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Police Law Bulletin

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In this issue:

United States Supreme Court

On April 21, 2009, the United States Supreme Court issued a ruling in *Arizona v. Gant* that significantly restricts an officer's authority, based on the theory of search incident to arrest, to conduct a search of the passenger compartment of a vehicle after arresting an occupant or a recent occupant. This issue of the Police Law Bulletin discusses the ruling and its impact on law enforcement practices and the introduction of evidence in court.

FACTS

On August 25, 1999, acting on an anonymous tip that a particular residence was being used to sell drugs, officers with the Tucson Police Department knocked on the front door of the residence and asked to speak with the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. After leaving the residence, the officers conducted a records check on Gant. The check revealed that Gant's driver's license had been suspended and that there was an outstanding warrant for his arrest for driving with a suspended license.

Later that evening two officers returned to the residence. They found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing them with false information, and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. Gant parked at the end of the driveway got out of his car, and shut the door. One of the officers called to Gant and approached him. They met about 10-12 feet from Gant's car. Gant was immediately arrested and handcuffed. Because the other arrestees were secured in the only patrol cars at the scene, the arresting officer called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. Two officers searched his car. A gun, and a bag of cocaine left in the pocket of a jacket on the backseat, were discovered.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia.

Gant moved to suppress the evidence seized from his car on the grounds that the warrantless search violated the Fourth Amendment. When asked at the suppression hearing why the search was conducted, the officer responded, "Because the law says we can do it." The trial court denied Gant's motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and

apprehended him shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. A jury found Gant guilty on both counts and he was sentenced to 3-years imprisonment. After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The United States Supreme Court granted the State's petition for the Court to review the case.

ANALYSIS

The Court began its analysis with the basic, long-standing rule that warrantless searches "are per se unreasonable…subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception to the warrant requirement is a search incident to a lawful arrest. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). The exception derived from interests in officer safety and evidence preservation.

In *Chimel v. California*, the Court recognized the search incident to arrest exception holding though that it applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." 395 U.S. 752, 763 (1969). That limitation ensured that the scope of the search was commensurate with its purpose of protecting arresting officers and safeguarding any evidence that an arrestee might conceal or destroy.

The Court later applied the exception to the automobile context in *New York v. Belton*, 453 U.S. 454 (1981). In that case, a lone police officer stopped a speeding car in which Belton was one of four passengers. After stopping the car, the officer smelled burned marijuana and observed an envelope on the car floor marked "Supergold," a name he associated with marijuana. Believing the occupants had committed drug offenses, the officer ordered them out of the car and frisked them. With no backup, and only a single pair of handcuffs available, the officer physically separated the four arrestees and proceeded to search the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. The New York Court of Appeals found the search unconstitutional concluding that, after the people were arrested, the vehicle and its contents were safely within the exclusive custody and control of the police. The State of New York asked the United States Supreme Court to grant certiorari in the case and to specifically address whether the exception recognized in *Chimel* permits an officer to search "a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle." It its brief to the Court, the State of New York argued that the New York Court of Appeals had erred in concluding that the jacket was under the officer's exclusive control. Focusing on the number of arrestees and their proximity to the vehicle, the State asserted that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents, making the search permissible under *Chimel*. There was never a suggestion by any of the parties that *Chimel* authorized a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle. Based upon the facts and arguments presented in *Belton*, the Court held that when an officer lawfully arrests the occupant of an automobile, he may, contemporaneous with that arrest, search the passenger compartment of the automobile and any containers therein.

Despite the context in which *Belton* was decided, the Court's opinion has been widely understood to allow a search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. As Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Thornton v. United States*, 541 U.S. 615, 624 (2004). Accordingly, the Court rejected a broad reading of *Belton* and held as indicated below.

The Court then applied its ruling to the facts of *Gant*. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's vehicle. Under the circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of the car. The Court therefore concluded that when the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer, a warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence. Accordingly, the Court further held the search in this case was unreasonable.

The Court was not persuaded by the State's argument that an expansive reading of *Belton* correctly balanced law enforcement interests with an arrestee's limited privacy interest in his vehicle. First, the Court believed that the State seriously undervalued the privacy interests at stake. Although a motorist's privacy interests in his vehicle are less substantial than in his home, the Court noted that the former interest is nonetheless important and deserving of constitutional protection. The Court found it particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, brief case, or other container within that space, and that when such searches are allowed to be conducted whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, it creates a serious and recurring threat to the privacy of countless individuals.

Second, the Court felt that the State's position exaggerated the clarity its reading of *Belton* provides. Lower appellate courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be in order to bring the encounter within *Belton's* purview, and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. According to the Court, "The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line." *Arizona v. Gant*, 556 U.S.___ (2009).

Finally, contrary to the State's suggestion, the Court felt that a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. *Belton* and *Thornton* allow an officer to 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.

HOLDING

The United States Supreme Court ruled that an officer may no longer search a vehicle incident to the arrest of an occupant of the vehicle unless:

- **the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle at the time of the search** (note though, that with regards to this situation, the Court stated in a footnote that "because officers have many means of ensuring the safe arrest of occupants, it will be the *rare* case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains"); **or**

- **the officer has "reason to believe" the vehicle contains evidence related to the crime for which the occupant has been arrested** (see discussion of "reason to believe" standard below).

"REASON TO BELIEVE"

It is curious that the Court used the phrase "reason to believe" in its opinion. "Reason to believe" is a standard not yet defined in the Fourth Amendment context. While the term has appeared in previous United States Supreme Court opinions, none have explained it. *See Thornton v. United States*, 541 U.S. 615, 632 (2004) and *Payton v. New York*, 445 U.S. 573, 603 (1980). Federal appellate courts have split on its meaning, but a large majority have interpreted the term to mean less evidence than is required to establish probable cause. It seems logical that the Court in *Gant* intended something less than probable cause or else it would add nothing to the authority officers already have under the automobile exception to the warrant requirement. If the Court did intend the standard to be less than probable cause, it is questionable whether the Court intended something as low as reasonable suspicion. The United States Supreme Court used the phrase in *Terry v. Ohio*, which in the course of the Court's later cases has come to mean "reasonable suspicion." See 392 U.S. 1, 27 (1968). However, the Court in *Gant* could have used the term "reasonable suspicion," but for some reason it did not. Until a definitive answer is provided by the United States Supreme Court or lower federal or state appellate courts, it is probably most reasonable to interpret the phrase as a standard slightly lower than probable cause, but higher than reasonable suspicion.

Whether the officer has "reason to believe" a vehicle contains evidence related to the crime for which the occupant was arrested will depend upon the totality of the circumstances. For motor vehicle offenses such as driving while license revoked, misdemeanor speeding, etc., it would be highly unlikely that circumstances would exist to permit a search of the vehicle incident to arrest. For other motor vehicle offenses, such as impaired driving, there may be valid grounds for believing that evidence relevant to the offense may exist in the vehicle (for example, impairing substances or containers used to drink or otherwise ingest them.) For arrests based upon outstanding arrest warrants, it is highly unlikely that circumstances would exist to permit a search of the vehicle incident to arrest, unless incriminating facts concerning the offense charged in the warrant exist at the arrest scene, or the offense is one for which evidence of the offense likely would still be found in the car. How recent the offense was committed may be an important factor in determining the "reason to believe" standard in this context.

EFFECT UPON PENDING CASES

Gant clearly applies to all pending cases in the trial courts and those not yet final on direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314 (1987). However, even though a search which was proper at the time it was conducted may be now be deemed unconstitutional under *Gant*, exceptions to the Fourth Amendment's exclusionary rule may exist which would allow the evidence to be admissible, such as the inevitable discovery and independent source doctrines. Furthermore, a footnote in the Court's majority opinion indicates that qualified immunity will shield officers from civil liability for such searches.

OTHER TYPES OF VEHICLE SEARCHES

This ruling does not affect the availability of other Fourth Amendment justifications to search a vehicle. Officers may continue to search a vehicle with a search warrant, or pursuant to other recognized exceptions to the warrant requirement. Such exceptions include:

- Automobile exception - officers with probable cause that a vehicle, located in a public place, contains evidence of a crime may search, without a warrant, anywhere in the vehicle that could reasonably contain the evidence;

- Car frisks - officers with reasonable suspicion that a person, whether or not an arrestee, is dangerous and might access the vehicle to gain immediate control of weapons, may perform a search of the vehicle limited to areas in which a weapon could be located and accessed by an occupant;

- Inventory search of impounded vehicles conducted pursuant to Department policies and procedure; and

- Search and seizure by valid consent.