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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP001787 CR
Circuit Court Case No. 2014CM000099

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

Miranda K. Hinderman,
Defendant-Respondent.

ON APPEAL FROM THE CIRCUIT COURT FOR GRANT COUNTY,
THE HONORABLE CRAIG R. DAY, PRESIDING

REPLY BRIEF OF THE PLAINTIFF-APPELLANT
STATE OF WISCONSIN

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REPLY BRIEF

APPELATE COURTS IN OTHER JURISDICTIONS HAVE FOUND THAT LAW ENFORCEMENT OFFICERS MAY SEARCH CONTAINERS IN A VEHICLE AFTER AN ARREST FOR OMVI BECAUSE IT IS REASONABLE TO BELIEVE EVIDENCE RELEVANT TO THE OMVI MIGHT BE FOUND IN THE VEHICLE.

In *Arizona v. Gant*, 556 U.S. 332 343-344, 129 S.Ct. 1710, 1719 (2009) the Court stated,

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S., at 632, 124 S.Ct. 2127(SCALIA, J., concurring in judgment) In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein. (Emphasis added).

The specific language in *Gant* allowing officers to search for evidence relevant to the crime of arrest that might be found in the vehicle is applicable to the facts in this case, generally and specifically.

In this case, Ms. Hinderman, the defendant-respondent, was arrested for operating a motor vehicle while under the influence of an intoxicant(OMVI). *Gant* involved the traffic violation of driving with a suspended license. 556 U.S. at 344, 129 S.Ct. at 1719. It is the State's position that because Ms. Hinderman was arrested for OMVI, the vehicle she was driving and the containers in that vehicle could be searched for evidence relevant to the OMVI.

In *Cain v. Arkansas*, 373 S.W.3d 392 (Ct.App. 2010), the Court addressed the very issue that is presented in this case. In *Cain*, 373 S.W.3d at 395 the Court pointed out that Cain was approached by an officer at 2:30 a.m. while sitting in his running car in a parking lot. The officer smelled alcohol and suspected him of DWI. The defendant was arrested for DWI. The officer searched his car and found part of a marijuana cigarette and a small amount of methamphetamine in a wallet on the passenger seat. In *Cain*, 373 S.W.3d at 396-397, the Court stated,

Appellant argues that the facts related to this incident fit perfectly with *Gant, supra*, in which the court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle

at the time of the search or that the vehicle contains evidence of the offense of arrest. He argues that the Gant court outlawed a warrantless search of a vehicle after the arrestee, appellant here, had been secured in a police car.

However, appellant's reading of Gant as applied here is wrong. What was actually found by the officers incident to the search is not the standard by which we measure whether Gant was followed. For example, an open container of alcohol could have been found in appellant's vehicle, making the officer's search permissible under Gant. As it happens, evidence of intoxication was found in appellant's car. Under the Omnibus DWI Act, "intoxicated" means "influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, and a controlled substance." Ark.Code Ann. §5-65-102 (Repl.2005). Since intoxication includes the use of controlled substances, the officers acted reasonably by searching those areas within appellant's reach as he sat in his car in a deserted parking lot. The discovery of marijuana and methamphetamine constituted evidence that he was using controlled substances in violation of the Act. Accordingly, we affirm on this point.

Surely, the officer in *Cain* would not have expected to find an open beer in the wallet. The point that the Arkansas Court of Appeals made in *Cain* is the point that the State - Appellant argued in this case. Ms. Hinderman was arrested for OMVI. Like the Arkansas law, the Wisconsin law prohibits a person from driving a motor vehicle while under the influence of alcohol, a controlled substance, or any other drug

which renders the person incapable of safely driving the motor vehicle.

Ms. Hinderman argues that there was not one scintilla of evidence suggesting that a container in the vehicle could contain a drug. (Resp. Brief, P.21). Ms. Hinderman, however, acknowledges in her brief at page 15 that she was stopped on suspicion of OWI for operating left of the center line, that when Deputy Vesperman made contact with Ms. Hinderman, and while she was inside her vehicle, he smelled a strong odor of intoxicants and observed her eyes to be bloodshot and her speech to be slurred, that he also observed that she seemed to have difficulty retrieving her driver's license, that she declined to perform field sobriety tests, and that Deputy Vesperman observed her to be unsteady on her feet. Other than the odor of intoxicants, the other conditions listed above might have been caused by use of drugs other than alcohol. The State knows of no way for an officer to tell the difference between a person who operates left of center because of alcohol, because of illegal drugs, or because of prescription medication. The State knows of no way for an officer to tell the difference between bloodshot eyes caused by alcohol, illegal

drugs, or prescription medication. The State knows of no way for an officer to tell the difference between poor coordination, such as difficulty retrieving a driver's license or unsteadiness on one's feet, because of alcohol, illegal drugs, or prescription medication.

In *Idaho v. Cantrell*, 233 P.3d 178, 183 (2010), the Court addressed a situation where Cantrell was arrested for DUI, placed in handcuffs, and secured in the back of a patrol car prior to Officer White's search of the vehicle. In *Cantrell*, P.3d at 254 the court stated,

In this case, Cantrell was arrested for DUI and the DUI supplied the basis for the search. See Gant, --- U.S. at ----, 129 S.Ct. at 1719, 173, L.Ed.2d at 496-97. It was reasonable to believe that evidence of the offense, e.g. alcohol containers or other evidence of alcohol use, "might be found in the vehicle." Gant, --- U.S. at ---, 129 S.Ct. at 1719, 173, L.Ed.2d at 496 (quoting Thornton, 541 U.S. at 632, 124 S.Ct. at 2137, 158 L.Ed.2d at 920 (Scalia, J., concurring in Judgment)). Cantrell's admission with respect to consuming alcohol does not negate the fact that evidence of DUI "might be found in the vehicle," particularly in light of the fact that officers are not required to accept as true a defendant's version of the events. Moreover, Cantrell's contention that a search of his vehicle is unreasonable because evidence of his DUI would only be contained in his body ignores the realities of a DUI investigation. Indeed, as the

State points out, "a DUI trial does not start and end with a breathalyzer report," considering the fact that the report may be suppressed in some instances. Officer White testified that after he placed Cantrell under arrest he intended to continue his DUI investigation, including looking in the vehicle for any open containers or other signs of alcohol use. In addition to finding the Tupperware containing marijuana, Officer White also found a beer can. Officer White's search of the vehicle fit within the second prong of the search incident to arrest exception under Gant.

What is interesting in *Cantrell* is that the officer found marijuana in a Tupperware container. While a Tupperware container can easily be used to store marijuana, it is not the type of container that first comes to mind when we think of beer or hard liquor in a motor vehicle. Deputy Vesperman testified at the suppression hearing that he was going up to look for the keys and cell phone and any open intoxicants that might have been in the vehicle that related to the arrest. (R.12, p.6, App.12).

In *Kansas v. Ewertz*, 305 P.3d 23, 25 (Ct.App. 2013) the Court addressed a situation in which the officer observed several clues of intoxication, including an odor of alcohol coming from the car and Ewertz' bloodshot and glassy eyes, slurred speech, and overall speech pattern. Ewertz admitted to the

officer that she had consumed at least one alcoholic beverage prior to driving. Ewertz was arrested and the officer went back to the car to retrieve the purse and to conduct a search of the car incident to arrest. The officer observed an unzipped, pink makeup bag on the passenger side floorboard of the car containing a glass pipe. The officer also searched the contents of the makeup bag and found a small pouch. Inside the small pouch, the officer found a plastic baggie containing methamphetamine.

The Court in *Ewertz* then addressed the application of *Gant* to a situation involving an OMVI arrest. The Kansas Court of Appeals was aware of *United States v. Taylor*, 49 A.3d 818 (D.C. 2012), but did not follow the reasoning of that court. In *Ewertz*, 305 P.3d at 27-28, the Court stated,

In this case, the district court did not address whether it was reasonable to believe evidence related to Ewertz' arrest would be found in the car; instead it only noted that an officer may search for evidence "relevant to the crime of arrest.'" As such, the district court's decision appears to follow the categorical approach that some courts have used under *Gant* because, like drug offenses, driving under the influence is likely within the category of crimes identified by the *Gant* Court as supplying a basis for searching a vehicle. See 556 U.S. at 343-44, 129 S.Ct. 1710. Specifically, the district court

seemed to rely on Officer Tatro's testimony that he was looking for open containers of alcohol during the search, which the district court concluded was evidence that is relevant to the crime for which Ewertz was arrested. This factual finding is supported by substantial competent evidence in Tatro's testimony. Thus, if we construe the "it is reasonable to believe" language in Gant to impose a categorical standard, the district court correctly held that Ewertz' arrest for driving under the influence provided Tatro with reason to believe the car might contain evidence related to the crime of arrest, such as open containers of alcohol.

But the lawfulness of the search also can be affirmed if we construe Gant's "it is reasonable to believe" language as imposing a reasonable suspicion standard. The district court found that Officer Tatro had probable cause to arrest Ewertz for driving under the influence based on the smell of alcohol in the car, Ewertz' failure of some of the field sobriety tests, and her glassy and bloodshot eyes. There is substantial competent evidence throughout Tatro's testimony-as well as the parties' stipulated facts-to support these findings. The district court also found that Tatro observed Ewertz swerving before he made the stop and noted her speech was slurred... In light of these specific and articulable facts, as well as any rational inferences that can be drawn from those facts, we conclude the district court did not err in finding it was "reasonable to believe" evidence relevant to the crime of driving under the influence might be found in Ewertz' vehicle.

SUMMARY

Generally speaking, an arrest for an OMVI should justify a search of the vehicle incident to arrest because there might be evidence supporting the offense for which the person was arrested. There might be evidence of alcohol consumption, there might be evidence of illegal drugs, or even of prescription medication. Specifically in this case, the officer was justified in searching the vehicle. Because Ms. Hinderman was arrested for OMVI and showed signs of impairment not exclusive to alcohol, the officer was justified in searching for other substances that would impair a person's ability to drive a motor vehicle.

Dated this 24th day of November, 2014.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § (Rule) 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 9 pages.

Dated this 24th day of November, 2014.

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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 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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues 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.

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.

Dated this 24th day of November, 2014.

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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 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 filed with the court and served on all opposing parties.

Dated this 24th day of November, 2014.

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