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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN

Plaintiff-Appellant, **Court of Appeals No. 2014AP001787 CR**

v. **Circuit Court Case No. 2014CM00099**

MIRANDA K. HINDERMAN,

Defendant-Respondent.

RESPONSE BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

APPEALED FROM: **Circuit Court,**
Grant County, Wisconsin

The Honorable Craig R. Day, Presiding

Submitted by:

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STATEMENTS OF ISSUE PRESENTED

I. The State frames the issue as follows:

> **May a law enforcement officer search containers in a vehicle for evidence of intoxicants or other substances that could impair driving after a lawful arrest of a driver for operating a motor vehicle while under the influence of an intoxicant?** (App's Br. at 3.)

II. The Defendant frames the issue as follows:

> **The issue presented is whether the facts available to the circuit court were sufficient to establish a reasonable belief that evidence relating to the crime of arrest (OWI) might be found in the Defendant's vehicle, such that the search of the Defendant's vehicle could be legally conducted incident to the Defendant's arrest.**

The Circuit Court found that there was nothing upon which to base a reasonable belief that any evidence relating to an OWI would be found inside the Defendant's vehicle and that in the absence of such a reasonable belief, the warrantless search of the Defendant's vehicle was not legal, incident to her arrest. (R. 12 at 18:15-20; R-App at 120).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would only be appropriate if deemed necessary to more fully express the issue(s) presented.

Publication is not requested per Wis. Stat. § 809.23(1)(b)4.

STATEMENT OF THE CASE

Following a March 15, 2014 arrest on suspicion of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration, the Defendant, Miranda K. Hinderman, was charged, on April 7, 2014, with those offenses and additionally on charges of possessing marijuana and drug paraphernalia. (R. 1, R-App. at 126-131). Ms. Hinderman filed a Motion to Suppress the marijuana and paraphernalia, as violative of the 4th Amendment to the United States Constitution and Article 1, Section11 of the Wisconsin Constitution under the rule expressed in *Arizona v. Gant*. (R. 8; R-App. at 124). Hearing on the Defendant's Motion was held on May 29, 2014 and the Motion was granted on that date, suppressing the marijuana and paraphernalia. (R. 12; R-App. at 102). The State filed leave to appeal the suppression order and subsequently, on August 8, 2014, Ms. Hinderman pleaded guilty to, and was sentenced for, operating a motor vehicle while intoxicated.

STATEMENT OF THE FACTS

On March 15, 2014, Grant County Sheriff's Deputy Jerry Vesperman performed a traffic stop on a vehicle driven by the Defendant, Miranda K. Hinderman, after observing her vehicle operating left of the center line. (R. 1 at 4, R-App. at 129). At the motion hearing on May 29, 2014, Defendant's counsel advised the District Attorney that

the Defendant was not challenging the legality of the arrest on suspicion of OWI. (See R. 12 at 2:13-14; R-App at 104). Deputy Vesperman testified that when he made contact with Ms. Hinderman, while she was inside her vehicle, he "detected a strong odor of intoxicants coming from within the vehicle. And once she started talking, I noticed her bloodshot eyes and slurred speech." (R. 1 at 4; R. 12 at 2:9-12; R-App at 104). Ms. Hinderman was subsequently placed under arrest, handcuffed, and placed in the back of a squad car. (R. 1 at 5; R. 12 at 2:17-25; R-App at 104).

Thereafter, while Deputy Vesperman had a conversation with Ms. Hinderman, another deputy, Deputy Jacobson, began searching the front passenger side of Ms. Hinderman's vehicle. (R.1 at 5; R. 12 at 6:10-18; R-App at 108). After searching for some time, Deputy Jacobson found a metal "one-hitter" and a baggie of suspected marijuana inside a coin purse that was inside Ms. Hinderman's purse. (R. 1 at 5; R. 12 at 4:10-15; R-App at 106). Deputy Vesperman described the coin purse as "approximately three inches by three inches … and … half inch to three quarters of an inch wide." (R. 12 at 4:16-20; R-App at 106).

ARGUMENT

POLICE OFFICERS MAY ONLY SEARCH A VEHICLE INCIDENT TO THE OPERATOR'S ARREST FOR AN OWI WHERE THERE IS SOME OBJECTIVE BASIS MAKING IT REASONABLE FOR THE OFFICER TO BELIEVE THERE MAY BE EVIDENCE RELATED TO THE OWI-ARREST FOUND WITHIN THE VEHICLE OR A CONTAINER THEREIN.

I. STANDARD OF REVIEW

The State presents the "Statement of the Issue" as follows:

> May a law enforcement officer search containers in a vehicle for evidence of intoxicants or other substances that could impair driving after a lawful arrest of a driver for operating a motor vehicle while under the influence of an intoxicant?

The State argues that the investigating officers, in the immediate action, properly searched Ms. Hinderman's vehicle upon her arrest for suspicion of OWI and that there was a reasonable basis for the officers to believe evidence related to the suspected OWI might be found in Ms. Hinderman's vehicle. The State does not argue that every OWI arrest inherently presents a reasonable belief that evidence might be found in an arrestee's vehicle on a *per se* basis, i.e., without any objective indicators suggesting there would be intoxicants inside the vehicle. This possibility was suggested by the United States Supreme Court in *Arizona v. Gant*; however, the specific types of offenses that would permit searches incident to arrest on a *per se* basis was not articulated any further than the suggestion that drug-related, possessory offenses would

be offenses that permit searches, by their very nature. 556 U.S. 332, 344, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009).

In Wisconsin, the supreme court is the law-developing, or policy making court. *See State v. Schumacher*, 144 Wis. 2d 388, 405-07, 424 N.W.2d 672 (1988). The court of appeals, in contrast, is mainly an error correcting court. *Id.* Although this court has a role in developing the law as it exists, it cannot declare new law. *Id.* Instead, "[W]e are duty-bound to apply the law as it presently exists." *Thomas ex rel. Gramling v. Mallett*, 2004 WI App 131, ¶20, 275 Wis. 2d 377, 685 N.W.2d 791, *aff'd in part and rev'd in part on other grounds*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

The State may be asking too much of this court, to the extent that the State implicitly seeks a ruling that an OWI-arrest, on its own, permits a vehicle search incident to arrest, in the absence of specific and articulable facts providing a reason to believe the vehicle driven by the arrested individual might contain evidence of the OWI. Again, because the State has argued that there is a reasonable basis to believe Ms. Hinderman's vehicle contained evidence related to her OWI-arrest and has not specifically raised or advanced the argument that the mere fact of her OWI-arrest justifies the search, it would be inappropriate to decide this case on that theory.

The State is arguing that there were sufficient objective facts to support a reasonable belief that Ms. Hinderman's vehicle might contain evidence of an OWI, and therefore, the application of constitutional principles to a particular case is a question of constitutional fact. *State v. Pallone*, 2000 WI 77, ¶ 26, 236 Wis. 2d 162, 613 N.W.2d 568. We accept the circuit court's findings of fact unless they are clearly erroneous. *Id.* at ¶ 27. The application of constitutional principles to those facts is a question of law that we review de novo. *Id.*

II. LEGAL AUTHORITY

Searches conducted without a warrant are presumed unreasonable. *See e.g., Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). Prior to the United States Supreme Court's decision in *Arizona v. Gant*, searches of motor vehicles incident to arrest were widely understood to be broadly permitted, as an exception to the warrant requirement, without need for specific factors suggesting such vehicles would contain evidence related to the crime of arrest. *See e.g., New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981); *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127 (2004); *State v. Fry*, 131 Wis. 2d 153, 178, 388 N.W.2d 565 (1986). In *Gant*, the Court limited this Fourth Amendment search authority to two circumstances and held that police may search a vehicle incident to a recent occupant's arrest only 1) where "the arrestee is within reaching

distance of the passenger compartment at the time of the search" (addressing concerns of officer safety), or 2) where "it is reasonable to believe the vehicle contains evidence of the crime of arrest" (addressing concerns of evidence preservation). 556 U.S. 332, 351, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009).

> The right to be secure against unreasonable searches and seizures is protected by both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. (citation omitted). We have historically interpreted the Wisconsin Constitution's protections in this area identically to the protections under the Fourth Amendment as defined by the United States Supreme Court. (citation omitted).

State v. Dearborn, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 261-62, 786 N.W.2d 97. *Dearborn* adopted the holding of *Gant* as the proper construction of Article 1, Section 11 of the Wisconsin Constitution. Id. at ¶ 3, 315 Wis. 2d at 257.

Gant's new, narrowed justification for a search incident to arrest where concerns of officer safety are absent, based on a "reasonable [] belie[f] evidence relevant to the crime of arrest might be found in the vehicle" was derived from Justice Scalia's concurrence in *Thornton*. *Id.* at 333, 351 S. Ct. at 1719. The *Gant* Court noted that some offenses would not, alone and by their nature, provide a reasonable basis to believe a vehicle contains relevant evidence. *Id.* at 343-44, 352 S. Ct. at 1719 (*citing Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S. Ct. 1536 (2001) (seat-belt violation); *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.

Ct. 484 (1998) (speeding)). The Court did however indicate that under some circumstances, including those present in *Belton* and *Thornton*, "the offense of arrest will supply a basis for searching the passenger compartment of the arrestee's vehicle and any containers therein." *Id.* at 344, 353 S. Ct. at 1719. *Belton* involved a traffic stop where the investigating officer smelled burnt marijuana and saw a container of marijuana in plain view during the traffic stop. 453 U.S. at 455-56. *Thornton* involved an individual who consented to a pat-down of his person, after exiting his vehicle, and both marijuana and cocaine were discovered. 541 U.S. at 618.

The *Gant* Court noted that "the State seriously undervalues the privacy interests at stake." 556 U.S. at 344-45, 129 S. Ct. 1720. The Court went further, stating:

> A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345, 129 S.Ct. 1720. The Court indicated that maintaining the broad misunderstanding of *Belton*, and continuing to allow officers *carte blanche* to search vehicles incident to arrest, was not necessary to protect evidentiary interests. *See id.* at 346, 129 S.Ct. at 1721.

Gant also reminds that even absent an arrest, where there is probable cause to believe a vehicle contains evidence of criminal activity, a search may be conducted in any area of the vehicle where such evidence might be found, and in such an instance, "the scope of the search authorized is broader." *Id.* at 347, 129 S.Ct at 1721 (*citing United States v. Ross*, 456 U.S. 798, 820-21, 102 S.Ct. 2157 (1982)). Warrant exceptions such as this "ensure that officers may search a vehicle when *genuine* [ ] *evidentiary concerns* encountered during the arrest of a vehicle's occupant justify a search." *Id.* at 347, 129 S.Ct. at 1721 (emphasis added). Permitting searches incident to any arrest, absent objective factors suggesting evidence relating to the arrest might be found "would serve no purpose except to provide police entitlement…" *Id.* "The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349, 129 S.Ct. at 1723. Finally, "'[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment'." *Id.* (*quoting Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408 (1978)).

Following *Gant*, courts around the nation have been faced with determining what sufficiently constitutes *Gant*'s "reasonable to believe" standard to justify a search incident to arrest. The District of Columbia Court of Appeals addressed the issue in a case involving an individual who, much like Ms. Hinderman, was arrested on suspicion of operating a motor vehicle while intoxicated. *United States v. Taylor*, 49 A.3d 818, 820 (D.C., 2012). Mr. Taylor was arrested after the investigating officer noticed slurred speech, swaying side-to-side, the odor of alcohol coming from Mr. Taylor, fumbling with his wallet when attempting to provide the officer his driver's license, Mr. Taylor's admission to having been drinking, and a preliminary breath test showing the presence of alcohol in excess of the legal limit. *Id.* After Mr. Taylor was handcuffed and secured in the back of a squad car, the investigating officer searched Mr. Taylor's vehicle "for a current insurance card and evidence of alcohol consumption." *Id.* During that search, the investigating officer unlocked a glove box and found a loaded handgun, which Mr. Taylor was charged with illegally possessing. *Id.*

The trial court's granting of Mr. Taylor's motion to suppress, under *Gant*, was upheld on appeal. Despite the investigating officer testifying that it was common for people arrested for driving under the influence to have open containers of alcohol in their vehicle, the trial court correctly ruled that "to pass muster under *Gant*, a search must be

based on 'articulable facts leading to a reasonable belief that evidence of the crime of arrest may be in the car in the specific case.'" *Id.* at 821. In approving the trial court's ruling, the D.C. Court of Appeals determined that the "reasonable to believe" standard from *Gant* is lower than the probable cause standard and is properly equated with the reasonable suspicion standard. *Id.* at 822-23. In holding that the reasonable to believe standard must be something less than the probable cause standard, the *Taylor* court simply noted that it must mean something different from probable cause or the new *Gant* standard would superfluously duplicate the existing standard. *Id.* at 823; *see United States v. Ross*, 456 U.S. 798, 820-21, 102 S.Ct. 2157, *supra*.

In rejecting the approach taken in other jurisdictions which had previously held that an OWI offense provided the reasonable basis to support a search incident to arrest, itself and in the absence of any objective factors suggesting the presence of OWI-related evidence, like open containers of alcohol, the *Taylor* court observed that:

> [S]uch a categorical approach seems inconsistent with the Supreme Court's concern that "[a] rule that gives police the power to conduct . . . a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals."

Id. at 823-24 (*quoting Gant* at 345, 129 S.Ct. at 1720). In determining that the proper understanding of the contours of *Gant*'s "reasonable to believe" standard is as a corollary to the reasonable suspicion standard

under *Terry v. Ohio*, 392 U.S.1, 30, 88 S.Ct. 1868 (1968), *Taylor* noted that the *Gant* standard, similar to the *Terry* standard, requires only a reasonable belief that evidence "might" be found. *Taylor* at 824.

Fleshing out *Gant*'s "reasonable to believe" standard, *Taylor* held that officers conducting searches incident to OWI arrests "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion" of the search. *Id.* These facts must include "more than a mere 'hunch' or 'gut feeling." *Id.* (citations omitted).

The *Taylor* court declined to adopt a *per se* rule involving whether an OWI arrest provides an adequate reason to believe evidence related to the OWI might be found in the vehicle, in part, because the State did not advance that argument, as is the case in the immediate action. *Id.* at 825. In so declining, the court did note that the offense of arrest cannot be ignored when determining whether it was reasonable to believe there might be evidence related to the crime of arrest in the arrestee's vehicle. *Id.* They noted instances where contraband was observed in plain view and reasoned that in such a situation, it might be reasonable for investigating officers to conclude that additional contraband might be concealed in an arrestee's vehicle. *Id.*

The court found that while it was clear that Mr. Taylor was intoxicated and there was probable cause to arrest him for OWI, it reasoned:

> [T]here was nothing in particular—no tell-tale sign—to suggest that he had been drinking in his vehicle. It was, of course, possible that evidence of drinking—such as empty or partially full containers of alcohol—would be found in the vehicle, just as it is possible that such evidence may be found in any vehicle driven by an intoxicated individual. But the question under *Gant* is whether it is reasonable to believe that such evidence might be found in this specific vehicle. The suspicion must be particularized.

Id. at 826. Despite the investigating officer's testimony that it is typical for intoxicated drivers to have alcohol containers in their vehicles, the court determined that the basis for that testimony was insufficiently developed and that there was nothing objective to suggest that Mr. Taylor represented a typical intoxicated driver. *Id.* at 827. While his apparent level of intoxication suggested that Mr. Taylor was being evasive or untruthful regarding his drinking, it did nothing to support the belief that he had been drinking in his vehicle. *Id.*

III. APPLICATION

There is no question that Ms. Hinderman was under arrest and secured in a squad car at the time the search of her vehicle took place. Therefore, the first *Gant* prong regarding officer safety is not implicated and cannot justify the search conducted in the immediate action. On that point, the State and Ms. Hinderman agree.

The Circuit Court considered and addressed the issue of whether an OWI is the sort of offense that provides, on its own, a reasonable belief that relevant evidence might be found in the vehicle of an individual validly arrested for OWI. The Circuit Court indicated such offenses are, consistent with the language in *Gant*, possessory offenses which "involve[] having a thing." (R. 12 at 18:7-14). *Gant* did not go so far as to depict any offenses, other than drug-related, possessory offenses, that might provide the reasonable belief that would justify a search incident to arrest. *See* 556 U.S. at 344, 353 S. Ct. at 1719. The Circuit Court found that while there could potentially be evidence related to an OWI-arrest inside an arrestee's vehicle, *Gant*'s "reasonable to believe" standard requires at least "some scintilla of something beyond merely it being an OWI arrest to justify a search of this extent of the personal belongings of the occupant of the vehicle." (R. 12 at 18:15-20, R-App. at 120).

While it's been suggested that the nature of the offense must be included in the totality of the circumstances calculus when determining whether it is reasonable to believe there might be evidence located in the arrestee's vehicle[1], there is nothing in the record to support such a reasonable belief in the immediate action—for example testimony from Deputy Vesperman that it is common for those arrested for OWI to have

[1] *See e.g., Colorado v. Chamberlain*, 229 P.3d 1054, 1057 (Colo., 2010).

alcohol containers in the vehicle at the time of such arrests. Additionally, the State has not asked this Court to adopt such a *per se* rule, and while Ms. Hinderman submits that such a rule would be inappropriate[2], because the State has not raised or advanced that issue, this Court need not address it, directly. *See e.g., Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App., 1990) (Failure to argue a raised issue or cite legal authority for an argument is waiver); *Block v. Gomez*, 201 Wis. 2d 795, 811, 549 N.W.2d 783 (Ct. App., 1996) (The court will not address amorphous and insufficiently developed arguments).

The facts which supported Ms. Hinderman's arrest for OWI include that she was stopped on suspicion of OWI for operating left of the centerline. (R. 1 at 4). When Deputy Vesperman made contact with Ms. Hinderman, while she was inside her vehicle, he smelled a strong odor of intoxicants and observed her eyes to be bloodshot and her speech slurred. (Id.) He also observed that she seemed to have difficulty retrieving her driver's license from her license holder. (Id.). Upon being directed to exit her vehicle, Ms. Hinderman declined to perform field sobriety tests and when he requested that she do so, Deputy Vesperman observed her to be unsteady on her feet. (Id.). Ms. Hinderman advised

[2] *See e.g., Taylor* at 823-24; *Chamberlain*, 229 P.3d at, 1057 (Colo., 2010); *United States v. Reagan*, 713 F.Supp.2d 724, 731-32 (E.D. Tenn., 2010); *but see e.g., Brown v. Florida*, 24 So.3d 671, pin (Fla. Dist. Ct. App., 2009).

Deputy Vesperman that she owned a bar and that she had been drinking at the bar that evening. (Id.). None of these facts suggested, in any way, that Ms. Hinderman had been drinking in her vehicle and Deputy Vesperman did not testify that he had any reason to believe that she had been.

At the end of its brief, the State points to the police report attached to the Criminal Complaint as an indication "that while speaking with [Hinderman] the officer could smell a strong odor of intoxicants coming from within the vehicle." (Pet.'s Br. at 9; R. 1 at 4). The State then argues "The odor coming from the vehicle would give the deputies reason to believe that alcohol might be present in the vehicle and to search it." (Pet's Br. at 9-10). This argument belies the factual findings made by the Circuit Court.

Ms. Hinderman asserts that the Circuit Court made the clear, if perhaps implicit, finding that the odor of intoxicants was attributable to Ms. Hinderman, herself, not to the interior of her vehicle. Even if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision. *Sohns v. Jensen*, 11 Wis. 2d 449, 454, 105 N.W.2d 818, 820 (1960). In rendering its decision and while discussing the possible application of *State v. Billips*, 337 Wis. 2d at 734, which involved a motorist arrested for OWI whose vehicle was searched after the investigating officer

"observed open containers in the vehicle during the arrest process," the Circuit Court noted the distinction between the facts in that case and the facts in the immediate action, stating, "*Billips* therefore didn't need to rely on the *bare fact* that it was an OWI arrest to conclude that it is the kind of offense that per se gives reason to believe." (R.12 at 16:23-17:5, R-App. at 118-119) (emphasis added). Shortly thereafter, the Circuit Court rendered its decision, stating:

[T]here has to be some scintilla of something beyond it merely being an OWI arrest to justify a search of this extent of the personal belongings of the occupant of the vehicle. So the motion to suppress is granted…

(R. 12 at 18:15-19).

The Circuit Court explained that *Billips* is distinguishable from the immediate action because that case involved an observation of open intoxicants which provided a basis on which the officers, there, could reasonably believe additional intoxicants would be found in the vehicle. Despite that, the State attempts to rely on *Billips* by arguing that *Billips* "held that not only alcohol but any other substance that would contribute to the impairment of the driver would be further evidence related to an arrest for operating while intoxicated." (App.'s Br. at 9). That observation was dicta and *Billips* merely acknowledged that evidence of substances other than alcohol could provide evidence relating to an OWI arrest. *See* 2011 WI App 155, ¶ 9, 337 Wis. 2d 734, 807 N.W.2d 32

(unpublished). *Billips* held that the observation of open intoxicants prior the driver's arrest provided the basis, under *Gant,* for a reasonable belief to justify the search of the vehicle's interior, incident to the driver's arrest. *See id*. Upon entering the interior of the vehicle to search for additional alcohol containers, the investigating officer observed "an end of a marijuana cigar, a blunt, that was in plain view…" and it was this discovery which *Billips* found "support[ed] the reasonableness" the further search into the driver's purse. *Id.*

In the immediate action, there were no facts suggesting it was reasonable to believe that there might be OWI-related evidence located inside Ms. Hinderman's vehicle, and there were certainly no facts suggesting it was reasonable to believe such evidence would be found inside a 3 by 3 inch coin purse, and because the Circuit Court's findings in that respect are not clearly erroneous, the Order Suppressing Evidence must be affirmed.

The State devotes a great deal of its brief advancing the notion that it is illegal to operate a motor vehicle while under the influence of alcohol, restricted controlled substances, or both. (Pet's Br. at 6-9). While that is undoubtedly true, it ignores the language in *Gant* which requires a reasonable belief, as opposed to even a hunch or gut feeling, that evidence relating to the OWI might be in the vehicle. The State argues that the 3 inch by 3 inch pouch in which the suppressed evidence

was recovered is conceivably "large enough to hold a small, single serving container of alcohol." (Pet's Br. at 7). The State makes this argument without any objective facts suggesting such a small container of alcohol might be present in the vehicle.

The State notes that "beer receptacles and beer can be evidence of a crime." *State v. Pallone*, 2000 WI 77, ¶ 75, 236 Wis. 2d 162, 197, 613 N.W.2d 568 (*Overruled by Dearborn*, 2010 WI at ¶ 27, 327 Wis. 2d at 267-68, (To extent it relied on *Fry*'s interpretation of *Belton* following *Gant*)). *Pallone* involved an individual who was approached by officers who observed the individual exit the driver's side of a truck holding an open bottle of beer and take drinks from it immediately after exiting the vehicle. *Id.* at ¶ 4-5, 236 Wis. 2d at 168. The officers then searched the truck for additional beer bottles, including searching a duffle bag in the truck's cab. *Id.* at ¶ 12, 236 Wis. 2d at 171. The search of the duffle bag uncovered a small bottle containing cocaine inside a box of plastic baggies. *Id.* at ¶ 13-15, 236 Wis. 2d at 172. *Pallone* held that the search of the duffle bag was justified as a search incident upon the driver's arrest, presumably for possessing open intoxicants in a motor vehicle, based on the *Belton* rationale permitting searches to ensure officer safety, because it was reasonable to believe the duffle bag may have contained a weapon. *Id.* at ¶¶ 48-49, 236 Wis. 2d at 186-87. *Pallone* also indicated that the search was justified, under the search incident exception, for the

preservation of evidence, under *Fry*'s broad pre-*Gant* understanding of *Belton*, which was understood to permit searches incident to arrest in any containers in which the object of the search might be concealed. *See id*. at ¶¶ 35, 54, 236 Wis. 2d at 181, 188; *see also Fry*, 131 Wis. 2d at 178, 388 N.W.2d 565. The search was justified for purposes of evidence preservation, independent of the arrest, because there was probable cause to believe the duffle bag contained beer bottles, in addition to the one officers saw the driver possess and drink from as he exited the vehicle. *Id.* at ¶ 51, 236 Wis. 2d at 187. Under the probable cause analysis, derived from e.g., *Ross*, *supra, Pallone* found "it was reasonable for him to search the 'fairly large duffel bag, about twelve inches high, twelve inches wide, and maybe two, two-and-a-half feet long" that was situated on the bench in the cab," because it was large enough to hold additional bottles of beer, like the one the officers had already observed. *Id.* at ¶ 77, 236 Wis. 2d at 198. This analytical distinction in *Pallone* seems to acknowledge and foreshadow the issue presented in *Gant*, where the evidence preservation aspect of the search incident to arrest exception was limited to instances in which officers have grounds on which to base a reasonable belief that there will be evidence of the offense of arrest located in the vehicle or containers to be searched.

While the search conducted in *Pallone* would likely pass muster post-*Gant*, as a search incident to arrest, because there was a basis on

which to reasonably believe the duffle bag would contain additional beer bottles, in the immediate action, the search conducted does not satisfy the post-*Gant* understanding of searches incident to arrest due to the lack of any objective basis to suggest Ms. Hinderman's vehicle contained any evidence related to her OWI-arrest as well as the extreme unlikelihood of alcohol being found in a 3 by 3 inch coin purse. (See R. 12 at 17:23-18:6, R-App. at 119-120).

The State further explicates the flaw in its argument by arguing the same container could contain marijuana or "another drug that could have caused the Defendant to be impaired," again with nothing but speculation to suggest there would be anything of the sort located in the vehicle. (Id.). The State argues that the law does not require officers in the field to be pharmacists or even "drug detection analysts," and on that point the parties can agree; however, officers in a post-*Gant* world cannot justify vehicle searches incident to arrests for OWI on mere speculation that an arrestee might be under the influence of something other than alcohol, particularly where the objective facts available to the investigating officer fail to provide even a "scintilla" that such speculation might prove true. (See R. 12 at 18:15-19, R.-App at 120). Again, "'[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment'." *Gant* at 349, 129 S.Ct. at 1723 (*quotation omitted).*

The propriety of the Circuit Court's decision is further illustrated upon review of the exchange between the District Attorney and the Circuit Court, which demonstrates the latter's restraint in deciding the immediate action very narrowly. Upon the District Attorney's request for clarification on the scope of its ruling, the Circuit Court noted that it had to confine its decision to the case presented and that on the facts the Circuit Court found, specifically, an OWI-arrest with nothing to suggest the presence of any alcohol or other potential evidence inside the vehicle, there was no reason to believe "that a three by three (inch) pouch, in a purse, in a vehicle contains evidence of that offense." (R.12 at 19:2-18, R-App at 121). In so confining its ruling, the Circuit Court correctly applied the law set forth in *Gant*, which requires there be facts making it "reasonable to believe" there might be evidence related to the OWI-arrest inside the vehicle. Because none of the Circuit Court's factual findings are clearly erroneous, there is no basis advanced by the State on which to upset its Order. Even if this Court declines to make a broad ruling which would require officers to point to some factors making it "reasonable to believe" evidence of an OWI might be found inside an individual's vehicle following all OWI-arrests, this Court may narrowly tailor its ruling and find, on the facts specific to this case, that it was unreasonable for the officers to search a small coin purse inside a

larger purse, where there was nothing to suggest that the coin purse might contain evidence related to the OWI-arrest.

CONCLUSION

For the above-reasons, the Defendant respectfully submits that the search of her vehicle, subsequent and incident to her OWI-arrest, violated her right to be free from unreasonable searches under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. The Defendant, therefore requests this Court AFFIRM the Circuit Court's Order Suppressing Evidence.

Dated this 13th day of November, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

> 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, maximum of 60 characters per full line of body text. The length of this brief is 5,489 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that:

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Dated this ____ day of November, 2014

Kopp McKichan, LLP

By: _____

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RESPONDENT'S APPENDIX CERTIFICATION

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 Wis. Stat. §809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court;
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues; and
(4) a copy of any unpublished opinion cited under §809.23(3)(a) or (b).

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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