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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002289 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DARRELL G. LEWIS,
Defendant-Appellant.

ON APPEAL FROM A DECISION BY THE
CIRCUIT COURT DENYING DEFENDANT'S
MOTION TO SUPPRESS FRUITS OF VEHICLE
SEARCH, ADAMS COUNTY, THE HONORABLE
CHARLES A. POLLEX, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-
APPELLANT

The Defendant does not request oral argument or
publication.

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ISSUES PRESENTED

1. Did the Circuit Court err in denying Defendant's Motion to suppress evidence obtained during an illegal vehicle search?

YES. The circuit court did not properly apply the standard set forth in *Arizona v. Gant* which limited the extent of a vehicle search post a lawful arrest.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Darrell Lewis requests neither oral argument nor publication.

STATEMENT OF CASE

The Alleged Crime and Investigation

The State argues that arresting officers had reason to believe that additional evidence would be found in Mr. Lewis's vehicle relevant to the crime for which he was arrested. (21:40:5-21). Sergeant Morrison, Deputy Murphy, and Investigator Greeno were involved in the arrest of Mr. Lewis.

Sergeant Morrison testified that he responded to a 911 call of an individual that was intoxicated, who was jumping on a couch, and who had a gun without a permit. (21:5:18-25). It was alleged that this individual, Mr. Lewis, was driving a vehicle, likely en route to a residence on West Street, in the town of Friendship, Wisconsin. (21:5-7). Upon finding the vehicle, now parked on the driveway of 405 West Street, Sergeant Morrison noticed a black male exit the vehicle and begin walking towards a house on the street. (Id). This black male would later be identified as Mr. Lewis. Mr. Lewis was cooperative, and a *Terry* stop and frisk did not result in anything of interest being found by the officer. (21:8:4-10).

Mr. Lewis indicated that he just come from purchasing groceries. Mr. Lewis allowed Sergeant Morrison to look into the vehicle for the groceries to prove he was telling the truth. While Sergeant Morrison walked around the vehicle, but before he entered the vehicle, he noticed two Fleischmann's Vodka bottles that appeared to have some liquid in them in open view, outside the vehicle some 10 feet away¹. (21:10:10-12). Sergeant Morrison later testified that he believed based on the proximity of the bottles to the vehicle that the bottles were "thrown outside the window and landed on the ground." (21:12:19-22).

As the officer walked around the vehicle, to inspect the groceries in the vehicle, he noticed the hood felt warm, indicating the vehicle had recently been driven. (21:10:15-16). During this encounter, this Officer noticed that Mr. Lewis was emitting an odor of intoxicants from his breath,

¹ Sergeant Morrison's Supplemental Report, dated 06/29/2013, not in this record, leads a reader to the belief that the officer found the Fleischmann's bottles located outside the vehicle only *after* the search of the vehicle took place. During the motion hearing on 12/04/2013, Sergeant Morrison confirms that he observed two Fleischmann's bottles outside the vehicle *before* Mr. Lewis was placed under arrest, and thus before the search of the vehicle. (21:21:9-11).

that his eyes were glassy and bloodshot, and that he was not walking in a steady fashion. (21:11:13-18).

Deputy Murphy took over the OWI investigation on the scene. Deputy Murphy placed Mr. Lewis under arrest for OWI after attempting to administer standardized field sobriety tests, and after Mr. Lewis did not wish to provide a PBT sample. (21:13:14-16). The vehicle was then searched by Investigator Greeno and Sergeant Murphy, which led to the discovery of THC, as well as another 50ml Fleischmann's bottle of vodka. Sergeant Morrison also secured a white Bic lighter and a package of Zig-Zag cigarette paper that were found on Mr. Lewis's person.

Sergeant Morrison testified that he believed that he may find other "evidence of driving under the influence" during his search of the vehicle, and that he was searching for a firearm that the 911 caller alleged Mr. Lewis had in his possession. (21:14:5-10).

The Plea and Sentencing

On April 23, 2014, Darrell Lewis entered a "no contest" plea to (1) count of Possession of THC, in violation of Wis. Stats. §961.41(3g)(e). The Court sentenced Mr. Lewis to (1) year of probation, with 90 days jail as a condition, imposed but stayed. The terms of probation were to maintain absolute sobriety, not to be present in bars or taverns where alcohol is served to the public, not to possess or consume any controlled substances for which he did not have a valid prescription, and to undergo such further evaluation, counseling or treatment as may be recommended by his probation agent, and to pay court costs of this action.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED DURING AN ILLEGAL VEHICLE SEARCH

In 2009 the Supreme Court of the United States handed down the decision in *Arizona v. Gant*, 556 U.S. 332 (2009), which rejected the prevailing interpretation of

*Belton*², which was adopted in Wisconsin in *State v. Fry*, 131 Wis.2d at 156, 388 N.W.2d 565.

In *Belton*, the Supreme Court attempted to establish a bright-line rule on vehicle searches post-arrest, allowing the search of any compartment of a motor vehicle after the lawful arrest of a vehicle occupant. Cited in *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (Wis., 2010) at ¶ 21. Wisconsin adopted the *Belton* standard in its holding in *State v. Fry*, which established that following a lawful arrest, police may search the contents of an automobile while the defendant is at the scene without running afoul of Wis. Stat. § 968.11, Article 1, Section 11 of the Wisconsin Constitution, or the Fourth Amendment to the United States Constitution, whether or not the area searched was actually accessible to the arrestee.

In *Gant* the United States Supreme Court gutted the *Belton* standard personified by *Fry* in Wisconsin. In its decision, the *Gant* Court indicated that the *Belton* standard essentially voided the *Chimel*³ exception. The Court further carved out an exception to this search standard, adding that a search incident to a lawful arrest may be justified when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” (emphasis added) *Gant*, 129 S.Ct. at 1719 (citing *Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring in the judgment)).

A. ARRESTING OFFICERS PERFORMED AN ILLEGAL SEARCH OF MR. LEWIS’S VEHICLE; EVIDENCE OF THE CRIME OF ARREST WAS OVERWHELMING AND THE FACTS IN THIS CASE RUN AFOUL OF THE *GANT* EXCEPTION

Sergeant Morrison and Deputy Murphy had established enough probable cause to arrest Mr. Lewis for operating while intoxicated *prior* to searching the vehicle. Since Mr. Lewis was placed under arrest for suspicion for operating while intoxicated, and that alone was the reason

² *New York v. Belton*, 453 U.S. 454, 455, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)

³ The *Chimel* exception authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *Dearborn*, at p. 27, citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

for the arrest, officers did not have the need or the lawful authority to search the vehicle any further pursuant to *Gant*. Mr. Lewis was in custody. During the encounter with police officers on this day, Mr. Lewis was never in his vehicle. Mr. Lewis was never within reach of anything in his vehicle. Considering that Mr. Lewis was arrested under suspicion for operating while intoxicated, and given that the following evidence had been collected or observed prior to the vehicle search:

- 911 complainant stating that Mr. Lewis was intoxicated
- Odor of intoxicants on Mr. Lewis's breath
- Mr. Lewis's eyes were glassy and bloodshot
- Swaying by Mr. Lewis
- The heat coming from Mr. Lewis's vehicle suggested it had recently been driven
- Mr. Lewis's admission that he had just driven from the grocery store
- Two bottles of Fleishmann's vodka that Sergeant Morrison saw and believed were thrown from Mr. Lewis's vehicle after being consumed, that he confirmed he believed were Fleishmann's vodka bottles due to the red label (21:24:10-14)
- Mr. Lewis's lack of cooperation with Deputy Murphy in performing field sobriety tests

the officers had enough to place Mr. Lewis under arrest, and the arrest was indeed made. The exception in *Gant* allows for a search of a vehicle after arrest if it is believed that relevant evidence to the *crime of arrest* might be found in the vehicle. (emphasis added). 129 S. Ct. 1714, 173 L. Ed. 2d 491. Whether Mr. Lewis had a weapon in the car or not was not relevant at that point. There was no danger to the officers or the community at that point. Mr. Lewis was under arrest for operating while intoxicated, not for possession of a weapon.

B. ARRESTING OFFICERS DID NOT HAVE PROBABLE CAUSE OF OTHER CRIMES BEING COMMITTED BY MR. LEWIS ALLOWING FOR THE VEHICLE SEARCH AFTER ARREST

Wisconsin case law allows for the search of a recent vehicle occupant's vehicle after arrest if there is probable cause that evidence of another crime will be discovered.

In *State v. Lefler*, the defendant was arrested for OWI but was known to the arresting officer to be a suspect in recent burglaries. When Lefler was stopped by police, he exited the vehicle and had a screwdriver sticking out of his pocket, which the officer believed to be a tool used to commit burglaries. 346 Wis.2d 220, 827 N.W.2d 650, 2013 WI App 22 (Wis. App., 2013). When officers asked Lefler about the screwdriver, he indicated he used it to open his car door, although the officer observed him open the door without it. Additionally, the officer saw, in open view in the vehicle, pliers, wrenches, and “another prying-type device”. *Id.* at ¶ 3. The court in Lefler held that the officer had probable cause to believe that evidence of burglary-related crimes would be found in Lefler's vehicle, and thus found that the search of the trunk of the vehicle was reasonable. *Id.* at ¶ 15.

The 911 complainant stated that Mr. Lewis was intoxicated, that he jumped on her couch, and that he had a gun without permit. (21:17:7-17). Sergeant Morrison did not have specific information regarding whether or not Mr. Lewis had this gun in his possession when the 911 call was made. It is unclear if the caller was describing a current law violation (i.e. he had a gun in his possession at that time, for which he did not have a permit), or if the caller was speaking in the abstract. There was no description of the gun. There was no allegation that Mr. Lewis was threatening or brandishing the weapon in any way. Mr. Lewis allowed Sergeant Morrison to search him when he was outside of the vehicle. Based on the information that the responding officers had upon encountering Mr. Lewis, there was no probable cause that Mr. Lewis was committing, had committed, or was about to commit another crime, which would have allowed for his vehicle to be searched after his arrest.

CONCLUSION

Mr. Lewis was a recent occupant of his vehicle, as was the case in *Gant*. Mr. Lewis was arrested for Operating While Intoxicated. Arresting officers had made typical observations that lead to an OWI arrest. Arresting officers had made additional observations, and located evidence, that supported the charge of OWI. After Mr. Lewis's arrest, the actions of the officers in searching his vehicle do not fit within the exception in *Gant*, which

allows for a search of a vehicle after an arrest if there is reason to believe that additional evidence of the offense of arrest will be found. The exceptions found in the case law in this State support such a search of there is probable cause of another crime, aside from the crime of arrest. The officers who arrested Mr. Lewis did not have probable cause of another crime that had been or was being committed. As a result, Mr. Lewis requests that this Court overturned the circuit court's ruling, vacate the judgment of conviction, and remand this case to the circuit court for further proceedings.

Respectfully submitted 28th of October, 2014

Luca L Fagundes
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2270 words.

Luca L. Fagundes

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 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.

Luca L. Fagundes

CERTIFICATION AS TO APPENDICES

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 issues raised, including oral or written rulings or decisions showing the circuit 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.

Luca L. Fagundes

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Appendix A: Judgment of Conviction, Adams County Case No. 2013-CM-303

Appendix B: Criminal Complaint, Adams County Case No. 2013-CM-303

Appendix C: Defendant's Notice of Motion and Motion to Suppress the Fruits of Illegal Vehicle Search

Appendix D: Excerpt of Motion Hearing Transcript, December 4, 2013.