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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 PLAINTIFF-
RESPONDENT

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RESPONDENT

ISSUE PRESENTED

1. Did officers have probable cause to conduct a warrantless search of Lewis' vehicle for evidence of criminal activity?

Circuit Court answered: Yes (47:12)

2. Did officers have reason to believe that evidence of the crimes associated with Lewis' arrest might be found during a vehicle search incident to Lewis' arrest?

Circuit Court answered: Yes (47:13-17)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

STATEMENT OF CASE

The State agrees with the facts stated and cited to the hearing transcript in Defendant's Brief. The State references additional transcript excerpts, which are attached in Appendix A.

Essentially, the pertinent facts include that officers responded to a 911 call that the caller's ex-boyfriend was jumping on her couch and had a gun without a permit. (5:19-21) The caller further stated that her ex-boyfriend would be en route to a brown duplex on West Street in a blue Tahoe bearing license plate 508UCH. (5:21-25) The caller also indicated her ex-boyfriend was intoxicated and had left the residence by driving away. (6:10-11) Officers understood that this incident had taken place recently. (6:15-17) They made contact with Lewis at a residence on West Street in a vehicle matching the description given. (7:4-6) Lewis invited the officer to look at groceries inside his vehicle in an effort to prove he had just come from the store and not from his ex-girlfriend's house. (9:1-10) While walking around the vehicle, Sergeant Morrison saw two bottles of what appeared to him to be Fleishmann's vodka, still containing a little bit

of liquid, sitting on the ground near the passenger side door of the vehicle. (9:18-21) Upon speaking with Lewis, Sergeant Morrison smelled the odor of intoxicants coming from him, saw that his eyes were glassy and bloodshot, and observed that his balance was unsteady and he wasn't walking a straight line. (11:13-18) Deputy Murphy attempted the standardized field sobriety tests with Lewis and subsequently placed Lewis under arrest for Operating While Intoxicated. (13:9-16) Sergeant Morrison testified that based on his observations of Lewis and the bottles outside the vehicle, he believed they would locate additional evidence of Operating While Intoxicated, such as open intoxicants. (14:3-6) He testified that it is common in his experience to find evidence of alcohol consumption within a vehicle during a search pursuant to the Operating While Intoxicated arrest. (14:21-23) Sergeant Morrison also testified that he believed they may locate the firearm reported by the 911 caller inside the vehicle. (14:6-10)

The relevant procedural history consists of the following. Lewis filed a motion to suppress. He did not challenge the legality of the arrest. (Transcript 47: 7). The issue raised at the suppression hearing was that the officers needed a "more particularized and articulable reason to believe that the evidence of the crime is contained within the vehicle." (42:8-17). Lewis also argued that the bottles observed by Sergeant Morrison prior to the search did not give officers a reasonable suspicion to believe evidence of intoxicants would be located within the vehicle. (43:15-16). Specifically, he argued that the bottles observed on the ground were not closely examined to verify they were Fleishmann's vodka (43:21-25), that the officer could not say for certain they had been thrown out of the vehicle (43:15-19), and that if they were reasonably believed to have come from inside the vehicle then the officers would not have had reason to believe any evidence of intoxicants would be left inside the vehicle (44:9-14).

The circuit court made the following relevant factual findings: 1) the arrest of Lewis took place before the search of his vehicle (46:2-3); 2) Sergeant Morrison's observation of the vehicle's hood being warm indicated recent driving (46:18-20); and 3) field sobriety tests were not fully administered or helpful in this case (46:20-23). The circuit court made the following relevant conclusions in denying Lewis' motion: 1) *Arizona v. Gant*, 556 U.S. 332 (2009) alone was determinative of the issue (46:3-5); 2) the instant case was "entirely different" from the fact scenario in *Gant* (46:13); 3) Lewis was lawfully arrested despite the lack of complete field sobriety tests (46:12); and 4) there was reasonable suspicion under *Gant* to search the vehicle for further evidence of Operating While Intoxicated (46:13-17).

On appeal, Lewis asserts that the circuit court erred in denying his motion to suppress evidence consisting of marijuana and a 50-ml bottle of Fleishmann's vodka located inside his vehicle. He argues that since the officers had enough to place Lewis under arrest, they ran afoul of the exception in *Arizona v. Gant*, 556 U.S. 332 (2009) when they searched the vehicle incident to arrest for more evidence of Operating While Intoxicated. Lewis' Brief at 7. He further asserts that the officers could not search his vehicle incident to arrest for evidence of other crimes related to the domestic disturbance that was reported to have occurred shortly before the arrest. Lewis' Brief at 8.

STANDARD OF REVIEW

When this court reviews a circuit court's ruling on a motion to suppress evidence, it applies the clearly erroneous standard to the circuit court's findings of fact. *State v. Smier*, 2011 WI App 15, 331 Wis. 2d 431, 793 N.W.2d 920. In reviewing an order deciding a suppression motion, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous. *State v. Kieffer*, 217 Wis. 2d 531, 577 N.W.2d

352 (1998). “A finding is clearly erroneous if ‘it is against the great weight and clear preponderance of the evidence.’” *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted). Further, this court is not constrained to the circuit court's reasoning in affirming or denying its order, and instead, it may affirm the circuit court's order on different grounds. *State v. Smiter*, 2011 WI App 15, 331 Wis. 2d 431, 793 N.W.2d 920.

CONSTITUTIONAL PROVISIONS INTERPRETED

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, protect “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV; Wis. Const. art. I, § 11. The Wisconsin Supreme Court has consistently conformed its “interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment.” *State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516.

ARGUMENT

I. OFFICERS LAWFULLY SEARCHED LEWIS’ VEHICLE WITHOUT A WARRANT INCIDENT TO HIS ARREST FOR OPERATING WHILE INTOXICATED PURSUANT TO ARIZONA V. GANT

An officer may arrest a person if the officer has probable cause to believe that the person has committed a crime. *State v. Young*, 2006 WI 98, ¶ 22, 294 Wis. 2d 1, 717 N.W.2d 729; Wis. Stat. § 968.07(1)(d). Further, Wis. Stat. §345.22 authorizes arrest for violation of a traffic regulation, such as civil 1st offense Operating While

Intoxicated. Lewis concedes that officers had probable cause to arrest him for Operating While Intoxicated. Lewis' Brief at 6. He does not challenge the search of Lewis' person incident to his lawful arrest, only the vehicle search, therefore the Bic lighter and Zig-Zag rolling papers are not at issue with regard to suppression.

Pursuant to lawfully arresting Lewis for Operating While Intoxicated, officers had reason to believe that a search of Lewis' vehicle would yield evidence of Operating While Intoxicated and the search was therefore legal under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In *Gant*, the United States Supreme Court held that, incident to a lawful arrest, police officers may search a vehicle without a warrant when: (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. The Wisconsin Supreme Court in *State v. Dearborn*, 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97, adopted *Arizona v. Gant*, 556 U.S. 332 (2009), as the proper interpretation of the Wisconsin Constitution's protection against unreasonable searches and seizures.

In *Gant*, the Court cited to both *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and *Thornton v. United States*, 541 U.S. at 615, 124 S.Ct. 2127 158 L.Ed.2d 905 (2004), as cases in which "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 556 U.S. 332. The defendants in *Belton* and *Thornton* were both pulled over for traffic offenses and then arrested for drug crimes before police officers searched their vehicles and discovered other incriminating evidence. *See Belton*, 453 U.S. at 455–56, 101 S.Ct. 2860; *Thornton*, 541 U.S. at 617–18, 124 S.Ct. 2127. Because the defendants were lawfully arrested for drug offenses, the Court concluded in *Gant* that it was reasonable for police officers to believe that further contraband or similar

evidence relevant to the drug crimes for which the defendants were arrested might be found in the defendants' vehicles. *See Gant*, 556 U.S. 332.

Lewis contends that since evidence of the crime of OWI was “overwhelming” prior to arrest, officers did not have a legal basis for conducting a *Gant* search following the arrest. Defendant’s Brief at 6. In *State v. Smiter*, the defendant contended that his arrest for possession of a marijuana blunt did not form a reasonable basis on which the police officers could conclude that additional contraband or relevant evidence of marijuana possession would be found in the Buick, arguing in part that because officers already had the marijuana blunt and, therefore, possessed all of the evidence necessary to charge him with the offense of his arrest and did not need to search the Buick. *State v. Smiter*, 2011 WI App 15, ¶ 14, 331 Wis. 2d 431, 437-38, 793 N.W.2d 920, 923 (2011).

Applying *Gant*, this court found that Smiter’s argument that *Gant* prohibited the police officers from searching the Buick for additional evidence relevant to his arrest for marijuana possession because the police officers already had the blunt and, therefore, enough evidence on which to arrest him, was nonsensical. *Id.* at ¶ 16. Rather the court ruled that *Gant* expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once some evidence is found. *Id.* The fact scenario in this case is analogous to *Smiter*. Based upon Lewis’ indicia of intoxication and discovery of liquor bottles adjacent to his vehicle, officers could reasonably believe additional evidence of operating under influence might be present inside vehicle.

Therefore, the circuit court properly applied the holdings in *Gant* and *Smiter* to the facts of the instant case and no basis exists for a finding that the ruling should be overturned for error.

II. OFFICERS HAD PROBABLE CAUSE TO SEARCH LEWIS’ VEHICLE

IRRESPECTIVE OF HIS ARREST FOR OPERATING WHILE INTOXICATED

Alternatively, when officers searched Lewis' vehicle, they had probable cause to believe evidence of the crimes committed at the ex-girlfriend's residence were present in vehicle. These crimes included disorderly conduct while armed, endangering safety by use of a dangerous weapon, possession of a firearm while intoxicated.

Law enforcement officers may conduct a warrantless search of a vehicle if they have probable cause to believe that the vehicle contains contraband or evidence of a crime and the vehicle is readily mobile. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *State v. Tompkins*, 144 Wis. 2d 116, 137-38, 423 N.W.2d 823 (1988). A vehicle may be readily mobile, even if its occupants have been arrested and the vehicle impounded. *State v. Marquardt*, 2001 WI App 219, ¶¶ 40-43, 247 Wis. 2d 765, 635 N.W.2d 188.

Probable cause to search a vehicle requires only that the facts available to the police officer would warrant a person of reasonable caution to believe that contraband is likely to be in the vehicle. *Tompkins*, 144 Wis. 2d at 123-25. Probable cause to search is a flexible, commonsense standard. The totality of the circumstances must be considered and the facts must be weighed as understood by those versed in the field of law enforcement. *Id.* at 125. There must be more than a possibility that contraband will be found in the vehicle, but it need not be more likely than not that contraband will be found in the vehicle. *Id.* The ultimate question is whether it is reasonable under the circumstances to believe that contraband will be located in the vehicle. *Id.*; see also *State v. Lefler*, 2013 WI App 22, ¶¶ 7-8, 346 Wis. 2d 220, 827 N.W.2d 650.

In *State v. Lefler*, this court found that a police officer had probable cause to conduct warrantless search

of trunk of defendant's vehicle for evidence of possession of burglarious tools or other burglary-related crimes, and thus search was valid, even though officer had initially stopped defendant on suspicion of operating while under the influence of an intoxicant (OWI) rather than for a burglary-related offense. Specifically, the court held that the facts, which included that the officer saw “prying-type” tools in plain view on vehicle floor, that defendant was a suspect in recent burglaries, that the officer knew that defendant was not employed in an occupation that would require him to possess such tools, that the defendant gave an implausible explanation for his possession of the tools, and that the stop was late at night were sufficient to justify the warrantless search. *State v. Lefler*, 2013 WI App 22, 346 Wis. 2d 220, 827 N.W.2d 650 review denied, 2013 WI 80, 353 Wis. 2d 430, 839 N.W.2d 617

Just as Lefler did, Lewis ignores *Gant's* adherence to precedent in authorizing vehicle searches “for evidence relevant to offenses other than the offense of arrest” when “there is probable cause to believe a vehicle contains evidence of criminal activity.” *Lefler* at ¶ 14. Thus, knowing that Lewis was a suspect in a recent disorderly conduct incident at his ex-girlfriend’s residence, in which he was reported to be in possession of a firearm, officers had reason to believe that a search of his trunk would probably reveal the firearm. Although the circuit court did not apply this reasoning to justify the search, this court is not bound by the same reasoning and can find an alternative justification as it did in *Lefler*. *Id.* at ¶ 11; *See also State v. Baudhuin*, 141 Wis.2d 642, 648, 416 N.W.2d 60 (1987) (a correct holding should be sustained on appeal, even on a theory not presented to the circuit court).

In this case, officers had probable cause to search for evidence of the crime of disorderly conduct while armed, endangering safety by use of a dangerous weapon, possession of a firearm while intoxicated. The facts supporting probable cause include the following. A 911

call was received by dispatch in which the ex-girlfriend contacted police to report that Lewis was intoxicated and jumping on her couch and that he was in possession of a gun without a permit. When officers located Lewis, he denied being at the caller's residence. He exhibited signs of intoxication, including the odor of intoxicants coming from him, glassy and bloodshot eyes, and unsteady balance. The evidence available to officers indicated that the incident occurred shortly before the 911 call – the caller indicated Lewis should be en route from her residence at the time of her call – and shortly before officers located Lewis. He was located a short time after the 911 call in the same vehicle described by the 911 caller. Therefore, when they searched his vehicle, officers had probable cause to believe evidence of intoxication and/or a firearm related to the crimes committed at the ex-girlfriend's house were present in vehicle.

CONCLUSION

For the above reasons, the State respectfully requests that this court affirm Lewis' judgment of conviction.

Dated this 30th day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,001 words.

Dated this 30th day of December, 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 30th day of December, 2014.

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CERTIFICATE 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 reproduce to preserve confidentiality and with appropriate references to the record.

Dated this 30th day of December, 2014.

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TABLE OF APPENDICES

Appendix A: Excerpt of Motion Hearing Transcript ,
December 4, 2013