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 REPLY BRIEF

Scott Thompson, Mo. Bar 43233
1010 Market Street
Suite 1100
St. Louis, MO 63101
314/340-7662 (ext. 238)
314/340-7685 Fax
scott.thompson[at]mspd.mo.gov

Attorney for Appellant

Index

Table of Authorities

Cases

Statutes

Jurisdictional Statement

Appellant adopts and incorporates his Jurisdictional Statement from his initial Brief.

***

Statutory citations are to RSMo (2000) unless otherwise indicated. The Record on Appeal will be cited to as follows: Legal File, "LF"; and the Trial Transcript, "Tr."

Statement of Facts

Appellant adopts and incorporates the Statements of Facts contained in his initial Brief.

Points Relied On

Appellant adopts and incorporates the Point Relied On contained in his initial Brief.

Argument

Appellant adopts and incorporates his Argument from his initial Brief and adds the following arguments in reply:

Reply Argument

I.

Appellant's initial concession that the search of his pocket was legal did not waive any subsequent challenge to the State's burden of proof to show beyond a reasonable doubt that the drugs seized were what the State claimed them to be. In this case, because the State could not prove the source of the various drugs seized, Appellant moved the trial court suppress all the evidence. Moreover, it is unfair of the Respondent to argue that Appellant should have *predicted in advance* that the State would be unable to establish something as fundamental as the source of the drugs it sought to convict Appellant of possessing.

In its brief, Respondent suggests that defense counsel's initial concession regarding the search of Edward's pocket was a waiver to any further challenge arising from the ineptitude of the State's witnesses. (Respondent's Brief at 12).

Appellant presciently objected, in advance of trial, to the search of Edward's bag and the drugs and paraphernalia found therein. (LF 17-20). Defense counsel did not initially contest the search of Edward's pocket because its seizure was facially constitutional as a search incident to arrest. But defense counsel's implicit concession was not a plea of guilt and defense counsel was still entitled to challenge the admissibility of all evidence in light of the evidence adduced. For instance, in State v. Davenport, 924 S.W.2d 6 (Mo. App. E.D. 1996), previously

cited by Appellant, Davenport did not address the seizure of the evidence (drugs), but the court still considered the foundation for admitting the drugs.

Edward's case is unique; some of the evidence was seized illegally and some legally. It is the State's burden to prove both legality of the seizure (See e.g.; State v. Avent, 432 S.W.3d 249, 252 (Mo. App. W.D. 2014); § 542.296(6) RSMo (2000)) and from what source the drugs originated to obtain a conviction.

Respondent further argues defense counsel waived in perpetuity any grounds to suppress the evidence found in Edward's pocket because she did not object to that evidence based on foundational grounds nor did she include it in her motion to suppress evidence. (Respondent's Brief at 12). But counsel did object once she learned that the State's witnesses could not say which drugs came from Edward's pocket. (Tr. 25-26). As to the latter complaint, defense counsel could not have reasonably predicted the State was unprepared to make so fundamental showing as where the drugs came from. Defense counsel filed her motion to suppress as soon as she learned which court would hear the case. (LF 5, 17-20). Defense counsel objected once she learned of the State's surprising omission. The Respondent cites no authority for its argument that defense counsel must be possessed of such foresight lest they waive their argument for suppression.

II.

Respondent's attempts to distinguish Arizona v. Gant, 556 U.S. 332 (2009), and State v. Carrawell, 481 S.W.3d 833 (Mo. banc 2016), from the instant case merely underscore and perpetuate the confusion those cases sought to end. The Fourth Amendment and Article I, § 15 ultimately protect people and not things against unreasonable search and seizure. Thus, the proper focus, in considering a search incident to arrest, is on the disposition of the arrestee and his or her relationship to the thing searched.

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). As this Court is aware, this narrow exception subsequently ballooned to encompass all manner of places and articles no matter how remotely associated with the arrestee. In New York v. Belton, 453 U.S. 454, 460 (1981), the Supreme Court supplied a vehicle codicil to the Chimel case which had the effect of sanctioning every search of a vehicle as incident to arrest under the assumption that the interior would always be within the reach of an occupant.

In Gant, the Court took certiorari to address the overbroad application of Belton. Gant, 556 U.S. at 343. The Court wrote, "[t]o read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel exception—a result clearly

incompatible with our statement in Belton that it 'in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.'" Id. at 343 quoting Belton, 453 U.S., at 460, n. 3. The Respondent argues that because Edward was a mere occupant of the vehicle, his personal effects therein enjoy no protection against unreasonable search and seizure. (Respondent's Brief at 18 citing Rakas v. Illinois, 439 U.S. 128, 133-134 (1978)).

Respondent's appeal to Rakas is misplaced. Rakas had to do with the search of a vehicle which uncovered a rifle and rifle shells. Id. at 129. Neither petitioner claimed ownership of the property found. Id. By contrast, in this case, Edward told officers the bag they discovered was his bag. Under the Respondent's hyper-technical reading of the case law, there exist seeming "zones" of protection against unreasonable search. Thus, according to the Respondent's logic, although Edward's bag enjoyed protection against a warrantless search, because it was found within a car he recently occupied but did not own, that protection evaporated. Appellant emphasized the vehicle aspect of the Gant case to draw a parallel that both men were sufficiently removed from their personal effects as to make their searches unreasonable.

Recently, Justice Gorsuch urged a focus on property rights in Fourth Amendment issues rather than litigating the "reasonableness" of one's expectations or privacy. Carpenter v. U.S., ___ U.S. ___, 138 S. Ct. 2206, 2267-68 (2018)(Gorsuch, J., in dissent). "Under this more traditional approach", Justice

Gorsuch writes, "Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties." Id. Likewise, in this case, Edward's protection against unreasonable search of his bag, should not depend on it being situated in a car he did not own, but his ownership of the bag and its position relative to him.

Respondent's attempts to distinguish Carrawell, are similarly unavailing. The Respondent argues that Carrawell was secured in the back of the police car when police searched his bag, but Edward was not yet in the police car. (Respondent's Brief at 15). At the time of his arrest, Respondent writes, "Mr. Hughes was 'still in immediate reach of that bag." Id. This is a misleading characterization of the evidence.

The evidence was that Edward was removed from the vehicle, placed under arrest, handcuffed, and then his pockets searched (Tr. 9-10). The bag however remained on the seat of the car and only came within Edward's "immediate reach" because Officer Streckfuss brought it out of the car and in the proximity of Edward,

> In the back seat, directly next to him, was a black, Nike nylon bag with a drawstring. I asked him if that was his property as well, to which he stated yes. Officer Streckfuss retrieved such bag from the vehicle, and while standing next to me, in the presence of myself and Offender Hughes, conducted a search of that bag.

(Tr. 10). The bag was only within Edward's immediate reach because officers put it there. Thus, the circumstances underpinning Chimel – officer safety and preventing the destruction of evidence – are just not present if Officer Streckfuss felt he could bring the bag over to where Edward was handcuffed. And it is ridiculous to suggest that bags, purses, or knapsacks could thus become "personal effects" by officers bringing them within the wingspan of handcuffed arrestees.

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

Scott Thompson, Mo. Bar No. 43233
1010 Market Street, Suite 1100
St. Louis, MO 63101
314/340-7662

Attorney for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on Wednesday, August 22, 2018, a true and correct copy of the foregoing brief (in searchable .PDF form) were delivered to the Court and to Shaun J. Mackelprang of the Office of the Attorney General via the Missouri E-filing System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the limitations of Rule 84.06. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 1529 words, excluding the cover page, signature block, and certificate of service and of compliance. Finally, I hereby certify that this electronic form of the brief has been scanned for viruses with Symantec Endpoint Protection, with updated virus definitions, and was found virus-free.

/s/ Scott Thompson

Scott Thompson

Attorney for Appellant