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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2010AP599-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

Trial Court Erred in Denying Mr. Smiter's Motion to Suppress as There was No Reason to Believe that Evidence of the Crime of Arrest Would Be Found in Mr. Smiter's Vehicle.

Arizona v. Gant justifies a vehicle search after arrest for officer safety, to prevent the destruction of evidence and/or if the officer has reason to believe that evidence related to the crime of arrest was in the car. 129 S.Ct. 1710 (2009). Yet it has not been established in Wisconsin, or in many jurisdictions, what exactly constitutes "reason to believe" that evidence of the crime of arrest is in the car. Mr.

Smiter contends that (1) while the officers had probable cause to arrest him for a drug crime, they did not have probable cause to search his car. (2) Additionally, the officers did not have reason to believe that more drugs were in his car simply because he threw a used blunt outside of the car after the stop. The cases that respondent cites to show that the officers had a reason to believe that there would be evidence of the crime of arrest in the car can be distinguished from Mr. Smiter's case. (Respondent's Brief at 5-6). And (3) public policy determines that without probable cause to search a car, police officers are simply engaging in a fishing expedition for evidence and making an end run around the probable cause requirement.

Every search should have at least a minimum standard of probable cause or else the search is violating the Fourth Amendment. Public policy should protect reasonable expectation of privacy by banning searches with less than probable cause. The whole basis for a search incident to arrest is officer safety (to protect an officer from the defendant grabbing a weapon) and to prevent the concealment and destruction of evidence, *Belton v. New York*, 453 US 454, 457 (1981), but when Mr. Smiter's car is searched without a warrant after his arrest and being secured in the police vehicle, Mr. Smiter's invaluable privacy rights are being violated.

Under *Gant,* there was no reason to believe that there were *more* drugs in the car simply because a blunt of marijuana was recovered after Mr. Smiter threw it out the car window. Not only are the cases cited by the Respondent non-binding on the Wisconsin courts; but also, each case that the Respondent cited can be distinguished from the instant case, and none of the cases explain *why* some drugs necessarily means more drugs.

Belton and *Thornton* are both cases in which a defendant was arrested for a drug crime after a traffic stop.

Thornton v. United States, 541 US 615, 617 (2004); *New York v. Belton*, 453 US 454 (1981). In *Thornton,* the defendant was patted down to reveal bags of marijuana and a large amount of crack cocaine. *Id.* Both the amount of drugs and the packaging was indicative of dealing. *Id.* With this information in hand, considering that the defendant may have been *dealing drugs,* there was more ammunition for an argument that there could be drugs, more drugs, in the defendant's car. In Mr. Smiter's case, the police found a recently used, single use, half smoked marijuana blunt, that Mr. Smiter threw outside of the car. R59:22. This, in and of itself, is solely personal use and does not indicate that more drugs are necessarily in the car.

In *Belton,* the officer pulled over four men, including Belton, for speeding only to smell burnt marijuana coming from the car and to see an envelope on the floor of the car marked "Supergold." 453 US at 455-56. "Supergold," was indicative to the officer of slang for marijuana. *Id.* First of all, the upon the stop there was a smell of marijuana, but the officers had not recovered the marijuana yet. *Id.* In Mr. Smiter's case, while there was no actual testimony about the smell of marijuana, the source of the marijuana was recovered upon the traffic stop outside of the car. R59:22.

Additionally, in *Belton,* the officer had a clue pointing him into the direction of the car, an envelope marked "Supergold." There was nothing of that nature present in Mr. Smiter's case, no clues or suspicions leading the officers directly into the car. Granted, Mr. Smiter made a "movement consistent with reaching and trying to hide something underneath the seat area of the vehicle," upon being cornered by the police, (R49: 5, 10), but this is not as obvious of a drug reference as a package in plain view marked "Supergold." For instance, Mr. Smiter could have been stretching, he could have been picking up a dropped key, he could have been putting something completely innocent

under the seat. Therefore, there was reason to believe that there were drugs in the vehicle in Mr. Belton's case, but not in Mr. Smiter's case.

In *People v. Osborne,* 96 Cal. Rept. 3d 696 (Cal. Ct. App. 2009), the court determined that "given the crime for which the officer had probable cause to arrest (illegal possession of a firearm), it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at 705. The court reasoned that:

> Unlike a simple traffic violation, illegal possession of a firearm is more akin to possession of illegal drugs, which would provide such a reasonable belief. Although the firearm found on defendant was loaded, it was reasonable to believe that the vehicle might contain additional items related to the crime of gun possession such as more ammunition or a holster. *Id.*

An application of this gun case to Mr. Smiter's drug case would be applying dicta, as this case is ruling on the application of the law to a search after finding a gun and not after finding drugs. *US v. Oliva,* 2009 WL 1918458 (S.D. Tex.) can be distinguished on this basis as well. In *Oliva,* the defendant sought to suppress marijuana found in her purse in the vehicle that she was traveling in. She had been stopped sitting in the driver's seat and there was suspicion that she had been driving while intoxicated. *2. The court found that it would be reasonable for the officers to search the vehicle for evidence of OWI, including open or empty containers. *6. This, again, is dicta, because the court was not deciding whether or not it was reasonable to believe that there were more *drugs* in a car based on an arrest for *drugs.*

In *US v. Winters*, 600 F.3d 963 (8th Cir. 2010), another case the Respondent cites, the defendant made a "furtive move" and a drug detection dog was summoned and detected narcotics in the defendant's vehicle. *Id.* at 966. In that circumstance, the court ruled that the totality of the circumstances, including the drug dog's alert provided

probable cause to search and not just reason to believe that evidence of the crime was in the car. *Id.* at 968. Therefore, this case does not provide guidance as to what would provide "reason to believe" that drugs are in the car. A drug dog making a hit on a car would provide, along with some "furtive movements" not only reason to believe, but also probable cause, but this does not explain what would be enough in Mr. Smiter's situation, in which there was no concrete evidence linking the drugs that Mr. Smiter threw out of the car with the car itself. R59.

In *US v. Evans*, 2009 WL 2230924 (C.D. Cal, 2009), the officers arrested the defendant on a warrant as well as for a designation as a missing adult. *1. But what gave the officers reason to believe that there was evidence in the car was an actual statement from the defendant indicating that she had put some drug paraphernalia inside of the car. *Id.* Once inside the car, the police found purses which were found to contain drugs and more paraphernalia. This is clearly different than Mr. Smiter's situation because not only did Mr. Smiter never give a statement indicating that he had drugs or paraphernalia in the car; but also, Mr. Smiter threw his drugs AND paraphernalia out of the car. R59:22. The object that Mr. Smiter threw out of the car was a "complete-in-an-of-itself" piece of contraband. It was marijuana wrapped in cigar paper. (*Id.*). Therefore, there was not reason to believe that there was necessarily anything else in the car.

For instance, if Mr. Smiter had thrown a bag of marijuana out of the car, there might be some rolling papers inside the car, or, the converse, that if Mr. Smiter had thrown some rolling papers outside of the car there might be some marijuana in the car. In this case, there was one personal use blunt, and the paraphernalia that was thrown out of the car was included in that blunt.

In *People v. Green,* 2009 WL 2037891 (Cal. Ct. App. July 15, 2009), the defendant's car was stopped because the

defendant was speeding. Upon disembarking from the vehicle, the defendant turned and ran from the officers and threw a plastic baggie in the direction of some trash cans. He then called some women out of a nearby house and threw his car keys to one of the women.*2. The baggie was found to contain a white substance, and the officers then took the car keys and searched the car, finding drugs and paraphernalia. *Id.*

Mr. Smiter's case is different from the *Green* case because Mr. Smiter never ran from the police, indicating a guilty mind and intent to escape from police contact. R59. Mr. Smiter also did not throw his keys in an attempt to prevent the police from looking in the car. *Id.* These are two significant differences that may have provided a reason to believe there were more drugs in Green's car that was not present in Smiter's situation. Mr. Smiter never made any ploys, decoys or evasive actions to prevent the officers from looking in the car. In *Green,* it may have been plausible to think that there were more drugs in the car because the defendant was attempting to hightail it out of there. In Mr. Smiter's case, that did not happen.

Finally, the *Bradford* case that Mr. Smiter cited in his appellate brief, (*US v. Bradford,* 2009 WL 3754174 (E.D. Wis. 2009), may state, as the respondent noted, that "nothing in *Gant* suggest that a permissible search incident to arrest must stop as soon as any contraband is found. (Respondent's Brief at 6.) First, the issue in this case is whether or not the search was justified in the first place, not the scope of the search. Secondly, the issue of whether a search incident to arrest must stop as soon as any contraband is found was not before the court in *Gant.* Third, if the issue was the scope of the search, Mr. Smiter was referring to the line of cases, specifically *US v. Ross,* 456 U.S. 798 (1982), and *US v. Chadwick,* 433 US 1 (1977), which discuss searches of

vehicles that are supported by probable cause to believe that the vehicle contains contraband.

Ross states that the scope of a warrantless search of a car is not defined by the nature of the container in which the contraband is located, but rather by the object of the search and places in which there is probable cause to believe the object may be found. *Id.* at 799. Mr. Smiter was indicating that if a search based on probable cause must be completed when the officers have located the object of a search, then it could be logical to insist that a search without probable cause should be over once contraband is found.

Based on the circumstances in this case, the lack of case law that says otherwise, there was no "reason to believe" under *Gant* that Mr. Smiter had more drugs in the vehicle simply because some personal use drugs were found outside of the vehicle. Furthermore, public policy should protect the searches of a vehicle without a warrant and without probable cause. The trial court therefore erred in denying the motion to suppress evidence.

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 18th of June, 2010.

Respectfully submitted,

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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 2,045 words.

_____
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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 18th day of June, 2010.

_____
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