



Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

December 2009

The Impact of Arizona v Gant: Limiting the Scope of Automobile Searches?

By Mark M. Neil, reprinted with permission.

The scope of a police officer's search of an automobile incident to the arrest of an occupant has been somewhat limited by a recent U. S. Supreme Court decision. The Court held in Arizona v. Gant,¹ that the search incident to arrest exception to the warrant requirement did not apply to the facts of this case and held that a vehicle search is not authorized incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

While investigating Gant for alleged drug activity, Tucson police officers learned 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. Officers observed Gant drive by, park and then get out of his automobile and shut the door. While about 30 feet apart, one officer called to Gant and they approached each other meeting 10 to 12 feet from Gant's car. Gant was then arrested and handcuffed.

Incident to his arrest, the officers then searched Gant's car, one finding a gun and the other a bag of cocaine in the pocket of a jacket on the backseat.

Because Gant was handcuffed and could not access the interior of the car to retrieve weapons or evidence at the time of the search, the Court found that the search incident to arrest exception did not justify the search in this case.

A divided Court (4-1-4) held (Stevens, J.) generally that a vehicle search incident to a recent occupant's arrest is not authorized after the arrestee has been secured and cannot access the passenger compartment of the vehicle. This is seemingly contrary to prior opinions in Thornton v. United States,² and New York v. Belton.³ Applying the safety and evidentiary justifications underlying Chimel v. United States⁴ to limit Belton, much of what has been taught to and practiced by law enforcement

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JENNY SMITH DOESN'T SEEM WORTH SUING.



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THE REAL ESTATE HEIRESS.

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officers regarding search incident to arrest is no longer valid. Gone is the more open and generous license to law enforcement officers in their ability to search the passenger compartment of a vehicle or any containers therein simply because they have arrested an occupant or recent occupant of the vehicle.

Yet, the opinion notes that Gant is consistent with the holding in Thornton and follows the suggestion of Justice Scalia's concurring opinion therein.⁵ Thornton had expanded Belton to allow for searches of the passenger compartment of a vehicle that is contemporaneous incident to arrest even when the officer did not make contact until that person had left the vehicle. The rationale of allowing a search of the entire passenger compartment, regardless of the manner of contact with the arrestee, was in the search for a clear rule. Still, it is one based on ensuring officer safety and preserving evidence. Justice Scalia's concurring opinion in Thornton argued that if Belton searches were justifiable, it was because of the safety and evidentiary issues, not simply because the vehicle might contain evidence relevant to the crime for which he was arrested.

While at the same time limiting an officer's ability to search the vehicle incident to arrest based upon proximity and access for the purposes of officer safety and evidentiary safekeeping, the Court also indicated that there may be circumstances unique to the automobile context to justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

The Court stated that not only is an officer permitted to "conduct a vehicle search when an arrestee is within reaching distance of the vehicle" but also if "it is reasonable to believe the

vehicle contains evidence of the offense or warrant." (emphasis added) This allows for searches incident to arrest where the vehicle is outside of the arrestee's reach based upon reasonable belief rather than probable cause. Assuming that the defendant had been stopped and subsequently arrested for Driving Under the Influence of Alcohol (DUI), the officer would be justified in searching for evidence of the consumption of alcohol if the officer had a "reasonable" belief such evidence might be found. A search might also be permitted in the case of the arrest of the occupant of the vehicle on an outstanding warrant so long as the officer had reasonable belief that evidence of the crime charged in the warrant might be found in the vehicle. Going on, the Court lists certain exceptions that still apply and are available to officers.

Frisk for Weapons. Permitting officers to search a vehicle's passenger compartment when there is reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons.⁶ This flows from the rationale for frisking a suspect for weapons.⁷

Probable Cause of Evidence of Crime. Where there is probable cause to believe a vehicle contains evidence of criminal activity.⁸ Of particular interest is the mention that this allows for searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. This exception does not rely upon an arrest for justification.

Protective Sweep. Where safety or evidentiary interests would justify a search, such as a limited protective sweep of those areas in which an officer reasonably suspects dangerous person may be hiding.⁹

From vehicle perspective, this exception may

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be applicable when dealing with larger vehicles such as multi-passenger vans, recreational vehicles, motor homes, buses and the like.

Although not mentioned in the opinion, other exceptions should also still apply.

Consent. The easiest of all exceptions to the search warrant requirement is the one of consent. When the defendant makes a knowing and intelligent waiver of his rights, the officer may search without a warrant.¹⁰ This consent, however, may be limited in scope.¹¹

Inventory. So long as the officer's department has a written policy providing for it, the officer may inventory the contents of a vehicle prior to it being impounded and towed for the purpose of safekeeping and avoiding claims of loss.¹²

PlainView. In situations where the officer is in a position in which he is lawfully entitled to be, anything plainly visible as being evidential or contraband falls under this well established exception.¹³

Abandonment. If the vehicle has been abandoned, then the privacy interests normally protected by the 4th Amendment have also been abandoned and the officer is free to search the vehicle.¹⁴

Sobriety Checkpoints. Police may still conduct appropriate sobriety checkpoints to detect impaired drivers but not for general criminal activity.¹⁵

Exigent Circumstances. There may be circumstances that arise to the level permitting a search under this exception, but caution should always be used in relying upon it. Only in the direst of circumstances such as hot pursuit, imminent destruction of evidence or danger to a third person might this be applicable.¹⁶

Some activities do not rise to the level of a search and officers should not worry about this

case having changed how they handle these situations. For example, dog sniffs of vehicles during an otherwise lawful stop are not affected. The dog sniff itself is not a search and as long as it is done during the pendency of a lawful stop and not beyond, there is no issue.¹⁷

It would also be appropriate to note that quite often vehicles are part of a crime scene, such as in vehicular homicide or DUI with Death cases. Care should be taken to remember that there is no crime scene exception for search warrants.¹⁸ Reliance purely upon the motor vehicle exception may not be workable when the vehicle is no longer mobile because of the crash.

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Save a tree and get the news first!

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CLLA members who opt for the online version receive it before the print copy is mailed, plus the links for email and websites are active. We send out a summary via email each month with a link to the full text. To switch from print to online, just email reference@cms.hamilton-co.org with a request to switch formats.



Some evidence within the vehicle, such as crash data recorders or some physical evidence might be subject to the exigent circumstances exception if the officer has a reasonable belief that the evidence may otherwise be lost. Officers are allowed to secure a crime scene pending the issuance of a search warrant.¹⁹

In short, the holding in *Arizona v. Gant* is not an overly burdensome one on law enforcement. While it certainly limits the prior practices of officers conducting wide-ranging searches incident to an arrest of an occupant of a motor vehicle, it does still permit those searches under more defined circumstances. Perhaps the most important requirement to come out of this case is the need for officers to articulate, and prosecutors to elicit, with great care and detail, the basis for the search.

Endnotes:

- 1 556 U.S. ___, No. 07-542 (2009).
- 2 541 U.S. 615 (2004).
- 3 453 U.S. 454 (1981).
- 4 395 U.S. 752 (1969).
- 5 *Id.*, 541 U.S. at 632.
- 6 *Michigan v. Long*, 463 U.S. 1032 (1983).
- 7 *Terry v. Ohio*, 392 U.S. 1 (1968).
- 8 *United States v. Ross*, 456 U.S. 798 (1982).
- 9 *Maryland v. Buie*, 494 U.S. 325 (1990).
- 10 *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).
- 11 *Florida v. Jimeno*, 500 U.S. 248 (1991).
- 12 *South Dakota v. Opperman*, 428 U.S. 364 (1976).
- 13 *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

14 *California v. Greenwald*, 486 U.S. 35 (1988).

15 *Michigan Dept. of State Police v. Sitz*, 469 U.S. 444 (1990), *Indianapolis v. Edmund*, 531 U.S.

32 (2000).

16 *Welsh v. Wisconsin*, 466 U.S. 740 (1984), *Schmerber v. California*, 384 U.S. 757 (1966).

17 *Illinois v. Caballes*, 543 U.S. 405 (2005).

18 *Mincey v. Arizona*, 437 U.S. 385 (1978), *Flippo v. West Virginia*, 528 U.S. 11 (1999).

19 *Thompson v. Louisiana*, 469 U.S. 17 (1984).

Search and Seizure Law

By Glenna Herald

Delve deeper into the area of search and seizure law with the help of the following materials available at the library.

Baldwin's Ohio Arrest, Search and Seizure/ Lewis R. Katz

Making Sense of Search and Seizure Law: a Fourth Amendment Handbook/ Phillip A. Hubbart

Officer's Search and Seizure Handbook

Ohio Search Warrant Manual

The Criminal Law Handbook: Know Your Rights and Survive the System/ Paul Bergman

Defending Federal Criminal Cases: Attacking the Government's Proof

American Constitutional Law/ Laurence H. Tribe

State Constitution Law/ Jennifer Friesen

Google Scholar Announces Availability of Case Law

The Official Google Blog <http://googleblog.blogspot.com/2009/11/finding-laws-that-govern-us.html> announced on November 19 that case law (and a collection of law journals) is now available on Google Scholar: "... we're enabling people everywhere to find and read full text legal opinions from U.S. federal and state district, appellate and supreme courts using [Google Scholar](#). You can find these opinions by searching for cases (like [Planned Parenthood v. Casey](#)), or by topics (like [desegregation](#)) or other queries that you are interested in."

Give it a try by visiting <http://scholar.google.com/>, entering your search terms, and clicking on the button for legal opinions and journals. You will see that Google Scholar lists the number of times a case has been cited and it will provide a snippet of the citing cases. Some advanced search features are available. Although intended primarily for non-lawyers, this is sure to generate interest in the legal community.

Federal Courts' Redaction Requirements

As Chuck Kallendorf reported in a recent CLLA blog post, the federal courts have required the redaction of certain personally identifying information for the past two years, including SSN, dates of birth, names of minor children, financial account numbers, and, in criminal cases, home addresses. See Chuck's blog post for more information: <http://cincinnatiilaw.blogspot.com/2009/11/pacer-redaction-policies.html>. The Conference of State Court Administrators has been also been working on the issue of balance of privacy concerns and public right to know and acknowledges it as a policy matter and a technological challenge. COSCA partnered with the Conference of Chief Justices some years ago to develop jointly *Public Access to Court Records: Guidelines for Policy Development for State Courts*. For recent developments on technology and public access to court records, see The National Center for State Courts' website at http://www.ncsconline.org/WC/Publications/Summary/KIS_PriPubCTCSum.htm and, in particular, Cornell's Peter Martin's presentation at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTTR=620>. He acknowledges the difficulties in reconciling various interests and in assigning responsibility for the protection of the rights of parties, non-parties, and pro se litigants but clearly sides with the notion promoted in the 1677 Concessions and Agreement of West New Jersey that "...justice may not be done in a corner nor in any covert manner...".

CLE Plans for 2010

In addition to offering CLEs on legal research, the Law Library will arrange for a series of speakers on topics for both the public and the legal community. If you have a suggestion for a topic or a specific speaker, please contact Mary Jenkins, Law Librarian & Director, mjenkins@cms.hamilton-co.org or Glenna Herald, Reference Librarian, gherald@cms.hamilton-co.org or 513.946.5300. We have tentative plans but we would benefit from your recommendations as well. Library staff may assist in the preparation of materials for application for accreditation by the Supreme Court of Ohio if we choose to host a program.

Madonna is Retiring!

Madonna Stoneking, the Library's Membership Assistant, will retire in December. For more than 35 years, Madonna has served the Law Library and its patrons most competently and graciously. Please be sure to wish her well by December 4.

Tech Tip: Lexis Book Browse

By Julie Koehne, Systems Librarian

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 FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 10, 2009 ***
 *** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 28, 2009 ***

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Holidays in December and January

The library will be closed on the following days this December and January.

Christmas Day	Friday	December 25, 2009
New Year's Day	Friday	January 1, 2010
Martin Luther King, Jr. Day	Monday	January 18, 2010



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