(Corrected)
NOT DESIGNATED FOR PUBLICATION

No. 103,497

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee,*

v.

BRENT RAUH,
*Appellant.*

MEMORANDUM OPINION

Appeal from McPherson District Court; CARL B. ANDERSON, JR., judge. Opinion on remand filed October 17, 2014. Reversed and remanded with directions.

*Donald E. Anderson*, legal intern, and *Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

*David A. Page*, county attorney, and *Steve Six*, attorney general, for appellee.

Before GREEN, P.J., HILL, J., and LARSON, S.J.

*Per Curiam*: Brent Rauh appealed his convictions of drug-related offenses to this court. Rauh contended that the evidence was insufficient to sustain his drug convictions. We disagreed and affirmed. *State v. Rauh*, No. 103,497, 2011 WL 6309159 (Kan. App. 2011) (unpublished opinion), *petition for rev. granted* May 2, 2014. In addition, Rauh argued that the trial court erred in denying his motion for new trial.

Under Rauh's motion for new trial, he argued that the evidence seized from his pickup truck should be suppressed under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 73 L. Ed. 2d 485 (2009). Although the State conceded that the search of Rauh's pickup truck incident to his arrest was in violation of *Gant*, it argued that the good-faith exception applied. Thus, the exclusionary rule was inapplicable to this case. We disagreed and concluded that the trial court erred in not suppressing the evidence seized from Rauh's pickup truck, relying on *State v. Dennis*, No. 101,052, 2011 WL 425987, at *3 (Kan. App. 2011) (unpublished opinion), *review granted* 292 Kan. 967 (2011), for support.

The State filed a petition for review from our decision. Our Supreme Court granted the petition for review on May 2, 2014, and summarily reversed and remanded to this court for consideration of this matter in light of *State v. Dennis*, 297 Kan. 229, 300 P.3d 81 (2013).

In reaching our conclusion in *Rauh* that the search could not survive constitutional scrutiny under *Gant* and that the good-faith exception to the exclusionary rule should not be applied, we relied on this court's majority decision in *Dennis*, which held that the *State v. Daniel*, 291 Kan. 490, 242 P.3d 1186 (2010), *cert. denied* 131 S. Ct. 2114 (2011), holding was inapplicable to this case. In *Daniel*, our Supreme Court applied a good-faith exception to the exclusionary rule for pre-*Gant* searches incident to a lawful arrest conducted under the then-existing authority of K.S.A. 22-2501(c). 291 Kan. at 493, 505.

As stated previously, this court's majority decision in *Dennis* ruled that the *Daniel* decision, concerning the application of the good-faith exception to the exclusionary rule, did not control the outcome of the *Dennis* case. The State sought review of this court's majority decision, which the Supreme Court granted. Our Supreme Court agreed with the dissenting judge in this court that the majority erred when it ruled that *Daniel* was distinguishable from this case. Our Supreme Court declared "that it was unnecessary for

the officer to specifically articulate K.S.A. 22-2501 as authority for the search because application of a good-faith exception to the exclusionary rule is not governed by a subjective inquiry. The question is whether an objectively reasonable officer could rely on K.S.A. 22-2501. We agree with the State that the good-faith exception applies." *Dennis*, 297 Kan. at 230. As a result, our Supreme Court held that the good-faith exception ruling in *Daniel* controlled the outcome of the case and reversed the majority's decision in *Dennis*.

FACTS

Charles Alcock, patrol captain of the McPherson Police Department, drove his police car to the home of Rauh's parents. Alcock had recently learned that Rauh had active probation violation warrants from Marion County, Kansas, and hoped to serve Rauh with those warrants.

When Alcock arrived at the home, Rauh stood by the driver's side door of his pickup truck. Another man, Travis Meyers, got out of the passenger side of the truck. Rauh calmly approached Alcock as he got out of his patrol car. Throughout their encounter, Rauh seemed calm and cooperative. Meyers, however, seemed rather nervous, paced back and forth, and got a can of chewing tobacco from the truck. Alcock requested that Officer Gallagher come to the home because he believed Meyers might also have an outstanding arrest warrant. Gallagher arrived in about 3 or 4 minutes.

Alcock took Rauh into custody, and Gallagher took Meyers into custody. Rauh was placed in the passenger seat of Alcock's police car, and Meyers was placed in the back of Gallagher's police car.

After both men were detained, Alcock and Gallagher searched Rauh's truck. They found two black pouches—one under the driver's seat and the other under the passenger's

seat. The pouch beneath the driver's seat contained drug paraphernalia, including syringes, baggies, electronic scales, a folded-up dollar bill, and two metal spoons with residue. Additionally, a cigarette box in the center console contained small baggies filled with a crystal-like substance.

Rauh was charged with possession of methamphetamine with intent to distribute, possession of methamphetamine without drug tax stamps, possession of drug paraphernalia for distribution or sale, and possession of drug paraphernalia. Rauh had a 1-day jury trial. The jury delivered unanimous guilty verdicts on three of the four charges but could not agree on the charge of possession of paraphernalia used to sell drugs.

Later, Rauh moved for new trial or arrest of judgment based on *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 73 L. Ed. 2d 485 (2009), decided after Rauh's trial but before his sentencing. In his motion, Rauh argued that he was entitled to a new trial because the search of his truck violated the new rule articulated in *Gant* regarding a search incident to a lawful arrest. The trial court denied Rauh's motion for new trial.

In the State's original brief, it conceded that the search of Rauh's truck violated *Gant*. Nevertheless, the State argued that the good-faith exception to the exclusionary rule should be applied to save the illegal search.

Now we turn our attention to Rauh's argument on remand from our Supreme Court. In his supplemental brief, Rauh contends that the search of his vehicle incident to arrest was illegal in light of the United States Supreme Court ruling in *Arizona v. Gant*. Nevertheless, before we can consider the merits of Rauh's argument, we must first address the State's contention that Rauh has not preserved this issue for appeal. The State argues that Rauh never raised before the trial court the issue that the search of his truck went beyond the scope of K.S.A. 22-2501 when he moved to suppress evidence under his motion for new trial. As a result, the State contends that Rauh should be precluded from

raising this issue for the first time on appeal. See *State v. Johnson*, 293 Kan. 959, 964, 270 P.3d 1135 (2012).

Nevertheless, we are guided in this inquiry by *State v. Poulton*, 286 Kan. 1, 179 P.3d 1145 (2008). In Poulton's direct appeal, this court refused to his defendant's "claim that the evidence seized during a search was the fruit of the poisonous tree," because the defendant had "failed to raise the issue in the trial court and [had] failed to argue that any exceptional circumstances applied, thereby failing to preserve the issue for appeal." 286 Kan. at 5.

In reversing this court, our Supreme Court explained the following:

> "Appellate courts can consider new issues on appeal in the following circumstances: (1) Cases in which the newly asserted theory involves only a question of law arising on proved or admitted facts and that is finally determinative of the case; (2) cases raising questions for the first time on appeal if consideration of those questions is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) cases upholding the judgment of a trial court even though the trial court may have relied on the wrong ground or assigned a wrong reason for its decision. *State v. Stevens*, 278 Kan. 441, 454, 101 P.3d 1190 (2004) (citing *State v. Bell*, 258 Kan. 123, 126, 899 P.2d 1000 [1995])." 286 Kan. at 5.

In stating that at least one of the first two exceptions applied, our Supreme Court declared:

> "At least one of the first two exceptions applies in the present case. Poulton and the State entered into a written stipulation of facts for the bench trial. The written stipulation specifically renewed Poulton's objection to the denial of his motions to suppress and preserved the issue of suppression for appeal. Because there are no factual disputes, the question of whether the evidence stemming from the second search should have been suppressed is a purely legal question. The first exception may apply if it is determined that the evidence should have been suppressed and the suppression finally

> disposes of the case. The second exception applies because the suppression of evidence based on the violation of Poulton's rights under the fourth Amendment to the United States Constitution implicates a Fundamental right." 286 Kan. at 5.

Here, the first two exceptions apply to Rauh's case. As a result, we will address the merits in this matter.

Enroute to this court's holding in *Rauh*, this court grounded its conclusion that the good-faith exception should not apply for two reasons:

> "In the absence of evidence of any reliance on K.S.A. 22-2501(c) and given that the search was conducted in an area outside the immediate presence of the defendant (who was safely secured in the patrol car when the search occurred and was not even in the truck when observed prior to arrest), the search cannot survive constitutional scrutiny under *Gant* and the good-faith exception to the exclusionary rule should not be applied." 2011 WL 6309159, at *4 (Kan. App.).

As Rauh points out in his supplemental brief, our Supreme Court in *Dennis*, 297 Kan. at 230, reversed the first basis of this court's decision, holding: "[I]t was unnecessary for the officer to specifically articulate K.S.A. 22-2501 as authority for the search [of defendant's car] because application of a good-faith exception to the exclusionary rule is not governed by a subjective inquiry."

Nevertheless, Rauh further notes that our Supreme Court recently upheld the second part of this court's rationale:

> "We hold that after *Conn* and *Anderson*, a law enforcement officer conducting a search incident to arrest could not objectively reasonably rely on federal caselaw to enlarge the physical scope set out in K.S.A. 22-2501 beyond the statute's plain language, which limited the search to the subject's "immediate presence." *State v. Pettay*, 299 Kan. __, 326 P.3d 1034, 1044 (2014).

In *Pettay*, our Supreme Court explained that a good-faith exception should not apply when a search of vehicle exceeds the physical scope allowed by K.S.A. 22-2501:

> "K.S.A. 22-2501 directs that an officer 'may reasonably search the person arrested *and the area within such person's immediate presence.'* (Emphasis added.) When Pettay's vehicle was searched, he was handcuffed and secured in a patrol car. The Court of Appeals agreed with the State that a good-faith exception should apply based on the factual similarities with the search in *Daniel. State v. Pettay*, No. 107,673, 2013 WL 1149745, at *8. (Kan. App. 2013) (unpublished opinion).
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> "We disagree with that outcome. The State's arguments do not justify application of a good-faith exception in light of the plain language of K.S.A. 22-2501, which had been held to statutorily control the permissible circumstances, purposes, and scope for a search incident to arrest long before Pettay's vehicle search. See *State v. Conn*, 278 Kan. 387, 391, 99 P.3d 1108 (2004); *State v. Anderson*, 259 Kan. 16, 22, 910 P.2d 180 (1996). Based on the issues as presented by the parties, we reverse the Court of Appeals panel, reverse the district court's order, and remand." 326 Kan. at 1041.

Because Pettay was handcuffed in a deputy sheriff's patrol car when the search of his truck was made, our Supreme Court held that he was not within the immediate presence of the vehicle. Thus, our Supreme Court held in *Pettay* that the good-faith exception did not apply.

As Rauh further points out, the justification for applying the good-faith exception is even less here than in *Pettay* because Officers Alcock and Gallagher never saw Rauh in his truck. On the other hand, the State cites *State v. Davison*, 41 Kan. App. 2d 140, 146, 202 P.3d 44 (2009), for an opposite position. In *Davison*, the majority stated: "Case law in Kansas and other jurisdictions indicates when an arrestee has been a 'recent occupant' of a vehicle, such vehicle may be considered to be within the person's 'immediate presence' and therefore within the proper scope of a search incident to arrest under K.S.A. 22-2501." Nevertheless, the *Davison* decision was reversed and remanded by summary order of our Supreme Court dated October 9, 2009.

Finally, the State argues that this case is distinguishable from *Pettay*, maintaining that Pettay "precisely argued the search exceeded the physical scope permitted by K.S.A. 22-2501." The State further argues that this "within such person's immediate presence" argument was not raised before the trial court or before this court until Rauh's supplemental brief. As stated earlier, we have rejected this argument based on *Poulton*.

As this court noted in its original decision, "[*a*]*fter taking both Rauh and Meyers into custody and securing them in each of the officer's respective police cars*, Alcock and Gallagher began a search of the pickup." *Rauh*, 2011 WL 6309159, at *1. Because the truck was not within the "immediate presence" of Rauh when the search incident to the arrest was made, the State cannot rely on the good-faith exception doctrine under the plain language of K.S.A. 22-2501.

Reversed and remanded with directions to suppress all evidence obtained as a result of the search.