

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,)	
)	
)	Appellant,
)	
vs.)	No. SC 91182
)	
ANDREA M. HICKS,)	
)	
)	Respondent .)

**APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
HOWELL COUNTY, MISSOURI
THIRTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE DAVID P. EVANS, JUDGE**

RESPONDENT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is made pursuant to § 547.200, RSMo,¹ from an Order suppressing evidence in the Howell County Circuit Court, the Honorable David P. Evans presiding. On September 8, 2010, following en banc review pursuant to Court Operating Rule 22.01, the Missouri Court of Appeals for the Southern District reversed the Order of the Howell County Circuit Court. A dissenting judge, however, transferred this cause to this Court pursuant to Rule 83.03. Therefore, jurisdiction lies in this Court under Article V, §10, Missouri Constitution (as amended 1982).

¹ All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant appeals the trial court's order sustaining Andrea's motion to suppress evidence. Viewed in the light most favorable to the trial court's ruling, the following evidence was adduced:

On September 13, 2008, Andrea was arrested for driving while her license was suspended after a valid traffic stop by West Plains Officer Powell (Tr. 4-5). Powell handcuffed and placed her on the curb (Tr. 5). He believed that he had the authority to search her Isuzu incident to the arrest, so he did that and found a syringe that contained methamphetamine in the passenger floorboard (Tr. 5-7). Andrea was charged with possession of a controlled substance, § 195.202 (LF 4). She filed a motion to suppress evidence (LF 6-14), and appellant filed a memorandum in opposition to defendant's motion to suppress (LF 15-30). A hearing was held on the motion to suppress, after which the motion court ordered, "As the facts in this case closely parallel those facts set forth in Gant, this court has no option other than to sustain defendant's Motion to Suppress, and the State will be prohibited from offering the seized evidence at trial" (LF 31-32).

Appellant filed a timely notice of appeal (LF 33-34). On September 8, 2010, following en banc review pursuant to Court Operating Rule 22.01, the Missouri Court of Appeals for the Southern District reversed the Order of the Howell County Circuit Court. A dissenting judge, however, transferred this cause to this Court pursuant to Rule 83.03. *State v. Hicks*, 2010 WL 3280092.

ARGUMENT

The trial court did not err in sustaining Andrea's motion to suppress and ordering that the State be prohibited from presenting evidence of the methamphetamine found during the search of the Isuzu at trial, because under *Arizona v. Gant*, the search was unconstitutional, in that it violated her right to be free from unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution. Although, the Supreme Court of the United States ruled in *Davis v. U.S.* that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule, this Court is not bound to give the same remedy as the Supreme Court of the United States.

Relevant Facts

Andrea was arrested for driving while her license was suspended after a valid traffic stop by West Plains Officer Powell (Tr. 4-5). Powell handcuffed and placed her on the curb (Tr. 5). He believed that he had the authority to search her Isuzu incident to the arrest, so he did that and found a syringe that contained methamphetamine in the passenger floorboard (Tr. 5-7). Andrea was charged with possession of a controlled substance. § 195.202 (LF 4). She filed a motion to suppress evidence (LF 6-14), and appellant filed a memorandum in opposition to defendant's motion to suppress (LF 15-30). A hearing was held on the motion to

suppress, after which the motion court ordered the evidence be suppressed (LF 31-32).

Standard of Review

At a hearing on a motion to suppress evidence, the State bears the burden of producing evidence and showing by a preponderance of such evidence that the motion should be overruled. *State v. Milliorn*, 794 S.W.2d 181, 183 (Mo. banc 1990); § 542.296. An appellate court reviews the trial court's ruling on appeal under an abuse of discretion standard, and will reverse only if the judgment is clearly erroneous. *Id.* If the trial court's ruling is plausible, this Court may not reverse, even if it is convinced that it would have weighed the evidence differently if it had been the trier of fact. *Id.* at 184. Appellate courts presume the trial court found the facts in accordance with its ruling, and must affirm if the record supports the ruling on any legal basis, even if such basis is not indicated by the trial court. *State v. Hamilton*, 227 S.W.3d 514, 516 (Mo. App. S.D. 2007).

Discussion

"Reasonable Reliance" on Court Precedent

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 area in question to obtain evidence or weapons. 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), *Thornton v. U.S.*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring).

The U.S. Supreme Court in *Arizona v. Gant* rejected this very broad interpretation of its decision in *New York v. Belton*, 453 U.S. 454 (1981), that caused lower courts to permit warrantless vehicular searches even when the arrestee could not gain access to the vehicle at the time of the search. 129 S.Ct. 1710, 1719 (2009). In doing so, the Court stated 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*, 395 U.S. 752 (1969), from the rules outlining the scope of such searches, as provided in *Belton. Gant*, 129 S.Ct. at 1719; *Chimel*, 395 U.S. at 762-63 (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 proper scope of the search of a vehicle incident to an arrest of its occupants includes the passenger compartment and containers found within, while declaring that this holding did not alter fundamental principles from *Chimel*).

In *Thornton v. U.S.*, the Supreme Court held that officers may search the entire passenger compartment of a vehicle and containers within incident to an arrest, regardless of whether the first contact with the arrestee occurred while he or she was in the vehicle or had already stepped outside. 541 U.S. 615, 621 (2001) (stating that danger to the officer flows from the fact of the arrest, but also stating

that an arrestee is not less likely to attempt to lunge for a weapon or destroy evidence “if he is outside of, *but still in control of*, the vehicle.”) (emphasis added).

Justice Scalia’s dissent in *Thornton* noted that it is extremely speculative to fear that an arrestee who is handcuffed and secured in a patrol car could gain access to a weapon or evidence from his vehicle, and that this could not justify the search in that case. 541 U.S. at 625-626. The majority in *Gant*, however, said that *Thornton* was distinguishable because the arrest in that case was for drugs. 129 S.Ct. at 1722. The Supreme Court held that a warrantless car search is still justified incident to arrest when it is reasonable to believe that evidence relating to the offense could be found in the vehicle, as was the case in *Thornton*. 129 S.Ct. at 1719. In *Gant*, the arrest was for a traffic violation; therefore it was not reasonable to conduct a vehicle search based on the belief that evidence related to the arrest would be discovered. *Id.* As previously mentioned, the evidentiary justification does not apply to the warrantless search of Andrea’s car, because she was also arrested for a traffic violation.

Although *Gant* abrogated decades of erroneous legal precedent set by lower courts, the Court did not overrule its own opinions in *Belton & Thornton*. 129 S.Ct. at 1722. Rather, 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*. *Id.* at 1722-23. *Gant* clarifies 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.

Therefore, *Gant* made vehicle searches incident to arrest conducted without justification, as in Andrea's case, unconstitutional since it violates the right to be free from unreasonable searches and seizures. However, *Gant* failed to answer the question of what remedy defendants -- like Andrea -- whose cases were pending at the time of that ruling, were entitled to when they suffered the same constitutional violation as the defendant in *Gant*.

The Supreme Court of the United States seemingly answered that very question in *Davis v. U.S.*, 131 S.Ct. 2419 (2011). In *Davis*, the United States Supreme Court created a new "good faith" exception to unconstitutional searches that were conducted in objectively reasonable reliance on binding appellate precedent. 131 S.Ct. at 2434. Therefore, the Court found that the exclusionary rule did not apply to the violation of the defendant's right to be free from unreasonable searches and seizures. *Id.*

Decisions Altering Prior Constitutional Interpretations Are Retroactive

Newly-declared constitutional rules are retroactive and applicable to cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). To apply good faith to such situations based upon officer reliance on prevailing, and

incorrect, law completely ignores Supreme Court precedent, and would nullify the rule of retroactivity.

Griffith involved the Supreme Court’s decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that a defendant could establish a prima facie case for discrimination on the prosecution’s use of peremptory challenges to strike jurors of the same race as the defendant, which then shifted the burden to the prosecution to provide a race-neutral explanation. *Batson* was handed down after the defendant’s trial, but while his petition for writ of certiorari with the Supreme Court was pending. *Griffith*, 479 U.S. at 318. The Supreme Court held that this ruling, and all rulings that created new rules for conducting criminal prosecutions, apply retroactively to any state conviction pending on direct review at the time the decision was issued. *Id.* at 328. This applies to all convictions, without any type of case-specific analysis, regardless of reliance by law enforcement officials and the burden on the administration of justice imposed by a retroactive application. *Id.* at 326-27.

Similarly, the prohibition against a warrantless nonconsensual entry into a person’s home in order to make a felony arrest applied retroactivity to pending cases. *U.S. v. Johnson*, 457 U.S. 537 (1982); see *Payton v. New York*, 445 U.S. 573 (1980).

The failure to apply newly declared constitutional rules to pending criminal cases violates basic norms of adjudication. *Griffith*, 479 U.S. at 323. This is true regardless of whether or not the new rule constitutes a “clear break” with the past,

although that is not the case in Andrea’s situation. *Id.* at 328. The Court declared, “[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.” *Id.* By its basic nature of judicial review, the Court said it was precluded from “fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.” *Id.* at 323.

This Court has historically applied the *Linkletter-Stovall* three-part test when determining whether retroactive application should be given to a new constitutional standard. *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. banc 2003). Those factors are: “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” *Id.*, citing, *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

In *Whitfield*, this Court was presented with an issue of whether to continue to use the *Linkletter-Stovall* three-part test when determining whether retroactive application should be given to new constitutional procedural rules in cases subject to federal habeas review or apply the test provided by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989) concerning the application of retroactivity in the federal courts. 107 S.W.3d at 267. This Court pointed out the fact that

“[s]tates are free to provide greater protections in their criminal justice system than the Federal constitution requires.” For this reason, “[t]he Supreme Court has recognized that states may apply new constitutional standards ‘in a broader range of cases than is required’ by the Court’s decision not to apply the standards retroactively.”

Id. (internal citations omitted). Ultimately, this Court chose not to adopt the *Teague* analysis and to continue using the *Linkletter-Stovall* approach. Applying the latter’s analysis, this Court found that the new procedural rule could be applied retroactively to the appellant’s case and granted him a remedy that he could not have received under the federal analysis.

Exclusion of Evidence is the Proper Remedy in this Case

By applying the three-part *Linkletter-Stovall* test in Andrea’s case, it is clear that *Gant* should be applied retroactively and she should be entitled to relief in the form of the exclusion of the evidence as a result of the violation of her right to be free from unreasonable searches and seizures. While there was law enforcement reliance on a belief that a search such as that done here was permissible, this Court should conclude the purpose to be served by the new standards and the minimal consequences to the administration of justice are more compelling than law enforcement reliance.

The purpose to be served by the new rule is to prevent the search incident to arrest of a recently arrested occupant’s vehicle unless (1) the arrestee is within reaching distance of the vehicle during the search, or (2) the police have reason to

believe that the vehicle contains evidence relevant to the crime of arrest. 129 S.Ct. at 1719. Thus, the rule protects a recently arrested vehicle occupant's right to be free from unreasonable searches and seizures of their vehicle. Clearly, the purpose of the new rule is of highest concern. In fostering the Fourth Amendments values of prohibiting unreasonable search and seizures and undue intrusions on peoples interests in the privacy of their personal effects.

The effect on the administration of justice of retroactive application of the new standards will be minimal. This Court in *Whitfield* pointed out that only five cases would be affected by a retroactive application of the new rule in that case. 107 S.W.3d at 268-269. Similarly, the number of cases in Missouri, arising from unreasonable searches and seizures of vehicles pursuant to searches incident to arrest that were pending at the time that *Gant* was handed down, is just as insignificant as the number of cases that were impacted in *Whitfield*

For too long, law enforcement treated the search-incident-to-arrest exception to the warrant requirement as an entitlement for warrantless vehicle searches, rather than an exception justified by the two-pronged rule outlined in *Chimel*. 395 U.S. at 762-63; see *Thornton*, 541 U.S. at 628 (2004) (Scalia, concurring and stating "cases involving this precise factual scenario - a motorist handcuffed and secured in the back of a squad car when the search takes place - are legion."); *State v. Reed*, 157 S.W.3d 353, 357 (Mo. App. W.D. 2005) (stating that vehicle searches incident to arrest are appropriate even in cases involving minor traffic violations). Not incidentally, since state statutory law allows officers

to arrest any person for any violation at any time, even for violation of a minor infraction or ordinance, vehicle searches incident to such arrests should have required strong justification by the reasons set forth by the United States Supreme Court and should not have been conducted as a matter of basic law enforcement policy or entitlement. *See* § 544.216, RSMo. “Because the unconstitutionality of the searches in *Gant* and this case was “clear,” the searches never should have occurred. They were unlawful *ab initio*. *U.S. v. Gonzalez*, 598 F.3d 1095, 1096-1097 (9th Cir. 2010).

The retroactive application of *Gant* “will not cause dislocation of the judicial of prosecutorial system.” *Whitfield*, 107 S.W.3d at 269. Mr. Gant received relief because of this clear violation. Andrea should not be denied the same relief merely because her case did not make its way through the courts as quickly as Mr. Gants. The holding in *Gant* is retroactive, it applies to Andrea’s case, good faith should not apply to negate the effect of the exclusionary rule, and the evidence obtained in the illegal search should be suppressed.

CONCLUSION

For the foregoing reasons, the trial court's ruling on the motion to suppress should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Matthew Ward, 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 Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,083 words, which does not exceed the 31,000 words allowed for an Appellant’s brief.
- ✓ The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using Symantec Endpoint Protection, updated in September of 2011.
According to that program, these disks are virus-free.
- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 2nd day of September, 2011, to Joshua N. Corman, Assistant Howell County Prosecutor, 326 Courthouse, West Plains, MO 65775.

/S/ Matthew Ward
Matthew Ward