

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
)	Respondent,
)	
vs.)	No. SC 91173
)	
HOWARD JOHNSON,)	
)	
)	Appellant.

APPEAL TO THE SUPREME COURT OF MISSOURI
 FROM THE CIRCUIT COURT OF DAVIESS COUNTY, MISSOURI
 FORTY-THIRD JUDICIAL CIRCUIT
 THE HONORABLE WARREN L. MCELWAIN, JUDGE

APPELLANT’S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Appellant, Howard D. Johnson, adopts the Jurisdictional Statement and the Statement of Facts in his original brief.

ARGUMENT

I.

This Court should reject the State's arguments that Deputy Watson was relying in "good faith" on existing precedent at the time of the warrantless search of Mr. Johnson's van, and that the denial of the motion to suppress should be upheld for this reason, because the deputy was engaging in procedures that were not authorized by any law as pretext to conduct a warrantless vehicle search, the exclusionary rule was designed to deter this type of misconduct, and it would be well-served by being applied here.

Respondent complains that Appellant presented an argument to this Court that was not made to the Court of Appeals, alleging a violation of Rule 83.08, because he did not attack Deputy Watson's subjective reasons for making the arrest and search. Resp. Br. 25. However, Appellant is basing the argument that the trial court erred in denying the motion to suppress on the same theory raised with the Court of Appeals - that it was a violation of his rights to due process and to be free from unreasonable searches and seizures, and that the officer had no justification for the search. The facts that show Deputy Watson's subjective intent and belief were also fully presented to the Court of Appeals; however, appellate counsel did not stress the pretextual nature of the officer's actions due to relying on existing Supreme Court precedent at the time, which did not require further exploration into this issue. See *Arizona v. Gant*, 129 S.Ct 1710 (2009).

Also, unlike the arguments the State presents for the first time on appeal, Mr. Johnson fully presented these arguments to the trial court. A party seeking the correction of error must stand or fall on the record made in the trial court. See, e.g., *State v. Thomas*, 969 S.W.2d 354, 355 (Mo. App. W.D. 1998), quoting *State ex rel. Selby v. Day*, 929 S.W.2d 286, 288 (Mo. App. S.D. 1996). An appellate court will not find that a lower court erred on an issue that was not presented for it to decide, absent allegations of plain error. See, e.g., *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. banc 2000); *Zundel v. Bommarito*, 778 S.W.2d 954, 957 (Mo. App. 1989). The State did not request plain error review with the Court of Appeals on this issue, nor did it request this when seeking transfer to this Court. However, Mr. Johnson repeatedly argued to the trial court that his arrest was invalid and that the unlawful detention was mere pretext to search his vehicle.

At a pre-trial hearing, defense counsel argued that Deputy Watson had intentionally made no effort to determine if Mr. Johnson's Texas driver's license was valid, and that the stop and search were pretextual. (Tr. 53-54). The prosecutor had no rebuttal, but the court overruled the motion without discussion. (Tr. 54). At this hearing, Mr. Johnson also personally argued that his learner's permit did not have any restrictions listed on it and he was not advised that he was required to follow any, and Deputy Watson was incorrect to accuse him of violating the restrictions when he had no documented proof that any existed. (Tr. 55). He argued that Watson had no cause to arrest him for any reason, and it was a false arrest and an unlawful detention. (Tr.

55, 59-60). These were all attacks on Deputy Watson's subjective intent and the validity of the "arrest" and detention.

In response, the prosecutor argued that there were no facts presented that he had received the permit under any separate requirements, apparently shifting the burden of proof to Mr. Johnson and ignoring his sworn testimony, and thus concluded that he was in violation of the requirements of the permit. (Tr. 57). The trial court did not make any ruling on these arguments, and defense counsel did not challenge the court's failure to do so. (Tr. 62). Mr. Johnson also tried to argue these issues again after his trial, but the prosecutor objected and said "these issues have been gone over I couldn't even count how many times with the Court." (Tr. 252). The court ruled in favor of the State and ended any argument by Mr. Johnson. (Tr. 255). These issues were fully presented for review.

Respondent also admits that the search of Mr. Johnson's van would be barred due to the holding in *Arizona v. Gant, supra*. Resp. Br. 9. The State argues that the denial of the motion to suppress should still be upheld, though, because Deputy Watson was acting in conformance with then-binding precedent, and because excluding the evidence would not deter police misconduct. Resp. Br. 9. Appellant disagrees. First, the State made no arguments at the trial court level suggesting that Deputy Watson was relying in "good faith" on any existing precedent, or precedent translated through his officer training, that purportedly authorized an automatic vehicle search incident to arrest. And the record also does not support any finding that Watson was acting in "good faith," when defense counsel questioned Deputy

Watson about his justification for the warrantless vehicle search, and Watson responded by admitting that the justifications he had been taught did not exist.

Deputy Watson testified that when he arrests people on the highway, he will always conduct a search of their vehicle. (Tr. 11, 37, 168). He testified that this type of search incident to arrest was done for safety reasons – to make sure that Mr. Johnson was not armed, and to make sure that if he regained access to his vehicle, there would not be anything within it that could be used to harm the officer.¹ (Tr. 11, 38, 168). These are the very justifications for vehicle searches incident to arrest that were outlined in United States Supreme Court opinions long before *Arizona v. Gant*, *supra*, reiterated that these justifications must actually exist for the search to be considered reasonable.

Courts in Missouri, the Eighth Circuit, and several other state and federal jurisdictions previously held that warrantless vehicle searches were permissible when conducted incident to the arrest of a recent occupant, regardless of whether the arrestee could access the vehicle at the time of the search. See, e.g., *State v. Scott*, 200 S.W.3d 41, 44-45 (Mo. App. E.D. 2006); *U.S. v. Hrasky*, 453 F.3d 1099, 1101 (8th Cir. 2006). The United States Supreme Court in *Arizona v. Gant* rejected this

¹ He also testified that another reason was to inventory the vehicle, but since he admitted that he had not yet made the decision to tow the van at the time of the search, this justification is inapplicable. (Tr. 37-38).

interpretation of its decision in *New York v. Belton*. 129 S.Ct. 1710, 1719 (2009); 453 U.S. 454 (1981).

In rejecting the lower courts' interpretations, the Supreme Court declared that it never intended to separate the reasoning for the search-incident-to-arrest exception to the warrant requirement, as provided in *Chimel v. California*, from the rules outlining the scope of such searches, as provided in *New York v. Belton*. *Gant*, 129 S.Ct. at 1719; *Chimel*, 395 U.S. 752, 762-63 (1969) (the arresting officer may reasonably search an arrestee and the area "into which an arrestee might reach" in order to provide for officer safety and prevent evidence concealment or destruction); *Belton*, 453 U.S. at 460 (the Court held that the proper scope of the search of a vehicle incident to an arrest of its occupants includes the passenger compartment and containers found within, but declared that this holding did not alter the fundamental principles from *Chimel*).

Here, Deputy Watson was clearly aware of the justifications for a vehicle search incident to arrest, and his belief was in accordance with the law that existed at the time, and the law as clarified by the United States Supreme Court in *Arizona v. Gant, supra*. (Tr. 11, 38, 168). But then Watson admitted that none of these justifications actually existed when he searched Mr. Johnson's van.

Defense counsel asked Deputy Watson how Mr. Johnson could have gotten anything out of his van if he was not allowed to leave the patrol car other than a brief moment when he was handcuffed and put back inside. (Tr. 21). Watson answered, "I've always wondered that myself." (Tr. 21). Watson then admitted that Mr. Johnson

never attempted to go back to his van, and he had no reason to believe that he would try to do so. (Tr. 21-22). So, Watson admitted that he knew the legal justifications for the warrantless search, and he admitted they did not exist at the time he searched Mr. Johnson's van. This is not "good faith" reliance.

The State claims that Deputy Watson was doing what he was authorized to do under then-existing precedent, thus his actions were reasonable. Resp. Br. 26. The State also dismisses the fact that Watson told Mr. Johnson that he was going to allow him to post bond at the scene if he did not find contraband in the vehicle search, and argues that Deputy Watson was authorized by statute to set the conditions for release. Resp. Br. 27, citing Section 544.560. This is incorrect.

Section 544.560 provides that an officer who arrests a person "by virtue of a warrant upon an indictment," or who has a person in custody under a specific "warrant of commitment" may authorize the conditions for release. Mr. Johnson was not arrested by virtue of any warrant, and this law is inapplicable. There do not appear to be any laws that actually authorize an officer to set bond and release a person who has been charged with a bailable offense and has been taken into custody for this purpose. Instead, laws clearly state that only the court in which an indictment or information is pending may release a defendant from custody or arrest, or the clerk of such court. Section 544.530.

Other than citing to this inapplicable statute, the State did not address Appellant's arguments that the justifications for the search-incident-to-arrest warrant exception do not exist when the officer is not making an arrest at all and admits that

he has no intention of transporting the accused to the police station, but instead is conducting a temporary detention without proper justification and calling it an "arrest" in order to improperly invoke such procedures as a pretext for a warrantless vehicle search. Resp. Br. 27. This is not "good faith," and it is not reasonable by any measure.

Finally, the State argues that Appellant's reliance on *Missouri v. Siebert*, 542 U.S. 600 (2004), is misplaced because the unlawful procedure at issue was not authorized by any United States Supreme Court opinion. Resp. Br. 27. The State argues that here, the search incident to arrest procedure followed by Deputy Watson was explicitly authorized by *Belton*, *supra*. Resp. Br. 27. This is incorrect in two regards.

First, an automatic vehicle search incident to the arrest of any recent occupant absent any justification was never authorized by *Belton*, or any other United States Supreme Court opinion. In *Gant*, the Supreme Court merely reiterated that the justifications for this exception to the warrant requirement must be adhered to as they were previously outlined, and that the lower court decisions had untethered the justifications outlined in *Chimel* from the rules providing for the scope of searches incident to arrest provided in *Belton* and *Thornton v. United States*, 541 U.S. 615 (2004). *Id.* at 1722-23. The Supreme Court clarified that unjustified vehicle searches conducted pursuant to every arrest were never constitutionally permissible, and that the lower court decisions were incorrect. 129 S.Ct. at 1723. Deputy Watson's belief

about the justifications required, therefore, was correct – he simply ignored whether or not these justifications existed.

And next, even if this jurisdiction's interpretation of the search-incident-to-arrest exception would have authorized an automatic vehicle search after a valid arrest at the time Mr. Johnson's van was searched, Deputy Watson was not relying in "good faith" on any such precedent. Instead, he was engaging in conduct that was not authorized by any law, by temporarily detaining Mr. Johnson under the guise of arresting him for driving without a valid license, and offering him the opportunity to post bond without approval of any judge, magistrate, or court clerk if he was unable to discover contraband in the warrantless and nonconsensual vehicle search. This is not authorized procedure, it was not reasonable by any measure, and it is exactly the type of conduct that the exclusionary rule was designed to deter.

Appellant respectfully requests this Court reverse Appellant's conviction for possession of a controlled substance and remand the cause for further proceedings.

CONCLUSION

For the reasons presented in Point I of this brief, and Point I of his initial brief, Appellant respectfully requests this Court to reverse his conviction for possession of a controlled substance, and remand the cause for further proceedings. For the reasons presented in Point II of his initial brief, he requests this Court to reverse his conviction for possession of a controlled substance. For the reasons presented in Point III of his initial brief, he requests this Court to reverse his conviction for driving without a valid license.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Alexa Irene Pearson, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, table of contents, the signature block, and this certificate of compliance and service, the brief contains 2,364 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On the 9th day of September, 2011, an electronic copy of the foregoing was sent through the Missouri e-Filing System to Daniel McPherson, Assistant Attorney General, at Daniel.McPherson@ago.mo.gov.

/s/ Alexa Irene Pearson

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