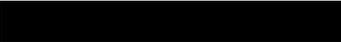


IN THE CIRCUIT COURT OF ST. LOUIS COUNTY

STATE OF MISSOURI

JT	)	
Petitioner,	)	
	)	
v.	)	
	)	Div. 38
DEPT. OF REVENUE	)	
Respondent,	)	August 29, 2017
	)	

JUDGMENT AND ORDER

This matter comes before the court on a Petition for a Trial De Novo of a License Suspension/Revocation pursuant to §302.535 RSMo. An administrative review of the order of the Director of Revenue was held on March 2, 2017, and the suspension/revocation pursuant to §302.505 and 302.525 was sustained on that date.

Petitioner appears by attorney DC. Respondent appears by SB.

The trial was started on July 5, 2017. Section 302.525 provides that the burden of proof falls on Respondent. Respondent offered exhibits A and B pursuant to §302.312 RSMo. Exhibit A is 27 pages of documents filed with the Missouri Department of Revenue including the Notice of Suspension, the Alcohol Influence Report, St. Louis County Police investigation report , the blood alcohol test report, the breathalyzer maintenance records, the Type III for the arresting officer, the Type II permit for the sergeant who maintained the breathalyzer, and the citations issued to Petitioner. Exhibit B is a second copy of the same blood alcohol test report submitted in exhibit A.

The arresting officer in the case was Officer BS of the St. Louis County Police Department. Officer BS was tragically killed in the line of duty on October 6, 2016. Petitioner offered a copy of Officer BS's death certificate in evidence and the parties stipulated to the fact that he was deceased and unavailable.

Petitioner objected to the admission of exhibits A and B on the grounds that the arresting officer is deceased and unavailable. Specifically, Petitioner argued based on Doughty v. Director of Revenue, 387 S.W. 3d 383, 387 (Mo. Banc 2013), that his due process rights would be violated by the admission of the DOR records without the ability to cross-examine and confront the deceased officer or to secure his appearance. The court held over the trial and took the matter under submission on the issue of the admissibility of the records.

On July 21, 2017, the court ruled that Exhibits A and B proffered by the Director must be admitted pursuant to §302.312. In Ersine v. Director of Revenue, 428 S.W.3d 789, 792-93

(Mo. App. 2014), the appellate court reversed the trial court's ruling to strike the DOR records because the arresting officer was unavailable. The court noted that §302.312 "plainly provides that all 'properly certified' [DOR] records 'shall be admissible as evidence in all courts of this state and in all administrative proceedings.'" *Id.* In conference, this court explained to counsel that Erskine required the court to admit the records but that the issues of confrontation and due process raised in *Doughty* would affect the weight and consideration the court would give the admitted documents.

Trial was resumed on August 23, 2017 for the parties to present any additional evidence to the court. Respondent did not present any additional evidence and rested. Petitioner did not present any evidence.

The reports in exhibit A state that Officer BS stopped petitioner's vehicle after he observed the vehicle speeding and failing to maintain a single lane on October 1, 2017. Officer BS noted that petitioner had indicia of the consumption of alcoholic beverages and driving while intoxicated. Petitioner was arrested and was given a breathalyzer test by Officer BS in his patrol vehicle, and petitioner's blood alcohol level registered greater than .08%.

Section 302.505.1 provides that the director must show that the arresting officer had probable cause to arrest the driver for an alcohol-related offense and that the driver was operating the vehicle with a BAC exceeding .08%. "The Director has both the burden of production and the burden of persuasion." *Tweedy v. Director of Revenue*, 412 S.W. 389, 394 (Mo. App. 2013). "There is 'no presumption of validity of the director's evidence'" and while "the director's evidence is admissible under §302.312.1, its admission alone does not necessarily satisfy the director's burden of persuasion." *Tweedy*, 412 S.W.3d at 398, quoting *White v. Director of Revenue*, 321 S.W.3d 298, 307 (Mo.banc 2010).

In *Doughty*, the petitioners appealed from a denial of a petition for review of a license revocation for failing to take a breathalyzer test under §302.311. The director's sole evidence in the hearing was the director's certified records which included the police report, alcohol influence report and driving record which were admitted pursuant to §302.312. *Doughty*, 387 S.W.2d at 385. The *Doughtys* argued that §302.312 violated their rights to confrontation and due process. The Supreme Court of Missouri held that "under the coextensive due process protections of both our state and national constitutions, each *Doughty* had the right to confront and cross-examine the witnesses against him in the trial on his petition for review of the administrative revocation of his license." *Id.* at 387. However, the court noted that the admission of the records under §302.312 did not violate the right to confrontation and cross-examination because the petitioner had the "right to subpoena witnesses to appear at the administrative hearing" and could subpoena and confront the arresting officer. *Id.* at 387-88. "The existence of this unbridled subpoena right undercuts any argument that the administrative hearing procedure was unfair." *Id.* at 388. The Supreme Court of Missouri in *White v. Director of Revenue* noted that a party can contest the evidence of the director by cross-examination, pointing out inconsistencies, or showing a witness's bias, incentive to lie, or demeanor. *White*, 321 S.W. 3d at 308. It is the ability to contest the evidence and dispute a fact in any manner that allows the finder of fact to determine credibility of the witness or the evidence.

That ability to contest the evidence is missing in this case through no fault of the Petitioner. The right to subpoena is specious when it is known to all that the witness is deceased. Officer BS is unavailable, due to his tragic death, to be confronted and cross-examined by petitioner as is his right under the state and federal constitutions in a license revocation proceeding. Although §302.312.1 requires the court to admit exhibits A & B, this court can not presume the reports and BAC readings as valid when Petitioner desires to contest the evidence and findings and cannot be afforded the opportunity to confront and cross-examine a deceased witness. To find otherwise would render the language of the *Doughty* opinion meaningless.

Wherefore, the court finds the Director has failed to meet its burden of persuasion as there is insufficient evidence that on October 1, 2016, the arresting officer had probable cause to arrest Petitioner for driving while intoxicated and insufficient evidence that Petitioner had a blood alcohol concentration of .08% or more by weight. The court orders and adjudges that the administrative suspension/revocation pursuant to §302.505 arising out of the arrest shall be removed from Petitioner's driving record and the Petitioner's driving privileges by reinstated, if otherwise eligible. Costs assessed against Petitioner.

SO ORDERED,

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Judge,

Div. 38

Cc: DC, attorney for Petitioner  
SB, attorney for Respondent