must be noted that the Western District in Harper and the Eastern District in Clare cited the same definitions in their conflicting decisions[1]. Harper at 201. and Clare at 879, 880. Appellant submits that dictionary definitions of the word "conviction" do not and cannot adequately explain the nuances of §302.060(9), and therefore the intent of the legislative act should bear more weight, since the same definitions of the word "conviction" led to two different interpretations and contradictory results by learned jurists on both sides of the state.

While the first source to determine the intent of the legislature is the words and phrases used in the statute, a proper analysis does not stop with an examination of the

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1 Harper cited three different definitions of "conviction" listed in Black's Law. 118 S.W.3d at 200-202. Clare cited two of these in its decision, and noted the definition under Yale v. City of Independence, 846 S.W.2d. 193 (Mo. banc. 1993). Harper also cited two different definitions from Webster's dictionary. 118 S.W.3d at 201-202.

bare words alone. Eaton v. Director of Revenue, 929 S.W.2d 282, 284 (Mo. App. S.D. 1996). A proper analysis also considers the context in which the words are used in the statute and, importantly, the problem the legislature sought to address with the statute enactment. Appleby v. Director of Revenue, 851 S.W.2d 540, 541 (Mo. App. W.D. 1993). The Appellate Court must construe a statute in light of the purposes the legislature intended to accomplish and the evils it intended to cure. Gannett Outdoor Co., vs. Missouri Highway and Transportation Commission, 710 SW2d 504, 506 (Mo. App. W.D. 1986).

"The problem the legislature sought to address in §302.060(9) is the threat to life and property posed by those who repeatedly drink and then drive. . Its purpose, then, is to protect the public, not to punish the licensee." Appleby, at 541. (emphasis added). Specifically, the statute was intended to "deny or delimit driver licensure to persons underage, addicts, drunkards, and recurrent intoxicated violators . . ." White v. King, *700* S.W.2d 152, 155 (Mo. App. W.D. 1985) (emphasis added).

The stated purpose of protecting the public from repeat drunk drivers, makes it a civil remedy in nature rather than punishment against drunk drivers, which precludes the drivers license suspension and denial system from double jeopardy attack. This purpose is also supported by the escalating civil remedy system in Chapter 302 used for recurrent violators of drunk driving laws.

A person convicted of driving while intoxicated for the first time receives 8 points

against his license and consequently a license suspension of 30 days if it is charged as a simple misdemeanor. §302.302.1(8) RSMo and §302.304.3 RSMo. If the first DWI conviction is the result of a prosecution for a felony involving a motor vehicle (assault second degree or involuntary manslaughter), then that individual will receive 12 points and a one year revocation of his driver's license. §302.302.1(11) RSMo and §302.304.7 RSMo.

A person who is convicted of driving while intoxicated a second time will receive 12 points against his license because it is a second alcohol conviction, §302.302.1(9) RSMo and would receive a one year revocation of his license under §302.304.7 RSMo. However, if that second conviction occurs within five years of the first conviction and is for either driving while intoxicated, or involuntary manslaughter while operating a motor vehicle in an intoxicated condition, then the person is prohibited from receiving a license for a period of five years from the date of the second conviction. §302.060(10) RSMo.

Finally, there is a ten year denial for an offender who has been convicted more than twice of offenses related to driving while intoxicated, whether it be a state law violation, or county or municipal ordinance violation. §302.060(9) RSMo. Following that ten year denial, the offender may petition the court to be considered for return of his drivers license and the Court must find that the Petitioner no longer poses a threat to the public safety of this state. §302.060(9) RSMo.

The ten-year denial received by Appellant in this case is an aberration to the escalating remedy system intended by the legislature when enacting Chapter 302.

Appellant had no offenses prior to his motor vehicle accident on July 20, 2006. Appellant drove while intoxicated one time, which resulted in one accident, and unfortunately injured three people. Applying the Eastern District's interpretation of §302.060(9), the civil remedy for this one accident is to deny the Appellant a license for a period of ten years which is a longer period of time than if he had been involved in two separate drunk driving accidents, which each resulted in the death of someone. §302.060(10) RSMo.

As the Court in Eaton succinctly stated:

> It is clear, by reading these statutes *in pari materia*, that the intent of the legislature was to give municipal and county convictions, that met the procedural safeguards required of state court convictions, the same force and effect as their counterpart state convictions in denying licensure to repeat alcohol abuse offenders. Eaton at 284. (Emphasis added.)

The complete language from Section 302.060(9) RSMo is as follows:

> To any person who has been convicted more than twice of violating state law, or a county or municipal ordinance where the defendant was represented by or waived the right to an attorney in writing, relating to driving while intoxicated; except that, after the expiration of ten years from the date of conviction of the last offense of violating such law or ordinance relating to driving while intoxicated, a person who was so

> convicted may petition the circuit court of the county in which such last conviction was rendered and the court shall review the person's habits and conduct since such conviction. If the court finds that the petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the preceding ten years and that the petitioner's habits and conduct show such petitioner to no longer pose a threat to the public safety of this state, the court may order the director to issue a license to the petitioner if the petitioner is otherwise qualified pursuant to the provisions of section 302.010 to 302.540. No person may obtain a license pursuant to the provisions of this subdivision through court action more than one time; (emphasis added)

When looking at the above cited language of the statute and reading it in harmony with the first phrase which requires a person to have been convicted more than twice of violating the law relating to driving while intoxicated, it is clear that the legislature intended for these convictions to occur at different times, otherwise there would be no reason for it to read ten years from the date of the last offense, or requiring the person to Petition the Circuit Court of the County in which such last conviction was rendered if all such convictions were rendered at one time in one county. The word "last" implies that it happened in time after some previous offenses. How do we know which offense is last if they all occur simultaneously?

Moreover, it is clear from the expressed language of the statute that the purpose that the legislature was intending to enact had to do with the threat to public safety just as was outlined above in White v. King, 700 SW2d. 152, 155 (Mo. App. W.D. 1985). If the purpose of the statute is to prevent the licensing of recurrent intoxicated violators, then that purpose is not furthered by imposing a ten-year denial to a person who drove while intoxicated one time.

As the Court in Harper noted, by employing the phrase "To any person who has been convicted more than twice," rather than a phrase such as "To any person who has more than two convictions", suggests that the legislature intended to focus on the number of occasions, rather than the number of offenses. The word "twice" means "for a first and second time: on two occasions." Webster's Third New International Dictionary of the English Language 2472 (3rd Ed. 1993) Harper at 202.

Appellant's interpretation would also harmonize §302.060(9) with the escalating penalties and remedies envisioned and presented by Chapter 302. The legislature's purpose was to protect the safety of the public, which explains the escalated remedy for a repeat offender as found in §302.060(10) RSMo and for habitual offenders as found in §302.060(9) RSMo. As they commit additional offenses and are considered a greater threat to public safety, their driving privileges are removed for a greater period than for a first-time offender. Appellant in this case is a first-time offender for driving while intoxicated and has received the remedy reserved for a habitual offender. This was

clearly not the intent of the legislature.

In the instant case, the State joined three offenses arising out of a single occurrence as authorized by Missouri Rules of Criminal Procedure 23.05. However, Missouri Courts have indicated that a criminal judgment is final both for the purposes of exhausting the trial courts jurisdiction and for triggering the Defendant's right of appeal when the Sentence and Judgment finally disposes of all issues in the criminal proceeding and leaves no question to the future judgment of the Court and is neither interlocutory or conditional in any respects. State v. Wakefield, 689 SW2d 809, 812 (Mo App. S.D. 1985).

The Prosecutor in this case could have charged Akins with one count of assault second degree naming all three victims or could have charged in three separate counts as he did. Regardless of whether the Information consisted of one or three counts, the fact remains that there is but one Judgment disposing of all of the issues of the case. The resulting civil loss of license cannot and should not depend upon whether the Prosecuting Attorney charges the case in one count with three victims or in three separate counts of an Information. There should be but one Judgment of conviction and in this case, the ten year revocation is neither valid nor authorized under §309.060(9) RSMo and should be set aside by this Court.

CONCLUSION

For the foregoing reasons, the trial court's judgment for the Director should be reversed.

By:_____

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that:

1. This brief contains 3,589 words and 428 lines in compliance with Mo. S. Ct. R. 84.06(b), according to Microsoft Word 2003's word count feature;

2. The CD containing this brief filed concurrently herewith has been scanned for viruses and is virus-free; and

3. On June 24, 2009, two copies of this brief and a CD containing a copy of the brief were sent first-class mail with postage prepaid to:

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APPENDIX

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