

No. SC91429

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

HEATHER SUE KINGSLEY,

Respondent.

Appeal from Henry County Circuit Court
Twenty-seventh Judicial Circuit
The Honorable James Kelso Journey, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On December 1, 2009, an order was entered in the Circuit Court of Henry County, Missouri, sustaining Respondent's motion to suppress evidence. L.F. 7.¹ Respondent, Heather Kingsley, had been charged with possession of a controlled substance. Supp. L.F. 3, 6.

After an opinion by the Missouri Court of Appeals, Western District, this Court granted Appellant's Application for Transfer. Missouri Constitution, Article V, Section 10; Rule 83.04.

¹ References to the record shall be abbreviated as follows: "L.F." for references to the Legal File, "Supp. L.F." for references to the Supplemental Legal File and "Tr." for references to the Transcript.

STATEMENT OF FACTS

On December 1, 2007, Officer Dan Guynn of the Clinton Police Department observed a maroon car operating on Highway 7 in excess of the posted speed limit. Tr. 9-11. Officer Guynn then pulled behind the vehicle and activated his emergency lights. Tr. 12. The maroon car then slowed greatly as it approached an upcoming intersection, approximately a quarter of a mile ahead. Tr. 24-26. The maroon vehicle made a right turn at the intersection and then pulled over at the first available place after the turn. Tr. 24-26.

When Officer Guynn approached the car, Respondent was in the driver seat and Heather Kingsley was in the passenger seat. Tr. 14. Officer Guynn asked Respondent for his driver's license, and Respondent replied that he did not have a driver's license. Tr. 14-15. A short time later, Respondent told Officer Guynn that his driver's license was revoked. Tr. 15. Officer Guynn observed that Respondent appeared to be nervous. Tr. 16.

Officer Guynn contacted dispatch to confirm the status of Respondent's license. Tr. 17. Dispatch confirmed that the license was revoked. Tr. 17. At that time, Officer Guynn placed Respondent under arrest for driving while revoked, a traffic violation. Tr. 17, 29. Officer Guynn handcuffed Mr. Kingsley and placed him in the back of his patrol vehicle. Tr. 17-18.

At around the time that Officer Guynn was arresting Respondent, Officer David Akers arrived to assist Officer Guynn. Tr. 17-18, 41. Officer Guynn asked Officer Akers

to conduct the search incident to arrest. Tr. 27. Officer Guynn did not recall telling Officer Akers to look for anything specific during the search. Tr. 28.

At the time that Officer Akers approached the car to search it, Ms. Kingsley was still in the car. Tr. 42. Officer Akers had Ms. Kingsley step out of the car and wait by the back of the car. Tr. 42. Officer Akers then searched the vehicle and found a sock containing an eye glass case. Tr. 42. Inside the eye glass case, Officer Akers found a spoon, a syringe, and some small bags which contained a white powdery substance. Tr. 42. It is unclear where these items were found in the car. Tr. 48-50. Officer Akers notified Officer Guynn about what had been found in the search, and then Officer Akers placed Ms. Kingsley under arrest. Tr. 42.

Both Officer Guynn and Officer Akers testified that they had training that lead them to believe that a search incident to arrest allowed them to search a vehicle of a recently arrested individual. Tr. 8-9, 39-40. There was no testimony as to whether that training was based on binding precedent from either a Missouri Court or the Eighth Circuit. Additionally, no individuals who provided such training testified at the suppression hearing.

Following the search and Ms. Kingsley's arrest, the car was towed. Tr. 21. If Ms. Kingsley had not been under arrest, she would have been allowed to move the car to a safe location within the parking lot, and the car would not have been towed. Tr. 53-55. It was not until after the search incident to arrest that there was any reason for the vehicle to be towed. Tr. 47.

A complaint was filed alleging that Respondent committed the offense of possession of a controlled substance. L.F.2-3. Subsequently, an information was filed formally charging Respondent with that offense. Supp. L.F. 3, 6.

Respondent then filed a motion to suppress the evidence found in the search based on the decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2008). L.F. 4-5. In the prosecutor's argument to the trial court on this motion, the prosecutor argued that, since such searches were thought permissible prior to the decision in *Gant*, a good faith exception to the exclusionary rule should apply to searches conducted prior to the *Gant* decision. Tr. 58-63. The prosecutor admitted that the issue of a good faith exception was not mentioned in the *Gant* decision. Tr. 65.

Respondent argued that a good-faith exception should not apply in this case and that the Supreme Court has not previously applied it on similar facts. Tr. 66-73. Respondent argued that this case should be governed by *Gant* and that the evidence should be suppressed. Tr. 66-73.

The trial court took the matter under advisement and subsequently issued its decision finding that the search in this case was prohibited by *Gant*. L.F. 7, Tr. 72.

POINT OF ERROR

Point I (Good Faith Reliance on Established Case Law)

The trial court did not error in granting Respondent's motion to suppress because the search was unconstitutional under the U.S. Supreme Court case of *Arizona v. Gant* and because *Gant's* rule should be applied retroactively to this case.

Arizona v. Gant, 129 S.Ct. 1710 (2009)

Griffith v. Kentucky, 479 U.S. 314 (1987)

Mo. Rev. Stat. § 542.296(6)

Point II (Standing)

The trial court did not error in granting the motion to suppress because the issue of Respondent's standing was not raised by the State at the trial court level and therefore the State, as an Appellant, cannot raise the issue for the first time on appeal.

State v. Lybarger, 165 S.W.3d 180, 184 (Mo. App. W.D. 2005).

State v. Ramires, 152 S.W.3d 385, 394-98 (Mo. App. W.D. 2004).

State v. West, 58 S.W.3d 563, 567 (Mo. App. W.D. 2001)

ARGUMENT

Point I (Good Faith Reliance on Established Case Law)

The trial court did not error in granting Respondent's motion to suppress because the search was unconstitutional under the U.S. Supreme Court case of *Arizona v. Gant* and because *Gant's* rule should be applied retroactively to this case.

Standard of Review

With respect to the issue of whether the good-faith exception applies in this case, the State is correct that the essential facts relative to that issue are not in dispute. Accordingly, the issue of law raised is reviewed de novo with appropriate deference to the factual findings of the trial court viewed in a light consistent with those findings. *State v. Lybarger*, 165 S.W. 3d 180, 184 (Mo. App. W.D. 2005).

Discussion

There is no doubt that the search in the instant case was unconstitutional based on the United States Supreme Court's holding in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). The issue is now whether to afford the Respondent the remedy of the exclusionary rule.

The State urges this Court to adopt a good-faith exception to *Gant* in cases where the search occurred prior to the *Gant* decision and where the officers conducted the search based upon the broader, and mistaken, reading of *New York v. Belton*, 452 U.S. 454 (1981). While Respondent acknowledges the United States Supreme Court's decision in *Davis v. United States*, 131 S. Ct. 2419 (2011), Respondent urges this Court to distinguish this case on its facts or, in the alternative, to determine that Article I, Section 15 of the Missouri Constitution affords the citizens of Missouri greater Fourth

Amendment protection than the U.S. Constitution. Under either circumstance this Court should not apply the good faith exception to the present case.

At a suppression hearing, the State bears the burden of proof in showing that the search at issue was constitutional. *See Mo. Rev. Stat. § 542.296(6); State v. Burkhardt*, 795 S.W.2d 399 (Mo.1990); *State v. Tipton*, 796 S.W.2d 109 (Mo.App.1990). The State must meet this burden by a preponderance of the evidence. *See Mo. Rev. Stat. § 542.296(6)*.

The holding in *Davis* states that the good faith exception applies to police searches which are done in “objectively reasonable reliance on binding appellate precedent.” *Davis*, 131 S.Ct. at 2434. Therefore, because the search in this case was unconstitutional under *Gant*, the State has the burden to show that the officers’ conduct was based in reliance on binding appellate precedent in order for the good faith exception to the exclusionary rule to apply.

In this case, the testimony from both officers indicates that the searches were based on training they had received at the police academy. Tr. 8-9, 39-40. No evidence was presented that such training was in reliance on the existing case law from the appellate courts of Missouri or the Eighth Circuit. Nor did the officers testify that they were specifically relying on any binding appellate precedent. In order to find that the officers’ conduct was based on binding appellate precedent this Court must connect those dots and find that the training received by Officer Guynn and Officer Akers was in reliance on certain appellate case law which was binding at the time. Such evidence was simply not produced. The State therefore did not meet their burden in establishing that

this particular search conducted by these officers was constitutional under the holding in *Davis*. Therefore, the rule in *Gant* should apply retroactively to this case and the trial court acted appropriately in suppressing the evidence.

In the event this Court does find that the State has established that the officers' conduct was based on their reliance on binding appellate case law, Respondent urges the Court to reject the application of the good faith exception by finding that Article I, Section 15 of the Missouri Constitution affords Missouri citizens greater fourth amendment protections than the U.S. Constitution. To do so would be to adopt the reasoning of the dissenting opinion in *Davis*.

Respondent finds the dissenting opinion of *Davis* to be well reasoned and consistent with prior Fourth Amendment law. The problem with the majority's holding in *Davis* is that in finding that *Gant* applies but refusing to allow the defendant a remedy, the Court treats *Gant*, a similarly situated defendant, differently from *Davis* (or in this case, Respondent). Prior U.S. Supreme Court precedent has held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *United States v. Johnson*, 457 U.S. 537, 562 (1982); *see also Griffith v. Kentucky*, 479 U.S. 314 (1987). The concern in these cases focuses on "treating similarly situated defendants similarly" and giving the same constitutional protection to defendants who are "subjected to identical police conduct." *See Johnson*, 457 U.S. at 555-56. The Supreme Court also notes that applying new Fourth Amendment law retroactively helps resolve cases "in light of our

best understanding of governing constitutional principles.” *Id.* at 555 (quoting *Mackey v. United States*, 401 U.S. 667 (1971)).

Arizona v. Gant does not consider or discuss the good faith exception even though the officers in that case were presumably acting in good faith as they searched Gant’s vehicle. There is nothing in the opinion itself to suggest the officers were acting inconsistent with or beyond the scope of how they were trained. Allowing the application of the good-faith exception to pre-*Gant* searches deprives a similarly situated defendant, such as Respondent (and Davis), the benefits afforded to Gant himself.

Respondent urges this Court to focus on ensuring similar constitutional benefits for similarly situated defendants in accordance with the U.S. Supreme Court retroactivity precedents, rather than focusing only on police conduct, as the State (and the *Davis* majority) would argue. Accordingly, Respondent requests that this Court reject the application of the good faith exception in this case.

Point II (Standing)

The trial court did not error in granting the motion to suppress because the issue of Respondent's standing was not raised by the State at the trial court level and therefore the State, as an Appellant, cannot raise the issue for the first time on appeal.

Standard of Review

To the extent that there are factual disputes on a motion to suppress, this Court reviews the trial court's ruling to determine if it is supported by sufficient factual evidence with due deference given to the factual findings of the trial court. *State v. West*, 58 S.W.3d 563, 567 (Mo. App. W.D. 2001). However, when the facts are undisputed, and the issue is one of law, this Court reviews the legal findings de novo. *State v. Lybarger*, 165 S.W.3d 180, 184 (Mo. App. W.D. 2005). The burden of proof on the issue of standing rests with the party challenging the search. *State v. Ramires*, 152 S.W.3d 385, 394-98 (Mo. App. W.D. 2004).

Discussion

The State failed to raise the argument of Respondent's standing at the suppression hearing in this case. Tr. 57-66. Had the State raised the issue, Respondent could have presented evidence in order to meet her burden of proof on the standing issue. However, as the State failed to raise the issue below, they are precluded from raising it for the first time on appeal. *See Ramires*, 152 S.W.3d at 397 ("Had the State been the appellant in our case, then, regardless of the fact that the defendant below had the burden of proof as to Fourth Amendment standing at the suppression hearing, the State would have been

obligated to raise the issue below in order to preserve it for an interlocutory appeal...”). Having failed to raise the issue below, the State is precluded from raising it for the first time on appeal.

CONCLUSION

The Order of the trial court sustaining Respondent’s Motion to Suppress should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. This brief includes all information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 2,539 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software; and
2. The CD-ROM format was Microsoft Word for Windows and was scanned for viruses and is free of any viruses; and
3. That a true and correct copy of the attached brief, and a CD-ROM containing a copy of this brief, were mailed this 29th day of August, 2011, to:

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Judgment on Defendant’s Motion to Suppress A1