

Fall 2007

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Recommended Citation

Alison K. Spinden, *Slurred Speech and Double Vision: Missouri's Supreme Court Is Unsteady on DWI Standard*, 72 Mo. L. REV. (2007)

Available at: <https://scholarship.law.missouri.edu/mlr/vol72/iss4/15>

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Slurred Speech and Double Vision: Missouri's Supreme Court Is Unsteady on DWI Standard

*York v. Director of Revenue*¹

I. INTRODUCTION

Supreme Court Justice Potter Stewart observed that “[t]he art of being a judge, if there is such an art, is in announcing clear rules in the context of . . . infinitely varied cases, rules that can be understood and observed by conscientious government officials.”² This might be excellent advice for Missouri’s judges to consider. After nearly fifteen years of struggling to formulate the proper standard for appellate review of a trial court’s finding of probable cause, courts appear to be as unsettled on the issue as ever.

In no context is this clearer than in cases involving charges of driving while intoxicated (DWI). Two contradictory lines of cases have emerged in DWI cases in Missouri, and decisions of the Supreme Court of Missouri issued within a year of each other provide good examples of each line, perhaps demonstrating the level of confusion that overshadows the issue. One line holds that appellate courts should review *de novo* a finding of probable cause based on uncontroverted evidence.³ These courts assert that, because no facts are in dispute, the only remaining issue is one of law and, thus, there is no need for deference.⁴ The other line holds to a deferential standard – that the appellate court should view the evidence, even if uncontroverted, in the light most favorable to the trial court’s ruling.⁵ These courts hold to the proposi-

1. 186 S.W.3d 267 (Mo. 2006) (en banc).

2. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

3. *Coyle v. Dir. of Revenue*, 181 S.W.3d 62, 64 (Mo. 2005) (en banc) (citing *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 621 (Mo. 2002)).

4. *Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543, 545 (Mo. 2003) (en banc) (citing *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 621 (Mo. 2002)) (“If the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court’s judgment.”).

5. *York*, 186 S.W.3d at 272 (even if evidence regarding intoxication is uncontroverted, “the trial court, in its discretion, was free to draw the conclusion that there was no probable cause”). See also, e.g., *Bedell v. Dir. of Revenue*, 935 S.W.2d 94, 96 (Mo. App. W.D. 1996); *Jurgiel v. Dir. of Revenue*, 937 S.W.2d 397, 398 (Mo. App. E.D. 1997); *Mills v. Dir. of Revenue*, 964 S.W.2d 873, 874 (Mo. App. E.D. 1998); *Terry v. Dir. of Revenue*, 14 S.W.3d 722, 724 (Mo. App. W.D. 2000); *Boyd v. Dir. of Revenue*, 71 S.W.3d 262, 264 (Mo. App. S.D. 2002); *Baldrige v. Dir. of Revenue*,

tion that search and seizure issues often involved mixed questions of law and fact, and the appellate court “must give due regard to the trial court’s opportunity to judge the credibility of the witnesses in determining whether the trial court’s findings are supported by substantial evidence.”⁶

The Supreme Court of Missouri’s latest opinion on the issue, *York v. Director of Revenue*, has significantly added to the confusion by not only contradicting the standard enunciated in its own decision issued just four years earlier, but also by making the pronouncement unceremoniously, without explanation, and without acknowledging that it was even aware that it was declaring a changed standard.⁷ And, perhaps of equal significance, the court has exacerbated the confusion by apparently rejecting the United States Supreme Court’s holding that the Fourth Amendment to the United States Constitution requires *de novo* review of probable cause rulings.⁸ This rebuff is significant because, since 1985, Missouri’s courts have deemed the interests protected by Missouri’s constitutional guarantees of reasonable governmental searches and seizures⁹ to be identical to the interests protected by the United States Constitution’s Fourth Amendment.¹⁰ Missouri has explicitly acknowledged that this recognition applies to the standard of review in cases to determine if there is a violation of the Fourth Amendment.¹¹ As a consequence, Missouri courts have obligated themselves to defer to the United States Supreme Court’s holdings concerning all search and seizure issues, including what constitutes probable cause.¹² Missouri courts deem requirements of “probable cause” DWI cases to be virtually identical to the use of “probable

82 S.W.3d 212, 219 (Mo. App. W.D. 2002); *Saladino v. Dir. of Revenue*, 88 S.W.3d 64, 68 (Mo. App. W.D. 2002).

6. *State v. Rodgers*, 963 S.W.2d 725, 725 (Mo. App. E.D. 1998) (motion to suppress eyewitness identification). *See also, e.g., Bedell*, 935 S.W.2d at 96; *Jurgiel*, 937 S.W.2d at 398; *Mills*, 964 S.W.2d at 874; *Terry*, 14 S.W.3d at 724; *Boyd*, 71 S.W.3d at 264; *Baldrige*, 82 S.W.3d at 219; *Saladino*, 88 S.W.3d at 68.

7. *See* 186 S.W.3d 267.

8. *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996) (noting that the U.S. Supreme Court has never “expressly deferred to the trial court’s determination” when reviewing a probable-cause ruling).

9. MO. CONST. art. I, § 15.

10. *State v. Sweeney*, 701 S.W.2d 420, 425 n.4 (Mo. 1985) (en banc) (“[A]rticle I, section 15 has been interpreted to provide essentially the same protections found in the fourth amendment to the United States Constitution.”).

11. *See, e.g., State v. Hawkins*, 137 S.W.3d 549, 556 (Mo. App. W.D. 2004) (noting that the United States Supreme Court has already determined that *de novo* review is necessary in reviewing legal and factual questions in Fourth Amendment cases).

12. *See State v. Damask*, 936 S.W.2d 565, 570 (Mo. 1996) (en banc) (“The Fourth Amendment provides the same guarantees against unreasonable searches and seizures as article I, section 15 of the Missouri Constitution. Thus, any analysis of search and seizure questions under the Fourth Amendment is identical to search and seizure questions arising under Missouri law.”).

cause” in search and seizure cases.¹³ The sudden rejection by Missouri’s Supreme Court of the United States Supreme Court’s holding – a holding that the Missouri court cited with approval just two years previously¹⁴ – therefore necessarily suggests that Missouri’s courts may no longer deem its state’s constitutional guarantees to be identical to those protected by the Fourth Amendment. If so – and there does not appear to be any other logical explanation for the rebuff – the change is drastic, especially in light of its occurring without even an explanation.

Whether the change results from mistake or was by design is not clear. The problem created by the Supreme Court of Missouri in *York* is not that its announced rule lacked clarity. The rule, as articulated by the court, was simple enough. The problem lies not in the court’s ability to articulate a rule, but in the manner in which it unveiled the rule: unceremoniously and without any apparent acknowledgement that it was contradicting precedent. Some uncertainty is to be expected as a necessary evil accompanying most any change. But by making such abrupt, unexplained change in an area already fraught with uncertainty and some confusion, the Supreme Court of Missouri has created much confusion. Indeed, a Missouri appellate decision, after noting *York*’s inconsistencies with precedent, resigned itself to being unable to do anything other than “to follow.”¹⁵

The Supreme Court of Missouri must hasten to clarify the issue and resolve the uncertainty surrounding the matter. Until it does, confusion undoubtedly will persist. To the extent that the Supreme Court intended the change enunciated in its *York* decision, it should heed the well-considered analysis of the United States Supreme Court and return to the *de novo* standard set out in its previous decisions. Doing so will, as Chief Justice William Rehnquist reasoned in *Ornelas v. United States*, assure that defendants are not subjected to a widely varying notion of probable cause and that law enforcement officers will have clearer guidelines of what the law demands of them.¹⁶

13. *Compare* *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 621 (Mo. 2002) (en banc) (“Probable cause to arrest [in a DWI case] exists when the arresting officer’s knowledge of the particular facts and circumstances is sufficient to warrant a prudent person’s belief that a suspect has committed an offense.”) with *Ornelas*, 517 U.S. at 696 (“We have described . . . probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found . . .”).

14. *See* *State v. Goff*, 129 S.W.3d 857, 862 (Mo. 2004) (en banc).

15. *Guhr v. Dir. of Revenue*, No. WD 65762, 2006 WL 2471601, at *7 (Mo. App. W.D. Aug. 29, 2006), *rev’d*, 228 S.W.3d 581 (Mo. 2007) (en banc) (“[T]his court is bound to follow the latest [Missouri] Supreme Court decision on this issue.”). Note the concurring opinion’s inability to pin-point the effect of the *York* decision. *Id.* at *8 (Howard, C.J., concurring) (“There are at least several possibilities as to the practical effect of *York*.”).

16. 517 U.S. 690, 697-98 (1996).

II. LEGAL BACKGROUND

A. *The Standard of Review of Probable Cause Findings in Missouri Courts*

Probable cause – or its legal equivalent “reasonable grounds”¹⁷ – has emerged as a central issue in DWI cases because Missouri’s legislature made it a threshold requirement for testing motorists to determine whether or not they were driving under the influence of intoxicants or drugs.¹⁸

The law declares that a motorist, simply by driving, impliedly consents to “a chemical test or tests of the person’s breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person’s blood.”¹⁹ The courts refer to this law as the “implied consent law.”²⁰ Notwithstanding the motorist’s consent, a prerequisite to an officer’s asking a motorist to submit to a test is that the officer arrest the motorist “for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or a drugged condition.”²¹ If the motorist refuses to submit to the test, the law requires that the officer administering the test take possession of the motorist’s driver’s license and to issue a temporary permit authorizing the motorist to operate a vehicle for fifteen days.²² The law mandates that the arresting officer make a report informing the director of the Department of Revenue either of the motorist’s refusal to submit to test²³ or of tests results showing that the motorist’s blood alcohol content exceeded .08 percent.²⁴ The law obligates the director, upon receiving the officer’s report, to “revoke” the motorist’s license for one year.²⁵

The General Assembly did not define “reasonable grounds” in the implied consent law. The courts, however, have equated the term to “probable

17. *Hinnah*, 77 S.W.3d at 620. See also *infra* text accompanying note 22.

18. MO. REV. STAT. §§ 302.505, 577.020 (2006) (the first statute uses “probable cause,” while the latter uses “reasonable grounds”). The General Assembly enacted the law for the purpose of ridding Missouri’s public roads and highways of drunk drivers. *Shine v. Dir. of Revenue*, 807 S.W.2d 160, 163 (Mo. App. E.D. 1991).

19. Mo. Rev. Stat. § 577.020.1.

20. The first reference to the law as an “[i]mplied [c]onsent [l]aw” in a Missouri decision occurred in *Blydenburg v. David*, 413 S.W.2d 284, 290 (Mo. 1967) (en banc) (setting out the history of the law and indicating that it originated in New York).

21. MO. REV. STAT. § 577.020.1(1).

22. *Id.* § 577.041.1.

23. *Id.* § 577.041.2.

24. *Id.* § 302.510.

25. *Id.* § 577.041.3. “Although the statute does not authorize termination of a driving license and permits only suspension of a license for one year, the General Assembly denominates this action as a revocation and not a suspension.” *Beach v. Dir. of Revenue*, 188 S.W.3d 492, 493 n.1 (Mo. App. W.D. 2006).

cause” as used in search and seizure cases.²⁶ Probable cause “exists when the arresting officer’s knowledge of the particular facts and circumstances is sufficient to warrant a prudent person’s belief that a suspect has committed an offense.”²⁷ Whether or not the arresting officer had probable cause to believe that the motorist was driving while intoxicated or in a drugged condition is an issue that the motorist can ask the circuit court to review *de novo* in a post-revocation hearing.²⁸

Because the director’s decision to revoke a motorist’s license is a non-contested case,²⁹ the circuit court conducts a review of the director’s decision *de novo*.³⁰ The circuit court is to decide three requisite elements for revocation of the license: (1) that the driver was under arrest when asked to submit to the test, (2) that the arresting officer had probable cause or reasonable grounds for believing that the driver was driving while intoxicated or in a drugged condition, and (3) that driver refused to submit to an authorized chemical test³¹ or had a blood alcohol concentration of at least .08 percent.³² The burden is on the director to prove all these elements at the hearing by a preponderance of the evidence.³³ If the director fails to carry her burden of proving any one of these three elements, the circuit court must order reinstatement of the motorist’s license.³⁴

The circuit court’s judgment is subject to review by an appellate court.³⁵ Typically, an appellate court reviews the trial court’s judgment concerning whether or not to reinstate a motorist’s license according to a deferential standard: Does substantial evidence support the judgment, is the judgment contrary to weight of the evidence, or did the trial court erroneously declare or

26. *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002) (en banc) (quoting *Hawkins v. Dir. of Revenue*, 7 S.W.3d 549, 551 (Mo. App. E.D. 1999)).

27. *Id.* at 621 (quoting *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. 1996) (en banc)).

28. *Swanberg v. Dir. of Revenue*, 122 S.W.3d 87, 90 (Mo. App. S.D. 2003).

29. *See Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 52 (Mo. 2001) (en banc) (construing MO. REV. STAT. § 302.311 (2006) (concerning director’s suspension or revocation of driver’s licenses)). The *Kinzenbaw* court concluded that, because the director made her decision to suspend a license without benefit of a hearing, the case should be classified as a non-contested case. *Id.* The court noted the definition of a “contested case” in Missouri’s Administrative Procedure Act, MO. REV. STAT. § 536.010(2) (defining “contested case” as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing”), and concluded that any case in which a hearing is not required is a non-contested case. *Kinzenbaw*, 62 S.W.3d at 52.

30. *Kinzenbaw*, 62 S.W.3d at 52.

31. *Swanberg*, 122 S.W.3d at 90 (citing *Hinnah*, 77 S.W.3d at 620).

32. *Jones v. Dir. of Revenue*, 189 S.W.3d 187, 189 (Mo. App. W.D. 2006).

33. *Swanberg*, 122 S.W.3d at 90 (quoting *Hinnah*, 77 S.W.3d at 620).

34. *Id.* (quoting *Hinnah*, 77 S.W.3d at 620 and MO. REV. STAT. § 577.041.5 (2006)).

35. MO. CONST. art. V, § 3.

apply the law?³⁶ The appellate court also must give deference to the trial court's determinations of credibility.³⁷

Missouri's courts are split, however, concerning the standard that an appellate court should use to review a trial court's ruling based on uncontroverted evidence. A large portion of the cases with uncontroverted evidence are cases in which the Department of Revenue's director merely presented written business records from her files rather than calling the arresting officer and others as witnesses, and the motorist does not present any evidence.³⁸

1. De Novo Review

One line of cases holds that the appellate court's review is *de novo* because the issues decided by the trial court are matters of law and not of fact.³⁹ Because the appellate court can decipher the written record as ably as the trial court, there is no need for it to defer to the trial court's judgment.⁴⁰ The Missouri Court of Appeals announced this standard of review in the context of a DWI case in *Hedrick v. Director of Revenue*.⁴¹

At issue in *Hedrick* was whether or not the circuit court had properly ordered reinstatement of Theodore Daniel Hedrick's license to operate a motor vehicle.⁴² The Department of Revenue's director had revoked Hedrick's license for a year pursuant to section 577.041 of the Missouri Revised Statutes after a peace officer reported that he had refused to submit to a chemical test of his blood alcohol content.⁴³ The circuit court ruled that the officer did not have reasonable grounds for believing that Hedrick was driving while intoxicated despite the officer's uncontroverted testimony – Hedrick acknowledged the officer's testimony that Hedrick had admitted to drinking, that he had “freak[ed] out” while driving, though he could not “remember” almost colliding with another car, and that he failed three out of five field sobriety tests.⁴⁴ “Consequently,” on appeal, the appellate court concluded, “even if [Hedrick's] testimony is viewed in its most favorable light, there

36. *Hinnah*, 77 S.W.3d at 620 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (en banc)).

37. *Id.* (citing *Prozorowski v. Dir. of Revenue*, 12 S.W.3d 405, 408 (Mo. App. W.D. 2000)).

38. *See, e.g., Callanan v. Dir. of Revenue*, 163 S.W.3d 509 (Mo. App. E.D. 2005).

39. *Hinnah*, 77 S.W.3d at 620 (citing *Hampton v. Dir. of Revenue*, 22 S.W.3d 217, 220 (Mo. App. W.D. 2000)).

40. *See id.*

41. 839 S.W.2d 300, 302 (Mo. App. W.D. 1992).

42. *See id.* at 301.

43. *Id.*

44. *Id.* at 302.

cannot be said to be a substantial contradiction to the testimony of the officer, which established the requisite probable cause.”⁴⁵

The *Hedrick* court concluded that, because the evidence pertinent to probable cause was uncontroverted, it was not obligated to defer to the trial court’s finding of no probable cause. It adopted the standard enunciated in a criminal DWI case: “Deference to the trial court’s findings ‘is only required where the evidence is contested,’ and where, ‘the case is virtually one of admitted facts or where the evidence is not in conflict, no such deference is required.’”⁴⁶ In support of the proposition, the court also cited a civil trademark case,⁴⁷ which, in turn, relied on precedent in civil cases that set the standard’s origin as early as 1855.⁴⁸ Because these license revocation and suspension cases are civil in nature despite their talk of probable cause, police, and arrest,⁴⁹ the *Hedrick* court relied on civil cases in enunciating the standard was proper.

The Missouri Court of Appeals reaffirmed the *de novo* standard of review in *Epperson v. Director of Revenue* in which a driver arrested for driving while intoxicated refused to submit to a chemical test.⁵⁰ Only the arresting officer testified, and he reported that he had followed the truck being driven by John Allan Epperson after receiving an anonymous call that Epperson was drinking and was driving a pickup, which the tipster described in detail, including the license number.⁵¹ The officer spotted the truck parked at a liquor store, and, after following it for some distance, the officer motioned for Epperson to stop.⁵² When Epperson got out of the truck, he was unsteady, failed one sobriety test, and refused to submit to any others.⁵³ The circuit court concluded that the officer did not have reasonable grounds for believing that Epperson was driving while intoxicated.⁵⁴ The appellate court disagreed and refused to defer to the circuit court’s judgment. Noting the traditional standard that “the decision of the trial court will be affirmed unless

45. *Id.* at 302-03.

46. *Id.* at 302 (quoting *State v. Hanners*, 827 S.W.2d 273, 274 (Mo. App. E.D. 1992) (illegal possession of intoxicating liquor by a minor)).

47. *Cushman v. Mutton Hollow Land Dev., Inc.*, 782 S.W.2d 150, 152 (Mo. App. S.D. 1990).

48. The *Cushman* court cited *Southgate Bank and Trust Co. v. May*, 696 S.W.2d 515, 519 (Mo. App. W.D. 1985), which cited *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. 1979) (en banc), *State ex rel. Sisco v. Buford*, 559 S.W.2d 747, 748 (Mo. 1978) (en banc), and *Kelly v. Maxwell*, 628 S.W.2d 931, 934 (Mo. App. E.D. 1982). The *Schroeder* court traced the doctrine back to *Stone v. Corbett*, 20 Mo. 350, 352 (1855).

49. *Arch v. Dir. of Revenue*, 186 S.W.3d 477, 479 (Mo. App. E.D. 2006).

50. 841 S.W.2d 252, 254 (Mo. App. W.D. 1992).

51. *Id.* at 253-54.

52. *Id.*

53. *Id.* at 254.

54. *Id.*

there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or misapplies the law,” the court added: “these precepts do not permit this court to affirm the judgment of the trial court by merely disregarding all the uncontradicted evidence.”⁵⁵ In response to Epperson’s argument “that the trial court must have concluded that the arresting officer’s testimony lacked credibility, and that we must defer to this assessment of credibility,”⁵⁶ the court said that while a reviewing court will defer to the trial court on the credibility of witnesses, a reviewing court need not defer when there is no contradiction between witnesses.⁵⁷ “Deference to the trial court’s findings is not required where the evidence is not controverted and the case is virtually one of admitted facts or where the evidence is not in conflict.”⁵⁸

The Supreme Court of Missouri adopted the *de novo* standard in DWI cases three years later in *Reinert v. Director*.⁵⁹ On the ground that the director did not lay a proper foundation for the results of a breath test machine’s indication that Kelly Joseph Reinert’s blood alcohol content after his arrest was .211 percent, the circuit court ordered reinstatement of Reinert’s driving privileges.⁶⁰ On appeal, the Supreme Court brushed aside problems with admission of the machine’s report because the officer who had administered the test had testified without objection or contradiction what the machine had reported.⁶¹ “Although one of the foundational prerequisites for the admission of the results of a breath alcohol test is proof that the machine has been properly maintained,” the *Reinert* court explained, “the foundational prerequisites are unnecessary where the test result is admitted in evidence without objection.”⁶² But Reinert argued that, even if the test result was erroneously excluded, “the judgment of the trial court must be affirmed because [an appellate court] must assume that all fact issues upon which no specific findings were made were found in accordance with the result reached.”⁶³ The court responded that Reinert’s argument must fail because Reinert introduced no evidence to refute the officer, the sole witness at trial, who was “unequivocal in identifying Reinert as the driver” and testified that Reinert “drove erratically, smelled of alcohol, and failed three field sobriety tests.”⁶⁴ There was no

55. *Id.*

56. *Id.* at 255.

57. *Id.* (citing *West v. Witschner*, 428 S.W.2d 538, 542 (Mo. 1968); *Cushman v. Mutton Hollow Land Dev., Inc.*, 782 S.W.2d 150, 152 (Mo. App. S.D. 1990)).

58. *Id.* (citing *Hedrick v. Dir. of Revenue*, 839 S.W.2d 300, 302 (Mo. App. W.D. 1992)).

59. 894 S.W.2d 162 (Mo. 1995) (en banc).

60. *Id.* at 163-64.

61. *Id.* at 164.

62. *Id.*

63. *Id.*

64. *Id.*

evidence on the record to support a finding that the officer lacked probable cause or that Reinert was not the driver.⁶⁵

This *de novo* standard of reviewing rulings based on uncontroverted evidence became an established and accepted standard, as evidenced by the Supreme Court of Missouri's affirmation of it in *Hinnah v. Director of Revenue*.⁶⁶ The court deemed evidence supporting the circuit court's finding of a lack of probable cause to arrest Mark Hinnah to be controverted – over the dissent's strong protest⁶⁷ – and thus requiring the court's deference. Despite these findings, the *Hinnah* court reaffirmed the standard as enunciated by *Hedrick*, *Epperson*, and *Reinert*: “If the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment.”⁶⁸

2. Deferential Standard

Notwithstanding this firmly established line of cases, another line developed independently that simply seemed to ignore the standard that has been an accepted part of Missouri's law since at least 1855. Typical of this line, even in cases in which the evidence was uncontroverted, the appellate courts tended to enunciate only a deferential standard of viewing the evidence in the light most favorable to the judgment – without any mention of *de novo* review.⁶⁹ One might be able to brush aside this line of cases as aberrant were it not for the Supreme Court's decision in *York*.

For example, the Supreme Court considered in *Walker v. Director of Revenue* the director's suspension of Scott Walker's license to operate a motor vehicle on the grounds that an officer arrested Walker on probable cause to believe that he was driving while intoxicated.⁷⁰ In addition, a breath test

65. *Id.*

66. 77 S.W.3d 616, 620 (Mo. 2002) (en banc).

67. *Id.* at 622-23 (Limbaugh, C.J., dissenting) (“I cannot fathom how the commissioner found that the officer did not have reasonable grounds to believe that Respondent Hinnah was driving a motor vehicle in an intoxicated condition . . . The points made on cross-examination are in the nature of mere inconsistencies that do not effectively rebut what the majority agrees is *prima facie* proof of reasonable grounds to believe that Hinnah was intoxicated.”).

68. *Id.* at 620 (majority opinion) (“Here the evidence was controverted, and deference is due to the trial court's determination.”).

69. *E.g.*, *Bedell v. Dir. of Revenue*, 935 S.W.2d 94, 96 (Mo. App. W.D. 1996); *Jurgiel v. Dir. of Revenue*, 937 S.W.2d 397, 398 (Mo. App. E.D. 1997); *Mills v. Dir. of Revenue*, 964 S.W.2d 873, 874 (Mo. App. E.D. 1998); *Terry v. Dir. of Revenue*, 14 S.W.3d 722, 724 (Mo. App. W.D. 2000); *Boyd v. Dir. of Revenue*, 71 S.W.3d 262, 264 (Mo. App. S.D. 2002); *Baldrige v. Dir. of Revenue*, 82 S.W.3d 212, 219 (Mo. App. W.D. 2002); *Saladino v. Dir. of Revenue*, 88 S.W.3d 64, 68 (Mo. App. W.D. 2002).

70. 137 S.W.3d 444 (Mo. 2004) (en banc).

indicated that his blood alcohol concentration was .113 percent.⁷¹ Acting under section 302.505,⁷² the director then suspended Walker's license because he was over the legal .08 percent limit for Blood Alcohol Content.⁷³ Procedurally, the director has the burden to present evidence to establish probable cause for the arrest and for the BAC level greater than .08 percent.⁷⁴ The driver then is entitled to rebut this evidence.⁷⁵ However, it is ultimately up to the circuit court to determine whether the director has met his burden by a preponderance of the evidence.⁷⁶ In this case, the director's evidence in establishing the essential elements was uncontroverted.⁷⁷ Citing to *Murphy v. Carron*, the court gave deference to the trial court's finding that there was probable cause in the arrest.⁷⁸

B. Federal Probable Cause Standard, *Ornelas v. United States*

During 1992, the same year that the *Hedrick* and *Epperson* courts applied *de novo* review in DWI cases, police detectives in Milwaukee made arrests that would lead to the United States Supreme Court's declaration that the United States Constitution requires a *de novo* review of probable cause rulings.⁷⁹ In *Ornelas v. United States*, the Supreme Court declared that the Fourth Amendment requires that an appellate court review a trial court's rulings concerning probable cause *de novo*.⁸⁰ The Supreme Court granted *certiorari* after the United States Court of Appeals for the Seventh Circuit had

71. *Id.* at 445.

72. Section 302.505.1 of the Missouri Revised Statutes provides that:

[t]he department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight, based on the definition of alcohol concentration in section 302.500, or where such person was less than twenty-one years of age when stopped and was stopped upon probable cause to believe such person was driving while intoxicated in violation of section 577.010, RSMo, or driving with excessive blood alcohol content in violation of section 577.012, RSMo, or upon probable cause to believe such person violated a state, county or municipal traffic offense and such person was driving with a blood alcohol content of two-hundredths of one percent or more by weight.

MO. REV. STAT. § 302.505.1 (2006).

73. *Walker*, 137 S.W.3d. at 445.

74. *Id.* at 446.

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.* (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (en banc)).

79. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

80. *Id.*

applied a deferential standard to the trial court's decision that police detectives did not have probable cause to make the arrests.⁸¹

The court reported that the facts in *Ornelas* were not in dispute.⁸² Sheriff's deputies effectuated the arrests during December 1992 after a 20-year veteran with the Milwaukee County Sheriff's Department, a detective, spotted the arrestees' car parked at a downtown Milwaukee motel and immediately became suspicious.⁸³ Two factors about the car caught the detective's eye: It was a 1981 two-door Oldsmobile, and it had California license plates.⁸⁴ The detective knew that drug couriers preferred older, two-door model cars manufactured by General Motors because they had good places in which to hide drugs and that California was a "source state" for drug couriers.⁸⁵ The detective called for backup before learning from the federal Drug Enforcement Administration that the car's registered owner was listed in a federal database as known drug dealer.⁸⁶

When two men walked to the Oldsmobile, a detective walked up to them, identified himself, asked whether or not they had illegal drugs in the car, asked for their identification after they denied having any, and asked for permission to search their car.⁸⁷ As deputies searched the car, one of them found what he later reported was a loose door panel on the passenger side and saw a rusty screw in the door jam adjacent to the panel, causing the deputy to suspect that it had been removed to hide something.⁸⁸ The deputy dismantled the panel and found two kilograms of cocaine hidden behind it.⁸⁹ The deputies arrested the two men.⁹⁰

Prior to trial, a magistrate considered the defendants' motion to suppress evidence of the drugs hidden in their car. After an evidentiary hearing, the magistrate concluded that the deputies had reasonable suspicion to question the men, but the deputies did not have probable cause to open the car's door panel.⁹¹ The magistrate made a finding of fact that the screw was not rusty, but he did not suppress evidence of the cocaine because the drug-sniffing dog's presence on the scene made discovery of the cocaine inevitable.⁹² The district court adopted the magistrate's rulings concerning reasonable suspi-

81. *United States v. Ornelas*, 52 F.3d 328 (7th Cir. 1995) (unpublished table decision).

82. *Ornelas*, 517 U.S. at 691.

83. *Id.* at 691-93.

84. *Id.* at 692.

85. *Id.*

86. *Id.*

87. *Id.* at 692-93.

88. *Id.* at 693.

89. *Id.*

90. *Id.*

91. *Id.* at 694.

92. *Id.*

cion but rejected his rulings concerning probable cause because “reasonable suspicion became probable cause when [the deputy] found the loose panel.”⁹³

On appeal, the court applied a deferential standard, ruling that it would reverse the district court’s ruling only if it was “clear error.”⁹⁴ The court found no clear error in the district court’s ruling concerning reasonable suspicion, but it remanded the case to the district court to determine whether or not the deputy’s testimony about the loose panel was credible.⁹⁵

Then, on remand, the magistrate ruled that the deputy’s testimony was credible, and the district court concurred.⁹⁶ The district court reached the same conclusion concerning probable cause – that the reasonable suspicion evolved into probable cause when the deputy discovered the loose door panel.⁹⁷ During review of this ruling, the appellate court affirmed, finding no clear error.⁹⁸ The Supreme Court granted *certiorari* “to resolve the conflict among the Circuits over the applicable standard of appellate review.”⁹⁹

The *Ornelas* majority, in an opinion authored by Chief Justice William Rehnquist, began its analysis by noting that “[a]rticulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible.”¹⁰⁰ Moreover, it declared, the concepts are “fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed”¹⁰¹ and their determination involves a two-step process, first, a determination of only historical facts and second, “a mixed question of law and fact.”¹⁰² “[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”¹⁰³ This analysis called into question the issue that had prompted its granting of *certiorari*: whether or not the appellate courts should be deferential in reviewing a trial

93. *Id.*

94. *Id.*

95. *Id.* at 695.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* See also *Ornelas v. United States*, 516 U.S. 963 (1995) (mem.) (granting *certiorari*). The Court noted these conflicting rulings:

United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992) (*de novo* review); *United States v. Ramos*, 933 F.2d 968, 972 (11th Cir. 1991) (same); *United States v. Patrick*, 899 F.2d 169, 171 (2d Cir. 1990) (same); *United States v. Spears*, 965 F.2d 262, 268-71 (7th Cir. 1992) (clear error). *Ornelas*, 517 U.S. at 695 n.4.

100. *Ornelas*, 517 U.S. at 695.

101. *Id.* at 696.

102. *Id.*

103. *Id.* (alteration in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

court's implementation of this two-step process as the court of appeals had been.

The *Ornelas* court noted that it had never deferred to a trial court's determination of reasonable suspicion or probable cause and concluded that "independent review," not deferential review, was a practical necessity under the Fourth Amendment.¹⁰⁴ It reasoned that the deferential standard would be unacceptable and inconsistent with a unitary court system by allowing "'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.'"¹⁰⁵ Moreover, because reasonable suspicion and probable cause "acquire content only through application," the deferential standard would cause appellate courts to abdicate their primary roles of maintaining control of, and clarifying, legal principles.¹⁰⁶ Finally, a deferential standard would create confusion because law enforcement officers look primarily to the appellate courts, not trial courts, for clearly defined rules.¹⁰⁷ Hence, appellate courts must review *de novo* a trial court's determination of reasonable suspicion and probable cause in cases of warrantless searches and seizures, even in cases in which the evidence before the trial court was controverted. Even with this restricted holding, *Ornelas* clearly applies to DWI cases because all DWI probable cause searches involve officers' decision to make a warrantless search.

This holding seems, at first glance, to be at odds with Missouri courts' holding that the appellate courts must defer to the trial courts' rulings based on controverted evidence – that they invoke *de novo* review only when the evidence was uncontroverted.¹⁰⁸ Yet, after the *Ornelas* Court explained application of its *de novo* standard, it appeared to be similar to the standard adopted by the Missouri courts before *York* put the matter in question. As a parting comment, the Court admonished appellate courts to be careful when implementing the standard "both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."¹⁰⁹ The appellate court was to give due weight to the officer's view of the facts through the "lens of his police experience and expertise."¹¹⁰ The Court remanded the case to the appellate court to review the district court's finding of reasonable suspicion and probable cause according to a *de novo* standard.¹¹¹

104. *Id.* at 697.

105. *Id.* (alteration in original) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

106. *Id.*

107. *See id.* at 697-98.

108. *E.g.*, *Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543, 545 (Mo. 2003) (en banc).

109. *Ornelas*, 517 U.S. at 699.

110. *Id.*

111. *Id.* at 700.

Only Justice Antonin Scalia dissented. He reasoned that the trial court is in a better position to judge factual presentations at trial and has expertise in grappling with the probabilities of factual situations.¹¹² He rejected the majority's emphasis of a need to protect the appellate courts in order to protect the clarity of legal rules. Reasonable suspicion and probable cause rulings were too fact-intensive, he reasoned, to permit easy application of a ruling to subsequent cases.¹¹³ "Law clarification requires generalization," he said.¹¹⁴ "Probable cause and reasonable suspicion determinations are . . . resistant to generalization."¹¹⁵ Those determinations, therefore do not lend themselves to *de novo* review.

C. Application of *Ornelas* to Missouri Law

Missouri's courts are confused about the proper standard to use in reviewing findings of probable cause in DWI cases. The level of confusion was manifested in the speculation of Chief Judge Victor Howard, of the Missouri Court of Appeals, Western District, concerning what the Supreme Court of Missouri was articulating in *York*: (1) that there will no longer be *de novo* review of a trial court's determination of probable cause in driver's license forfeiture cases, (2) that deference should be given to the trial court's determination where the evidence is uncontrovered, (3) that there is no longer *de novo* review "when there is uncontrovered evidence regarding probable cause but the officer equivocates on the issue," or (4) that the Supreme Court may have had no intention of reshaping the standard of review through *York*.¹¹⁶ Only the last of these possibilities – that the *York* court did not intend to reshape the standard of review – is tenable. Each of Chief Judge Howard's attempts at clarifying the Missouri Supreme Court's decision in *York* will be looked at with respect to the United States Supreme Court's decision in *Ornelas*.

The first of Chief Judge Howard's proffered explanations – that Missouri's appellate courts are to apply only a deferential standard in DWI cases – is untenable because it is contrary to the mandate of the United States Supreme Court in *Ornelas*, which the court has previously followed without comment.¹¹⁷ Since 1981, the United States Supreme Court has been the final arbiter of matters involving Fourth Amendment issues in Missouri.¹¹⁸ Before then, the Supreme Court of Missouri held that, although Article I, Section 15

112. *Id.* at 701-02 (Scalia, J., dissenting).

113. *Id.* at 703.

114. *Id.*

115. *Id.*

116. *Guhr v. Dir. of Revenue*, No. WD 65762, 2006 WL 2471601, at *8 (Mo. App. W.D. Aug. 29, 2006) (Howard, C.J., concurring), *rev'd*, 228 S.W.3d 581 (Mo. 2007) (en banc).

117. *See supra* note 12 and accompanying text.

118. *State v. McCrary*, 621 S.W.2d 266 (Mo. 1981) (en banc).

of the Missouri Constitution¹¹⁹ provided virtually the same guarantee as the Fourth Amendment to the United States Constitution,¹²⁰ the state's provision was unique from the Fourth Amendment's guarantee. Missouri courts held that the state provision provided standing to one with "a reasonable expectation . . . [to] be free from governmental intrusion,"¹²¹ whereas the federal provision granted standing to one who had "a 'legitimate expectation of privacy' in the place or thing being searched."¹²² In 1981, Missouri's high court concluded that it had been making a distinction without a difference and announced that the interests protected by the state provision were identical to those protected by the Fourth Amendment.¹²³ With that merger of concepts, the door was open to Missouri's courts to begin declaring that the state and federal provisions "provide essentially the same protections"¹²⁴ and "that the interpretation given the Fourth Amendment by the United States Supreme Court . . . is applicable to our state."¹²⁵

Therefore, when the *Ornelas* court declared that the Fourth Amendment requires *de novo* review of a trial court's probable cause rulings, Missouri's courts necessarily took heed and followed. Although statutorily the court could have adopted a different standard for Missouri, the year after *Ornelas*' issuance, the Supreme Court of Missouri noted the decision and adopted its standard in the context of warrantless automobile searches.¹²⁶ Later, the Supreme Court cited *Ornelas* for the proposition that "[t]he legal determination of whether reasonable suspicion existed is made *de novo*."¹²⁷

119. This provision guarantees

[t]hat the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

MO. CONST. art. I, §15.

120. This provision says

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

121. *In re J.R.M.*, 487 S.W.2d 502, 508 (Mo. 1972) (en banc).

122. *State v. McCrary*, 621 S.W.2d 266, 272 (Mo. 1981) (en banc) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).

123. *Id.* at 273.

124. *State v. Sweeney*, 701 S.W.2d 420, 425 n.4 (Mo. 1985) (en banc).

125. *State v. Welch*, 755 S.W.2d 624, 631 (Mo. App. W.D. 1988).

126. *State v. Hampton*, 959 S.W.2d 444, 450 (Mo. 1997) (en banc). Ironically, the author of *Hampton* was Justice Ronnie White, who authored *York*. Compare *id.* at 446 with *York v. Dir. of Revenue*, 186 S.W.3d 267, 269 (Mo. 2006) (en banc).

127. *State v. Goff*, 129 S.W.3d 857, 862 (Mo. 2004) (en banc).

The Missouri Court of Appeals, in *Guhr v. Director of Revenue*, was the first court to recognize that *Ornelas* also governed appellate review in civil DWI license revocation and suspension cases because the probable cause requirement in DWI cases was the same requirement in criminal procedure cases.¹²⁸ The *Guhr* court concluded that, because the statutory requirement of “[r]easonable grounds to arrest” in a DWI license revocation case “is virtually synonymous with probable cause to arrest,”¹²⁹ *Ornelas*’ mandates concerning standard of review governed.¹³⁰

In his concurring opinion in *Guhr*, Chief Judge Howard dismissed *Ornelas*’ significance by contending that “the United States Supreme Court has not adopted as rigid an application of *de novo* review as the Missouri Supreme Court.”¹³¹ He did not cite any cases for this proposition and did not explain how he had drawn the conclusion.¹³² Instead, the opposite seems to be the case since the *Ornelas* Court declared that appellate courts should apply the *de novo* standard in every case in which a trial court has made a probable cause ruling. “We have never,” the *Ornelas* Court said, “when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court’s determination.”¹³³ In *Hinnah, Verdoorn v. Director of Revenue*, and *Coyle v. Director of Revenue*, the Supreme Court of Missouri reserved *de novo* review to situations in which the trial court’s ruling rested on uncontroverted evidence.¹³⁴ The Supreme Court of Missouri seems to be applying a less rigid standard in reviewing probable cause in DWI cases than the standard adopted in *Ornelas*.

Moreover, not only has the Supreme Court of Missouri adopted a less rigid standard than *Ornelas* mandated, the Court’s inconsistency has caused much confusion for the lower courts. *York* was not the first time that the Supreme Court seemed to signal an end to the *de novo* standard in DWI cases. In *Walker*, in which the driver’s rebuttal to the director’s *prima facie* case was “inconclusive,” the court declared that the proper standard of review was deferential.¹³⁵ Furthermore, not only did the Supreme Court seemingly con-

128. No. WD 65762, 2006 WL 2471601, at *7 (Mo. App. W.D. Aug. 29, 2006), *rev’d*, 228 S.W.3d 581 (Mo. 2007) (en banc).

129. *Id.*

130. *Id.* at *7.

131. *Id.* (Howard, C.J., concurring).

132. *See id.* at *7-8.

133. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

134. *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002) (en banc); *Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543, 545 (Mo. 2003) (en banc); *Coyle v. Dir. of Revenue*, 181 S.W.3d 62, 64 (Mo. 2005) (en banc).

135. *Walker v. Dir. of Revenue*, 137 S.W.3d 444, 446 (Mo. 2004) (en banc).

tradict itself by asserting differing standards,¹³⁶ but it also has failed to recognize the same split among the three districts of Missouri's appellate courts.¹³⁷

Chief Judge Howard's proffered second explanation – when contested evidence has been found not credible, we defer to the trial court's discretion to weigh uncontroverted evidence"¹³⁸ – is equally untenable. The Missouri Supreme Court rejected this position in *Brown v. Director of Revenue*, in which the court considered whether or not an officer had probable cause to arrest a motorist and to administer a chemical test of the motorist's BAC.¹³⁹ The motorist argued that the arresting officer did not have probable cause because, according to an expert whose testimony the circuit court found credible, the officer did not administer field sobriety tests properly, and the officer testified that he relied solely on the tests to determine whether or not he had probable cause to arrest.¹⁴⁰ The motorist also contended that, even if the circuit court was incorrect in concluding that improperly administered field sobriety tests eviscerated probable cause, the circuit court, as the final arbiter of credibility issues, was free to disbelieve all of the evidence that supported probable cause.¹⁴¹

The *Brown* court concurred that "the credibility of the witnesses is for the trial court to determine," but this standard changes, the court noted, "[w]hen the evidence supporting revocation is uncontroverted and the trial court has not specifically found the director's witness incredible."¹⁴² In those cases, the court explained, "appellate courts will not presume that the trial judge found a lack of credibility and will not affirm on that basis."¹⁴³ The *Brown* court concluded that, even without evidence of the sobriety tests, the director had presented "substantial evidence that was not controverted by any witness that warrant[ed] a finding of probable cause."¹⁴⁴ Therefore, *Brown* makes clear that a suggestion that an appellate court should defer to a trial court's discretion to weigh uncontroverted evidence is incorrect.

136. Compare *Coyle*, 181 S.W.3d at 64, *Verdoorn*, 119 S.W.3d at 545, and *Hinnah*, 77 S.W.3d at 620, with *York v. Dir. of Revenue*, 186 S.W.3d 267, 269 (Mo. 2006) (en banc), and *Walker*, 137 S.W.3d at 446.

137. See *supra* text accompanying notes 3-4.

138. *Guhr v. Dir. of Revenue*, No. WD 65762, 2006 WL 2471601, at *8 (Mo. App. W.D. Aug. 29, 2006) (Howard, C.J., concurring), *rev'd*, 228 S.W.3d 581 (Mo. 2007) (en banc).

139. 85 S.W.3d 1, 2 (Mo. 2002) (en banc) (director suspended motorist's license pursuant to MO. REV. STAT. § 302.505 (2006), after test indicated blood alcohol concentration exceeded legal limit).

140. *Id.* at 3.

141. *Id.* at 7.

142. *Id.* (quoting *Mathews v. Dir. of Revenue*, 8 S.W.3d 237, 238 (Mo. App. E.D. 1999)).

143. *Id.*

144. *Id.*

Chief Judge Howard's third proffered explanation of *York* – that appellate courts are not to review uncontroverted evidence regarding probable cause *de novo* when the officer equivocates on the issue – is questionable, too. Chief Judge Howard's reference to an officer's equivocating concerned the arresting officer in *York* who, in Chief Judge Howard's estimation, "proved to be a disaster on the stand."¹⁴⁵ Whether or not the officer was a disaster may be disputable, but undoubtedly her testimony was ineffective. Chief Judge Howard does not explain why an officer's equivocating should affect how the appellate court reviews uncontroverted testimony. If, as the *Brown* court had already made clear, the appellate court is not to weigh uncontroverted evidence, then it should not deem the officer's equivocation to be affecting its obligation to review *de novo*. Indeed, the United States Supreme Court, with its declaration that it "never" defers to the trial court in reviewing probable cause rulings, did not recognize such an exception in *Ornelas*.¹⁴⁶

Chief Judge Howard's final possible explanation is the most plausible – that *York*'s pronouncement was unintentional. That the probable cause standard was applied without any acknowledgement that it was contrary to the, *Hinnah* case, which the court cited at the end of the standard, suggests that it perhaps was inadvertent.¹⁴⁷ But far more telling was the manner in which the Supreme Court, while recognizing its obligation to review uncontroverted facts *de novo*, applied the doctrine.

D. Missouri's Test

Missouri has previously used *Hinnah v. Director of Revenue* as the proper standard of review for cases involving uncontroverted facts. In *Hinnah*, the court did little more than pay lip service to the *de novo* standard of review doctrine. In that case, the director's only witness was the arresting officer who testified that when he saw Mark Hinnah's pickup early on New Year's Day, it was parked on a highway shoulder with its engine running and Hinnah sitting in the passenger's seat asleep.¹⁴⁸ When the officer awakened him, Hinnah told the officer that he had fallen asleep while driving the pickup, and that the truck had crashed into a barrier, blowing the front tire.¹⁴⁹ The officer reported that Hinnah smelled strongly of alcohol, his eyes were watery, glassy, and bloodshot, and that he had difficulty balancing when he

145. *Guhr v. Dir. of Revenue*, No. WD 65762, 2006 WL 2471601, at *7 (Mo. App. W.D. Aug. 29, 2006) (Howard, C.J., concurring), *rev'd*, 228 S.W.3d 581 (Mo. 2007) (en banc).

146. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

147. *See York v. Dir. of Revenue*, 186 S.W.3d 267, 272 n.16 (Mo. 2006) (en banc). *See also infra* Part II.D.

148. *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 618 (Mo. 2002) (en banc).

149. *Id.* at 618-19.

stood.¹⁵⁰ Because of inclement weather, the officer took Hinnah to a police station to perform field sobriety tests and to administer a chemical test for blood alcohol, but Hinnah refused to submit to the test.¹⁵¹ Hinnah countered this evidence with the testimony of a man who said that he, not Hinnah, was driving the truck when it hit a pothole and then crashed into the barrier.¹⁵² The man said that he left Hinnah in the truck to walk to a gas station to call his brother, who went to the gas station to get him.¹⁵³ When they returned to the pickup, Hinnah was gone.¹⁵⁴ The circuit court ruled that the arresting officer did not have probable cause to believe that Hinnah had been driving the pickup while intoxicated and, therefore, ruled that the director could not use Hinnah's refusal to submit to the breath test as a ground for revoking his operator's license.¹⁵⁵

In affirming the circuit court's ruling, the *Hinnah* court recognized that the director presented sufficient evidence from which, if believed, the circuit court could have ruled that the officer had probable cause to believe that Hinnah was driving while intoxicated, "but was free as well to draw the conclusion that there was no probable cause."¹⁵⁶ The *Hinnah* court could not have reached this conclusion if it were truly applying a *de novo* standard to the uncontroverted evidence. As the *Hinnah* court acknowledged, the issue of whether Hinnah or the other man was driving was irrelevant.¹⁵⁷ Because this was a DWI license revocation case, the only relevant issue was whether the arresting officer had probable cause for *believing* that Hinnah was driving the pickup.¹⁵⁸ As the dissent noted, evidence of probable cause that Hinnah was driving while intoxicated was uncontroverted. The dissent went on to note that Missouri courts have held that an officer's uncontroverted evidence that an individual admitting to driving a car was "alone sufficient to constitute reasonable grounds that [the individual] was indeed driving."¹⁵⁹ The dissent further challenged the majority's suggestion that evidence of Hinnah's intoxication was controverted by the officer's admitting that he could not quantify the amount of alcohol that he smelled on Hinnah's breath, and that Hinnah's lack of balance and slurred speech could have resulted from his having just awakened.¹⁶⁰ The dissent correctly noted these were "more than enough to

150. *Id.* at 618.

151. *Id.* at 619.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 618-19.

156. *Id.* at 622.

157. *Id.* at 621.

158. *Id.*

159. *Id.* (citing *Pendergrass v. Dir. of Revenue*, 4 S.W.3d 599, 601 (Mo. App. E.D. 1999)).

160. *Id.* at 621, 623.

establish reasonable ground that Hinnah was intoxicated.”¹⁶¹ Had Hinnah “wished to controvert the director’s case, he would have testified himself, and his failure to do so may properly be weighed against him.”¹⁶²

Clearly, the *Hinnah* court did not apply the *de novo* standard; this is a situation of actions speaking louder than words. The court’s vacillation on the standard and its failure to apply the standard when the court actually mentions it, calls to question whether the *York* court’s pronouncement was truly inadvertent, as Chief Judge Howard suggested, or whether it was the result of a standard that has not become actually entrenched in the Supreme Court’s understanding of the law. What emerges from a detailed examination of how the Supreme Court has applied the *de novo* standard, especially in recent cases, such as *Hinnah*, is an indication that the Supreme Court is backing away from the standard. If this is so, the court is likely to discover the door of escape locked by the United States Supreme Court in *Ornelas*.

III. RECENT DEVELOPMENTS

In *York*, the Supreme Court considered the director’s revocation of Ryan York’s license to operate a motor vehicle pursuant to section 302.505 of the Missouri Revised Statutes for registering more than .08 percent blood alcohol content on a portable breath test device, among other factors.¹⁶³ York was arrested at a sobriety checkpoint on Missouri Highway 19.¹⁶⁴ There is no evidence that he was driving erratically or that any traffic violations had occurred.¹⁶⁵ In fact, York made no attempt to avoid the checkpoint and produced his license and insurance card at the officer’s request.¹⁶⁶ The trooper only spent three minutes with York prior to placing him under arrest.¹⁶⁷

The central issue of the case was whether or not the arresting Highway Patrol trooper had probable cause to administer the test. The circuit court declared that the trooper’s testimony lacked credibility because the officer was unable to recall whether her observations were made in association with the field sobriety tests prior to arrest, as is required to establish probable cause.¹⁶⁸ The trooper also admitted that she “improperly administered all of these tests and that her failure to do so seriously compromised their validity.”¹⁶⁹ The circuit court determined that the uncontroverted evidence indicating intoxication – York’s smelling of intoxicants, his watery, bloodshot,

161. *Id.* at 623.

162. *Id.*

163. *York v. Dir. of Revenue*, 186 S.W.3d 267, 269 (Mo. 2006) (en banc).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

and glassy eyes, and his admitting that he had been drinking beer – were not sufficient to support probable cause to arrest York.¹⁷⁰ “The burden of proof is on the director of revenue to establish grounds for the suspension or revocation by a preponderance of the evidence.”¹⁷¹ Thus, without this evidence, there was no case against York.

The Director argued that the trial court erred in the exclusion of this evidence because section 577.021¹⁷² does not require any foundation for the admission of these tests.¹⁷³ The Director argued that these results coupled with the general observations of the arresting trooper added up to enough evidence to support a finding of probable cause for York’s arrest and the suspension of his driving privileges.¹⁷⁴ The Director also argued for a *de novo* standard of review as had been previously established by the court in *Hannah*.¹⁷⁵ It seemed a forgone conclusion that the Supreme Court had the right not to grant discretion to the trial court on this decision. However, that was not the case.

In reviewing the circuit court’s ruling concerning probable cause, the York court stated that its standard of review was deferential.¹⁷⁶ “This [c]ourt will affirm the trial court’s judgment,” the court declared, “unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law.”¹⁷⁷ Although the court cited its earlier decision, *Verdoorn*,¹⁷⁸ in which

170. *Id.*

171. *Id.* at 270 (quoting *Verdoorn v. Director Revenue*, 119 S.W.3d 543, 545 (Mo. 2003) (en banc)).

172. Section 577.021 provides that

Any state, county or municipal law enforcement officer who has the power of arrest for violations of section 577.010 or 577.012 and who is certified pursuant to chapter 590, RSMo, may, prior to arrest, administer a chemical test to any person suspected of operating a motor vehicle in violation of section 577.010 or 577.012. A test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content. The provisions of section 577.020 shall not apply to a test administered prior to arrest pursuant to this section.

MO. REV. STAT. § 577.021 (Supp. 2001).

173. *York*, 186 S.W.3d at 270.

174. *Id.*

175. Appellant’s Substitute Brief at 29-30, *York v. Dir. of Revenue*, 186 S.W.3d 267 (Mo. 2006) (en banc) (No. SC87159), 2005 WL 3590437.

176. *York*, 186 S.W.3d at 269.

177. *Id.* (quoting *Walker v. Dir. of Revenue*, 137 S.W.3d 444, 446 (Mo. 2004) (en banc)).

178. *Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543 (Mo. 2003) (en banc). *Verdoorn* had been pulled over by Platte County Sheriff’s deputy for swerving his vehicle across lanes of traffic. *Id.* at 544. The deputy detected a strong odor of alcohol and “observed that *Verdoorn*’s eyes were bloodshot and watery.” *Id.* *Verdoorn* admitted

the Supreme Court set out the *de novo* standard for reviewing rulings based on uncontroverted evidence,¹⁷⁹ it ignored this part of *Verdoorn*. Instead, citing it only for the proposition that an appellate court “defers to the trial court’s determination of credibility of the witness testimony.”¹⁸⁰ Later in its opinion, the *York* court contradicted *Verdoorn* and previous other court cases when it said that “the trial court, *in its discretion*, was free to draw the conclusion that there was no probable cause based upon its assessment of *this* evidence and the officer’s own equivocation of the existence of probable cause.”¹⁸¹ “[T]his evidence” had to refer to the uncontroverted indicia of York’s intoxication. *York*, therefore, expressed a standard that has put into question a standard accepted by Missouri courts since 1855, and it revitalized what previously seemed to be an aberrant line of cases.¹⁸² But, beyond this revitalization, the *York* court put Missouri’s courts at odds with the United States Supreme Court and its holdings concerning constitutional requirements for appellate review of a trial court’s probable cause ruling.

IV. DISCUSSION

Concerning the difficulty of distinguishing between issues of fact and issues of law, Judge Henry Friendly remarked, “what a court can determine better than a jury [is] perhaps about the only satisfactory criterion for distinguishing ‘law’ from ‘fact.’”¹⁸³ The United States Supreme Court used a similar test concerning when appellate courts should employ the *de novo* standard: the only satisfactory criterion is whether or not the issue is one that an appellate court can determine better than a trial court. The *Ornelas* decision declared that an appellate court should always use a *de novo* standard when reviewing a trial court’s probable cause rulings, but it “hasten[ed]” to admonish that the “reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”¹⁸⁴ Hence, the *de novo* standard has two steps – the first being deference to the trial court’s findings of historical facts and the second being *de novo* application of the law to those facts in determining probable cause.

Although the Supreme Court of Missouri has not recognized the *Ornelas de novo* standard in the context of reviewing probable cause findings in

to the officer that he had had a couple of beers and failed all three field sobriety tests that were administered. *Id.*

179. *Id.* at 545 (“If the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court’s judgment.”).

180. *York*, 186 S.W.3d at 269.

181. *Id.* at 272 (emphasis added).

182. *See supra* note 49.

183. *United States v. J.B. Williams Co.*, 498 F.2d 414, 431 (2d Cir. 1974).

184. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

DWI license revocation cases, it has articulated a standard that at least approximates it. Prior to *York*, the Supreme Court articulated its standard of review in these cases:

This Court will affirm the trial court's judgment unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law. This Court defers to the trial court's determination of credibility. If the evidence is uncontroverted or admitted so that the real issue is a legal one as to the legal effect of the evidence, then there is no need to defer to the trial court's judgment.¹⁸⁵

Although this standard is a close approximation of the *Ornelas de novo* standard, it is different in significant ways.

The primary difference is that the *Hinnah* standard suggests that the only time that an appellate court should employ the *de novo* standard is when the evidence is uncontroverted. In all other instances, the appellate court is to be deferential to the trial court. For the sake of consistency in the law and to create a clear set of rules for law enforcement officers, appellate courts must exercise oversight in every case involving a probable cause ruling.

Appellate judges are in a better position than trial judges to guarantee unified and clear rules because of the nature of their daily duties. Trial judges typically must make their legal rulings quickly under the pressure of keeping a trial or docket moving without the benefit of exhaustive, in-depth research. They typically must rely heavily on the litigants' research, which is usually biased. Appellate judges, on the other hand, have the benefit of taking much more time to contemplate an issue and to research it extensively. Moreover, because they work in panels of three or more, they can take time to analyze and debate issues before having to settle on a position. Trial judges are closer to the facts, typically deciding those facts on the basis of face-to-face observation of the witnesses. They are in a better position to determine credibility issues and the historical facts. Appellate judges, while removed from the fray and in a better position to make a studied, contemplative decision, are in a better position to declare the law.

If the appellate courts only engage in *de novo* review when the evidence is uncontroverted, the *Ornelas* court is correct that the appellate judges are, in effect, abdicating their roles as stewards of the law.¹⁸⁶ Even in cases in which a probable cause ruling has been made based on controverted evidence – because every probable cause issue is a mixed question of law and fact – the appellate courts must exercise independent review in every case of a war-

185. *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 620 (Mo. 2002) (en banc) (citations omitted).

186. *Ornelas*, 517 U.S. at 697.

rantless arrest to determine the soundness of the probable cause ruling. This allows the appellate courts to fulfill their duty of deciding the application of law to the facts of the case they are presented with in the record.

The lack of discussion of the standard of review in *York* leads one to question whether the change was intentional. As the Western District noted in *Guhr*, it is quite probable that the pronouncement of the divergent standard was unintentional.¹⁸⁷ This is supported by the fact that the court took care to cite to the long standing test in *Hinnah*.¹⁸⁸ However, it seems logical that if the court was aware of the test in *Hinnah* and went so far as to cite it, it would not be so clumsy as to not apply the correct standard. This seemingly illogical contradiction simply fuels the debate as to whether the Missouri Supreme Court was deliberate in their choice of standards of review. But, given the confusion and the divergent lines of cases that already surrounded the issue, to relegate the pronouncement as an inadvertent misstatement would be pure speculation. The decision was uttered by a court, which as the state's policy-making court every other court in Missouri is obligated to follow,¹⁸⁹ that already had vacillated and contradicted itself on the issue.¹⁹⁰

Thankfully, *Guhr* was recently transferred to the Supreme Court for review.¹⁹¹ The court had the opportunity to review their findings in *York*. Instead the court reaffirmed the standard of review used in *Murphy* with little fanfare.¹⁹² Without recognizing or discussing the alternative string of appellate decisions applying a *de novo* review of uncontroverted facts in DWI cases, the court merely stated that *Murphy* is to be the applicable test.¹⁹³ The Supreme Court missed an important and necessary opportunity to clarify and discuss the standard of review in Missouri. Although the court made their decision clear, it is unfortunate that the court failed to return to the analysis in *Orenlas*. The Supreme Court took only small steps to clarify an uncertain standard and called into question Missouri's application of the Fourth Amendment in all other areas.

V. CONCLUSION

The struggle that Missouri courts have encountered in formulating the proper standard of review of DWI license revocation cases illustrates the un-

187. *Guhr v. Dir. of Revenue*, No. WD 65752, 2006 WL 2471601, at *8 (Mo. App. W.D. Aug. 29, 2006) (Howard, C.J., concurring), *rev'd*, 228 S.W.3d 581 (Mo. 2007) (en banc).

188. *York v. Dir. of Revenue*, 186 S.W.3d 267, 272 (Mo. 2006) (en banc).

189. MO. CONST. art. V, § 2 ("The supreme court shall be the highest court in the state. . . Its decisions shall be controlling in all other courts.").

190. See *supra* note 137 and accompanying text.

191. *Guhr*, 2006 WL 2471601.

192. See *Guhr v. Director of Revenue*, 228 S.W.3d 581, 585 n.3 (Mo. 2007) (en banc)

193. *Id.*

desirable consequences of a court's failure to enunciate clear, specific, and thorough explanations when creating new law. It also illustrates the fate of a judiciary when its policy-making court fails to remain at the helm to ascertain that the legal development follows the charted course. The Supreme Court truly failed to think of the full ramifications of their decision in both this case as well as other areas of law.

But these cases also demonstrate the effect of taking a primrose path in the law. In the 1980s, Missouri courts noted the marked similarities between Article I, section 15, of Missouri's constitution and the Fourth Amendment of the United States Constitution. The courts reasoned that these similarities meant that the provisions protected the same interest and that decisions by the United States Supreme Court, therefore, governed matters pertaining to search and seizure. When Missouri courts did so, they could have not anticipated that the ripple effect of that decision would splash beyond the world of criminal procedure and invade the civil world of DWI license revocation cases. That, however, is the nature of primrose paths. They always appear. Rarely are such thorny issues as significant power shifts from state to federal courts in unintended areas evident. Prudence demands that such paths be selected only after measured consideration. The decisions of Missouri's courts suggest not only a path selected without wise consideration, but one selected carelessly.

Following the United State Supreme Court's guidance for the standard of review in these cases not only helps to clarify this area of law and make easy understanding for Missouri's practicing attorneys, it also provides guidance in other areas. If Missouri chooses to go beyond their previous interpretation of how the Missouri Constitution fits with the Fourth Amendment of the United States then any other concurring interpretation is up for debate. Attorneys may now come to the court to debate other issues which, up until now, have been settled law. There is no question that *York* has opened the door to future discord. The best option for the court is to retract their ruling in *York* and go back to a *de novo* standard of review in probable cause cases for driving while intoxicated.

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