Missouri Court of Appeals

Southern District

en banc

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SD30266
	)	
ANDREA M. HICKS,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF HOWELL COUNTY

Honorable David P. Evans, Judge

REVERSED AND REMANDED WITH DIRECTIONS.

Andrea M. Hicks ("Respondent") was charged with possession of a controlled substance in violation of section 195.202,[1] a class C felony, following a search incident to her arrest for a driving offense. Respondent filed a motion to suppress in the trial court contending that the search violated her rights under the Fourth Amendment to the United States Constitution and article I, section 15 of the Missouri Constitution. The trial court granted the motion to suppress methamphetamine discovered in the search. The State presents this interlocutory appeal pursuant to section 547.200.1(3). We reverse and remand.

[1] All references to statutes are to RSMo 2000, unless otherwise indicated.

Factual and Procedural History

On September 13, 2008, Officer Ivie Powell ("Powell") initiated a traffic stop of Respondent's vehicle for failure to display a current state license plate. Powell advised Respondent the reason for the stop and asked Respondent for her driver's license. Respondent informed Powell that she did not have a current driver's license because her license had been suspended. Powell then advised Respondent she was under arrest for driving while her license was suspended. Respondent was placed under arrest, handcuffed, and seated on the curb. Powell searched the vehicle incident to her arrest and discovered a syringe containing methamphetamine in the floorboard of the passenger side of the vehicle.

On February 4, 2009, Respondent was charged by information with the class C felony of possession of a controlled substance, in violation of section 195.202. On April 21, 2009, the Supreme Court of the United States decided ***Arizona v. Gant***, 129 S.Ct. 1710 (2009). In ***Gant***, the Court held "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." ***Id.*** at 1723. On October 28, 2009, Respondent filed a motion to suppress the methamphetamine arguing Powell's search violated her Fourth Amendment rights based on ***Gant***. On November 6, 2009, the trial court conducted a hearing regarding Respondent's motion. At the hearing, Powell testified that at the time of the arrest, his understanding of the law -- based on his training and what he had been taught -- was that an officer could search a vehicle incident to arrest. On December 22, 2009, the trial court sustained Respondent's motion because of ***Gant*** and excluded the methamphetamine from introduction into evidence at any trial.

The State contends in its sole point the trial court erred by sustaining the motion to suppress because the exclusionary rule does not apply if police act in good faith on objectively reasonable reliance on well-settled case law that is subsequently overturned (the "good faith exception"). Respondent contends there was no error because the holding in ***Gant*** is retroactive and application of the holding means the search was unconstitutional. The issues presented for determination here are:

1. Was case law well settled on the subject of search incident to arrest prior to the decision in ***Gant?***

2. Did the police act in good faith on objectively reasonable reliance on well-settled case law at the time of the search?

3. Does the exclusionary rule require suppression of evidence if the police acted in good faith on well-settled case law in completing the search?

Standard of Review

We will only reverse the trial court's decision regarding a motion to suppress evidence if it is clearly erroneous. ***State v. McFall***, 991 S.W.2d 671, 673 (Mo.App. W.D. 1999). We must consider all facts, including reasonable inferences, in the light most favorable to the trial court's decision and defer to the trial court's credibility determinations. ***Id***. However, because this case involves a decision regarding the Fourth Amendment, "[t]he ultimate issue of whether the Fourth Amendment was violated is a question of law which this court reviews *de novo*." ***Id***. The United States Constitution and the Missouri Constitution afford individuals the same level of protection from unreasonable searches and seizures; therefore, the analysis is the same. ***State v. Woods***, 284 S.W.3d 630, 634 (Mo.App. W.D. 2009).

Analysis

Well-Settled Case Law Prior to Arizona v. Gant

Our analysis must begin with what was well-settled case law before ***Gant***. A search incident to an arrest was justified to:

> [S]earch the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' -- construing that phrase to mean the area within which he might gain possession of a weapon or destructible evidence.

Chimel v. California, 395 U.S. 752, 763 (1969).

A search of a passenger compartment of an automobile when an occupant was placed under lawful arrest was recognized as an extension of the principle expressed in ***Chimel***. "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***New York v. Belton***, 453 U.S. 454, 460 (1981) (internal footnote omitted).

The practical effect of ***Belton*** was that state and federal courts around the country interpreted ***Belton*** to be a widely understood principle allowing the search of passenger compartments even if the arrestee did not have access to the passenger compartment at that time. ***Gant***, 129 S.Ct. at 1718. These were the principles taught in police academies throughout the country. ***Id.*** at 1722-23.

Some courts described the rule expressed in ***Belton*** as a "bright-line" principle. *See* ***State v. Dearborn*** --- N.W.2d ---, 2010 WL 2773536 at *4 (Wis. July 15, 2010).

These principles of well-settled case law were recognized by our Supreme Court. In ***State v. Parker***, 458 S.W.2d 241, 244 (Mo. 1970), our Supreme Court embraced the holding in ***Chimel***. In ***State v. Harvey***, 648 S.W.2d 87 (Mo. banc 1983), our Supreme Court recognized the holding in ***Belton***.

In ***Harvey***, the Court described the holding in ***Belton*** as being "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Harvey***, 648 S.W.2d at 89 (quoting ***Belton***, 453 U.S. at 460). The Court rejected the appellant's claim that ***Belton*** did not authorize the search in this case because he was handcuffed and could not have broken free to gain control of the weapon that was seized. ***Id***. The Court then held "that under *Belton* the challenged search was valid as one made incident to a lawful custodial arrest." ***Id.*** at 90.

Thereafter, Missouri appellate courts emphasized that officer safety was a concern that authorized the search of a passenger compartment of a vehicle incident to a lawful arrest even if the defendant is handcuffed. In ***State v. Reed***, 157 S.W.3d 353 (Mo.App. W.D. 2005), the court stated that:

> The Missouri Supreme Court, in its application of ***Belton***, recognized that the concern for officer safety is applicable even when the officer has already placed the defendant in handcuffs. The Court adopted a broad interpretation of ***Belton*** as the intent of the U.S. Supreme Court, concluding that even had the defendant and the other three occupants of the vehicle in ***Belton*** been handcuffed and placed in the law enforcement officer's patrol vehicle that 'the result would have presumably been the same.'

Id. at 358 (internal citation omitted).

Following ***Harvey*** and ***Reed***, the Eastern District, in a trio of cases, upheld the search of a defendant's vehicle after the defendants had been handcuffed. In ***State v. Scott***, 200 S.W.3d 41 (Mo.App. E.D. 2006), the court stated that "the Missouri Supreme Court recognized that the concern for officer safety is applicable even when the officer has already secured the suspect in handcuffs and it held that searches incident to arrest in that situation are valid." ***Id.*** at 44. In ***State v. Taylor***, 216 S.W.3d 187 (Mo.App. E.D. 2007), the court stated that "[t]he search of a vehicle is valid as incident to the defendant's arrest, even where the defendant is handcuffed in the officer's car at the time of the search." ***Id***. at 190. In ***State v. Dickson***, 252 S.W.3d 216 (Mo.App. E.D. 2008), the court stated that "[a] law enforcement officer who has made a lawful custodial arrest of the occupant of an automobile, may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and may also examine the contents of any containers within the passenger compartment." ***Id***. at 221.

This was the well-settled case law in 2009 when ***Gant*** was decided. In ***Gant***, the Supreme Court revisited the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement as applied to vehicle searches in ***Belton***. Gant was arrested for driving with a suspended license. ***Gant***, 129 S.Ct. at 1715. "After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat." ***Id***. Gant was charged with two drug offenses and he subsequently moved to suppress the evidence found as a result of the search of his vehicle. ***Id***. The Court wrote that its decision in ***Chimel*** limits the scope of the search authorized in ***Belton*** to "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." ***Id***. at 1716. The Court in ***Gant*** held "that ***Belton*** does not authorize a vehicle search incident to a recent occupant's arrest after the

arrestee has been secured and cannot access the interior of the vehicle," but "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." ***Gant***, 129 S.Ct. at 1714. Here, the trial court sustained Respondent's motion to suppress because the facts were so similar to ***Gant***.

Police Search in Good Faith on Objectively Reasonable Reliance on Well-Settled Case Law

The evidence here is uncontested that the police officer in this case acted upon well-settled case law to complete the search of Respondent's passenger compartment in her vehicle. The testimony of Officer Powell confirmed that fact:

> Q. After you arrested her, why did you search the vehicle?
>
> A. Due to the time, search incident to arrest allowed me to do so.
>
> Q. Okay. So it was your understanding at the time that--that the law was that you were allowed to search a car incident to arrest?
>
> A. Yes.
>
> Q. Okay. And--And was that--I guess was that part of your training as a law enforcement officer, that that is what you have been taught?
>
> A. Yes.

The transcript reflects that Powell was not cross-examined on the basis of his training or understanding of the law on search incident to arrest and there was no other evidence submitted on this issue. Powell acted in good faith on objectively reasonable reliance on well-settled case law in order to complete the search. ***Gant*** was decided after that search and changed well-settled case law.

The Exclusionary Rule and Suppression of Evidence When Police Act in Good Faith on Well-Settled Case Law

The parties here agree that the search of Respondent's car did not meet the standards for a valid search incident to arrest utilizing the standard articulated in ***Gant***. The parties disagree as to the remedy available in view of the offensive search. The remedy for the offensive search is the crux of this case.

This is the most difficult issue presented by this appeal. Numerous state and federal courts have addressed the effect of ***Gant*** and the suppression of evidence; however, no clear consensus has emerged.[2] The Western District of this Court has only recently considered the issue. ***State v. Johnson***, No. 70167 slip op. (Mo.App. W.D. July 13, 2010). The analyses used in these decisions confirm that a review of the exclusionary rule is required, along with the good faith exception to that rule.

Exclusionary Rule as a Remedy

The exclusionary rule was created as a remedy to exclude evidence acquired by unlawful searches. It is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served. ***Herring v. United States***, 129 S.Ct. 695, 700 (2009). ***Herring*** teaches that application of the exclusionary rule should focus on its efficacy in

[2] The following decisions have held that the good faith exception to the exclusionary rule applied and the evidence was deemed admissible. ***U.S. v. Lopez***, 2009 WL 3112127 (E.D. Ky. 2009), ***Brown v. Romeoville***, 2010 WL 431474 (N.D. Ill. 2010), ***U.S. v. Gray***, 2009 WL 4739740 (D. Neb. 2009), ***U.S. v. Grote***, 629 F.Supp. 2d 1201 (E.D. Wash. 2009), ***U.S. v. McCane***, 573 F.3d 1037 (10th Cir. 2009), ***U.S. v. Hairston***, 2009 WL 3335604 (D. Kan. 2009), ***U.S. v. Davis***, 2010 WL 810984 (11th Cir. 2010), ***People v. Henry***, 2010 WL 2046574 (Cal. App. 1st Dist. 2010), ***People v. McCarty***, 2010 WL 1840822 (Colo. 2010), ***Meister v. State***, 912 N.E.2d 412 (Ind. Ct. App. 2009), ***State v. Baker***, 2010 UT 18, 2010 WL 841271 (Utah 2010), ***State v. Gettling***, 2010 UT 17, 2010 WL 841282 (Utah 2010), ***State v. Riley***, 154 Wash. App. 433, 225 P.3d 462 (Div. 1 2010), ***State v. Dearborn*** --- N.W.2d ---, 2010 WL 2773536 (Wis. 2010), ***U.S. v. Owens***, 2009 WL 2584570 (N.D. Fla. 2009), ***Brown v. State***, 24 So.3d 671 (D.C. App. Fla. 2009), and ***U.S. v. Allison***, 637 F.Supp.2d 657 (D.C. Iowa 2009). In the following cases, the court has determined that the evidence seized would be inadmissible despite a claim of good-faith reliance on pre-***Gant*** law. ***U.S. v. Peoples***, 668 F.Supp.2d 1042, 1045 (W.D. Mich. 2009), ***U.S. v. Buford***, 623 F.Supp.2d. 923 (M.D. Tenn. 2009), ***U.S. v. Avendano***, 2010 WL 1258215 (9th Cir. 2010), ***U.S. v. Debruhl***, 2010 WL 1608116 (D.C. 2010), ***People v. Mungo***, 2010 WL 1461620 (Mich. Ct. App. 2010), ***State v. Williams***, 155 Wash. App. 1014, 2010 WL 1223116 (Div. 2 2010), ***State v. Harris***, 154 Wash. App. 87, 224 P.3d 830 (Div. 2 2010), and ***U.S. v. Gonzalez***, 578 F.3d 1130 (9th Cir. 2009).

deterring future Fourth Amendment violations. ***Id.*** at 700. Moreover, marginal deterrence is not enough to justify exclusion; “the benefits of deterrence must outweigh the costs.” ***Id.***

Our Supreme Court has recognized the purpose of the exclusionary rule. "The exclusionary rule is a judicially created means of deterring illegal searches and seizures." ***Riche v. Director of Revenue***, 987 S.W.2d 331, 334 (Mo. banc 1999). The exclusionary rule does not apply in all contexts. "Because the exclusionary rule is prudential rather than constitutionally mandated, it will not be applied where its ‘substantial social costs’ outweigh its deterrent benefits." ***Id***. at 334 (quoting ***Pennsylvania Bd. of Probation v. Scott***, 524 U.S. 357, 363 (1998)).

The Good Faith Exception to the Exclusionary Rule

The exclusionary rule is not mechanically applied in every instance when a search is determined to be inappropriate. An exception to the exclusionary rule is the good faith exception, which was first recognized in ***United States v. Leon***, 468 U.S. 897 (1984). In ***Leon***, a facially valid warrant was issued by a state court judge. ***Id***. at 902. A search pursuant to that warrant led to the discovery of a large quantity of drugs. ***Id***. The defendant was later charged in federal court because of the drugs found pursuant to the warrant. ***Id***. The federal judge, pursuant to defendant's motion to suppress, found the affidavit presented to the state court did not establish probable cause. ***Id***. at 903. The Court stated that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." ***Leon***, 468 U.S. at 916. The Court found that the exclusionary rule should not apply under these circumstances because there was no evidence of "police illegality and thus nothing to deter." ***Id***. at 921. The exclusionary rule should not be applied when officers conducting an illegal search act in the "objectively reasonable belief that their conduct did not violate the Fourth

Amendment." ***Id.*** at 918. The test of whether the officer's reliance was reasonable is an objective one, querying "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" ***Herring***, 129 S.Ct. at 703 (quoting ***Leon***, 468 U.S. at 922, n. 23).

Herring, decided last year, reaffirmed ***Leon's*** holding that the exclusionary rule should not apply when the police act in good faith "in objectively reasonable reliance" on a subsequently invalidated search warrant. ***Herring***, 129 S.Ct. at 701. The court clarified when the exclusionary rule should apply:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 702.

In ***Illinois v. Krull***, 480 U.S. 340 (1987), the court extended the good faith exception to statutorily authorized administrative searches, without a warrant, where the statute was later found to be unconstitutional, in circumstances where the search was performed in good-faith reliance on that statute. ***Id.*** at 349-50.

Leon, ***Krull***, and ***Herring*** teach the good faith exception was recognized where warrants were found to be invalid, after a search, due to clerical or judicial error, and where a legislature passed a statute found to be unconstitutional. None of these errors were attributed to police conduct.

Our Supreme Court adopted the good faith exception to the exclusionary rule in ***State v. Brown***, 708 S.W.2d 140, 145 (Mo. banc 1986).

Considering all these principles as a whole, "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." ***Dearborn***, 2010 WL 2773536 at *8.

The Supreme Court's decision in ***Gant*** is silent regarding whether the good faith exception to the exclusionary rule applies, or whether its holding should apply retroactively. The State's brief implicitly concedes that ***Gant*** applies retroactively; otherwise, there would be no need to discuss the good faith exception. Respondent argues that ***Gant's*** holding is retroactive and the evidence obtained must be suppressed.

In ***State v. Johnson***, No. 70167, slip op. (Mo.App. W.D. July 13, 2010), the Western District of this Court, in a thorough and well-written opinion, determined that the good faith exception to the exclusionary rule does not apply to pre-***Gant*** searches. However, this Court respectfully disagrees with the decision reached by the majority. We find the dissent of Judge Mitchell to be more persuasive, along with decisions of other federal and state courts that have concluded the good faith exception precludes the suppression of evidence in the context of the facts presented here.[3]

In ***Johnson***, the majority concluded that application of the holding in ***Gant*** is retroactive and the good faith exception does not apply because it has never before been extended in situations where police relied on well-settled case law. ***Id.*** at 18. The majority also reasons there may be a danger created of police interpreting case law and acting on their own. ***Id.*** The ***Johnson*** majority found an unacceptable tension between the retroactivity doctrine and the good faith exception and concluded that recognition of the good faith exception in this Fourth

[3] See footnote 2 for a list of those decisions.

Amendment context would require them to ignore the Supreme Court's retroactivity rules when there is a clear break from prior case law. ***Id.*** at 20.

The retroactive application of ***Gant***, as the Western District explains in ***Johnson***, and argued by the Respondent here, is a principle with which this Court has no disagreement. ***Griffith v. Kentucky***, 479 U.S. 314, 322-23 (1987) directs the retroactive application of substantive principles of law announced by the United States Supreme Court. However, it is the remedy this Court is examining in this case, not the principle of retroactive application of the decision in ***Gant***.

In ***Johnson***, Judge Mitchell's dissent touches upon the lack of tension between the retroactivity doctrine and the good faith exception:

> I disagree that a tension exits between the Court's good-faith and retroactivity doctrines. The retroactivity doctrine mandates the application of *substantive law* to similarly situated litigants whose cases are pending at the time the Supreme Court pronounces a new rule of constitutional interpretation. Therefore, the ruling of *Gant* is applied retroactively so that anyone subjected to a warrantless search incident to arrest unsupported by probable cause has suffered a violation of his or her Fourth Amendment rights. The retroactivity doctrine, however, does not dictate what, if any, *remedy* exists for litigants in pending cases. The good-faith doctrine, as an exception to the exclusionary rule, addresses what *remedy* is available for a constitutional violation. As such, the retroactivity and the good-faith doctrines address two distinct legal issues.

Johnson, *supra* (Mitchell, J., dissenting at 7).

We recognize that the good faith exception has not been extended to an officer's reliance on case law by either the Supreme Court of the United States or our Supreme Court. However, our opinion is fortified by the strength of the Supreme Court's holding in ***Leon***, coupled with the court's comments on retroactivity:

> Similarly, although the Court has been unwilling to conclude that new Fourth Amendment principles are always to have only prospective effect, . . . no Fourth Amendment decision marking a 'clear break with the past' has been applied retroactively. The propriety of retroactive application of a newly announced Fourth Amendment principle, moreover, has been assessed largely in terms of the contribution retoactivity might make to the deterrence of police misconduct.

Leon, 468 U.S. at 912-13 (internal citations and footnotes omitted).

Absent an express holding from the Supreme Court, it is clear the concept of deterrence of police misconduct is a compelling common denominator in any discussion of the good faith exception and retroactivity.

In ***United States v. Grote***, 2009 WL 2068023 at *3 (E.D. Wash. July 15, 2009), the U.S. District Court explained why the doctrine of retroactivity would not exclude application of the good faith exception to the exclusionary rule:

> This court understands the importance of the retroactivity doctrine in insuring that similarly situated criminal defendants are treated the same. In this court's view, however, the good faith exception to the exclusionary rule is of equal importance. The exclusionary rule is intended to deter future police misconduct, not to cure past violations of a defendant's rights. Future police misconduct is not deterred when, as here, the officer did not engage in any misconduct and did not make a mistake of fact or law, but acted in objective good faith on the search incident to arrest law as it existed at the time, and had existed for many years. There is no deterrent effect to be gained by applying the exclusionary rule in this case.

In ***Johnson***, the majority concluded that "[e]xtending *Leon's* good-faith doctrine to include reliance on court precedent creates the danger of injecting 'an interpretative step on the part of the police that is totally absent from and unjustified by any previous Supreme Court application of a good faith exception to the exclusionary rule.'" ***Johnson***, *supra* at 10 (quoting ***United States v. Peoples***, 668 F. Supp. 2d 1042, 1050 (W.D. Mich. 2009)).

It may be wise to recognize that the good faith exception does not apply when court precedent requires law enforcement to perform an interpretative step. However, we do not think that an interpretative step was required to be performed in this case. The precedent in case law at the time of Respondent's arrest was clear: the arrest justified the search of Respondent's vehicle, and the bright-line test in ***Belton*** permitted the search. A reasonably trained police officer knew the search was legal.

We are persuaded that the benefits of applying the exclusionary rule in this case are extremely low. The deterrent effect on officer misconduct, a critical component of the analysis, would be non-existent. Here, there is nothing to deter. There was no reckless or grossly negligent conduct. Because there is nothing to deter, social costs clearly outweigh the non-existent deterrent benefits. For these reasons, we are persuaded that the strong directions the U.S. Supreme Court and our Supreme Court have given concerning the focus of the exclusionary rule would require extension of the good faith exception here. The overwhelming lack of any deterrent effect in suppressing the evidence envelops the rationale of the retroactivity doctrine. We conclude it was clearly erroneous for the trial court to suppress the evidence and the good faith exception to the exclusionary rule precludes suppression of the illegally obtained evidence in this case because the officers acted reasonably and relied on clear and settled precedent in carrying out the search.

We hold that the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled precedent that is later deemed unconstitutional by the United States Supreme Court. Evidence seized by police acting in good faith on settled case law should not be suppressed if the law is

modified after the seizure takes place. We, therefore, reverse and remand the decision of the trial court with instructions consistent with this opinion.

William W. Francis, Jr., Judge

BARNEY, J. - Concurs in principal opinion and concurs in concurring opinion.

RAHMEYER, J. - Dissents in separate opinion.

BATES, P.J. - Concurs in principal opinion and concurs in concurring opinion.

LYNCH, P.J. - Concurs in principal opinion and concurs in concurring opinion.

SCOTT, C.J. – Concurs in principal opinion and separate concurring opinion.

BURRELL, J. - Concurs in principal opinion and concurs in concurring opinion.

Opinion Filed August 20, 2010.

Appellant's Attorney: Joshua N. Corman, Howell County Assistant Prosecuting Attorney, of West Plains.

Respondent's Attorney: Matthew Ward of Columbia.

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CONCURRING OPINION

I concur. In ***U.S. v. Leon***, 468 U.S. 897 (1984), the Supreme Court formally recognized the exclusionary rule's "good-faith exception,"[1] declaring that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." ***Id***. at 919.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.… Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.
>
> …

[1] ***Id***. at 913. The Court later clarified that this "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal…." ***Id***. at 922 n.23. *See also* ***Herring v. U.S.,*** 129 S. Ct. 695, 701 (2009)("We (perhaps confusingly) called this objectively reasonable reliance 'good faith.'").

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.
>
> …
>
> In short, where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances.

Id. at 919-20 (citations and quotation marks omitted).[2] The Missouri Supreme Court quickly followed suit, finding it "most wise … to allow a good-faith exception" to Missouri's exclusionary rule, and that ***Leon's*** good-faith exception "applied with equal force" to claims under our state constitution. ***State v. Brown***, 708 S.W.2d 140, 145 & n.10 (Mo. banc 1986).[3]

The exclusionary rule is not a constitutional or individual right, but a judge-made remedy. It focuses on police misconduct and should be applied only where its remedial objectives will best be served. ***Herring***, 129 S. Ct. at 700.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 702. The test is objective -- "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" ***Id.*** at 703 (quoting ***Leon***, 468 U.S. at 922 n.23).

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[2] The Court deemed these principles "particularly true" in ***Leon***'s search warrant context (***Id***. at 920), but did not so limit them, and has extended them to other good-faith scenarios. *See infra* pages 3-4 and ***Herring***, 129 S. Ct. at 701.

[3] It "would be injudicious and contrary to ***Leon's*** teaching" and "would provide no deterrent effect" to exclude such evidence. ***Brown***, 708 S.W.2d at 146-47. *See also* ***State v. Sweeney***, 701 S.W.2d 420, 425 n.4, 426 (Mo. banc 1985)).

By these standards, the evidence here should not be excluded. When this search took place, as the principal opinion ably shows, our Missouri courts promoted the broad view of ***Belton*** which the Supreme Court disavowed in ***Gant***. *See* ***State v. Harvey***, 648 S.W.2d 87, 88-90 (Mo. banc 1983); ***State v. Reed***, 157 S.W.3d 353, 357-59 (Mo.App. 2005). A search authorized by controlling precedent from our state's highest courts is not culpable misconduct. We expect Missouri officers to honor our decisions, and they are entitled to rely on them, especially those of our supreme court. Penalizing police for our mistakes "cannot logically contribute to the deterrence of Fourth Amendment violations." ***Leon***, 468 U.S. at 921.

It is our judicial adherence to the ***Belton/Harvey*** rule, until ***Gant***, which should allay our sister district's concern about "the danger of injecting 'an interpretive step on the part of the police.'"[4] Good faith may not save an *officer*'s mistake of law,[5] but "the mistake of law here was not attributable to the police." ***Davis***, 598 F.3d at 1267. Missouri courts, including its highest court, clearly and consistently approved these searches for more than a quarter-century.[6] Reliance on such "well-settled and unequivocal precedent is analogous to relying on a statute, or a facially sufficient warrant - not to personally misinterpreting the law." ***Davis***, 598 F.3d at 1267-68 (internal cites omitted).

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[4] ***State v. Johnson***, No. WD70167, 2010 WL 2730593, at *10 (Mo.App., W.D. July 13, 2010)(quoting ***U.S. v. Peoples***, 668 F. Supp. 2d 1042, 1050 (W.D. Mich. 2009)).

[5] The exclusionary rule is "well-tailored" to hold police accountable for their mistakes in citing precedent for legal positions "as to which '[r]easonable minds ... may differ.'" ***U.S. v. Davis***, 598 F.3d 1259, 1267 (11th Cir. 2010)(quoting ***Leon***, 468 U.S. at 914).

[6] ***Reed*** illustrates how confident Missouri courts were and how wrong we turned out to be. ***Reed*** noted that ***Belton*** "expressed the need for a rule applicable in all cases." 157 S.W.3d at 357. "'When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.'" ***Id***. at 357-58 (quoting ***Belton***, 453 U.S. at 459-60). ***Belton***, per ***Reed***, established "a universal 'workable,' 'straightforward rule'" that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id***. at 358 (quoting ***Belton***, 453 U.S. at 459-60). Citing our Missouri Supreme Court's "broad interpretation of ***Belton***" in ***Harvey***, and U.S. Supreme Court cases that "extended the rule in ***Belton***," ***Reed*** concluded – erroneously, we now know – that "the Missouri Supreme Court's analysis of ***Belton*** was proven correct." ***Id***. Our point is not to pan ***Reed***, but to show how strongly, clearly, and consistently Missouri courts approved these searches.

I cannot see the distinction, perceived by our sister district and a few other courts, between good faith reliance on case precedent and good faith reliance on warrants or statutes. The Supreme Court always cites the "good faith exception" – not some lesser term like "invalid warrant" or "unconstitutional statute" exception – when it considers these issues.[7] This fact, coupled with the broad principles that I have quoted from ***Leon*** and ***Herring***, convinces me that the "good faith exception" is more about "good faith" than context.

No one denies Officer Powell's good faith. No one claims that "a reasonably well trained officer would have known that the search was illegal." ***Leon***, 468 U.S. at 922 n.23. The defendant sought suppression only after and because ***Gant*** changed the law. If it is not "objectively reasonable" for police, not charged with any bad faith or misconduct, to rely on the directives of our state's highest courts and well-settled law nationwide, then I don't know what those words mean.

Daniel E. Scott, Chief Judge

[7] *See* ***Leon***, 468 U.S. at 912 & n.9, 913 n.11, 919 n.20, 924 & n.25, 928; ***Illinois v. Krull***, 480 U.S. 340, 346, 353 (1987); ***Arizona v. Evans***, 514 U.S. 1, 14 (1995); ***Herring***, 129 S. Ct. at 702.

Missouri Court of Appeals

Southern District

en banc

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SD30266
	)	
ANDREA M. HICKS,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF HOWELL COUNTY

Honorable David P. Evans, Judge

DISSENTING OPINION

I respectfully dissent to the thoughtful and well-reasoned majority opinion. I do so only because I believe, as did the trial judge, that the facts of this case are squarely on all fours with the facts in ***Arizona v. Gant***, 129 S.Ct. 1710 (2009). In ***Gant***, the United States Supreme Court, although fully aware of ***U.S. v. Leon***, 468 U.S. 897 (1984), did not address or apply any "good-faith exception" to the almost identical situation that we have in the case before us. As noted in ***State v. Johnson***, 2010 WL 2730593 (Mo. App. W.D. July 13, 2010):

> [The dissent], fairly read, assumes that ***Gant***'s new rule and the exclusion of any resulting evidence will be applied retroactively, without application of the good-faith exception. [Justice Alito] states that, "[t]he Court's

> decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law[.]"

Id. at *12 (quoting ***Gant***, 129 S.Ct. at 1726 (Alito, J., dissenting)). While I am sympathetic to the goal of having a bright-line test for law enforcement, as Justice Scalia stated in ***Gant***:

> I am therefore confronted with the choice of either leaving the current understanding of ***Belton*** and ***Thornton*** in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches-which is the greater evil.

Id. at 1725.

For these reasons, I dissent from the majority opinion. Further, for the purpose of reexamining existing law, this case is hereby transferred to the Missouri Supreme Court pursuant to Rule 83.03.

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Nancy Steffen Rahmeyer, Judge