

northbound I-435 at the Missouri River Bridge. Upon arriving at the scene, Corporal Sims found a passenger vehicle off the side of the roadway and down an embankment. The vehicle was extensively damaged on the front end.

Approaching the vehicle at approximately 2:14 a.m., Corporal Sims saw Ms. Ross in the front passenger seat and a male lying across the rear seat. Corporal Sims opened the driver's side door and immediately detected a strong odor of intoxicants. Neither occupant of the car was injured. Ms. Ross denied walking on the roadway and denied driving the vehicle. She said a female friend had been driving the vehicle but was unable to provide a name. Corporal Sims noticed that Ms. Ross's eyes were red and watery, and her speech was "mumbled." He confiscated a glass marijuana pipe from the driver's seat.

Corporal Sims directed Ms. Ross to get out of the vehicle, and he accompanied her to the patrol car. Ms. Ross was wearing only one high-heeled shoe and opted to leave it in the vehicle because she was unable to locate the other shoe. Her other shoe was later located half-way up the embankment. Based on footprints in the snow, Corporal Sims determined that the male passenger had only been on the passenger side of the wrecked vehicle. Footprints consistent with Ms. Ross's shoes were found only on the driver's side of the vehicle and up the embankment.

At the scene, Corporal Sims placed Ms. Ross under arrest for possession of drug paraphernalia and careless and imprudent driving. He did not conduct field

sobriety tests at that time because Ms. Ross was without shoes and the ambient temperature was below freezing.

Ms. Ross was transported to the Platte County Detention Facility, where the field sobriety tests were conducted. She performed poorly and was advised that she was also under arrest for driving while intoxicated. Immediately following the arrest, Corporal Sims read the implied consent advisory at 3:54 a.m., and Ms. Ross refused to take the chemical breath test.

The Director of Revenue subsequently revoked Ms. Ross's driving privileges, pursuant to Section 577.041¹ for refusing to submit to the chemical test. At the circuit court review hearing, Ms. Ross argued that her warrantless arrest for driving while intoxicated was invalid because it did not occur within ninety minutes of the violation, as required by Section 577.039. In light of the invalid arrest, Ms. Ross further argued that the Director could not establish a *prima facie* case for revocation under Section 577.041. The circuit court rejected the argument and affirmed the license revocation. Ms. Ross appeals.

ANALYSIS

On review of this court-tried case, we must affirm the circuit court's decision unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. ***Fick v. Dir. of Revenue*, 240 S.W.3d 688, 690 (Mo.banc 2007)**. Ms. Ross contends the circuit court erred in affirming the revocation of her driver's license because it failed to apply Section

¹ All statutory references, except Section 577.039 RSMo 2000, are to Revised Statutes of Missouri (Cum.Supp. 2008) unless otherwise noted.

577.039 in determining the validity of her arrest, as a key element of the Director's revocation case.

The Director revoked Ms. Ross's driving privileges, pursuant to Section 577.041.3, based on her refusal to submit to the chemical breath test following the car accident on February 8, 2008. On review of the revocation, the circuit court was required to determine only three elements: (1) whether Ms. Ross was arrested or stopped; (2) whether Corporal Sims had reasonable grounds to believe Ms. Ross was driving a motor vehicle in an intoxicated or drugged condition; and (3) whether Ms. Ross refused to submit to the chemical test. **§ 577.041.4; *Garriott v. Dir. of Revenue*, 130 S.W.3d 613, 615 (Mo.App. 2004).** The Director had the burden of proof, and the failure to satisfy any of these elements results in reinstatement of the driver's license. ***Akers v. Dir. of Revenue*, 193 S.W.3d 325, 327-28 (Mo.App. 2006).**

Ms. Ross argues that the Director failed to establish the first element of the revocation case because her arrest for driving while intoxicated was untimely and invalid under Section 577.039, which provides:

An arrest without a warrant by a law enforcement officer, including a uniformed member of the state highway patrol, for a violation of section 577.010 [Driving while intoxicated] or 577.012 [Driving with excessive blood alcohol content] is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer and *when such arrest without warrant is made within one and one-half hours after such claimed violation occurred*, unless the person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment, in which case such arrest without warrant

may be made more than one and one-half hours after such violation occurred.

(Emphasis added.) This statute requires that a warrantless arrest for driving while intoxicated be made within ninety minutes of the alleged violation.

The record indicates that Corporal Sims first came into contact with Ms. Ross at the accident scene at 2:14 a.m., but he did not arrest her for driving while intoxicated until one hour and forty minutes later at 3:54 a.m. Because the warrantless arrest took place more than ninety minutes after Corporal Sims arrived on the scene, Ms. Ross asserts it was untimely and cannot provide evidence of a lawful arrest to support the license revocation.

The Director responds that the validity of the arrest is irrelevant in this revocation proceeding, because it is an administrative and civil action to which the exclusionary rule does not apply. The Director cites the refusal cases of *Garriott*, **130 S.W.3d at 615**, and *Sullins v. Director. of Revenue*, **893 S.W.2d 848, 850 (Mo.App. 1995)**, wherein our court determined that the license revocations were proper despite evidence that the traffic stops and subsequent arrests in both cases were unlawful. In *Garriott*, we concluded:

Mr. Garriott's contention that the validity of the stop matters in this case is meritless. Section 577.041.4 is very clear about what the trial court can consider in a hearing about a revocation for refusal to take a test: whether the driver was arrested, whether the officer had reasonable grounds to believe the driver was driving while intoxicated, and whether the driver refused to take the test. The statute does not require a showing that the initial stop was valid, or even that the arrest was lawful.

130 S.W.3d at 616 n.3.

Ms. Ross argues that *Garriott* and *Sullins* are not applicable here because neither case involved a challenge to the lawfulness of the arrest under Section 577.039. She points out that her argument is grounded on the statutory requirement for a valid arrest under Missouri law and not the exclusionary rule approach that was rejected in the cited cases.

Ms. Ross relies on *Reed v. Director of Revenue*, 184 S.W.3d 564 (Mo. banc 2006), to support her challenge of the arrest under Section 577.039. Mr. Reed was arrested for driving while intoxicated more than three hours after he backed his truck into a ditch and walked home. *Id.* at 565-66. The Director suspended Mr. Reed's driving privileges, pursuant to Section 302.500-302.540, RSMo 2000, based on test results showing that his blood alcohol content (BAC) was 0.136%. *Id.* at 566. Mr. Reed argued that his license should be reinstated because his arrest was illegal under Section 577.039, in that he was arrested more than ninety minutes after the claimed violation. *Id.* He also argued that the BAC test results were inadmissible as a result of the illegal arrest. *Id.* at 567. The Director responded, in part, that exclusionary rule principles cannot be applied in a civil proceeding to suspend or revoke driving privileges. *Id.* at 566.

The Supreme Court concluded that Mr. Reed was not lawfully arrested under Section 577.039. *Id.* In light of the invalid arrest, the court further determined that the BAC test results could not be used to support the administrative suspension. *Id.* at 568. The court explained that its ruling was based on a violation of Missouri law and did not rest on the exclusionary rule. *Id.* at 568 n.3.

Similarly, the evidence here established that Ms. Ross was arrested for driving while intoxicated more than ninety minutes after the alleged violation. Consequently, the arrest was unlawful under 577.039 and cannot provide evidence of an arrest for purposes of an administrative revocation. Although *Reed* involved a license suspension in a case where the driver submitted to a BAC test, its holding is no less applicable in this case involving a refusal to submit to such testing. Otherwise, we would have the illogical result that an intoxicated driver who submits to chemical testing could avoid administrative sanction based on an invalid arrest, while a similarly situated driver who refused the testing would have his driving privileges revoked.

Alternatively, the Director argues that Ms. Ross's earlier arrest for careless driving is sufficient to meet the arrest requirement under the implied consent provisions of Section 577.020.1 and, by extension, the first element required for revocation under Section 577.041.4. We note, however, that the implied consent law provides that consent to a chemical test is deemed given "[i]f the person is arrested 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 drugged condition[.]*" § 577.020.1(1) (Emphasis added.) The Director did not offer any evidence that Ms. Ross's earlier arrest for careless driving or possession of drug paraphernalia was based upon reasonable grounds to believe she was intoxicated. Presumably, Corporal Sims would have made the arrest for driving while intoxicated at the earlier time if he

had reasonable grounds to support such detention. The record does not support a finding that Ms. Ross was arrested for any offense arising out of the officer's belief that she was driving while intoxicated within ninety minutes of the alleged offense.

The Director failed to present evidence of lawful arrest to support the revocation of Ms. Ross's driving privileges under Section 577.041.4. Accordingly, the circuit court erred in affirming the revocation. We reverse the judgment and reinstate Ms. Ross's driving privileges.

LISA WHITE HARDWICK, JUDGE

All Concur.