IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Appeal No. SC96867
	)	
EDWARD HUGHES,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE JIMMIE M. EDWARDS, JUDGE AT TRIAL AND SENTENCING

APPELLANT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

The State charged Appellant, Edward Hughes, with two counts of felony possession of a controlled substance and one count of possession of drug paraphernalia in the Circuit Court for the City of St. Louis, Cause No. 1522-CR04504-01. The charges were the subject of a bench trial that began July 26, 2016, with the Honorable Jimmie M. Edwards, presiding. That day the court convicted Appellant as charged. On September 2, 2016 the trial court sentenced Appellant to two (2) seven-year terms to run concurrent in the Missouri Department of Corrections for the possession counts and a concurrent 30-day jail sentence for the paraphernalia count. On September 13, 2016, Appellant filed his notice of appeal to the Missouri Court of Appeals – Eastern District.

The Court of Appeals affirmed the convictions and sentence in an opinion issued October 24, 2017. However, this Court sustained Appellant's application for transfer on April 3, 2018. This Court has jurisdiction over this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

* * *

The Record on Appeal will be cited to as follows: Legal File, "LF"; and the Trial Transcript, "Tr."

Statement of Facts

The State charged Edward Hughes in the Circuit Court for the City of St. Louis with three (3) counts: Count I; possession of a controlled substance (Class C Felony) (heroin), Count II; possession of controlled substance except 35 grams or less of marijuana (Class C Felony) (cocaine base) and Count III; possession of drug paraphernalia (Class A Misdemeanor) (LF 11-12). The State alleged, without pleading, that Edward was a prior and persistent offender (LF 11-12). The case proceeded to bench trial on July 26, 2016 with the Honorable Judge Jimmie M. Edwards presiding.

The State pled on September 9, 2015 Edward was a passenger in a vehicle being operated by another individual (LF 11-12). Defense counsel sought to exclude the evidence pertaining to Counts I and III arguing they were byproducts of an illegal search (LF 17-20). The court decided it would take up the motion to suppress the evidence along with the evidence adduced at trial (Tr. 3).

The State first called Ryan Murphy, an officer with the St. Louis City Police Department (Tr. 6). Officer Murphy said he witnessed a black Chevy Impala violate a traffic light while headed south on Salisbury (Tr. 6-7). The car turned west on Hebert and the officer activated the emergency lights (Tr. 7). After curbing the vehicle, Officer Murphy saw it had three occupants (Tr. 8). Edward Hughes, the rear seat passenger, had a bench warrant out for his arrest (Tr. 8-9).

Officer Murphy testified Edward was removed from the vehicle and placed in handcuffs (Tr. 9). Officer Murphy further stated that a "search incident to arrest" of

Edward yielded a "knotted plastic bag containing an off white substance" from Edward's trousers which Murphy believed was heroin, an illegal narcotic (Tr. 10, 18). Officer Murphy placed Edward under arrest for suspicion of possession of a controlled substance (Tr. 10).

After Edward had been handcuffed and removed from the vehicle, Officer Murphy claimed he saw a nylon Nike bag in the back seat of the vehicle (Tr. 10). Officer Murphy said his partner seized the bag after asking Edward if the bag was his (Tr. 10, 19). Officer Murphy testified the bag contained a digital scale, an electric grinder with an off white residue and one orange pill bottle with knotted baggies of suspected heroin and cocaine base (Tr. 10).

At trial, Officer Murphy could not say which suspected narcotics he took from Edward's pocket and which were found in the bag:

> Q. And now are you able to identify which items were removed from defendant's front pocket?
> A. From the front pocket -- I'm not familiar with the laboratory packaging, so I'm not exactly sure which one came out of his pants pocket.

(Tr. 13). Officer Murphy further admitted his partner's search of the bag occurred after Edward was already in handcuffs (Tr. 19-20).

A stipulated laboratory report (State's Exhibit #3) was admitted into evidence (Tr. 23). The defense offered no evidence.

The defense argued the search of the nylon bag was unlawful as a search incident to arrest because Edward was already arrested and secured in handcuffs at the time the bag was searched (Tr. 25). He had, the defense stated, no access to the bag at the time it

was searched (Tr. 25). Because Officer Murphy could not say which suspected drug had come from Edward's pocket (as opposed to from the bag), all the evidence should be suppressed (Tr. 25-26). The State countered that personal effects closely associated with an arrestee could be searched incident to arrest (Tr. 26). Additionally, the circuit attorney stated, the bag would have been subject to an inventory search sooner or later (Tr. 27). Defense counsel responded that the car and its occupants were permitted to leave so inevitable discovery did not apply to the case (Tr. 29).

Though agreeing this was not an "inventory situation," the court concluded that some greater proof of an expectation of privacy was required to trigger the Fourth Amendment with regard to the bag (Tr. 29-30). If, for instance, the bag had had a lock on it, then "the Fourth Amendment would have kicked in in terms of the expectation of privacy" (Tr. 29-30). The court overruled the motion to suppress the evidence (Tr. 30). The court then found Edward guilty as charged (Tr. 30).

On September 2, 2016 the court sentenced Edward to seven (7) years on Count I, seven (7) years on Count II, and thirty (30) days on Count III, with all sentences to run concurrently (Tr. 33-34; LF 21-24; Appendix A1-A4). This appeal follows (LF 27-31). To avoid repetition, additional facts may be cited in the Argument portion of this brief.

Point Relied On

The trial court erred and abused its discretion in denying Appellant's Motion to Suppress Evidence and in admitting physical evidence of drugs and drug paraphernalia at trial because the court's rulings violated Appellant's constitutionally protected rights to be free of unreasonable searches and seizures, as guaranteed by article I, § 15 of the Missouri Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, in that the State failed to show that police searched the Appellant's bag pursuant to lawful authority as they conducted an ostensible "search incident to arrest" of Edward's bag even though Edward was, at the time, secured in handcuffs. Nor could the State prove by a preponderance of evidence which drugs admitted at trial came from Edward's person and which came from the illegal search of his bag. Thus all the physical evidence should have been suppressed.

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

Davis v. United States, 564 U.S. 229 (2011)

State v. Carrawell, 481 S.W.3d 833 (Mo. banc 2016)

State v. Grayson, 336 S.W.3d 138 (Mo. banc. 2011)

Missouri Supreme Court Rule 30.20

Revised Statutes of Missouri, § 542.296.6 (2000)

Missouri Constitution, Article I, § 15

U.S. Constitution, Amendments IV and XIV.

Argument

The trial court erred and abused its discretion in denying Appellant's Motion to Suppress Evidence and in admitting physical evidence of drugs and drug paraphernalia at trial because the court's rulings violated Appellant's constitutionally protected rights to be free of unreasonable searches and seizures, as guaranteed by article I, § 15 of the Missouri Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, in that the State failed to show that police searched the Appellant's bag pursuant to lawful authority as they conducted an ostensible "search incident to arrest" of Edward's bag even though Edward was, at the time, secured in handcuffs. Nor could the State prove by a preponderance of evidence which drugs admitted at trial came from Edward's person and which came from the illegal search of his bag. Thus all the physical evidence should have been suppressed.

Preservation

Before trial, Appellant filed a Motion to Suppress Evidence (LF 17-20). The motion alleged police violated Edward's right to be free of unreasonable searches and seizures when they searched his nylon bag after Appellant was removed from the vehicle and placed in handcuffs (LF 17-20). With the trial court's permission defense counsel argued the motion to suppress at the conclusion of the bench trial, arguing that Edward was out of the vehicle, under arrest, and in handcuffs for a bench warrant before either officer searched any items in the car (Tr. 24). If the Court concludes the matter is not preserved, Appellant seeks plain error review. Missouri Supreme Court Rule 30.20.

Standard of Review

At a hearing on a motion to suppress, "the state bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled." § 542.296(6) RSMo (2000); State v. Grayson, 336 S.W.3d 138, 142 (Mo. banc. 2011) (citing State v. Franklin, 841 S.W.2d 639, 644 (Mo. banc. 1992)). An appellate court considers 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. Grayson, *supra* (citing State v. Pike, 162 S.W.3d 464, 472 (Mo. banc. 2005)).

This Court defers to the trial court's determination of credibility and factual findings, inquiring only "whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous." Grayson, *supra* (citing State v. Goff, 129 S.W.3d 857, 862 (Mo. banc. 2004)) (and quoting State v. Edwards, 116 S.W.3d 511, 530 (Mo. banc. 2003)). By contrast, legal "determinations of reasonable suspicion and probable cause" are reviewed *de novo*. Grayson, *supra* (citing Ornelas v. United States, 517 U.S. 690, 699 (1996)). Where the trial court fails to make findings, "[t]he facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." State v. Norfolk, 366 S.W.3d 528, 531 (Mo. banc. 2012) (citing State v. Galazin, 58 S.W.3d 500, 507 (Mo. banc. 2001)).

Analysis

The Warrantless Search of the Bag was Unlawful

The Fourth Amendment to the U.S. Constitution, enforceable against the states through the due process clause of the Fourteenth Amendment, guarantees the right of the people to be secure from unreasonable searches and seizures. State v. Williams, 382 S.W.3d 232, 234-235 (Mo. App. W.D. 2012) (citing State v. Ramires, 152 S.W.3d 385 (Mo. App. W.D. 2004)). This same right is guaranteed by article I, section 15 of the Missouri Constitution. State v. Rushing, 935 S.W.2d 30, 34 (Mo. banc 1996). Pursuant to these constitutional guarantees, warrantless searches and seizures are deemed per se unreasonable subject only to a few specifically established and well-delineated exceptions. Arizona v. Gant, 556 U.S. 332, 338 (2009). None of those exceptions apply in Edward's case.

Police officers testified Edward was under arrest and handcuffed at the time the bag was seized and searched. (Tr. 18-19). Incident to arrest, officers may lawfully search "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). That particular exception to the warrant requirement does not apply to Edward's bag. Edward did not have immediate access to the bag because he was out of the vehicle and handcuffed when the bag was seized and searched. (Tr. 9, 11).

Searching incident to arrest does not give officers *carte blanche* to search everything in the vicinity of an arrestee. In United States v. Chadwick, the United States

Supreme Court observed that once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. United States v. Chadwick, 433 U.S. 1, 14 (1977) *overruled on other grounds by* California v. Acevedo, 500 U.S. 565, 579 (1991). In Gant, the Court clarified, in the context of a vehicle search, that the space searched incident to an arrest is only that space within an arrestee's "immediate control" Gant, 556 U.S. at 335.

In 2016, this Court confirmed the limitations on a search incident to arrest. In State v. Carrawell, 481 S.W.3d 833, 836 (Mo. banc 2016), Mr. Carrawell was detained by police officers after he had uttered some vulgarities in the presence of his neighbors directed toward the officers. Mr. Carawell was carrying a plastic grocery bag in his hand when officers approached to detain him for disturbing the peace. Id. He was commanded to release the plastic bag which he refused to do. Id. During the attempt to handcuff Mr. Carrawell, one officer "forcibly removed" the bag from his hand and as it hit the ground a breaking sound was heard. Id. Mr. Carrawell was placed under arrest for peace disturbance and placed in a patrol car, at which time the officers determined the plastic bag then sitting on the back of the patrol car, should be searched. Id. Mr. Carrawell was subsequently found guilty of possession of heroin after the contents of the bag were tested. Id.

This Court concluded the search of Carrawell's bag was unlawful because it was not "incident to arrest." Carrawell, 481 S.W.3d at 845. What mattered to the Court was whether the bag was within Carrawell's immediate control, which it was not. Id.

The rationale of Carrawell applies here because Edward's bag was likewise not under his immediate control when it was searched. The bag was in the rear of the car and discovered only after Edward was arrested and cuffed (Tr. 10, 20). Indeed, unlike Mr. Carrawell, police never saw Edward in possession of the bag at all.

The Court in Carrawell ultimately did not find the trial court erred by failing to suppress the evidence because at the time of Carrawell's arrest and motion to suppress there was caselaw suggesting such searches were legal. Carrawell, 481 S.W.3d at 486. But, the Court wrote, "such searches should no longer be deemed lawful" Id. Carrawell was decided nine months prior to Edward's trial, and defense counsel brought the case to the trial court's attention (LF 17-20; Tr. 25). Nevertheless, the trial court did not consider whether the bag was within Edward's immediate control when it overruled the motion to suppress (Tr. 29-30).

The issue in this appeal is whether the trial court erred by failing to suppress the evidence that resulted from the illegal search of Edward's bag. Defense counsel argued initially that the evidence in the bag should be excluded. The exclusionary rule provides that "evidence obtained as a direct result of an unlawful search or seizure is considered 'fruit of the poisonous tree' and is inadmissible at trial." State v. Lucas, 452 S.W.3d 641, 642-43 (Mo. App. W.D. 2014) (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961) and Wong Sun v. United States, 371 U.S. 471, 484 (1963)).

The Gant decision governed the search and seizure of Edward's bag. The trial court (and the Court of Appeals) overlooked that the facts of Edward's case are aligned with the facts in Gant and not the facts in State v. Ellis, 355 S.W.3d 522, 524-25 (Mo. App. E.D. 2011) and Carrawell. Indeed, the "good faith exception" this Court hearkened to in Carrawell was articulated in State v. Johnson, 354 S.W.3d 627, 635 (Mo. banc 2011). But in Johnson, decided in 2011, this Court announced that Gant thereafter would control the searches of automobiles. Johnson 354 S.W.3d at 633 ("After Gant, when an arrestee is secured out of reaching distance of a vehicle, officers are no longer constitutionally allowed to search the passenger compartment of a vehicle incident to an arrest based upon the rational of officer safety"). Thus, Gant prescribed the binding precedent controlling Edward's arrest and subsequent search and not cases whose "reasoning is based on a misunderstanding of law."[1]

In Gant, Gant's car was searched after he was out of the car and handcuffed. Gant, 556 U.S. at 336. Likewise, Edward was removed from the vehicle he was in and handcuffed prior to police retrieving a bag from the vehicle (Tr. 10). In contrast, the Court in Ellis did not believe Gant necessarily extended to the search of backpacks and purses associated with detainees encountered on foot; items, the Court said, "that are on the person of an arrestee at the time of the arrest" Ellis, 355 S.W.3d at 524. Mr. Carrawell, like Mr. Ellis, was on foot carrying a bag when the bag was illegally searched. Carrawell, 481 S.W.3d 836. So, to that extent, Ellis and Carrawell were factually similar.

[1] Carrawell, 481 S.W.3d at 839 referring to Ellis, *supra*, and State v. Rattler, 639 S.W.2d 277 (Mo. App. E.D. 1982).

But post-Gant, there was no binding precedent authorizing the search of the car and, subsequently, Edward's bag. It is illogical to assume that automobiles enjoy the protection against unreasonable search and seizure announced in Gant but not so their contents if they are in a bag or other container.

Neither does the so-called "automobile exception" legitimize the officers' warrantless search and seizure because Officer Murphy did not articulate probable cause to believe the car or its contents contained any contraband. See e.g.; Acevedo, 500 U.S. at 580; State v. Middleton, 995 S.W.2d 443, 458 (Mo. banc 1999) ("police may search a vehicle and seize contraband found if there is probable cause to believe the vehicle contains contraband and exigent circumstances necessitate the search").

The trial court mistakenly applied the good faith exception to the facts of Edward's case. The purpose of the exclusionary rule is not to "'redress the injury' occasioned by an unconstitutional search" but, rather, "to deter future Fourth Amendment violations." Davis v. United States, 564 U.S. 229, 236-37 (2011) (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)). No deterrence is accomplished if trial courts refuse to acknowledge the dictates of the Missouri and United States Supreme Courts. The trial court here erred as a matter of law in failing to suppress the evidence seized in the warrantless search of Edward's bag after he had been taken into custody.

The State Did Not Prove Which Drug Came from Edward's Pocket

This Court must ultimately reverse for suppression of all the evidence of suspected narcotics and paraphrenalia. Although defense counsel initially seemed willing to concede the search of Edward's person was a valid search incident to arrest (Tr. 5, 24; LF

17-20), ultimately the State could not prove which suspected drug police had seized from Edward's pocket and which suspected drug had come from the bag (Tr. 13). Defense counsel moved to have all the evidence suppressed because Officer Murphy could not say which piece of evidence was found in Edward's pocket (Tr. 25-26).

In the absence of proof of the origin of the suspected drugs, neither the trial court nor this Court can say which drugs were illegally seized. Appellant can find no Missouri cases directly on point, but Missouri courts understand that, at least for foundational issues, drugs are not readily identifiable and a chain of custody is required for their admission. State v. Davenport, 924 S.W.2d 6, 10 (Mo. App. E.D. 1996). "The chain of custody is only necessary when evidence is not distinguishable as is the case where items such as drugs are seized." Id (citing State v. Watts, 813 S.W.2d 940, 944 (Mo. App. E.D. 1991)). Here, Officer Murphy only seized the drugs in Edward's pocket; Murphy's partner discovered the drugs and paraphernalia in the bag which Murphy apparently packaged (Tr. 10). The source of the drugs matters not only because some of the items were the product of an illegal search, but also because the two drugs were different – one was heroin and the other cocaine base (LF 11-12). Where police knowingly engage in warrantless searches, it falls to the State to prove what drugs were seized from where.

Conclusion

WHEREFORE, for the foregoing reasons, Appellant, prays this Honorable Court reverse the denial of his motion to suppress evidence and reverse his convictions and sentences in all counts.

Respectfully Submitted,

/s/ Scott Thompson

_____

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Certificate of Service

An electronic copy of the forgoing Appellant's Statement, Brief, and Argument was delivered to this Court and to the Office of the Attorney General, State of Missouri, Jefferson City, Missouri, c/o shaun.mackelprang[at]ago.mo.gov via the Missouri E-filing System on this 18th day of May, 2018.

/s/ Scott Thompson

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Certificate of Compliance

I, Scott Thompson, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, the certificates of compliance and service, and appendix, the brief contains 3699 words, which does not exceed the 31,000 words allowed for an appellant's brief. I hereby certify that this document is in PDF-searchable format and has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software, with updated virus definitions, and has been found virus-free.

/s/ Scott Thompson

Attorney for the Appellant