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LEGAL BULLETIN NO. 05-6

**SUBJECT: Recent Decisions - Driving While Intoxicated Cases**

Recently, Missouri courts have handed down numerous decisions in the area of driving while intoxicated (DWI) that are of interest to law enforcement. A short summary of each case follows. These decisions involve appeals from findings in administrative hearings following either the suspension or revocation of a driver's license or criminal cases involving DWI charges.

***Herr v. Director of Revenue***, 134 S.W.3d 686 (Mo. App. 2004).

In this case, Herr's license was suspended following the trial court's judgment that his license was subject to suspension under the provisions of Section 302.505 of the Revised Statutes of Missouri.<sup>1</sup>

The facts of the case are as follows:

On April 14, 2002, a Missouri State Trooper saw a vehicle being operated by Herr traveling down a hill at a speed below the posted speed limit. The vehicle pulled over to the shoulder of the road and the trooper saw Herr exit the vehicle on the driver's side. Herr advised the trooper that the car was out of gas and no one was driving, but he and three (3) passengers had been pushing the car. The trooper smelled alcohol on Herr's breath and noticed his speech was slurred. Following the administration of a field sobriety test, which Herr failed, Herr submitted to a chemical test which revealed a blood alcohol content of .128 percent.

At trial, Herr contended that because his car was out of fuel, he could not have been operating it as that term is defined in Missouri law. The court held that it is not necessary for a vehicle to be running on its own power to be driven, used or operated. The court held that Missouri law aims to protect people from the danger presented by

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<sup>1</sup> Section 302.505 of the Revised Statutes of Missouri provides in part: 1. The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight, based on the definition of alcohol concentration in section 302.500, or where 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 driving with excessive blood alcohol content in violation of section 577.012, 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.

intoxicated persons attempting to guide a vehicle along the road and found that this danger was not reduced by the fact that the moving vehicle was out of fuel. Because the trooper saw Herr exit the driver's side of the vehicle, it could reasonably be believed that person had steered the vehicle down the hill. Steering a vehicle that is in motion constitutes guiding a vehicle along or through and therefore, constitutes the act of driving under Missouri case law.

The suspension of Herr's driving privileges were upheld by the Court. The full text of this case can be accessed at:

<http://www.courts.mo.gov/courts/pubopinions.nsf/ccd96539c3fb13ce8625661f004bc7da/a8d72c04fc12569986256e6300795fe7?OpenDocument&Highlight=0,Herr>.

***State of Missouri v. Laplante***, 148 S.W.3d 347 (Mo. App. 2004).

The issue in the case involving Andrew Laplante was whether or not the definition of motor vehicle in the DWI statute includes motorized bicycles. The court determined that it did and upheld Laplante's conviction. The facts of the Laplante's case are as follows.

On May 3, 2002, at approximately 2:11 a.m., a Springfield, Missouri police officer observed two (2) mini-bikes operating without lights traveling northbound on a city street. The operators of the mini-bikes failed to stop at a stop sign at a four-way intersection and were pulled over for committing the traffic violation. The officer noticed that Laplante's eyes were bloodshot and asked if he had been consuming intoxicants. Laplante admitted that he had. Field sobriety tests were administered, and it was concluded that Laplante was under the influence of intoxicants and could not safely operate a motor vehicle. Laplante was transported to the jail and administered a breathalyzer test which showed a blood alcohol content of .102. Laplante was charged with DWI and disobeying a stop sign.

At trial, Laplante argued that he was driving a motorized bicycle, a vehicle that is excluded from the definition of "motor vehicle" in Section 302.010. Testimony at trial indicated that the mini-bike had an engine size of 49 cubic centimeters and a top speed of 22-25 miles per hour. Laplante was subsequently found guilty on both charges and appealed.

The Appellate Court upheld the convictions and found that state law defined a motorized bicycle as meaning any two (2) or three (3) wheeled device having an automatic transmission and a motor with a cylinder capacity of not more than 50 cubic centimeters capable of propelling the device at a maximum speed of not more than 30 miles per hour on level ground. The statute specified that a motorized bicycle shall be considered a motor vehicle for purposes of any insurance policy. The court found that there was no sound reason for excluding motorized bicycle operators from the DWI statute. "The motorized bicycle darting down a public street under the control of an

intoxicated driver creates a clear hazard to the traveling public just as a standard motor vehicle operated by an intoxicated driver does.”

The court further noted that the legislature has expressly prohibited the use of motorized bicycles on streets or highways without first obtaining a motor vehicle license. The court believed that the legislature appeared to have recognized that motorized bicycles riders should have a level of knowledge of traffic rules and physical characteristics that are required of all motor vehicle license holders. The full text of this case can be accessed at:

<http://www.courts.mo.gov/courts/pubopinions.nsf/ccd96539c3fb13ce8625661f004bc7da/9f2768defc39eb4286256f4e007392af?OpenDocument&Highlight=0,Laplante>.

***Murphy v. Director of Revenue***, WD64266 (Mo. App. 2005).

In this case, the Director of Revenue revoked Murphy’s driver’s license for excessive blood alcohol content. The Circuit Court admitted evidence of toxicology test results based upon a blood sample obtained from Murphy by the arresting officer after Murphy explicitly refused consent to obtain the blood. The facts of the case are as follows.

On July 25, 2003, Murphy was involved in two-vehicle injury accident. When the trooper arrived to investigate, he noticed that Murphy’s breath smelled of alcohol, his eyes were bloodshot and glassy, his pupils appeared dilated and his speech was slurred at times. Murphy admitted to drinking one (1) beer prior to the accident. Due to injuries, the trooper asked him to perform only one (1) field sobriety test, the results of which indicated Murphy was impaired. Murphy was placed under arrest for two (2) counts of second degree assault. As Murphy was being treated inside the ambulance, the trooper advised Murphy of his rights under the Implied Consent Law. Murphy refused to give a blood sample. Despite that refusal, the trooper directed the paramedic to take a sample of Murphy’s blood. The results of the toxicology test showed his blood alcohol content was .134. Shortly thereafter, Murphy’s license was revoked for one (1) year for driving a motor vehicle while his BAC was over .08%. Murphy appealed when the trial court entered judgment sustaining the Director’s revocation of Murphy’s driver’s license.

In order to make a case for revocation of Murphy’s license, the Director of Revenue has the burden of proving that Murphy was 1) arrested on probable cause to believe that he was driving and; 2) that he was driving when the alcohol concentration in his blood, breath or urine was .08% or more by weight. Murphy challenged the blood test results because of his refusal to submit to the blood test.

The court began by noting that because this is a civil case, the exclusionary rule would not be applicable and held that the issue here must be viewed solely in terms of consent. Under Missouri law, once an arrested driver refuses to consent to a blood test as provided for in Section 577.020, then pursuant to Section 577.041.1, “none shall be given.”

The court held that the statute was clear that once a refusal to consent is given, the penalty for the driver is that his driver's license may be automatically revoked for doing so. Once the driver refuses, the blood should not have been drawn. Because the blood draw was not performed in accordance with Missouri statutes, the court held that the blood test results were inadmissible.

The court then reviewed the case law concerning exigent circumstances which allows blood to be drawn as an exception to the Fourth Amendment. The court found, however, that the Fourth Amendment is not applicable to the current situation as the procedures to be followed in this situation are specifically governed by Missouri statutes.

The revocation of Murphy's license was reversed. The full text of this case can be accessed at:

<http://www.courts.mo.gov/courts/pubopinions.nsf/ccd96539c3fb13ce8625661f004bc7da/8940efe4472849d0862570260060e159?OpenDocument&Highlight=0,Murphy>.

***Richardson v. Director of Revenue***, 26580 (Mo. App. 2005).

In the *Richardson* case, the Department of Revenue revoked the driving privileges of Mark K. Richardson for allegedly refusing to submit to a chemical test of his blood alcohol content pursuant to Section 577.041 of the Revised Statutes of Missouri. Richardson appealed to the Circuit Court, and in that appeal the only evidence submitted was the Director of Revenue's records consisting primarily of the police reports completed by the arresting officer. This is a fairly common practice as a legally sufficient case can be made without the officer's live testimony. As this case illustrates, however, it is very important that an officer's report be accurate and consistently written, as in these cases there is no live testimony to remedy any internal inconsistencies with the police reports.

The trial court in the *Richardson* case set aside the revocation of Richardson's driver's license because the police reports were internally inconsistent with respect to whether Richardson refused the breathalyzer test. The Director of Revenue appealed, however, the appeal was unsuccessful.

The issue in this case was whether or not Richardson refused the Intoxilyzer 5000 after being informed of his rights under Missouri's Implied Consent Law. The officer's report indicated that although he initially agreed to take a breathalyzer, he changed his mind while the officer was preparing the Intoxilyzer 5000 and refused to be tested. In the narrative section of the Alcohol Influence Report (AIR), the officer reported that although Richardson had initially agreed to take the blood test, he later changed his mind and refused the test. On page 3 of the alcohol influence report, the officer wrote "refused" in the bottom right-hand corner of the page in the box provided for the officer to write Richardson's blood alcohol concentration. On the same page at

the top, the officer checked the “no” box following the question, “Having been informed of the reasons for requesting the test(s), will you take the test(s)?” Unfortunately, the officer also completed the operational checklist and certification section on page 3 of the AIR. The officer placed slash marks through each of the boxes next to steps 1 through 6 indicating to the court that each step was completed, however, no printout showing a refusal was included in the records. The trial court concluded that by checking the box next to Step 5, which read, “[W]hen display reads PLEASE BLOW, insert mouthpiece and take the subject’s breath sample,” it appeared the officer had taken Richardson’s breath sample. If that were the case, the court found that Richardson could not have refused the test. In addition, the officer completed the certification of examination by operator section which is found just below the operational checklist. This certification indicated the instrument was properly functioning and that no radio transmission occurred inside the room when the test was being conducted. The court again found that if the test was conducted, Richardson could not have refused the test.

Finally, although the officer was subpoenaed to appear and testify on behalf of Richardson, the officer failed to appear for trial. The court discussed the inconsistencies on the face of the AIR and concluded that the Director of Revenue failed to meet her burden of proving that Richardson refused the test and affirmed the judgment of the trial court setting aside the revocation of Richardson’s driving privileges.

The appellate court, in making its decision seemed to place weight on the fact that the officer failed to appear for trial and the fact that the officer failed to include a printed test result showing “refused” from the instrument used in the *Richardson* case.

This case illustrates the importance of carefully preparing the AIR, and the importance for appearing in any trial in connection with an arrest made. This case also stands for the proposition that if a person refuses the breathalyzer test, boxes should not be checked that would indicate in any way that a test was given.

The full text of this case can be accessed at: <http://www.courts.mo.gov/courts/pubopinions.nsf/ccd96539c3fb13ce8625661f004bc7da/a4e9ee58acea572f8625702d00707f33?OpenDocument&Highlight=0,Richardson>

Questions about any aspect of these cases may be referred to the Office of the General Counsel.

Lisa S. Morris  
General Counsel

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