

No. SC91173

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

**HOWARD D. JOHNSON,
Appellant.**

**Appeal from Daviess County Circuit Court
Forty-Third Judicial Circuit
The Honorable Warren L. McElwain, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**CHRIS KOSTER
Attorney General**

**DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of Daviess County for one count each of the class C felony of possession of a controlled substance (cocaine), section 195.202, RSMo;¹ and the class A misdemeanor of operating a motor vehicle without a valid license, section 302.020, RSMo, for which Appellant was sentenced to one year and two months in the Daviess County Jail. Following a Missouri Court of Appeals, Western District opinion reversing Appellant's conviction, this case was transferred to this Court pursuant to this Court's order upon Respondent's Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Supreme Court Rule 83.04.

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

Appellant was charged by information with one count each of operating a motor vehicle without a valid license, section 302.020, RSMo; possession of a controlled substance (cocaine), section 195.202, RSMo, and possession of drug paraphernalia, section 195.233, RSMo. (L.F. 2, 9-10). Appellant was tried by a jury on July 18, 2008, before Judge Warren L. McElwain. (L.F. 4). Appellant contests the sufficiency of the evidence to support his conviction for possession of a controlled substance. Viewed in the light most favorable to the verdict, the evidence at trial showed:

On July 14, 2007, Daviess County Deputy Sheriff Larry Watson stopped a southbound vehicle on Interstate-35 for not having license plates. (Tr. 164-65). Appellant was driving the 1988 Ford Econoline van. (Tr. 165, 169). Also in the van was a passenger named Joyce Washington. (Tr. 166, 168). Appellant produced a registration and proof of insurance, and told Deputy Watson that he had not yet gotten license plates for the van. (Tr. 166). Deputy Watson asked Appellant for his driver's license, and Appellant produced a learner's permit. (Tr. 166). Deputy Watson ran a computer check that confirmed that Appellant only had a valid learner's permit and did not have any other type of license. (Tr. 166-67). Deputy Watson also did a computer check on Washington's driving record and learned that her Kansas driver's license was revoked and that she had no other

valid license. (Tr. 167). Deputy Watson asked Appellant to come to his patrol car, where he arrested Appellant for driving without a valid license. (Tr. 167).

Watson then returned to the van and asked Washington to get out. (Tr. 168). A trooper had arrived at the scene and he watched Washington while Deputy Watson conducted a search of the van incident to arrest. (Tr. 168). He immediately saw a “broken-up” white rock-type substance that appeared to be cocaine. (Tr. 169-70). The substance was in and around some cupholders located on a console between the driver’s and passenger’s seats. (Tr. 169, 174). The portion of the console where the substance was found was within arm’s reach of a person sitting in the driver’s seat. (Tr. 191). Appellant and Washington were given the *Miranda*² warnings and both denied any knowledge of the substance. (Tr. 170). The white substance was tested at the Highway Patrol Laboratory and was determined to be .08 grams of cocaine. (Tr. 193, 197).

Appellant did not testify or present any evidence. (Tr. 207-09). The jury convicted him of operating a motor vehicle without a valid license and possession of a controlled substance, and acquitted him on the charge of possession of drug

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

paraphernalia.³ (Tr. 233; L.F. 4, 67-69). In the sentencing phase of the trial, the jury returned with recommendations of two weeks in jail for operating a motor vehicle without a valid license and one year in jail for possession of a controlled substance. (Tr. 242-43; L.F. 4, 70-71). The court imposed the sentences recommended by the jury on August 19, 2008, and ordered that they be served consecutively. (Tr. 257; L.F. 6). Appellant was then released from custody after being given credit for time served. (Tr. 257-58; L.F. 6).

³ That charge arose from the discovery in the pocket of the passenger side door of what appeared to be a pipe and filter that could be used to smoke cocaine. (Tr. 171; L.F. 60).

ARGUMENT

I.

The trial court did not err in denying Appellant's motion to suppress the drugs found in Appellant's van.

Appellant claims that the trial court erred in overruling his motion to suppress the drugs and paraphernalia found in the van because the search of the van was not a valid search incident to arrest under the newly-announced standards of *Arizona v. Gant*, 129 S. Ct. 1710 (2009). While the search of Appellant's van would be barred under the new rule announced in *Gant*, the denial of the suppression motion should be upheld.

The United States Supreme Court recently held in *Davis v. United States*, 131 S. Ct. 2419 (2011), that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. In searching Appellant's van, Deputy Watson acted in conformance with then binding precedent from this Court and from the Eighth Circuit that permitted a vehicle search incident to the arrest of a recent occupant regardless of the offense for which the arrest was made and regardless of whether the arrestee was able to gain access to the passenger compartment of the vehicle during the search. The trial court's denial of the motion to suppress should be upheld because it falls within the

holding of *Davis* and because excluding the evidence obtained in the search will not further the exclusionary rule's stated purpose of deterring police misconduct.

A. Underlying Facts.

Appellant, even though represented by counsel, filed a *pro se* Motion to Suppress Evidence. (L.F. 14-43). The State did not object to the *pro se* filing, and a hearing on the motion was held on July 15, 2008. (Tr. 7-8).

1. Evidence at suppression hearing.

Daviess County Deputy Larry Watson testified that he stopped a van being driven by Appellant on July 14, 2007. (Tr. 9, 14). Watson said that he stopped the van on Interstate 35 for not having registration plates. (Tr. 9-10). Appellant produced a valid Missouri learner's permit, but did not have a driver's license. (Tr. 10). Deputy Watson discovered that the female passenger in the van had a revoked driver's license out of Kansas. (Tr. 10). Watson took Appellant to his patrol car while the passenger remained in the van. (Tr. 10, 15). Watson explained to Appellant that he could not operate a motor vehicle without a licensed driver accompanying him. (Tr. 10). Appellant said he knew that he was in violation of the learner's permit requirements. (Tr. 10). Watson then arrested Appellant for operating a motor vehicle without a valid driver's license. (Tr. 10-11). Watson testified that driving without a valid license was an offense that he normally arrests

people for, and that he does not let people go with just a warning if he knows that they do not have a valid driver's license. (Tr. 11, 17).

Deputy Watson asked Appellant if he had anything illegal on his person or in the van. (Tr. 11). Appellant hesitated, and then said that he did not have knowledge of anything. (Tr. 18). During this time, a Missouri Highway Patrol trooper arrived at the scene. (Tr. 18). The trooper informed Watson that he had stopped the van earlier for the same violation of not having plates or a registration sticker. (Tr. 31). The trooper told Watson that there were three people in the van and that the driver had a valid license. (Tr. 31). The trooper said he saw indications that drugs were possibly being transported, but that the occupants denied him permission to search the van. (Tr. 31). Watson said that the refusal to permit a search made him suspicious. (Tr. 32). Watson testified that he searched the van incident to arrest to make sure the van did not contain anything that could harm him if Appellant were to gain access to the vehicle. (Tr. 11).

Watson had Appellant get out of his patrol car, searched him for weapons, and then put him back in the patrol car after not finding any. (Tr. 18-19). Watson had the passenger get out of the van, and she was watched by the trooper. (Tr. 11, 20). Watson opened the passenger door to the van and saw pieces of a white rock-type substance in a console located between the driver's and passenger's seats. (Tr. 12-13). Based on his training and experience in drug enforcement, Watson

believed the substance to be either cocaine or methamphetamine. (Tr. 12). He testified that it appeared to be one rock that had been broken-up into fine pieces, and that the pieces were all over the dash and in some cup holders that were molded into the dash. (Tr. 23-25).

Watson went back to Appellant, read him the *Miranda* warnings, and questioned him about the substance. (Tr. 12). Appellant denied any knowledge of it. (Tr. 12). The passenger was also given the *Miranda* warnings and asked about the substance. (Tr. 29). She also denied any knowledge of it. (Tr. 29). Watson had Appellant get out of the patrol car, handcuffed him, put him back in the car, and drove him to the jail in Pattonsburg. (Tr. 19-20). The passenger was handcuffed and placed in the trooper's vehicle. (Tr. 30). The substance was submitted to the Highway Patrol lab where it was tested and found to be .08 grams of cocaine. (Tr. 13-14). Watson also found various items of paraphernalia in the van that were sent to the lab but were not tested. (Tr. 28-29). Watson testified that prior to discovering the drugs and paraphernalia, he planned to give Appellant the opportunity to post bond at the scene on the driving without a valid license charge. (Tr. 36).

The only other witness to testify at the hearing was Appellant, who testified that he believed that he had a valid Texas license when Deputy Watson stopped him. (Tr. 41-52). The court overruled the motion to suppress. (Tr. 65).

2. Evidence at trial.

Deputy Watson's trial testimony largely mirrored his testimony at the suppression hearing. (Tr. 164-92). Watson testified that he normally arrested persons for driving without a license because persons charged with that offense and not arrested will frequently fail to appear in court. (Tr. 168). Watson said that he initially conducted a search incident to arrest to make sure that there was not something in the van that could harm him or the trooper, in the event that either Appellant or the passenger had access to get back into the vehicle. (Tr. 169).

B. Standard of Review.

This Court reviews the trial court's overruling of a motion to suppress by considering the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling. *State v. Gaw*, 285 S.W.3d 318, 319 (Mo. banc 2009). The facts and the reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded. *Id.* This Court gives deference to the trial court's factual findings but reviews questions of law *de novo*. *Id.* at 320.

Appellant's motion to suppress cited to both the Missouri Constitution and the United States Constitution. (L.F. 14). This Court has previously stated that the language of Article I, Section 15 of the Missouri Constitution parallels the

language of the Fourth Amendment to the United States Constitution, and that the protections of the two provisions should be viewed as co-extensive. *State v. Rushing*, 935 S.W.2d 30, 33-34 (Mo. banc 1996). The Court recently reaffirmed that the protections provided under the United States and Missouri constitutions are to be given the same interpretation. *State v. Waldrup*, 331 S.W.3d 668, 673 n.3 (Mo. banc 2011).

C. Analysis.

Deputy Watson testified during the suppression hearing and at trial that he discovered the cocaine and the drug paraphernalia in Appellant's car while performing a search incident to arrest. (Tr. 11, 168). That is one of the recognized exceptions to the Fourth Amendment prohibition against warrantless searches. *Gant*, 129 S. Ct. at 1716. At the time of the search in 2007, and indeed at the time of Appellant's trial a year later, the leading Supreme Court case defining when an automobile could be searched incident to the arrest of a recent occupant was *New York v Belton*, 453 U.S. 454 (1981). *See Gant*, 129 S. Ct. at 1714, 1716-17. In *Belton*, a police officer conducting a traffic stop lawfully arrested four occupants of a vehicle and ordered them to line up, unhandcuffed, along the highway while he searched the passenger compartment of the vehicle. *Belton*, 453 U.S. at 456. The Supreme Court upheld the search, announcing "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 459-60. The predominant interpretation of *Belton* by lower courts was that it authorized a vehicle search incident to every arrest of a recent occupant, even if there was no possibility that the arrestee could gain access to the vehicle at the time of the search. *Gant*, 129 S. Ct. at 1718-19.

While Appellant’s case was pending on direct appeal, the Supreme Court issued its opinion in *Gant*, which drastically changed the law relating to automobile searches conducted incident to the arrest of a recent occupant.⁴ The defendant in *Gant* had been arrested for a suspended driver’s license, handcuffed, and locked in the backseat of a patrol car. *Id.* at 1715. Two officers then searched the defendant’s car, finding a gun and a bag of cocaine. *Id.* The trial court denied the defendant’s motion to suppress, finding that the search was a valid search incident to arrest. *Id.* The Supreme Court disagreed,⁵ holding that police may

⁴ The Notice of Appeal was filed in this case on October 14, 2008. (L.F. 6). The opinion in *Gant* was handed down on April 21, 2009. *Gant*, 129 S. Ct. at 1710. The Court of Appeals issued its opinion in this case on July 13, 2010. *State v. Johnson*, 2010 WL 2730593 (Mo. App. W.D., July 13, 2010).

⁵ The actual posture of the opinion in *Gant* was to affirm the judgment of the Arizona Supreme Court, which had found the search to be unreasonable and had reversed the trial court. *Gant*, 129 S. Ct. at 1715, 1724.

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 if it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Id.* at 1723. When those justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Id.* at 1723-24.

1. Application of *Gant* to facts of this case.

The facts of this case appear to fit within the holding of *Gant*. Appellant, while not handcuffed, was in Deputy Watson's patrol car during the search of the van. Appellant did not make any attempts to return to the van during the search, so he was never within reaching distance of the passenger compartment. And Appellant, like the defendant in *Gant*, was arrested for a traffic violation, driving without a valid license, an offense for which the police would not expect to find evidence in the passenger compartment of the van. *See id.* at 1719. Because the new rule in *Gant* was announced while Appellant's case was pending on direct appeal, that rule applies retroactively to make the search unreasonable under the Fourth Amendment. *Davis*, 131 S. Ct. at 2431. But that does not decide the issue of whether suppression is warranted. *Id.* The remedy of the exclusionary rule is subject to exceptions and applies only where its purpose is effectively advanced. *Id.*

2. Evidence should be permitted under good faith exception to exclusionary rule.

Respondent argued in the Court of Appeals that the trial court's ruling allowing evidence recovered from the search to be admitted at trial should be upheld under the good faith exception to the exclusionary rule. That exception has been used to permit the admission of evidence obtained in good faith reliance on an invalid warrant (*United States v. Leon*, 468 U.S. 468 U.S. 897, 922 (1984)), a subsequently invalidated statute (*Illinois v. Krull*, 480 U.S. 340, 349-50 (1987)), and erroneous records entered into a police database (*Herring v. United States*, 555 U.S. 135, 137, 144 (2009)).⁶ The Western District rejected that argument, finding the good faith exception to be inapplicable to Deputy Watson's good faith reliance on *Belton*. *Johnson*, 2010 WL 2730593 at *13.

After this Court granted transfer, the United States Supreme Court granted certiorari in *Davis* to resolve a split in the federal appellate courts over whether the good faith exception applies to pre-*Gant* searches conducted in good faith reliance

⁶ This Court has found that the good faith exception applies with equal force to claims raised under the Missouri Constitution. *State v. Brown*, 708 S.W.2d 140, 145 (Mo. banc 1986).

on established case law in the jurisdiction.⁷ This Court stayed briefing while *Davis* was pending in the Supreme Court.

The Supreme Court issued its opinion on June 16, 2011. *Davis*, 131 S. Ct. at 2419. It found that the logic which governed the good faith exception for reliance on invalid warrants and invalid statutes applied to reliance on appellate decisions later found to be invalid. *Id.* at 2428-29. As the Court stated, “when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.” *Id.* at 2429 (citations omitted, emphasis in original). The Supreme Court also noted that, in conducting a search in accordance with binding appellate precedent, an officer is acting “as a reasonable officer would and should act.” *Id.* Because such actions do not demonstrate police misconduct that needs to be deterred, the Supreme Court held that “[e]vidence obtained in a search conducted in reasonable reliance based on established binding precedent is not subject to the exclusionary rule.” *Id.*

⁷ That issue provoked a similar split among two districts of the Missouri Court of Appeals. *Compare, Johnson*, 2010 WL 2730593 at *13 (finding good faith exception inapplicable) *to State v. Hicks*, 2010 WL 328092 at *8 (Mo. App. S.D., Aug. 20, 2010) (finding good faith exception applicable).

The Supreme Court did not expressly define in *Davis* what qualifies as “established binding precedent.” But the reasoning of *Davis* provides guidance. According to the Court, *Belton* was widely understood for years to have set down a simple, bright-line rule, with numerous jurisdictions reading the decision to authorize automobile searches incident to the arrest of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search.⁸ *Id.* at 2424. Looking at the particular facts of *Davis*, the Court noted that the defendant was charged in the United States District Court for the Middle District of Alabama for an offense that occurred in 2007. *Id.* at 2425. The Court found that the established precedent of the United States Court of Appeals for the Eleventh Circuit interpreted *Belton* as permitting the search of the passenger compartment of the defendant’s car while the defendant sat handcuffed in a patrol car. *Id.* at 2425-26. The Supreme Court found that the case law of an intermediate federal appellate court qualified as the type of binding precedent that would support application of the good faith exception. *Id.* at 2428-29.

Based on *Davis*, it is clear that the controlling precedent of the federal Circuit with jurisdiction over a state qualifies as binding precedent (at least for federal cases). By the same logic, the precedent of a state’s own appellate courts

⁸ A similar summary of the state of the law prior to *Gant* is found in *Gant*, 129 S. Ct. at 1718-19.

should receive equivalent treatment for a state case.⁹ Prior to *Gant*, both the Eighth Circuit and Missouri appellate courts laid out similar rules governing vehicle searches incident to the arrest of a recent occupant.

The United States Supreme Court cited one of those Eighth Circuit cases in *Davis* in support of the proposition that “[e]ven after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that *Belton* still authorized a substantially contemporaneous search of the automobile’s passenger compartment.” *Id.* at 2424 n.3 (citing *United States v. Barnes*, 374 F.3d 601, 604 (8th Cir. 2004)). The Eighth Circuit reviewed in *Barnes* the development of the law regarding automobile searches and agreed with what it characterized as the organizing principle of those cases, “that areas reachable by an occupant without exiting the automobile may be searched incident to arrest” *Barnes*, 374 F.3d at 604. The court went on to state, “[t]he lawfulness of the search does not depend on whether the occupant was *actually capable* of reaching the area during the course of the police encounter . . . and we

⁹ As discussed further below, the precedent of the Eighth Circuit, this Court, and the Missouri Court of Appeals reach the same conclusion. It is thus not necessary in this case for this Court to address the hypothetical of a conflict between the federal courts and the state courts in a particular jurisdiction.

have held that *Belton* applies even after the arrestee has been taken into custody and removed from the scene.” *Id.* (emphasis in original).

United States v. Orozco-Castillo concerned a search of the passenger compartment of a vehicle incident to the arrest of the driver for careless driving. *United States v. Orozco-Castillo*, 404 F.3d 1101, 1102 (8th Cir. 2005). Even though the arrest was for a minor traffic violation, the Eighth Circuit found that the search was authorized incident to arrest based on its reading of *Belton* and of *Knowles v. Iowa*, 525 U.S. 113 (1998). *See also United States v. Searcy*, 181 F.3d 975, 979 (8th Cir. 1999) (finding that officer could lawfully arrest driver who admitted to having suspended license and could search his vehicle incident to that arrest).

Similarly, in *United States v. Hrasky*, the Eighth Circuit found that a search of the passenger compartment of a vehicle incident to an arrest of the driver for driving while suspended was authorized under *Belton*. In upholding that search, the Eighth Circuit described *Belton* as a “bright-line rule” establishing 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.” *United States v. Hrasky*, 453 F.3d 1099, 1100 (8th Cir. 2006). The Eighth Circuit further described *Belton* as eliminating the need to litigate in each case whether there were additional reasons beyond the

arrest to support the search including what items may have been accessible to the individuals in the automobile. *Id.* at 1101.

This Court has also broadly interpreted *Belton*, upholding a search incident to arrest where the defendant had been handcuffed. *State v. Harvey*, 648 S.W.2d 87, 89-90 (Mo. banc 1983). The Western District noted *Harvey*'s "broad interpretation of *Belton*" in upholding a search incident to arrest conducted under circumstances similar to this case. *State v. Reed*, 157 S.W.3d 353, 359 (Mo. App. W.D. 2005). The driver in *Reed* was pulled over by an officer because the license plates on the vehicle were registered to another vehicle. *Id.* at 355. The driver admitted to the officer that his license was revoked. *Id.* The officer confirmed that and arrested the defendant for driving without a valid license. *Id.* The Western District concluded that the officer had probable cause to make the arrest. *Id.* at 357. After arresting the driver, the officer searched the passenger compartment of the vehicle and discovered drugs and paraphernalia. *Id.* at 355-56. The Western District noted the interpretation given to *Belton* by this Court in *Harvey* and by the United States Supreme Court in *Thornton v. United States*, 541 U.S. 615 (2004),¹⁰

¹⁰ The Western District quoted the Supreme Court's conclusion in *Thornton* that, "So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest." *Thornton*, 541 U.S. at 623-24, *quoted at* 157 S.W.3d at 359.

and concluded that once the driver was placed in custody, the officer was justified in performing a warrantless search incident to arrest of the passenger compartment of the vehicle. *Id.* at 359.

A year before the search of Appellant’s van, the Eastern District of the Court of Appeals upheld a search incident to arrest occurring under almost identical circumstances to *Gant* – with the search taking place after the defendant, who was being arrested for a traffic violation, was handcuffed and placed in a patrol car. *State v. Scott*, 200 S.W.3d 41, 43-44 (Mo. App. E.D. 2006).¹¹ The opinion stated that “the fact of arrest alone justifies the search.” *Id.* at 44. The Eastern District upheld another search incident to arrest the following year, stating that such a search is appropriate even for traffic violations, including driving without a license. *State v. Taylor*, 216 S.W.3d 187, 190 (Mo. App. E.D. 2007). The court stated that “[a]s long as an arrestee is a ‘recent occupant’ of a vehicle, officers may search the vehicle incident to the recent occupant’s arrest.” *Id.* The court went on to state that such a search is valid even where the defendant is handcuffed in the officer’s car at the time of the search. *Id.* Other Missouri cases upholding searches incident to an arrest for a traffic violation include *State v. Darrington*, 896 S.W.2d 727, 729

¹¹ *Scott* was a plurality decision for six of the thirteen judges of the Eastern District, sitting *en banc*. One of the three judges who concurred in the result only questioned a different part of the opinion. 200 S.W.3d at 46.

(Mo. App. W.D. 1995) and *State v. Remrey*, 824 S.W.2d 106, 108 (Mo. App. E.D. 1992).

Deputy Watson's search of Appellant's van was done in strict compliance with established precedent from this Court, the Missouri Court of Appeals, and the Eighth Circuit. As the Supreme Court noted in *Davis*, a police officer who conducts a search that is specifically authorized by binding appellate precedent is acting reasonably and is doing his duty by conducting such a search. *Davis*, 131 S. Ct. at 2429. Using the exclusionary rule in such circumstances deters the officer from doing his duty, and that is not the kind of deterrence that the exclusionary rule seeks to foster. *Id.*

Appellant does not even attempt to argue that the search did not comply with the controlling appellate precedent that existed at the time of the search. Instead he presents an argument not made to the Court of Appeals¹² in which he challenges the validity of the arrest, in part by attacking Deputy Watson's subjective reasons for making the arrest and the search. That argument overlooks well-established case law that an officer's subjective motive in making an arrest is immaterial where the police conduct, assessed objectively, falls within the requirements of the Fourth Amendment. *State v. Mease*, 842 S.W.2d 98, 105 (Mo. banc 1992) (citing

¹² See Supreme Court Rule 83.08(b), stating that a substitute brief shall not alter the basis of any claim that was raised in the court of appeals.

Maryland v. Macon, 472 U.S. 463 (1985)); *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001); *Whren v. United States*, 517 U.S. 806, 813 (1996). Even the existence of an ulterior motive does not invalidate an arrest made on lawful grounds. *Whren*, 517 U.S. at 812-13.

Deputy Watson's actions in arresting Appellant and searching the van were objectively reasonable. Deputy Watson confirmed that Appellant did not have a valid driver's license and Appellant admitted that he was in violation of the requirements imposed by the learner's permit that he did possess. (Tr. 10). As discussed in Point III below, that also put Appellant in violation of the statute creating the offense of driving without a valid license. Deputy Watson thus had probable cause to arrest Appellant for driving without a valid license. *Reed*, 157 S.W.3d at 355, 357. And once he made the arrest, Deputy Watson was authorized under then-controlling law to search the van that Appellant had recently occupied. *See Harvey, et al., supra*.

Appellant tries to claim pretext by pointing to Deputy Watson's testimony where he expresses his beliefs about the rationale underlying the search incident to arrest exception and his opinions about the validity of that rationale. Besides the fact that pretext does not invalidate a search, *see Whren supra*, Deputy Watson's beliefs and opinions are further irrelevant because it is the job of the courts to decide what the law permits and the job of the police to enforce those decisions,

regardless of their own personal opinions. Deputy Watson was doing what he was authorized to do under then-existing precedent, which is sufficient for determining the reasonableness of his actions and for applying the good faith exception. *Davis*, 131 S. Ct. at 2429; *Mease*, 842 S.W.2d at 105-06.

Deputy Watson's testimony that he initially considered allowing Appellant to post bond at the scene on the charge of driving without a valid license does not carry the significance that Appellant tries to give it. As noted above, Deputy Watson had probable cause to arrest Appellant for driving without a valid license. Deputy Watson testified that he normally arrests persons who have committed that offense. (Tr. 11, 17). He also testified that conducting a search incident to arrest was a common practice in his office and that he always conducted a search when making an arrest along the interstate. (Tr. 11, 37). That testimony is consistent with the trial court's ruling and is to be given effect by this Court. *Gaw*, 285 S.W.3d at 319. And because the arrest was for a misdemeanor offense, Deputy Watson was authorized by statute to set the conditions for release and to discharge Appellant from custody. § 544.560, RSMo 2000. Deputy Watson's consideration of possibly letting Appellant post bond at the scene thus did not affect the validity of the arrest nor did it alter his authority to search the van as an incident of that arrest. *See United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) (upholding

search where defendant was lawfully arrested and his placement into custody did not depart from established procedure).

Finally, Appellant's reliance on *Missouri v. Seibert*, 542 U.S. 600 (2004), to argue against application of the good faith rule is misplaced. *Seibert* involved a police procedure that was extrapolated from *Oregon v. Elstad*, 470 U.S. 298 (1985). *Seibert*, 542 U.S. at 614. But the procedure at issue was never explicitly authorized by any United States Supreme Court opinion. *Id.* By contrast, the search incident to arrest procedure followed by Deputy Watson was explicitly authorized by *Belton*. *Gant*, 129 S. Ct. at 1718-19. *Seibert* is further inapposite because no Missouri precedent authorized the procedure declared unconstitutional by the Supreme Court, and Eighth Circuit precedent had specifically disapproved of the procedure. *United States v. Carter*, 884 F.2d 368, 373-74 (8th Cir. 1989).

The holding of *Davis* is clear. A search that is authorized under the established appellate precedents of the jurisdiction is objectively reasonable, and evidence obtained during that search is not subject to the exclusionary rule. The search of Appellant's van was just such a search, and the admission into evidence of drugs seized from the van should be sustained under the doctrine announced in *Davis*. Appellant's point should be denied.

II.

Sufficient evidence supports Appellant's conviction for possession of a controlled substance.

Appellant claims that there was insufficient evidence to support his conviction for possession of a controlled substance. But the totality of the circumstances supports the jury's finding that Appellant possessed the cocaine that was located in plain view in Appellant's van, in an area that was easily accessible to him.

A. Standard of Review.

This Court's review of the sufficiency of the evidence is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of the defendant's guilt beyond a reasonable doubt. *State v. Nash*, 339 S.W.3d 500, 508-09 (Mo. banc 2011). This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 509. In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence. *Id.* All evidence and inferences to the contrary are disregarded. *Id.* When reviewing the sufficiency of the evidence

supporting a criminal conviction, this Court does not act as a “super juror” with veto powers, but gives great deference to the trier of fact. *Id.* This Court will not weigh the evidence anew since the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances, and other testimony in the case. *Id.*

B. Analysis.

To sustain a conviction for possession of a controlled substance, the State must prove: (1) conscious and intentional possession of the substance, either actual or constructive; and (2) awareness of the presence and nature of the substance. *State v. Purlee*, 839 S.W.2d 584, 587 (Mo. banc 1992). Both possession and knowledge may be proved by circumstantial evidence. *Id.*

“Possession” or “possessing a controlled substance” is defined as:

A person, with the knowledge of the presence of and nature of a substance, has actual or constructive possession if he has the substance on his person or within easy reach and convenient control.

A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may be sole or joint. If one person alone has possession of a substance possession is sole. If two

or more persons share possession of a substance, possession is joint . .

..

§ 195.010(34), RSMo Supp. 2001. In cases involving joint control of an automobile, a defendant is deemed to have both knowledge and control of items discovered within the automobile, and thus, possession in the legal sense, where there is additional evidence connecting him with the items. *State v. Woods*, 284 S.W.3d 630, 639 (Mo. App. W.D. 2009). The totality of the circumstances must be considered in determining whether the State has presented sufficient additional incriminating evidence. *Id.* at 640.

Among the incriminating facts linking Appellant to the drugs is that he was the owner of the vehicle. (Tr. 166). As the owner and driver of the van, Appellant certainly had routine access to the front passenger compartment where the drugs were found, and this fact is not destroyed by the fact that other persons also had access. *State v. Mickle*, 164 S.W.3d 33, 45 (Mo. App. W.D. 2005). While ownership alone is not enough to create an inference of control over the drugs, *State v. Fields*, 181 S.W.3d 252, 255 (Mo. App. W.D. 2006), it is an important factor when considered in combination with other incriminating facts. *State v. Booth*, 11 S.W.3d 887, 892 (Mo. App. S.D. 2000), *see also*, *Woods*, 284 S.W.3d at 640 (fact that defendant rented the vehicle was an incriminating circumstance supporting an inference of knowledge and control).

Other incriminating factors are easy accessibility to the drugs and the presence of the drugs in plain view. *Woods*, 284 S.W.3d at 640. The drugs were plainly visible on a console that was within Appellant's reach as he sat in the driver's seat. (Tr. 169-70, 191). In *Mickle*, the court noted that the incriminating evidence against the defendant included the fact that the bags and containers containing meth-related items were in plain view and within the defendant's reach. *Mickle*, 164 S.W.3d at 45.

Appellant argues that the discovery of the cocaine in plain view does not support an inference of possession because Deputy Watson did not see it during the initial traffic stop. First, that argument is contrary to the standard of review, since it asks the Court to draw an inference contrary to the verdict. *Nash*, 339 S.W.3d AT 509. And the implicit inference that the passenger dumped the cocaine while Appellant was in Deputy Watson's patrol car is both contrary to the standard of review and illogical, since one cannot reasonably expect a person to take a concealed substance and sprinkle it around in plain view while a law officer is making a traffic stop of the vehicle that she is in. The argument also misinterprets the evidence, because while Deputy Watson could see into the passenger compartment while making that initial traffic stop, he also testified that because of the height of the van, he had to look up at Appellant. (Tr. 184). While Watson could see the dashboard and steering column as he looked into the van, he did not

testify that he could see the area around the cupholders, which is where the cocaine was found. (Tr. 185). Also, Watson said the cocaine appeared to have been a rock that had been broken-up to be used. (Tr. 170). That testimony supports an inference that Appellant had been using cocaine in the van.

Other incriminating factors that support an inference of possession are the defendant's conduct and statements, including false statements made in an attempt to deceive police. *Woods*, 284 S.W.3d at 640. Appellant denied any knowledge of the drugs. (Tr. 170). Given the location and visibility of the drugs, as well as the presence of paraphernalia in the van, some of which was in the open (Tr. 170), the jury could find that Appellant's denial was a lie and could consider that lie as a circumstance supporting an inference of possession.

The totality of the circumstances supports an inference that Appellant possessed the cocaine found in his van. The jury's verdict is supported by sufficient evidence and Appellant's point should be denied.

III.

The trial court did not plainly err in submitting the verdict directing instruction for driving without a valid license.

Appellant claims that the trial court erred in submitting Instruction No. 5, the verdict directing instruction for driving without a valid license, because the instruction failed to require the jury to determine if Appellant committed the charged act while in possession of a valid learner's permit. But the trial court did not plainly err because Instruction No. 5 properly submitted the elements of the offense to the jury, in that possession of an instruction permit that is not being used in accordance with the law is not a defense to the charge of driving without a valid license.

A. Underlying Facts.

The charge of driving without a valid license was submitted to the jury in Instruction No. 5, based on MAI-CR 3d 332.49, and which read:

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

First, that or (sic) July 14th, 2007, in the County of Daviess, State of Missouri, the defendant operated a motor vehicle on a highway, Interstate 35, and

Second, that defendant did so during a time when he did not have a valid operator's license, and,

Third, that defendant was aware that he did not have a valid operator's license, then you will find the defendant guilty under Count 1 of driving without a valid license.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 55; Tr. 211). The court submitted an instruction prepared by Appellant that conversed the element of whether Appellant was aware that he did not have a valid driver's license. (L.F. 56). The jury also received the following Not-in-MAI instruction that was prepared by Appellant and submitted to the jury as Instruction No. 7:

As to Count 1, if you do not find the defendant guilty of operating a motor vehicle without a valid license, you must consider whether he is guilty of violating the provisions of a temporary instruction permit under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 14, 2007, in the County of Daviess, State of Missouri, the defendant operated a motor vehicle on a highway, Interstate 35, and

Second, that defendant was not operating a motor vehicle within the limitations of a temporary instruction permit, by not having a licensed operator in the vehicle then you will find the defendant guilty under Count 1 of violating the provisions of a temporary instruction permit.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 57; Tr. 211).

B. Standard of Review.

Instructional error must be properly raised before the trial judge to be preserved for review. *State v. Martin*, 211 S.W.3d 648, 652 (Mo. App. W.D. 2007). In order to preserve claims of instructional error for review, counsel is required to make specific objections to the instructions at trial and again raise the error in the motion for new trial. *Id.* The only objection made at trial to Instruction No. 5 is that there was allegedly insufficient evidence to submit the instruction. (Tr. 210). The theory of instructional error raised on appeal must be

the same theory asserted before the trial court in order to preserve the claim for review. *State v. Scott*, 278 S.W.3d 208, 212 (Mo. App. W.D. 2009). The new trial motion drafted by counsel did not contain any claim of instructional error. (L.F. 74-75). The *pro se* motion for new trial contained broad allegations that “[t]he court has misdirected the jury in a material matter of law,” and that it was unconstitutional to submit Instructions Nos. 5 and 6 and ask the jury to find Appellant guilty of driving without a valid license under section 302.020, RSMo, for allegedly violating the provisions of section 302.130, RSMo. (L.F. 78, 82). Besides not articulating the precise theory advanced on appeal, such sweeping allegations of error are insufficient to preserve a claim of instructional error. *State v. Moriarty*, 914 S.W.2d 416, 421 (Mo. App. W.D. 1996).

Because Appellant’s claim of instructional error is not properly preserved, this Court is limited to plain error review. *Scott*, 278 S.W.3d at 212. Instructional error rarely rises to the level of plain error. *Id.* To establish plain error in the context of instructional error, a defendant must show more than mere prejudice and must show that the trial court so misdirected or failed to instruct the jury that it is apparent that the instructional error affected the jury’s verdict and caused manifest injustice or a miscarriage of justice. *Id.*

C. Analysis.

Appellant does not contend that Instruction No. 5 failed to accurately track the language of MAI-CR 332.49, but instead claims that the instruction conflicts with the substantive law as set out in sections 302.020.1 and 302.178.9, RSMo. *See Scott*, 278 S.W.3d at 213 (MAI instruction is not to be given if it is in conflict with the substantive law). His argument is that the instruction should have included an additional provision requiring the jury to determine if Appellant had a valid learner's permit and was violating the terms of that permit. But that argument misconstrues the applicable statutes.

Appellant was convicted under section 302.020, RSMo, which makes it unlawful for any person, except those expressly exempted by section 302.080, RSMo, to operate any vehicle upon any highway in this State unless the person has a valid license. § 302.020.1(1), RSMo 2000. Violation of that provision is a class A misdemeanor. § 302.020.3, RSMo 2000. The only reference the statute makes to an instruction permit is to make it a violation to operate a motor vehicle with an instruction permit issued to another person. § 302.020.1(4), RSMo 2000. The only specific exemptions to the requirements of section 302.020, RSMo are those set forth in section 302.080, RSMo. § 302.020.1(1), RSMo 2000. Operating a motor vehicle while in possession of a temporary instruction permit is not an exemption recognized in that statute. § 302.080, RSMo 2000. If merely

possessing an instruction permit was intended to be a defense to a charge of operating a motor vehicle without a license, and thus a basis for acquittal, then that would have been listed in the exemptions set forth in section 302.080.

Another reason the possession of an instruction permit does not constitute a defense is that the instruction permit constitutes a valid license only when the holder of that permit is operating a motor vehicle in compliance with the requirements of the permit law. § 302.130.1, RSMo Supp. 2006. Appellant failed to comply with the requirements of the permit law when he drove the van without the presence of a licensed driver, and he thus was operating that van without having a valid license to do so. Appellant cannot therefore claim to be entitled to acquittal for having a permit that was not being used in accordance with the law.

The gravamen of Appellant's argument is that because his conduct violated the provisions of the instruction permit statute, which violation is only an infraction, he could not therefore have been guilty of the misdemeanor offense of driving without a valid license. §§ 302.130.1, RSMo Supp. 2006; 302.178.9, RSMo Supp. 2006. But as explained above, Appellant's conduct violated both section 302.020 and section 302.130. When a single act may constitute an offense under two different statutes, the state may elect under which statute to proceed. *State v. Oliver*, 298 S.W.3d 437, 445 (Mo. Banc 2009). In this case, the State

chose to proceed under the statute for driving without a valid license, and Instruction No. 5 correctly submitted the elements of that offense to the jury.

Appellant further cannot show plain error because the jury was given the option of convicting him of violating the instruction permit statute rather than the statute for operating a motor vehicle without a valid license. (L.F. 55, 57; Tr. 211). While Appellant now claims that the instruction submitting the offense of violating the instruction permit statute was incorrect, that claim is based on the same mistaken premise that the mere possession of an instruction permit negates a finding of guilt on the charge of driving without a valid license.

The trial court did not plainly err in submitting Instruction No. 5 to the jury. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 8,059 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 22nd day of August, 2011, to:

Alexa I. Pearson
Office of the State Public Defender
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, MO 65203

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

SECTION 302.020, RSMo 2000A1-A2

SECTION 302.080, RSMo 2000A3

SECTION 302.130, RSMo SUPP. 2006.....A4-A6

SECTION 302.178, RSMo SUPP. 2006.....A7-A9

SECTION 544.560, RSMo 2000A10

INSTRUCTION NO. 5A11

INSTRUCTION NO. 7A12

SUPREME COURT RULE 83.08A13