STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2010AP599-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRACY SMITER,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
PAUL VAN GRUNSVEN, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would not add to the arguments presented by the parties in their briefs.

The opinion should be published because this is the first Wisconsin case to consider the application of the rule of *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which permits the police to search a vehicle incident to the arrest of an occupant when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

Because this case goes to the merits of a *Gant* issue, it is significantly different from *State v. Michael A. Littlejohn*, Case No. 2007AP900-CR, 2008 WI App 45, 307 Wis. 2d 477, 747 N.W.2d 712, and *State v. David A. Dearborn*, Case No. 2007AP1894-CR, 2008 WI App 131, 313 Wis. 2d 767, 758 N.W.2d 463, both argued in the supreme court April 13, 2010, which involved an application of the good faith exception to the rule of *Gant.*

ISSUE PRESENTED

The issue in this case, although always relating to the search of the vehicle in which the defendant-appellant, Tracy Smiter, was a passenger, has continuously evolved through various proceedings in the circuit court and on appeal. Considering the facts established at evidentiary proceedings in the circuit court, the argument made in the appellant's brief in this Court and the response to that argument in this brief, the issue that should now be resolved by this Court may be stated as follows:

After arresting Smiter for possession of a controlled substance found outside the vehicle in which he was a passenger, could the police properly search the vehicle for additional controlled substances under the rule of *Gant* which permits the police to search a vehicle incident to the arrest of an occupant when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle?

Although this issue was never considered by the circuit court, the state, as respondent on appeal, may make any argument in support of the judgment which is supported by the facts in the record. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

ARGUMENT

AFTER ARRESTING SMITER FOR POSSESSION OF A CONTROLLED SUBSTANCE FOUND OUTSIDE THE VEHICLE IN WHICH HE WAS A PASSENGER, THE POLICE PROPERLY SEARCHED THE VEHICLE FOR MORE CONTROLLED SUBSTANCES SINCE IT WAS REASONABLE TO BELIEVE THAT MORE EVIDENCE OF THE CRIME FOR WHICH SMITER WAS ARRESTED MIGHT BE FOUND IN THE VEHICLE.

We used to think that the police could search a vehicle without any further justification any time they arrested an occupant of the vehicle, even if the occupant was handcuffed, confined in a squad car, and guarded by the police when the search was conducted. *See, e.g., State v. Pallone*, 2000 WI 77, ¶¶ 31-35, 236 Wis. 2d 162, 613 N.W.2d 568.

In *Gant*, the Supreme Court told us we were wrong. The Court told us that the police could search a vehicle incident to an arrest without any further justification only if the arrestee was within reaching distance of the passenger compartment of the vehicle at the time of the search. *Gant*, 129 S. Ct. at 1723.

The Court comforted us with the assurance that this constriction of what we thought was the bright line rule enunciated in *New York v. Belton*, 453 U.S. 454 (1981), would not prevent the police from searching a vehicle after an occupant was arrested. They could still do a protective search if they had reason to suspect that a dangerous person could retrieve a weapon from the vehicle, *Gant*, 129 S. Ct. at 1721 (citing *Michigan v. Long*, 463 U.S. 1032 (1983)), and they could still search for evidence if they had probable cause. *Id.* (citing *United States v. Ross*, 456 U.S. 798 (1982)).

However, realizing that its ruling would put the brakes on a practice that after *Belton* was widespread, *Gant*, 129 S. Ct. at 1718-19 and nn.2 & 3, the Court announced a new intermediate position which recognized an arrest as an important, though not controlling, factor in permitting the warrantless search of a vehicle. Adopting Justice Scalia's concurring opinion in *Thornton v. United States*, 541 U.S. 615, 632 (2004), the Court ruled that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence of the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719.

Since the facts in *Gant* did not warrant the application of this new rule in that case, the Court did not explain in greater detail when it would be "'reasonable to believe evidence of the crime of arrest might be found in the vehicle.'" However, some insight particularly relevant to the present case can be gained from the two cases on which the Court relied for the rule.

Justice Scalia provided an example of what he meant by "cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle" when he went on to state in *Thornton*,

> In this case, as in *Belton*, petitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence of the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of his arrest.

Thornton, 541 U.S. at 632 (Scalia, J., concurring).

Like Justice Scalia in *Thornton*, the Court in *Gant* also identified *Belton* as a case where it was reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *See Gant*, 129 S. Ct. at 1719, 1721.

In *Belton*, a police officer saw on the floor of the car an envelope that he associated with marijuana. *Id.*, 453 U.S. at 456. The men in the car were ordered out and placed under arrest. *Id.* The officer picked up the envelope and found that it contained marijuana. *Id.* The officer then searched the car and found cocaine in Belton's jacket, which was laying on the back seat. *Id.*

From the approval of *Belton* and *Thornton* in *Gant*, it is possible to extract a rule that when the police arrest the occupant of a vehicle for a drug offense after finding a controlled substance in the occupant's possession, the police may search the vehicle for additional controlled substances because in this situation it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

In the year since *Gant* was decided, several lower courts have applied this rule in drug cases. *United States v. Winters*, 600 F.3d 963, 968 (8th Cir. 2010) (search justified when drugs found); *United States v. Bradford*, Case No. 09-CR-71, 2009 WL 3754174 *3 (E.D. Wis. Nov. 5, 2009) (search justified when drug paraphernalia found);[1] *United States v. Evans*, Case No. CR 08-1207-CAS, 2009 WL 2230924 *6 and n.3 (C.D. Cal., July 23, 2009) (search justified when drug paraphernalia found); *People v. Green*, Case No. B209617, 2009 WL 2037891 *3-4 (Cal. Ct. App. July 15, 2009) (search justified when drugs found). *See Belton*, 453 U.S. at 456 (noting that New York court reasoned that once defendant was arrested for possessing marijuana police were justified in searching vehicle for other contraband). *See also People v. Osborne*, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009) (illegal possession of firearm provides reasonable belief to search akin to illegal possession of drugs). *Cf., e.g., United States v. Oliva*, Case No. C-09-341, 2009 WL 1918458 *6 (S.D. Tex. July 1, 2009) (once driver arrested

[1] Unpublished cases from other jurisdictions may be cited for their persuasive value. *State v. Stenzel*, 2004 WI App 181, ¶ 18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20.

for drunk driving reasonable to search vehicle for evidence of intoxicants).[2]

Applying the rule of *Gant*, *Thornton* and *Belton* to the facts of this case leaves no doubt that after arresting Smiter for possessing marijuana; the police were justified in searching the car in which he had been riding for more controlled substances.

After the car in which Smiter was riding was stopped for a traffic violation, Detective Willie Huerta saw Smiter throw an object out the window (59:20). As Huerta approached the vehicle, he recognized the object as a "blunt," a cigar wrapper filled with marijuana (59:21-22). The cigar wrappers must be licked to be closed, and the blunt found by Huerta was moistened (59:22-23). When Huerta approached the vehicle and identified himself as a police officer, he saw Smiter move forward with his arm extended under the seat as though he was trying to hide something there (49:5, 10).[3]

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[2] Smiter cites no authority for his contention that once the police have recovered the drugs which give them probable cause to arrest the defendant, they are foreclosed from searching the defendant's vehicle for additional controlled substances. Indeed, one of the cases he cites, *United States v. Bradford*, Case No. 09-CR-71, 2009 WL 3754174 *4 (E.D. Wis. Nov. 5, 2009), states that "nothing in *Gant* suggests that a permissible search incident to arrest must stop as soon as any contraband is found."

Moreover, while Smiter asserts that finding drug paraphernalia provides more reason to search for drugs than actually finding drugs, he offers no authority or reasoning for that assertion. Finding either drug paraphernalia or drugs indicates that the defendant is either using or selling drugs, and therefore that there might be drugs in his car.

[3] This Court may consider evidence presented at the preliminary hearing in reviewing a decision on a motion to suppress evidence. *State v. Fox*, 2008 WI App 136, ¶ 2 n.1, 314 Wis. 2d 84, 758 N.W.2d 790. Although an appellate court cannot overturn a suppression ruling based on evidence that was not presented at the suppression hearing, *State v. Mikkelson*, 2002 WI App 152, ¶¶ 20-21, 256 Wis. 2d 132, 647 N.W.2d 421, it can use evidence presented at other hearings in the case to affirm a suppression ruling. *State v.*

Huerta arrested Smiter for possessing the marijuana filled blunt (59:21), then searched the area under the seat where Smiter had been reaching (49:5-6). There, Huerta found a plastic baggy containing fifty-three corner cuts of cocaine (49:6).

The very fact that Smiter was arrested for possessing some marijuana gave Detective Huerta, perhaps not probable cause, but at least good reason to believe there might be more controlled substances in the vehicle. *See Gant*, 129 S. Ct. at 1719 (in cases where defendant arrested for drug offense, like *Belton* and *Thornton*, offense of arrest will supply basis for searching arrestee's vehicle); *Thornton*, 541 U.S. at 632 (Scalia, J., concurring) (where defendant lawfully arrested for drug offense reasonable to believe evidence relevant to crime of arrest might be found in vehicle).[4]

In addition, the fact that the blunt was moist suggested that it had just been sealed, which suggested that it had just been packed with marijuana, which suggested that there was a supply of marijuana in the car from which the marijuana in the blunt had been taken.

Moreover, Smiter's furtive movement under the seat after throwing out the marijuana filled blunt suggested that he was trying to hide something else, which could have been that additional supply of marijuana.

Begicevic, 2004 WI App 57, ¶ 3, n.2, 270 Wis. 2d 675, 678 N.W.2d 293. This is consistent with the principle that an appellate court will try to sustain a ruling of a circuit court for a different reason as long as the ruling was correct. *See Holt*, 128 Wis. 2d at 124-25.

[4] Smiter seems to concede that finding drug paraphernalia gives the police reason to search a vehicle for drugs. *See* Brief for Defendant-Appellant at 14. The cigar wrapper found by the police was drug paraphernalia, i.e. an object that is used for using drugs. The fact that this drug paraphernalia actually contained drugs did not give the police any less reason to search the vehicle.

These facts plainly made it reasonable to believe that there might have been more controlled substances in the vehicle in which Smiter had been a passenger. Detective Huerta was therefore authorized to search the car for this evidence of the crime for which Smiter had been arrested incident to his arrest.

CONCLUSION

It is therefore respectfully submitted that Smiter's conviction for possessing cocaine with intent to deliver it should be affirmed.

Dated at Madison, Wisconsin: June 9, 2010.

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CERTIFICATION

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 200 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 length of the brief is 1,883 words.

_____
THOMAS J. BALISTRERI

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief, excluding the appendix, is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief, excluding the appendix, filed with the court and served on all opposing parties.

Dated this 9th day of June, 2010.

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