MMACJA

MISSOURI MUNICIPAL AND ASSOCIATE CIRCUIT JUDGES ASSOCIATION

Regional Seminar Notebook

January 15, 2021

MMACJA Regional Seminar

January 15, 2021 Noon to 4:00 PM

Lake of the Ozarks - Lodge of Four Seasons
and Virtual Via Zoom Video Conferencing

Agenda

12:00 - 1:10 - Caselaw Update - Municipal Prosecutor Chris Graville

1:15 - 2:45 - Panel Discussion - Muncipal Judges from across the state will discuss operating courts during COVID-19 - what worked and what changes may be here to stay

3:00 - 4:00 - Top 12 complaints about judges (judicial ethics) presented by the Honorable Judge Roy Richter

Who Should Attend

All municipal court judges[1] and associate circuit judges hearing municipal and/or traffic violations and municipal appeals. Prosecutors are also encouraged to attend.

This seminar qualifies for 4.0 hours judicial CLE including 1.0 hour of ethics. MMACJA is an accredited sponsor under both Supreme Court Rules 15 and 18.

[1]All attorney municipal judges are required to complete 5 hours and non-attorney judges 15 hours of judicially related CLE each reporting year ending July 31, 2021. All municipal judges must complete 2 hours of ethics annually.

Case Summaries

STATE OF MISSOURI v. BRENDA THURMOND, ED 108253 (October 6, 2020)

Defendant appealed her jury trial conviction for possession of a controlled substance on three points: (1) that the trial court plainly erred in failing to sua sponte interrupt the State's comments during voir dire which minimized the beyond-a-reasonable doubt standard; (2) the trial court erred in denying Defendant's motion for a judgement of acquittal; and (3) the trial court plainly erred in allowing the State to argue that Thurmond's exercise of her right to trial made her unsuitable for probation and in considering this argument in imposing its sentence.

The Court of Appeals first addressed the fact that while a prosecutor defining reasonable doubt represents reversible error, the correct trial instruction can cure any harm from those erroneous statements. *See* State v. Green, 307 S.W.3d 197, 202–03 (Mo. App. S.D. 2010). The Court found the prosecutor's questioning to be more akin to a discussion than a definition and that ultimately the questions were helpful in identifying venirepersons who could conform their decision making to the burden of proof as instructed by the trial court. On the first point on appeal the Court held that the State did not offer an improper definition of reasonable doubt and the venire-persons were appropriately directed to follow the trial court's instructions. Interestingly, while only dicta, the Court did note that the State's comments regarding the burden of proof were the "kind of thing" people do "all the time."

Next the Court turned to the insufficient evidence point and restated that constructive possession requires, at a minimum, "evidence that the defendant had access to and control over the premises where the controlled substances were found." Citing *State v. Clark*, 490 S.W.3d 704, 709 (Mo. banc 2016) (internal quotation omitted). Contraband within defendant's easy reach and control, in defendant's purse, was sufficient to show possession. The Court of Appeals held that there was sufficient evidence to support Defendant's conviction.

Finally, the Court turned to the novel third point on appeal regarding retaliatory sentencing. The Defendant had previously chosen to forgo drug court and instead proceed to trial and the State made reference to this decision at sentencing. The Court analyzed the State's reference and comments and found them to be part of a larger argument showing why the Defendant's denial of having a drug problem would make her a bad candidate for probation. Critically, defendant did not show "statements made or attributable to the trial court" which directly connected her probation denial with her decision to proceed to trial. The Court held defendant failed to establish that the sentencing court impermissibly punished her for exercising her right to a jury trial. This case serves as a good reminder of how judges must be cautious in engaging so called retaliatory sentencing, especially in cases where there are difficult defendants.

STATE OF MISSOURI V. DAVID RODNEY SCHACHTNER SD36093 (October 6, 2020)

Defendant appealed his conviction of statutory sodomy in the first degree on six points, only one of which the Court found meritorious. The Court quickly disposed of point I, related to age, point III, regarding the defendant's browser history and video, point IV, regarding propensity evidence, and point VI regarding alleged cumulative prejudice. The only points addressed herein

are point II which was the alleged Brady violations regarding the trauma narrative and point V regarding the trial court's oral and written sentencing.

On the second point, Defendant claimed that the victim's story was material evidence and its suppression was prejudicial for Brady purposes. The Court reviewed the victim's story in light of the fact that the "trial below boiled down to whether [defendant] acted with the requisite mens rea." The Court ultimately held that Defendant failed to demonstrate the victim's trauma narrative was favorable to defendant and thus the State's failure to disclose was not a Brady violation. In dicta the Court reaffirmed the fact that "direct evidence [of a defendant's mental state] is rarely available, instead intent is most often proven by circumstantial evidence. Intent may be inferred from surrounding facts or the act itself." *State v. Greenlee*, 327 S.W.3d 602, 618 (Mo. App. E.D. 2010).

On the fifth point, Defendant argued the trial court erred in executing its judgement because the written sentencing was materially different from the oral pronouncement. The Court found a material difference did exist between the written judgement and the trial court's oral pronouncement of sentence and held that the oral sentence controlled. As a practical matter, pursuant to *Lemasters v. State*, 598 S.W.3d 603, 606 n.3 (Mo. banc 2020), the defendant's presence was not necessary for the trial court to enter a new judgement that correctly reflected the oral sentencing.

STATE OF MISSOURI V. KEITH ANDRE DANIEL SD36306 (October 8, 2020)

Defendant appealed his conviction for child molestation in the first degree on a single point, that the trial court abused its discretion in overruling defendant's hearsay objection to testimony of one victim regarding a statement made by another victim. Defendant argued that the testimony violated defendant's Sixth Amendment right to confrontation, however, defense counsel did not include the confrontation issue in the objection made at trial. The Court held that defendant's allegation of error was not preserved for appellate review because the confrontation objection was not made specifically. Further, the State declined to engage in plain error review pursuant to Rule 30.20 because the statement was not offered for the truth of the matter asserted and the statement was not testimonial hearsay, and thus not subject to the confrontation clause.

STATE OF MISSOURI V. RASHIDI DON LOPER SC98295 (October 13, 2020)

Defendant appealed his jury trial conviction of attempted rape, domestic assault, armed criminal action, and victim tampering on five points. Of note, defendant claimed that the circuit court abused its discretion in overruling an objection and admitting the "surprise" testimony of the treating physician as to the source of the victim's injuries. Upon review of the record, the Court noted that the trial court had identified over 250 pages of medical records which the state disclosed and defense counsel had conceded that defense knew about the treating physician. Still, defendant argued that the State had violated Rue 25.03 because the records did not disclose that the treating physician opinion that the victim's injuries were not self-inflicted. The Court held that the treating physician's testimony that the victim's injury was not self-inflicted was not surprise expert testimony and was therefore not subject to exclusion as a discovery sanction.

As a whole this case provides a great deal of insight about expert witnesses in criminal cases, although much of this occurs in dicta. For instance, in evaluating the testimony of the detective, the Court cited to Missouri case law, which says "[i]t is permissible for an officer to testify concerning their observation of a fact based on the witness' experience as a police officer." *State v. Galvin*, 483 S.W.3d 462, 467 (Mo. App. E.D. 2016). The Court went on to hold that the trial court did not plainly err in allowing the officer to testify about power and control dynamics in domestic violence cases based on defendant's untimely, unmeritorious objection.

Finally, defendant tried to argue the trial court abused its discretion in overruling his objection to admitting testimony from a director of a domestic violence shelter. The Court was presented with no caselaw that supported the defendant's position that there must be formal education or licensure for an individual to qualify as an expert. The Court found the statute's plain language contemplates an expert to be qualified based on training or experience alone. As such, the Court held the director of a domestic violence shelter was qualified as an expert on domestic violence despite the lack of formal education.

STATE OF MISSOURI V. MICHAEL L. ELLMAKER WD83026 (October 20, 2020)

Defendant appealed his conviction of driving while intoxicated following a jury trial on three points: (1) the trial court erred in finding he was a habitual offender; (2) the trial court erred in permitting testimony that referred to defendant's post-arrest silence; (3) the trial court failed to intervene when the State referred to defendant's post-arrest silence in its opening and closing. As to defendant's first point, the Court reviewed its earlier *State v. Gibson* decision saying "a past offense for which the appellant was convicted would not constitute an IRTO at the time of the offense being appealed, the prior offense did not qualify as an IRTO for enhancement purposes." However, the defendant was not arguing that his convictions were for conduct no longer constituting an IRTO, just they might have been for such conduct. The Court held the driver records showing six prior DWI convictions were sufficient to support finding the existence of prior IRTO.

As for points two and three, the Court engaged in a review of Fifth Amendment case law and in particular looked at *Doyle v. Ohio* which "held that it violates the defendant's due process rights to allow a defendant's post-arrest, post-Miranda silence to be used to impeach the defendant at trial." *State v. Ellmaker* citing 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Even though defendant conceded that his third point was not properly preserved, the Court exercised its discretion to engage in plain error review concerning defendant's constitutional rights. The Court held the police officer's testimony constituted a *Doyle* violation of defendant's right to remain silent and that the state's improper reference to defendant's silence were not harmless beyond a reasonable doubt. In dicta the Court said "it is reasonable to doubt that the erroneously admitted evidence (of [defendant's] assertion of his right to remain silent) did not contribute to the jury's guilty verdict – that it is reasonable to conclude that such evidence could have contributed to the jury's guilty verdict."

STATE OF MISSOURI V. DORYON MASON ED108248 (October 20, 2020)

Defendant appealed his conviction of robbery in the first degree and armed criminal action on a single point, the sufficiency of the evidence for his conviction. The Court expounded upon earlier case law which says that intent to commit the offense can be based on circumstantial evidence or inferred from surrounding facts such as defendant's conduct before, during, or after the act. Citing *State v. Osborn*, 504 S.W.3d 865, 876 (Mo. App. W.D. 2016). Mere presence or flight alone is insufficient as a matter of law to draw a reasonable inference but the State was not required to prove that defendant pointed a gun at victim, only that defendant acted with the purpose to promote or further the commission of the armed robbery. The Court looked at how the robbery occurred shortly after defendant gave the accomplice a gun at a location which "unquestionably supports a reasonable inference that [defendant] gave [accomplice] the gun for the express purpose of committing a robbery." The Court held that there was sufficient evidence that defendant acted with the purpose to promote the underlying offense of first-degree robbery to sustain his conviction.

STATE OF MISSOURI V. PAMELA RUTH CAMPANELLA SD36578 (October 29, 2020)

Defendant complained in a single point that the trial court erred in finding that defendant "knowingly, voluntarily, and intelligently waived counsel" in violation of her rights. The circuit court started and finished the trial after defendant's trial counsel withdrew. There was no record that defendant wanted to represent herself and no indication that she signed a waiver of counsel. The trial court failed to inquire into defendant's indigency and failed to conduct a *Faretta* hearing.
The Court reversed and remanded the case for a new trial.

STATE OF MISSOURI V. STEPHEN WAYNE CRIDER SD36540 (October 29, 2020)

Defendant appealed his convictions for first-degree stalking and violating an order of protection on two points: (1) the trial court erred in admitting evidence of the victim's statements made to police; and (2) there was insufficient evidence defendant directed his actions specifically toward the victim. As an initial matter, the Court limited the point on appeal because a "claim contained in a motion for new trial 'must be the same as the claim on the appeal.'" *State v. Crider* quoting *State v. Nickels*, 598 S.W.3d 626, 633 (Mo. App. E.D. 2020). The victim's statement contained proof of specific prior conduct, which is not character evidence. *Id*. The Court held that the victim's statement did not constitute "character evidence" and was relevant.

As for defendant's second point on appeal, the Court's analysis was "limited to whether there was sufficient evidence for any reasonable fact-finder to have found the defendant guilty beyond a reasonable doubt." Citing *State v. Naylor*, 510 S.W.3d 855, 859 (Mo. banc 2017). The Court looked to the evidence that defendant had previously threated victim, defendant had been served with an ex parte order of protection, and had come to victim's residence three times on the same day when the victim was home in finding that the reasonable inference supported defendant's conduct was directed at the victim. The Court held the evidence was sufficient to support conviction of first-degree stalking.

STATE OF MISSOURI V. KEVIN DARNELL COASTON SD36445 (October 30, 2020)

Defendant appealed his conviction for domestic assault on a single point, challenging the admission of testimony regarding defendant's alleged past domestic abuse. Defendant was unable to show reversible error because defendant had chosen to try his case before a judge which had evidentiary implication, including a presumption the circuit judge does not give weight to erroneously-admitted evidence. Citing *State v. Taylor*, 504 S.W.3d 116, 122 (Mo. App. E.D. 2016). The Court held the defendant was unable to make a clear showing the court relied on the erroneously-admitted evidence of prior abuse.

JOHNNY B. STANTON v. DIRECTOR OF REVENUE WD83551 (November 10, 2020)

Defendant appealed the judgment of the Circuit Court sustaining the Director of Revenue's revocation of his driver's license for refusal to submit to a chemical test of his blood. On appeal, Defendant raised two points: 1) that his refusal was not valid because the deputy who arrested him was not a "law enforcement officer" when he requested Defendant submit to the test because the request was made in Clay County, outside the officer's jurisdiction of Clinton County; and 2) that the trial court erred in finding there were reasonable grounds to believe Defendant was driving a motor vehicle in an intoxicated condition.

In its analysis on the first point, the Court relied on the holdings of *Sterneker v. Director of Revenue*, 3 S.W.3d (Mo. App. W.D. 1999), *Jennings v. Director of Revenue*, 992 S.W.2d 249 (Mo. App. W.D. 1999) and *Mason v. Director of Revenue*, 321 S.W.3d 426 (Mo. App. S.D. 2010) in that nothing in sections 302.574, 557.041, or 557.020 RSMo. requires compliance with criminal procedural law regarding jurisdiction and fresh pursuit. Like cases related to BAC suspensions, cases under 302.574 RSMo. are administrative law cases, not criminal cases, therefore the General Assembly is free to set boundaries and procedures for them. The Court concluded at the time of the arrest, the arresting officer was employed as a deputy sheriff in Clinton County and had the power and duty to make arrests for violations of the laws of the state. While the officer's arrest of the Defendant outside of Clinton County may have not withstood Fourth Amendment scrutiny in a criminal case, it did not divest the officer of his status as a law enforcement officer and did not prevent the Director of Revenue from revoking the Defendant's driver's license.

For the second point, the Court held that the trial court did not err in determining that the Director of Revenue presented sufficient evidence that the arresting officer had reasonable grounds to believe the Defendant was driving while intoxicated. Probable cause determinations are reviewed *de novo* for abuse of discretion. Thus, the appellate court gives deference to the trial court's determination of historical facts and to the reasonable inferences drawn therefrom. Based on the observations from the arresting officer, the Court held that the Director of Revenue presented sufficient evidence that the officer had reasonable grounds to believe the Defendant was driving while intoxicated.

STATE OF MISSOURI v. RODRIGO J. DIAZ SD36276 (November 16, 2020)

Defendant appealed from his conviction of first-degree felony drug trafficking following a jury trial. Defendant's sole point on appeal challenged the sufficiency of the evidence supporting his conviction in that Defendant argued the jury could not reasonably infer he intended to distribute methamphetamine found in his possession where the only fact presented by the State was that he possessed 107 grams of methamphetamine. Finding no merit to Defendant's argument, the Court affirmed.

In the Court's analysis, they determined that the evidence was sufficient for a reasonable juror to find Defendant took one or more substantial steps towards the commission of the offense of trafficking based on the amount of methamphetamine in his possession and how it was individually packaged. The Court relied on the extensive training and experience of the arresting officer and his testimony that having 107 grams of methamphetamine packaged in the way Defendant packaged it was supportive of the inference that the substance was packaged for distribution. In a footnote, the Court further reached its holding by stating that Defendant's argument that the amount of methamphetamine should be compared to other controlled substances was unavailing because section 579.065 RSMo. provides that the amount of a controlled substance necessary to establish a conviction for trafficking depends on the substance involved.

STATE OF MISSOURI V. GUSTAVO VENZEZ HERNANDEZ SD363382 (December 11, 2020)

Defendant appealed his conviction of second-degree domestic assault on three points: (1) failing to submit to the jury a proper verdict form; (2) by failing to accept the jury's verdict that Defendant was not guilty; and, (3) by failing to sustain defendant's objection to the State asking a witness questions which impermissibly shifted the burden of proof to defendant. Defendant acknowledged that none of these points were preserved for appeal and requests plain error review. The Court stated "the threshold issue in plain error review is whether the trial court's error was facially "evident, obvious, and clear." State v. Hernandez citing State v. Wood, 580 S.W.3d 566, 579 (Mo. banc 2019) (citation omitted).

As for points I and II, the Court began by looking to the verdict form which the trial court used. The trial court had provided the jury with three verdict forms which the trial court described as follows:

> I realize that I made an error, I submitted to you three verdict forms. One says we, the jury, find [Defendant] not guilty. That was a correct form. Then I should have submitted two verdict forms to allow you to find him guilty of either domestic assault in the first degree or guilty of domestic assault in the second degree. The verdict form I incorrectly submitted to you that you signed is we, the jury find [Defendant] not guilty of domestic assault in the second degree. That is the verdict form signed by [Foreperson]. I can tell you that I should not have provided you with that copy because I already gave you a not guilty form for both charges.

The trial court then asked the foreperson what the jury's verdict was as to first-degree domestic assault. The trial court then consulted with the state and found that the attorneys would like to poll the jurors as to their verdict on the record. When polled the jury came back with a different

result from what their verdict forms stated, and the trial court concluded the "true verdict" was guilty of domestic assault in the second degree.

"Alleged errors in verdict forms are not treated as errors in instructions." M.P. Indus., Inc. v. Axelrod, 706 S.W.2d 589, 592 (Mo. App. 1986). "Defendant has failed in his burden to show any prejudice from the error, much less the outcome-determinative prejudice required to establish manifest injustice or miscarriage of justice." State v. Hernandez, citing Wood, 580 S.W.3d at 579. "Because every single juror stated explicitly that the jury found Defendant guilty of second-degree domestic assault, Defendant cannot show any prejudice from the erroneous verdict form." Id. The Court held that defendant failed to meet his burden of establishing facially substantial grounds to believe the trial court's error in submitting the incorrect verdict form resulted in manifest injustice.

As for point II, the Court stated a "trial court has a duty to examine the verdict returned by the jury for defects, inconsistencies and ambiguities." State v. Dorsey, 706 S.W.2d 478, 480 (Mo. App. 1986). Following the logic found in Point I, the Court then held that defendant failed to establish an evident, obvious, and clear error when the trial court did not accept the jury's verdict.

Finally, as to point III, the Court held that defendant failed to establish the requisite prejudice that resulted from the state's questioning. "[D]efendant bears the burden of showing that the State's argument had a "decisive effect" on the jury's verdict." State v. Hernandez, citing State v. Dudley, 809 S.W.2d 40, 42 (Mo. App. 1991). The Court did not believe that a single question had such a decisive effect.

STATE OF MISSOURI v. LSMSTION V.E. THOMAS ED108148 (December 15, 2020)

Defendant, a juvenile offender, appealed a trial court's decision holding the statutorily mandated 15-year minimum sentence for forcible rape was constitutional as it applied to him given that at the time of sentencing, Defendant was 23 years old. Before trial, the Defendant filed a motion to declare section 566.030 RSMo. unconstitutional as applied to him because the statute imposed a mandatory minimum sentence of 15 years and therefore does not allow the sentencer discretion to consider a sentence of less than 15 years, despite the Defendant's status as a juvenile at the time of the offense. The trial court denied the motion and later found the Defendant guilty.

After reviewing Supreme Court holdings regarding cruel and unusual punishments, the Court stated that Defendant's 17 year sentence did not alter his life by a forfeiture that was irrevocable because Defendant was sentenced to a term of years with the possibility of parole. Furthermore, when determining the 17 year sentence, the trial court considered the attendant circumstances of Defendant's childhood when sentencing him. Decisions of assigning sentence lengths to particular crimes are within the province of the state legislature to which courts give substantial deference to. The General Assembly has established the situations in which a juvenile

offender must be tried as an adult. Because of the analysis that the Defendant's sentence did not irrevocably alter his life and because the trial court considered the Defendant's childhood upbringing, the Court affirmed the trial court's judgment that the Defendant's sentence for forcible rape was not unconstitutional.

STATE OF MISSOURI V. JOSHUA ROLAND GILLEY SD36589 (December 18, 2020)

Defendant appealed his conviction of assault in the second degree on a single point, that there was insufficient evidence to support a finding of a reckless mental state. "After accepting the evidence in the light most favorable to the verdict and rejecting all contrary evidence, [the Court] then review[s] a challenge to the sufficiency of the evidence to determine whether the State has introduced "'sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.'" State v. Gilley citing State v. Smith, 944 S.W.2d 901, 916 (Mo. banc 1997) (internal quotations omitted). Defendant was a semi-professional, mixed martial arts fighter and was arrested for assault following a disturbance. En route to the jail, the defendant became hysterical, slamming his head into the glass of the patrol car, and said he wanted to hurt the arresting officer. After booking, defendant broke free of another officer and punched the victim officer in the face with his left fist. The victim was knocked to the ground and received severe injuries, some of which caused permanent and serious damage. "Contrary to Appellant's assertion that this was simply "a one-punch situation," there is no "one free punch" rule of law." State v. Gilley. The Court held there was sufficient evidence to support a finding of a reckless mental state.

STATE OF MISSOURI V. RICKY JOHN HARDING ED108113 (December 29, 2020)

Defendant appealed his conviction for second-degree murder, third-degree domestic assault, four counts of endangering the welfare of a child, and unlawful possession of a firearm. Defendant appealed on five points, none of which were successful.

First, defendant alleged the state committed a Brady violation after the prosecutor, a minor witness, and the minor's guardian ad litem, met before the trial and this meeting was never disclosed. "In order to make a successful Brady claim, a movant must prove by a preponderance of the evidence: 1) that the evidence is exculpatory or impeaching; 2) that the evidence was willfully or inadvertently suppressed; and 3) that the defendant was prejudiced as a result of its suppression, i.e., the evidence is material to guilt or punishment." State v. Harding, citing State v. Smith, 491 S.W.3d 286, 298 (Mo. App. E.D. 2016). Defendant was unable to show how there were any substantive statements or facts from that meeting that would have supported his defense or would have provided him a different defense. The Court thus held defendant failed to show a Brady violation.

Next, the Court turned to points II through V which all addressed defendant's allegedly ineffective counsel. For point II, defendant argued that by failing to impeach a witness, defendant's counsel was ineffective. "Counsel's decisions whether to impeach, cross-examine,

and to call a witness constitute reasonable trial strategy and do not rise to the level of ineffective assistance under the performance prong of the Strickland test. Id. citing State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997). "The mere failure to impeach a witness does not entitle a movant to post-conviction relief." Id. citing Polk v. State, 539 S.W.3d 808, 822 (Mo. App. W.D. 2017). The Court held that defendant failed to show how his counsel's decision not to impeach a witness and a failure to call a different witness harmed his defense.

Next, defendant argued that his counsel was ineffective because counsel had stipulated to telling the jury for which felony defendant was previously convicted in a situation where the state was entitled to inform the jury of defendant's status as a felon. The Court held that defendant's counsel made the permissible strategic decision to include in the stipulation that defendant's prior felony was the class C felony of burglary. Similarly, in point IV, the Court found that defendant's counsel was effective even though he did not object to testimony defendant believed constituted inadmissible prior bad acts evidence.

Finally, as to point V, defendant argued that his counsel was ineffective for failing to object during closing argument to allegedly inflammatory statements. "Closing argument is designed to advise the jury and opposing counsel of each party's position, and to advocate to the jury what that party believes the jury should do." State v. McFadden, 369 S.W.3d 727, 747 (Mo. banc 2012). The Court stated that the decision to object is left to the broad judgement of counsel. State v. Harding citing Helmig v. State, 42 S.W.3d 658, 679 (Mo. App. E.D. 2001). The Court held that defendant's counsel's decision not to object to permissible argument is not ineffective assistance of counsel.

STATE OF MISSOURI v. MELISSA ANN GLAZE, WD82708 (August 18, 2020)

Defendant appealed her conviction of possession of a controlled substance and drug paraphernalia following a bench trial. The Defendant, a passenger in the vehicle, alleged that the evidence failed to establish that she had knowledge of, and an intent to exercise control over, the methamphetamine and drug paraphernalia found in the vehicle.

The Court of Appeals disagreed with the Defendant based on the following facts: (1) a sizeable quantity of drugs was found in a black bag; (2) the black bag was found on the front passenger floorboard, in front of the Defendant, and had both easy access to it and superior access to it as compared to the driver; (3) Defendant was looking at the front passenger floorboard when the trooper initially spoke with the driver; (4) the black bag was found on the front passenger floorboard with a purse, food, and beer that the Defendant admitted were her personal belongings; (5) Defendant's appearance, including attire, were consistent with that of an intravenous methamphetamine user; and (6) Defendant appeared extremely nervous during the search of the vehicle but appeared unsurprised when she was advised that drugs had been found in the black bag on the front passenger floorboard amongst her personal belongings.

> With respect to her appearance, the officer described her as "skin-and-bones," consistent with other heavy methamphetamine users with whom he has interacted during his career. He also testified that Glaze was wearing a long sleeve shirt, despite the fact it was August, consistent with an attempt to cover track marks from the intravenous injection of methamphetamine.

STATE OF MISSOURI V. BARRY GEORGE SD36280 (August 31, 2020)

Defendant appealed his DWI conviction. At trial, the Defendant admitted he was intoxicated and asserted that he was justified in driving while intoxicated based on his passenger's alleged medical emergency. Moreover, his attorney repeated admitted his client was intoxicated in statements to the jury.

On appeal, Defendant alleged that the court committed plain error in allowing the police officer to testify that .08 was the legal limit in Missouri, thereby "abdicating the responsibility" of the jury in determining whether he was intoxicated. The Court of Appeals affirmed the conviction. "When a defendant makes a voluntary judicial admission of fact before a jury, it serves as a substitute for evidence and dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case." State v. Olinger, 396 S.W.2d 617, 621-22 (Mo. 1965). This includes counsel's admissions in opening statements and closing arguments. State v. Nickels, 598 S.W.3d 626, 638 (Mo.App. 2020); State v. Denzmore, 436 S.W.3d 635, 643 (Mo.App. 2014).

STATE OF MISSOURI V. KEITH HUDSON WD83128 (September 1, 2020)

Defendant was scheduled for sentencing on August 23, 2019, following a conviction for robbery and receiving stolen property. At the time, the Defendant was incarcerated and was sentenced to jail time via video conference. Prior to sentencing, his attorney requested a writ of habeas corpus ad testificandum for his personal appearance at the hearing. Instead, the Judge issued a writ of habeas corpus ad testificandum **via Polycom.** At the hearing, his attorney asked the Defendant if he wanted to appear in person, and the court interjected by saying "he doesn't have an option to be here today" and sentenced the Defendant to a prison term. Defense counsel objected to the video appearance and appealed on that basis.

Section 546.550, RSMo 2016, requires that, if a conviction is punishable by imprisonment, the defendant must be personally present for sentencing. Section 561.031.1(6), RSMo 2016 provides that the defendant may appear for sentencing after conviction at trial by way of two-way audio-visual communication, but only "upon waiver of any right such person might have to be physically present." In this case, the Defendant objected to the appearance by video. The Court of appeals vacated the sentence and remanded the case for in-person sentencing.

ROBIN SCHMIDT V. DIRECTOR OF REVENUE ED108175 (September 1, 2020)

The Director of Revenue appealed the trial court's ruling removing the license revocation and reinstating Defendant's license based on a finding of an invalid search warrant. Defendant was stopped for traffic violations and after detecting an odor of alcohol and slurred speech, she was asked to perform field sobriety tests and a preliminary breath test. Defendant refused the breath test, stating "I guess just take me to jail. I'm too scared to. I'd rather get my blood drawn." Defendant was arrested for DWI.

Defendant was read the implied consent notice and then refused a chemical breath test. Officers then obtained a search warrant for a blood test. After the warrant was issued, but prior to the blood draw, the officer realized that while Schmidt's name and identifying information appeared correctly throughout the warrant application, on one occasion a former arrestee's name appeared instead of Schmidt on the application. The officer contacted the prosecuting attorney who advised him to cross out the wrong name on the application and write in "Schmidt." The officer did so without approval from the warrant judge.

Defendant argues that the warrant was invalid because it contained incorrect information and was altered without approval from the warrant judge. After initially sustaining the revocation, the trail judge reversed itself and ordered the removal of the suspension.

The appellate first determined that under the 4th amendment, a warrant is required for a blood test, rejecting the DOR argument that at the time, the Missouri statute did not require a warrant. The appellate court then analyzed the probable cause basis for the warrant and concluded that the warrant application contained sufficient probable cause to issue the warrant.

The appellate court noted that a warrant can be rendered invalid "[i]f it does not describe the person, place, or thing to be searched or the property, article, material, substance, or person to be seized with sufficient certainty[.]" § 542.276.10(5). However, in this case, the court noted that an error in description does not automatically invalidate a search warrant. The court noted "there is a strong preference for searches conducted with a warrant and we 'should not quash a warrant by construing it in a hypertechnical, rather than a commonsense, manner.'" Turner, 471 S.W.3d at 416 (quoting, Neher, 213 S.W.3d at 49).

In a footnote, the court stated that it strongly disapproved of the alteration to the warrant application made by the officer "on the advice and with the blessing" of the prosecuting attorney, without the knowledge and approval of the warrant judge. The court continued that neither the officer nor the prosecuting attorney had the authority to alter the warrant application.

WILLIAM HENKE V. DIRECTOR OF REVENUE ED108287 (September 15, 2020)

The Director of Revenue appealed the trial court ruling which reinstated Defendant's driving privileges after the trial court excluded evidence of the Defendant's blood alcohol content. At trail, the Defendant argued that the Director failed to lay a proper foundation for the test results. He argued that 19 CSR 25-30.050(1), which lists the approved breathalyzers, requires that the Director establish not only that the police used an approved breath analyzer, but that such machine was manufactured or supplied by the company listed in the regulation. The trial court agreed and the Director appealed.

The appellate court noted that to lay a foundation for the admission of breath analyzer test results, the Director must establish that the test was performed: "(1) by following the approved techniques and methods of the Division of Health; (2) by an operator holding a valid permit; (3) on equipment and devices approved by the division." Carvalho v. Dir. of Revenue, 586 4 S.W.3d 262, 267 (Mo. banc 2019) (quoting, Stuhr v. Dir. of Revenue, 766 S.W.2d 446, 449 (Mo. banc 1989)).

After an analysis of related regulations, the appellate court concluded that the fact that 19 CSR 25-30.050 "merely notes the manufacturers or suppliers, rather than stating that such machines shall come from a particular manufacturer or supplier, suggests that Intoximeters, Inc. is the only provider of an Intox EC/IR II, and thus such language would be unnecessary." The appellate court held that 19 CSR 25-30.050 does not require the Director to establish the supplier or manufacturer of an approved breath analyzer.

Trial court finding reversed and remanded.

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Defendant's vehicle was located in a park after after closing hours. While the truck as warm, they were unable to locate a driver. They observed a container of alcohol in the vehicle and determined the driver's registration as the Defendant. Fifteen minutes later, they observed the vehicle leave the area of the park. The driver did not commit any traffic offenses, but the officer stopped the vehicle for being in the park after hours. The officer detected an odor of alcohol and slurred speech when speaking to the driver. The officers asked the driver to perform filed sobriety tests, he refused, stating, "I won't pass them." Defendant was arrests and later voluntarily submitted to a breathalyzer, which indicate a blood alcohol of .174%.

Defendant appealed his revocation of his driver's license arguing that there was no probably cause for the arrest based on: 1. Insufficient evidence for the stop; and 2. No probable cause to arrest because no filed sobriety tests were conducted.

The appellate court first held that the Director is not required to establish probably cause or a reasonable suspicion for a traffic stop. Next, the appellate court analyzed whether there was sufficient probable cause for the DWI arrest. The Court stated, "in determining whether there was probable cause, a trial court should "consider both evidence of 'unusual or illegal operation of a motor vehicle' prior to stopping the driver, and evidence of 'indicia of intoxication on coming into contact with the motorist.'" Williams, 521 S.W.3d at 663 (quoting White, 321 S.W.3d at 309). The Court noted that filed sobriety tests are not mandatory, rather, probable cause may be established by credible observations of the arresting officer.

Trial court finding reversed and remanded.

JUDICIAL ETHICS

- BE NICE:
- It doesn't cost you anything.
- The rewards are priceless.
- BE COURTEOUS:
- Courtesy is a basic form of civilized behavior. Everyone is entitled to be treated courteously.
- Respect is something earned – you may or may not respect the person before you, but they are nonetheless entitled to be treated courteously.

TREAT EVERYONE EQUALLY

- Treat your best friend the same way you treat one of your “frequent flyers” when they are in your courtroom.
- Best practice: address everyone by their last name – Mr or Ms Whatever. Can’t remember the lawyer’s name? “Counselor” is safe. When you address some people by their first name and others by their last name, you aren’t treating them equally and you are creating a potential problem you don’t need.

WHEN IN DOUBT – DON'T DO IT

- If you have the slightest little tickle in the back of your brain about whether or not something you are about to do might be a problem – **DON'T DO IT**.
- Would you be happy with whatever you are about to do being the topic of an op-ed piece in your local paper, or appearing in a story on TV? If not – **DON'T DO IT**.
- Would you love to see your worst enemy do what you're about to do because you know it will be a problem? **DON'T DO IT**.

SHOULD I RECUSE?

- When in doubt – bail out
- *(that rhymes, remember it)*
- You aren't being paid by the case.
- Could anyone on the outside complain that you shouldn't have stayed in the case? If so, bail.
- The Rules declare when a party can seek a change of Judge. Know and follow those Rules.
- I know – some lawyers use a late DQ to stall their case. You can stay in on those cases if there is no basis for the late request.

TOP 12 COMPLAINTS MADE AGAINST MUNICIPAL JUDGES

AND HOW YOU CAN (HOPEFULLY) AVOID THEM

NUMBER ONE

“I WASN’T ALLOWED TO EXPLAIN WHY I GOT THE TICKET”

[guilty, with an explanation]

NUMBER TWO

- "I DID NOT UNDERSTAND THE COURT PROCEDURES"

- This is something you should have covered at the beginning of the Court session.
- Probably shouldn't assume that defendants will read (or be able to read) any written explanations provided by posting, on line, or even a sheet that is handed to them.

NUMBER THREE

"I HAD TO WAIT FOREVER FOR MY CASE TO BE CALLED"

If your dockets routinely last for several hours, you may want to consider adding more dockets so people aren't required to wait long periods of time. Consider "attorney only" dockets, pro-se dockets and "trials only" dockets to move things along

NUMBER FOUR

"ATTORNEYS GET PREFERENTIAL TREATMENT"

This might be solved by having "attorney only" dockets, any other suggestions on how to deal with this?

NUMBER FIVE

"WHY CAN'T I JUST DROP BY AND TALK TO THE JUDGE? I KNOW HIM/HER"

Especially in smaller jurisdictions, defendants may have a personal relationship with the Judge and need to be informed about the rules against *ex parte* communication – in a nice manner.

NUMBER SIX

"THE JUDGE WAS BIASED"

This is a "catch-all" complaint, but one that is often raised, the bias alleged may be based on being from 'out of town', gender, race, number of tattoos and piercings, or anything else the defendant can come up with.

NUMBER SEVEN

"TEXTING WHILE ON THE BENCH"

If you are doing this – STOP Your focus should be on the people appearing before you, not keeping up with your e-mail or social calendar

NUMBER EIGHT

"YELLING AT DEFENDANTS OR THREATENING THEM WITH JAIL"

Everyone should be treated with courtesy – and yelling never caused a defendant to change their lifestyle. Threats of jail that you know you won't enforce just make you look foolish.

NUMBER NINE

"THE FINE AND/OR COSTS WERE EXCESSIVE"

These are the complaints that may land you on the front page of your local newspaper. Hopefully all of the municipalities in Missouri now realize that their Municipal Courts are not there to generate income.

NUMBER TEN

"I WAS PUNISHED MORE HARSHLY BECAUSE I WENT TO TRIAL"

You may be able to take some of the "sting" out of this by explaining that the fine schedules are based on people admitting their guilt, and if they have no defense, a higher fine is possible – if they have a logical excuse, it might be lower. What are YOUR thoughts?

NUMBER ELEVEN

"THE JUDGE WOULDN'T LET ME REPRESENT MYSELF"

Litigants have a right to appear pro se even if it is not "prudent".

You can recommend getting counsel and grant a continuance to encourage it.

You can tell them that they must follow the law and court procedures and that you are not allowed to make objections, ask questions or file papers for them.

But when that's done, if they still want to represent themselves, you have to let them.

LAST ONE - # TWELVE

WHY SHOULDN'T I SHARE MY VALUABLE OPINIONS ON SOCIAL MEDIA?

You are asking for trouble.
Please point to a single example where a posting on social media was beneficial to the poster.
If you simply MUST be on social media, limit the public's access to your account.
Once you hit the button – you can't take it back – count on someone to take a screen shot.

READ RULE 18 !!!!!!

Non-lawyers must report 15 hours of credit each year

at least **three of the total 15 credit hours** must be devoted **exclusively to accredited ethics programs**, seminars, and activities, including **professionalism, substance abuse, mental health, legal or judicial ethics**, malpractice prevention, **ONE HOUR MUST BE** explicit and implicit bias, diversity, inclusion, or cultural competency programs, seminars, and activities

LAWYERS MUST REPORT 5 HOURS YOU CAN USE THESE HOURS TO SATISFY 5 HOURS OF THE 15 HOURS REQUIRED BY THE BAR

You need two hours of Judicial Ethics and one hour of explicit and implicit bias, diversity, inclusion, or cultural competency programs.

BOTTOM LINE – after you fulfill your Ethics requirement (3 hours) you only need TWO more hours of "judge only" training. You then need 10 more hours of CLE to satisfy the Bar.

NEW JUDGES MUST ATTEND ORIENTATION

New Judges MUST attend the Committee's orientation course within 12 months. It is offered twice a year, if you can't make either session, you cannot serve – so make it a priority on your calendar. You must attend if there was a 24 month gap in service.

DOMESTIC RELATIONS, BANKRUPTCY, AND COLLECTION CLEs DO NOT COUNT AS "JUDICIAL EDUCATION"

C'mon, man – don't try to slide in hours that have NOTHING to do with your judicial role. If you want to be a Judge – make the effort to get the education.

READ RULE 2 – CANONS

READ RULE 18 ON JUDICIAL EDUCATION

https://www.courts.mo.gov
RULES AND RESOURCES