APPEAL NO. SC90738

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI,
Respondent,

vs.

WILLIAM R. SCHROEDER,
Appellant.

APPEAL FROM CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
20th JUDICIAL CIRCUIT, DIVISION V
THE HONORABLE GAEL D. WOOD
(Cause No. 07E5-CR00019-01)

APPELLANT'S REPLY BRIEF

Frank K. Carlson #27840
Sarah K. Tupper #60695
THE CARLSON LAW FIRM
17 South Oak Street
Union, Missouri 63084
(636) 583-8300
(636) 583-2523
Email: fcarlson@usmo.com
ATTORNEYS FOR APPELLANT

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POINT I

Respondent argues that the evidence was sufficient to prove that Mr. Schroeder was within three hundred feet to the rear of another vehicle traveling in the same direction, because Trooper Keathley stated in his report that he noticed the bright headlights came on "as [he] began to pass," and such a statement "necessarily implies" that Keathley moved from behind the vehicle to the front, and from this implication the trial court could "reasonably infer" that Schroeder switched to his high-beams well within the 300 feet Respondent admits is required by the statute. (Resp. Brief 13-14.)

But this inference based upon an implication does not meet the State of its burden to prove each element of the offense. Keathley did not testify about distance, he did not testify as to the manner in which he passed Mr. Schroeder's vehicle, and he did not testify as to what "in front of it" meant. He did not testify to the two vehicles' speeds so that the distance between the vehicles could be extrapolated. The State here asks this Court to engage in rank speculation. There was no evidence adduced regarding distance between the two vehicles. The State had the opportunity to present evidence, if it had any, through a simple question directed to its sole witness about what distance was between the two vehicles when the "bright headlights" came on. It failed to do so and thus failed to prove one element of the offense charged.

Respondent wholly fails to respond to Schroeder's argument that his vehicle was not traveling at all, but rather had come to a stop on the shoulder of the road before the

high-beams allegedly came on. Because Mr. Schroeder's vehicle was not "traveling," the headlight law, § 307.070 was inapplicable to Mr. Schroeder.

Respondent argues that the evidence was sufficient to prove that the "glaring rays" from Mr. Schroeder's high-beams were aimed so as to project into Keathley's eyes. But contrary to the State's assertion, common experience teaches that high-beam headlights, if so aimed, shine into the eyes of oncoming drivers. Thus if one is outside the pattern of light projected by the headlights one can perceive the difference between high-beams and low-beams without being subjected to the glaring rays. § 307.070 itself acknowledges this truth by allowing high-beam use so long as the headlights are "so aimed that the glaring rays are not projected into the eyes of the other driver." The fact that Trooper Keathley would have used his eyes to perceive a switch from low-beams to high-beams is meaningless. One can follow a vehicle and perceive with one's eyes when its driver switches from low-beams without being subjected to its glaring rays. A car that is pulled to the shoulder can be angled slightly away from the road bed sufficient that its high-beams do not project glaring rays into the eyes of any motorist.

In fact, §307.070 RSMo. does not differentiate between high-beams and low-beams or between multi-beam headlights and single-beam headlights. § 307.070, despite it's title, does not require a driver to dim his or her headlights by switching from high-beams to low-beams at all. It only requires that "the driver … use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the other driver…." Thus one can violate this statute by employing improperly aimed low-beams. Conversely, one can remain in compliance with this statute by employing high-

beams, or "brights," that are appropriately aimed. Evidence that Appellant's "bright headlights" came on, in the absence of evidence as to how they were aimed does not show a violation of § 307.070 RSMo. beyond a reasonable doubt. The phrase "glaring rays" does not carry a "specialized meaning that requires some sort of additional proof." (Resp. Brief 14.) It is plain English. It is an element of the offense defined by the statute under which Appellant was charged. Respondent failed to put on any evidence whatsoever that Appellant failed to "use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the other driver."

Respondent's cited cases are unavailing as to this point. In *Garey v. Anco Mfg. & Supply Co.*, 221 F.2d 683 (8th Cir. 1955), the Eighth Circuit merely approved of the trial judge instructing the jury with reference to the failure to dim headlights statute in a personal injury action where there was a question of contributory negligence; namely, where the issue was whether the plaintiff had a defense to contributory negligence because defendant had projected glaring rays into plaintiff's eyes. This case simply has no bearing on whether or not the State put on any evidence about Mr. Schroeder's lights projecting glaring rays into Trooper Keathley's eyes. The same holds true for *Fuller v. Baxter*, 284 S.W.2d 66 (Mo.App. 1955), where the appellate court found that the jury instruction substantially followed the language of the statute. In *Fuller*, in fact, there was testimony by the oncoming driver that he was blinded by the defendant's bright lights and that he "couldn't see where [he] was going." *Id.* at 69. Whether the trial court properly instructs a jury as to the elements of an offense does not affect the State's burden to prove those elements. The State again could have put on evidence, if it had any, of whether Mr.

Schroeder's lights projected glaring rays into Trooper Keathley's eyes, by simply asking Trooper Keathley. It failed to do so.

Appellant having shown State's failure to adduce any evidence on two elements of the Count III infraction now prays this Court will reverse the judgment of the trial court, set aside Appellant's conviction under Count III of the Indictment, referred to there as "failure to dim headlights" and remand to the trial court for the entry of a not guilty judgment thereon.

POINT II

Respondent argues that Mr. Schroeder's motion to suppress should have been denied because, first, Trooper Keathley did not technically stop Mr. Schroeder, as Mr. Schroeder had already pulled over on his own, and second, because the incident was not a "seizure" within the meaning of the Fourth Amendment.

First, Respondent cites no authority for its argument that under the fourth Amendment a seizure of the person of a motorist cannot occur when the motorist's vehicle is already stopped and the motorist has already exited his or her vehicle. The law is otherwise.

As Respondent concedes, a Fourth Amendment seizure of an individual occurs when governmental authorities "by means of physical force or show of authority . . . restrain[ ] the liberty of a citizen." *Terry v.* Ohio, 392 U.S. 1, 19 n. 16. A seizure can occur when a vehicle is already stopped, just as an initially valid seizure may become unconstitutional. In *State v. Roark*, 229 S.W.3d 216 (Mo.App. W.D. 2007), a trooper followed defendant on a highway, defendant pulled off the highway, parked his car and walked into a hotel bar before the trooper made contact and asked defendant to walk outside with him. The State argued that no stop actually occurred, since defendant "exited his vehicle and entered the bar of his own volition" (i.e. no traffic stop occurred), and the trooper first encountered defendant in "a business establishment open to the general public." *Id.* at 220. The Court of Appeals disagreed, finding that at the point the trooper asked defendant to walk outside with him, a reasonable person in defendant's position would not have felt free to disregard the trooper and "go about his business."

The Court held that a Fourth Amendment stop had occurred. *Id.* Ultimately, the Court determined that the trooper's observation of defendant's passenger-side tires going over the fog line, combined with an anonymous tip concerning a "possible intoxicated driver" did not constitute articulable facts that would "warrant a man of reasonable caution in the belief" that a crime had been committed. *Id.* at 222. *See also U.S. v. Jefferson*, 906 F.2d 346, 349-51 (8th Cir. 1990)(holding that defendants' statements, obtained by a trooper who approached a parked vehicle and who did not have a reasonable basis for suspicion that defendants were engaged in criminal activity at the time they were seized, were properly excluded). Similarly, Trooper Keathley's observations did not constitute articulable facts showing that an offense was being committed.

Trooper Keathley testified that he detained and questioned Mr. Schroeder, because Mr. Schroeder's "bright lights came on…and stayed on." (TS 7.) But as shown in Point I, Trooper Keathley did not observe a violation of the charged statute, nor of any law. He was thus not authorized to accost, detain and question Mr. Schroeder. Not even the "reasonable suspicion" standard was met; Trooper Keathley did not have reasonable suspicion, based on "specific and articulable facts" that illegal activity had occurred or was occurring. *Terry*, 392 U.S. at 21. According to the evidence, Appellant did not use a distribution of light or composite beam so aimed that the glaring rays were projected into the eyes of any other driver. Troooper Keathely did not observe the violation or the incipient violation of any law. When Trooper Keathely saw that Appellant's car had pulled to the shoulder and switched on his brights, the officer's Constitutional command was to go on his way and leave Mr. Schroeder alone.

According to the evidence, Appellant did not commit the infraction of failure to dim headlights in violation of Mo. Rev. Stat. § 307.070, for all of the reasons discussed in Point I, above. Because the alleged violation of that statute was the basis for Appellant's detention, the detention was an unreasonable seizure of Appellant's person. All evidence and statements obtained through the illegal and unconstitutional detention and questioning should have been suppressed. U.S. CONST. amend. IV. Further, no evidence would have been available against Mr. Schroeder had the trial court properly suppressed the evidence obtained after the illegal seizure. The error is therefore not harmless beyond a reasonable doubt. *State v. Wolfe*, 13 S.W.3d 248, 263 (Mo. banc 2000).

Respondent's brief posits that Mr. Schroeder was in fact seized when Appellant admitted that he was illegally driving without a license, and the officer immediately ordered Appellant into his patrol car. (Resp. Brief 20.) At that moment, Trooper Keathely was obligated to Mirandize Mr. Schroeder. *Miranda v. Arizona*, 384 U.S. 436 (1966). He did not do so. Accordingly, Appellant is compelled to respond to an issue related to the seizure not raised in the initial brief. Because this issue was injected into the appeal by Respondent, ordinary standards of review apply. In the event this Court determines that ordinary review is precluded, "[w]hether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Mo. R. Crim. Pro. 30.20.

Trooper Keathley conducted a custodial interrogation of Mr. Schroeder without complying with the *Miranda* requirements, and statements and evidence obtained as a

result of said interrogation were admitted over objection at trial, in violation of Mr. Schroeder's privilege against self-incrimination guaranteed by the United States and Missouri Constitutions. U.S. Const. amend. V, XIV; Mo. Const. art. I, § 19.

In *Miranda v. Arizona*, the United States Supreme Court held that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. 436, 444 (1966). The Court later clarified that it "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976).

The test for whether a person is in custody "or otherwise deprived of his freedom of action in any significant way" is based on a reasonable person standard. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Immediately after admitting to committing the crime of driving without a license, Mr. Schroeder was placed in Trooper Keathley's patrol car. Any reasonable person would have understood he was not free to leave at that point and continue driving with no license, or even to simply walk away from the arresting officer.

Respondent claims that Mr. Schroeder was seized at that point. After so seizing Mr. Schroeder, Trooper Keathley confirmed that Mr. Schroeder's driver's license had been revoked, and then proceeded to question Mr. Schroeder, administer a preliminary breath test, and administer field sobriety tests. Not until he took Mr. Schroeder back to the police station did he advise Mr. Schroeder of his *Miranda* rights. All statements and evidence obtained after the seizure admitted by Respondent were obtained in violation of Mr. Schroeder's privilege against self-incrimination, as guaranteed by the United States and Missouri Constitutions and should have been suppressed. U.S. Const. amend. V, XIV; Mo. Const. art. I, § 19. The trial court denied Appellant's Motions to Suppress Statements and Evidence on grounds the same were obtained involuntarily and without advice of his constitutional rights, including his privilege against self-incrimination. (LF 18-23.)

Ordinary review of this ruling "is limited to whether the decision is supported by substantial evidence," and reversal is required "if clearly erroneous." *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009). Plain error review involves a two-step process. *State v. Smith*, 185 S.W.3d 747, 757 (Mo.App. S.D. 2006); *State v. Dowell*, 25 S.W.3d 594, 606 (Mo.App. W.D. 2000). First, appellant must show that the error is on its face a plain error. *Id.* The error must be "evident, obvious, and clear." *State v. Stewart*, 997 S.W.2d 36, 40 (Mo.App. W.D. 1999). Here, Respondent plainly admits that Mr. Schroeder was seized at the time he was placed in the patrol car. Respondent also admits that Mr. Schroeder was not *Mirandized* at that point, but that questioning and investigation continued. Respondent further admits that Mr. Schroeder was not *Mirandized* until

Trooper Keathley had transported him back to the police station. Here, the error of admitting statements and evidence obtained in violation of Mr. Schroeder's constitutional privilege against self-incrimination is "evident, obvious, and clear."

Second, an appellant must show that the error he alleges, on its face, establishes substantial grounds for believing that manifest injustice or miscarriage of justice has occurred. *State v. Brink*, 218 S.W.3d 440, 448 (Mo.App. W.D. 2006). If, on review, there is a strong showing of manifest injustice, or miscarriage of justice, an appellate court will reverse a trial court for plain error. *State v. Mickle*, 164 S.W.3d 33, 59 (Mo.App. W.D. 2005). Here, Mr. Schroeder's fundamental constitutional rights were violated, and all the evidence obtained against him was fruit of the poisonous tree. *See Wong Sun v. U.S.*, 371 U.S. 471, 488 (1963). Manifest injustice occurred in admitting the illegal obtained evidence.

Accordingly, this Court must reverse the trial court's Order denying Appellant's Motion to Suppress Statements and Motion to Suppress Evidence, reverse the trial Court's judgment of guilt as to Counts I and II, for driving while intoxicated and driving while revoked respectively, and remand this case to the trial court for a new trial on Counts I and II, with specific instruction to the trial court to sustain Appellant's motions to suppress and exclude all statements and evidence obtained by virtue of Appellant's detention by Trooper Keathley.

POINT III

In arguing that Missouri's statutory scheme for driving while intoxicated, Mo. Rev. Stat. §§ 577.001 and 577.010, is unconstitutional because the definition of intoxication contained within that scheme, "under the influence," is void for vagueness, Appellant is not suggesting, as Respondent asserts, that "only an egregious degree of intoxication should be prohibited for drivers." (Resp. Brief 26.) Rather, Appellant argues that there must be guidance on exactly what constitutes "intoxication" at all in order to give notice to citizens and provide explicit standards for those charged with enforcement. Respondent's argument that "the degree of intoxication is not relevant. It is the fact, not the degree, of intoxication that is the significant issue to consider" begs the question. (Resp. Brief 26.) The fact of intoxication is precisely what is at issue, because varying degrees of effect on a person from ingesting alcohol may obtain. It is the very nature of intoxication that is the question; what does it mean to be "intoxicated" or "under the influence"? Without some reference to impairment or inability to safely operate a vehicle, the legislative purpose in preventing unsafe driving is not effectuated, as Respondent argues strenuously. (Resp. Brief 29-30.) Appellant does not dispute that it is sound public policy to prohibit "drunk driving," if drunk driving is defined to mean driving while unable to safely operate a vehicle. However, that is not what is criminalized in the current statutory scheme. It is not enough for appellate courts to inject that meaning into the statute.

Every day citizens must be able to make decisions about their behavior and conduct without guessing at the meaning of Missouri's statutes. If a person has a glass of

wine at dinner, is she under the influence of alcohol? For how long? Does it matter what her weight is, or how much she has to eat, or her metabolic rate, or the alcohol by volume content of the wine? If a person has six beers, does it matter how long ago he had them? Does it matter if they were light or non-alcoholic beers? These are the questions that people have to ask themselves under the current statutory scheme, because what is criminalized is not operating a vehicle unsafely. What is criminalized is operating a vehicle "under the influence." This scheme does not provide adequate notice or explicit standards for enforcement and as such unconstitutionally violates the requirements of due process. U.S. CONST. amend V, XIV; MO. CONST. art. I, § 10; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Respondent argues that Missouri's DWI statute is not unconstitutionally vague as applied to Mr. Schroeder, and insists that the record "clearly shows that he was intoxicated by anyone's definition." (Resp. Brief 31.) This also begs the question; whether Mr. Schroeder was intoxicated at the time of his seizure is the question, and the vague statute does not provide an answer. The record reflects that the stop occurred at around 2:00 in the morning, a time when tired eyes can be bloodshot or glassy in the absence of alcohol intake. Mr. Schroeder, who was 63 at the time and wore insoles to help manage leg pain (A30, TS11), told the trooper he had consumed six beers, but did not say when he had consumed them or whether they were light or non-alcoholic. Trooper Keathley did not testify as to whether he was familiar with Mr. Schroeder's speech so as to know whether it was comparatively slurred. Failure to perform field sobriety tests well does not prohibit Mr. Schroeder from challenging the statute on due

process grounds; whether he was "under the influence" of alcohol might well have been answered differently if the statute adequately defined the phrase. Mr. Schroeder and Trooper Keathley were unconstitutionally disadvantaged by the statute's failure to provide adequate guidance as to prohibited behavior.

In Missouri, there is no definition of "under the influence" available to a jury, to police officers trying to enforce the law without intruding upon the rights of the public or to an average person attempting to understand and comply with the laws of the state. There is no reference to impairment or lack of control. There is no requirement that one's ability to drive safely be compromised. There is no guidance whatsoever as to what is prohibited. On its face and as applied to Appellant, the Missouri's DWI statutory scheme, sections 577.001 and 577.010, is unconstitutionally void for vagueness.

For all the above-stated reasons, Appellant prays this Court will enter its order and Opinion finding and declaring Missouri's DWI statutory scheme, Mo. Rev. Stat. §§ 577.001 and 577.010, unconstitutionally void for vagueness, reversing the judgment of conviction against Appellant under Count I of the Indictment, and remanding the case to the trial court with instruction to enter an order dismissing Count I of the Indictment. Appellant submits to the Court that should the relief sought by Appellant under Points Relied On I and II above be fully granted, it will be unnecessary to address the unconstitutional vagueness of Missouri's DWI statutory scheme.

CONCLUSION

Wherefore, Appellant William R. Schroeder prays this Court will enter its Opinion and orders:

1. As to Point III, declaring void for vagueness the Missouri DWI statutory scheme, Mo. Rev. Stat. §§ 577.001 and 577.010, reversing the judgment of guilt under Count I of the Indictment and remanding the cause to the trial Court with an Order to sustain Appellant's Motion to Dismiss Count I, unless this Court deems it unnecessary to reach the constitutional issues here presented by virtue of its decision to grant Appellant's prayed relief as to Points I and II;
2. As to Point I, reversing Appellant's conviction under Count III of the Indictment of the infraction of failure to dim headlights pursuant to Mo. Rev. Stat. § 307.070, referred to there as "failure to dim headlights" and remand to the trial court for the entry of a not guilty judgment thereon.
3. As to Point II, reversing the trial court's Order denying Appellant's Motion to Suppress Statements and Motion to Suppress Evidence, reversing conviction as to Counts I and II, for driving while intoxicated and driving while revoked respectively, and remanding this case to the trial court for a new trial on Counts I and II, with specific instruction to the trial court to sustain Appellant's motions to suppress and exclude all statements and evidence obtained by virtue of Appellant's detention by Trooper Keathley.

CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This Brief complies with the information required by Rule 55.03;

2. This Brief complies with the limitations contained in Rule 84.06(b) and Special Rule No. 1(b);

3. The word count of this Brief is 3964.

4. The disk containing this Brief and provided to this Court, and the disks containing this Brief served upon opposing counsel, have been scanned for viruses and are virus free;

5. This Brief was prepared using 13 point Times New Roman font, in Microsoft Word 2004.

Respectfully submitted,

_____

Frank K. Carlson #27840
Sarah K. Tupper #60695
THE CARLSON LAW FIRM
17 South Oak Street
Union, Missouri 63084
(636) 583-8300
(636) 583-2523
Email: fcarlson@usmo.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned counsel certifies that he has served two true, accurate, and complete copies of the foregoing instrument and one copy of a disk containing this instrument upon **Chris Koster**, Attorney General's Office, P.O. Box 899, Jefferson City, Missouri 65102 this 29th day of September, 2010.

_____

Frank K. Carlson