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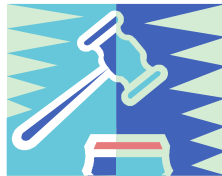
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## NORTH CAROLINA COURT OF APPEALS



### Roadside Strip Search of Defendant Was Reasonable

#### *State v. Fowler*, No. COA11-1414 (1 May 2012)

On the evening of November 19, 2009, Officer Gant of the Charlotte-Mecklenburg Police Department was working with a confidential informant to set up potential drug deals with multiple individuals. The confidential informant and the defendant agreed to meet in the parking lot of a specific McDonald's restaurant in order to exchange a small amount of cocaine. Officer Gant and the informant drove in an unmarked vehicle to a parking lot across the street from the McDonald's, and the informant identified defendant's vehicle. When the informant did not show up to complete the deal, defendant left the McDonald's parking lot. Officer Gant followed defendant initially while relaying to fellow Officer Bignall that "there was going to be a subject in a silver Kia with crack cocaine in the Beatties Ford Road corridor." Officer Bignall drove to the area and saw a vehicle matching Officer Gant's description. Defendant was traveling at approximately 45 miles per hour in a 35 mile per hour zone. Accordingly, Officer Bignall activated his patrol lights and stopped the vehicle. Upon approaching the vehicle, Officer Bignall informed defendant he was speeding "40, 45" miles per hour in a 35 mile per hour zone, and requested defendant's driver's license and registration. Defendant responded that he did not have a driver's license. After checking defendant's information, Officer Bignall discovered defendant's driver's license had been permanently suspended. Defendant was placed under arrest for driving while license revoked. Officer Bignall asked defendant for permission to search the vehicle, to which defendant responded, "go ahead." A small amount of marijuana was discovered in the ashtray. Believing defendant had drugs on his person, Bignall proceeded to conduct a search of defendant's person. Officer Bignall asked defendant to remove his socks and shoes, and the officer proceeded to search defendant's pockets and waistband area. Officer Bignall then undid defendant's belt and looked down into defendant's pants. Officer Bignall then told defendant he would need to conduct a second, more thorough search of defendant's person. The officer placed defendant in the back of his police vehicle and drove defendant to the back side of a school parking lot behind a loading dock so that they were shielded by the loading dock, a

fence and the police vehicle. Officer Bignall dropped defendant's pants down and searched defendant's boxer briefs with his hand. Defendant's underwear were not removed during the search. Officer Bignall discovered crack cocaine in the fly area of defendant's boxer briefs. The entirety of the vehicle stop was recorded by audio-video equipment on the officer's patrol vehicle.

Defendant was indicted for possession with intent to sell or deliver cocaine. Prior to trial, defendant filed a motion to suppress the evidence found on his person, arguing that the officers performed an unreasonable and intrusive public strip search that violated his constitutional rights. The trial court denied defendant's motion. Defendant pled guilty to possession of cocaine reserving his right to appeal the denial of his pretrial motion. After being sentenced to 7-9 months imprisonment, defendant appealed to the North Carolina Court of Appeals.

The North Carolina Court of Appeals has previously held that a valid search incident to arrest will not normally permit a law enforcement officer to conduct a roadside strip search. Rather, in order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location – usually at a private location within a police facility.

The Court of Appeals first concluded that the searches of defendant's person constituted strip searches. During both searches, defendant's private areas were observed by Officer Bignall. In addition, during the last search, defendant's pants were removed, leaving defendant in his underwear. Defendant's underwear were then searched by the officer with his hand.

Second, the court considered whether probable cause existed for the more extensive search. Officer Gant testified that: the confidential informant involved in this case was known by both him and another officer at the police department; information from the informant had led to the arrest of at least six other individuals during the week prior to the arrest of defendant; the informant had contacted a specific telephone number to set up a drug deal, and that individual had returned the informant's call to arrange for the exchange of a small amount of cocaine at the McDonald's restaurant on Beatties Ford Road; the informant was in Officer Gant's vehicle when the informant both made and received the phone calls; immediately after the phone calls, the informant traveled with Officer Gant to a parking lot approximately 100 feet away from the McDonald's restaurant, where the informant identified defendant's vehicle as the individual who showed up based on the phone call; and when defendant left the McDonald's parking lot, Officer Gant followed him onto Beatties Ford Road while providing a description of his vehicle to Officer Bignall. Officer Bignall testified that twice he received information from Officer Gant that "there was going to be a subject in a silver Kia with crack cocaine in the Beatties Ford Road corridor." It was less than a minute between the time Officer Bignall received the call from Officer Gant and the time he observed defendant's vehicle. Defendant's vehicle was the only silver vehicle on Beatties Ford Road. After stopping defendant's vehicle, a consent search revealed a small amount of marijuana, but no cocaine. Based upon the foregoing, the Court of Appeals found that the informant, who was known to the officers and who had provided reliable information in the past, provided sufficient reliable information, corroborated by Officer Gant, to establish probable cause to believe that defendant would be carrying a small amount of cocaine in his vehicle. When the consensual search did not reveal the cocaine, the officers had sufficient probable cause, under the totality of the circumstances, to believe that defendant was hiding the drugs on his person. Therefore, the Court of Appeals held that defendant's arguments that the

officers lacked probable cause to conduct a more extensive search of his person were without merit.

Next, the Court of Appeals addressed whether exigent circumstances warranted the roadside strip search. The transcript revealed multiple conversations between Officer Bignall and the defendant regarding defendant's prior criminal record, which included felony drug offenses as well as defendant's constant pleading with officer Bignall not to take him to jail. The Court of Appeals found this was competent evidence supporting the trial court's finding that Officer Bignall knew defendant had prior experience with intake procedures at the jail and he could reasonably expect that defendant would attempt to rid himself of any evidence in order to prevent his going to jail. Thus, the court found that defendant's arguments that no exigent circumstances existed to justify the search of his person were also without merit.

Having concluded that both probable cause and exigent circumstances supported the searches, the court went on to hold that the searches of defendant's person were reasonable under the circumstances. The search of defendant was based upon corroborated information that the defendant himself would be carrying drugs; a small amount of marijuana was found in defendant's vehicle during a consent search; the search of defendant took place at night, in a discreet location, away from any vehicle or pedestrian traffic; and no females were present during the search.

### **Search of Juvenile's Bra Was Constitutionally Unreasonable**

#### ***In re T.A.S., No. COA10-275 (19 July 2011)***

Brunswick County Academy (Academy) is an alternative school in the Brunswick County School System. Many of its students are assigned there because of disciplinary infractions at traditional schools, including behavioral problems and substance abuse or weapons violations on campus. T.A.S. was a student at the Academy in November 2008, although the record does not indicate the basis for her attendance.

To enter the Academy, students must pass through a metal detector, at which time their book bags, purses, and coats are also searched. More thorough searches of their persons are frequently conducted, sometimes in response to information from other students but regularly without any "leads." On November 5, 2008, one of these more extensive searches was ordered after the principal was informed by other students that pills of a type that "would cause kids to be unsafe" were currently coming into the school but had no further clues as to their nature or which students were responsible. The only details learned by administrators were that some of these students were hiding the pills in places not normally searched when they came through the metal detectors, like shoe tongues, socks, bras, and underwear.

After passing through the metal detectors that morning, all students were required to wait in the lunchroom to be brought one-by-one to a classroom to be searched, where they emptied their book bags, had their jackets thoroughly searched, removed their shoes, and emptied their pockets. A staff member whose sex is not specified in the record conducted the searches and patted down the students' socks. The girls were required to perform a "bra lift," where they "pull their shirts out," "shake them," and "go underneath themselves with their thumb in the middle of their bra to pull it out." Other administrators and a resource officer, whose sexes were likewise unspecified, were also in the room, and a male law enforcement officer was present throughout-

apparently regardless of the sex of the student being searched-solely to observe. During T.A.S.'s search, a white powder, identified as Percocet, and drug paraphernalia were found. The trial court concluded that the search was reasonable based on the fact that many Academy students are there because of school policy violations regarding drugs and weapons; pills, often prescribed to someone else, are found at the school two to three times every nine weeks; generalized searches for weapons have been upheld because of special circumstances that permitted requiring male students to take off shoes, socks, and empty pockets because of reports of weapons at school; and no private parts were exposed. The trial court thus denied T.A.S.'s motion to suppress.

Charged with possession of a Schedule II substance and drug paraphernalia, T.A.S. filed a motion to suppress. T.A.S. appealed.

The ultimate measure of the constitutionality of a governmental search is reasonableness. Reasonableness depends on the context within which a search takes place, and while probable cause and a warrant may render a search reasonable, certain limited circumstances require neither. Public schools are one context where balancing government against private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.

Although schoolchildren have legitimate expectations of privacy, and public school officials are state actors subject to the Fourth Amendment, the Court in *T.L.O.*, 469 U.S. 325, 83 L.Ed. 2d 720 (1985), explained that the special needs of the school environment require assessment of the legality of school searches against a standard less exacting than that of probable cause. Instead, the legality of a student search by a school official is governed by its reasonableness under the circumstances, which involves a two-part inquiry: 1. was the action justified at its inception; and 2. was the search reasonably related in scope to the circumstances which justified the interference in the first place.

Under ordinary circumstances, a search of a student by a teacher or other school official, will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and the sex of the student, and the nature of the infraction.

The Court in *T.L.O.* did not decide if the reasonableness inquiry requires individualized suspicion (there was no need to do so because the search in *T.L.O.* was based on individualized suspicion that the juvenile had violated school rules), nor if it applies to searches which are more intrusive than the type which occurred in *T.L.O.* (which involved the search of a student's purse). Based upon rulings from other courts, the Court of Appeals held that inherent in the validity of any search that goes beyond a student's outer clothing is a requirement that, at the very least, school officials suspect the particular student to be offending a school rule.

Therefore, the Court of Appeals ruled that because the blanket search of the entire school lacked any individualized suspicion as to which students were responsible for the alleged infraction, or any particularized reason to believe the contraband sought presented an imminent threat to school safety, at the point the Academy required T.A.S. to pull out her bra, the content of the suspicion failed to match the degree of intrusion. Consequently, the court held that the search of

T.A.S.'s bra was constitutionally unreasonable under the Fourth Amendment. Therefore, the court reversed the trial court's order denying petitioner's motion to suppress.



## NORTH CAROLINA SUPREME COURT



### **NC Supreme Court Overrules Prior Decision of Court of Appeals and Holds Search of Defendant's Vehicle Following Arrest for Carrying Concealed Handgun Was Valid Search Incident to Arrest**

***State v. Mbacke*, No. 33A11 (27 January 2012).**

On September 5, 2007, officers from the Winston-Salem Police Department responded to a 911 call stating that a "black male... wearing a yellow shirt" and "driving a red Ford Escape" was parked in the caller's driveway, armed with a handgun. The caller alleged that the suspect had "shot up" his house the previous night. Upon arriving at the caller's residence, officers observed a red Ford Escape backing out of the driveway of the residence. The driver was a black male wearing a yellow shirt. The officers exited their vehicles and, with their service weapons drawn, approached the Ford Escape and ordered the driver to stop and raise his hands in the air. The driver did not initially comply, but after repeated commands from the officers, he did stop and raise his hands. The officers then ordered the driver to exit the vehicle. The driver complied, but as he exited, he kicked the vehicle door shut. Officers located a firearm concealed in the driver's waistband. Defendant was placed under arrest and secured in the back of a patrol vehicle. The officers then conducted a search of the Ford Escape incident to arrest. A cellophane wrapped package that contained a white powdery substance was found under the driver's seat. A field test revealed that it was cocaine.

An indictment charged defendant with carrying a concealed weapon and trafficking in cocaine by transportation. Defendant filed a motion to suppress any and all evidence. The trial court denied defendant's motion. A jury found defendant guilty on all counts. He was sentenced to two concurrent sentences of 175 to 219 months in prison and fined \$250,000. The defendant then filed a motion for appropriate relief arguing that the trial court should have granted his motion to suppress and should dismiss the drug charges against him, based upon the United States Supreme Court ruling in *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 173 L. Ed. 2d 485 (2009), which was decided during defendant's trial. The trial court held that the ruling in *Gant* was applicable to defendant's case, but that defendant was not entitled to relief under *Gant* and thus, denied defendant's motion. Defendant appealed. A divided panel of the Court of Appeals reversed the trial court's decision, holding that "it was not reasonable to believe that defendant's vehicle contained evidence of the offense of carrying a concealed weapon." (See the May-June 2011 Police Law Bulletin for a discussion of the court's analysis). The State appealed to the North Carolina Supreme Court.

In *Arizona v. Gant*, the United States Supreme Court held that police may search a vehicle incident to a recent occupant's arrest only if: 1. the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or 2. it is reasonable to believe the vehicle contains evidence of the offense of arrest. In the case at hand, *Gant*'s first prong did not permit a search of defendant's vehicle because defendant was neither unsecured nor within reaching distance of the passenger compartment of his car at the time of the search. Therefore, the North Carolina Supreme Court focused on whether it was reasonable for the police to believe that defendant's vehicle might contain evidence of the crime of arrest.

The North Carolina Supreme Court began its analysis by finding that the “reasonable to believe” standard enunciated in *Gant* parallels “reasonable suspicion.” Accordingly, the court held that when investigator’s have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect’s vehicle after the occupants have been removed and secured, the investigator’s are permitted to conduct a search of the vehicle.

In the case at hand defendant was arrested for carrying a concealed handgun. The court held that the circumstances detailed above, including the report of defendant’s actions the night before and defendant’s furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest could be found in defendant’s vehicle. The court stressed that it was not holding that an arrest for carrying a concealed weapon is automatically an occasion that justifies the search of a vehicle. Rather, the circumstances of each case will ordinarily determine the propriety of any vehicular searches incident to arrest.



## United States Supreme Court



### **Searches Conducted in Objectively Reasonable Reliance on Binding Appellate Precedent Are Not Subject to the Exclusionary Rule**

*Davis v. United States*, No. 09-11328 (16 June 2011).

On an April evening in 2007, Alabama officers conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens for driving while intoxicated and passenger Willie Davis for giving a false name to police. The police handcuffed both individuals and placed them in the back of separate patrol cars. The police then searched the passenger compartment of Owens’s vehicle and found a revolver inside Davis’s jacket pocket.

The search was done in reliance on precedent in the jurisdiction that had interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize automobile searches incident to arrests of recent occupants. Davis was subsequently indicted on charges of being a felon in possession of a firearm. After unsuccessfully moving to suppress the revolver, he was convicted. While Davis’s case was on appeal, the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. \_\_\_ (2009), adopting a new, two-part rule under which an automobile search incident to a recent occupant’s arrest is constitutional: (1) if the arrestee is within reaching distance of the vehicle during the search; or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. The Eleventh Circuit held, under *Gant*, that the vehicle search at issue violated Davis’ Fourth Amendment rights, but the court declined to suppress the revolver and affirmed Davis’ conviction. Davis appealed to the United States Supreme Court which agreed to hear the case.

Analyzing whether to apply the exclusionary rule to the search at issue, the Court noted that the exclusionary rule’s sole purpose is to deter future Fourth Amendment violations. Although the search in this case turned out to be unconstitutional under *Gant*, Davis concedes that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way. The Court therefore determined that “[the] acknowledged absence of police culpability dooms Davis’s claim.” It stated: “Because suppression would do nothing to deter police misconduct in these circumstances, and because it

would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”