STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2010 AP 599-CR

TRACY SMITER,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE PAUL VAN GRUNSVEN, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MAAYAN SILVER
Attorney for Defendant-Appellant
State Bar No. 1052569

Gamiño Law Offices, LLC
1746 South Muskego Avenue
Milwaukee, WI 53204
Telephone (414) 383-6700

Attorney for Defendant-Appellant

Table of Contents

Cases Cited

Statutes Cited

Wisconsin Statutes

Constitutional Provisions

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Issues Presented

Did the trial court err when it denied Mr. Smiter's motion to suppress on the basis of an unlawful vehicle search?

The trial court denied the motion.

Position on Oral Argument and Publication

Neither is requested.

Statement of the Case

On April 13, 2008, Tracy Smiter was charged with one count of possession with intent to deliver controlled

substance-cocaine, more than one gram but less than five grams, as a second or subsequent offense, contrary to Wisconsin Statutes §§ 961.16(2)(b)(1) and 961.41(1m)(cm)1r and 961.48. R2:1. According to the complaint, Mr. Smiter was a passenger in a car that was involved in a traffic stop. After the stop, officers recovered a blunt of suspected marijuana that they saw Mr. Smiter throw out the front passenger window. *Id.* Mr. Smiter was also seen reaching his right hand between the seat cover and foam patting on the passenger seat of the car. *Id*. According to the complaint, officers also recovered 53 individually wrapped cornercuts of suspected cocaine. Officers tested the suspected marijuana and cocaine, and the substances tested positively for each of their respective controlled substances. *Id* at 2.

On October 23, 2008, the State moved to amend the information to include a count of possession of controlled substance: marijuana, second or subsequent, contrary to Wis. Stats § 961.01(14); 961.14(4)(t); 961.41(3g)(e) & 961.48. R19. Count one was also amended to include a party to a crime subsection, contrary to Wis. Stats. § 939.05. *Id.*

On February 13, 2009, Mr. Smiter filed a motion to suppress fruits of vehicle search. R24. Mr. Smiter contended that the police lacked reasonable suspicion to stop the vehicle, and that the police exceeded the reasonable scope of a simple traffic stop when they searched the vehicle. *Id.*

On March 4, 2009, the trial court heard the motion to suppress. R59. The trial court indicated that the parties would be brief and address the narrow issue of the stop of the vehicle. *Id.* at 5. During the motion to suppress, Officer John Schott testified that as he was in his squad car behind the vehicle in question, he observed that the front passenger turn signal of the vehicle was not operating, so it was "either not functional or the driver failed to signal his turn." *Id.* at 8. He

also observed that the rear registration stickers on the license plate were not properly displayed. *Id.* at 9. The trial court ruled that the stop in the case was lawful and that the motion to suppress was denied. *Id*. at 28.

On May 18, 2009, the defense filed another motion to suppress based on the then newly issued United States Supreme Court case *Arizona v. Gant,* 556 U.S. _____, 129 S.Ct. 1710 (2009). R28. On June 9, 2009, no testimony was taken, but defense argued that *Gant* precluded the search of the vehicle in this case because (1) Mr. Smiter was handcuffed after his arrest and not in a position to get at the vehicle, and (2) police did not have probable cause to search the car for evidence of the crime of arrest because the police had already found the evidentiary fruits that formed the basis for the arrest: the marijuana blunt that Mr. Smiter was seen throwing from the vehicle. R61:3. ("the actual thing he [Mr. Smiter] was arrested for, they [the police] actually found.") Therefore, defense argued, there was no legitimacy to search the car under *Gant. Id.*

The trial court again denied the motion to suppress, finding that the officers had probable cause to search under *State v. Pallone,* 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568 (2000), because "the automobile exception [to the warrant requirement] permits warrantless searches of a vehicle if there is probable cause to believe that evidence of a crime will be found inside." The trial court reasoned that the officers had probable cause to believe that the vehicle contained evidence of a crime. *Id.* at 5. The court stated that "the conduct of Mr. Smiter, the observation of discarding the drugs, *the clear and unmistakable odor of marijuana*[1]*,* created

[1] Defendant makes note that nowhere in the actual testimony at the motion hearing on March 4, 2009 (or in the criminal complaint for that matter) did either Officer John Schott or Detective Willie Huerta mention that they smelled an odor of marijuana in the vehicle.

the probable cause to arrest Mr. Smiter…and under the authority I've cited, a search incident to arrest is permissible." *Id.* at 6.

On June 23, 2009, Mr. Smiter pleaded guilty pursuant to a plea agreement to count one of the information, possession with intent to deliver cocaine, without the second or subsequent enhancer. R63:2-3. He received 54 months in the Wisconsin Prison System divided into 18 months of initial confinement followed by 36 months of extended supervision. *Id.* at 27. Notice of Intent to Pursue Postconviction Relief was timely filed on June 25, 2009. R37. Notice of Appeal was timely filed on December 19, 2007. R46.

Statement of Facts

On April 9, 2008 at approximately 9:30 p.m., City of Milwaukee Police Officer John Schott, Detective Willie Huerta, Detective Britt Kohnert and Detective James Henner were working in plain clothes capacity driving an unmarked squad car in the area of 13th and Chambers. R59:6. According to Officer Schott, while he was facing westbound on Chambers at about 14th Street, he observed a '92 Buick Roadmaster stopped at a stop sign and make an eastbound turn off of North Teutonia onto West Chambers. *Id.* at pp. 7-8. Officer Schott observed that the front right passenger turn signal was not operating, "so it was either not functional or the driver failed to signal his turn onto Chambers." *Id.* at 8. Next, Officer Schott observed that the rear registration stickers on the license plate of the vehicle were not properly displayed. *Id.* at 9. Officer Schott pulled over the vehicle and approached the driver along with the three other detectives. *Id.* at 10-11.

Detective Willie Huerta testified that as he was approaching the rear of the vehicle to effectuate the traffic

stop, he observed the front passenger throw an item out of the car. *Id.* at 21. This item was on "object…that was consistent with that of a cigar." *Id.* at 20. Then the passenger was asked out of the vehicle and taken to the back of the car. *Id.* Detective Huerta testified that he "went back and had seen that it was marijuana." *Id.* Detective Huerta recovered the item and it was basically a cigar wrapper filled with a green plant-like substance. *Id.* at 22. Detective Huerta testified that the recovered blunt was damp, consistent with someone putting it in their mouth and moistening it. *Id.* at 22. Neither Officer Schott nor Detective Huerta testified at the hearing that they smelled the odor of marijuana coming from the vehicle. *See Generally* R59. The trial court determined that the testimony was undisputed that two officers observed the driver's failure to signal and noticed an improperly affixed registration sticker. *Id.* at 28. The trial court determined that reasonable suspicion to stop may be based on behavior amounting to nothing more than a forfeiture violation, as in this case. *Id.*

The second motion hearing occurred on June 9, 2009. R61. There was no testimony taken, but the parties made legal arguments and the trial court provided its legal reasoning. *Id.* at 2. The trial court agreed with the uncontested proposition that Mr. Smiter had not been within reach of the vehicle upon the search, but that *Gant* does not prohibit all searches even though the defendant may be in custody and removed from close proximity to the vehicle. *Id.* at 2. Defense counsel Martin Tanz agreed that there was no question or possibility of Mr. Smiter getting a weapon and endangering safety or destroying or further concealing any evidence, *Id.* at 3, but went further, stating, "the actual thing he [Mr. Smiter] was arrested for, they actually found. Its not like they are looking--- they smell the marijuana, they see the marijuana on

the ground, they pick up the marijuana. Auh, we're arresting him. Now we are going to go search the rest of the vehicle. I think that *Gant* prohibits that. *Id.* at pp. 3-4.

The State argued that the automobile exception applied, which states that when officers have probable cause to believe that a vehicle contains evidence of a crime, they may search it without a warrant. *Id.* at 4. The State contended that under *State v. Secrist,* 224 Wis. 2d 201, 589 N.W.2d 387 (1999), "the unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime." *Id.*

The trial court stated that:

> The automobile exception permits warrantless searches of a vehicle if there is probable cause to believe that evidence of a crime will be found inside, citing *State v. Pallone,* at 236 Wis. 2d 162. The officers observed movements by Mr. Smiter. They observed him discard a marijuana blunt. Based on the unmistakable odor of marijuana, coupled with the defendant's behaviors that were observed, there was probable cause to arrest. This is a search incident to arrest. And when police have probable cause to believe that a vehicle contains evidence of a crime, they are allowed to conduct a warrantless search of a vehicle without a showing of exigent circumstances. That is *State v. Tompkins,* 144 Wis. 2d 116 at Page 130. *Tompkins* and the cases I've cited have indicated that this is not a *Gant* situation. *Gant* applies to stops where the defendant or the suspect is detained and removed from close proximity to the vehicle. Here the officers had lawful authority to stop the vehicle. The conduct of Mr. Smiter, the observation of discarding the drugs, the clear and unmistakable odor of marijuana created the probable cause to arrest Mr. Smiter. Mr. Smiter was taken into custody, and under the authority I've cited, a search incident to arrest is permissible.
>
> *Id.* at 5-6.

The court continued, stating that "what the United States Supreme Court said is if officers have reason to believe that the vehicle contains evidence of the crime for which the

vehicle was stopped, then the officers are justified in conducting a search." *Id.* at 6. The trial court concluded that "*Gant* does not apply under the facts of this case." *Id.* at 7.

Argument

The Trial Court Erred in Denying the Defense Motion to Suppress as the Officers Did Not Have Sufficient Reason To Believe that the Vehicle that Mr. Smiter was in Contained Evidence of the Crime of Mr. Smiter's Arrest Rendering the Search of the Vehicle Unreasonable Pursuant to *Arizona v. Gant*.

The issue in this case is whether the search of the vehicle Mr. Smiter was in was proper under the search and seizure provisions of both the United States and Wisconsin Constitutions.

I. Standard of Review

The application of constitutional principles to a set of evidentiary or historical facts poses a question of constitutional fact. *State v. Martwick,* 2000 WI 5, ¶ 17, 231 Wis.2d 801, 604 N.W.2d 552. The court of appeals engages in a two-step inquiry when it analyzes issues of constitutional fact. *Id.* at ¶ 16. First, in reviewing a motion to suppress, the court of appeals applies a deferential standard to the circuit court's findings of evidentiary, historical facts. *Id.* at ¶ 18. The court of appeals affirms the circuit court's findings of fact, and inferences drawn from those facts, unless they are clearly erroneous. *Id.; State v. Harris,* 206 Wis.2d 243, 249-50, 557 N.W.2d 245 (1996). Second, the court of appeals reviews the circuit court's application of constitutional principles to the evidentiary facts. *Martwick,* 2000 WI 5 at ¶ 17. This second step presents a question of law that the court of appeals

reviews independently. *Id.* at ¶ 18; *State v. Richardson,* 156 Wis.2d 128, 137-38, 456 N.W.2d 830 (1990).

II. The Trial Court's Determination that the Officers had Probable Cause to Arrest Mr. Smiter for a Drug Crime was not "Clearly Erroneous."

The trial court's factual determinations are reviewed under the "clearly erroneous" standard. *State v. Smith,* 170 Wis. 2d 701, 714, 490 N.W.2d 40, 46 (Wis. App. 1992). ("the court of appeals accepts all factual determinations unless no reasonable finder of fact could have reached the conclusions by the trial court.") Here, the crime of arrest was a drug crime. R59:21. According to the testimony, Mr. Smiter opened up the window of his car and flicked a "cigar-like object" outside of the window and the cigar like object was recovered. *Id.* at 20. The cigar like object had a green, plant-like substance in it that was "damp, consistent with someone putting it in their mouth and moistening it." *Id.* at 22. Detective Huerta testified that he saw Mr. Smiter flick the blunt with his own two eyes. *Id.* at 20.

Whether or not Detective Huerta was telling the truth is a credibility determination that the trial court needed to make, and not only does the court of appeals defer to that determination, but also the defense does not have any evidence that this was a "clearly erroneous" decision. Therefore, the defense concedes that there was probable cause to arrest Mr. Smiter for possession of marijuana.

III. Officers Lacked Reason to Believe that there were More Drugs in the Vehicle.

The question is, given probable cause to arrest, did the officers exceed the lawful scope of search incident to arrest

by searching the vehicle that Mr. Smiter had been in after they recovered the marijuana blunt.

The Fourth Amendment to the United States Constitution[2] and article I, section 11 of the Wisconsin Constitution[3] both protect citizens from unreasonable searches and seizures. The Wisconsin Appellate Courts historically follow the interpretations of the United States Supreme Court when it analyzes the search and seizure provisions of both constitutions. *Secrist,* 224 Wis. 2d at 208-209. This ensures consistency in the application of constitutional principles. *State v. Fry,* 131 Wis. 2d 153, 173-74, 388 N.W.2d 565 (1986). A warrantless search is per se unreasonable unless one of the few specifically established and well-delineated exceptions justifies the search. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507 (1967). The State bears the burden of proving that a warrantless search falls under one of the established exceptions. *Id.*

The two arguable exceptions in this circumstance are whether (1) the search is conducted "incident to a lawful arrest." Wis. Stat. § 968.11[4], *Abel v. United States,* 362 U.S.

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[2] The Fourth Amendment to the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[3] Article I, § 11 of the Wisconsin Constitution states:
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

[4] Wisconsin Stat. § 968.11 provides:
Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:
(1) Protecting the officer from attack;

217, 80 S.Ct. 683; *Fry,* 131 Wis. 2d 153, or (2) whether the police had probable cause to believe that the vehicle "contains the object of the search." *United States v. Ross,* 456 U.S.798, 806-809, 102 S. Ct. 2157 (1982).

The search incident to arrest exception was previously interpreted to automatically permit the warrantless search of the passenger compartment of a vehicle and any containers situated in that compartment if the search is incident to a lawful arrest. *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860 (1981). Secondly, the "automobile exception" was first recognized in *Carroll v. United States,* 267 U.S. 132, 149-56, 45 S.Ct. 280 (1925), in which the Supreme Court concluded that law enforcement officers may search an entire motor vehicle without a warrant if there is probable cause to believe that the vehicle contains contraband. The Court clarified *Carroll* in *United States v. Ross*, and recognized that the scope of such a probable cause search extends to "every part of the vehicle and its contents that may conceal the object of the search," including closed containers. *Ross,* 456 U.S. at 825

Arizona v. Gant placed limitations on the search incident to arrest exception to the warrant requirement for vehicle searches. *Gant* established that the police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if (1) it is reasonable to believe that the arrestee might gain access to the vehicle at the time of the search or (2) that the vehicle contains evidence of the offense of arrest. *Arizona v. Gant,* 129 S.Ct. 1710. The Court rejected a broad reading of *Belton* that would permit a vehicle search

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(2) Preventing the person from escaping;
(3) Discovering and seizing the fruits of the crime; or
(4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

incident to a recent occupant's arrest even if there was no possibility the arrestee could gain access to the vehicle at the time of the search. *Id.* at 1722. Therefore, the decision in *Gant* established that the defendant must be within reaching distance of the vehicle to justify a search in circumstances where further evidence of the crime of arrest would not be found, such as driving with a suspended license, as in *Gant.*

Mr. Smiter has searched at length and has found no case that states that evidence of drugs upon a traffic stop automatically becomes a reason to believe that there will be more evidence of other drug activity in a vehicle. If this point seems in any way obvious, it is not obvious in case law. Mr. Smiter has found federal case law that indicates that arrest for possession of drug *paraphernalia* made it reasonable to search the car for drugs, just as locating a bullet made it reasonable to search for a gun. *United States v. Martin,* 2010 WL 145111 (7th Cir. 2010); *United States v. Bradford,* 2009 WL 3754174 (E.D.Wis. 2009). However, Mr. Smiter notes that in his case, the *drugs* were found, not evidence of *potential drug use*, which would admittedly potentially allow for further search of the vehicle. Additionally, federal cases are not controlling on Wisconsin state law, and the Wisconsin courts are able to make their own conclusions about fourth amendment protections. It is the State court's responsibility to interpret the State Constitution independently. *State v. Ward,* 2000 WI 3, ¶ 59, 231 Wis.2d 723, 604 N.W.2d 517; *State v. Agnello*, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999).

Upon arrest, a warrantless search of a vehicle is justified by the need to discover and preserve evidence. *Knowles v. Iowa,* 525 U.S. 113, 116-118, 119 S.Ct. 484 (1998); *Ross,* 456 U.S. at 809. The *Knowles* Court explained that the need to preserve evidence for later use at trial does not arise when the driver receives a speeding citation. In most instances, once police issue a citation, "all the evidence

necessary to prosecute that offense had been obtained." *Id.* at 118, 119 S.Ct. 484. Under the facts of *Knowles,* "[n]o further evidence of excessive speed was going to be found either on the person ... or in the passenger compartment." *Id.*

In this case, Mr. Smiter flicked a marijuana blunt out of the car window. R59:20. The police recovered the marijuana blunt and arrested Mr. Smiter. *Id*. The evidence necessary to prosecute that offense had been obtained. The blunt was damp, recently used, observed to have been thrown from the car. *Id.* at 22. There were no statements by Mr. Smiter that there were drugs in the car. R59. There was no confidential informant who had given information about drug possession or dealing in that particular car. *Id.* There were no additional drugs in plain view. *Id.* Therefore, the determination that there would be more drugs in the vehicle was speculation, not corroborated by anything other than a blunt being found on the side of the road. Mr. Smiter could not find one case that stated that contends that discovery of some drugs outside of the car, in the form of one personal use blunt, without more, provides reason to believe that there are more drugs inside the car.

Searches according to the automobile exception as opposed to searched based on search incident to arrest provide some guidance. First of all, before police can conduct a warrantless search of a vehicle, they must have probable cause to believe that a passenger compartment contains contraband. *Carroll,* 267 U.S. at 153-54. Secondly, the officers can only search until they have found "the object of the search." *Ross,* 456 U.S. at 825. In this circumstance, the very object that would precipitate a search was found outside the vehicle. R59:20. The officers had no proof that there was any *more* marijuana simply because *some* marijuana was found. In this situation, the officers saw Mr. Smiter throw

something outside of the vehicle. They went and recovered the item. That was it.

Conclusion

This Court therefore should reverse the decision of the trial court denying the motion to suppress in this case.

Dated at Milwaukee, Wisconsin this 27th day of April, 2010.

Respectfully submitted,

MAAYAN SILVER
Attorney for Defendant-Appellant
State Bar No. 1052569

Gamiño Law Offices, LLC
1746 S. Muskego Ave.
Milwaukee, WI 53204
Telephone (414) 383-6700

Attorney for Defendant-Appellant

APPENDIX

INDEX TO APPENDIX

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 3,627 words.

Respectfully submitted,

MAAYAN SILVER
Attorney for Defendant-Appellant
State Bar No. 1052569

Gamiño Law Offices, LLC
1746 S. Muskego Ave.
Milwaukee, WI 53204

Telephone (414) 383-6700

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Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issue raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Signed:_____,
MAAYAN SILVER
Attorney for Defendant-Appellant

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Certification of Electronic Brief

Pursuant to Rule 809.19(12)(f), I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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MAAYAN SILVER
Attorney for Defendant-Appellant