WD82018

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

vs.

DEAN RIGSBY,

Appellant.

On Appeal from the Circuit Court of Johnson County
Honorable Chad Pfister, Circuit Judge
Case No. 16JO-CR00733-01

BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
DEAN RIGSBY

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Johnson County convicting the appellant of one count of driving while intoxicated as a persistent offender and one count of driving while revoked or suspended, and sentencing him to a fine and a suspended sentence of three years in the custody of the Missouri Department of Corrections (D34; App. A1).

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Johnson County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Background

Warrensburg Police Officer Ryan Easley said he was on routine patrol on March 10, 2016 around 11:00 p.m., when he saw a Ford F-150 heading northbound just north of the intersection of Holden and Culton Streets, with no headlights on (Tr. 14-15, 78-79, 83). He said he observed the vehicle roll past a stop sign and through an intersection (Tr. 15, 79). He said he activated his emergency lights and conducted a traffic stop (Tr. 15, 84).

Officer Easley identified Dean Rigsby as the vehicle's driver and said he noticed Mr. Rigsby's "eyes were bloodshot, kind of glassed over and watery. And he wouldn't speak for a while" (Tr. 15, 17, 84-85). He said he had Mr. Rigsby perform field sobriety tests behind Mr. Rigsby's truck (Tr. 18-19, 89-91, 101). He said another officer arrived shortly thereafter, and Mr. Rigsby was Mirandized (Tr. 18, 88). He said that based on his experience and the results of the standard field sobriety tests, he believed Mr. Rigsby was intoxicated, and so placed Mr. Rigsby under arrest (Tr. 91-92; D30 p. 14).

Officer Easley said police then transported Mr. Rigsby to the Warrensburg Police Department (Tr. 92), where Officer Brandon Hargrave said he advised Mr. Rigsby of Missouri's Implied Consent Law (Tr. 28, 92, 106-07). Officer Hargrave said he observed Mr. Rigsby for 15 minutes before attempting to administer a breathalyzer test (Tr. 28, 107-08, 110). He said Mr. Rigsby submitted to the test, but the machine timed out, and thereafter Mr. Rigsby refused to give a sample after also attempting to put a penny in his mouth (Tr. 29-30, 32, 109, 111).

B. Proceedings below

1. Charges

The State charged Mr. Rigsby in the Circuit Court of Johnson County with driving while intoxicated in violation of § 577.010, R.S.Mo., as a persistent offender, a class D felony (D20 p. 1; App. A3). He also was charged with driving while his license was revoked, a misdemeanor, in violation of § 302.321, R.S.Mo. (D20 p. 2; App. A4). In September 2017, after a preliminary hearing the court found that the State had met its burden to show sufficient probable cause (Tr. 33). Mr. Rigsby waived his right to a jury trial, and the case proceeded to a bench trial in April 2018 (D28; Tr. 45, 48, 57).

2. Prior offenses

Before trial, Mr. Rigsby challenged that that the two prior convictions the State alleged qualified as intoxication-related traffic offenses, both of which were from Illinois, were insufficient to meet its burden necessary to enhance his present Missouri DWI charge to a felony (Tr. 7-8, 32-33 59-60, 71-76; D24). He moved to exclude the convictions, arguing that the Illinois statute at issue encompassed acts outside of those that the law of Missouri prohibited, so the State had to prove beyond a reasonable doubt that the acts he actually committed during the Illinois offenses would have qualified as an intoxication-related traffic offense in Missouri under § 577.023, which the State had not done and could not do (Tr. 59-60; D24).

The State introduced "a certified copy of a prior [2006 DWI conviction] from St. Clair County, Illinois," which the court admitted over the defense's objection (Tr. 7-8, 12, 58-59; State's Ex. 1). The State also introduced

"certified records from the State of Illinois", which contained a police report concerning a conviction for "driving under the influence of cannabis or a controlled substance" in 2005, which the court also admitted over the defense's objection (Tr. 7-8, 12, 58-59; State's Ex. 2). The defense's objection to both exhibits was that their admission to prove his prior convictions violated his "due process rights under the U.S. Constitution 5th and 14th amendment [and] Article 1, Section 10 of the Missouri Constitution" (Tr. 8, 59).

a. St. Clair County, Illinois conviction

Exhibit 1, the St. Clair County record, stated that on May 25, 2006, Mr. Rigsby "was found behind the steering wheel of the vehicle, with the vehicle still running, unconscious, with his foot on the brake" (Tr. 58). The exhibit included "the clerk's certified copy of the criminal information, verdict of guilty, docket minutes, sentencing order, conditions of probation, appellate mandate, petition to revoke probation, request extension in the case of *State of Illinois v. Dean Rigsby* from 2006" (Tr. 7, 57-58; State's Ex. 1). Mr. Rigsby also had appealed his conviction, so the record also contains an appellate opinion from the Illinois Appellate Court, Fifth District, which set forth the facts of that case as the appellate court saw them (Tr. 58; State's Ex. 1).

b. Johnson County, Illinois conviction

For the Johnson County, Illinois offense, the trial court heard testimony from Captain Greg Kilduff, an Illinois State trooper, who said he had contact with Mr. Rigsby on March 18, 2005, in Goreville, Illinois (Tr. 61).

Captain Kilduff said he was on patrol on March 18, 2005 around Yarbors, a gas station just off I-24 (Tr. 62). He said he observed a vehicle pull into the Yarbors parking lot "a little after 10:00 at night" and observed the driver turn off all the vehicle's lights (Tr. 62; State's Ex. 2). He said he did not recall whether he was driving on the road or parked near the road when he observed the vehicle pull into Yarbors (Tr. 65). He said that "from looking at [his] report, … [the vehicle] was pulling into the Yarbors parking" but he did not know whether the vehicle had been on the highway (Tr. 63). He said he could not see who was driving the vehicle at the time he saw the vehicle pull into the Yarbors parking lot (Tr. 66). Captain Kilduff's report, which he filled out near the time of the arrest and was entered into evidence, only indicated that he "observed a vehicle pulled into the Yarbors parking lot" (State's Ex. 2, Road Block Log ("RBL")).

Captain Kilduff said "the vehicle was sitting in the darkness" and "this appeared suspicious given the time of night and the fact that the business was obviously closed" (Tr. 62-63; State's Ex. 2, RBL). He said he pulled in behind the vehicle and saw two occupants in it; he identified the driver as Mr. Rigsby and the passenger as Justin Hooker (Tr. 63-64). He said he advised Mr. Rigsby of the reason for the traffic stop and asked why he was parked in the parking lot (Tr. 64; State's Ex. 2, RBL). He said Mr. Rigsby told him they were meeting some girls (Tr. 64).

Captain Kilduff said he noticed a large amount of alcohol inside the vehicle and, according to his report, "smelled a strong odor of burnt cannabis" (Tr. 63). He said he asked Mr. Rigsby "if he had smoked any cannabis, and

[Mr. Rigsby] denied it the whole time" (Tr. 64). Captain Kilduff testified that from looking at his report, Mr. Rigsby "had somewhat of a sleepy appearance …. And his eyes were glassy. And whenever I spoke with him[,] he was kind of slow and thick tongued, kind of rolled off his words" (Tr. 64). He said Mr. Rigsby told him "he had smoked about a week prior" but continued to deny smoking cannabis that evening (Tr. 64).

Captain Kilduff said he asked Mr. Rigsby to step out of the vehicle to see whether the smell "might just be from inside the vehicle" and "to further investigate [Mr. Rigsby's] … ability to drive" (Tr. 64, 68). He said he smelled the cannabis outside when he spoke with Mr. Rigsby one-on-one and asked Mr. Rigsby "to do some field sobriety tests" including "the horizontal gaze nystagmus test, which is just basically checking his eyes, the walk-and-turn, and the one-leg stand" (Tr. 64). He said Mr. Rigsby "failed all those" and he "marked it on the alcohol influence report" (Tr. 64, 68). He said "that was all on videotape at the time …. But [he was] sure that's since been destroyed" (Tr. 68).

Captain Kilduff initially said that Mr. Rigsby was not able to recite the alphabet when instructed to do so (Tr. 64), but later said Mr. Rigsby was able to state the alphabet when asked and "submitted to a preliminary breath test" that resulted in a reading of .000 (Tr. 69; State's Ex. 2). He said that after Mr. Rigsby blew a .000, he advised Mr. Rigsby that he "smelled an odor of burnt cannabis" and asked to look in the vehicle (Tr. 64). He said that after Mr. Rigsby consented to the search, he was able to locate approximately 14 grams of cannabis "inside a nylon outer pocket with holes of the backpack"

(Tr. 64; State's Ex. 2, RBL). He said Mr. Hooker, the passenger, admitted the cannabis was his (Tr. 64, 69-70). He said Mr. Hooker told him "he had smoked cannabis about two hours prior to the stop with Mr. Rigsby" (Tr. 64-65). He said Mr. Rigsby again denied having smoked cannabis that evening but nonetheless was arrested for driving under the influence (Tr. 65, 70). Captain Kilduff said he did not seek a warrant after Mr. Rigsby refused to give a blood or urine sample, so "there was nothing done that showed any verifiable amount of cannabis in Mr. Rigsby's system" (Tr. 70-71).

Mr. Rigsby was charged with driving under the influence of cannabis in violation of 625 ILCS § 5/11-501(a)(6) (State's Ex. 2; Tr. 72-73). On July 8, 2005, he pleaded guilty (State's Ex. 2).

3. Trial

At Mr. Rigsby's bench trial in Missouri, the defense argued "the State failed in their duty to prove beyond a reasonable doubt that either of Rigsby's prior convictions would qualify as Missouri intoxicated related offenses under the ruling of *State v. Coday*, [496 S.W.3d 572 (Mo. App. 2016)]" and that "there was no evidence that [Mr. Rigsby] was actually operating a vehicle in" Johnson County in 2005 (Tr. 32-33, 71-72). The trial court disagreed and found beyond a reasonable doubt that Mr. Rigsby's two prior Illinois convictions qualified as intoxication-related traffic offenses to enhance his present Missouri charge to a felony under § 577.023 (Tr. 76-78).

The State then presented evidence regarding Mr. Rigsby's present Missouri charge (Tr. 82-112). At the close of the State's evidence and at the close of all evidence, the defense moved for a new trial and a judgment of

acquittal, and the trial court denied both motions (D32; D33; Tr. 112-114). The court then found Mr. Rigsby guilty of both counts (Tr. 120).

In August 2018, the court sentenced Mr. Rigsby to three years in the Missouri Department of Corrections but suspended the execution of that sentence contingent on his completing five years of supervised probation (Tr. 130; D34; App. A1). The court also sentenced Mr. Rigsby to 30 days of "shock time" in the Johnson County Jail (Tr. 131; D34; App. A1).

Mr. Rigsby then timely appealed to this Court (D36).

Point Relied On

The trial court erred in convicting Mr. Rigsby as a persistent offender under § 577.023, R.S.Mo. (2015) *because* the evidence was insufficient to prove this beyond a reasonable doubt, as when an out-of-state prior conviction encompasses acts outside of those prohibited by § 577.010, R.S.Mo. (2015), for it to be an intoxication-related traffic offense qualifying as a prior for enhancement under § 577.023, the State must prove that the underlying facts of that conviction would qualify as an intoxication-related traffic offense in Missouri under § 577.010 *in that* even viewing the evidence the light most favorable to the trial court's verdict, Mr. Rigsby's 2005 Johnson County, Illinois conviction for driving under the influence of cannabis in violation of 625 ILCS § 5/11-501(a)(6) (2005), a "zero-tolerance" prohibition without an element of impairment, would not constitute a crime under § 577.010, which requires impairment due to the use of cannabis, and there was insufficient evidence of impaired ability, presence of cannabis, or impairment due to the use of cannabis.

State v. Kelly, 728 S.W.2d 642 (Mo. App. 1987)

State v. Brown, 97 S.W.3d 97 (Mo. App. 2002)

State v. Friend, 943 S.W.2d 800 (Mo. App. 1997)

State v. Clarkston, 963 S.W.2d 705 (Mo. App. 1998)

577.010, R.S.Mo. (2015)

625 ILCS § 5/11-501 (2005)

Argument

The trial court erred in convicting Mr. Rigsby as a persistent offender under § 577.023, R.S.Mo. (2015) *because* the evidence was insufficient to prove this beyond a reasonable doubt, as when an out-of-state prior conviction encompasses acts outside of those prohibited by § 577.010, R.S.Mo. (2015), for it to be an intoxication-related traffic offense qualifying as a prior for enhancement under § 577.023, the State must prove that the underlying facts of that conviction would qualify as an intoxication-related traffic offense in Missouri under § 577.010 *in that* even viewing the evidence the light most favorable to the trial court's verdict, Mr. Rigsby's 2005 Johnson County, Illinois conviction for driving under the influence of cannabis in violation of 625 ILCS § 5/11-501(a)(6) (2005), a "zero-tolerance" prohibition without an element of impairment, would not constitute a crime under § 577.010, which requires impairment due to the use of cannabis, and there was insufficient evidence of impaired ability, presence of cannabis, or impairment due to the use of cannabis.

Preservation Statement

This point is preserved for appellate review. The defense made the argument in this point in its motions for judgment of acquittal below (Tr. 112-114). Moreover, in a criminal case as a matter of due process sufficiency arguments automatically are reviewed on the merits, regardless of preservation: "arguments concerning the sufficiency of the evidence, even those not preserved for appeal, are reviewed on the merits, not for plain error." *State v. Zetina-Torres*, 482 S.W.3d 801, 808 (Mo. banc 2016).

Standard of Review

In reviewing a claim of sufficiency of the evidence, this Court's "role is limited to determining whether sufficient evidence exists from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt." *State v. Warren*, 304 S.W.3d 796, 799-800 (Mo. App. 2010). The evidence and all reasonable inferences are viewed in the light most favorable to the verdict, with all contrary evidence and inferences disregarded. *Id.* at 800. Deference also is given to the factfinder's "decision as to the credibility and weight of the witnesses' testimony," as the factfinder "may believe all, some, or none of the testimony of a witness." *Id.* (citation omitted). At the same time, this Court "may not supply missing evidence or give the [State] the benefit of unreasonable, speculative or forced inferences." *State v. Loyd*, 326 S.W.3d 908, 916 (Mo. App. 2010) (citation omitted).

* * *

The law of Missouri is that when the State seeks to enhance a DWI charge to a felony using an out-of-state conviction, it must prove the facts of that conviction would constitute an intoxication-related traffic offense under § 577.010, R.S.Mo., *i.e.*, that the accused was driving in an intoxicated condition. Where the accused is charged with driving under the influence of drugs, the State must prove the defendant's behavior not only amounts to a crime in Missouri, but also evinced impairment attributable to drugs or a combination of drugs and alcohol. Here, for Mr. Rigsby's 2005 Johnson County, Illinois conviction, all the Stated proved was that he pleaded guilty to driving with any amount of cannabis in his system, without any evidence

of actual impairment due to drugs. Nonetheless, the trial court held this was sufficient to enhance Mr. Rigsby's Missouri DWI charge to a felony. This was error, requiring reversal and remand for resentencing his DWI as a class B misdemeanor.

A. For an out-of-state conviction that encompasses acts outside of those prohibited by Missouri law to qualify as a prior intoxication-related traffic offense for enhancement under § 577.023, R.S.Mo., the State must prove that the underlying facts of that conviction would qualify as an intoxication-related traffic offense under Missouri law.

The State charged Mr. Rigsby with DWI as a "persistent offender" under §§ 577.010 and 577.023, R.S.Mo. (2015). Section 577.010 is in the appendix to this brief at pp. A6-7 and § 577.023 is at pp. A8-12.

Under § 577.023.1(5)(a), a "persistent offender" is "[a] person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offense." "[A] 'prior offender' is a person who has pleaded guilty to or has been found guilty of one intoxication-related traffic offense, where such prior offense occurred within five years of the occurrence of the intoxication-related traffic offense for which the person is charged." § 577.023.1(6). Section 577.023.1(4) further defines an "intoxication-related traffic offense" as "driving while intoxicated, driving with excessive blood alcohol content, … or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance."

Under § 577.023.2, being a "prior offender" enhances the defendant's offense level from a class B misdemeanor to a class A misdemeanor, but under § 577.023.3 being a "persistent offender" enhances it to a class D

felony. Section 577.023.7 guides a trial court's determination as to whether a defendant is a prior or persistent offender:

> 7. The state, county, or municipal court shall find the defendant to be a prior offender, persistent offender, aggravated offender, or chronic offender if:
>
> (1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender or persistent offender; and
>
> (2) Evidence is introduced that establishes sufficient facts pleaded to warrant a *finding beyond a reasonable doubt* the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender; and
>
> (3) The court makes findings of fact that warrant a finding *beyond a reasonable doubt* by the court that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

(Emphasis added).

"Statutes enhancing punishment … are highly penal in nature and must be strictly construed." *State v. Mitchell*, 659 S.W.2d 4, 6 (Mo. App. 1983). In cases involving out-of-state convictions, it is always the State's burden to prove beyond a reasonable doubt that the offense underlying that conviction falls within the meaning of an "intoxication-related traffic offense" specifically prohibited under § 577.010, R.S.Mo. *See State v. Coday*, 496 S.W.3d 572, 574 (Mo. App. 2016); *see also State v. Gibson*, 122 S.W.3d 121, 126 (Mo. App. 2003); § 577.023.7(2)-(3).

This always is true when the State seeks to use an out-of-state conviction to prove a predicate offense for a Missouri enhancement, regardless of the offense at issue. The facts of the underlying conduct at

issue must constitute a punishable offense in Missouri. This is called the "fact-based test."

For example, in *State v. Kelly* the defendant argued that because first-degree sexual assault under Colorado law encompassed a broader set of acts than the Missouri statutes defining felonies that could be used to support a "persistent sexual offender" finding, the State had to prove that his conduct underlying two Colorado convictions qualified as a prior sexual conviction under Missouri law. 728 S.W.2d 642, 648 (Mo. App. 1987). Specifically, first-degree sexual assault in Colorado included the act of anilingus, which at the time no Missouri felony statute that could be used to establish persistent sexual offender status included. *Id.* at 648. Using the fact-based test, this Court held the State failed to "set forth the facts showing which *type* of sexual penetration was committed by the defendant with respect to the offense of November 5, 1975, or the offense of November 3, 1975." *Id.* (emphasis in the original). "In the absence of such proof," the Court held, "it is possible that the Colorado convictions were based upon anilingus." *Id.*

In *State v. Brown*, this Court reaffirmed the use of the fact-based test in holding that a foreign conviction did not qualify to enhance a defendant's status to "persistent sexual offender." 97 S.W.3d 97, 102 (Mo. App. 2002). The Court stated,

> The test for determining whether a foreign conviction qualifies is whether the acts constituting the foreign conviction constitute the commission of one of the crimes enumerated in § 558.018.2, [R.S.Mo. (2000)]. … It is not necessary for the State to prove that the elements of the foreign statute correspond to the elements of the crimes listed in section 558.018, [R.S.Mo. (2000)].

Id.

The Illinois statute at issue in this case criminalizes a broader set of conduct than § 577.010. Under this fact-based approach, the State did not meet its burden of proving beyond a reasonable doubt that the predicate facts underlying Mr. Rigsby's 2005 Johnson County, Illinois conviction would have supported a conviction under § 577.010.

Some Missouri cases have used an element-comparison approach to determine whether the same acts that are prohibited by the foreign statute also are prohibited by the Missouri statute at issue. But because the determination of a defendant's prior or persistent status under § 577.023 does not "involve a determination of guilt or innocence," the element-comparison approach is more suitable in cases where the defendant pleaded guilty to an enumerated charge not specifically prohibited under Missouri's driving while intoxicated statute. *Gibson*, 122 S.W.3d at 131; *see*, *e.g.*, *State v. Stanley*, 390 P.3d 40 (Kan. App. 2016). Under this approach, in this case the question is whether the Illinois statue at issue is equivalent to § 577.010.

B. Illinois' DUI statute criminalizes a broader set of acts that the law of Missouri does not prohibit.

Under either the fact-based test or the element-comparison approach, Mr. Rigsby's 2005 Johnson County, Illinois conviction does not qualify as an "intoxication-related traffic offense" under § 577.010.

At the time of the acts underlying Mr. Rigsby's 2005 Johnson County conviction, the Illinois Statute at issue provided that "a person shall not drive or be in *actual physical control* of any vehicle within this State while:

> (1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2;
>
> (2) under the influence of alcohol;
>
> (3) under the influence of any intoxicating compound or combination of intoxicating compounds to a degree that renders the person incapable of driving safely;
>
> (4) under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving;
>
> (5) under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving; or
>
> (6) there is *any amount of a drug*, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act, a controlled substance listed in the Illinois Controlled Substances Act, or an intoxicating compound listed in the Use of Intoxicating Compounds Act.

625 ILCS § 5/11-501 (2005) (emphasis added). The Illinois statute is in the appendix to this brief at pp. A13-19.

Mr. Rigsby was charged with the offense of driving or actually physically controlling a vehicle while "there is any amount of drug in the person's breath … resulting from the unlawful use or consumption of cannabis" in Illinois (State's Ex. 2); *see* § 5/11-501(a)(6).

In § 5/11-501(a)(6), the Illinois Legislature enacted a *per se* ban on driving with *any* controlled substance in the body, specifically targeting cannabis consumption, separate from the offense of driving under the influence of drugs. *See Id*. at (a)(3)-(4). Under § 5/11-501(a)(6), a person may not drive a vehicle while "there is any amount of a drug, substance, or

compound in the person's breath … resulting from the unlawful use or consumption of cannabis ...." *Id.* at (a)(6). "Section 5/11-501(a)(6) [was] designed to ban driving a vehicle with any amount of an unlawfully-ingested controlled substance in a person's breath, blood or urine." *People v. Rodriguez*, 926 N.E.2d 390, 394 (Ill. App. 2009).

In assessing its constitutionality, the Illinois Supreme Court found that § 5/11-501(a)(6) properly created "an absolute 'prohibition against driving with any amount of a controlled substance in one's system'" without a requirement of impairment. *Rodriguez*, 926 N.E.2d at 394 (quoting *People v. Fate*, 636 N.E.2d 549, 551 (Ill. 1994)). Illinois does not require any impairment to be proven to meet §§ 5/11-501(a)(1) or (a)(6). *Id.* at 392-93. Instead, Illinois only requires that the intoxication render the person incapable of safely driving if the charge is under §§5/11-501(a)(3) or (a)(4), *id.*, which Mr. Rigsby *was not* charged with violating. Instead, under § 5/11-501(a)(6), Mr. Rigsby's charged section, *any* amount of cannabis in a person's body is itself the crime. *Id.*

The Illinois Supreme Court's decision upholding this zero-tolerance ban rests on the idea that "there is no standard that one can come up with by which, unlike alcohol in the bloodstream, one can determine whether one is driving under the influence." *Fate*, 636 N.E.2d at 550. Other jurisdictions also have upheld an unqualified ban on driving with any proscribed substance in the body. *See, e.g.*, *State ex rel. Montgomery v. Harris*, 346 P.3d 984, 989 (Ariz. 2014) (under Arizona statute, whether the driver was impaired does not matter); *see also State v. Comried*, 693 N.W.2d 773, 776

(Iowa 2005) (Iowa statute prohibited drivers from "operating motor vehicles with controlled substances in their bodies, whether or not they are under the influence").

In contrast, § 577.010, R.S.Mo., *does not* criminalize having just *any* amount of a prohibited drug in the body while operating a motor vehicle. Rather, it states that "[a] person commits the crime of 'driving while intoxicated' if he operates a motor vehicle while in an intoxicated or drugged condition." *Id.* at .1. So, "the elements of the offense of [driving while intoxicated] in Missouri are twofold: that the defendant operated a motor vehicle and that he did so while in an intoxicated or drugged condition." *State v. Slavens*, 375 S.W.3d 915, 917 (Mo. App. 2012).

This means § 577.010 more narrowly prohibits driving while in a drugged condition than Illinois' blanket, zero-tolerance prohibition. Section 577.010 requires that to be a crime, the substance must affect the person "to such an extent that it interferes with the proper operation of an automobile by the defendant …." *State v. Schroeder*, 330 S.W.3d 458, 475 (Mo. banc 2011) (internal citation omitted). In other words, § 577.010 requires "the impaired condition of thought and action and the *loss of normal control of one's faculties*" to satisfy the element of impairment, which must be proven beyond a reasonable doubt. *State v. Cox*, 478 S.W.2d 339, 342 (Mo. 1972) (emphasis in the original).

The Illinois statute Mr. Rigsby was convicted of violating in 2005 not only criminalizes the mere presence of cannabis in a person's body, an act *not* prohibited in Missouri, but it also relieves the State of the burden of proving

impairment, which is an essential element of the Missouri offense. *See State v. Hoy*, 219 S.W.3d 796, 801 (Mo. App. 2007). But just like "[a] driving impairment may not necessarily render a person incapable of safely driving a vehicle", the mere presence of a controlled substance in a person's body may not necessarily render a person impaired. *Stanley*, 390 P.3d at 44.

So, under the element-comparison approach, the Illinois statute at issue fails, as it is not equivalent to § 577.010, but instead criminalizes conduct that § 577.010 does not. Therefore, we turn to the fact-based test.

C. The State failed to prove beyond a reasonable doubt that Mr. Rigsby's conduct underlying his 2005 Johnson County, Illinois conviction would constitute a crime under § 577.010.

The evidence the State introduced below of Mr. Rigsby's 2005 Johnson County, Illinois conviction also fails the fact-based test.

1. There was insufficient evidence that Mr. Rigsby was driving, was impaired, or that any impairment was due to cannabis consumption.

Mr. Rigsby was charged in 2005 with violating a cannabis-specific Illinois law that disposes of the element of impairment and pleaded guilty to either driving or actually physically controlling a motor vehicle with any amount of a prohibited drug in his body (State's Ex. 2). The State therefore had to prove his acts undergirding his Johnson County, Illinois conviction satisfy Missouri's additional element of impairment. "Each of these words [(1) driving (2) while (3) intoxicated] has significance, and imposes a separate evidentiary burden on the State." *State v. Hatfield*, 351 S.W.3d 774, 776 (Mo. App. 2011).

"Missouri courts look to see if the defendant [was] intoxicated" at the time he was driving or operating the vehicle. *Stanley*, 390 P.3d at 43; *see also State v. Pickering*, 473 S.W.3d 698, 704 (Mo. App. 2015). Section 577.001, R.S.Mo., provides that "a person is in an 'intoxicated condition' when he is under the influence of alcohol, a controlled substance, or drug, or any combination thereof." *Id.* Missouri courts have long understood "under the influence" to mean "any intoxication that in any manner impairs the ability of a person to operate an automobile." *Pickering*, 473 S.W.3d at 704.

The State need only prove the defendant operated a vehicle under any intoxication that "in any manner impairs the ability of a person to operate an automobile." *Id.*; *see also Schroeder*, 330 S.W.3d at 475. In other words, "[i]t is [only] the fact, not the degree, of intoxication" that is sufficient to convict a person of DWI. *Pickering*, 473 S.W.3d at 704. A determination that a defendant is under the influence of a proscribed substance while driving nonetheless is required to uphold a conviction. *Hoy*, 219 S.W.3d at 801 (Mo. App. 2007); *see also State v. Adams*, 163 S.W.3d 35, 37 (Mo. App. 2005).

In *Hoy*, for example, the defendant was convicted of driving while intoxicated after "he drove his semi-tractor into the rear of another vehicle." 219 S.W.3d at 798. This Court held the terms "intoxicated condition" and "drugged condition" "may continue to be used interchangeably." *Id.* at 801. After summarizing the few cases dealing with convictions involving drug impairment, the Court outlined the criteria for proving that a driver is in a "drugged condition" within the meaning of § 577.010:

> [A] determination that a defendant is "under the influence" of a proscribed substance (alcohol, controlled substance, or drug) to

> satisfy the "intoxicated condition" element of the offense of driving while intoxicated under § 577.010.1, is composed of three components: (1) *impaired ability* – the defendant's impaired ability in any manner to operate a motor vehicle at the time of the alleged offense; (2) *presence of the substance* – the presence of the proscribed substance in the defendant's body at the time of the alleged offense; and (3) *causation* – the causal connection between the presence of the proscribed substance and the impaired ability to operate a motor vehicle.

Id. at 802 (emphasis in the original).

The Court found the defendant's impaired ability was supported by his erratic driving, his irrational behavior during the traffic stop, and the lay opinion of the officer that the defendant was impaired. *Id.* at 806-07. The presence of the drugs in the defendant's body was supported "by the direct evidence of … expert opinion … that scientific tests performed on the urine specimen … showed the presence of both drugs in Defendant's system." *Id.* Lastly, the Court found "[t]he causal connection between the presence of hydrocodone and zolpidem in Defendant's body and Defendant's impaired ability to operate a motor vehicle" was supported by the officer's opinion that the defendant was impaired due to drugs, the defendant admitted ingesting pain medications on the evening before the alleged offense, and – most importantly – expert testimony establishing the effects of both drugs. *Id.*

Conversely, in *State v. Friend*, this Court reversed a drug-intoxication conviction where the evidence did not meet all these components. 943 S.W.2d 800, 802-03 (Mo. App. 1997). The defendant was stopped for driving erratically on the wrong way on I-70 and there was evidence that he was exhibiting bizarre behavior. *Id.* at 801. A blood test revealed he had methamphetamine in his system. *Id.* But "[t]here was no testimony as to the

amount of methamphetamine in his system, the effect of the methamphetamine on his driving ability, or whether it would cause the behavior the defendant exhibited." *Id.* This Court noted that "the decisive point is that the behavior, which evidences impaired judgment and motor skills, must be consistent with the symptoms of the ingested drug." *Id.* The Court found the evidence was insufficient to sustain a conviction because there was "no evidence that the level of methamphetamines was sufficient to impair his driving ability." *Id.* at 803.

Similarly, in *State v. Clarkston*, at the scene of his accident the defendant exhibited behaviors consistent with being intoxicated and said he was "too drunk" to perform field sobriety tests. 963 S.W.2d 705, 708 (Mo. App. 1998). The State charged him with "driving while intoxicated while under the influence of alcohol and a combination of alcohol and insulin." *Id.* The defendant told investigators that he had taken his insulin at 7:00 a.m. and had drunk several beers later that evening before the accident. *Id.* This Court found there was insufficient evidence of recent ingestion of drugs or that the level of the ingested drug could cause impairment and reversed the defendant's conviction. *Id.* at 712-13. It noted that the crucial problem was that "[t]here simply was no evidence as to how much, if any, insulin would have remained in his system by 9:30 p.m. that evening." *Id.* at 714.

Mr. Rigsby's 2005 Johnson County, Illinois conviction is like *Friend* and *Clarkston*, and would not qualify as an offense in Missouri. After refreshing his recollection, Captain Kilduff said he saw a vehicle pull into the parking lot and extinguish its lights around 10:00 p.m., which made him suspicious

(Tr. 63, 65). He said he observed "a large amount of alcohol within the vehicle" and "smelled a strong odor of burnt cannabis" (Tr. 63-64). Although Mr. Rigsby denied having smoked any cannabis that evening, Captain Kilduff said that from looking at his report, he noticed Mr. Rigsby had a sleepy appearance, his eyes were glassy, and "he was kind of slow and thick tongued" (Tr. 64, 67). Captain Kilduff also said Mr. Rigsby did not pass the horizontal gaze nystagmus test, the walk-and-turn test, or the one-leg stand test, but he did pass the alphabet test and blew a 0.0 on the preliminary breath test (Tr. 64-65, 68-69).

Captain Kilduff said he did not place Mr. Rigsby under arrest at that point (Tr. 64, 70). He said he then discovered approximately 14 grams of cannabis inside a backpack after Mr. Rigsby had consented to a search (Tr. 69). The other occupant, Mr. Hooker, admitted the cannabis was his and told Captain Kilduff "he had smoked cannabis about two hours prior to the stop with Mr. Rigsby" (Tr. 69-70). Based on Mr. Hooker's statement that they had smoked "just one joint two hours prior," Captain Kilduff arrested Mr. Rigsby for cannabis DUI under the Illinois zero-tolerance statute (Tr. 70).

As in *Friend* and *Clarkston*, none of this showed that Mr. Rigby was driving in a drugged condition that would violate Missouri law. As an initial matter, it is far from clear that Mr. Rigsby operated a vehicle at all. While the trial court found Captain Kilduff's testimony credible, his own report arguably contradicts his version of the story (Tr. 63, 65-66; State's Ex. 2, RBL). Captain Kilduff's report merely indicates that he "observed a vehicle … *pulled* into the Yarbers [*sic*] Parking Lot" (State's Ex. 2) (emphasis added).

The report further indicates that he "observed the driver turn off all the lights to the vehicle … sitting in total darkness" (State's Ex. 2). But even after reading his report, Captain Kilduff could not recall whether he was "driving on the road or parked near the road" (Tr. 65). Yet, he was able to recall seeing the vehicle rolling, despite testifying the parking lot was "kind of secluded … kind of set back a little bit" (Tr. 62). Captain Kilduff also admitted having no "independent recollection other than the report" (Tr 65).

As to whether Mr. Rigsby was impaired, the first component of driving in a drugged condition in Missouri, Captain Kilduff merely stated that he failed the Horizontal Gaze Nystagmus (HGN) but reported only two out of six clues present on his report (State's Ex. 2, Influence Report). Generally, only if the person scores four or more points out of the six, officers will classify the person's BAC as above .10 percent. *See* Anderson, Schweitz & Snyder, *Field Evaluation of Behavioral Test Battery for DWI*, U.S. Dept. of Transportation Rep. No. DOT-HS-806-475 (1983), *available online at* https://www.ncjrs.gov/pdffiles1/Digitization/97136NCJRS.pdf (field evaluation of the field sobriety test battery that police officers from four jurisdictions conducted indicated that it was about 80% effective in determining BAC above and below .10 percent). Conversely, "the observation of two HGN clues indicate[s] a BAC [of] .04 percent." 42 MO. PRAC. § 17:3 (Mar. 2017). Captain Kilduff also noted four out of nine clues on the walk-and-turn test (State's Ex. 2, Influence Report). But there was no presence of vertical nystagmus. *Cf. State v. Finch*, 398 S.W.3d 928, 930 (Mo. App. 2013) (presence of vertical nystagmus was evidence of impairment).

More importantly, Captain Kilduff did not observe Mr. Rigsby commit any moving violations. *Cf. State v. Savick*, 347 S.W.3d 147, 155-56 (Mo. App. 2011) (officers' testimony about the defendant's moving violations was sufficient evidence of his impaired driving ability). This component was not met.

As to whether a proscribed substance was present in Mr. Rigsby's body at the time of the offense, Missouri's second component of driving in a drugged condition, all the evidence established was that there were 14 grams of cannabis inside a backpack with some rolling papers, a strong odor of burnt cannabis inside and outside the vehicle, and that according to Mr. Hooker, Mr. Rigsby had "smoked cannabis two hours prior to the stop" (Tr. 63-65, 69-70). But "there was nothing done that showed any verifiable amount of cannabis in Mr. Rigsby's system" other than the smell outside the vehicle when Captain Kilduff spoke with Mr. Rigsby one-on-one (Tr. 64, 68, 71). All the evidence established was that Mr. Rigsby had a "sleepy appearance" and "his eyes were glassy" at 10:00 p.m. (Tr. 63). Moreover, Captain Kilduff did not say whether Mr. Rigsby "swayed back and forth and was unable to stand still" or whether his "eyes 'jerked' and 'bounced' during the initial HGN." *Savick*, 347 S.W.3d at 155-56 (listing signs that would indicate the presence of a drug in a person's body). This component was not met, either.

As to whether there was a causal connection between the presence of the proscribed substance and the impaired ability, Missouri's final – and most crucial – component of driving in a drugged condition, Captain Kilduff

charged Mr. Rigsby with driving with *any* presence of an illicit drug in his system rather than with driving "under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving." *Cf.* 625 ILCS § 5/11-501(a)(4) *with* (a)(6). And unlike *State v. Owen*, 869 S.W.2d 310 (Mo. App. 1994), where the trooper who observed the defendant and his condition testified that based on his observations of the defendant's eyes, odor, and his actions, his driving ability was impaired by reason of the effects of alcohol or drugs, Captain Kilduff crucially did not offer his opinion as to whether Mr. Rigsby's ability to drive was in fact impaired. *See also Savick*, 347 S.W.3d at 156-57; (State's Ex. 2, Illinois State Police Citation and Complaint).

Most importantly, there was no evidence at all that the level of cannabis, whatever that amount was, was consistent with identifiable symptoms of ingestion of cannabis that would impair Mr. Rigsby's ability to drive. As in *Friend* and *Clarkston*, the third component is not met, either.

There was insufficient evidence that Mr. Rigsby's 2005 Johnson County, Illinois conviction qualified as an intoxication-related traffic offense in Missouri.

2. Mr. Rigsby's appearance and Mr. Hooker's statement are not enough.

If the State argues that Mr. Rigsby's sleepy appearance, glassy eyes, and slow speech are sufficient signs of impairment, or that Mr. Hooker's admission to Captain Kilduff coupled with the close presence of cannabis paraphernalia suggests this substance was in Mr. Rigsby's body, and this is sufficient, its argument would be without merit.

First, Captain Kilduff's report and restatement of Mr. Hooker's statement should not have been admitted at trial in the first place. Doing so plainly violated Mr. Rigsby's right to confrontation under U.S. Const. Amends. VI and XIV, and Mo. Const. art. I, §18(a).

The Confrontation Clause protects defendants from having testimonial statements introduced against them at trial if the defendant does not have the opportunity to cross-examine the person who made the statement. *State v. March*, 216 S.W.3d 663, 665 (Mo. banc 2007). Statements contained in reports are testimonial if they were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" *id*. (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)), and where the statement's "'primary purpose' is not to respond to an ongoing emergency but 'to establish or prove past events potentially relevant to later criminal prosecution.'" *March*, 216 S.W.3d at 665 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). The primary purpose of a charge for driving while intoxicated is its use in a later criminal prosecution. *See State v. Lanhai*, 18 A.3d 630, 643-44 (Conn. App. 2011) (discussing and listing cases for the conclusion that a police report is the "quintessential example" of a testimonial statement under *Crawford*).

Although Captain Kilduff's restatement of Mr. Hooker's statement was not objected to, this was a court-tried case, and there is a presumption in court-tried cases that the judge only will consider the evidence for its constitutionally-allowed purpose. *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005). The Court will "presume that the trial judge was not

prejudiced by inadmissible evidence and was not influenced by it in reaching a judgment … unless it is clear from the record that the trial judge considered and relied upon the inadmissible evidence." *State v. Anders*, 975 S.W.2d 462, 466 (Mo. App. 1998) (citations omitted); *cf. id. with State v. Sladek*, 835 S.W.2d 308, 313 (Mo. banc 1992).

So, Captain Kilduff's report, as well as his testimony about Mr. Hooker's statement, cannot constitute evidence to support Mr. Rigsby's conviction. And if the trial court relied on that anyway, it was error and this Court still cannot consider it in reviewing the sufficiency of the evidence.

Second, even if Captain Kilduff's report or Mr. Hooker's statement somehow were admissible evidence, they still would not prove Missouri's three components of driving in a drugged condition.

"Drugs do not necessarily produce readily recognizable symptoms and behavior patterns", as the effects that various strengths of cannabis doses have on possible impairment varies by individual. Harder and Rietbrock, *Concentration-Effect Relationship of Delta-9-Tetrahydrocannabiol and Prediction of Psychotropic Effects After Smoking Marijuana*, 35(4) INT. J. CLIN. PHARMACOL. THER. 155 (1997) ("H&R"), *available online at* https://europepmc.org/abstract/med/9112136. "Different drugs have varying effects on behavior, whereas alcohol has readily identifiable symptoms, such as loss of balance and bloodshot eyes, and frequently is identified by its odor." *Friend*, 943 S.W.3d at 802. So, "[t]here must be evidence beyond the mere fact that a drug was present in someone's system in a particular quantity before a reasonable inference can be made that the person is impaired

therefrom." *Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 282 (Mo. App. 2011). "It is not the rule that any level of any drug in a person's system results in an automatic permissible inference of impairment." *Id*. at 283.

Nothing in the record suggests "that the level of drugs" allegedly ingested two hours prior to the traffic stop was "sufficient to impair [Mr. Rigsby's ability to drive a vehicle." *Friend*, 943 S.W.2d at 802. Moreover, driving studies have shown that the consumption of marijuana causes drivers to slow down and drive more safely. *See* Kruger and Berghaus, *Behavioral Effects of Alcohol and Cannabis: Can Equipotencies be Established?* Center for Traffic Sciences, Univ. of Wurzburg, Rontgenring 11, D-97070 Wurzburg, Germany (1995), *available online at* http://www.icadtsinternational.com/files/documents/1995_061.pdf. But Mr. Rigsby denied smoking anything that evening (Tr. 64, 69). And Captain Kilduff did not testify that Mr. Rigsby was intoxicated. In fact, he said he arrested Mr. Rigsby only after speaking with Mr. Hooker (Tr. 64-65), which would explain the charge under Illinois' zero-tolerance statute.

The fleeting effects of cannabis consumption also undermine the State's argument. Any cannabis effects on a person's driving ability generally are gone between 30 to 60 minutes after ingestion. Sticht and Kaferstein, *Pharmacokinetic Evaluation of Published Studies on Controlled Smoking of Marijuana*, Institute of Legal Medicine, University of Cologne, *available online at* http://casr.adelaide.edu.au/T95/paper/s16p1.html; *see also* H&R. Without some connecting evidence, which was not present here, courts are left "to speculate whether the level of [cannabis] in the defendant's system

was sufficient to cause the [sleepy appearance], and if so, whether the symptoms described were the result of [cannabis] or some other cause." *Friend*, 943 S.W.3d at 802.

Illinois' § 5/11-501(a)(6) criminalizes what in Missouri is lawful conduct that §§ 577.010 and 577.023 do not punish. Punishing prior conduct that Missouri never has sought to deter would be antithetical to the purpose of § 577.023, which is "to deter persons who have previously been convicted of driving while intoxicated from repeating their unlawful acts and to severely punish those who ignore the deterrent message." *Gibson*, 122 S.W.3d at 128.

The State had to produce evidence to establish that the specific acts underlying Mr. Rigsby's 2005 Johnson County, Illinois conviction would constitute a crime in Missouri. All it proved was that Mr. Rigsby pleaded guilty to conduct that would not lead to a conviction under § 577.010, R.S.Mo.

The State therefore did not prove beyond a reasonable doubt that the conviction on which the trial court relied was an intoxication-related traffic offense that Missouri law prohibited. The trial court erred in holding otherwise and finding as a result that Mr. Rigsby qualified as a "persistent offender." And Mr. Rigsby did not qualify as a "prior offender" either, as his other predicate offense was from 2006 (State's Exhibit 1), and so did not "occur[r] within five years of the occurrence of the intoxication-related traffic offense for which [he] is charged" in 2016. § 577.023.1(6).

The Court should reverse the trial court's judgment and remand this case with instructions to resentence Mr. Rigsby's DWI offense as a class B misdemeanor.

Conclusion

The Court should reverse the trial court's judgment and remand this case with instructions to resentence Mr. Rigsby's DWI offense as a class B misdemeanor.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
DEAN RIGSBY

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 7,926 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on April 8, 2019, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

Mr. Shaun J. Mackelprang,
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
Telephone: (573) 751-3321
Facsimile: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Counsel for Respondent
State of Missouri

/s/Jonathan Sternberg
Attorney