

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
SPECIAL DIVISION
ZEL FISCHER, SPECIAL JUDGE, PRESIDING JUDGE
MARK D. PFEIFFER, JUDGE
GARY D. WITT, JUDGE
SEPTEMBER 17, 2021
MISSOURI DWI INSTITUTE
MARGARITAVILLE LAKE RESORT
LAKE OF THE OZARKS, MISSOURI**

WD84220

David Wilmoth, Appellant,

v.

Director of Revenue, Respondent.

David Wilmoth appeals from the circuit court's judgment affirming the Director of Revenue's decision to suspend Wilmoth's driving privileges. The facts as alleged claim that, on November 17, 2019, Deputy Cole Mazer of the Clinton County Sheriff's Department responded to a 911 call of a physical domestic assault in progress between Wilmoth and his wife. While in route to the provided address, Deputy Mazer received information that Wilmoth had left the residence in a Honda Pioneer side-by-side utility vehicle. Deputy Mazer caught up to the described vehicle and observed the vehicle make a left turn without signaling. In response, Deputy Mazer initiated a traffic stop. According to Deputy Mazer, he detected a moderate odor of intoxicating beverage and Wilmoth's eyes appeared to be bloodshot and watery. Wilmoth admitted to having "a couple beers" with dinner approximately three hours earlier. Wilmoth took a portable breath test which gave a positive result, meaning that the result was over .08 blood alcohol concentration. Wilmoth did not agree to any further field sobriety tests, and Deputy Mazer arrested him for driving while intoxicated. Following his arrest, Wilmoth was notified his driving privileges would be revoked or suspended. Wilmoth requested administrative review, and the suspension was upheld by an administrative hearing officer. Wilmoth timely filed a petition for de novo review in the Circuit Court of Clinton County. The circuit court sustained the Department of Revenue's order suspending Wilmoth's driving privileges. Wilmoth now appeals.

Appellant's points on appeal:

1. The trial court erred in allowing Deputy Mazer to testify that a preliminary breath test result was in excess of .08 because (1) such evidence was inadmissible in that, pursuant to § 577.021, R.S.Mo., the results of such tests "shall not be admissible as evidence of blood alcohol content," and, on the specific evidence presented in the present case, there was no foundation for such test results, and (2) such evidence was prejudicial in that it was the only evidence presented at trial which could even arguably be construed as substantial evidence of impairment, as opposed to lawful consumption.
2. The trial court erred in entering Judgment sustaining the Director of Revenue's revocation of Mr. Wilmoth's driving privileges for being arrested upon

- probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more because said Judgment is not supported by substantial evidence, in that there was not substantial evidence to support a finding Mr. Wilmoth was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more.
3. The trial court erred in entering Judgment sustaining the Director of Revenue's revocation of Mr. Wilmoth's driving privilege for being arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more because said Judgment is against the weight of the evidence, in that the trial court could not have reasonably found, from the record at trial, that Mr. Wilmoth was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in his blood, breath, or urine was eight-hundredths of one percent or more.

WD84301

Paul Mottet, Respondent,

v.

Director of Revenue, State of Missouri, Appellant.

The State of Missouri appeals from the circuit court's judgment denying the State's Motion for New Trial/to Set Aside Judgment. On May 24, 2020, the Director of Revenue notified Paul Mottet that his driving privileges would be revoked for one year for Mottet's alleged failure to submit to a chemical test following his arrest for driving while intoxicated. Respondent filed a petition for review with the Circuit Court of Putnam County. On October 13, 2020, the circuit court held a hearing on the petition. The prosecuting attorney did not appear, and no evidence was presented. The circuit court entered a default judgment, ordering the Director of Revenue to reinstate Mottet's driving privileges and to set aside the disqualification of Respondent's commercial driver's license. On October 28, 2020, the State filed a Motion for New Trial/to Set Aside Judgment alleging that the default judgment was void because §§ 56.060-56.120, RSMo, did not permit the case from being tried in the absence of the prosecuting attorney or other person appointed to discharge the duties of the prosecutor. The circuit court entered a judgment denying the State's motion on January 21, 2021. The State now appeals.

Appellant's point on appeal:

The trial court erred in denying Appellant's Motion for New Trial/to Set Aside Judgment because the original judgment was void, in that the trial court failed to ensure the presence of someone properly qualified to represent the state's interests, per § 56.090, RSMo.