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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1209-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MOSE B. COFFEE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Winnebago County Circuit Court, the Honorable John A. Jorgensen, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

> Did the totality of circumstances create a basis for a search of Mr. Coffee's vehicle, and of the contents of a backpack found on the backseat floor, after police arrested Mr. Coffee on suspicion of drunk driving, cuffed him, and placed him in the back of a squad car?

The circuit court ruled the search proper because the bag was within reach while Mr. Coffee was driving.

The court of appeals ruled the particularized facts of the case to be irrelevant, and held that as a matter of law police may always search the passenger compartment of a vehicle upon a probable cause arrest of the driver on suspicion of drunk driving.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for this court.

STATEMENT OF THE CASE AND FACTS

Statement of the Facts

At the suppression hearing, Officer Timothy Skelton testified that while he was on patrol on August 30, 2017, he observed a vehicle without its required front license plate. (43:6-7, 28). Skelton conducted a traffic stop and identified the driver as Mr. Coffee. (43:7, 8-9, 28-29). Mr. Coffee was outside

the vehicle when Skelton first spoke with him. (43:9) Skelton testified that Mr. Coffee had a slur to his speech and that he could smell the odor of intoxicants, specifically "alcoholic beverages," coming from the direction of Mr. Coffee or the vehicle. (43:9, 50). Skelton testified that Mr. Coffee's eyes were "very glazed over and bloodshot." (43:10). Based on these observations, Skelton conducted field sobriety testing. Mr. Coffee exhibited all six clues on the Horizontal Gaze Nystagmus test, failed to complete the nine-step-walk-and-turn test, and sang the alphabet after being told not to twice. (43:10-11, 12, 15, 19). Skelton then administered a preliminary breath test, which indicated a result of .14. (43: 21-22). Mr. Coffee was then placed under arrest, handcuffed and secured him in the back of his squad car.[1] (43:22).

Three additional officers arrived on scene while Skelton was performing the field sobriety testing. (43:24-25). Skelton instructed the other officers to conduct a search of Mr. Coffee's vehicle incident to the OWI arrest. (43:49-50). Skelton testified that he informed the other officers as to the reason for the arrest—"operating under the influence of alcoholic beverages." (43:50).

Officer Brendon Bonnett testified at the suppression hearing stating he arrived on scene after Mr. Coffee's arrest and that Skelton asked him to search Mr. Coffee's vehicle. (43:61-62; App. 110-11). Bonnett testified that he was aware that Mr. Coffee

[1] After he was arrested, Mr. Coffee was transported to the local hospital for a legal blood draw. (1). His blood alcohol concentration was .17. (6).

had been arrested for an OWI offense. (43:62; App. 111). In regard to the scope of the vehicle search, Bonnett testified: "I'd be looking for any substance in the vehicle that could impair a driver's ability to operate the motor vehicle safely." (43:63; App. 112). He further explained: "I would be looking for any substance, whether that could be prescription medication, nonprescription medication, alcohol, illegal drugs, or even up to possibly as inhalant such as Dust-Off . . .". (43:63; App. 112). On cross-examination, Bonnett indicated that he could not recall if he was informed of whether Mr. Coffee's OWI-arrest was alcohol related or not. (43:66; App. 115).

Bonnett further testified as to the details of his search and defense counsel introduced pertinent portions of the footage from Bonnett's body camera. (43:68-71, 75, Ex. 1; App. 117-120).[2] Bonnett approached Mr. Coffee's two-door vehicle on the driver's side and opened the driver-side door. (43:Ex. 1 at 0:19-0:23).[3] He shined his flashlight on the interior of the driver-side door and into the backseat, which illuminated a black backpack bag with a draw-string closure located on the floor behind the driver's seat. (43:64; Ex. 0:50-1:01). He then started a search of the compartment in the driver-

[2] Defense counsel also identified the specific portions of the body camera footage relevant to the motion to suppress in its supporting memorandum. (14:3). The circuit court also indicated that it had viewed the DVD exhibit prior to the suppression hearing. (43:3).

[3] References to particular portions of the body camera footage will be indicated by "Ex. 1" followed by the time at which the particular event referenced appears in the recording.

side door. (43:Ex. 1 at 1:15-1:30). Next Bonnett searched beneath the driver's seat. (43:Ex. 1 at 1:48-1:54). He then used the lever on the driver's seat to flip forward the driver's seat to allow access to the backseat of the vehicle. (43:Ex. 1 at 1:55-1:56). Bonnett then removed items from the floor behind the driver's seat. (43:Ex. 1 at 1:57-1:59).

Bonnett first removed a green cloth bag on the top of the black backpack. (43:Ex. 1 at 2:02-2:05). This revealed a nearly full backpack with various items including a number of cords and cables inside. (43:Ex. 1 at 2:06-2:10). Bonnett removed items from the bag including a cell phone, cardboard packaging, a smaller black pouch, and a box of light bulbs. (43:Ex. 1 at 2:08-2:40). Bonnett continued to rummage through the bag and numerous cords and cables contained within before removing some cell phones. (43:Ex. 1 at 2:41-2:59). He continued to dig into the bag and then removed a small mason jar from underneath the remaining items in the bag. (43:Ex. 1 at 2:59-3:22). Bonnett then located a second small mason jar from a similar position within the bag. (43:Ex. 1 at 3:29-3:42). Bonnett testified that he observed what he believed to be flakes of marijuana in the jars. (43:65; App. 114). He also testified that he located sandwich baggies within the black bag. (43:74; App. 123). However, it was unclear whether the video showed the sandwich baggies or whether the baggies found in the black bag were in a box or not. (43:75-76; App. 124-125).

Finally, Officer Benjamin Fenhouse testified to his search of Mr. Coffee's vehicle, which included the passenger side and the trunk. (43:78; App. 127). He

testified that he found nothing of evidentiary value in the passenger side of the vehicle, but that he initiated a search of the trunk after Officer Bonnett located the mason jars containing suspected marijuana residue. (43:78-79; 127-128). The officers then found various items of paraphernalia as well as additional marijuana in the vehicle's trunk. (1:4-5).

At the suppression hearing, defense counsel asserted that the search of Mr. Coffee's vehicle incident to his alcohol-related OWI arrest did not permit the search of the black bag behind the driver's seat. (43:85; App. 134). Specifically, counsel argued that it was not reasonable for officers to believe that evidence of the alcohol-related OWI arrest would be found inside the vehicle at the bottom of a bag behind the driver's seat under the circumstances presented. (43:85-88; App. 134-137). Counsel maintained that the unreasonable search of the black bag led to the search of the vehicle's trunk and that the fruits of the unlawful search must be suppressed. (43:89; 138).

The court denied Mr. Coffee's suppression motion, finding the search reasonable.[4] (43:93-94; App. 142-143). In doing so, the court found as fact that Mr. Coffee's OWI arrest was alcohol related, which allowed officers to search the vehicle for alcohol. (43:90; App. 139). The court then indicated that the black bag at issue was within reach of the driver; therefore, it would be reasonable for officers to

[4] In the circuit court, Mr. Coffee also challenged the administration of the field sobriety tests, the preliminary breath test, and his subsequent OWI arrest. (10). Mr. Coffee did not renew these challenges on appeal.

believe that alcohol could have been concealed within the bag. (43:92; App. 141). The court said:

> I'm really not putting much weight on the fact of where exactly that bottle[5] was found because it doesn't matter if the defendant just threw it on top of the bag or to conceal it pushed it down to the bottom or in the middle. That's easily done. That's not a difficult task to accomplish. And then you put a few things on it, close it up, that's still all reasonable actions that someone could do and would do if they are trying to hide something from an officer's search when they come up to make contact with a driver. . . .

(43:92-3; App. 141-42). The court concluded that once the jars containing marijuana were found, then officers could search for other evidence of that crime. (43:94; App. 143).

After the court denied Mr. Coffee's suppression motion, the state dismissed charges for possession of drug paraphernalia and operating with a prohibited alcohol content and Mr. Coffee pled no-contest to the OWI, second offense, and to possession with intent to deliver. (43:95; App. 144). Following sentencing, Mr. Coffee appealed.

In the court of appeals Mr. Coffee argued the government's warrantless search of the black backpack, located beneath a green bag, both of which were on the floor of the backseat behind the driver's seat, violated his Fourth Amendment right to be free from an unreasonable search of his person and

[5] The court later clarified that it meant to say "jar" rather than "bottle." (43:94; App. 143).

property. The court of appeals rejected the argument, holding "as a matter of law that when an officer lawfully arrests a driver for OWI, even if alcohol is the only substance detected in relation to the driver, a search of the interior of the vehicle, including any containers therein, is lawful because it is reasonable to believe evidence relevant to the offense of OWI might be found." *State v. Coffee*, 2019 WI App 25, ¶13, 387 Wis. 2d 637, 929 N.W.2d 245 (App. 108).

ARGUMENT

Evidence Obtained During a Warrantless Search of Mr. Coffee's Vehicle Incident to His OWI Arrest Must Be Suppressed Because There Was No Reason to Believe That Evidence of the OWI Would Be Found in the Area Searched.

When Mr. Coffee was arrested for OWI, law enforcement had no particular reason—other than the fact of the arrest—to believe that evidence might be found inside his car. The court of appeals held, though, that regardless of the facts known to the officer at the time of the search, it was constitutionally permissible because as a matter of law police may *always* search the passenger compartment of vehicle upon a person's arrest for suspected drunk driving. *Coffee,* 2019 WI App 25, ¶13 (App. 108). In rejecting a case-by-case reasonableness analysis and instead adopting a *per se* rule to be applied to an entire category of cases—all OWI arrests—the court of appeals decision violates basic Fourth Amendment principles and *Arizona v. Gant*,

556 U.S. 332 (1981), *Missouri v. McNeely*, 569 U.S. 141 (2013); *Mitchell v. Wisconsin,* ___ U.S. ___, 139 S. Ct. 2525 (2019).

A correct application of the Fourth Amendment and *Gant* show the search of Mr. Coffee's car and the bag within in it were not supported by a reasonable belief that they might contain evidence of the OWI. As such, the search was unconstitutional and the fruits of the search should be suppressed.

Appellate review of a circuit court's order on the reasonableness of a Fourth Amendment search presents a question of constitutional fact necessitating a two-step review process. *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, this court upholds the circuit court's factual findings unless clearly erroneous. *Id.* Second, this court independently applies constitutional principles to the facts. *Id.*

A. Reasonableness guides the analysis for Fourth Amendment searches.

The Fourth Amendment guarantees the right to be free from unreasonable searches. U.S. CONST. amend. IV. "The Fourth Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances, eschewing bright-line rules and emphasizing instead the fact-specific nature of the reasonableness inquiry." *State v. Sumner*, 2008 WI 94, ¶20, 312 Wis. 2d 292, 752 N.W.2d 783 (citations omitted); *Riley v. California,* 573 U.S. 373, 381 (2014). The reasonableness inquiry requires an assessment of "on the one hand, the degree to which [the search]

intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton,* 526 U.S. 295, 300 (1999).

Searches "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The Supreme Court has not delineated an exception to the warrant requirement for automobile searches in suspected drunk driving cases. Such categorical blanket exceptions are condemned generally, *see*, *e.g.*, *Richards v. Wisconsin*, 520 U.S. 385 (1997), and have been rejected specifically in the context of drunk driving prosecutions. *See McNeely*, 569 U.S. 141; *Mitchell,* 139 S. Ct. 2525. Fourth Amendment reasonableness always "must be determined case by case on the totality of circumstances." *McNeely*, 569 U.S. at 145.

B. "A reasonable belief" in the search-incident-to-arrest exception—What does it mean?

The search-incident-to-arrest doctrine was first recognized by the Supreme Court in 1914. *See Chimel v. California*, 395 U.S. 752, 755 (1969). Between 1914 and 1969 when *Chimel* was decided, the scope of the search permitted under the doctrine contracted and expanded repeatedly over the years. *Id.* at 755-764 (summarizing the early evolution of the doctrine). *Chimel* reined in the "far from consistent" approach

and overruled prior broad interpretations of the doctrine. *Id.* at 768 (overruling *Harris v. United States*, 331 U.S. 145 (1947) and *United States v. Rabinowitz*, 339 U.S. 56 (1950)). Specifically, after *Chimel* evidence-gathering searches of the premises were no longer justified by the fact of arrest. *Id.* *Chimel* held a search incident to arrest is constitutional only if there are concerns of officer safety or evidence destruction and therefore any search incident to arrest must be limited to "the search of the arrestee's person and the area 'within his immediate control." *Id.* at 755, 763. Until *Arizona v. Gant* was decided in 2009, searches pursuant to the search-incident-to-arrest doctrine were at least purportedly justified by the *Chimel* rationale. *See e.g. New York v. Belton*, 453 U.S. 454, 460, n.3 and *Thornton v. United States,* 541 U.S. 615, 626 (2004) (each citing *Chimel,* 395 U.S. 752).

Gant defined the present scope of a search-incident-to-arrest exception to the warrant requirement in the automobile context.[6] Prior to *Gant, New York v. Belton*, 453 U.S. 454, 460 (1981), allowed the search of the passenger compartment of an automobile contemporaneous to the lawful arrest of a recent occupant. Despite its stated adherence to the justifications of officer safety and evidence preservation, however, the *Belton* rule was routinely applied to situations where the motorist was handcuffed and secured in the back of a squad car, leaving no possibility that the arrestee would harm the officer or destroy evidence. *See Thornton,*

[6] This Court adopted *Gant* in *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97.

541 U.S. at 617 (affirming and extending the holding in *Belton*) (Scalia, J. concurring). Sharply criticizing the situation created by *Belton* in his concurrence in *Thornton,* Justice Scalia noted: "we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." *Id.* (citations and quotations omitted).

Adopting Justice Scalia's concurrence in *Thornton,* the *Gant* Court corrected the pervasive misapplication of the search-incident-to-arrest doctrine, holding *Belton's* bright-line rule was based on a "faulty assumption" that erroneously authorized "myriad unconstitutional searches." *Gant*, 556 U.S. at 350-51. The Court explained, "[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest untether[s] the rule from the justifications underlying the *Chimel* exception." *Id.* at 344.

Thus, recognizing that a motorist's privacy interests are "important and deserving of constitutional protection," *Gant* rejected the automatic-search rule and retethered the search-incident-to-arrest doctrine to the Constitution. After *Gant* "[p]olice may search a vehicle incident to a recent occupant's arrest only if [1] the arrestee is within reaching distance of the passenger compartment at the time of the search or [2] it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351.

The second prong of the rule, that officers may search when it is reasonable to believe the vehicle contains evidence of the offense of arrest, however, was newly created in *Gant* and not an outgrowth of the historical justifications (officer safety and evidence preservation). *Id.* at 343. As such, there is little direction from precedential case law interpreting the scope of this new evidence-gathering search permitted only in the vehicle context and authorized by "reasonable to believe." The facts and reasoning in *Gant* itself however, provide the boundaries for this prong. And above all, "since the historical scope of officer's ability to search incident to arrest is uncertain, traditional standards of reasonableness govern." *Id.* at 351 (Scalia, J. concurring).

1. "Reasonable to believe" requires a showing of particularized facts to support the belief.

First, the "reasonable to believe" clause clearly does not authorize a search by the fact of arrest alone as such a reading would be at odds with *Gant's* holding.

Second, the cases discussed in *Gant* as well as the facts that gave rise to the unconstitutional search of Mr. Gant's vehicle illustrate that "reasonable to believe" requires a showing of particularized facts that form a basis for the belief in order for the search to pass constitutional muster. *Gant* cited cases involving moving traffic offenses, like failure to wear a seatbelt and speeding (where the existence of real or documentary evidence is precluded by the nature

of the offense) as examples of cases where there "will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* at 343 (citations omitted). But in addition to that, both the majority and the concurrence easily concluded that Mr. Gant's offense, driving with a suspended license, was also an offense where there was no reason to believe evidence of the crime of arrest would be in the car. However, unlike moving traffic violations, documentary evidence does exist for driving without a license. In order to commit the crime in Arizona, the driver must know his/her license is suspended – some kind of documentation or an official notice suspending the license would be evidence of the crime. *See State v. Yazzie,* 307 P.3d 1042 (Ariz. Ct. App. 2013) (state is required to prove that defendant knew or should have known that his license was suspended at time of his offense). This possibility, however, did not create a reasonable belief that this evidence might have been in the car: "reasonable to believe" requires more than a possibility.

Further, the officer who searched Mr. Gant's car offered no specific facts or rationale as to why he searched the car other than "the law says we can do it." *Id.* at 337. *Gant* specifically noted "police entitlement" was not a "genuine … evidentiary concern" and that "it is anathema to the Fourth Amendment to permit a warrantless search on that basis." *Id.* at 347.

In addition, *Gant* was explicit that it was not overruling the holdings in *Belton* and *Thornton. Id.* at 343-44, 346. Rather, *Gant* explained, the new rule and reasoning announced in *Gant* affirmed the

constitutionality of the searches in those cases. *Id.* Both cases involved drug possession arrests and in each, specific facts created a reasonable belief that more drugs might be in the car. The vehicle search in *Belton* was justified because "the officer smelled burnt marijuana and observed an envelope on the car floor marked 'Supergold'—a name he associated with marijuana." *Gant*, 556 U.S. at 339. In this same vein, in *Thornton* the defendant volunteered he possessed illegal narcotics, and produced "two individual bags, one containing three bags of marijuana and the other containing a large amount of crack cocaine," from which intent to deliver could be inferred. 541 U.S. at 618. These specific facts gave rise to a reasonable belief that there would be more evidence of the crime of arrest inside the car.

In sum, *Gant* rejected *Belton's* automatic-search rule because of the Fourth Amendment's "concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 345. *Gant* therefore implemented a narrower, constitutional rule. The new rule rejects automatic searches and inserts "reasonable to believe" into the analysis. The new rule requires more than a possibility that evidence of the crime of arrest might be found in the car. The belief must be grounded in particularized facts and the search will not be justified by police entitlement. Anything short of these parameters is unconstitutional.

2. A *per se* rule entitling officers to search every car after every OWI arrest regardless of the facts violates the reasonable belief requirement and is anathema to the Fourth Amendment.

A governmental intrusion on an individual's privacy can be justified only if the intrusion "meaningfully further[s] law enforcement interests." *Gant,* 556 U.S. at 347. A *per se* rule allowing the search of every vehicle in every OWI arrest, regardless of the facts, does not meaningfully further law enforcement interests. Because of the nature of the evidence needed in an OWI prosecution, evidence collected in the car after the arrest of a drunk-driving suspect typically does little to prove or establish the severity of the crime. A categorical rule in the drunk-driving context therefore does not justify the government's intrusion on protected privacy interests and is thus unreasonable under the Fourth Amendment.

In an OWI case, the state must prove (1) that the defendant operated a motor vehicle on a highway and (2) that the defendant was under the influence of an intoxicant at the time the defendant drove the vehicle. Wis. Stat. § 346.63(1)(a); Wis. JI – Criminal 2663. Once the suspected drunk driver has been arrested, the state is already in possession of all the "vital" evidence it needs to secure a conviction for drunk driving – the arrestee's breath and blood, along with the officer's observations of indicia of

intoxication. *McNeely,* at 159. *See also Mitchell*, 139 S. Ct. at 2535 ("BAC tests are links in a chain on which vital interest hang").

In Mr. Coffee's case, as would be true of any routine drunk-driving arrest, at the time of arrest the officer had already observed many indicators of intoxication, including the results of the preliminary breath tests (0.14). (43:21-22). As is also typical in OWI cases, Mr. Coffee's blood was subsequently lawfully obtained (revealing a blood alcohol concentration of 0.17). (1)(6). Thus, after taking Mr. Coffee into its custody, the state had all the evidence it needed to secure a conviction for the crime of arrest. *See* Wis. Stat. § 885.235(1g)(c) (blood alcohol of .08 or more is *prima facie* evidence the driver was under the influence of an intoxicant).

It is hard to imagine any fact situation where the presence of open intoxicants in a vehicle would make a difference in an OWI prosecution. An open bottle of alcohol tells little about who consumed it or when, much less whether the driver consumed enough of it to impair his or her ability to operate the vehicle. Should an unusual case come along where law enforcement fails to obtain blood alcohol levels, without other substantial evidence of impairment at the time of driving, empty bottles in the car will not save the prosecution.

Open containers in the car merely establish that the driver has violated the driving with open intoxicants statute. *See* Wis. Stat. § 346.935(2) and 346.95 (a non-criminal violation punishable by fine up to $100). While arguably tangentially related to

the crime of OWI, the presence or absence of this evidence in no way impacts, much less "severely hamper[s] effective law enforcement." *McNeely,* 569 U.S. at 163.

Moreover, in a typical OWI arrest, it is not likely that this marginally relevant evidence would be found in the car. CCAP indicates 236,834 OWIs have been prosecuted and 4,964 open intoxicant tickets have issued in Wisconsin since 2010; only 327 OWIs were accompanied by an open intoxicant ticket.[7] In addition to the data, logically, the legality and public availability of alcohol make it far more likely that individuals consume it at bars, restaurants, and homes than in their cars. In Mr. Coffee's case, the state (who has the burden to show the search is within an exception to the warrant requirement) presented no evidence as to why an officer might reasonably believe that there would be bottles in a car in a routine drunk driving arrest. *State v. Johnston,* 184 Wis. 2d 794, 806, 518 N.W.2d 759, (1994) (citing *United States v. Jeffers,* 342 U.S. 48, 51 (1951).

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeely,* 569 U.S. at 160 (citations and quotations omitted). But the Supreme Court has repeatedly rejected the government's requests for a *per se* exception to the warrant requirement to facilitate the government's interest in obtaining the

[7] This information was compiled by the State Public Defender's IT department from CCAPs publically available raw data. *See* App. 176-225 for county-by county, year-by-year totals.

important blood alcohol evidence, notwithstanding that this evidence is critical to the prosecution and it is "literally disappearing by the minute." *McNeely*, 569 U.S. at 169 (Roberts, C.J., concurring). *McNeely, Birchfield,* and *Mitchell* all discussed the serious and devastating effects of drunk driving, at length, recognizing the government's "paramount" needs served by BAC testing, yet all have rejected a categorical rule excusing the government from getting a warrant. *McNeely,* 569 U.S. at 160 (holding the natural dissipation of blood alcohol is not a per se exigency permitting a warrantless blood draw); *Mitchell,* 139 S. Ct. at 2535-38, 2539 (holding an unconscious driver does not create a *per se* exigency permitting a warrantless blood draw); *Birchfield v. South Dakota,* 136 S. Ct. 2160, 2167-70, 2179 (2016) (holding the search-incident-to-arrest exception does not authorize a warrantless blood draw).

While "circumstances unique to the vehicle context" permit the government to dispense with the warrant requirement under the search-incident-to-arrest doctrine, *Gant* did not do away with, and in fact insisted upon, the reasonability analysis required by the Fourth Amendment. *Gant,* 556 U.S. at 343. At its core, the Fourth Amendment was designed to protect against abusive policing. *See Chimel* at 760-761 ("…the Amendment must be read in light of the history that gave rise to the words – a history of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"). Requiring police to have articulable facts that form their basis for a reasonable belief that there is evidence of the crime of arrest in the car not only protects against abusive policing, but also this requirement makes the

decision to search reviewable by a court.[8] *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.")

A requirement that police are basing their belief that there is evidence of the crime of arrest on

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[8] In an age where police are often accused of disparate treatment among the races and where many citizens and scholars believe the overrepresentation of minorities in the criminal justice system is due, at least in part to racial bias in policing, it is critical that protections of the Fourth Amendment are meaningfully enforced. *See e.g.* Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 3 (2011); Christine Eith & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008* 7 (Oct. 2011) available at https://www.bjs.gov/content/pub/pdf/cpp08.pdf (reporting black drivers are three times more likely than white drivers to be searched during a traffic stop); Harris, David A. "*The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*." LAW AND CONTEMP. PROBS, vol. 66, no. 3, 2003, 92 (discussing several studies finding minorities were searched at statistically significant higher rates than non-minorities after traffic stops). A requirement that police must be able to articulate particularized facts that gave rise to the decision to search would not only curb abusive tactics but also, importantly, would help insulate law enforcement from charges that racial bias played a role in the decision to search.

particular facts also ensures that the exception the warrant requirement is "jealously and carefully drawn." *State v. Payano-Roman*, 2006 WI 47, ¶30, 290 Wis. 2d 380, 714 N.W.2d 548 (quoting *Jones v. United States,* 357 U.S. 493 (1958). *Gant,* like *Chimel* before it, explicitly rejected a broad interpretation of the search-incident-to-arrest doctine. Furthermore, focusing on the facts and circumstances that support an exception to the warrant requirement is required by the Fourth Amendment. *See e.g. Sibron v. New York*, 392 U.S. 40, 59 (1968); *Preston v. United States*, 376 U.S. 364, 367 (1964) (rejecting bright-line rules in favor of case-by-case analysis to justify exceptions to the warrant requirement).

If the *per se* rule created by the court of appeals is allowed to stand, the pretext of the OWI arrest gives police "unbridled discretion to rummage at will among a person's private effects" in the hopes of finding evidence of an unrelated crime. This is exactly the kind of blanket search that was so sharply condemned by Justice Scalia in *Thornton* and corrected by the rule of *Gant.* A *per se* rule allowing the search of every car after every OWI arrest is unreasonable and susceptible to abuse; no legitimate government interest justifies it under the Constitution. It should not therefore be the law of our state.

3. There were no particular facts that gave rise to a reasonable belief that open or illegal intoxicants would be in Mr. Coffee's car.

As discussed above, *Thornton* and *Belton* provide examples of case-specific facts – odor of marijuana, admissions by the occupant, furtive movements, drugs and drug packaging in plain view – that gave rise to the reasonable belief that there was evidence of the crime of arrest (drug possession) in the car. Nothing close to that is present in Mr. Coffee's case, a routine drunk driving case with no particular reason to think there was evidence in the car. Police gained no information from Mr. Coffee, found nothing on his person and observed nothing from their lawful vantage point outside his vehicle to create a reasonable belief evidence of drunk driving might be found inside.

To be sure, different factual scenarios in suspected drunk-driving cases may supply a valid basis for a vehicle search. For example, if police observed or were informed about a suspect consuming alcohol while driving or just before driving, they could reasonably expect to find evidence of consumption in the vehicle. *See*, *e.g.*, *State v. Relyea*, 2015 WI App 58, ¶3, 364 Wis. 2d 529, 868 N.W.2d 199 (2014AP2860, unpublished op. App. 171-175) ("The officer saw that Relyea was 'guzzling' from what appeared to be a bottle of 'microbrew' beer."); *State v. Bons*, 2007 WI App 124, ¶15, 301 Wis. 2d 227, 731 N.W.2d 367 (unusual behavior "coupled with the presence of the shot glass on the console, gave [the officer] reasonable suspicion that

Bons had been committing or was about to commit a crime involving alcohol."); and *City of West Bend v. Willie*, 2018 WI App 62, ¶1, 384 Wis. 2d 272, 921 N.W.2d 10 (2018AP151, unpublished op. App. 145-149) (police received "a report from the manager of Wendy's that Willie and his passenger had open beers in their vehicle.").

The same would be true if the suspect told police about items in the car. Thus, had Mr. Coffee told officers he had an open container, pursuant to *Gant* police could search the vehicle to retrieve it. The same might also be true if officers observed a furtive movement indicating the suspect had hid or concealed suspected contraband. *See e.g. State v. Shands*, 2011 WI App 114, 336 Wis. 2d 476, 801 N.W.2d 349 (2010AP2407, unpublished op. App. 150-162) ("Shand's movement with hand-rolled cigarette" characterized as "furtive" contributed to "totality of circumstances" justifying search.). But nothing like that happened or is present here.

Despite the court of appeals' comment that "[i]t is not unusual for a driver's impaired condition to be caused by a potpourri of substances – some legal, some illegal, some easily detected, some not – sometimes including alcohol, sometimes not" there were not particularized facts to support this speculation in Mr. Coffee's case. Further, there is no reason to believe that this is generally the case. While drinking alcohol is extremely common in Wisconsin, (66% of Wisconsin adults use alcohol), using illegal drugs is not (between 3 and 11% use illegal drugs or prescription drugs for non-medical purposes). *See Wisconsin Epidemiological Profile on*

Alcohol and Other Drug Use, 2012 available at: https://www.dhs.wisconsin.gov/publications/p4/p4578-12.pdf. It is far more likely that an intoxicated driver would be drunk on alcohol than anything else.

In addition, the Substance Abuse and Mental Health Services Administration reports that in 2014 11.1 percent of Americans drove under the influence of alcohol but only 2.4 percent drove under the influence of a combination of alcohol and drugs. *See The CBHSQ Report,* (Dec. 2016) available at https://www.samhsa.gov/data/sites/default/files/report_2688/ShortReport-2688.html. This data suggests it is more unusual for intoxicated driving to be caused by a "potpourri of substances" than for it to be caused by alcohol alone. The mere fact of drunkenness gives no particular reason to think that a person is also on other drugs; while it's *possible* that this is so, the possibility is merely speculative. *See*, *e.g.*, *Riley,* 573 U.S. at 379 (2014) (officer's testimony hypothesizing that evidence might be found on a cell phone was too speculative to justify search of the cell phone found on a person incident to arrest).

The record unambiguously establishes Officer Skelton arrested Mr. Coffee on suspicion of driving while intoxicated on "alcoholic beverages," and nothing more. (43:7-10, 48-50). As discussed above, there is no reason to believe open intoxicants will be found in a car after a routine drunk-driving arrest. Skelton did not refer to any smell of drugs or other observations that would have led him to believe Mr. Coffee was under the influence of any other substance. The fact that Officer Bonnett searched the vehicle for evidence of other intoxicants, when the

only articulated fact was that the officers believed Mr. Coffee to be intoxicated on alcoholic beverages demonstrates the unbridled and therefore unreasonable nature of the search. *Gant*, 556 U.S. at 337.

In sum, under the facts of this case, police did not have a reasonable belief that there would be evidence of the OWI in Mr. Coffee's car.

4. Even if it were reasonable to search the vehicle, it was not reasonable to believe evidence of the OWI would be at the bottom of the bag.

Finally, even if there were a permissible basis for the officers to search the interior of Mr. Coffee's vehicle for evidence of alcohol consumption, searching his backpack was unreasonable. The circuit court judge commented that because the backpack was within reach, opening the pack, pushing an item to the bottom, closing it up, and putting a few things on top could be "easily done" and would not be "a difficult task to accomplish." (43:92; App. 141). The actions the judge describes, though, could not be done surreptitiously while driving without some furtive movement or unusual and easily observed action such as the driver's head or body moving or the car swerving as the driver reached to the backseat. Officer Skelton's testimony is devoid of any hint any such action occurred.

Further, had Mr. Coffee somehow been able to perform an act of contortion to get an open can or bottle into the pack, odor or wetness could have

provided a basis for digging deeper inside. But none of the officers testified to any such observation.

The body cam clearly shows an exploratory rummaging through Mr. Coffee's personal effects. It was very unlikely that the officer was going to find evidence of a recently consumed intoxicant underneath all the random items in the bag. Far more likely, Officer Bonnett was searching for evidence of another crime (i.e. drug possession). But Officer Bonnett's sense of entitlement does not justify rummaging through Mr. Coffee's personal effects. *Gant,* 556 U.S. at 342.

In sum, there was no reason to believe that any type of intoxicant was buried deeply at the bottom of the bag wedged behind the driver's seat. Under the facts of this case, this was not a constitutional search.

CONCLUSION

For the reasons stated, Mose B. Coffee respectfully requests that the court reverse his convictions and remand to the circuit court with instructions to permit him to withdraw his no-contest pleas.

Dated this 18th day of November, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,046 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 18th day of November, 2019.

Signed:

FRANCES REYNOLDS COLBERT
Assistant State Public Defender

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CERTIFICATION AS TO APPENDIX

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 § 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 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.

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Signed:

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