

No. 18-120028-A

**IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

JAMES LAWTON THORNTON
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
Honorable Sally Pokorny, Judge
District Court Case No. 17 CR 729

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Nature of the Case

A jury convicted James Thornton of possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. The district court imposed a controlling 18-month prison sentence. This is Mr. Thornton's direct appeal.

Issues Presented

- Issue #1:** The police arrested Mr. Thornton for failure to yield and an arrest warrant for a probation violation. Officer Kerby searched Mr. Thornton's backpack incident to this arrest. The search of Mr. Thornton's backpack was not a valid search incident to arrest.
- Issue #2:** The jury was instructed that it could convict Mr. Thornton for possession of paraphernalia based on a glass pipe or a syringe. The district court should have instructed the jury to agree unanimously upon an act to convict.

Statement of Facts

One December evening, James Thornton rode his bicycle through a residential neighborhood in Lawrence. (R.6, 4). Lawrence police officer Peter Kerby saw Mr. Thornton, lantern in hand, riding down the street. (R.10, 17). The officer decided that the bike did not have proper lighting or reflectors and gave chase. (R.10, 17). Officer Kerby followed Mr. Thornton for a few seconds with his emergency lights on before he tried to run Mr. Thornton off the road with his police cruiser. (R.10, 18-19). Mr. Thornton stopped to steady himself to regain control of his bike, and then rode further down the street, coming to a stop two

houses later. (R.6, 7-8). Officer Kerby never saw anything drop from Mr. Thornton during the pursuit. (R.10, 72). Officer Kerby jumped out of his vehicle and immediately put Mr. Thornton in handcuffs. (R.10, 20). Officer Kerby seized Mr. Thornton's backpack and placed it on his patrol car. (R.7, 7). Mr. Thornton was arrested for outstanding warrants and failure to yield to Officer Kerby. (R.6, 27).

Officer Matthew Roberts arrived on scene to find Mr. Thornton handcuffed and asked Mr. Thornton "if he had anything on him that [he] needed to be aware of, and [Mr. Thornton] said he may have a marijuana pipe in his possession." (R.6, 27). Officer Roberts searched Mr. Thornton and located a blue glass pipe on Mr. Thornton. (R.6, 27). The pipe that was recovered was never submitted to the KBI for any testing. (R.10, 106). No marijuana or methamphetamine was located on Mr. Thornton's person. (R.10, 75-82).

While Officer Roberts searched through Mr. Thornton's pockets, Officer Kerby rifled through Mr. Thornton's backpack. (R.10, 34). Officer Kerby searched Mr. Thornton's backpack incident to arrest once Officer Kerby determined there was a warrant out for Mr. Thornton's arrest. (R.7, 9). Inside of the backpack, Officer Kerby found a pair of wire cutters and a syringe with an orange cap. (R.10, 34). No illicit drugs were found in Mr. Thornton's backpack. (R.10, 35).

After Officer Kerby searched through Mr. Thornton's backpack and Officer Roberts searched through Mr. Thornton's pockets, the officers decided to walk along the roadway where Mr. Thornton had rode the bicycle. (R.10, 58). A baggie of marijuana was found on the ground 75-100 feet from the place where Mr. Thornton stopped his bike. (R.10, 40). Officer Kerby took photographs of a mailbox and ditch near where the baggie was found. (R.10, 37-38). Neither officer took photographs of the baggie as it was found. (R.10, 37-38). The baggie was found was near where Officer Kerby first attempted to stop Mr. Thornton with his patrol car. (R.10, 37, 39-40). Officer Kerby suspected that the material in the baggie was marijuana. (R.10, 43). Upon closer inspection, Officer Kerby observed a smaller baggie inside and later tests confirmed that the smaller baggie contained methamphetamine. (R.10, 137, 199).

As a result of the stop and searches, the state charged Mr. Thornton with possession of drug paraphernalia, possession of marijuana, and possession of methamphetamine. (R.1, 12). A jury found Mr. Thornton guilty on all three counts. (R.1, 63; R.10, 169-170). The district court imposed an 18-month prison sentence. (R.12, 19). Mr. Thornton filed a timely notice of appeal. (R.3, 1).

Arguments and Authorities

Issue #1: The police arrested Mr. Thornton for failure to yield and an arrest warrant for a probation violation. Officer Kerby searched Mr. Thornton's backpack incident to this arrest. The search of Mr. Thornton's backpack was not a valid search incident to arrest.

Preservation

Defense counsel moved to suppress evidence obtained in violation of the Fourth Amendment and K.S.A. 22-2401. (R.1, 30). In the motion, defense counsel noted that “[t]o have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek to support the crime of arrest.” (R.1, 33). Defense counsel specifically argued that the “search incident to arrest is a violation of the 4th and 14th Amendments.” (R.1, 34). The district court denied Mr. Thornton’s motion to suppress after a hearing. (R.7, 36). At trial, when the state sought to introduce information from the stop and subsequent searches, defense counsel repeatedly objected citing the Fourth Amendment and the district court granted a standing objection. (R.10, 114, 128-29). When the state specifically sought to introduce evidence of the syringe found in Mr. Thornton’s backpack, Mr. Thornton again objected citing the Fourth Amendment. (R.10, 138). The district court indicated that “I find that’s your standing objection. I will overrule it and stand by my prior ruling and admit [the syringe.]” (R.10, 139). Therefore, this issue is properly preserved for appeal.

Standard of Review

An appellate court reviews the district court's decision on a motion to suppress evidence using a bifurcated standard. The appellate court reviews the district court's factual findings to determine whether they are supported by substantial competent evidence. The court then reviews the ultimate legal conclusion regarding the suppression of evidence using a de novo standard. *State v. Woolverson*, 284 Kan. 59, 70, 159 P.3d 985 (2007). In the present case, there are no factual disputes, therefore review is de novo.

Argument

Warrantless searches are considered unreasonable and invalid unless they fall within a recognized exception to the search warrant requirement. *State v. Daniel*, 291 Kan. 490, 496, 242 P.3d 1186 (2010). The United States Supreme Court held that a search incident to a lawful arrest for the purposes of searching for evidence of a crime, must be limited to searching for evidence of *the* crime for which the defendant was arrested. *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the defendant was arrested for driving with a suspended license. *Gant*, 556 U.S. at 334. He was handcuffed and locked in the back of a patrol car. *Gant*, 556 U.S. at 334. Police officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. *Gant*, 556 U.S. at 334. The *Gant* Court held that because the defendant could not access his car to retrieve weapons or evidence at the time

of the search, that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, 395 U.S. 752 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U.S. 454 (1981), did not justify the search. *Gant*, 556 U.S. at 335.

SEARCH INCIDENT TO ARREST DOES NOT REACH AREAS OUTSIDE OF SUSPECT'S CONTROL

Under *Chimel*, police may search incident to arrest only the space within the area where the arrestee might gain possession of a weapon or destructible evidence. *Chimel*, 395 U.S. at 763. The *Gant* Court pointed out that the safety and evidentiary justifications underlying *Chimel's* reaching-distance rule determine *Belton's* scope. *Gant*, 556 U.S. at 335. The Court held that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. *Gant*, 556 U.S. at 335. The Court also held that circumstances unique to the automobile context justify a search incident to arrest when arresting officers reasonably believe that evidence of the offense of arrest might be found in the vehicle. *Gant*, 556 U.S. at 335.

The *Gant* Court pointed out that in many cases, arresting officers will not have a reasonable basis to believe a recently occupied car contains relevant evidence about the offense of arrest. *Gant*, 556 U.S. at 343. The Court did acknowledge that in other cases, the offense of arrest will supply a basis for

searching the passenger compartment of an arrestee's vehicle and any containers therein. *Gant*, 556 U.S. at 343.

MR. THORNTON WAS SEPARATED FROM HIS BACKPACK

In this case, Officer Kerby spotted Mr. Thornton riding his bicycle through a residential neighborhood. (R. 6, 4). Officer Kerby stopped Mr. Thornton, and within seconds Officer Kerby slapped cuffs on Mr. Thornton's wrists and separated Mr. Thornton from his backpack. (R.10, 20).

Officer Kerby arrested Mr. Thornton for an outstanding warrant and for failing to stop for Officer Kerby. (R. 6, 20, 27). During the stop, the officers discovered that Mr. Thornton had an outstanding warrant for failure to report to his probation officer. (R10. 188). The officers had no reasonable basis to believe that the backpack would contain relevant evidence about Mr. Thornton's failure to yield or the outstanding arrest warrant. Officer Kerby's search of Mr. Thornton's backpack was illegal.

DISCOVERY OF BAGGIE WAS FRUIT OF POISONOUS TREE

Because the paraphernalia found in Mr. Thornton's backpack stemmed from an illegal search, the resultant discovery of the marijuana and the methamphetamine should be excluded by the fruit of the poisonous tree doctrine. The fruit of the poisonous tree doctrine bars the admission of evidence obtained in the course of unlawful searches and seizures. *State v. Deffenbaugh*, 216

Kan. 593, 598, 533 P.2d 1328 (1975). This rule extends to evidence directly seized and to evidence indirectly obtained as a result of information learned or leads obtained in the unlawful search. *State v. Deffenbaugh*, 216 Kan. 598. In this case, based on the discovery of the syringe, officers suspected that that Mr. Thornton used drugs. (R.10, 131). No controlled substances were located on Mr. Thornton's person or in his belongings. (R.10, 108-190). Officer Kerby testified that "[a]fter locating [the syringe] and then this other item that was located, I backtracked the route that we took to see if anything was discarded on the way." (R.10, 132). This testimony directly connects the discovery of the baggie of marijuana and methamphetamine with the discovery of the syringe in Mr. Thornton's backpack.

REVERSAL

As a result, all of the resulting evidence must be suppressed a fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963). In this case, all of the evidence for the drug-related convictions flowed from the illegal search. Mr. Thornton's convictions of possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia must be reversed.

Even if this Court determines that the discovery of the baggie of marijuana and methamphetamine was sufficiently attenuated from the illegal search of the backpack, reversal of the convictions for possession of methamphetamine and marijuana would still be required. The prosecutor repeatedly linked the

discovery of the syringe with its circumstantial claim that the drugs found on the ground were Mr. Thornton's. (R.10, 234, 240). So, even if this Court holds that the baggie of marijuana and methamphetamine do not have to be suppressed, Mr. Thornton should still receive a new trial for possession of marijuana and methamphetamine free from any circumstantial argument based on the illegal discovery of the syringe in Mr. Thornton's backpack.

Issue #2: The jury was instructed that it could convict Mr. Thornton for possession of paraphernalia based on a glass pipe or a syringe. The district court should have instructed the jury to agree unanimously upon an act to convict.

Preservation

Defense counsel did not object to the district court's elements instructions nor the district court's failure to give a unanimity instruction. Nonetheless, this Court can reach an instructional issue on appeal. K.S. A. 22-3414(3); *State v. Williams*, 295 Kan. 506, 514, 286 P.3d 195 (2012).

Standard of Review

To determine if the district court erred in failing to include a unanimity instruction, the Court must determine whether the instruction was legally and factually appropriate. *Williams*, 295 Kan. At 506. Whether an instruction is legally appropriate is subject to de novo review. 295 Kan. 516. Whether the instruction was factually appropriate is determined viewing the evidence in the light most favorable to the party arguing for the instruction. *State v. Ashley*, 306 Kan. 642,

646, 396 P. 3d 92 (2017). In this case, the district court erred in failing to give the jury a legally and factually appropriate unanimity instruction.

The state did not elect which evidence it was relying on in its pursuit of the paraphernalia claim against Mr. Thornton. Jury instruction number 10, left it to the jury to decide whether Mr. Thornton possessed the pipe with the intent to smoke marijuana or the syringe with the intent to inject methamphetamine. (R1, 59).

Argument

LEGALLY APPROPRIATE

A unanimity instruction is legally appropriate in multiple acts cases where several acts are alleged and any one of them could constitute the crime charged.

State v. Voyles, 284 Kan. 239, 244, 160 P.3d 794 (2007).

FACTUALLY APPROPRIATE

Multiple acts cases make it impossible to determine whether the jury came to a unanimous decision on the same act when convicting the defendant. The unanimity issues arises when the jury is presented with different theories of conduct but because of the lack of the unanimity instruction it becomes impossible to determine which theory the jury convicted. *State v. Allen*, 290 Kan. 540, 544, 232 P.3d 861 (2010). The *Allen* Court held that the state presented evidence that the defendant possessed cocaine in his bedroom with intent to sell

and possessed cocaine in his pocket with intent to sell it. Without a unanimity instruction, it was impossible for the Court to ensure that Allen received a unanimous verdict.

In the instant case, the state presented two legally separate acts that a jury could reasonably have found to constitute the crime of possession of drug paraphernalia. The state presented evidence of a blue glass pipe found in Mr. Thornton's pocket and a capped syringe found in Mr. Thornton's backpack. Both the pipe and the syringe were submitted to the jury to support Mr. Thornton's conviction of possession of drug paraphernalia.

Once it has been determined that a case is a multiple acts case, it is next necessary to determine if the jury was appropriately instructed. Either the state must elect an act it is relying upon or the district court must tell the jury that they must agree on one or more specific acts as the basis of their decision. *State v. Voyles*, 284 Kan. 239, 241, 160 P.3d 794 (2007). The jury was not instructed as to what act they were to base their decision.

REVERSAL

The *Allen* Court held that instructions are clearly erroneous if the reviewing court is firmly convinced that there is a real possibility that the jury would have rendered a different verdict if the trial error had not occurred. 290 Kan. at 546. In *Allen*, the Court reversed because it found that it was plausible

that jurors would not have agreed on the element of possession that underlay the intent to sell cocaine for which Allen was charged. 290 Kan. at 546. In Mr. Thornton's case, the facts are less clear. Mr. Thornton was charged with possession of paraphernalia of a pipe under the theory that he used it to smoke marijuana. He was also charged with possession of a syringe that the state alleged that he used to inject methamphetamine. The state argued in its closing that the jury needs to consider both theories to convict Mr. Thornton. (R.10, 235-238). It is plausible that some jurors could have convicted on the pipe while others found beyond a reasonable doubt that the possession of paraphernalia was proven with the syringe. Such a possibility is especially real given that Mr. Thornton suggested factually distinct defenses for each item, arguing that the pipe might have been used for tobacco and that the syringe might have been used for legitimate purposes. (R.10, 246-47, 252). Based on these arguments, some jurors may have formed a reasonable doubt regarding whether the pipe was drug paraphernalia and other may have formed a reasonable doubt regarding whether the syringe was drug paraphernalia. Without a unanimity instruction, this Court cannot know whether the jury in the instant case reached a unanimous verdict on either or both acts.

The district court erred in not giving a factually and legally appropriate unanimity instruction to the jury. As a result, Mr. Thornton's right to a unanimous jury verdict was violated and this Court should reverse.

Conclusion

For these reasons, this Court should reverse the convictions and sentences in this case.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by e-mailing a copy to Charles E Branson, Douglas County Attorney, at daappeals@douglascountyks.org; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 18th day of June, 2019.

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