

MARQUETTE UNIVERSITY LAW SCHOOL
THE MILWAUKEE BAR ASSOCIATION

***THIRTIETH ANNUAL CONFERENCE
ON
RECENT DEVELOPMENTS
IN CRIMINAL LAW***

Milwaukee, Wisconsin
December 5, 2009

AUTO SEARCHES AND THE IMPACT OF ARIZONA v. GANT

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I. Arizona v. Gant - Fourth Amendment Protections for Vehicle Searches Resurrected?

In *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. *Id.* 129 S.Ct. at 1716 - 1724. The *Gant* Court rejected a broad reading of the rule enunciated in *New York v. Belton*, 453 U.S. 454 (1981) that would permit a vehicle search incident to a recent occupant's arrest, even if there was no possibility that the arrestee could gain access to the vehicle at the time of the search.

The police safety and evidentiary preservation justifications underlying the exception recognized in *Chimel v. California*, 395 U.S. 752 (1969), authorize a vehicle search only when there is a reasonable possibility of such access. The *Gant* Court found that circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton v. United States*, 541 U.S. 615, 632 (2004). Neither *Chimel*'s reaching-distance rule nor *Thornton*'s allowance for evidentiary searches authorized the vehicle search in the *Gant* case.

The Court split 5-4 in rendering its decision in *Gant*, in an unusual line-up, that limits the broad rule established in *Belton*, wherein the Court had held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous search incident to that arrest, enter and search the passenger compartment of the vehicle. Turning the clock back to pre-*Belton* days, the *Gant* majority resurrected the "reaching-distance rule" of *Chimel v. California*.

Justice Stevens's opinion for the majority, which was joined by an uncommon coalition of Justices Ginsburg, Souter, Thomas, and Scalia, held that *stare decisis* cannot justify unconstitutional police practice, especially in a case clearly distinguishable on its facts from *Belton* and its progeny. Defense counsel argued, and the Supreme Court ultimately agreed, that such an application of the *Belton* exception has caused the "exception to swallow the rule," allowing unconstitutional searches. The Fourth Amendment's protections for persons in vehicles were reinvigorated by this important decision to return to the basics.

In his concurring opinion, Justice Scalia disparaged this line of cases as “badly reasoned” with a “fanciful reliance” upon the officer safety exception, which has been interpreted as *carte blanche* for broad warrantless vehicle searches.. Justice Scalia was clearly the swing vote in the case, explaining that a “4-to-1-to-4 opinion that leaves the governing rule uncertain” would be “unacceptable.” Justice Scalia wrote, “In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* “reasonable” only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.”

The *Gant* majority did not go quite that far. Does Justice Scalia’s apparent change of heart from his concurring opinion in *Thornton* mean that he is reassessing his position on the Fourth Amendment? He has applied to confrontation cases, like Justice Hugo Black did to most constitutional rights, a “words mean what they say” approach. The current high court is split down the middle and one vote either way will make the difference in the law and whether our constitutional rights are protected or diminished.

The dissenting justices, including Justice Breyer, would have adhered rigorously to *stare decisis* to maintain *Belton*’s “bright-line rule.” The dissenters failed to mention that *Belton* flew in the face of *stare decisis* 25 years ago, but that didn’t stop the court then from straying from the *Chimel* “within reach” rule. The dissenters stated that the majority had effectively overruled *Belton* and *Thornton*.

Whether this is true and to what extent will now be battled out in the trial and appeals courts in Wisconsin and around the country.

II. Where does the law of auto searches go after *Gant*?

A. There are many questions

Veteran prosecutor and noted (and quoted) legal scholar Bob Donohoo states that at this point in time, there are an enormous amount of questions and very few answers to this question. This author joins that view, but is hopeful that perhaps, as Justice Black once expounded, the words of the Fourth Amendment will be interpreted to mean what they say. Many of the issues will be litigated for years to come. All we have at this point as to most issues is either a good guess as to the answer or a theory as to what the answer should be. Is the search a *Belton* search, a *Belton-Gant* search or a *Gant* search? Bob’s cogent observations and questions on application are reprinted in Section III herein. Following are summaries of two recent court decisions actually applying (or rather, not applying) the new *Gant* decision.

Two post-*Gant* decisions in Wisconsin in the past few months show that courts are reluctant to have *Gant* trump assertions of officer safety and will carefully review the facts of the stop and search to see if they fall within the factual scenario as in *Gant*. This should come as no surprise to criminal defense attorneys, who will have to try to fit the facts of their client’s case into one of the above three categories. Or is it four or five?

B. The fight will go on, but remember the fundamentals

The exceptions to the Fourth Amendment probable cause and warrant requirements will still be vigorously asserted by prosecutors, and readily applied by courts. The battle to prevent the exceptions from swallowing the rule and our fundamental Fourth Amendment rights, as *Gant*'s counsel argued to the Supreme Court, will continue in earnest. What will the courts do after *Gant*? What does defense counsel need to argue to prevail on suppression motions? What exceptions will prosecutors be asserting to uphold the search?

Remember, as the *Gant* Court stated, "Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

C. State v. Bailey (Wisconsin Court of Appeals)

In *State v. Bailey*, 2009 WI App 140, 773 N.W.2d 488 (Aug 11, 2009), a motorcycle policeman, while on routine patrol in the early evening, observed a vehicle with the the front passenger window having darkened tint greater than the limit set by ordinance. He pulled the vehicle over and when his back-up officer arrived, the back-up officer observed the driver making repeated kicking motions with one foot, as if attempting to hide something under the driver's seat.

The motorcycle officer told the driver that he was going to test the windows with a tint meter and requested that the driver exit the vehicle and step to the rear so he could conduct the tint test. The driver did and consented to a pat down of his person for the officer's safety. Nothing was found on his person, but the back-up officer then walked to the front passenger side of the vehicle and saw a white plastic bag under the driver's seat, partially exposed. The officer thought the bag might contain a weapon, and when he asked the driver what was in the bag, the driver answered "candy." It was, as in nose candy and the driver was arrested for felony possession with intent.

The motorcycle officer did perform the tint test on the windows and confirmed that both the front and rear windows of the vehicle were in violation of the tint ordinance, only allowing 11.8 percent of light through the driver's side front window, and the driver was also issued a citation for the tint violation.

Bailey challenged the authority of local police to stop a vehicle and enforce a state equipment regulation. The court of appeals held that this was an absurd argument to say that local police officers have *less* authority than state patrol and DOT officers to check window tint.

Bailey challenged the reasonable basis for the search of his vehicle, arguing that when the stop involves a minor equipment violation, even where, as was described here, there were "furtive movements," the officers were limited to a frisk of the person, citing *State v. Johnson*, 2007 WI 32, ¶ 43, 299 Wis.2d 675, 729 N.W.2d 182. Bailey tried to distinguish *State v. Alexander*, 2008 WI App 9, 307 Wis.2d 323, 744 N.W.2d 909, wherein the vehicle search was upheld. Bailey also raised the argument that the vehicle search was prohibited under the April 2009 Supreme Court decision in *Arizona v. Gant*, --- U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

The court of appeals rejected Bailey's argument that based on *Gant*, the court was obligated to find the officer's protective search of the vehicle and found such argument to be unreasonable. *Gant* was found to be distinguishable from the fact situation in Bailey because it was a search incident to an arrest case. *Gant* arrived home, parked and exited his car and was about ten to twelve feet away from his car when he was arrested and handcuffed for driving with a suspended license. *Gant* was not going to be returning to his vehicle and police then searched his car, wherein they found a gun and a bag of cocaine in the pocket of a jacket in the back seat. The Supreme Court held that the search in this factual situation was unreasonable, declaring:

[A]n officer [can] conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. *Gant*, at 1721.

The court of appeals in *Bailey* found that this was not a "search incident to arrest" case. The search in this case was done out of the officers' concern for their safety. No arrest had occurred before the search and Bailey was still very close to his car, not restrained and would have been released after the tinting citation had been issued.

The *Bailey* court found that *Gant* does not govern, but rather *Michigan v. Long*, 463 U.S. 1032 (1983) did. *Long* is still good law after *Gant*, the court of appeals declared. In *Long*, the Supreme Court held that a protective search conducted pursuant to an investigative stop, similar to the facts in *Bailey*, was lawful. *Long*, at 1034- 35. The Supreme Court took the case to address "the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle." *Long*, at 1037.

The *Bailey* court held that a protective searches pursuant to a *Terry* stop under *Long* was done and is "permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inference from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Long*, 463 U.S. at 1049. Protective searches are justified, the court of appeals said, when under the particular facts and circumstances police have a reasonable belief that the suspect poses a danger, and

Bailey's attempt to analogize this case to fit under the holdings of *Johnson* and *Gant* fell short, the court of appeals held, as the factual circumstances and safety concerns of the police are consistent with what is permitted under *Terry*, *Long* and *Alexander*.

D. United States v. Bullock (Eastern District of Wisconsin)

In *United States v. Bullock*, 2009 WL 1770120 (E.D.Wis. June 23, 2009), District Judge Adelman denied a suppression motion that raised *Gant*. The magistrate judge recommended denial of the motion based on *Belton*. Judge Adelman noted that in *Belton*, the Supreme Court held that when an officer lawfully arrests the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and any containers therein. 453 U.S. at 460-61. The Court justified the rule based principally on officer safety concerns.

However, lower courts subsequently adopted a broad construction of *Belton*, untethered from the officer safety concern animating the decision, approving searches after the suspect had been handcuffed and secured, or even after he had left the scene. *Gant*, 129 S.Ct. at 1718-19 (collecting cases). In *Gant*, the Court adopted a limited construction of *Belton*, holding that: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 129 S.Ct. at 1723.

Bullock argued that he had no ability to access a weapon in the vehicle; he had, at the time of the search, been removed from the car, was handcuffed, and was being walked to the squad. Nor, defendant contends, can the search be justified based on the need to collect evidence of the offenses of arrest; the vehicle would not reasonably contain evidence of the noise violation, and the officers had already discovered the open intoxicant.

Judge Adelman rejected this argument, finding that the *Gant* Court acknowledged that a search incident to arrest is not the only method by which police may conduct a lawful warrantless search of a suspect's car: Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id.*, at 1049 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. *Cf. Maryland v. Buie*, 494 U.S. 325, 334 (holding that, incident to arrest, an officer may conduct a limited protective

sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

Judge Adelman found that these exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. *Id.* at 1721. In Bullock's case, the court looked closely at the facts to distinguish them from *Gant* or find another exception that would allow for a legal warrantless search of the vehicle. The police officer who stopped Bullock on suspicion of possession of an open intoxicant and/or drunk driving, lawfully entered the defendant's vehicle to seize the gin bottle as "evidence of the offense of arrest," Judge Adelman found, citing *Gant*, 129 S.Ct. at 1723, i.e., possession of an open intoxicant, and safety and evidentiary concerns supported the search of the center console area in which the police officer found the gun.

Of importance to this analysis was defendant's failure to immediately pull over in response to the officers' signal, slowing but continuing on for about a block, during which time the officers observed him lean to the left, as if withdrawing something from his waistband or pocket, then lean to the right, as if to stash something in the center console area. Both officers concluded, based on their training and experience, that these movements were consistent with the driver trying to conceal a firearm.

Judge Adelman upheld the search despite facts similar to *Gant*, as the officers had a reasonable concern for their safety and, when combined with the driver's furtive actions, probable cause to believe that evidence of the crime would be found in the stopped vehicle, which was an independent basis for conducting a warrantless search of the vehicle. See *United States v. Ross*, 456 U.S. 798 (1982), cited with approval in *Gant*, at 1721.

III. Bob Donohoo's concerns about how auto searches will be categorized and whether *Gant* applies

A. SEARCHES PURSUANT TO *BELTON*

1. The prior basic requirements for a valid *Belton* search including: (1) the arrested person must have been an occupant or a recent occupant of the vehicle, (2) the arrest must have been a valid "arrest" and not a citation and release situation, (3) there must have been probable cause to arrest, (4) the arrestee can be either the driver or any passenger.
2. The focus was on the status of the defendant at the time of his arrest rather than his status at the time of the search.
3. *Belton* issues such as a locked car, locked compartments/containers in the car, the defendant who flees after his arrest remained

B. IS IT A *BELTON-GANT* SEARCH?

1. Introduction.
 - a. The new “at the time of the search” requirement rather than the old “at the time of the arrest” requirement.
 - b. The *Gant* “will not be used much” quote.
2. The correct definition of this type of search of a vehicle pursuant to the arrest of a person—the relationship between the “arrestee is within distance of the passenger compartment at the time of the search” and the “arrestee is unsecured and can access the interior of a vehicle” language.
 - a. The Court’s use of the secured/unsecured wording.
 - b. The Court never said that a person who is handcuffed is a secured person.
 - c. Is a handcuffed person a secured person?
3. The secured/nonsecured at the time of the search issue/requirement.
 - a. The defendant is handcuffed in a squad car.
 - b. The defendant is handcuffed, near the car, one officer.
 - c. The defendant is handcuffed, near the car, more than one officer.
 - d. The defendant is not handcuffed, near the car, one officer.
 - e. The defendant is not handcuffed, near the car, more than one officer.
4. Is the scope of the search the same as under *Belton*?
5. Is the Wisconsin “locked car” rule still applicable?
6. The situation where the search legally precedes the arrest.
7. The officer does not need to have either of the two reasons that justify a search incident to arrest.
8. The presence of not arrested vehicle occupants at the time of the search. See footnote 2 in Justice Alioto’s dissent in *Gant*.

9. The presence of not arrested persons who were not vehicle occupants. Footnote 2 in Justice Alito's dissent in *Gant*.

C. IS IT A *GANT* “REASONABLE TO BELIEVE/ REASON TO BELIEVE SEARCH?”

1. The “reasonable to believe” search incident to arrest search of a vehicle.
 - a. The correct terminology.
 - b. Defense attorneys must ask “reason to believe what”? Officer safety an issue?
 - c. Destruction of evidence?
What type of crime or offense was the focus and purpose of the stop – expired license tag versus tip that the ?car involved in drug trafficking
2. The history of this standard, which originated in Justice Scalia's concurring opinion in *Thornton v. United States*, 541 U.S. 615 (2004).
3. What quantum/level/amount of information is required to satisfy this standard-probable cause to search, less than probable cause to search, the PBT standard, reasonable suspicion, less than reasonable suspicion, a new standard, etc.
4. What part of the car can be searched—the issue of scope.
 - a. The *Belton* rules or rules that are different (more or less)
5. Do some crimes, in and of themselves, supply the reason to believe?
 - a. Is it an objective test, subject test, an objective/subjective test?
 - b. The experience of the officer.
 - c. Operating under influence of alcohol or drugs cases
6. Information about the defendant's criminal history is used to satisfy the required level of information.
 - a. NCIC/CIB and/or the officers' personal knowledge.
 - b. By itself or in conjunction with other information or observed activities.

7. The actions/activities of the driver and/or any passengers are used to satisfy the required level of information.
 - a. By themselves or in conjunction with other information.
8. The situation where the arrest is based on an arrest warrant and the issue of what information, if any, from the arrest warrant, can be used in determining if reason to believe was present in a particular case.
 - a. The nature of the offense or crime—the type of crime, municipal, misdemeanor, felony
 - b. What information concerning the offense or crime does the officer know from NCIC/CIB—the date the warrant was entered into the system, the date the complaint was signed, etc.
 - c. What information concerning the offense or crime does the officer not know from NCIC/CIB—the date of the offense/crime, the details, was anything taken, etc.
9. The situation where the defendant is arrested for an offense that does not give the officer “reason to believe,” the officer searches the defendant and finds something that would give the officer reason to believe.
 - a. Should the officer rearrest the defendant?
10. Attempting to obtain consent in some situations.

D. HOW WILL *GANT* BE APPLIED TO CASES INVOLVING SEARCHES THAT OCCURRED BEFORE THE DECISION?

1. The issue of the retroactivity of the *Gant* decision.
2. Cases already in the appellate/habeas pipeline
3. Is there a “good faith” exception?
4. The ineffective assistance of counsel argument/situation in failure to raise, research or preserve the issue.