SC90181

IN THE
SUPREME COURT OF MISSOURI

JUSTIN WAYNE AKINS,

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Respondent.

RESPONDENT'S SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

OTHER AUTHORITIES

STATEMENT OF FACTS

The few pertinent facts in this case can be stated very briefly.

The Director of Revenue received from the circuit court for Jefferson County by electronic transmission three separate records of conviction, denominated separately as Court Report ID numbers 08141T01812, 08141T01813, and 08141T01814. L.F. 13 – 15. The notifications included a date of violation – in each instance, July 20, 2006 – and a date of conviction – in each instance, February 11, 2008.

The Director posted the pertinent data from each report separately to Akins' Missouri Driver Record and assessed twelve points for each reported conviction. L.F.10. The Director then notified Akins, as required by the provisions of § 302.060(9),[1] RSMo Supp. 2008, that Akins' driving privileges would be denied for a ten-year minimum period effective June 24, 2008 as required by the provisions of § 302.060(9) for his having been "convicted more than twice for offenses relating to driving while intoxicated." L.F. 12. The Director also notified Akins of a one-year license revocation for excessive point accumulation under § 302.302 as a result of a total assessment of 36 points, also effective June 24, 2008. L.F. 10.

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[1] All references are to RSMo Supp. 2008 unless noted otherwise.

On June 19, 2008, Akins filed a petition for review in the circuit court for Jefferson County pursuant to § 302.311, RSMo 2000, challenging the ten-year license denial. L.F. 3-5. The parties stipulated that

> [Akins] was involved in an auto accident while he was intoxicated which resulted in injury to three people; [and that Akins] pled guilty and was convicted of three counts of assault 2nd degree ....

L.F. at 17.

Based on *Timko v. Director of Revenue*, 86 SW3d 132 (Mo. App. E.D. 2002), the circuit court sustained the Director's action. L.F. at 18-20.

ARGUMENT

The question before this Court is one that divides the districts of the Missouri Court of Appeals: whether, in the scheme enacted in Chapter 302, the Director of Revenue may rely on circuit court reports of convictions for driving while intoxicated, or instead must look beyond those reports and determine whether multiple convictions arose from a single instance of driving while intoxicated. The language of the statute simply does not contemplate that the Director is to do more than the ministerial task of reading the report and taking the steps that the information stated in the report requires, as the Eastern District held. The Western District demands more.

The question arises here in the context of § 302.060(9), which imposes restrictions on drivers' licenses for anyone "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...." Here, the Director received three separate electronic reports, each stating that Akins had been convicted of felony vehicular assault. L.F. at 13-15. Each one shows that on February 11, 2008, Akins was convicted of felonious vehicular assault from an arrest on July 20, 2006. *Id.* But the documents are not identical; they list different "ticket/arrest" numbers. *Id.* Thus it was clear on the face of the reports that

they were not inadvertent duplicates – and that each was a report of what the circuit court deemed to be a "conviction."

Akins claims that the Director was required to consolidate the convictions, *i.e.*, to record and act on just one "conviction" for purposes of § 302.060(9) because, though he struck three people and was charged with and convicted of three felonies, the assaults took place during a single drunk driving episode. He points to nothing in the record that suggests the Director knew or could have known that was the case. The only support for it in the record is a very brief stipulation to that effect entered into in the circuit court; the record does not contain any document or testimony on which the stipulation was based. L.F. at 17. The electronic reports themselves do not show whether Akins received three convictions because he drove while intoxicated once on July 20, 2006, or because he drove multiple times. Again, they simply show three separate felony assault convictions.

The responsibilities of the circuit courts and the Director of Revenue with regard to drunk driving offenses are found in two sections of Chapter 302. First, the circuit court is required to provide notice to the Director of each "conviction":

> Whenever a court convicts a person of a violation of section 303.025, RSMo, or enters an order of court-ordered supervision, the clerk of the court shall

within ten days forward a report of the conviction or order of supervision to the director of revenue in a form prescribed by the department of revenue.

§ 302.303.1. The Director is then required to asses "points" for each conviction:

> The director of revenue shall put into effect a point system for the suspension and revocation of licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is ...
>
> (8) For the first conviction of driving while in an intoxicated condition or under the influence of controlled substances or drugs ..... 8 points
>
> (9) For the second or subsequent conviction of any of the following offenses however combined: driving while in an intoxicated condition, driving under the influence of controlled substances or drugs or driving with a blood alcohol content of eight-hundredths of one percent or more by weight ..... 12 points

(10) For the first conviction for driving with blood alcohol content eight-hundredths of one percent or more by weight In violation of state law ..... 8 points

In violation of a county or municipal ordinance or federal law or regulation ..... 8 points

§ 302.302.1. The Director is to deny driving privileges to those who have been convicted "more than twice":

The director 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, 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 ....

§ 302.060.1. Again, here the circuit court notified the Director of three convictions. Akins does not dispute that the Director then did precisely what the statute required her to do once she learned of a third conviction, but instead argues that there really aren't three convictions for purposes of § 302.060(9) – *i.e.*, that he really was only convicted once.

That argument departs from the common use of the term – and the court must "take the words in a statute in their plain and ordinary sense."

Lincoln Industrial, Inc. v. Director of Revenue, 51 S.W.3d 462, 465 (Mo. banc 2001). If it must refer to some authority to define the word, the court looks first to dictionaries. *Id.*; *Curry v. Ozarks Electric Corp.*, 39 S.W. 3d 494, 496 (Mo. banc 2001). Dictionary definitions support the conclusion that a person is "convicted" of individual offenses regardless of any factual connection among them and regardless of whether they are charged or tried together.

A "conviction" is "the act of proving, finding, or adjudging a person guilty of an offense or crime." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) at 499. It is a noun derived from "convict," which means "to find or declare guilty of an offense by the verdict or decision of a court or other authority." *Id.*

The legal definition largely parallels the lay one: to "convict" means "[t]o find (a person) guilty of a criminal offense," and a "conviction" is a "judgment (as by a jury verdict) that a person is guilty of a crime." BLACK'S LAW DICTIONARY (7th Edition, West 1999) at 355. Similarly, Missouri courts have defined a "conviction" as occurring when "judgment has been pronounced upon the verdict," *Yale v. Independence*, 846 S.W. 2d 193, 194 (Mo. banc 1993), or as "a final judgment when one suffers a loss of privileges or the imposition of a disability," *State v. Prell*, 355 S.W. 3d 447, 450 (Mo. App. W.D. 2000).

Here, the records transmitted to the Director by the circuit court of Jefferson County showed that Akins was "f[ou]nd or declare[d] guilty of [three] offense[s] by the verdict or decision of a court or other authority," or to put it another way, that he three times "suffer[ed] a loss of privileges or the imposition of a disability." Each conviction is independent; were even two of the three reversed, Akins would still have a sentence for vehicular assault. Under the dictionary definitions, Akins was "convicted" more than twice.

Because § 302.060(9) has a plain and natural meaning, courts cannot resort to rules of construction. *Jones v. Director of Revenue*, 832 S.W. 2d 516 (Mo. banc 1992). But even if the Court found ambiguity and invoked rules of construction, the first rule it must apply would lead to affirmance.

Because § 302.060 is remedial in nature, and is intended to protect the public, it "must be liberally construed to effect its beneficiary purpose." *Wilson v. Director of Revenue*, 873 S.W. 2d 328, 329 (Mo. App. E.D. 1994), citing *Appleby v. Director of Revenue*, 851 S.W. 2d 540, 541 (Mo. App. W.D. 1993). *See also Messer v. King*, 698 S.W.2d 324, 325 (Mo. banc 1985) (remedial purpose and liberal construction of § 302.060(10)). Put another way, § 302.060 must be liberally "interpreted 'in order to accomplish the greatest public good.'" *Hagan v. Director of Revenue*, 968 S.W. 2d 704, 706 (Mo. banc 1998). Thus "all reasonable doubts" about the legislature's intent in drafting the statute "should be construed in favor of applicability to the

case." *Martinez v. State*, 24 S.W. 3d 10, 19 (Mo. App. E.D. 2000). Akins' construction runs directly contrary to the "greater public good." It requires a narrow, rather than a liberal construction of the law. It thus could not be accepted even if resort to rules of construction were required.

And if the Court were to construe the statute, it would presumably do so consistent with other statutory uses of "conviction" in Chapter 302. In establishing a system of "points" leading to license revocation, the legislature used the word "conviction," again without definition. But its intention is suggested by a particular parallel. Twelve points are allocated to "the second or subsequent conviction for any of the following offenses however combined," followed by a list of drunk driving offenses. § 302.302.1(10). The words "however combined" suggest that it doesn't matter whether the convictions are for separate instances or for the same instances. The statute then also applies the 12-point penalty to "[a]ny felony involving use of a motor vehicle." § 302.302.1(11). The statute thus equates a "felony" with a "conviction" – much as do the dictionary definitions discussed above. There is no doubt here that Akins committed three "felonies," for he received three verdicts and three sentences. Again, that means he was convicted three times.

Section 558.016 similarly demonstrates that the legislature knows how to combine multiple convictions. There, in authorizing extended sentences for offenders found to be "prior," "persistent," or "dangerous," § 558.016, the

legislature did not use the term "conviction." But it did address repeat offenders – which it defined as those who have "pleaded guilty to or has been found guilty of two or more felonies *committed at different times*," § 558.016.3 (emphasis added), or "pleaded guilty to or has been found guilty of two or more class A or B misdemeanors, *committed at different times*," § 558.016.5 (emphasis added). The legislature could have similarly limited § 302.060 to convictions for offenses committed at different times. But it did not.

Akins may argue that the result is unfair – that he is subject to a 10-year ban because he just happened to assault three people rather than one. The issue of whether the law ought to treat the person who injures three persons with a single act of culpable negligence differently from the one who injures three persons in separate acts "is one of policy that has been determined by the legislature." *Hagan*, 968 S.W. 2d at 706. Indeed, this Court has recognized that "the killing by culpable negligence of three different human beings" constitutes "three separate offenses . . . even though the three deaths arose out of the same acts constituting culpable negligence." *State v. Whitley*, 382 S.W. 2d 665, 667 (Mo. 1964). There is, quite simply, nothing in Chapter 302 that suggests the legislature did not understand or ignored the basic point that each offense leads to a separate conviction, regardless of whether they take place at a single moment, or are separated by

minutes or years, and regardless of whether they are charged and tried together or separately.

Missouri courts have long and consistently recognized that questions of the wisdom of, or issues of policy of, legislation are for the legislature alone, and that a legislative act should not be held invalid merely because of the possible harshness of some of its provisions in some circumstances. *Spitcaufsky v. Hatten*, 182 S.W.2d 86 (Mo. 1944). As long as the legislature is acting within the scope of its police power, courts are not to inquire into its wisdom and policy, or undertake to substitute their discretion for that of the legislature. *Poole & Creber Market Co. v. Breshears*, 125 S.W.2d 23 (Mo. 1939). "The legislature is free to enact laws that it deems reasonable, free from the meddling of the courts as to their reasonableness. *Johnson v. Missouri Department of Health and Senior Services*, 174 S.W3d 568, 582 (Mo. App. W.D. 2005). In *Messer v. King*, 698 S.W.2d 324, 325 (Mo. banc 1985), this Court further held that remedial statutes, such as § 302.060, should be enforced as they are written, and a court is to look to the language of the statute, and not to the reasonableness of the result. "Where the statutory language is clear, the matter of reasonableness is for the legislature," *Id.*, at p. 325. Here, the language is clear. And it does not support Akin's proposed rule, which is apparently that once either a driver becomes intoxicated or an intoxicated person starts to drive, as a matter of law they cannot commit

more than one offense leading to conviction until they sober up and then start the process again.

CONCLUSION

For the reasons stated above, the trial court's judgment should be affirmed.

Respectfully submitted,
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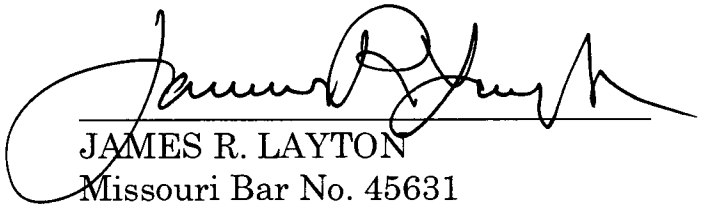

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CERTIFICATION OF SERVICE AND OF COMPLIANCE

WITH RULE 84.06(b) AND (c)

The undersigned hereby certifies that on this 7th day of August, 2009, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,679 words.

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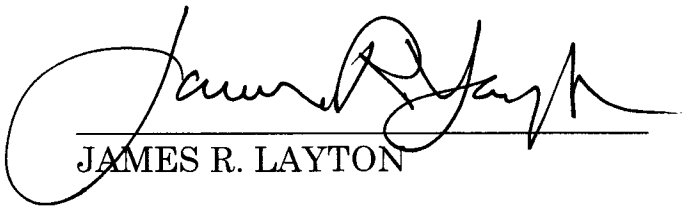

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