

IN THE CIRCUIT COURT OF COUNTY, MISSOURI

)	
)	
Petitioner/Applicant,)	Case No.: 14AE-CV00979
vs.)	
)	Division III
DIRECTOR OR REVENUE OF THE)	
STATE OF MISSOURI,)	
)	
Respondent.)	

FILED
JUL 28 2014
 SANDRA L. DOWD
 Clerk of the Circuit Court County, MO

JUDGMENT

On the 24th day of July 2014, this matter came on for trial. Petitioner appeared by and through his attorney, Jeffrey S. Eastman. Respondent appeared by and through Assistant Platte County Prosecuting Attorney, Annie Booton. Evidence was adduced and the matter was taken under advisement.

NOW ON THIS 23rd day of July 2014, after being duly and fully advised in the premises, the court finds as follows:

1. Pursuant to section 577.041, RSMo, this court's inquiry is specifically limited to three issues: whether the person was arrested or stopped; whether the officer had reasonable grounds to believe that the driver was driving while in an intoxicated or drugged condition; and whether the driver refused to submit to a chemical test.
2. The court finds the first two issues in favor of the Director. However, the third issue (refusal to submit to a chemical test) requires more careful examination.
3. Typically, when a driver refuses the test, it is not a valid concern if the test would have been valid had it been given. Missouri courts have repeatedly held that in a refusal case the Director does not have to prove that the results of the breath test would have been otherwise admissible had the driver submitted to the test. Fredrickson v. Dir. of Revenue, 55 S.W.3d 460, 464-65 (Mo.App.2001). However, in the present case, the driver did submit to a breath test on two separate occasions. So, the question becomes whether or not the Petitioner properly followed the arresting officer's instructions in performance of the test. In other words, was there a volitional failure by Petitioner to do

what is necessary in order that the chemical test could be performed? See *Fischbeck v. Dir. of Revenue*, 91 S.W.3d 699, 701–02 (Mo.App.2002).

4. Respondent's evidence consisted of the testimony of the arresting officer, Trooper J.M. Harrison; Respondent's Exhibit "A", which is a collective exhibit that contained: a proposed Judgment; certain pleadings filed in the case, two driving records; proof of insurance, copy of the Alcohol Influence Report and other supporting documents.

5. Petitioner presented no evidence or testimony. However, Petitioner cross-examined the Trooper extensively.

6. During the course of the trial there were two Datamaster evidence tickets (sometimes called printouts) that were offered into evidence by Respondent. However, the Director did not submit proof that the machine had been properly calibrated. In order to establish a prima facie foundation for the admission of the results of a breathalyzer test, the Respondent must establish the test was performed: (1) following the approved techniques and methods of the Department of Health; (2) by an operator holding a valid permit; and (3) on equipment and devices approved by the Department of Health. *Coyle v. Director of Revenue*, 181 S.W.3d 62, 64 (Mo. banc 2005); see also *Whitworth v. Director*, 207 S.W.3d 623, 626 (Mo.App.2006). The evidence tickets, or printouts, were not admitted into evidence due to a lack of foundation and compliance with the factors set forth above.

7. However, whether Petitioner's failure to provide a sufficient sample was volitional on his part is a question of fact and goes to the credibility of the witness – and that is to be decided by the trial court, regardless of evidence that might support a different result. *Hawk v. Dir. of Revenue*, 943 S.W.2d 18, 21 (Mo.App.1997). In the present case, Trooper Harrison testified that the Petitioner did not follow his instructions on how to provide an adequate breath sample. The trooper's testimony was credible.

8. The court finds that the Respondent sustained the burden of proving by a preponderance of the credible evidence that the Petitioner refused to submit to a chemical test.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner's Petition for Hearing Under Section 577.041, R.S.Mo. is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent's revocation of Petitioner's driving privileges for a period of one year pursuant to Section 577.041, R.S.Mo. is hereby sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Court costs are assessed against Petitioner.

IT IS SO ORDERED.

Dated: 7/28/14