



Police Law Bulletin



City Attorneys' Office

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Search of Defendant's Vehicle Incident to Arrest Violated *Gant* – Pgs. 4-6**NORTH CAROLINA****COURT OF APPEALS****Roadside Strip of Vehicle Occupant in Daylight Hours Violated Fourth Amendment*****State v. Battle*, No. COA09-201 (16 February 2010).**

A confidential and reliable informant told police that Battle, her boyfriend, and another man would be going to Durham to buy cocaine in a specified vehicle, and then transporting it back to Granville County, exiting at the Linden Avenue exit off Interstate 95. Several officers set up along the predicted route and, shortly after 5:00 p.m., witnessed the vehicle exiting onto Linden Avenue. They had probable cause to arrest Battle's boyfriend for a prior drug offense, so they stopped the car and immediately arrested the boyfriend, who was driving. As he exited the vehicle, the officers noticed many small Ziploc bags in the driver's side-door. The officers searched the boyfriend incident to his arrest but found nothing. They also searched the male passenger and found nothing.

A female officer then searched Battle. Apparently in anticipation of an intrusive search, the officer asked Battle to stand between the opened front and rear passenger doors of the officers' SUV, and between the body of the SUV and the officer. The officer did a pat-down and found nothing. She then asked Battle to pull her bra away from her body and shake the bra; the evidence is conflicting about whether rolling papers fell out of her bra. The officer then opened the front of Battles' pants and pulled her underwear away from her body. The officer was able to see Battles' buttocks and the top of her pubic hair. This revealed a crack pipe and a folded five-dollar bill, inside of which was a small amount of heroin. The officer conducting the search testified that men involved in drug offenses often ask their female companions to hold contraband because most police officers are men and won't strip search females.

Battle was arrested and charged with possession of heroin and possession of drug paraphernalia. She moved to suppress, but the trial court denied the motion, apparently finding that the search was supported by probable cause. Battle then pled guilty, reserving her right to appeal. The Court of Appeals reversed and ruled that the strip search violated the defendant's Fourth Amendment rights because "it constituted an unnecessary intrusion into [Defendant's] privacy and was unreasonable under the totality of the circumstances." While a majority of the three-judge panel that decided this case agreed that the strip search was unconstitutional, there was not a majority agreement as to why. The decision appears to have been based, at least in part, upon the following:

First, this was a strip search, although Battle's pants and underwear were not completely removed or lowered. The buttocks and public area are very private, and the scope of the intrusion was great regardless of the exact degree of exposure.

Second, the search was a "roadside" strip search, not one conducted in private. Although the female officer made some effort to shield Battle from view during the search, the court noted that several vehicles passed by during the search, and that residences and a nursing home were located nearby. On this issue, the Court of Appeals plainly disagreed with the trial judge who had found that there was no way for anyone but the female officer to see Battle during the search. The Court of Appeals suggested that it might have viewed the search differently had it been conducted inside the officers' SUV, in a restroom, or some other private location.

Third, roadside strip searches require probable cause *plus* exigent circumstances "that show some significant government or public interest would be endangered were law enforcement officers to wait until they could conduct the search in a more discreet location, usually a private location within a law enforcement facility." Possible circumstances include evidence that the person will attempt to destroy evidence in the interim, or evidence that the person will attempt to conceal the evidence in a way that endangers his or her health i.e. by secreting a controlled substance in a body cavity. The court found that there were no exigent circumstances on the facts of this case. There was some evidence that Battle resisted the officer's attempts to open Battle's pants, but the Court of Appeals viewed this as "consistent with a person who is about to have her pants unzipped by a stranger," not necessarily as evidence of an intent to conceal or destroy evidence. And, since Battle had already been frisked, the court did not think that an immediate strip search could be justified on the grounds that it might uncover a weapon.

Near the end of its opinion, the Court of Appeals distinguished this case from *State v. Smith*, 118 N.C. App. 106 (1995), reversed for reasons stated in the dissenting opinion, 342 N.C. 407 (1995), in which the North Carolina State Supreme Court upheld a roadside strip search of a drug suspect. While the intrusiveness of the search in *Smith* was greater (the police searched under the suspect's scrotum) and the privacy precautions taken by the officers were lesser (the search took place in the middle of an intersection), the Court of Appeals observed that the showing of probable cause was significantly stronger in *Smith*, the search took place late at night rather than during daylight hours, and there were no other people in the vicinity as opposed to being in a relatively busy area. In the end, the Court of Appeals simply found the combination of facts and circumstances present in *Battle* called for a different result than *Smith*.

Note: The different results in two relatively similar cases (*Battle* and *Smith*) highlights the fact that there are no simple rules and bright lines in this area. Therefore, the following are some suggestions for officers considering a roadside strip search: 1. Attempt to obtain the suspect's consent, clearly indicating the intent to conduct a strip search (remember, the scope of a consent search is governed by what a reasonable person would believe he or she is consenting to); 2. Conduct the search in as private a location as possible; 3. Proceed only if you have specific reasons to believe that the suspect is concealing evidence in his or her undergarments; and 4. Document those reasons, as well as evidence suggesting that the suspect might destroy evidence or attempt to hide it in a body cavity.

Odor of Marijuana From Spare Tire In Luggage Area Provided Probable Cause For Warrantless Search of Vehicle, Including Second Spare Tire in Undercarriage

***State v. Toldeo*, No. COA09-1063 (18 May 2010).**

On October 21, 2008, a Sergeant with the Smithfield Police Department was parked along Interstate 95 when he noticed a black Chevrolet Suburban with a Connecticut license plate. The vehicle moved behind a tractor-trailer and came within a car length and a half of it. The Sergeant activated his blue lights and stopped the vehicle for following too closely. After confirming that the driver's license and registration were valid, the Sergeant informed the driver that he would only be issuing a warning ticket. The Sergeant noted that the defendant seemed extremely nervous, "continually rubbing his hands on his thighs" and avoiding eye contact. Therefore, after issuing the ticket, the Sergeant asked Defendant if he had anything such as guns, drugs or large amounts of currency, to which the defendant replied that he did not. The Sergeant then asked if he could look in defendant's vehicle. Defendant said, "Yeah, go ahead and look." Inside the vehicle, the Sergeant noticed a large tire in the luggage area which was larger than the tires on the vehicle. When asked to what vehicle the tire belonged, the defendant said it belonged to his truck in Miami. The Sergeant conducted a ping test, pressing the tire valve to release some of the air. He immediately noticed a very strong odor of marijuana. The defendant was then handcuffed and placed in the officer's patrol car. The Sergeant continued to search the vehicle. In the undercarriage was another spare tire. The Sergeant performed a ping test on it and again noticed a strong odor of marijuana. Thirty-five gallon size bags of marijuana were found in the tires, totaling 16.45 pounds.

Defendant was indicted on charges of trafficking in marijuana by possession and trafficking in marijuana by transportation. Defendant filed a pretrial motion to suppress evidence obtained as a result of the warrantless search of his vehicle, arguing that it violated his Fourth Amendment rights. The trial court found that the search of the tire within the interior of the vehicle was within the scope of defendant's consent, but that the search of the tire found in the vehicle's undercarriage exceeded the scope of the consent. Therefore, it ordered suppressed the evidence recovered from the second tire, located in the undercarriage. The State appealed.

The North Carolina Court of Appeals reversed the decision of the trial court. The Court of Appeals ruled that after discovering the strong odor of marijuana emanating from the tire located within the interior of the vehicle, the officer had probable cause to make a warrantless search of the rest of the vehicle, including the second spare tire. The Court also noted that there was a second, separate justification for the search of the spare tire under *Arizona v. Gant*, 129 S. Ct. 1710 (2009). In *Gant*, the United States Supreme Court ruled that officers may search a vehicle incident to arrest only if 1. the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle; or 2. it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. In this case, it was reasonable for the officer to believe that the vehicle contained evidence of the crime of arrest, possession of marijuana.

Search of Defendant's Vehicle Was Valid Search Incident to Arrest

***State v. Foy*, No. COA10-331 (21 December 2010).**

At approximately 3:15 a.m. on April 3, 2009, Sergeant Miller of the Wrightsville Beach Police Department observed a pickup truck travel across the fog line and swerve inside its lane. The officer stopped the truck suspecting that its driver was intoxicated. The officer noticed that defendant's speech was slurred, and defendant admitted that he had consumed alcohol that night. Due to a shortage of

manpower, the officer decided to allow defendant to have someone pick him up rather than charging him with driving while impaired. Defendant asked to call his wife, and consented to the officer retrieving his cell phone from his truck. As the officer was retrieving defendant's cell phone, he observed beneath the fold-down center console the barrel of a .357 revolver in a holster. Upon discovery of the handgun, defendant was placed under arrest for carrying a concealed weapon. Following the arrest, officers searched defendant's vehicle. The search revealed an open bottle of wine, an open beer can, an AR 15 rifle, over 200 rounds of ammunition for the rifle, a .45 caliber pistol and rounds for the pistol, marijuana, and magazines for the rifle and pistol. After defendant's arrest, it was discovered that he had previously been convicted of felony forgery and uttering. Therefore, defendant was charged with possession of a firearm by a convicted felon, possession of marijuana, possession of drug paraphernalia, carrying a concealed weapon, operating a motor vehicle with an open container of alcohol after consuming alcohol, and a designated lane violation.

Defendant filed a motion to suppress arguing that the search of his truck was unlawful. The trial court granted in part, and denied in part, defendant's motion. The trial court concluded that the initial entry into the truck to find defendant's cell phone was with the consent of defendant and that the .357 handgun was in plain view of the officer. The court then held that the remainder of the evidence found during the search of the truck should be suppressed because it was not justified as a proper warrantless search. The State appealed

This case is controlled by the search incident to arrest doctrine. The broad application of this doctrine was recently limited by the United States Supreme Court in *Arizona v. Gant*. In *Gant*, the Court held that police may search a vehicle incident to a recent occupant's arrest only in two circumstances: 1. If the arrestee is unsecured and within reaching distance of the vehicle; or 2. It is reasonable to believe the vehicle contains evidence of the offense of arrest. In the instant case, defendant was arrested for carrying a concealed weapon. Under the rationale of *Gant*, in order for the search of defendant's truck to be valid, officers conducting the search must have had reason to believe that evidence related to the charge of carrying a concealed weapon could be found in the truck. The State argues that the discovery of one concealed weapon gave the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt or a gun permit, could exist in the truck. The Court of Appeals agreed and held that a search incident to arrest for evidence related to the charge of carrying a concealed weapon was within the scope allowable under the second exception set forth in *Gant*. The Court of Appeals reversed the portion of the trial court's order granting defendant's motion to suppress.

Note: Compare *Foy* to *Mbacke* below.

Search of Defendant's Vehicle Incident to Arrest Violated *Gant*

***State v. Mbacke*, No. COA 09-1395 (4 January 2011).**

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. 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 for appropriate relief. Defendant appealed.

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, the State argued that the search of defendant's vehicle was permitted by *Gant* because the officers had reason to believe they would find evidence in the vehicle supporting the charge for which they had arrested defendant. The State explained that

had defendant contested the concealed weapon charge, the State could have been required to use evidence such as other firearms, gun boxes, holsters, ammunition, spent shell casings or other indicia of ownership of the firearm to rebut claims by...Defendant of good faith mistake, inadvertence, duress or that he was not aware he had placed the gun in the waistband of his trousers. Without knowing that claims defendant would eventually make, the officers were justified in searching for additional evidence establishing defendant's intent to carry a concealed handgun.

The Court of Appeals disagreed. First, the Court of Appeals interpreted *Gant* to require an officer to suspect the presence of more direct evidence of the crime of arrest than indirect circumstantial evidence that may be necessary to rebut possible defenses.

Second, defendant was arrested for carrying a concealed weapon. The focus of that crime is whether defendant carried a weapon, while outside his own premises, and intentionally concealed the weapon about his person. The Court of Appeals disagreed with the trial court's reasoning that the officers had reasonable grounds to believe they would find evidence in defendant's vehicle to support any of these elements. The Court of Appeals found that the type of evidence the State contended the officers were looking for was not evidence of the crime for which the defendant was arrested, but rather evidence of separate offenses. The Court of Appeals did not interpret *Gant* as authorizing officers to search vehicles for evidence justifying additional charges. Therefore, the Court of Appeals reversed the denial of defendant's motion for appropriate relief.

Note: As you can see, *Foy* and *Mbacke* seem virtually irreconcilable. Factually similar, both cases were decided by the North Carolina Court of Appeals but resulted in vastly different holdings. What could explain the difference? The court's opinion in *Mbacke*, which was issued exactly two weeks after *Foy*, not only fails to distinguish the facts or analysis found in *Foy*, it makes no reference at all to the case. Therefore, I think the most likely explanation lies with the manner in which the Court of Appeals decides and issues its opinions. The North Carolina Court of Appeals is composed of fifteen judges who hear

cases in rotating panels of three. *Foy* and *Mbacke* were decided by completely different panels which heard the cases only a couple of weeks apart. It is possible that before the *Foy* panel's clerks and administrative staff were able to formally prepare and distribute their opinion, three other judges decided *Mbacke*, and clearly their thoughts on the matter were completely different. So, which one should officers follow? At this point, officers may rely upon *Foy*. *Foy* was a unanimous decision; *Mbacke* was not. Because there was a dissenting opinion in *Mbacke*, the North Carolina Supreme Court will review this case on appeal. Until that occurs, a Stay of the opinion in *Mbacke* has been issued.