

No. SC98376

**IN THE
MISSOURI SUPREME COURT**

**STATE OF MISSOURI,
Appellant,
v.
JAMES CHRISTOPHER BALES,
Respondent,**

**On transfer to the Missouri Supreme Court
From an appeal to the Missouri Court of Appeals
Southern District
From the Circuit Court of Pulaski County, Missouri
25th Judicial Circuit, Division II
The Honorable John Beger, Judge**

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Statement of Facts

Appellant, the State of Missouri, reincorporates and reasserts herein the Statement of Facts from its opening brief as though set out in full.

REPLY ARGUMENT I

RESPONDENT'S BRIEF FAILS TO DISTINGUISH CASES CITED BY THE APPELLANT FROM THE PRESENT CASE.

i. Respondent fails to distinguish the Appellant's reliance on State v. Brown.

Respondent attempts to distinguish both *State v. Brown*, 708 S.W.2d 140 (Mo. banc 1986) and *State v. Johnson*, 576 S.W.3d 205 (Mo. App. 2019) relied on by Appellant to refute the fact that the cell phone was described with sufficient particularity.

Respondent's entire argument regarding the *Brown* case is premised on the fact that Brown "might be" distinguishable. Respondent argues there is not enough information in the record on appeal, a lack of findings by the trial court and that the *Brown* opinion does not indicate whether or not the owner of the items actually had the brand name and serial number of the items to provide to the police to attempt to contrast the cases. However, the *Brown* court did find that the warrant was not fatally defective simply because the descriptions could have included more precision such as brand name or serial number, which is not required. *Id. at 143.*

It is also worth noting that in the present case, the police did not have the serial number or specific model and could not have obtained either without first seizing the phone. The police did have the brand name, which was included in the warrant. The police in this present case acted reasonably and sought a warrant prior to trying to attempt to seize the phone. Should the Court find that a more specific description was

needed, then it will have the effect of requiring seizures of phones prior to a warrant application to satisfy the Court's requirements.

ii. Respondent fails to distinguish the Appellant's reliance on *State v.*

Johnson.

As the Court of Appeals in this case noted, while the primary issue in *State v. Johnson* was the permissible breadth of a cell phone search, a part of the claims was that the warrant was not sufficiently particular and the description of the item to be seized in this case was more specific than the one approved by the court in *Johnson*. As was noted above, requiring a more specific description will encourage police officers to seize phone prior to obtaining a warrant. Rather, the correct method is what the detective did in this case, obtaining the warrant prior to the seizure.

REPLY ARGUMENT II

The issue of where the cell phone was seized was not alleged in Respondent's Brief or Amended Brief and was therefore not addressed by the Court of Appeals.

"The general rule is that constitutional questions are deemed waived that are not raised at the first opportunity consistent with good pleading and orderly procedure" *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo.banc 1991). In this case, the first time the Appellant has raised the question of the legality of where the phone was seized is in his brief to this Court.

Although the trial court does find that the phone was seized from the defendant instead of being surrendered, it makes no further findings or statement regarding the location of the seizure. The Respondent, further, never argued nor alleged this point

in Respondent's brief or Respondent's Amended brief to the Court of Appeals. In fact, although Appellant addressed this issue briefly, Respondent specifically argued that the trial court did not "refer to any such thing" and instead relied on *Groh v. Ramirez* and *U.S. v. Leon*. (Respondent's Amended Brief, p. 14). If this is an issue this Court considers case determinative, then the matter should be remanded to the trial court to hear evidence and argument on that issue so that it can be properly raised.

REPLY ARGUMENT III

THE FACT THAT THE PHONE WAS SEIZED AT THE POLICE STATION AS OPPOSED TO THE DEFENDANT'S HOME DOES NOT NEGATE THE GOOD FAITH EXCEPTION NOR EXCEED THE SCOPE OF THE WARRANT.

Respondent cites *State v. Lucas*, 452 S.W.3d 641 (Mo. App. 2014), stating that "*Leon's* good-faith exception also does not apply because the warrant was not executed properly." Resp. Br., p. 18. However, in finding the good faith exception did not apply, the *Lucas* court also found that the officers seized numerous items outside the scope of the warrant. In fact, the court found that "the officers seized about as many items not covered by the warrant as covered by the warrant" and that this showed a "flagrant and widespread disregard for the scope of the warrant by the officers." *Lucas*, 452 S.W.3d at 644. That is not the case here. The warrant only ever described one item: a black, Samsung cell phone in a black case. The detective seized one item: a black, Samsung cell phone in a black case.

Respondent also cites *United States v. Alberts*, 721 F.2d 636 (8th Cir. 1983) for the proposition that the police should not have been able to search defendant's person

and should only have been able to search the defendant's residence for the cell phone. However, *Alberts* is distinguishable in that the items in question in that case were checks, not a cell phone. A cell phone is a movable object and by its very nature, designed to be on a person. Similar to automobiles, cell phones may move locations many times in a day. It is practically impossible for a detective to know where a cell phone is at any given time. By Respondent's logic, one must obtain a different search warrant every time a cell phone moves locations.

In fact, Missouri law recognizes the challenges presented by movable objects. Section 542.286 (1), RSMo. states: "A warrant to search a person or any movable thing may be executed in any part of the state where the person or thing is found if, subsequent to the filing of the application, the person or thing moves or is taken out of the territorial jurisdiction of the judge issuing the warrant."

Further, just because the police did not serve the warrant prior to the interview at the police station, does not change the analysis. Even if the police had gone to the defendant's residence prior to the interview at the police station, there is no guarantee the cell phone would have been there, especially if the defendant did not happen to be home. The police were well within 10 days at the time of the execution of the search warrant. Respondent argues that the warrant did not give the police permission to go out into the world and seize anything from the Respondent. Indeed, the warrant was only ever for one specific movable object: a black Samsung cell phone in a black case. That is exactly the only thing the detective seized in this case.

Conclusion

WHEREFORE, based on the arguments in Point I and Point II of Appellant's Substitute Brief, and the arguments of Appellant's Substitute Reply Brief, it is clear that the warrant was not facially invalid and even if it was, the Good Faith Exception applies. Appellant pray that this Court affirm the decision of the Court of Appeals and allow evidence from the search warrants to be used by the State against the Respondent at trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on This 17th day of August, 2020, a true and correct copy of the foregoing reply brief and the attached appendix were served via the e filing system and by e-mail to Ms. Erica Mynarich, attorney for Respondent, at erica@carvercantin.com. In addition, pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13-point font and does not exceed 7,750 words. The word processing software identified that this brief contains 1605 words.

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