IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 91173
	)	
HOWARD D. JOHNSON,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DAVIESS COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE WARREN L. MCELWAIN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Howard D. Johnson, appeals his conviction following a jury trial in the Circuit Court of Daviess County, Missouri, for the class A misdemeanor of operating a motor vehicle without a valid license, Section 302.020, and the class C felony of possession of a controlled substance, Section 195.202.[1] On August 19, 2008, the Honorable Warren L. McElwain sentenced Mr. Johnson in accordance with the jury's recommendation to terms of imprisonment of two weeks and one year in the county jail, respectively, with sentences to run consecutively. (LF 71, 92-93). A notice of appeal was filed, *in forma pauperis*, on October 14, 2009. (LF 95-99).

On July 13, 2010, the Western District Court of Appeals issued its opinion reversing the trial court's ruling, and this Court granted transfer after opinion. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

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[1] All statutory citations are to RSMo 2000, unless otherwise indicated. The Record on Appeal consists of a Legal File (LF), a Transcript (Tr.), three State's Exhibits (St. Ex. 1, 3, and 4), and one Defendant's Exhibit (Def. Ex. A).

STATEMENT OF FACTS

On July 14, 2007, Deputy Larry Todd Watson stopped a van that was being driven on I-35 within Daviess County because it did not display license plates. (Tr. 9-10, 14, 165). Watson made contact with the driver and identified him as Howard D. Johnson. (Tr. 10, 165).

Mr. Johnson gave the deputy his proof of insurance, bill of sale, and title to the van, and explained that he had not yet had a chance to get license plates because he had purchased it just two weeks earlier. (Tr. 42, 166). He had also been pulled over earlier that day by Trooper Maudlin, and had already received a citation for failure to register the new vehicle. (Tr. 48).

Deputy Watson asked for Mr. Johnson's driver's license, and he gave the deputy his Missouri learner's permit. (Tr. 166). When Watson disapproved of the permit, Mr. Johnson informed him that he had recently moved to Missouri from Texas and that he had a valid license in the other state, but had applied for a temporary permit in order to transfer his license to Missouri. (Tr. 44-45). While speaking to Mr. Johnson, Deputy Watson could see into the vehicle, could see his passenger, and could see the dashboard and steering wheel area from where he stood. (Tr. 184-85). Watson estimated that he had been standing by the van speaking with Mr. Johnson for about five minutes. (Tr. 190-91).

Deputy Watson went back to his patrol vehicle, leaving Mr. Johnson and his passenger in the van, and ran a computer check on them. (Tr. 10, 15, 167). He determined that the passenger, Joyce Washington, had a revoked Kansas driver's

license, and that Mr. Johnson had a valid Missouri learner's permit. (Tr. 10, 67). The check apparently revealed no other information about Mr. Johnson's driving status, or whether he had a valid or revoked license in Texas or any other state.[2] (Tr. 10, 167). On the back of the learner's permit, Watson saw Restriction Letter A, which indicated that Mr. Johnson had to wear corrective lenses. (Tr. 34). Watson did not recall any other restrictions written on the back of Mr. Johnson's permit, though. (Tr. 34).

Deputy Watson returned to the van and advised Mr. Johnson that he wanted to talk to him further, and told him to exit his vehicle and come back to his patrol car. (Tr. 15, 167). Ms. Washington remained in the van while Mr. Johnson was being questioned. (Tr. 15, 167-168). Once Mr. Johnson was inside the patrol car, Deputy Watson explained that he believed he had to abide by the same conditions as a 15-and-a-half year old child with a learner's permit, even if he was an adult man, and that he was required to have a parent or legal guardian, or a licensed driver, in the car to legally operate the vehicle. (Tr. 10, 167). Mr. Johnson gave the deputy his Texas license number and he wrote it down, but did not see him make any effort to verify its validity. (Tr. 45).

Deputy Watson was hesitant about his knowledge of the law on learner's permits, and was not convinced at that time that Mr. Johnson's actions were in

[2] No records from the Department of Revenue were presented at any time, nor was Mr. Johnson's permit; this evidence was presented solely through Deputy Watson's testimony.

violation of the law. (Tr. 16, 17). He was not sure if the learner's permit requirements would apply in the same manner to an older gentleman as they would a 15-and-a-half year old child, and intended to research the issue. (Tr. 16, 17). However, Mr. Johnson apparently admitted he knew he was in violation of the permit's conditions, so Deputy Watson arrested him for driving without a valid license based on his confession. (Tr. 10, 11, 17, 167). Deputy Watson then asked Mr. Johnson if he had anything illegal on his person or in his vehicle, and he said no. (Tr. 11, 18). Mr. Johnson testified at a pre-trial hearing that Deputy Watson asked him for consent to search the vehicle, and he denied consent, and then the officer informed him he was under arrest. (Tr. 45-46).

At some point, Trooper Maudlin, who had pulled over Mr. Johnson's vehicle and issued a citation to him earlier that day, arrived at the scene.[3] (Tr. 18, 46, 48, 168, 170). Trooper Maudlin told Deputy Watson that he had stopped the same van earlier that day for the same violation of failure to display registration plates. (Tr. 31). At the time of the earlier stop, the driver had a valid license and there were three other occupants in the van, including Mr. Johnson. (Tr. 31). Trooper Maudlin told the

[3] Deputy Watson testified that he believed Maudlin did not arrive until after he took Mr. Johnson to his patrol car, but prior to the search of his van. (Tr. 15, 18, 31, 168). Mr. Johnson testified that Maudlin came before Deputy Watson took him back to the patrol vehicle, and that the officers had a conversation while he was still inside of his van. (Tr. 46).

deputy that they "showed indication that there possibly was drugs being transported," without indicating why he believed this, but the occupants had denied his request for consent to search the van. (Tr. 31, 47). This made Deputy Watson suspicions, and he wanted to search the vehicle. (Tr. 32).

Deputy Watson indicated that when he pulls somebody over for a traffic stop, he will typically separate the occupants of the vehicle to question them, ask them where they are going or where they have been, and see if they tell the same story or say anything suspicious. (Tr. 31-32). Watson became suspicious when he found out from Trooper Maudlin that Mr. Johnson and the other vehicle occupants had denied consent for a vehicle search earlier that day, and he wanted to search the van. (Tr. 32). He did not ever question or speak to both Mr. Johnson and Ms. Washington, though, because he knew he could search the vehicle incident to arrest. (Tr. 37).

Deputy Watson testified that driving without a valid license is an offense for which he will typically arrest people, because driving without a license is a jailable offense and knowing this, a lot of defendants will not appear in court. (Tr. 168). There was no policy in his department to arrest people for this offense; it was at his discretion. (Tr. 35). Watson also testified that when he arrests people on the highway, he will always conduct a search of their vehicle. (Tr. 11, 37, 168). Watson testified that this type of search incident to arrest was common practice in his office, and that it was done for safety reasons - to make sure that Mr. Johnson was not armed and that if he regained access to his vehicle, there would not be anything within it that could be used to harm the officer. (Tr. 11, 38, 168). Watson testified that another

reason for these searches is to inventory the vehicle, but he had not yet made the decision if he was going to tow the van at that the time of the search. (Tr. 37-38).

Deputy Watson was asked by defense counsel how Mr. Johnson could have gotten something out of his van if he was not allowed to leave the patrol vehicle other than the brief moment he was handcuffed and put back inside. (Tr. 21). Watson answered “I’ve always wondered that myself." (Tr. 21). But then he claimed he did have "times where they made it to my vehicle handcuffed – or, made it back to their personal vehicle handcuffed. They have." (Tr. 21). Watson admitted that Mr. Johnson never attempted to do this and that he had no reason to believe that he would try to return to his van, even though he was free to do so prior to being arrested. (Tr. 21-22). After his "arrest," Mr. Johnson was not allowed out of the patrol vehicle until the deputy took him to jail. (Tr. 20).

After informing Mr. Johnson that he was under arrest, Deputy Watson told Mr. Johnson that if he did a search of the van and did not find anything illegal, then he would have the opportunity to pay bond of $150 right there at the scene. (Tr. 36). Watson did not write out a citation at that time. (Tr. 35). The deputy had Mr. Johnson step out of the vehicle, searched him for weapons, and placed him back in the patrol car. (Tr. 18-19). Deputy Watson returned to Mr. Johnson’s vehicle, and asked Ms. Washington to step outside. (Tr. 11, 168). He left Mr. Johnson in the patrol car. (Tr. 168).

Trooper Maudlin stood with Ms. Washington, and Deputy Watson began his search on the passenger side of the vehicle. (Tr. 11, 18, 20, 185, 190). Immediately

after commencing the search, Watson noticed pieces of a white rock-type substance on the dash or engine compartment area in the front of the vehicle, and in a cup holder in this area, which was about 1.5 to 2 inches deep. (Tr. 169, 189; Def. Ex. A). Watson, who was trained in drug recognition, testified that from his training and experience, "it almost appeared to be like a piece of rock cocaine that's been broke to be used." (Tr. 170).

Watson told Trooper Maudlin of his discovery, and Maudlin began to read Ms. Washington her *Miranda* rights.[4] (Tr. 170). Watson returned to Mr. Johnson, who was still inside of his patrol vehicle, and read him his *Miranda* rights. (Tr. 170). Watson asked Mr. Johnson about the substance in the van, and he told the deputy that he did not know what it was and had no knowledge of it being there. (Tr. 170). Ms. Washington also denied knowledge of the substance; the officer handcuffed her and secured her inside of the trooper's vehicle. (Tr. 29-30, 170).

The officers went back to the van to continue searching through it. (Tr. 30). Watson looked under the seats and through pockets in the console. (Tr. 190). Watson discovered a cigarette box in a pocket on the passenger side front door, which was concealed by the passenger seat. (Tr. 171, 187-88, 192). Inside the cigarette box, the deputy discovered a glass pipe, which he believed was for smoking cocaine. (Tr. 171). He also found a broken piece of a car antenna inside of the box, and some copper mesh or filter that the deputy believed was commonly used as a filter. (Tr.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

171, 181). Behind the driver's seat, Watson found a brown paper sack containing a Pepsi can that had the lid and bottom cut out and was rolled into a tube, which contained residue. (Tr. 171). Watson collected and bagged the evidence, inventoried the other items in the van, and called a service to tow it from the interstate. (Tr. 172).

At some point, Deputy Watson took pictures of Mr. Johnson's vehicle and the dash or console area where he found the broken-up rock-type substance. (Tr. 173-74; St. Ex. 3, 4). He did not take pictures until after he had removed most of the substance. (Tr. 175). Residue within the broken antenna was tested and revealed to be cocaine. (St. Ex. 1). The lab report of the broken-up substance on the console indicated that it was cocaine, weighing .08 grams. (Tr. 13-14; St. Ex. 1). Marcy Stiefel, the State Highway Patrol Criminalist, testified that she did not believe a gram would even fill up a bottle cap. (Tr. 200).

Mr. Johnson was charged with driving without a valid license, possession of a controlled substance, and possession of drug paraphernalia. (LF 9-10). Before trial, Mr. Johnson personally prepared a motion to suppress the evidence. (LF 14-35). He alleged that the evidence was illegally obtained in an unlawful search and seizure, that it was unreasonable for Deputy Watson to arrest him for driving without a valid license by ignoring his valid Texas driver's license number, and that he purposely failed to perform a check on the license, and that he used the traffic stop as a pretext to search his car and passengers with no justification. (LF 14-35). The motion was overruled after hearing. (Tr. 54). At trial, defense counsel renewed objections to the evidence seized from the van, which were overruled. (Tr. 176-77, 179, 182).

At a pre-trial hearing, defense counsel argued that Deputy Watson had intentionally made no effort to determine if Mr. Johnson's Texas license was valid, that the stop and search were pretextual. (Tr. 53-54). The prosecutor stated that he had no rebuttal, and the court overruled the motion without discussion. (Tr. 54).

At this hearing, Mr. Johnson also argued that his permit did not have any restrictions listed on it and he was not advised of any, that Deputy Watson was incorrect to accuse him of violating the permit restrictions, and that it was a false arrest and an unlawful detention. (Tr. 55). He also argued that the deputy had no documented proof that he had to follow any restrictions. (Tr. 55). The prosecutor argued that there were no facts presented that he had received the permit under any separate requirements, so he was in violation of the requirements of the permit. (Tr. 57).

Mr. Johnson then argued that his charge was incorrect, because subsection 9 of Section 302.178, RSMo Supp. 2006, expressly provides that any person who violates conditions of a temporary instruction permit is guilty of an infraction, and no points shall be assessed to that person's driving record. (Tr. 59). He argued this did not give Deputy Watson cause to arrest him, in addition to arguing that he had no cause to arrest him for either the infraction or the misdemeanor offense. (Tr. 59-60). The judge said that his version of the law did not have subsection 9, and aside from discussions off of the record, the court did not discuss the matter again at that time or make any ruling. (Tr. 62).

On July 15, 2010, following a jury trial, Mr. Johnson was found guilty of driving without a valid license and possession of a controlled substance. (LF 67-68). The jury found him not guilty of the charge of possession of paraphernalia. (LF 69).

Mr. Johnson informed the court that he would like a motion for a new trial, but did not want his public defender to represent him. (Tr. 244-45). He said that he felt she could not be trusted and would fabricate something that would look good but would harm him, and was afraid to have her represent him on the motion. (Tr. 245). The judge admonished Mr. Johnson for stating this, said that he had known the public defender for years and she was an honest and very reputable attorney and would not fabricate anything or make anything up, and that he was offended by Mr. Johnson's allegations and did not want to hear any more about it. (Tr. 246).

On July 29, 2008, Mr. Johnson's attorney filed a boilerplate "motion for judgment of acquittal, or in the alternative, motion for a new trial," which alleged that the court erred in overruling the previous motions for judgment of acquittal because the evidence was insufficient. (LF 5, 74-75). On August 8, defense counsel filed a supplemental motion for new trial to incorporate *pro se* motions that Mr. Johnson had filed with the court on July 25, prior to the time his attorney filed her boilerplate motion for a new trial. (LF 5, 72-73; Tr. 246).

Mr. Johnson's attorney took up his personally-prepared motion for a new trial at sentencing. (LF 71-Tr. 247). It alleged various errors, most of which defense counsel did not argue, but she did orally argue that it was error not to suppress the evidence found in the illegal search of his vehicle, and that it was error to submit the

verdict director for driving without a valid license when "he simply was in violation of the terms of the permit." (Tr. 248). Other than asking for the motion to be overruled, the prosecutor indicated that the State had no argument. (Tr. 248). The court overruled paragraphs 1 and 2 of the defendant's motion for judgment of acquittal or, in the alternative, motion for new trial. (Tr. 249). The Court did not address any of the claims in Mr. Johnson's incorporated *pro se* motions, nor the issues his attorney orally argued for him at the hearing.

Defense counsel indicated that she had filed a timely supplemental motion for a new trial, which incorporated motions that Mr. Johnson had filed *pro se* on July 25, four days before counsel filed the boilerplate motion for a new trial. (LF 5, 72-73, Tr. 249). The court indicated that it had noticed this, and allowed Mr. Johnson to briefly argue his motions. (Tr. 249).

Mr. Johnson argued that that the State had not presented any evidence from the Department of Revenue stating that his license was not valid, and the officer had no reason to believe that he had violated any conditions of his learner's permit, because the permit did not indicate he had to be accompanied by a licensed driver. (Tr. 250). He testified that he had made diligent efforts to try to acquire a copy of the permit to present at trial, but it was not in the property of the jail, and he believed the prosecutor must have it. (Tr. 251).

The prosecutor objected that he was bringing up arguments outside anything related to trial court error, and that "many of these issues have been gone over I couldn't even count how many times with the Court," and that he was just stating

issues that were already settled. (Tr. 252). Mr. Johnson argued that the State did not present correct evidence to support the conviction for driving without a valid license, and that the evidence was insufficient to show he possessed a controlled substance or that he was aware of its presence and illegal nature, and the jury could not reasonably infer this when he did not have exclusive control of the vehicle. (Tr. 253). The prosecutor objected again and said that the argument had nothing to do with the motion that had been filed. (Tr. 255).

The court ruled in favor of the State, indicated that Mr. Johnson was ignoring them and ended the argument at this point. (Tr. 255). Defense counsel stated that she knew of no legal cause by sentence should not be imposed. (Tr. 257). Mr. Johnson was not asked.

The Honorable Warren L. McElwain sentenced Mr. Johnson in accordance with the jury's recommendation to two weeks imprisonment in the county jail for driving without a valid license, and one year imprisonment in the county jail for possession, with sentences to run consecutively. (LF 71, 92-93). Since he had been in jail more than this time already, the court ordered him released the same day. (Tr. 258). Mr. Johnson had previously filed a motion to dismiss his attorney; the court sustained the motion and relieved counsel of responsibility for filing the notice of appeal. (Tr. 258). The court did not inform Mr. Johnson of any rights under Rule 29.15, and the judgment does not reflect whether the court found cause to find his attorney ineffective, but since Mr. Johnson was never delivered to the Department of

Corrections for his convictions this effectively precludes him from challenging his attorney's representation or raising any claims under this rule.

On October 14, 2008, notice of appeal was filed, *in forma pauperis*, by the Central Appellate Office of the State Public Defender. (LF 6, 95).

POINTS RELIED ON

I.

The trial court clearly erred in overruling Howard Johnson's motion to suppress evidence, and in admitting the evidence at trial, because this violated his rights to due process and to be free from unreasonable searches and seizures, as guaranteed by the Fourth & Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution, in that a vehicle search incident to arrest was unjustified because Mr. Johnson was secured inside a patrol car at the time, and Deputy Watson was *not* relying in good faith on existing case law that authorized a vehicle search after any valid arrest, he was not even initially aware if an adult man would be violating the conditions of a temporary permit by not having a licensed driver in the car, he planned to research the issue but did not do so because Mr. Johnson confessed that he was violating the permit's restrictions, so the deputy arrested him for driving without a valid license, but since Deputy Watson told Mr. Johnson that he would allow him to pay bond right there at the scene unless he found something illegal in his van, the deputy essentially admitted that he was conducting a temporary detention, not an arrest, in order to conduct a warrantless search for contraband; Deputy Watson's conduct was not supported by this Court's interpretation of *New York v. Belton*, or his training, it was not reasonable under any measure, and it is exactly the type of flagrant misconduct that the exclusionary rule was designed to deter.

Davis v. United States, 131 S.Ct 502 (2010;

Arizona v. Gant, 129 S.Ct 1710 (2009);

Missouri v. Siebert, 542 U.S. 600 (2004);

United States v. Robinson, 414 U.S. 218 (1973);

U.S. Const., Amends. IV and XIV;

U.S. Const., Amend XIV;

Mo. Const., Art. I, Sections 10 and 15;

Section 302.178; and

Section 544.216.

II.

The trial court erred in overruling Mr. Johnson's motions for judgment of acquittal and in convicting him of possession of cocaine, because this denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish that Mr. Johnson was in actual or constructive possession of cocaine or that he had any awareness of its presence or nature, when Mr. Johnson did not have exclusive control of the van, he had recently purchased the used vehicle, other occupants were seen in the van on the day of his arrest and another person had been driving it, a passenger was left in the van for several minutes while Mr. Johnson was questioned inside of the deputy's patrol vehicle, the deputy did not notice the broken-up rock-like substance on the van's dashboard or console area during the initial traffic stop even though he could see directly in the van and talked with the occupants for several minutes, he noticed it immediately upon commencing his later search, but testified that in his training and experience "it almost appeared to be like a piece of rock cocaine that's been broken," but no evidence was presented that Mr. Johnson would have known what the substance was even if it was present before he was taken to the patrol car, and the evidence as a whole was entirely insufficient to support any inference that Mr. Johnson knew of the presence or the nature of the substance in the van.

State v. Ingram, 249 S.W.3d 892 (Mo. App. W.D. 2008);

State v. Bristol, 98 S.W.3d 107, 112 (Mo. App. W.D. 2003);

State v. Johnson, 81 S.W.3d 212 (Mo. App. S.D. 2002);

State v. Chavez, 128 S.W.3d 569 (Mo. App. W.D. 2004);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Section 10; and

Sections 195.010 and 195.202.

III.

The trial court plainly erred in submitting Instruction Number 5 to the jury, the verdict director for driving without a valid license, because this violated Mr. Johnson's rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that this instruction directed the jury to find Mr. Johnson guilty if he was driving without a valid license and was aware of this fact, but failed to require the jury to determine if Mr. Johnson committed this act while in possession of a valid learner's permit, which would have negated any cause for conviction as statutory law clearly states that a violation of permit requirements is only an infraction, which does not constitute a crime and for which no jail time could have been requested.

State v. Doolittle, 896 S.W.2d 27, 30 (Mo. banc 1995);

In re Winship, 397 U.S. 358, 364 (1970);

State v. Carson, 941 S.W.2d 518, 523 (Mo. banc 1997);

State v. Nolan, 872 S.W.2d 99, 103 (Mo. banc 1994)

Sections 302.020, 302.130, 302.178, RSMo Supp. 2006;

Section 556.021, RSMo Supp. 2006;

U.S. Const., Amends. IV and XIV;

Mo. Const., Art. I, Sections 10 and 18(a);

MAI-3d 332.49.

ARGUMENT

I.

The trial court clearly erred in overruling Howard Johnson's motion to suppress evidence, and in admitting the evidence at trial, because this violated his rights to due process and to be free from unreasonable searches and seizures, as guaranteed by the Fourth & Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution, in that a vehicle search incident to arrest was unjustified because Mr. Johnson was secured inside a patrol car at the time, and Deputy Watson was *not* relying in good faith on existing case law that authorized a vehicle search after any valid arrest, he was not even initially aware if an adult man would be violating the conditions of a temporary permit by not having a licensed driver in the car, he planned to research the issue but did not do so because Mr. Johnson confessed that he was violating the permit's restrictions, so the deputy arrested him for driving without a valid license, but since Deputy Watson told Mr. Johnson that he would allow him to pay bond right there at the scene unless he found something illegal in his van, the deputy essentially admitted that he was conducting a temporary detention, not an arrest, in order to conduct a warrantless search for contraband; Deputy Watson's conduct was not supported by this Court's interpretation of *New York v. Belton*, or his training, it was not reasonable under any measure, and it is exactly the type of flagrant misconduct that the exclusionary rule was designed to deter.

Standard of Review

Appellate review of a trial court's decision to overrule a motion to suppress is limited to a determination of whether the record shows sufficient evidence to support the decision. *State v. Reed*, 157 S.W.3d 353, 356-7 (Mo. App. W.D. 2005). When a motion to suppress was overruled and the evidence introduced at trial, the appellate court must consider the evidence presented both at the suppression hearing and at trial in determining whether the motion should have been granted. *Id*. at 356. All facts and reasonable inferences should be stated in the manner most favorable to the challenged ruling. *Id*. at 357. However, the ultimate issue of whether the Fourth Amendment was violated is a question of law, which this Court reviews *de novo*. *Id*.

Argument

In April of 2009, the United States Supreme Court clarified nearly three decades of lower court precedent that allowed for an extremely broad reading of its prior decision in *New York v. Belton*, 453 U.S. 454, 460-61 (1981), which was incorrectly interpreted by many jurisdictions as authorizing an automatic warrantless vehicle search incident to the arrest of a recent occupant, regardless of whether the area was within the arrestee's reach at the time of search. *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

In *Gant*, the defendant was arrested for driving with a suspended license. *Id.* at 1714-15. After his arrest, officers handcuffed and locked him in a patrol vehicle, searched his car, and seized a weapon and a bag of cocaine. *Id*. at 1715. Gant argued that the holding in *Belton* did not authorize the warrantless search of his vehicle

because he was not a threat to the officers, as he was secured in a patrol vehicle at the time of search, and because he had been arrested for a traffic offense for which no evidence would have been present in his vehicle. *Id*.

The United States Supreme Court held that the search was unreasonable, because the justifications underlying the rules in *Chimel v. California*, 395 U.S. 752, 762-63 (1969), no longer existed once the arrestee was secured in a patrol car and under officer supervision. *Id*. *Chimel* provided that it is reasonable for an officer to conduct a warrantless search of the arrested person and any areas within his or her immediate control in order to ensure officer safety and prevent concealment or destruction of evidence. *Gant*, 129 S. Ct. at 1719. The Court rejected the lower courts' overly broad interpretation of *Belton*, and held that the rationale under *Chimel* will allow officers to search a vehicle and containers therein incident to a recent arrest only when 1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or 2) when the officer reasonably believes that evidence pertaining to the crime of arrest might be found in the vehicle. *Id*. at 1719. There was no such justification in Mr. Johnson's case.

After Mr. Johnson's case was transferred to this Court following opinion by the lower appellate court, the United States Supreme Court granted a petition for certiorari in *Davis v. United States*, which asked a question nearly identical to the one presented in the State's application for transfer here - whether the "good faith" exception to the exclusionary rule encompasses an officer's objectively reasonable reliance on existing court precedent at the time of the search. 131 S.Ct 502 (2010).

Specifically, the question related to an officer's reliance on his jurisdiction's interpretation of the vehicle search-incident-to-arrest exception to the warrant requirement. *Davis*, 131 S.Ct 2419, 2426 (2010).

In *Davis*, an officer conducted a routine traffic stop and pulled over a vehicle in which the defendant was a passenger. *Id.* at 2426. Davis and the driver were arrested, handcuffed and placed in separate patrol cars, and the police then searched the passenger compartment of the vehicle and discovered a revolver inside Davis's jacket pocket. *Id.* He was charged with being a convicted felon in possession of a firearm, and unsuccessfully moved to suppress the weapon. *Id.* While Davis's appeal was pending, the United States Supreme Court issued its opinion in *Arizona v. Gant, supra*, which made clear that searches of this type are not justified. *Id.* at 2426. Davis argued that the exclusionary rule should still apply to suppress the illegally-seized evidence, because to do otherwise would be irreconcilable with the Court's decisions regarding retroactivity of new Fourth Amendment precedent. *Id.* at 2430.

The United States Supreme Court held that the exclusionary rule does not apply to suppress evidence obtained during a search conducted in reasonable reliance on binding precedent. *Id.* at 2430. The Court determined that the decision in *Gant* is retroactive, but that retroactivity does not determine the appropriate remedy, if any, the defendant should obtain. *Id.* at 2430-31. The Court held that to suppress evidence when officers are "blamelessly" relying on binding Circuit precedent would do nothing to deter future officer misconduct, and therefore the "good faith" exception to

the exclusionary rule applied to allow the government to use the illegally seized evidence. *Id.* at 2434.

However, all parties in *Davis* agreed that the officers' conduct complied with existing judicial precedent, and that the officers were not culpable in any way. *Id.* at 2428, citing *United States v. Gonzales*, 71 F.3d 819, 822 (11th Cir. 1996). The Court declared, "Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim." *Id.* at 2428.

Appellant does not concede this issue, and this is not the case here.

The essential purpose of the Fourth and Fourteenth Amendment is to impose a standard of reasonableness on the exercise of discretion by government officials in order to protect the privacy and security of individuals against arbitrary invasions. *Delaware v. Prouse*, 440 US. 648, 654 (1979). The permissibility of a law enforcement practice is judged by balancing its intrusion on constitutional rights against the promotion of legitimate governmental interests. *Id.* In justifying the particular intrusion, the officer must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Scott*, 436 U.S. at 138, citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). The overarching principle required by these constitutional provisions, which stands firm regardless of any nuanced decision about which law enforcement procedures may be justified under specific facts, is that the searches and seizures must be reasonable. See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); U.S. Const., Amends IV and XIV; Mo. Const., Art. I, Section 15.

A warrantless search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Edmond*, 531 U.S. at 37, citing *Chandler v. Miller*, 520 U.S. 305, 308 (1997). There are limited exceptions when this usual rule does not apply, one of which is a search incident to a lawful arrest. *Gant*, 129 S.Ct at 1716. This warrantless intrusion is considered reasonable because it is justified by interests in officer safety and preservation of evidence. *Id.*

Here, Deputy Watson admitted that he was initially unsure if Mr. Johnson had committed a violation for which he could be arrested. (Tr. 16-17). He did not know if Mr. Johnson, who was an adult man and not a 15 year old child, was required to have a licensed driver in the vehicle with him under the conditions of his learner's permit. (Tr. 16-17). He only arrested Mr. Johnson after he admitted that he was in violation of the permit's restrictions. (Tr. 10, 11, 17, 167). Watson then arrested him for the separate offense of driving without a valid license, and said he typically arrests people for this because it is a jailable offense. (Tr. 168). But violating the conditions of a learner's permit is an infraction for which no jail time is authorized.[5] Section 320.178.9, RSMo Supp. 2006.

Below, the prosecutor argued that Deputy Watson still had authority to perform a full custodial arrest for an infraction, pursuant to Section 544.216. (Tr. 68).

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[5] This issue is argued in the context of the verdict director for driving without a valid license, which did not include operating under a valid learner's permit as a defense, in Point III of this brief.

Appellant does not concede this, however, because there are limitations within Section 544.216 that could have affected Deputy Watson's authorization to perform an arrest for an infraction, which the State failed to prove or even discuss in this proceeding.

Watson also testified that he was aware of the justification for vehicle searches incident to arrest, and admitted they did not exist. (Tr. 11, 37-38, 168). He testified that this type of search incident to arrest was standard procedure and was done for safety reasons - to make sure that Mr. Johnson was not armed and that if he regained access to his vehicle, there would not be anything within it that could be used to harm the officer. (Tr. 11, 38, 168). Watson admitted that Mr. Johnson never attempted to return to his van and he had no reason to believe that he would try to do so, even though he was free to leave before he was arrested. (Tr. 21-22).

Deputy Watson was asked by defense counsel how Mr. Johnson could have gotten something out of his van if he was not allowed to leave the patrol vehicle other than the brief moment he was handcuffed and put back inside. (Tr. 21). Watson answered “I’ve always wondered that myself." (Tr. 21). Then he claimed he did have "times where they made it to my vehicle handcuffed – or, made it back to their personal vehicle handcuffed. They have." (Tr. 21). But he conceded he had no reason to think Mr. Johnson would try to return to his van. (Tr. 21-22). After his "arrest," Watson never allowed Mr. Johnson out of the patrol vehicle until he took him to jail. (Tr. 20).

Watson testified that another reason for these searches is to inventory the vehicle, but he had not yet made the decision if he was going to tow the van at that the time of the search. (Tr. 37-38). But Watson also admitted that he became suspicious when he found out that Mr. Johnson had denied consent for a vehicle search earlier that day, and admitted that he wanted to search the car for this reason. (Tr. 32). It is obvious that the "arrest" was mere pretext to rifle through Mr. Johnson's vehicle and belongings in a search for contraband.

Most importantly, though, Deputy Watson informed Mr. Johnson that if he did not find anything illegal in the warrantless search of his van, he would allow him to post bond right there at the scene. (Tr. 36). Watson did not write out a citation at that time. (Tr. 35). Of course, after Deputy Watson found the sought-after contraband in the van, Mr. Johnson was not given the opportunity to bond out and leave the scene. (Tr. 36). Deputy Watson had no intention of performing a full custodial arrest of Mr. Johnson for driving without a valid license and transporting him to the station to book him for this offense. Instead, he was conducting a temporary detention solely for the purpose of conducting a warrantless search of Mr. Johnson's vehicle in order to look for contraband. This is not a "good faith" reliance on law or officer training, it is not objectively reasonable under any measure, and it is exactly the type of flagrant misconduct that would be deterred by application of the exclusionary rule.

In *United States v. Robinson*, the defendant challenged the breadth of the general authority to search an arrestee's person incident to his arrest for a minor traffic violation. 414 U.S. 218, 234-35 (1973). The officer had admitted that he was not

motivated by a feeling of danger and was not specifically looking for weapons, which are the general justifications for such a search. *Id.* at 237, n. 7. The Court held that it is the fact of the lawful arrest that authorizes the search, and the search requires no additional justification. *Id.* at 235.

But the Court declared that its basis for treating all custodial arrests alike for the purposes of the search justification was because "[i]t is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." *Id.*

In comparison, here, Deputy Watson had no intention of transporting Mr. Johnson to the police station. He admitted that he was going to let Mr. Johnson bond out and leave if he did not find contraband in his van. (Tr. 36). The justifications for the search-incident-to-arrest exception hardly exist if the officer does not intend to perform a full custodial arrest of the person, but is only engaging in a temporary detention which he calls an "arrest" merely to act as a pretext for a warrantless search.

When an officer admits to facts showing that he is attempting to invoke a standard police procedure as a pretext to engage in an investigation that is not based on individualized suspicion, and that procedure is then declared unconstitutional while the case is still pending, the "good faith" exception to the exclusionary rule should *not* apply. And when a certain standard procedure can so easily be invoked as

a pretext to purportedly authorize greater intrusions without any individualized suspicion, this should act as a red flag that such procedure is constitutionally suspect.

In *Missouri v. Siebert*, an officer of the Rolla Police Department testified that the strategy of withholding *Miranda* warnings until after interrogation was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. 542 U.S. 600, 610 (2004). This testimony was supported by the Police Law Institute, which instructed the same unconstitutional procedure. *Id.* The Court noted the popularity of this procedure as well. *Id.*

Appellant does not believe that officers are trained to rely on specific case law as a justification for their actions, nor are they trained to perform legal analysis of these decisions. When officers are exercising their discretion in the field, they probably do not decide to search a person or vehicle because *New York v. Belton* ostensibly authorized them to do so, or decide not to search somebody because *Arizona v. Gant* now provides that they cannot. These decisions have obviously been the subject of a great deal of debate, are the topic of numerous legal treatises, and have been subject to a great deal of varied interpretation. We cannot expect, and should not encourage, law enforcement officers to perform legal analysis of lower court decisions in order to determine which procedure might be justified within their jurisdiction. Instead, officers are trained by their various offices and departments about the justifications for certain procedures, so that they can quickly assess the reasonableness of the intrusion based on the specific circumstances they face.

But despite the officer's clear reliance on his training in *Siebert*, and the objective reliance by many officers on the same procedure, the Court still held that the confession obtained in this manner must be suppressed. *Id.* at 617. And the Court mentioned that the officer in *Siebert* had intentionally withheld *Miranda* warnings, unlike the officer in *Oregon v. Elstad*, who the Court determined had made a mere "good-faith" *Miranda* mistake. *Siebert*, 542 U.S. at 615, citing *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (when the officer did not intend to interrogate the suspect but made a passing comment that resulted in an incriminating statement, it was not suppressed).

The Court held that by any objective measure, the police strategy in *Siebert* was adapted to undermine the *Miranda* warnings and the protections of the Fifth Amendment. *Id.* at 616. The Court mentioned in a footnote that the officer's intent will rarely be as candidly admitted as it was there, so the focus is on the facts apart from the intent that show the unconstitutional tactic at work. *Id. at 617*, n. 6. However, the Court has also declared that on occasion, the motive with which the officer conducted the illegal search may be relevant to determine if application of the exclusionary rule will result in substantial deterrence. *Scott v. United States*, 436 U.S. 128, 139 n. 13 (1978). Appellant believes this is such an occasion, because the police strategy here was adapted, and improperly invoked by Deputy Watson, merely to undermine the protections of the Fourth and Fourteenth Amendment, and Article I, Section 15 of our State Constitution.

As the United States Supreme Court recognized, cases in which an officer actually admits to facts that show their motivations were pretextual will be few and far between. *Siebert*, 542 U.S. at 617, n. 6. An officer who believes a certain procedure is authorized regardless of whether any justification exists will probably be more willing to candidly admit to such facts. But in the cases where the standard procedure is declared unconstitutional when the case is not yet final, it seems that the information known to the officer and whether or not he was actually relying in "good faith" should not be ignored.

If the officer admits to facts that show the search was not reasonable based on the information known to him at the time, as Deputy Watson did, this misconduct should not be swept aside by an objective determination that another officer might have been allowed to search the car upon a valid, lawful, full custodial arrest. And here, Deputy Watson admitted to facts that showed he was engaging in a pretextual temporary detention, which he called an "arrest," solely in order to conduct a warrantless and suspicionless search of Mr. Johnson's vehicle. This does not even seem to properly invoke the vehicle search-incident-to-arrest exception, even if this procedure had not been declared unconstitutional. This is not "good faith" reliance on the overruled law, and whether this is viewed subjectively or objectively, it is unreasonable by any measure. This is exactly the type of future misconduct which the exclusionary rule is designed to deter.

Appellant respectfully requests that this Court reverse Appellant's conviction for possession of a controlled substance, based upon the illegally seized evidence, and remand the cause for further proceedings.

II.

The trial court erred in overruling Mr. Johnson's motion for judgment of acquittal at the end of all evidence and in convicting him of possession of cocaine, because this denied him his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish that Mr. Johnson was in actual or constructive possession of cocaine or that he had any awareness of its presence or nature, when Mr. Johnson did not have exclusive control of the van, he had recently purchased the used vehicle, other occupants were seen in the van on the day of his arrest and another person had been driving it, a passenger was left in the van for several minutes while Mr. Johnson was questioned inside of the deputy's patrol vehicle, the deputy did not notice the broken-up rock-like substance on the van's dashboard or console area during the initial traffic stop even though he could see directly in the van and talked with the occupants for several minutes, he noticed it immediately upon commencing his later search, but testified that in his training and experience "it almost appeared to be like a piece of rock cocaine that's been broken," but no evidence was presented that Mr. Johnson would have known what the substance was even if it was present before he was taken to the patrol car, and the evidence as a whole was entirely insufficient to support any inference that Mr. Johnson knew of the presence or the nature of the substance in the van.

Standard of Review

A criminal defendant is protected against jury irrationality or error by a review of the sufficiency of evidence for the conviction, which involves a determination of whether the evidence submitted at trial could support any rational finding of guilt beyond a reasonable doubt. *United States v. Powell*, 469 U.S. 57, 67 (1984). In determining if the evidence is sufficient to support a finding of guilt, the appellate court does not weigh the evidence presented at trial, but accepts all evidence tending to prove guilt and ignores all contrary inferences. *State v. Johnson*, 81 S.W.3d 212, 215 (Mo. App. S.D. 2002). However, the reviewing court may not supply missing evidence, or give the State the benefit of speculative or unreasonable inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001).

Argument

Howard Johnson was convicted of the felony offense of possession of cocaine, in violation of Section 195.202. (LF 92-93). A person possesses a controlled substance if he has conscious and intentional possession of the substance, and an awareness of the presence and the nature thereof. Section 195.010(34); *Johnson*, 81 S.W.3d at 215. Possession can be either actual, if the person has the substance on his or her person or within his or her easy reach and convenient control, or constructive, if the person has the power and intention at a given time to exercise control over the substance. Section 195.010(34).

In Mr. Johnson's case, the State failed to establish that Mr. Johnson was in actual possession of the cocaine found within the van. He did not have it on his

person, and the evidence is insufficient to show that he had it within his easy reach and control. *Id.* The tiny rocks of cocaine were found on a console or dash area in the center of the vehicle, in and around a cup holder. (Tr. 169-170, 186; Def. Ex. A). The cup holder was located closer to the passenger side of the car. (Tr. 186; Def. Ex. A). Even if this Court assumes that Mr. Johnson could easily reach and control the substance within the passenger side cup holder, mere proximity to contraband alone is not enough to prove ownership. *State v. Ingram*, 249 S.W.3d 892, 895 (Mo. App. W.D. 2008).

A defendant who has exclusive control of property is deemed to have possession and control of any substances found on that property. *Johnson*, 81 S.W.3d at 215. However, the "exclusive possession of premises" rule has been modified in cases of automobiles, and this rule is tempered by evidence that other persons had equal access to the vehicle. *Id.*

Here, Mr. Johnson did not have exclusive control of the automobile. He had very recently purchased the used vehicle, a 1988 Econoline van, just two weeks earlier. (Tr. 160). When Trooper Maudlin conducted the earlier traffic stop, Mr. Johnson was not driving the vehicle, and there were three other occupants in the van besides Mr. Johnson. (Tr. 31). At the time of the later traffic stop that was conducted by Deputy Watson that same day, Mr. Johnson was driving, but still had a passenger with him. (Tr. 159, 167). Watson testified that after the initial traffic stop, he left Mr. Johnson and his passenger, Joyce Washington, in the van together while he ran a check to see if they had valid licenses and to see if they had any warrants for their

arrest. (Tr. 166-67). But later, Washington was left in the van alone for several minutes while Mr. Johnson was questioned inside of Deputy Watson's patrol vehicle, and had sole access to it during this time. (Tr. 167, 168, 221).

Possession cannot be inferred when others have had equal access to a vehicle. *State v. Chavez*, 128 S.W.3d 569, 574 (Mo. App. W.D. 2004). In cases involving joint control of an automobile, a defendant may only be deemed to have possession and control if additional evidence in the record connects him or her to the controlled substance found within. *Johnson*, 81 S.W.3d at 215; *Chavez*, 128 S.W.3d at 575. Additional evidence supporting an inference of possession can include the presence of a large quantity of the substance at the scene, routine access to the area where the substance was found, the substance being found in plain view, nervousness exhibited during the search, or other conduct and statements made by the accused. *Johnson*, 81 S.W.3d at 215-216.

In Mr. Johnson's case, there was not a large quantity of the substance found within the van. The amount of cocaine found in the vehicle weighed only eight one-hundredths of a gram. (Tr. 200; St. Ex. 1). Marcy Stiefel, the State Highway Patrol Criminalist, did not believe a full gram would even fill up a bottle cap. (Tr. 200). Deputy Watson had been trained in drug recognition, and testified that in his training and experience, it "almost appeared to be like a piece of rock cocaine that's been broken to be used." (Tr. 170). Even assuming that the drugs were present on the console area at the time of the traffic stop or before, there was such a small amount of substance that the evidence is also insufficient to show that Mr. Johnson would have

been aware of its presence and nature, rather than just thinking it was dust or debris. (St. Ex. 4).

Although the substance was found in plain view, the deputy did not notice it during the initial traffic stop, further leading to inferences that the substance was not present on the dash area until after Mr. Johnson had been taken to the patrol vehicle. During the initial stop, the deputy could easily see into the van, and could see Ms. Washington around Mr. Johnson. (Tr. 184-185). The van sat higher than a car and the deputy was able to view the dashboard, steering wheel, and steering column area inside. (Tr. 185). The deputy chatted with the occupants for several minutes, long enough to go through all of his necessary paperwork, and still did not notice the substance. (Tr. 191). However, as soon as the deputy began the search of the vehicle, he "immediately" saw the white rock-type substance that had been broken up on the cup holder area. (Tr. 169).

There is no evidence that Mr. Johnson exhibited any nervousness during the search, or that there were any signs that he was under the influence of any controlled substance. He was cooperative, and voluntarily went back to Deputy Watson's patrol vehicle for questioning when asked to do so. (Tr. 167). Mr. Johnson stated that he did not know what the substance was, as he had no knowledge of it being in his vehicle. (Tr. 170). There is no evidence of consciousness of guilt or that Mr. Johnson had any awareness of the substance found in the van. *See, e.g., State v. Bristol*, 98 S.W.3d 107, 112 (Mo. App. W.D. 2003) (reversing conviction for possession of a controlled substance when there was no evidence the accused exhibited signs of guilt;

he gave his correct name to officers, was cooperative, did not attempt to flee, and did not appear nervous or make any incriminating statements).

The State has failed to prove beyond a reasonable doubt that Mr. Johnson had any knowledge of the existence of the cocaine, or that he intended to or had exercised any control over the substance. There were no additional factors supporting any inferences that he had any knowledge or control of the drugs. As the evidence as a whole is entirely insufficient to show actual or constructive possession of the cocaine, Mr. Johnson's conviction should be reversed.[6]

[6] He has already served the full sentence for this conviction.

III.

The trial court plainly erred in submitting Instruction Number 5 to the jury, the verdict director for driving without a valid license, because this violated Mr. Johnson's rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that this instruction directed the jury to find Mr. Johnson guilty if he was driving without a valid license and was aware of this fact, but failed to require the jury to determine if Mr. Johnson committed this act while in possession of a valid learner's permit, which would have negated any cause for conviction as statutory law clearly states that a violation of permit requirements is only an infraction, which does not constitute a crime and for which no jail time could have been requested.

Standard of Review

Due process protects a person against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). It is the state's burden to prove each and every element of a criminal offense. *State v. Keeler*, 856 S.W.2d 928, 930 (Mo. App. S.D. 1993). Verdict directing instructions must contain each element of the offense charged, and must require a finding of every fact necessary to support the elements. *State v. Doolittle*, 896 S.W.2d 27, 30 (Mo. banc 1995).

Defense counsel objected to the submission of the jury instruction regarding driving without a license prior to the time the jury retired to consider its verdict, as required by Rule 28.03. However, she objected to the instruction on the basis that the evidence was insufficient for submission to the jury, not that it was not in accordance with statutory law and failed to contain an applicable defense. (Tr. 210). Mr. Johnson, in the motion for a new trial that he personally drafted, also objected to the instruction on the basis that it was unconstitutional, and correctly pointed out that the verdict of the misdemeanor offense was contrary to law as provided in Section 302.178 and asserted that the court had misdirected the jury in a material matter of law. (LF 78, 82). Mr. Johnson's attorney took up his personally-prepared motion for a new trial at sentencing. (Tr. 247). It alleged various errors, most of which defense counsel did not argue, but she did orally argue that it was error to submit the instruction to the jury allowing them to find him guilty of driving without a valid license when he had a learner's permit. (Tr. 247-48). The court ruled in favor of the State. (Tr. 255).

Although this issue was presented to the trial court, technically it is not preserved. Mr. Johnson respectfully requests plain error review. Rule 30.20. When exercising plain error review, the appellate court must determine whether substantial grounds exist for believing that the error resulted in manifest injustice. *State v. White*, 92 S.W.3d 183, 189 (Mo. App. W.D. 2002). A faulty instruction, or submission of an instruction that is not applicable, is grounds for reversal if the defendant has been prejudiced. *State v. Carson*, 941 S.W.2d 518, 523 (Mo. banc 1997). Instructional

error is plain error "when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994), citing *State v. Cline*, 808 S.W.2d 822, 824 (Mo. banc 1991).

Argument

Howard Johnson was convicted of the misdemeanor offense of driving without a valid license, in violation of Section 302.020. To establish proof for the elements of this offense, the State argued that he did not have a valid driver's license, but only had a valid Missouri learner's permit and failed to have a licensed driver in the vehicle with him as is required by Section 302.130. (Tr. 212-13). However, it was improper for the court to submit a verdict director for the offense of driving without a valid license without including an additional provision requiring the jury to find him not guilty of this offense if they determined Mr. Johnson had a valid learner's permit. (LF 55).

The instruction submitted to the jury was as follows.

INSTRUCTION NUMBER 5

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

First, that or [sic] July14th, 2007, in the County of Daviess, State of Missouri, the defendant operated a motor vehicle on a highway, Interstate 35, and

Second, that defendant did so during a time when he did not have a valid operator's license, and,

Third, that defendant was aware that he did not have a valid operator's license,

then you will find the defendant guilty under Count I of driving without a valid license.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Submitted by State

MAI 3d 332.49

(LF 55).

Section 302.178.9, RSMo Supp. 2006, provides: "Any person who violates any of the provisions of this section relating to intermediate drivers' licenses or the provisions of Section 302.130 relating to temporary instruction permits is guilty of an infraction, and no points shall be assessed to his or her driving record for any such violation." Section 556.021, RSMo Supp. 2006, states that an infraction does not constitute a crime, and that no sentence other than a fine or other civil penalty is authorized upon conviction.

Mr. Johnson was in possession of a valid learner's permit, which he obtained in accordance with Section 302.130. (Tr. 166). If he actually was in violation of Missouri's permit law, an offense for which he was never charged, it would only amount to an infraction. Section 302.178.9. The offense of driving without a license provides that "[u]nless otherwise provided for by law," it shall be unlawful for any person to operate a vehicle unless the person has a valid license. Section 302.020.1.

As otherwise provided for by law, Section 302.178 provides that a person who possesses a valid learner's permit and is violating the conditions of the permit is guilty of an infraction, not a misdemeanor. The law also provides that an infraction is not a crime, and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime. Section 556.021. Despite this, the court submitted a jury instruction that did not contain this defense. (LF 55).

Mr. Johnson, or his defense counsel, submitted a non-MAI instruction that allowed the jury to consider whether he was guilty of the infraction of violating provisions of a permit if they did not find him guilty of driving without a valid license. (LF 57). The rejected instruction stated:

INSTRUCTION NO. 7

As to Count 1, if you do not find the defendant guilty of operating a motor vehicle without a valid license, you must consider whether he is guilty of violating the provisions of a temporary instruction permit under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about July 14, 2007, in the County of Daviess, State of Missouri, the defendant operated a motor vehicle on a highway, Interstate 35, and

Second, that defendant was not operating a motor vehicle within the limitations of a temporary instruction permit, by not having a licensed operator in the vehicle

then you will find the defendant guilty under Count I of violating the provisions of a temporary instruction permit.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Not in MAI-CR3d

Submitted by Defendant

(LF 57).

This instruction was also improper. It did not ask the jury to find Mr. Johnson not guilty of driving without a valid license if they determined he was operating with a temporary instruction permit – it asked them to find him guilty of violating the provisions of a temporary permit *only if* they did not first find him guilty of driving without a valid license.

Appellant realizes that instructional error is rarely found to result in a miscarriage of justice under a plain error review. *State v. January*, 176 S.W.3d 187, 193 (Mo. App. W.D. 2005). However, when the trial court has so misdirected or failed to instruct the jury that it is readily apparent that the jury's verdict was affected, then the error requires reversal. *Id.*, citing *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999). As a general rule instructional error that relieves the state from having to prove a disputed element of the case is plain error that requires reversal. *Doolittle*, 896 S.W.2d at 30.

It was against substantive law for the court to submit a verdict director to the jury allowing them to convict Mr. Johnson of driving without a valid license, without providing information directly within Instruction No. 5 that would have negated

consideration of guilt for the misdemeanor offense if the jury determined that he had a valid learner's permit at the time. This would be similar to the parenthetical director already required by this verdict director, which asks the jury to determine whether the defendant was driving within the restrictions or limitations of a valid hardship license before they can determine guilt for this offense, and which must be submitted if there is evidence of such. MAI-3d 332.49.

An appellate court should exercise its discretion to correct plain error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Jones v. United States*, 527 U.S. 373, 389 (1999). "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946).

The submitted Instruction Number 5, the verdict director for driving without a valid license, did not explain the legal distinction between driving without a valid license or violating requirements of a learner's permit and resulted in an unlawful conviction. This is obvious error that prejudiced Mr. Johnson greatly, because he would not have been convicted and sentenced to jail time for the misdemeanor offense. As the erroneous instruction resulted in manifest injustice, Mr. Johnson is entitled to a reversal of his conviction for driving without a license. *State v. Beck*, 167 S.W.3d 767, 789 (Mo. App. W.D. 2005). Since he has already served his full time for this offense, he respectfully requests that this Court discharge him from his sentence rather than remanding for a new trial.

CONCLUSION

For the reasons presented in Point I of this brief, Appellant respectfully requests this Court to reverse his conviction for possession of a controlled substance and remand the cause for further proceedings. For the reasons presented in Point II, he requests this Court to reverse his conviction for possession of a controlled substance. For the reasons presented in Point III, he requests this Court to reverse his conviction for driving without a valid license.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Alexa Irene Pearson, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,523 words, which does not exceed the 31,000 words allowed for an Appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using Symantec Endpoint Protection, updated in July of 2011. According to that program, these disks are virus-free.

On the 2nd day of August, 2011, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

_____

Alexa Irene Pearson

APPENDIX

TABLE OF CONTENTS TO APPENDIX