

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI,

Respondent

v.

HOWARD D. JOHNSON.

Appellant

DOCKET NUMBER WD70167

DATE: July 13, 2010

Appeal From:

Circuit Court of Daviess County, MO
The Honorable Warren L. McElwain, Judge

Appellate Judges:

Division Three: Mark Pfeiffer, P.J., James Edward Welsh and Karen King Mitchell, JJ.

Attorneys:

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Counsel for Appellant,

Attorneys:

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Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, Respondent, v.
HOWARD D. JOHNSON, Appellant

WD70167

Daviess County

Before Division Three Judges: Mark Pfeiffer, P.J., James Edward Welsh and Karen King Mitchell, JJ.

Howard D. Johnson appeals from a judgment of conviction following a jury trial. He was convicted of the class A misdemeanor of operating a motor vehicle upon a highway without a valid license, in violation of section 302.020, RSMo 2000, and the class C felony of possession of a controlled substance, in violation of section 195.202, RSMo 2000.

AFFIRMED IN PART AND REVERSED IN PART.

Division Three holds:

(1) The retroactive application of the United States Supreme Court's decision in *Arizona v. Gant*, 129 S.Ct. 1710 (2009), renders the search of Johnson's car incident to his arrest unconstitutional. The good-faith exception to the exclusionary rule does not apply to permit admission of the evidence in this case. Thus, the search of Johnson's vehicle was invalid as a search incident to his arrest, and the evidence obtained during the search was inadmissible on that basis.

(2) The evidence obtained during the invalid search of Johnson's vehicle was not admissible under the inevitable discovery doctrine because the State failed to prove that an inventory search of Johnson's vehicle would inevitably have occurred.

(3) Because the evidence supporting Johnson's conviction for possession of a controlled substance was improperly admitted, there was insufficient evidence to convict Johnson of this offense and the conviction is reversed.

(4) The court properly instructed the jury on the charge of driving without a valid license, as the instruction followed the language of MAI-CR 3d 332.49. Johnson failed to preserve for review any claim that he should have been charged with the lesser offense of violating the terms of his learner's permit.

Opinion by: James Edward Welsh, Judge

July 13, 2010

Dissenting Opinion by Judge Karen King Mitchell:

The author would affirm the judgment of the trial court, although agreeing with the majority that the United States Supreme Court decision in *Arizona v. Gant*, 129 S.Ct. 1710 (2008), applies retroactively to render the police's search of Howard Johnson's automobile

improper as against his Fourth Amendment rights. The officer in this case searched Johnson's vehicle in reliance on case law, from the United States Supreme Court, the Missouri Supreme Court, Court of Appeals, and the Eighth Circuit, which allowed the search of the passenger compartment of a vehicle incident to arrest. Therefore, there was no officer misconduct and no justification for applying the exclusionary rule. Because the police officer relied in objective good faith upon well-established, although ultimately erroneous, case law in conducting the automobile search incident to arrest, the author would conclude that the good-faith exception to the exclusionary rule applies to warrant admission of the evidence found in the search of Johnson's automobile.

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