



**In the Missouri Court of Appeals  
Western District**

STATE OF MISSOURI, )  
 )  
Appellant, )  
v. ) **WD71800**  
 ) **FILED: November 9, 2010**  
HEATHER SUE KINGSLEY, )  
 )  
Respondent. )

**APPEAL FROM THE CIRCUIT COURT OF HENRY COUNTY  
THE HONORABLE JAMES K. JOURNEY, JUDGE**

**BEFORE DIVISION ONE: KAREN KING MITCHELL, PRESIDING JUDGE,  
LISA WHITE HARDWICK, CHIEF JUDGE, AND CYNTHIA L. MARTIN, JUDGE**

This interlocutory appeal arises from the circuit court's decision granting Heather Kingsley's motion to suppress evidence obtained during a warrantless search in violation of the Fourth Amendment. The State contends the circuit court erred in excluding the evidence because: (1) the officers acted in good faith by relying on then well-settled case law regarding a search incident to arrest; and (2) Heather Kingsley lacked standing to challenge the search as a passenger in the vehicle. For reasons explained herein, we find no error and affirm the suppression order.

## FACTUAL AND PROCEDURAL HISTORY

On December 1, 2007, Officer Guynn of the Clinton Police Department observed a maroon car traveling in excess of the posted speed limit. Guynn activated his emergency lights and pulled the car over in a motel parking lot.

Dustin Kingsley ("Dustin") was in the driver's seat and Heather Kingsley ("Kingsley") was in the passenger's seat. Guynn asked Dustin for his driver's license, and Dustin responded that he did not have one. Dustin later admitted that his license had been revoked. Guynn observed that Dustin appeared to be nervous.

Guynn verified that Dustin's license had been revoked, placed him under arrest, and secured him in the patrol car. At that time, Officer David Akers arrived at the scene to provide assistance. Guynn asked Akers to perform a search of Dustin's vehicle incident to the arrest. Akers instructed Kingsley to step out of the car and wait near the rear bumper.

Akers searched the passenger compartment of the car and found a sock containing an eyeglass case. Inside the case, Akers found a spoon, a syringe, and small bags containing a white powdery substance. Akers placed Kingsley under arrest. Laboratory testing later revealed the substance in the small bags was methamphetamine.

Kingsley was charged with possession of a controlled substance, a violation of Section 195.202.<sup>1</sup> She filed a motion to suppress the evidence found during the

---

<sup>1</sup> All statutory citations are to the Revised Statutes of Missouri 2000, as updated by the Cumulative Supplement 2009.

search incident to Dustin's arrest. At the suppression hearing, Kingsley argued that while the search incident to arrest may have been lawful at the time of the search, that same search was now unlawful under the U.S. Supreme Court's subsequent ruling in ***Arizona v. Gant*, 129 S. Ct. 1710 (2009)**. She further argued that the good faith exception to the exclusionary rule was inapplicable because ***Gant*** must be retroactively applied to her case. The circuit court agreed and granted the motion to suppress. The State appeals the suppression of the evidence recovered from the vehicle.

#### STANDARD OF REVIEW

"A trial court's ruling on a motion to suppress may be reversed only if it is clearly erroneous." ***State v. Shaon*, 145 S.W.3d 499, 504 (Mo. App. 2004)**. "In reviewing a trial court's order on a motion to suppress, this court considers all facts and reasonable inferences in the light most favorable to the challenged order." ***Id.*** However, "[t]he ultimate issue of whether the Fourth Amendment was violated is a question of law which this court reviews de novo." ***Id.***

#### ANALYSIS

##### ***Good Faith Exception to Gant***

In Point I, the State contends the circuit court improperly suppressed the evidence found in the search incident to the arrest because the officers acted in good faith by relying on then-applicable case law set forth in ***New York v. Belton*, 453 U.S. 454 (1981)**. The search occurred prior to the recent decision of ***Gant*, 129 S. Ct. at 1723-24**, in which the U.S. Supreme Court departed from ***Belton*** and

held that a search incident to arrest is valid 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.” Here, the circuit court retroactively applied **Gant** in determining that the search was unlawful and the evidence must therefore be excluded. The State argues that the court should have recognized a good faith exception to the retroactive application of **Gant** and denied the motion to suppress.

The precise issue raised in this point was recently addressed by our court in **State v. Johnson**, No. WD 70167, 2010 WL 2730593 (Mo. App. Aug. 31, 2010), and **State v. Kingsley**, No. WD 71799, 2010 WL 3303684 (Mo. App. Aug. 24, 2010). On October 26, 2010, the Supreme Court granted transfer in both cases and, thus, the decisions are not final but currently represent the majority opinion of this court. The factual background of **Johnson** is substantially similar to this case, and **Kingsley** is based on the same facts as this case but involved drug possession charges against Dustin, the driver of the vehicle. In **Johnson**, the majority held that **Gant** must be retroactively applied to invalidate the search incident to arrest, and the good faith exception cannot be applied to otherwise permit admission of the evidence. **Johnson**, 2010 WL 2730593, at \*13. **Kingsley**, following **Johnson**, likewise applied **Gant** to invalidate the search of Dustin’s vehicle and rejected the State’s argument regarding the good faith exception. **Kingsley**, 2010 WL 3303684, at \*4.

In light of these majority opinions, we will adhere to the principles of law cited therein unless and until otherwise directed by the Supreme Court. Based on the retroactive effect of *Gant*, we must conclude that the warrantless search of the car was unlawful because Dustin was unable to access the passenger compartment at the time of the search incident to his arrest for driving while revoked, and the officers did not have reason to believe the vehicle contained evidence related to his arrest. The good faith exception does not apply to permit admission of the evidence recovered during the unlawful search. Accordingly, the circuit court did not err in granting the motion to suppress. Point I is denied.

### ***Standing***

In Point II, the State contends the circuit court erred in granting the motion to suppress because Kingsley was merely a passenger in the vehicle and lacked standing to challenge the validity of the search. We cannot reach the merits of this Point because the issue of standing was not preserved for appellate review.

At oral argument, the State conceded that it failed to make any objection to Kingsley's standing at the suppression hearing. "To preserve an issue for appellate review, the *appellant* is required to raise that issue with the trial court below to give it an opportunity to take remedial action." *State v. Ramirez*, 152 S.W.3d 385, 397 (Mo. App. 2004). If the issue had been presented at the suppression hearing, Kingsley asserts she could have presented evidence to meet her burden of proof on

the standing issue.<sup>2</sup> Although Kingsley had the burden of persuasion on her suppression motion, the State was obligated to challenge the issue of standing in order to preserve it for this interlocutory appeal. *Id.*

The State waived the standing issue by raising it for the first time on appeal. Point II is denied.

### CONCLUSION

The circuit court did not clearly err in suppressing the evidence obtained during an unlawful search of a vehicle. We affirm the suppression order.

---

LISA WHITE HARDWICK, CHIEF JUDGE

Mitchell, J. concurs in separate concurring opinion.

---

<sup>2</sup> On a suppression motion, the moving party has the burden of proving “that he has Fourth Amendment standing to challenge the search and seizure by showing that he has a legitimate expectation of privacy in the place or thing searched.” *Ramires*, 152 S.W.3d at 395. The mere status as a passenger in a vehicle does not establish a reasonable expectation of privacy. *State v. Martin*, 892 S.W.2d 348, 352 (Mo.App. 1995). However, even when a person lacks standing to challenge the search of a vehicle, that person may have standing to challenge a search of particular items within the vehicle. *Ramires*, 152 S.W.3d at 397-98.



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI,** )  
)  
**Appellant,** ) **WD71800**  
**v.** )  
) **Opinion Filed:**  
) **November 9, 2010**  
**HEATHER SUE KINGSLEY,** )  
)  
**Respondent.** )

**Concurring Opinion**

I concur in affirmance of the trial court's order granting Kingsley's motion to suppress, because we are bound to reach this result following this Court's 2-1 decision in *State v. Johnson*, No. WD70167, 2010 WL 2730593 (Mo. App. W.D. July 13, 2010) and this Court's decision in *State v. Kingsley*, No. WD71799, 2010 WL 3303684 (Mo. App. W.D. August 24, 2010) (*Kingsley I*).<sup>3</sup> However, because the Missouri Supreme Court has granted transfer in *Johnson* (SC91173, transfer sustained October 26, 2010) and *Kingsley I* (SC91214, transfer sustained October 26, 2010), neither case is final at this time. Therefore, I write separately to reiterate that but for the majority opinions in those two cases I would hold, as I did in the dissenting opinion in

---

<sup>3</sup> *Kingsley I* involves the same traffic stop that gave rise to this case, but it addresses drug possession charges against the driver of the vehicle in which Appellant was riding immediately prior to her arrest.

*Johnson*, that the exclusionary rule cannot be applied here because the officers who searched the vehicle in which Kingsley was riding acted in an objectively reasonable manner.

---

Karen King Mitchell, Judge