

MISSOURI COURT OF APPEALS – WESTERN DISTRICT  
DIVISION 1 (NEWTON, P.J., MARTIN AND ARDINI, JJ.)  
OCTOBER 12, 2016-9:30 A.M.  
MISSOURI WESTERN STATE UNIVERSITY  
ST. JOSEPH, MISSOURI

**WD78589**

**State of Missouri, Respondent,**

**vs.**

**Richard Anderson Preston, Jr., Appellant**

On September 14, 2014, Corporal Roger Sherman of the Missouri Highway Patrol was traveling southbound on Interstate 35 in Clinton County, Missouri. Corp. Sherman observed a white Chevrolet Lumina traveling at 99 miles per hour in a 70 miles per hour speed limit. Corp. Sherman activated the emergency equipment on his patrol car and stopped the Lumina. When Corp. Sherman approached the vehicle he asked Richard Preston (Appellant) for his driver's license and proof of insurance. Appellant stated he did not have either of those items. Corp. Sherman noticed a strong smell of alcohol coming from the vehicle and observed that Appellant's eyes were bloodshot and that he was slurring his words. When Corp. Sherman asked Appellant to walk back to the patrol he swayed, staggered and tried to maintain his balance. Appellant refused to blow into a portable breath tester or to perform any field sobriety tests. A check of Appellant's driver's license indicated he was driving with a revoked license. Once at the police station, Appellant also refused to perform a chemical breath test. After a jury trial, Appellant was found not guilty of driving while intoxicated. He was found guilty, however, of driving while revoked. In Appellant's motion for new trial he alleged that the trial court erred in enhancing the driving while revoked count to a D felony after finding him to be a prior persistent offender, enhancing the range of punishment on the D felony of driving while revoked to that of a C felony, when Appellant was not guilty of a D felony and instead guilty of only an A misdemeanor. The trial court overruled Appellant's motion for new trial and sentenced him to six years of imprisonment.

Appellant's points on appeal:

- (1) The trial court erred in finding that Richard was guilty of D felony driving while suspended, §302.321.1-2, RSMo, and sentencing Richard, who had been found to be a prior and persistent offender, §§557.036, 558.016, RSMo, to six years imprisonment, in violation of Richard's rights to due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amendments V, VI, VIII, XIV; Mo. Const., Art. I, §§10, 18(a), 21, because the state failed to prove beyond a reasonable doubt that Richard's prior convictions for driving while suspended occurred when Richard was either represented by counsel or waived his right to counsel in writing, as required by §302.321.2, RSMo.
- (2) The trial court plainly erred and committed a manifest injustice in finding Richard to be a prior and persistent offender, §§557.036, 558.016, RSMo, and in sentencing

Richard for D felony driving while suspended, §302.321.1-2,RSMo, to six years imprisonment, which was within the enhanced C felony range of punishment, §558.011.1(3),RSMo; §558.016.7(4),RSMo, in violation of Richard's rights to due process, a fair trial, and freedom from cruel and unusual punishment, U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§10, 18(a), 21, because: (1) as discussed in Argument I, the state failed to prove beyond a reasonable doubt that Richard was guilty of D felony driving while revoked and, thus, was only guilty of a misdemeanor; 2) the sentence enhancement provisions under §558.011.1, RSMo and §558.016.7, RSMo, only apply to convictions for felonies-not misdemeanors; and 3) six years imprisonment is far beyond the authorized maximum sentence for a misdemeanor conviction.

- (3) The trial court erred and abused its discretion by admitting state's Exhibit B—a redacted version of Richard's DOR driving record showing all seven of his active suspensions/revocations as of the date of the charged offense, in that state's Exhibit B was not legally relevant, and its prejudicial effect greatly outweighed its probative value, in that it suggested extensive prior driving offenses, thus violating Richard's rights to due process, fair trial, and being tried only for the charged crime, U.S. Const., Amends. V, VI, XIV; Mo. Const., Art. I, §§10, 17, 18(a).

**WD79244**

**State of Missouri, Dept. of Social Services, Family Support Division, Appellant**

**vs.**

**Randy Jay Swank, d/b/a R. Swank Farms, Respondent**

In 1997, the Circuit Court of Saline County ordered Michael Silkwood to pay child support in the amount of \$275.00 per month. He did not comply with the order and owed an arrearage. In December of 2012, the Missouri Department of Social Services, Family Support Division (Appellant) issued an income withholding order to Randy Swank (Respondent), Mr. Silkwood's employer. The order required Respondent to withhold \$275.00 per month for current support and \$137.50 for the arrearage, for a total of \$412.50 per month. Respondent began to withhold the money from Mr. Silkwood's paychecks. Soon after, Mr. Silkwood discussed the withholding with Respondent and gave him a document indicating that on September 6, 2010, the custodial parent agreed to waive all past and future child support due to her. Respondent showed the document to his accountant. The accountant advised Respondent that he could stop withholding money from Mr. Silkwood's wages. Respondent followed the accountant's advice. The Appellant subsequently filed a Petition to Enforce Child Support Withholding Order. After a hearing the trial court found that Respondent "did not willfully fail or refuse to comply with the withholding directives and in good faith, after appropriate consultation with his professional accountant, abandoned his planned withholding." The Court determined that Respondent should be excused under the circumstances for failing or refusing to withhold or pay over the amounts set forth in the withholding order.

Appellant's point on appeal:

The trial court erred in denying the Division's Petition to Enforce Child Support Withholding Order, because the Employer was strictly liable for failing to comply with the income withholding order under §454.505.8, RSMo, in that Employer employed Silkwood and received the income withholding order but failed to withhold and pay over the amounts as ordered.

**WD79417**

**State of Missouri, Dept. of Social Services, Family Support Division, Respondent**

**vs.**

**Kenneth Schauer, Appellant**

In 2002 a Judgment of Dissolution of Marriage was entered in Nodaway County Circuit Court, dissolving the marriage between Kenneth Schauer (Appellant) and Lisa Schauer (Mother). Appellant was ordered to provide health insurance and pay \$400.00 per month in child support. At the request of Mother, in late 2009 or early 2010, the Missouri Department of Social Services, Family Support Division (Respondent) reviewed the case and filed a Proposed Modification Decision and Order, stating that the support amount paid by Appellant should be raised to \$746.00 per month. Appellant requested an administrative hearing. The administrative hearing officer reviewed the Proposed Modification Decision and Order and determined that the presumed child support amount of \$714.00 per month was just and appropriate. Respondent filed a Motion to Review and Approve the decision in the circuit court. In March of 2011, the circuit court entered a Judgment of Modification approving the increase in child support to \$714.00 per month. Over a year later, Appellant filed a Motion for Relief from Judgment under Rule 74.06(b). In September of 2013, the circuit court denied Appellant's motion. In December of 2015, Appellant filed a Motion to Vacate the Judgment. The circuit court denied Appellant's motion.

Appellant's points on appeal:

- (1) The trial court erred in modifying its previous order of April 18, 2002, because it lacked subject matter jurisdiction under §454.496 in that all of the elements of §454.496 and §452.370 were not met.
- (2) The trial court erred in assisting the Division who came to court with unclean hands, because the Division misled the trial court in that the Division made false statements with their filings to the trial court in order to have their motion approved.

**WD79220**

**Village of Agency, Missouri, Appellant**

**vs.**

**City of St. Joseph, Missouri, et al., Respondents.**

The Village of Agency, Missouri (Village), is situated in Buchanan County, Missouri. It sought to annex approximately 347 acres of land located in Buchanan County. The City of St.

Joseph Missouri owns approximately 238 acres of the total acreage sought for annexation. The Johnsons, residents of Buchanan County, are owners (in whole or in part) of an unincorporated area adjacent to the Village, consisting of approximately 109 acres of the total acreage sought for annexation. In May of 2013 the Board of Trustees of the Village adopted Resolution No. 2013-01 concerning its intent to annex. The Board also introduced Resolution No. 2013-02 and Bill No. 2013-2 (proposed Ordinance No. 28), providing for the annexation of unincorporated land adjacent to the Village. In July of 2013 a public hearing was held to discuss the annexation plan. In November of 2014 an election was held and the proposition passed: 159 – yes; 26 – no. The Village filed a petition for declaratory judgment in the Circuit Court of Buchanan County to authorize the annexation. After analyzing the relevant factors the Court declined to allow the annexation to proceed.

Appellant's points on appeal:

- (1) The trial court erred in finding that there was not substantial evidence that the proposed annexation was fairly debatable because there is no burden of proof in involuntary annexation cases pursuant to §71.015 RSMo in that the decision to pursue annexation is essentially a legislative action that only required the Appellant to present competent evidence to demonstrate that it was at least “fairly debatable” that the annexation was proper, and the court cannot interpose its Judgment as to the advisability or the wisdom of the proposed annexation for that of the Village of Agency’s legislators.
- (2) The trial court erred in finding that the Appellant had failed to put forth substantial evidence to satisfy any of the factors as set forth in *City of Centralia v. Norden*, 879 S.W.2d 724, 727 (Mo.App. W.D. 2008) because the list of the twelve factors is non-exclusive and the absence of any individual factor is not determinative as “reasonableness and necessity” must be judge on a case-by-case basis in that the court should add “regulation of nearby land so that it would not become noxious to the municipality” as an additional factor the court may take into consideration when determining if a particular annexation is reasonable and necessary.