In the
Missouri Court of Appeals
Western District

JEREME J. ROESING,	)	
	)	
Appellant,	)	**WD80585**
	)	
v.	)	**OPINION FILED: March 13, 2018**
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Robert L. Trout, Judge

Before Special Division: James E. Welsh, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Jereme Roesing ("Roesing") appeals from a trial court judgment which sustained the Director of Revenue's ("Director") revocation of his driving privileges. Roesing argues that he was not afforded the statutory right to attempt to contact counsel after being read the implied consent law because he was not allowed to speak to his attorney in private. We affirm.

Factual and Procedural Background

On May 1, 2016, Roesing was arrested on suspicion of driving while intoxicated following a traffic stop. He was transported to the Lee's Summit Police Department where Officer Jordan Clapp ("Officer Clapp") read him the implied consent law.[1] Roesing requested to speak with an attorney. Officer Clapp permitted Roesing to use his personal cellular phone to attempt to contact an attorney. Roesing successfully reached an attorney. Approximately one minute into the call, Roesing handed his phone to Officer Clapp. The attorney told Officer Clapp that he wanted to speak with Roesing in private. Officer Clapp advised that although it might be possible to arrange for Roesing to speak with his attorney in another room, the discussion would not be private because every room in the detention facility was audio and video recorded. Officer Clapp returned the phone to Roesing. Roesing continued the telephone conversation with his attorney in Officer Clapp's presence. Officer Clapp was standing three to four feet from Roesing and could hear what Roesing was saying during the call, but could not hear what Roesing's attorney was saying.

[1]Pursuant to section 577.020.1, a person who operates a motor vehicle upon the public highways of the state of Missouri is deemed to have given consent under specified circumstances to chemical testing of the "person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood." Pursuant to the version of section 577.041 in effect at the time of Roesing's arrest, the request of an officer to submit to a chemical test permitted by section 577.020.1 must include the reasons for the request, and must also "inform the person that evidence of refusal to take the test may be used against such person and that the person's license shall be immediately revoked upon refusal." The purpose of this required warning is to insure that "a law enforcement officer provide[s] an arrestee with information upon which the arrestee may make a voluntary, intentional and informed decision as to whether or not to submit to the chemical test." *Teson v. Dir. of Revenue*, 937 S.W.2d 195, 197 (Mo. banc 1996).

All statutory references are to the version of RSMo in effect at the time of Roesing's arrest unless otherwise indicated. We so emphasize because sections of Chapter 577 referred to in this opinion were materially amended effective January 1, 2017.

After twenty minutes had passed following Roesing's request to speak with an attorney, Officer Clapp again read Roesing the implied consent law. Roesing expressly refused to submit to a chemical test.

The Director revoked Roesing's driving privileges for one year pursuant to section 577.041.[2] Roesing filed a petition for review of his driver's license revocation with the Jackson County Circuit Court pursuant to section 577.041.4.[3] Following an evidentiary hearing, the trial court entered its judgment ("Judgment") sustaining the revocation of Roesing's driving privileges.

Roesing timely filed this appeal.

Standard of Review

We review a trial court's judgment in a "license suspension or revocation case like any other court-tried civil case." *Johnson v. Dir. of Revenue*, 411 S.W.3d 878, 881 (Mo. App. S.D. 2013). "In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *White v. Dir. of Revenue*, 321

[2]The version of section 577.041 in effect at the time of Roesing's arrest provided that following a refusal to submit to chemical testing, the officer should submit a certified report to the Director with the contents specified in the statute, and that upon receipt of the report, the Director "shall revoke the license of the person refusing to take the test for a period of one year." Section 577.041.2 and .3.

Section 577.041 was **substantially** amended effective January 1, 2017, and no longer includes the language that appeared in the earlier version of the statute at subsections .2 and .3. Similar language now appears in section 302.574 effective January 1, 2017.

[3]The version of section 577.041 in effect at the time of Roesing's arrest provided that a person whose license has been revoked because of a refusal to submit to a chemical test "may petition for a hearing before a circuit division or associate division of the court in the county in which the arrest or stop occurred." Section 577.041.4.

Section 577.041 was **substantially** amended effective January 1, 2017, and no longer includes the language that appeared in the earlier version of the statute at subsection .4 addressing, among other things, the procedure to seek review of the Director's revocation of a license for refusal to submit to a chemical test. The procedures for seeking review following revocation for refusal to submit to a chemical test are now located in section 302.574 effective January 1, 2017.

S.W.3d 298, 307-08 (Mo. banc 2010). "A legal question of statutory interpretation [] is reviewed *de novo*." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 564 (Mo. banc 2010) (citation omitted).

Analysis

Roesing raises a single point on appeal. Roesing argues that his statutory right to counsel was deprived because Officer Clapp refused to allow him to speak with his attorney in private; his phone call with counsel was videotaped and audio recorded; and because Officer Clapp stood three feet from him permitting Officer Clapp to listen to what Roesing said during the call. Roesing thus argues that the Director did not sustain his burden to establish that Roesing refused to submit to chemical testing, an essential element that must be found to sustain the Director's revocation of Roesing's license.

In a section 577.041.4 proceeding to review the Director's revocation of a license based on the refusal to submit to a chemical test, the circuit court is directed to determine only:

> (1) Whether or not the person was arrested or stopped;
>
> (2) Whether or not the officer had:
>
> (a) Reasonable grounds to believe that the person was driving a motor vehicle in an intoxicated or drugged condition; or
>
> (b) Reasonable grounds to believe that the person stopped, being under the age of twenty-one years, was driving a motor vehicle with a blood alcohol content of two-hundredths of one percent or more by weight; or
>
> (c) Reasonable grounds to believe that the person stopped, being under the age of twenty-one years, was committing a violation of the traffic laws of the state, or political subdivision of the state,

> and such officer had reasonable grounds to believe, after making such stop, that the person had a blood alcohol content of two-hundredths of one percent or greater; and
>
> (3) Whether or not the person refused to submit to the test.

Section 577.041.4.[4] *See White*, 255 S.W.3d at 577 ("At the hearing [provided for by section 577.041.4], the court shall determine only: (1) whether or not the person was arrested; (2) whether or not the officer had reasonable grounds to believe the person was driving while intoxicated; and (3) whether or not the person refused to submit to the test.") (citing section 577.041.4). "'The Director has the burden of establishing each element [set forth in section 577.041.4] by a preponderance of the evidence.'" *White*, 255 S.W.3d at 577 (quoting *Foster v. Dir. of Revenue*, 186 S.W.3d 928, 930 (Mo. App. S.D. 2006)). "If the court determines any issue not to be in the affirmative, the court shall order the director to reinstate the license or permit to drive." Section 577.041.5.[5]

Roesing challenges only whether the Director established the third statutory element--that Roesing refused to submit to a chemical test. Though Roesing concedes that he expressly refused to submit to a chemical test, he argues his refusal was not valid because he was not allowed to speak with an attorney in private. "Resolution of this case depends on the interpretation of section 577.041.1." *Norris v. Dir. of Revenue*, 304 S.W.3d 724 (Mo. banc 2010).

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[4]Section 577.041 was **substantially** amended effective January 1, 2017, and no longer includes the language that appeared in the earlier version of the statute at subsection .4 describing the statutory elements which must be found to sustain the Director's revocation of a license based on the refusal to submit to chemical testing. Similar language now appears in section 302.574 effective January 1, 2017.

[5]Section 577.041 was **substantially** amended effective January 1, 2017, and no longer includes the language that appeared in the earlier version of the statute at subsection .5. Similar language now appears in section 302.574 effective January 1, 2017.

Section 577.041.1 provides in pertinent part as follows:

> If a person when requested to submit to any test allowed pursuant to section 577.020 requests to speak to an attorney,[6] the person shall be granted twenty minutes in which to attempt to contact an attorney. If upon the completion of the twenty-minute period the person continues to refuse to submit to any test, it shall be deemed a refusal.[7]

"[T]here is no constitutional right to speak with an attorney prior to deciding whether to submit to a breath test."[8] *White*, 255 S.W.3d at 578 (citing *State v. Foster*, 959 S.W.2d 143, 146 (Mo. App. S.D. 1998)). "Section 577.041.1 does provide a limited statutory right [to attempt] to confer with an attorney prior to making that decision."[9] *Id*. "The purpose of this provision is to provide a person with ***a reasonable opportunity to contact an attorney*** to make an informed decision as to whether to submit to a chemical test." *Id*. (citation omitted) (emphasis added). "'[T]he ***statutory twenty[-]minute requirement has been deemed by the courts to be the definition of 'reasonable opportunity[.]***'" *Id*. (quoting *Christensen v. Dir. of Revenue*, 128 S.W.3d 171, 175 (Mo. App. S.D. 2004) (emphasis added). This accepted definition of "reasonable opportunity" is wholly consistent with the plain language of section 577.041.1, which provides that "[i]f upon the

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[6]In *Norris v. Director of Revenue*, 304 S.W.3d 724, 727 (Mo. banc 2010), the Supreme Court held that "when a person has requested an attorney, the [twenty]-minute time period in section 577.041.1 begins immediately after the officer has informed the driver of the implied consent law, irrespective of whether the driver requested an attorney before or after an officer informs the person of the implied consent law."

[7]As previously noted, section 577.041 was **substantially** amended effective January 1, 2017. The quoted language from section 577.041.1 now appears, in substantially the same form, in section 577.041.3 RSMo 2016.

[8]Roesing does not argue that he had a Sixth Amendment constitutional right to counsel before deciding whether to submit to chemical testing. "The authorities are unanimous that such a right has not yet attached under the Sixth Amendment." *State v. Senn*, 882 N.W.2d 1, 22 (Ia. 2016) (summarizing United States Supreme Court and state court decisions addressing the Sixth Amendment right to counsel).

[9]"The right to counsel is provided by the civil statute and is not an extension of any constitutional rights recognized by *Miranda*. . . ." *Akers v. Dir. of Revenue*, 193 S.W.3d 325, 328-29 (Mo. App. W.D. 2006). "Law enforcement's authority to request a driver to take a chemical test is not conditioned upon that person being advised of his *Miranda* rights or being told that he can consult with an attorney." *Id*.

completion of the twenty-minute period the person continues to refuse to submit to any test, ***it shall be deemed a refusal***." (Emphasis added.) Our Supreme Court has thus consistently held that section 577.041.1 is not violated unless "an officer fails to allow a driver, upon request, [twenty] minutes to attempt to contact an attorney."[10] *Norris*, 304 S.W.3d at 726.

Roesing requested the opportunity to speak with an attorney after being read the informed consent notice. Roesing was granted twenty minutes after that request within which to attempt to contact an attorney. Pursuant to *White*, Roesing was given the reasonable opportunity to attempt to contact an attorney required by section 577.041.1. Roesing subsequently refused to submit to chemical testing. Section 577.041.1 was not violated, and Roesing's refusal was valid.

Roesing argues that we should broaden *White's* definition of "reasonable opportunity to contact an attorney" to require not just the statutory requirement of twenty minutes to attempt to contact an attorney, but also the right to confer privately with an

[10]The only Missouri cases which have found a violation of section 577.041.1 are consistent with this construction of the statute. *See, e.g., Norris*, 304 S.W.3d at 727 (finding that section 577.041.1 was violated where driver requested an attorney and was not given twenty minutes to attempt to contact an attorney after being informed of the implied consent law); *White*, 255 S.W.3d at 579-80 (finding that section 577.041.1 was violated where driver requested an attorney and was not given "the full twenty minutes" to contact an attorney); *Schussler v. Fischer*, 196 S.W.3d 648, 653 (Mo. App. W.D. 2006) (finding that section 577.041.1 was violated where driver requested an attorney after receiving *Miranda* warning, but before being read the implied consent law, and then was not given twenty minutes to attempt to contact an attorney after being read the implied consent law); *Kotar v. Dir. of Revenue*, 169 S.W.3d 921, 926-27 (Mo. App. W.D. 2005) (finding that section 577.041.1 was violated where law enforcement officer chose to try to call an attorney for a driver rather than allowing the driver himself twenty minutes to attempt to contact an attorney); *Bacandreas v. Dir. of Revenue*, 99 S.W.3d 497, 501 (Mo. App. E.D. 2003) (finding that section 577.041.1 was violated where Director did not establish that driver was given full twenty minutes to attempt to contact an attorney); *Keim v. Dir. of Revenue*, 86 S.W.3d 177, 180 (Mo. App. E.D. 2002) (finding that section 577.041.1 was violated where driver was given only nine minutes to attempt to contact an attorney and the Director did not establish that the driver abandoned further attempts to contact an attorney); *Glastetter v. Dir. of Revenue*, 37 S.W.3d 405, 407 (Mo. App. E.D. 2001) (finding that section 577.041.1 was violated where driver was only given eighteen minutes to attempt to contact an attorney and Director did not establish that driver abandoned further efforts to contact an attorney).

attorney. The plain language of section 577.041.1 does not afford a person the right to confer privately with an attorney if the attempt to contact an attorney is successful. "When the language of a statute is clear, the court must give effect to the language as written." *Norris*, 304 S.W.3d at 726. We have no authority to engraft upon the limited statutory right to attempt to contact counsel described in section 577.041.1 a right to private consultation with counsel if the attempt to contact is successful. *See Pavlica v. Dir. of Revenue*, 71 S.W.3d 186, 189 (Mo. App. W.D. 2002) ("Where the legislative intent is made evident by giving the language employed in the statute its plain and ordinary meaning, we are without authority to read into the statute an intent, which is contrary thereto.") (citation omitted). We reject Roesing's invitation to broaden the definition of "reasonable opportunity to contact" an attorney beyond the definition articulated in *White*--a definition that is consistent with the plain language of section 577.041.1

It is uncontested that Roesing was allowed twenty-minutes to attempt to contact an attorney after he made the request to do so. Section 577.041.1 was not violated. The purpose of section 577.041.1 was met in this case, just as it is "met when [a] person attempts to contact an attorney unsuccessfully and the twenty-minute statutory period expires, or the driver abandons the attempt." *White*, 255 S.W.3d at 578. If it is sufficient to satisfy the purpose of the section 577.041.1 to afford a person twenty minutes to unsuccessfully attempt to contact an attorney, then it is certainly sufficient to satisfy the purpose of the statute to afford a person twenty minutes to successfully attempt to contact an attorney, regardless whether the ensuing conversation is private.

Our conclusion is consistent with the result reached in *Clardy v. Director of Revenue*, 896 S.W.2d 53 (Mo. App. W.D. 1995). In *Clardy*, a person arrested on suspicion of driving while intoxicated was read the informed consent law, and requested the opportunity to contact an attorney. *Id*. at 54. The driver "requested privacy, [and] that the officers move away from [him] so that they could not hear his conversation," as they "were within arm[']s reach." *Id*. The driver's request for privacy was denied. *Id*. The driver thereafter refused to submit to a chemical test, and his license was revoked. *Id*. On appeal, the driver argued that he "was effectively denied his right to counsel under Missouri law." *Id*. Noting that "[t]here is no Missouri case on point," this court viewed "*City of Mandan v. Jewett*, 517 N.W.2d 640 (N.D. 1994) as being instructive." *Clardy*, 896 S.W.2d at 55. "In *Jewett*, the officers were in the same room as the accused and testified they heard his end of the conversation. This alone was held not sufficient to conclude accused's statutory right to counsel had been violated." *Id*. (citing *Jewett*, 517 N.W.2d 640). *Clardy* reached the same conclusion as *Jewett*, and found that although "the officers might have moved back from appellant while he was on the phone . . . their failure to do so under all the circumstances[11] did not effectively deprive appellant of his right to counsel." *Id*. at 56.

Our conclusion is also consistent with the analogous result reached in *In Interest of J.P.B.*, 509 S.W.3d 84 (Mo. banc 2017). In *In Interest of J.P.B.*, the Supreme Court observed that a natural parent in a termination of parental rights proceeding has "no constitutional right to counsel . . . but, pursuant to section 211.462.2 . . . has a statutory

[11]The referenced circumstances included the fact that when a breathalyzer is used as the chemical test, "the accused must be observed for fifteen minutes prior to the test. . . . Clearly the officers were required to keep the suspect under observation." *Clardy*, 896 S.W.2d at 55-56.

right to counsel . . . and, therefore, an implied right to effective assistance of counsel." *Id.* at 97. Father argued that his statutory right to counsel (and thus the implied right to effective assistance of counsel) was denied because "he was unable to have private conversations with his counsel during trial due to the presence of Department of Corrections['] personnel while Father communicated via videoconference." *Id.* The Supreme Court concluded that "a parent does not have to be able to communicate at all with counsel during trial, let alone confidentially, for counsel to be effective." *Id.* If private communications are not required to afford a natural parent the statutory right to counsel in a termination of parental rights proceeding, there is no basis to conclude that private communications are required to afford a driver the limited statutory right to attempt to contact counsel for the purpose of determining whether to submit to chemical testing.

Roesing argues that without the right to consult privately with an attorney before deciding to submit to chemical testing, a driver who reaches an attorney during the twenty-minute period authorized by section 577.041.1 risks making inculpatory statements that could be used against him in the license revocation proceeding or in a related criminal proceeding. Roesing's hypothetical concern is not implicated by the facts in this case, however. The Director did not attempt to admit the content of Roesing's conversation with his attorney into evidence during the license revocation review hearing. And Roesing's criminal proceedings (if any) are not before us. Moreover, it is elementary that although Roesing's conversation with his attorney was a privileged communication, "the privilege may be waived, [but] such waiver must be voluntary." *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 729 (Mo. App. E.D. 2011). The privilege that attaches to any attorney-client

communication which occurs after exercising the limited statutory right to attempt to contact counsel set forth in section 577.041.1 is not waived merely because a driver is required to involuntarily conduct the conversation in the presence of a police officer. Regardless, Roesing's stated concern about the attorney-client privilege conflates distinct concepts. The attorney-client privilege implicates whether privileged communications can be admitted at trial. The attorney-client privilege does not implicate whether Roesing was afforded the limited statutory right to attempt to contact counsel described in section 577.041.1.

Finally, Roesing relies heavily on the decision in *State ex rel. Healea v. Tucker*, No. ED105348, 2017 WL 2451869 (Mo. App. E.D. June 6, 2017). That decision possesses no precedential value as it was vacated when the Supreme Court sustained the State's motion to accept transfer of the case. Regardless, the case is readily distinguishable. In *State ex rel. Healea*, a defendant sought dismissal of ***criminal charges*** based on an allegation that his ***Sixth Amendment*** right to counsel was violated when a private meeting with counsel was audio and video recorded. *State ex rel. Healea v. Tucker*, No. ED105348, 2017 WL 2451869, *2. The trial court appointed a special master to investigate the claim, and the special master found a Sixth Amendment violation.[12] *Id*. The ***unrelated*** issue which presented itself to the Eastern District pursuant to a writ of prohibition was whether the

[12]The special master did not recommend a remedy for the Sixth Amendment violation, but did note that dismissal of Healea's criminal charges was not the appropriate remedy. *State ex rel. Healea v. Tucker*, No. ED105348, 2017 WL 2451869, *2. The trial court agreed, and imposed the remedy of excluding from evidence in Healea's ***criminal*** proceedings the fact that he refused to submit to a breathalyzer, although the results of blood testing were deemed admissible. *Id*. Though of no precedential value, this analysis underscores the fallacy of Roesing's suggestion that a claimed violation of his attorney-client privilege by virtue of being denied the opportunity to privately confer with his attorney warrants reinstatement of his license--the practical equivalent of dismissal of criminal charges at issue in *Healea*.

special master's report should be unsealed. *Id*. at 3. *State ex rel. Healea* has no application to this case--a civil driver's license revocation proceeding, where no constitutional right to counsel exists, and where no attorney-client privileged communication is alleged to have been disclosed.

In summary, Roesing was not denied the limited statutory right to attempt to contact counsel described in section 577.041.1, effectively or otherwise. Roesing's explicit refusal to submit to chemical testing after being afforded twenty minutes to attempt to contact an attorney was a valid refusal pursuant to the plain language of section 577.041.1.

Conclusion

The trial court's Judgment sustaining the Director's revocation of Roesing's license is affirmed.

Cynthia L. Martin

Cynthia L. Martin, Judge

Welsh, Presiding Judge, joins in the majority opinion
Witt, Judge, dissents in separate opinion

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DISSENTING OPINION

I respectfully dissent. At the time he phoned his attorney, Roesing was under arrest, was in custody, had been read his Miranda[1] rights, was in the intake area of the jail and knew he was facing possible suspension of driver's license and potential criminal charges for driving while intoxicated. At the time he requested to speak to his attorney there is no way for the officer or this court to know why Roesing was contacting an attorney. They could not know if he wished to exercise his statutory right to speak with his attorney to discuss the civil issues regarding the driver's license suspension and the impact of taking or refusal to take a chemical test on his license, or if he wished to exercise his constitutional right to counsel to discuss the potential criminal charges and the other legal issues

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

implicated by the events that caused him to be taken into custody. It is safe to say that Roesing probably had no idea there was a difference. In fact, in every driving while intoxicated arrest the legal issues that the arrested person may wish to discuss with their attorney and the advice the attorney gives to that person are hopelessly intertwined and cannot be separated.

As the majority recognizes, the taking or refusal to take a chemical test is admissible in any subsequent action, civil or criminal that may arise from that arrest. An attorney would be committing malpractice to only advise his or her client regarding the civil license suspension and ignore the potential criminal charges that may be brought and the impact of the chemical test on those potential criminal charges.

The Missouri legislature granted Roesing the right to a reasonable opportunity to contact an attorney prior to deciding whether to submit to a breathalyzer and he exercised that right. The Fifth Amendment to the constitution also provides him the right to consult with an attorney prior to speaking with the officer when he has been placed under arrest for potential criminal charges. The majority believes that the statutory right granted by the legislature was not the right to privately speak with an attorney but rather consult with an attorney in the presence of an officer who is listening to the conversation, despite knowing, and having been affirmatively warned, that anything he said could and would be used against him in any later criminal proceedings. The majority would have us believe that, without explanation, the legislature intended to create a new type of attorney consultation nowhere else present in Missouri's laws. One in which a client can speak with an attorney but only receive advice equal in quality to the clients ability to communicate important and

necessary facts in vague and unusual ways to obfuscate their true nature from the trained hearing of the officer a few feet away but still convey vital information to an attorney. I find that there is no such recognized attorney-client relationship in Missouri and that the legislature cannot be assumed to have established such a relationship by simply not clarifying that a driver is allowed to consult with an attorney privately--as are all other attorney/client consultations.

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. banc 2006). "In doing so, a court considers the words used in the statute in their plain and ordinary meaning." *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 106 (Mo. App. W.D. 2008). The term "contact an attorney" has several plain and ordinary meanings. The term "contact an attorney" in section 577.041 could be read to mean contact for the purposes of hiring but not be allowed to seek advice, to contact to seek advice but not be allowed to do so privately, or to contact to seek confidential legal advice regarding the myriad of issues that he may face based on the current situation. Any of these interpretations could be reasonable until you realize that the last definition is the only definition that conveys any benefit to the person in custody. There is no reason for a person to hire an attorney *before* submitting to a chemical test except to obtain legal advice regarding that decision. Advice that is based on the limited facts that can be conveyed during a conversation overheard by an officer similarly has little, if any, benefit. The only reason for the legislature to give automobile drivers an opportunity to contact an attorney before submitting to a chemical

test is to allow them to obtain a private legal consultation so they fully understand their rights prior to agreeing or refusing to submit to a chemical test.

This interpretation is further supported by the general rule that the Missouri legislature is presumed to have not intended a statute to create an absurd result. *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934, 938 (Mo. App. W.D. 1993). "As a result, statutory construction should avoid unreasonable or *unjust* results." *Id.* at 938-39 (emphasis added). For example, in *Jenkins v. Missouri Farmers Association, Inc.*, this Court when interpreting the meaning of "grown" as used in the Food Security Act had to choose from two reasonable definitions of the word. 851 S.W.2d 542, 546 (Mo. App. W.D. 1993). This Court chose the definition that most reasonably implemented the legislative intent of protecting a security interest in the crops. *Id.*; *See also, Kansas City Star Co.*, 859 S.W.2d at 942-43. Such should be the case here. The only reasonable implementation of the statute is to define "contact an attorney" as allowing a private consultation. Any other interpretation conveys no benefit or even risks future harm. It makes little sense to think the legislature would intend to grant a right that, under the majority's interpretation, potentially places drivers at greater risk for criminal charges and/or puts the contacted attorney at risk for malpractice claims. "We will not interpret a statute or ordinance so as to reach an absurd result contrary to its clear purpose." *Leiser v. City of Wildwood*, 59 S.W.3d 597, 604 (Mo. App. E.D. 2001) (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)). The most widely accepted understanding of an attorney consultation is that it is done privately and this is the only definition that makes sense in the context of section 577.041.

This is not a case of "broadening" rights as the majority suggests, instead, it is merely refusing to create some lesser attorney client relationship that does not as yet exist. The legislature did not "exclude" the word "privately" because it did not intend to grant a private consultation. The term was not included because consultation with an attorney implicitly and necessarily includes privacy.

Another important consideration is that we assume whenever the Legislature passes legislation it is aware of the existing law. Section 600.048.3 specifically requires: "It shall be the duty of every person in charge of a jail, police station, constable's or sheriff's office, or detention facility to make a room or place available therein where any person held in custody under a charge or suspicion of a crime will be able to talk privately with his or her lawyer, lawyer's representative, or any authorized person responding to a request for an interview concerning his or her right to counsel." The legislature did not need to include in Section 577.041 the provisions regarding the private consultation with an attorney because the right already existed in statute. The majority wishes to draw a line between the legal advice regarding the potential criminal charges and the legal advice regarding the taking or refusing to take the chemical test. It does not make logical sense that the legislature would grant a right to speak privately with an attorney to all persons in custody under the suspicion of a crime ***except*** for those in custody suspected of a crime who are also at risk for civil penalties. Clearly, section 600.048.3 suggests that the legislature intended to grant privacy to attorney communications to all persons in custody, including those in custody facing both civil ramifications for their alleged crimes as well as criminal penalties. There is no way that proper legal advice as to one issue can be given without

consideration of the effects that legal advice has on the other issues which will arise therefrom. Further there is no way that an attorney can possibly give proper legal advice to his or her client on either issue unless they are allowed to converse confidentially so the client can provide all of the relevant facts necessary to provide informed legal advice. The client cannot candidly provide those facts to the attorney with a law enforcement officer standing over their shoulder listening to the conversation.[2]

"The purpose of section 577.041.1 is to provide the driver with a reasonable opportunity to contact an attorney to make an informed decision as to whether to submit to a chemical test." *Norris v. Dir. of Revenue,* 304 S.W.3d 724, 726-27 (Mo. banc 2010)(internal citation omitted). When a driver qualifies his refusal on speaking to an attorney, "the consent implied by law is temporarily withdrawn for the twenty-minute abatement period to permit the driver to consult counsel for the purpose of deciding whether to expressly consent or refuse testing." *Riley v. Dir. of Revenue*, 378 S.W.3d 432, 438 (Mo. App. W.D. 2012). The driver must be given a reasonable opportunity to contact an attorney. *Kotar v. Dir. of Rev*., 169 S.W.3d 921, 925 (Mo. App. W.D. 2005). Although thus far the "reasonable" standard has only been applied to the "opportunity" to contact an attorney, for the reasons put forth in this dissent, I believe the "reasonable" standard must also be extended to the type of contact a person is allowed to have with that attorney. To

[2] The attorney would need to know if the client was in fact driving, when the client started drinking, when he/she stopped drinking, how many drinks were consumed, what type of liquor was consumed, the circumstances of the initial contact with law enforcement, if there was an accident, if anyone was injured, the clients height and weight, the clients prior arrest record and many other factors that the client cannot properly relay to the attorney with the officer listening to the conversation. Some of these matters may provide for enhanced criminal charges including various serious felonies and could impact possible civil actions for damages brought by other parties from any potential related accident.

find otherwise would be contrary to the policies espoused in the existing case law and would make the statutory opportunity to contact an attorney virtually meaningless.

As noted by the majority, this Court last addressed this issue in 1995 in *Clardy v. Dir. of Revenue*, 896 S.W.2d 53 (Mo. App. W.D. 1995). First, I agree with Roesing that *Clardy* is distinguishable. In *Clardy*, the room in which Clardy and the officer were located was approximately 15x20 feet. *Id.* at 54. Further, the court specifically noted that although the room was small, there was no indication that the conversation between Clardy and his attorney was actually overheard by the officer. *Id.* at 55. Here, Officer Clapp was never more than four feet from Roesing and Officer Clapp testified that he overheard the entirety of Roesing's side of the conversation. Nevertheless, I believe that we need not distinguish *Clardy* because under our current case law regarding attorney client consultation, Roesing was entitled to confidentially consult with his attorney. To the extent that *Clardy* can be read to allow a law enforcement officer to listen to the conversation between attorney and client, I would overrule it.

A driver "does not have a *constitutional* right to consult with an attorney prior to deciding whether or not to submit to a breathalyzer test . . . ." *State v. Ikerman*, 698 S.W.2d 902, 907 (Mo. App. E.D. 1985). Nonetheless, a driver "does have the right to consult with counsel or others on his behalf, and the arresting authorities do not have the right to prevent him from doing so." *Id.* Section 544.170 confers "a limited right to the defendant to consult with counsel, notwithstanding the conclusion that no *constitutional* right to assistance of counsel exists." *Id.* The Director argues that the lack of privacy does not "prevent" consultation with counsel; Officer Clapp fulfilled the requirements of section 544.170 by

allowing Roesing to call his attorney. If the Legislature had intended the consultation to occur in private, contends the Director, the legislature would have expressly stated so in the statute.[3] Missouri has not addressed this question directly. However, our courts have found that the statutory right to consult with an attorney under this statute is a personal right and the officer is prohibited from attempting to contact the attorney on the driver's behalf. *Kotar*, 169 S.W.3d at 926. Further, the statutory right to consult with an attorney cannot be ignored based on circumstances created by the officer. *Id.* (The fact there was no phone available at a sobriety check point did not negate the driver's right to personally consult with an attorney.)

The Missouri Supreme Court has noted that the right to confidentiality of communications between a client and attorney is important even in a civil context. In *In Interest of J.P.B.*, in a concurrence with the majority's reversal of a father's termination of parental rights the court highlighted that the father was denied meaningful access to his attorney because father was only allowed to speak with his attorney by video conference during which a guard and another person were present with father for the entire conversation. 509 S.W.3d 84, 107 (Mo. banc 2017) (Breckenridge, concurrence). The concurring opinion relied, in part, on other jurisdiction which have held that, even in the prison context, the right to privately confer with an attorney must be protected. *Id.* at 107 n. 4. The majority correctly notes that the majority in *In Interest of J.P.B.*, ultimately held that in the context of a termination of parental rights, "a parent does not have to be able to

[3] As previously noted the right to consult in private with an attorney while in law enforcement custody has already been legislatively addressed in 600.048.3.

communicate at all with counsel during trial, let alone confidentially, for counsel to be effective." *Id.* at 97. This is not, however, dispositive in a license revocation hearing where, as noted above, criminal penalties will almost always follow.

Although of no precedential value, I am persuaded by the actions of other states which have concluded that it is well-established that the right to counsel includes the right to consult with an attorney in private. *State v. Holland*, 711 P.2d 592, 595 (Ariz. 1985). A defendant must "be allowed to [consult with an attorney] in a meaningful way," and "effective representation [would not be] possible without the right of a defendant to confer in private with his counsel." *Id.* (In a criminal case, the court found driver was denied right to counsel when, following his arrest for DWI, an officer refused to leave the room so that driver could talk to his attorney in private before deciding whether to submit to a breath test.); *State v. Durbin*, 63 P.3d 576 (Or. 2003) (Oregon Supreme Court held results of the breath test should have been suppressed in a DUI case because of the "presence within earshot of the arresting officer when [the driver] consulted a lawyer by telephone before taking [the test].); *People v. Iannopollo*, 502 N.Y.S.2d 574 (County Ct. 1983) (same); *see contra Herndon v. Com.*, 2009 WL 2475331 (Ken. App. Aug. 14, 2009) (declining to require privacy because Kentucky's Criminal Rules of Procedure only allowed contacting of an attorney to "secur[e] services" rather than "consult in private"); *City of Ann Arbor v. McCleary*, 579 N.W.2d 460, 481 (Mich. App. 1998) (refusing to extend right to consult counsel to a right to private communications instead noting statute requiring such conversations be protected by attorney-client privilege).

This position is further supported by Missouri's most current cases regarding attorney-client confidentiality. Missouri Courts are currently tackling the bounds of the right of an arrestee to confer privately with an attorney in criminal cases in *State ex rel. Healea v. Tucker*, No. ED105348 (Mo. App. E.D. June 6, 2017). In *State ex rel. Healea*, a driver was arrested after backing his truck into a restaurant and fleeing the scene of the accident. *Id.* at *2. At the police station, the driver asked to call his attorney and speak with him privately. *Id.* The arresting officer placed him in a holding cell where the officers could, and did, record the audio and video of the driver's conversation with his attorney." *Id.* On a Writ of Prohibition and/or Mandamus, the Eastern District found that Missouri has continually placed an outsized importance on protecting an individual's attorney-client privilege.

> The Missouri Supreme Court "has spoken clearly of the sanctity of the attorney-client privilege." The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value . . . than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

State ex rel. Behrendt v. Neill, 337 S.W.3d 727, 729 (Mo. App. E.D. 2011) (quoting *State ex rel. Peabody Coal Co v. Clark*, 863 S.W.2d 604, 607 (Mo. banc 1993). "Confidentiality is essential if attorney-client relationships are to be fostered and effective." *Id.* (citing *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383-84 (Mo. banc 1978). The attorney-client privilege is "absolute in all but the most extraordinary situations[.]" *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 366 n.3 (Mo. banc 2004). Confidentially is not merely an abstract legal construct. The complexity of our legal system

makes the "attorney-client privilege even more essential." *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assoc.*, 407 S.W.3d 621, 634 (Mo. App. E.D. 2013) (quoting *State ex rel. Great Am. Ins. Co.*, 574 S.W.2d at383). "This is what a client expects." *Id.*

The Director and the majority are correct that the Eastern District's opinion in *Healea* holds no precedential value because the Supreme Court has granted transfer of the case. *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 437 (Mo. App. S.D. 1981). Further, the case involves the rights of a criminal defendant rather than the statutory civil right involved in the revocation of driving privileges. I, however, do not believe that either of these two points negates the quality and persuasiveness of the analysis of the Eastern District and most certainly not the existing mandates of the Missouri Supreme Court upon which it is premised.

I recognize that there is a balancing of interests. Officer Clapp testified that his actions were required so that he could comply with the Operating Procedures for Breath Analyzers and the mandated observation period prior to giving a breath test. 19 CSR 25-30.060.[4] However, I see no justification in this case as to why Officer Clapp could not have allowed Roesing additional privacy for the phone call either by watching him through a window in a room with recording equipment turned off, taking him to the room without recording equipment (that the officer testified was available at the time), taking him to a larger room where the phone call could not be overheard, or simply waiting to begin the

[4] All regulatory references are to the Missouri Code of State Regulations as currently updated unless otherwise indicated.

fifteen-minute observation period until after Roesing was able to properly consult with his attorney.

Additionally, I see no justification for the argument that a lesser attorney-client relationship is acceptable when the rights and risks at issue are civil in nature as opposed to criminal. Attorneys are held to the same standard of competence whether their client faces civil or criminal penalties. Clients hold the same expectation of competent advice whenever they consult with an attorney on a civil or a criminal matter. Speaking with an attorney with an officer present and listening comes with real risks of clients being unable to provide the attorney with all of the relevant information so the attorney may provide proper legal advice and the client and attorney may fully understand one another. This Court believes allowing the officer to listen to the conversation between attorney and client runs afoul of *Spradling*'s mandate that "arresting authorities do not have the right to prevent" a driver from consulting with his or her attorney. 528 S.W.2d at 764.

Further, it must be noted that while a refusal to submit to a breathalyzer test triggers a civil penalty in forfeiture of ones driving privileges, the refusal or a test result may be admissible in a subsequent related criminal trial and acquiescing to the test puts one at risk for additional criminal charges. *McMaster v. Lohman*, 941 S.W.2d 813, 816 (Mo. App. W.D. 1997). In almost every alcohol related driving arrest there will be some criminal charges associated with the civil license action. In many cases those criminal charges may include significant felony offenses if an accident or injuries were involved. The attorney is not just providing legal advice as to the civil matter but also as to the potential criminal charges that may arise from the same conduct and the impact of taking or refusing the

breath test may have on those potential criminal charges. Thus, by giving advice on whether to refuse to submit to the test, an attorney is necessarily and unquestioningly giving advice affecting later criminal proceedings which may be filed against a driver.

The majority finds that the officer's listened to attorney-client conversation only becomes a legal issue once the State attempts to admit evidence of such a privileged conversation at trial. Thus it argues, in this case, the issue is merely hypothetical. The majority misses the mark. If such were the case, the State would be free to eavesdrop and record conversations with attorneys and clients with impunity so long as they only used the conversations to gain an advantage but did not admit the contents of the conversations at trial. This is not the state of the law. If a client cannot speak with his attorney with candor and clarity to obtain honest and comprehensive advice then it cannot be said that they were given an opportunity to consult with an attorney.

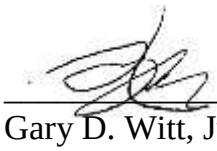
The right to privately consult with an attorney is constitutionally guaranteed in a criminal case and the advice given under section 577.041 cannot be given without giving advice regarding criminal proceedings. I do not see how the Legislature could have intended anything but to grant drivers the right to privately consult with an attorney. To the extent that there is a distinction that license revocation cases are civil as opposed to criminal, it is a distinction without a difference. The issues are too hopelessly intertwined to draw such an artificial and completely unworkable distinction.

"Under the actual prejudice standard adopted, the issue is 'whether an arrestee's decision to refuse to submit to a chemical test is an informed one,' so it must be determined 'whether the warning was so deficient as actually to prejudice the arrestee's decision-

making process.'" *Brown v. Dir. of Revenue*, 34 S.W.3d 166, 174 (Mo. App. W.D. 2000) (quoting *Teson v. Dir. of Revenue*, 937 S.W.2d 195, 196 (Mo. banc 1996)). "[W]here the officer has violated the statutory requirement to afford a driver 20 minutes to call an attorney after the Implied Consent Law advice, regardless of whether the request comes before or after that advice, then the court must view all the evidence to determine actual prejudice." *Id.* I would find in this case, although Roesing was able to contact his attorney, he was not provided a reasonable opportunity to have any meaningful consultation with that attorney because he was never given privacy as the police officer listened to every word he said to his attorney. He was denied his statutory right to at least attempt to obtain legal counsel before deciding whether to submit to a breathalyzer test. Thus, he was prejudiced. To hold otherwise would allow officers to continue to deny drivers their right to privacy in their consultation under section 577.041 and yet claim there was no prejudice because some limited and completely ineffective consultation was allowed.

Conclusion

For the reasons stated above, I would find that Roesing was denied his statutory right to consult an attorney prior to submitting to a breathalyzer test. As such, the trial court erred in sustaining the Director's revocation of Roesing's driving privileges for refusal to submit to a breathalyzer test.



Gary D. Witt, Judge