IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
APPELLANT,	)	
	)	
vs.	)	**No. SC85128**
	)	
TRAVIS GLASS,	)	
	)	
RESPONDENT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY
THE HONORABLE FRANK CONLEY, JUDGE

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

ONE

(Replying to Respondent's Argument Point I)

1. Respondent's argument – that Travis' statements were not the product of an illegal seizure because at the time Travis made the statements he was not "under arrest" and, instead, the statements were the result of a "consensual encounter" the police conducted with Travis and his ensuing trip to the police station of his own free and voluntary will – must fail because a detention subject to Fourth Amendment protections occurs not only when the police announce an "arrest" but whenever police conduct – whether through physical force or by assertion of authority – cause the accused to submit.

2. Although undoubtedly inadvertent, respondent substantially misstated appellant's argument concerning the distinction between reasonable suspicion and probable cause; appellant argued the authorities had reason to be suspicion but did not have reason to believe that Travis had probably committed a crime.

3. Respondent's argument – that appellant's encounter with Sgt. Lawzano was consensual from the start and never changed – relies on the fact that there was no evidence of threats, no display of

weapons, and no physical force; this argument fails because assertion of authority causing a citizen to submit, and thereby accomplishing a detention of the citizen within the meaning and protection of the Fourth Amendment, does not require threats, weapons, or physical force.

4. Respondent's claim that the police had probable cause to arrest Travis but did not do so invites the conclusion that the police deliberately refrained from telling Travis that he was under arrest mistakenly believing that by not announcing the arrest they could avoid advising him of his constitutional rights.

5. *State v. Seibert,* 93 S.w3d 700 (Mo.banc 2002) was correctly decided.

1. Respondent states, as though fact, that Travis was not under arrest when a fourth officer was summoned to Travis' house to drive him and Sgt. Lawzano to the sheriff's department and was not under arrest when the officers agreed to let Travis buy some cigarettes. Resp.Br. at 28. Travis, of course, could not drive his own car because it was being scrutinized for evidence by other officers.

Whether the Fourth Amendment has been violated requires *de novo* review. *State v. Davalos***,** 2004 WL 51779 (Mo.App.S.D. 2004) *3; *see also Ohio v. Robinette*, 519 U.S. 33, 46 (1996) Stevens, J., dissenting

(noting that whether a person has been detained is a question of law). Accordingly, whether Travis had or had not been "arrested" when a show of four officers gathered at his house is also a question of law.

Appellant does not dispute that an arrest may occur when law enforcement officers announce to a citizen, "you are under arrest." And appellant does not dispute that the officers in this case never advised Travis that he was "under arrest."

But an arrest or detention subject to Fourth Amendment protections may occur even when law enforcement authorities say nothing. "An arrest requires either physical force ... or, where that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Contrary to respondent's argument, it was not necessary for Travis to be told "you are under arrest" for an arrest to have occurred.

2. Appellant believes that respondent inadvertently misstated appellant's argument. Because it was a rather substantial misstatement that blurred an important distinction between "reasonable suspicion" and "probable cause," appellant must correct the misstatement.

On page 32 of its brief, respondent states: 'Appellant grants that before Sgt. Lawzano arrived at his home to question him, he had

reasonable suspicion to believe that appellant had "probably committed a crime" (App.Br.58).' Appellant's argument, however, was very different.

Appellant stated that Sgt. Lawzano *did* have reason to be suspicion, but ***did not*** have reason to believe that Travis had probably committed a crime. Addressing the total facts of which Sgt. Lawzano had knowledge at the time he appeared at Travis' house and detained him, appellant argued:

> Reason to be suspicious: yes. Reasonable belief that Travis had probably committed a crime: ***no***.

App.Br. at 58; emphasis added.

3. Respondent's argument – that appellant's encounter with Lawzano was consensual from the start and never changed – relies on the fact that there was no evidence of threats, no display of weapons, and no physical force; this argument fails because assertion of authority causing a citizen to submit to law enforcement officers, and thereby accomplishing a detention of the citizen within the meaning and protection of the Fourth Amendment, does not require threats, weapons, or physical force.

In *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), the Supreme Court established a rather broad standard for determining

when a seizure or arrest has occurred. The *Mendenhall* standard requires the reviewing court to view "all the circumstances surrounding the incident" as a "reasonable person" would have viewed them at that time:

> [A] person has been "seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, *even where the person did not attempt to leave,* would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers request might be compelled....

Id. at 554. Respondent appears to have lost sight of the *standard* and, instead, have focused on one of the *examples* given by the Court. Respondent has lifted one phrase – "the threatening presence of several officers" – from the opinion and has used it suggest that where the police do not make threats, there can be no arrest. (*See, e.g.,* Resp.Br. at 35 repeatedly noting that "Lawzano did not threaten appellant ... There was no threatening presence of several officers. No weapon was

displayed ... no evidence that officers used physical force or a forceful show of authority... Lawzano ... did not threaten or promise appellant anything...").

Examples may be useful. But, as illustrated by its brief, what respondent has done here is to misread "the threatening presence of several officers" as: "the presence of several officers making threats." The fact that in other cases, a defendant may have been arrested by being told he is under arrest or because he had a gun pointed at him or because one or more officers used their hands and arms to physically restrain or move the defendant simply does not provide much help in the instant case. What the *Mendenhall* example actually says, and what happened here, was that the presence of several officers may, "in view of all of the circumstances surrounding the incident," be a sufficient assertion of authority that the defendant submits and has thereby been restrained.

4. Respondent's claim that the police had probable cause to arrest Travis but did not do so invites the conclusion that the police deliberately refrained from telling Travis that he was under arrest because they thought that by not announcing the arrest they could avoid advising him of his constitutional rights.

Respondent argues the officers had probable cause to arrest Travis

from the time they arrived at his home, but if not, they acquired probable cause after arriving at his house and before taking Travis to the sheriff's department (Resp.Br. at 39-43). If so, the failure to advise Travis of his constitutional rights was a deliberate omission designed to elicit unwarned statements from him.

Essentially, the state wants it both ways: the state wants the police to have probable cause to arrest Travis but seeks to avoid the constitutional protections afforded an arrested person by claiming: Well, the police never told him he was under arrest and not only that, Travis did not need to be advised of his rights because he was never really in police custody! Respondent asks the Court to accept that the police had probable cause to arrest Travis but also accept that despite probable cause, despite the four officers who descended on his home to question him, to search his car, to look in his house, and to make "'decisions on his ca,"' Resp. Br. at 27, Travis was not in custody. As support for this argument, respondent reiterates its previous argument "that appellant had not been formally arrested or subjected to arrest-like restraints when he was questioned by police," he was not subject to a display of weapons, and he was not placed in handcuffs or restraints of any kind (Resp.Br. at 44-45).

Well, this is not the era of the rack and screw. As the Supreme

Court has recognized in *Mendenhall* and subsequent cases such as *Hodari D.*, *supra*, arrest does not depend on handcuffs, physical force, or even an announcement of arrest. And "custody" does not depend on being taken to the police station. *See e.g., Oregon v. Elstad*, 470 U.S. 298 (1985); *Berkemer v. McCarty*,468 U.S. 420, 442 (1984).

5. Travis has already discussed *State v. Seibert*, 93 S.W3d 700 (Mo.banc 2002), in his initial brief (App.Br. 63-64). Suffice it to say that *Seibert* was correctly decided and remains good authority. The state could, of course, avoid any risk that it might violate the constitution and taint evidence needed for criminal prosecutions by requiring its officers to advise citizens of their constitutional rights before questioning them.

As discussed in appellant's initial brief, the state's case was not overwhelming. The statements prejudiced Travis because they shored up the state's claim that Travis was guilty of first degree murder – not a lesser offense – and the statements contained facts that reflected poorly on Travis. For all the foregoing reasons, in addition to the reasons presented in appellant's initial brief, Respondent's argument fails. It was reversible error to admit evidence of the statements at trial.

TWO

(Replying to Respondent's Argument Point II)

1. The United States Supreme Court has never applied the inevitable discovery rule to uphold the admission of evidence illegally seized from a person's home without a warrant. In any event, the record fails to show that the discovery of the evidence ultimately admitted – the testimony of Nicole Withrow and Samantha Bramlett – was "inevitable."

2. To the extent appellant's Point II is not preserved, appellant respectfully requests the Court to review the point for plain error.

3. To the extent that *State v. Cole*, 706 S.W.2d 917 (Mo.App.S.D. 1986) holds that an adult occupying a room in a residence occupied by his or her parents or other family members will be presumed to have no expectation of privacy in the room she or he occupies, *Cole* unconstitutionally diminishes the state's burden of proof, specifically, of proving the legality of the state action. The Court must clarify, correct, or overrule *Cole*.

"A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement" for searches of houses. *Flippo v. West Virginia*, 528 U.S. 11, 14 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 937 n.4 (1995).

Respondent relies on *Nix v. Williams*, 467 U.S. 431, 444 (1984) and *State v. Butler*, 676 S.W.2d 809, 812-13 (Mo.banc 1984). In *Nix*, the evidence in question was a child's body; it was found outdoors within an area that would have been searched shortly. 467 U.S. at 436. Appellant's research has not disclosed any cases in which the Supreme Court has applied the "inevitable discovery" rule adopted in *Nix* to uphold the admission of evidence illegally seized from a home without a warrant.

In any event, the record fails to show that the discovery of the evidence ultimately admitted – the testimony of Nicole Withrow and Samantha Bramlett – was "inevitable." Respondent argues that because the officers were contacting Travis' former employers, the officers would have "uncovered" Nicole's mother, Sandra Harding, because she had worked with Travis at Dura Automotive (Resp.Br. at 59).

It was ***not*** inevitable that the officers would have come across Sandra Harding. Sandra was a co-worker – not one of Travis' former employers (T1167). Moreover, nothing in the record indicates that Sandra would have been "inevitably" contacted; the record did not even indicate that Sandra still worked at Dura. Far from being inevitable, the possibility that the officers would have come across Sandra Harding

was speculative at best.

Although *State v. Butler* claimed to rely on the inevitable discovery rule, the search in that case was supported by the exigent circumstances exception and the fact that the victim, a co-tenant of the house, consented to the search. 676 S.W.2d at 812-15. To the extent that *Butler* holds that the inevitable discovery rule allows warrantless searches of a house or dwelling, in violation of the Fourth Amendment, the Court should reconsider and clarify or overrule that portion of *Butler* as in violation of the Fourth Amendment and Supreme Court authority.

2. Respondent correctly notes that not only did appellant fail to timely object "to the admission of Withrow's or Bramlett's testimony," on appeal, appellate counsel failed to request plain error review of appellant's Point II. (Resp.Br. at 55). Undersigned counsel apologizes for the oversight. Although counsel did note the untimely objection in appellant's Point VII (which raised different claims concerning the same evidence), counsel failed to do so with regard to appellant's Point II. On behalf of appellant, for the following reasons, undersigned counsel respectfully asks that treat the fault as counsel's, not appellant's, and consider the Point as preserved. Should the Court decline to do so, appellant requests that the Court review for plain error. Rule 30.20.

Penalty phase began immediately after the hearing on the motion to suppress evidence seized from Travis' house without a warrant and pertaining to the unauthorized walk-in's involving state's witnesses Samantha Bramlett and Nicole Withrow; Samantha and Nicole, the state's first two witnesses, testified almost immediately thereafter (T1187-1212). Defense counsel did not object at the time these witnesses testified; the following morning, counsel moved the trial court to strike their testimony, and the trial court denied this motion (T1241). Defense counsel included this in the motion for new trial (LF465-67). Because the evidence followed so soon after the trial court's denial of the motion to suppress, it is unlikely that the court would have changed its mind had defense counsel timely objected. For this reason, appellant asks that the Court treat this Point as preserved even though there was no timely objection at trial. In the alternative, appellant requests the Court review this part of the claim for plain error. Rule 30.20.

3. In his initial brief, appellant argued that the Supreme Court has held that the Fourth Amendment protects a citizen's privacy, not solitude or property; rather than repeat those arguments, appellant respectfully directs the Court's attention to Appellant's Brief at 71-72.

Respondent relies on *State v. Cole*, 706 S.W.2d 917 (Mo.App.S.D.

1986). To the extent that *Cole* holds that an adult occupying a room in a residence occupied by his or her parents or other family members will be presumed to have no expectation of privacy in the room she or he occupies, *Cole* unconstitutionally diminishes the state's burden of proof, specifically, of proving the legality of the state action. The Court must clarify, correct, or overrule *Cole*.

THREE

(Replying to Respondent's Argument Point V)

Respondent contends that in appellant's Point VI, appellant did not pursue the theory presented by the defense at trial: that Travis recklessly caused Steffani's death by strangling her (St.Br. 83-84). Although appellant did not discuss this part of his point at length, it was not and is not appellant's desire to abandon that theory or that part of his Point VI on appeal; to this end, appellant here replies to respondent's arguments.

Before addressing the state's own guilt phase arguments concerning the strangulation evidence – which may provide the best explanation of the evidence supporting the involuntary manslaughter instruction – a quick review of the physical evidence is necessary. A bra strap had been tied tightly around Steffini's neck compressing her skin about a half inch (T1046). Six corresponding abrasions suggested the strap had been moved (T756, 760). "There were linear abrasions on the back that were consistent with dragging" and there were grass and mud stains in a linear pattern on Steffini's back (T769-70).

The prosecution relied on this evidence for its guilt phase argument:

> It is clear that the victim's body had been subjected to repeated blunt trauma. She had been stepped on in the process. *Her*

body had been drug across the ground. You saw the scrape marks for yourself on the photographs. And dumped at this [river] Access. She had repeated blows around her head. Her neck had been, she had been strangled with this strap, I take it part of the bra although I've never been clear on exactly what part, that was applied with such pressure that it has been described as having dug as much as a half an inch into her neck. In fact, was still found like that the next morning because it was tied like that. *Her body had received blows and had been drug and showed the abuse that resulted from being drug.*

(T1106-07; emphasis added).

Number two, the wounds around the throat, there's not a single wound from that strap. *There are at least six. Now I don't know whether that ligature slipped from one to the other or whether it was loosened and allowed to not, to discontinue the pressure and reapply it, I can't tell you that, no one can. But we do know this. That the pressure was applied again and again and again in six different positions on her neck....*

(T1110).

As the defense pointed out in closing argument, when Steffini was found, the bra was still wrapped around her neck, it was still tight, but the ligature injuries weren't "necessarily" from "a constant pressure by a person just sitting there holding it for two to three minutes" (T1120). Counsel further argued:

> What we know about the abrasions and the dragging of the body i[s] that the back of her neck showed abrasions from scraping and rubbing of the ligature. That could have happened when her body was being dragged. Causing the moving of the ligature, making all of those marks on her neck.

(T1122).

Viewed in the light most favorable to Travis, *State v. Avery*, 120 S.W.3d 196, 200 (Mo.banc 2003), the evidence discussed above shows that Steffini was dragged along the ground and that the strap around her neck was moved which caused multiple abrasions. Based on the evidence discussed above, and other evidence adduced at trial, the jury could have found the following facts:

1. Steffini was strangled by the ligature.

2. The strangling could have occurred according to Sgt. Lawzano's account of Travis' statement.

3. The strangling could have occurred by Steffini being dragged or pulled along the ground by someone holding the end of a bra strap tied around her neck.

4. Travis moved Steffini by wrapping a bra strap around her neck to use to pull her along the ground with a bra strap tied around her neck.

5. The injuries to Steffini's neck were consistent with the ligature shifting as Steffini was pulled along the ground.

6. In pulling Steffini along the ground with a bra strap tied around her neck, Travis "consciously disregard[ed]" the "substantial and unjustifiable risk" that doing so would cause Steffini's death, and that "disregard [was] a gross deviation from what a reasonable person would do in the circumstances" (A8 – Instruction A).

Had the jury been given Instruction A, the jury could have found that Travis wrapped Steffini's bra strap around her neck and used it to pull her along the ground, and in so doing, there was "a substantial and unjustifiable risk" that he would "cause [her] death and he consciously disregard[ed] that risk..."

For these reasons, and for the reasons presented in Travis' initial brief, the trial court erred in failing to instruct the jury on involuntary manslaughter in accordance with Instruction A.

FOUR

(Replying to Respondent's Argument Point VI)

1. The pre-*Ring*, pre-*Whitfield* cases that respondent relies on are no longer good authority on the proof required to make a crime death-eligible.

2. Penalty phase is not a "no-holds-barred" evidentiary free for all.

1. Respondent relies on *State v. Smith*, 32 S.w.3d 532, 556 (Mo.banc 2000) and *State v. Smith*, 649 S.W.2d 417, 430 (Mo.banc 1983), both issued prior to *Ring v. Arizona*, 536 U.S. 584 (2002) and *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003), to support its argument that only one statutory aggravating circumstance, proved to exist beyond a reasonable doubt, is needed to support a death sentence and no other facts must be made beyond a reasonable doubt (Resp.Br. 94-95).

Respondent seeks to limit *Ring* arguing it held only that a jury, not a judge, must find the statutory aggravating circumstances because they operate as the functional equivalent of an element of a greater offense[1]

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[1] Respondent evidently agree with appellant's Point V: that statutory aggravating circumstances, as elements of the greater offense of

(Resp.Br. 96). *Ring* goes far further than respondent would wish. *Ring* held, "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id*. at 589. Because this holding was premised on the Sixth Amendment's right to jury trial, and on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the holding is not just that the jury must make that decision: the holding is that the jury must make that decision – and all "determination[s] of any fact on which the legislature conditions an increase" in the maximum punishment beyond a reasonable doubt.

Respondent likewise seeks to restrict *Whitfield*: "its holding is limited only to the issue of whether judge or jury must make the determinations of whether aggravating circumstances warrant death or whether mitigating circumstances outweigh aggravating circumstances, and does not require proof of there determinations beyond a reasonable doubt." (Resp.Br. at 99). *Whitfield* cannot be so limited. *Whitfield* relied on *Ring* and the Sixth Amendment. *Whitfield* may not have anticipated its impact, but that does not change its holding. To the

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aggravated or "capital" first degree murder, must be pled in the charging document.

extent that the newly issued jury instructions failed to comply with *Ring* and *Whitfield*, the Court may send them back to the instructions committee for further revisions.

2. Respondent asserts, "Both the state and the defendant may introduce any evidence pertaining to the defendant's character in order to help the jury assess punishment" (Resp.Br. 92). In pertinent part, § 565.030.4 provides: "Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 562.032, may be presented *subject to the rules of evidence at criminal trials*" (emphasis added). Penalty phase is not a free for all at which the state may introduce any and every sort of evidence regardless of the reliability and prejudicial effect of that evidence.

CONCLUSION

For the foregoing reasons, appellant affirms the Conclusion of his initial brief and prays that this Court will reverse the judgment of the circuit court and remand for a new trial or, alternatively, a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 4,330 words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 8th day of March, 2004, to Adriane Crouse, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102, and a copy of the same was emailed to Adriane.Crouse@ago.mo.gov.

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