No. SC96867

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

EDWARD HUGHES,

Appellant.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Jimmie M. Edwards, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Hughes appeals his convictions of two counts of the class C felony of possession of a controlled substance and the class A misdemeanor of unlawful use of drug paraphernalia (*see* L.F. 21-24). He asserts that the trial court abused its discretion in admitting physical evidence of drugs and drug paraphernalia in violation of his right to be free from unreasonable searches and seizures (App.Sub.Br. 9).

* * *

On September 9, 2015, at about 10:00 p.m., Officer Ryan Murphy and his partner were traveling south on Salisbury toward Natural Bridge (Tr. 6). They saw "a black Chevy impala violate the red electric signal while traveling southbound approximately four car lengths in front of [them]" (Tr. 7). They activated their emergency equipment, but the vehicle did not immediately stop (Tr. 7). The vehicle continued for a short distance, made a U-turn, and parked on Hebert (Tr. 7).

The officers approached the vehicle (Tr. 7). Officer Murphy approached on the driver's side, and his partner approached on the passenger's side (Tr. 8). There were three people inside the vehicle, including Mr. Hughes, who was sitting in the rear passenger seat (Tr. 8). Officer Murphy identified himself and obtained pedigree information from all three occupants (Tr. 8). A computer inquiry revealed that Mr. Hughes had a bench warrant for his

arrest (Tr. 8).

The officers asked Mr. Hughes to step out of the vehicle, and he complied (Tr. 9). Officer Murphy told Mr. Hughes he was under arrest (Tr. 9). As Officer Hughes put him in handcuffs, Mr. Hughes said, "oh, man, this is f---ing bulls---" (Tr. 9).

Officer Murphy then searched Mr. Hughes incident to arrest and found "a clear, knotted-off baggie in his trousers pant pocket" that contained a substance (Tr. 10, 18). Based on his experience, Officer Murphy believed that the substance was heroin (Tr. 10). Officer Murphy then placed Mr. Hughes under arrest for possession of a controlled substance (Tr. 10).

Officer Murphy observed "a black, Nike nylon bag with a drawstring" that was "[i]n the back seat, directly next to" Mr. Hughes (Tr. 10). At the time of the arrest, Mr. Hughes was "still in immediate reach of that bag" (Tr. 11). He was standing between Officer Murphy and the vehicle (Tr. 19).

Officer Murphy asked Mr. Hughes if the bag belonged to him, and Mr. Hughes said that it did (Tr. 10). Officer Murphy's partner retrieved the bag and, "while standing next to [Officer Murphy], in the presence of [Officer Murphy] and [Mr. Hughes], conducted a search of that bag" (Tr. 10). The officer found an "electric grinder with white residue, digital scale with white residue, and orange pill bottles which contained clear, knotted-off baggies of what [the officers] believed to be additional heroin and crack cocaine" (Tr.

10). Officer Murphy told Mr. Hughes that he was also going to be charged with another count of possession of a controlled substance and unlawful use of drug paraphernalia (Tr. 11). A subsequent analysis of the substances found in Mr. Hughes's pocket and the nylon bag revealed the presence of heroin and cocaine base (*see* Tr. 23; State's Ex. 1, 3).

The State charged Mr. Hughes with two counts of the class C felony of possession of a controlled substance (one count based on heroin and one count based on cocaine base), and the class A misdemeanor of unlawful use of drug paraphernalia (*see* L.F. 3, 8-9, 11-12).[1] Before trial, Mr. Hughes filed a motion to suppress physical evidence, in which he alleged that, although he was lawfully arrested, the police searched the nylon bag after "the bag was already outside of [his] control," and after he had been "handcuffed and removed from the Impala" (L.F. 19). He alleged that, accordingly, under *State v. Carrawell*, 481 S.W.3d 833 (Mo. 2016), the bag was not lawfully searched

[1] Although the offenses were each listed at the top of the Information, Counts II and III were not correctly drafted (*see* L.F. 11-12). The Information also alleged that Mr. Hughes was a prior and persistent drug offender and a prior and persistent offender; however, he was neither found to be nor sentenced as either one (*see* L.F. 11-12, 21-24). Mr. Hughes does not assert a claim related to the sufficiency of the Information.

incident to arrest (L.F. 19). He did not allege that the officers unlawfully searched the vehicle (L.F. 17-19).

At a bench trial on July 26, 2016, the court took the motion to suppress with the case (Tr. 3). Defense counsel stated that the motion to suppress evidence was addressed to "the evidence constituting the basis of charges I and III" (Tr. 5).

In closing argument, defense counsel argued (as alleged in the motion to suppress) that the evidence found in the nylon bag was not obtained pursuant to a lawful search (Tr. 24). Defense counsel stated that the defense was not challenging the admission of the evidence found in Mr. Hughes's pocket; she stated: "We're not contesting that the pat down was a lawful search incident to arrest. We are contesting what was found in the black nylon bag was not" (Tr. 24). Counsel then requested, however, that the court suppress all of the physical evidence, because Officer Murphy testified that he "could not remember which piece of evidence was found on Mr. Hughes' person, as opposed to which was found in the bag" (Tr. 25-26).

The prosecutor argued that the search of Mr. Hughes's person and his bag were permissible searches incident to arrest under Missouri law (Tr. 26-27). The prosecutor pointed out that, at the time of his arrest, Mr. Hughes was "within reach of the bag" (Tr. 26-27). The prosecutor argued that the case was distinguishable from *Carrawell*, "in that the defendant was within

immediate control of the bag (Tr. 27). The prosecutor further asserted that "even if everything had not been searched on the scene, . . . everything would have been found pursuant to an inventory search" (Tr. 27).

The court observed that "this is not an inventory situation," but it found that, after Mr. Hughes "indicated that the bag belonged to him, . . . certainly the officers had a right to take the bag in light of the proximity of the bag to the defendant, as well as the fact that it happened immediately" (Tr. 29). The trial court overruled the motion to suppress (Tr. 29).

The court then found Mr. Hughes guilty of all three counts (Tr. 30; L.F. 21-24). On September 2, 2016, the court sentenced Mr. Hughes to seven years for each count of possession of a controlled substance and thirty days for unlawful use of drug paraphernalia (Tr. 33-34; L.F. 22-23).

ARGUMENT

I.

The trial court did not abuse its discretion in admitting the physical evidence seized during a search of Mr. Hughes's person and personal effects at the time of his arrest.

Mr. Hughes asserts that the trial court abused its discretion "in admitting physical evidence of drugs and drug paraphernalia in violation of his right to be free from unreasonable searches and seizures (App.Sub.Br. 10). He also asserts that, with regard to substance that was seized from his pocket, the State failed to provide an adequate foundation for its admission because Officer Murphy could not identify at trial which baggie was found in Mr. Hughes's pocket (App.Br. 10, 15-16).

A. Preservation and the standard of review

With regard to the evidence that was found in the nylon bag, Mr. Hughes's constitutional claim was preserved by a timely motion to suppress that was taken with the case and argued to the court. "A trial court has wide discretion in deciding whether to admit evidence, and its decision will only be overturned for an abuse of discretion." *State v. Hosier*, 454 S.W.3d 883, 895 (Mo. 2015). "When reviewing the trial court's decision to overrule a motion to suppress, this Court considers the evidence presented both at the suppression hearing and at trial to determine whether sufficient evidence exists in the

record to support the trial court's decision." *Id.* at 891.

"This Court defers to the trial court's credibility determinations and factual findings, inquiring only whether the decision is supported by substantial evidence, and reverses only if the trial court's decision is clearly erroneous." *Id.* "Determinations of whether there was reasonable suspicion or probable cause are questions of law that are reviewed de novo." *Id.*

With regard to the physical evidence that was found in his pocket, Mr. Hughes's constitutional claim was waived. Defense counsel expressly stated that the defense was not contesting the search of Mr. Hughes's pocket; counsel stated, "We're not contesting that the pat down was a lawful search incident to arrest" (Tr. 24; *see also* Tr. 5).

"There is a fundamental difference in appellate review of the admission of evidence in a case where no objection is made and where a party apparently consents to the admission." *State v. Woods*, 357 S.W.3d 249, 255 (Mo.App. W.D. 2012). "When one party makes the statement 'no objection' to the admission of evidence, this is equivalent to affirmatively waiving appellate review." *Id.* Here, counsel expressly stated that the defense was "not contesting" (or objecting to) the evidence found in Mr. Hughes's pocket.

Mr. Hughes's challenge to the foundation for the physical evidence found in his pocket was also waived. At no point during the presentation of evidence did defense counsel object to the foundation for that evidence (Tr. 6-

22). "Claims of inadequate foundation will not be considered for the first time on appeal." *State v. Blue*, 875 S.W.3d 632, 633 (Mo.App. E.D. 1994). " 'It is particularly important that where an inadequate foundation has been laid for admission of evidence that the objection made be specific as such foundation deficiencies can frequently be remedied.' " *Id.* (quoting *State v. Jones*, 569 S.W.2d 15, 16 (Mo.App. St.L.D. 1978)).

Insofar as Mr. Hughes requests plain error review (*see* App.Br. 10), this Court has discretion to review for plain error when the court finds that manifest injustice or miscarriage of justice has resulted. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. 2006). " '[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.]' " *Id.* "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id.*

B. The trial court properly admitted the evidence found in Mr. Hughes's pocket

Under the Fourth Amendment to the United States Constitution and Article I, section 15 of the Missouri Constitution, the people have a right to be free from unreasonable searches and seizures. *State v. Hosier*, 454 S.W.3d at 892 n. 6. The Missouri provision is coextensive with the Fourth Amendment, and the same analysis applies under both provisions. *Id.*

The search of an individual incident to a lawful arrest has been held to be a reasonable search under the Fourth Amendment. In *United States v. Robinson*, 414 U.S. 218, 235 (1973)—in upholding the search of a cigarette pack found on the arrested person—the United States Supreme Court stated, "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." The Court continued, "It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id*.

Here, Officer Murphy testified that there was a bench warrant for Mr. Hughes's arrest (Tr. 8). He testified that, after he arrested Mr. Hughes, he searched Mr. Hughes's person and found a clear baggie in Mr. Hughes's pocket that appeared to contain a controlled substance (Tr. 10, 18). This was a permissible search incident to arrest under settled precedent, and Mr. Hughes does not allege that his arrest on the bench warrant was unlawful, or that the search of his pocket was unlawful.

Instead, having argued that the evidence found in his bag was illegally seized, Mr. Hughes argues that the State's alleged inability to prove which

drugs came from his pocket and which drugs came from his bag should have resulted in suppression of all of the evidence (App.Br. 15-16). He asserts that, "[i]n the absence of proof of the origin of the suspected drugs, neither the trial court nor this Court can cay which drugs were illegally seized" (App.Br. 16). He points out that, "at least for foundational issues, drugs are not readily identifiable and a chain of custody is required for their admission" (App.Br. 16). He argues, "Where police knowingly engage in warrantless searches, it falls to the State to prove what drugs were seized from where" (App.Br. 16).

At trial, however, defense counsel expressly stated that the defense was not contesting the legality of the search of Mr. Hughes's pocket, and she stated that the motion to suppress was addressed only to the evidence that supported Counts I and III (Tr. 5, 24). This amounted to a concession that the evidence supporting Count II (the cocaine base) was found in Mr. Hughes's pocket and was not subject to suppression.

Accordingly, Mr. Hughes should not now be heard to assert that the State failed to prove which item of physical evidence was found in Mr. Hughes's pocket. Had Mr. Hughes's objected to the admission of the evidence on that basis, or argued in his motion to suppress that the State could not prove which item was seized pursuant to the lawful search incident to arrest, the State would have had an opportunity to marshal additional evidence to show which item had come from Mr. Hughes's pocket. Officer Murphy

specifically identified the items of physical evidence as "the same items that were removed from the defendant on September 9, 2015," but he stated that he was "not familiar with the laboratory packaging, so [he was] not exactly sure which one came out of his pants pocket" (Tr. 13). Had there been a proper objection to the foundation, the State could have called a witness from the laboratory to testify about additional chain of custody.[2] And under the plain error standard, it is Mr. Hughes's burden to prove that the State would not have been able to provide that foundation.

Respondent acknowledges that, if some of the evidence should have been suppressed due to an unlawful search, the specific identity of the drug found in Mr. Hughes's pocket is important for other reasons. Specifically, it is important because, if the other evidence was illegally seized, then only the conviction based upon the drugs found in the pocket should be affirmed. That is not a question, however, that goes to the *admissibility* of the evidence in the first instance. In any event, because the trial court properly admitted all

[2] Because Officer Murphy identified the physical evidence at trial, the basic foundation for their admission was laid. *See State v. Cramer*, 465 S.W.3d 508, 511 (Mo.App. S.D. 2015) ("when an exhibit is identified positively at trial, chain of custody evidence no longer is required to prove that an item produced at trial is the item taken into custody as evidence").

of the evidence found in Mr. Hughes's possession, all of Mr. Hughes's convictions were supported by properly admitted evidence, and Mr. Hughes's claim is without merit.

C. The trial court properly admitted the evidence found in Mr. Hughes's bag

In *State v. Carrawell*, 481 S.W.3d 833, 838-45 (Mo. 2016), this Court limited the search-incident-to-arrest exception to the warrant requirement and held that, when a personal item (*e.g.*, a bag) is no longer within an arrestee's area of immediate control, the item cannot be searched incident to arrest. The Court observed that at the time the police searched the defendant's bag while "outside the police car," the defendant "had already been handcuffed and placed into the back of the police car." *Id.* at 838. The Court concluded that, under those circumstances, the "bag was not with [the defendant's] immediate control." *Id.*

Even assuming that the rule in *Carrawell* would apply under the facts of Mr. Hughes's case, the trial court properly declined to suppress the physical evidence seized in Mr. Hughes's case. At the time of Mr. Hughes's arrest (and the search incident to that arrest), the opinion in *Carrawell* had not yet been handed down. The evidence showed that Mr. Hughes was arrested and searched on September 9, 2015 (Tr. 6, 9-10). At that time, under Missouri law, a search of the defendant's person and personal effects was

permissible. *See id*. at 846. Thus, in searching Mr. Hughes incident to arrest, the officers were acting in good faith. *Id*.

Accordingly, the exclusionary rule did not apply. As the Court stated in *Carrawell*—which was handed down some months after the search, on January 12, 2016—" '[W]hen an officer conducts a search incident to arrest in "objectively reasonable reliance" on binding appellate precedent that is later overturned, the exclusionary rule does not suppress the evidence obtained as a result of that search.' " *Id*. Thus, here, as in *Carrawell*, the exclusionary rule did not apply.

In addition, Mr. Hughes's case is distinguishable from *Carrawell*, in that Mr. Hughes was not confined in the police car during the search of his bag. Rather, Mr. Hughes was still standing next to the vehicle he had been riding in, and he was in close proximity to his bag (Tr. 10-11). The evidence showed that the bag was "[i]n the back seat, directly next to" Mr. Hughes (Tr. 10). And, at the time of the arrest, Mr. Hughes was "still in immediate reach of that bag" (Tr. 11). Moreover, the mere fact that Mr. Hughes had been handcuffed did not mean that the bag was not within his immediate control or that Mr. Hughes could not have gotten access to his bag. *See United States v. Shakir*, 616 F.3d 315, 317-21 (3rd Cir. 2010) (although defendant was handcuffed and restrained by two police officers at the time his bag was searched, the search was lawful because the defendant was standing up at

the time of the search, his bag was right next to him, and the police had reason to believe that one or possibly more of the defendant's accomplices was nearby); *United States v. Perdoma*, 621 F.3d 745, 750-51 (8th Cir. 2010) (holding that a search of a bag was permissible incident to arrest even though the officer had restrained the defendant and taken the bag because "the search of the bag occurred in close proximity to where [the defendant] was restrained").

In short, this is not a case where the rule announced in *Carrawell* should be applied. Rather, this is a case that should be governed by *Robinson*, *supra*, which established that it is permissible, incident to a lawful arrest, to search personal effects that are closely associated with the arrestee's person or the area within the arrestee's immediate control.[3]

Although he expressly relied on *Carrawell* in the trial court (*see* L.F. 17-19), and although he asserts in his brief that "[t]he rationale of *Carrawell*

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[3] In another case currently pending before the Court—*Cletus Greene v. State*, No. SC96973—the State has suggested that the Court should reexamine its holding in *Carrawell* and reaffirm the categorical rule found in *Robinson*. To the extent that *Carrawell* might be found to be applicable here, respondent respectfully suggests that the holding in *Carrawell* should be reexamined for the reasons set forth in Respondent's Substitute Brief in *Greene*.

applies here because [his] bag was likewise not under his immediate control when it was searched," Mr. Hughes ultimately eschews reliance on *Carrawell* and now argues that "[t]he *Gant* decision governed the search and seizure of [his] bag" (App.Sub.Br. 15). He asserts that "[t]he trial court (and the Court of Appeals) overlooked that the facts of [his] 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*" (App.Sub.Br. 15).

This new claim, however, was not preserved in the motion to suppress or by any previous argument that the search violated the rule set forth in *Arizona v. Gant*, 556 U.S. 332 (2009) (*see* L.F. 17-19).[4] Accordingly, the claim should be reviewed, if at all, only for plain error. *See State v. Galazin*, 58 S.W.3d 500, 507 (Mo. 2001).

In any event, Mr. Hughes's reliance on *Gant* is misplaced. The question in *Gant* was whether it was lawful to search the defendant's *vehicle* after he had been arrested, handcuffed and locked in the back of a patrol car. *Id.* at 335. The Court observed that, "[u]nder *Chimel*[*v. California*, 395 U.S. 752 (1969)], police may search incident to arrest only the space within an arrestee's ' "immediate control," ' meaning 'the area from within which he

[4] Defense counsel made a passing reference to *Gant* before trial, but only to point out that *Carrawell* relied on *Gant* for a supporting principle (Tr. 25).

might gain possession of a weapon or destructible evidence.' " *Gant*, 556 U.S. at 335. The Court ultimately held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id*. at 343.

Here, however, Mr. Hughes cannot rely upon *Gant* because he failed to assert or prove that he had standing (*i.e.*, a reasonable expectation of privacy) in the vehicle that was searched. " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id*.

Here, Mr. Hughes did not allege—and there was no evidence—that he owned, leased, or rented the vehicle he was riding in. Rather, the evidence showed merely that he was passenger in a rear passenger seat (Tr. 8; *see also* Tr. 16-17). As such, he had no standing to challenge a search of the vehicle. *See id*. at 148 (passengers in a vehicle failed to establish that they had a legitimate expectation of privacy in the vehicle); *State v. Hindman*, 446 S.W.3d 683, 688 (Mo.App. W.D. 2014) ("A mere passenger with no ownership interest in an automobile generally lacks the requisite standing to challenge

a search of the vehicle on Fourth Amendment grounds.").

In addition, even if the rule in *Gant* were available to Mr. Hughes, the facts of his case were distinguishable, in that the record showed that—while handcuffed—Mr. Hughes was not locked in the police vehicle and he was still standing in close proximity to the vehicle and his bag. The evidence showed that the bag was in plain view "[i]n the back seat, directly next to" Mr. Hughes (Tr. 10). Moreover, at the time of the arrest, Mr. Hughes was "still in immediate reach of that bag" (Tr. 11). Thus, Mr. Hughes still could have gained access to the interior of the vehicle and his bag. *See Shakir*, 616 F.3d at 317-21 (although defendant was handcuffed and restrained by two police officers at the time his bag was searched, the search was lawful because the defendant was standing up at the time of the search, his bag was right next to him, and the police had reason to believe that one or possibly more of the defendant's accomplices was nearby).

In short, the issue in this case was never whether the police lawfully searched the vehicle in violation of *Gant*; rather, the issue was whether they lawfully searched Mr. Hughes's bag. As such, except insofar as the rule in *Gant* was extended by *Carrawell* to searches of personal effects of an arrestee, *Gant* has no direct application in this case.

D. Conclusion

In sum, Mr. Hughes waived his foundational claim and any challenge

to the evidence found in his pocket. In any event, the evidence found in his pocket was lawfully seized during a search incident to arrest. With regard to the evidence found in the bag, the bag was also lawfully searched incident to arrest. But even assuming that the rule in *Carrawell* applied, at the time of the search, Missouri law permitted a search of Mr. Hughes's bag incident to arrest. *See Carrawell*, 481 S.W.3d at 846; *see also Ellis*, 355 S.W.3d at 524-25. Thus, as in *Carrawell*, the officer searched the bag in good faith, and the exclusionary rule did not apply. In addition, unlike in *Carrawell*, the search of Mr. Hughes's bag occurred while Mr. Hughes was still in close proximity to his bag, under circumstances in which he (or potential co-actors) could have obtained access to the bag and its contents. Thus, the justifications for permitting a search of an area within reach of the defendant—officer safety and the preservation of evidence—were still present at the time of the search. This point should be denied.

CONCLUSION

The Court should affirm Mr. Hughes's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached substitute brief complies with Rule 84.06(b) and contains 4,457 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system..

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