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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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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Gant Did Not Create a Novel Categorical "Nature of the Offense" Test to Determine the Constitutionality of Vehicle Searches Incident to Arrest; Traditional Standards of Reasonableness Govern.

The state argues the words "offense of arrest" determine the constitutionality of the search of a vehicle incident to an arrest. But these words are not derived from the Constitution and the Fourth Amendment makes no reference to or distinction between the types of crimes for which evidence is being searched or seized.[1] *See Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978) (explaining there is no principled distinction between crimes when it comes to the requirements of the Fourth Amendment). "Reasonable to believe" and "reasonable basis to believe" on the other hand, stem directly from the "right to be secure … against unreasonable searches"

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[1] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., AMEND. IV.

clause of the Fourth Amendment. *Arizona v. Gant*, 556 U.S. 332, 335, 343, 345, 346, 351 (2009); U.S. CONST., AMEND. IV. These are the words that create a constitutional standard for the search of a vehicle incident to arrest.

The state argues that a focus on the circumstances that give rise to a reasonable belief creates "some ill-defined less-than-probable-cause-but-more-than-a-hunch test." Resp. Br. at 20. Many courts, though, have concluded that the "reasonable to believe" standard is analogous to the familiar and regularly applied "reasonable suspicion" standard. *See e.g. See United States v. Vinton*, 594 F.3d 14, 25 (D.C. Cir. 2010) ("the 'reasonable to believe' standard probably is akin to the 'reasonable suspicion' standard required to justify a *Terry* stop"); *People v. McCarty*, 229 P.3d 1041, 1046 (Colo. 2010) ("the Supreme Court intended a degree of articulable suspicion commensurate with that sufficient for limited intrusions like investigatory stops"); *State v. Mbacke*, 721 S.E.2d 218, 222 (N.C. 2012) ("the 'reasonable to believe' standard set out in *Gant* parallels the objective 'reasonable suspicion' standard sufficient to justify a *Terry* stop"); *Taylor v. State*, 137 A.3d 1029, 1034(Md. 2016) ("We conclude that the 'reasonable to believe' standard is the equivalent of reasonable articulable suspicion because we cannot discern any logical difference between the two").

To be sure, the offense of arrest is important to the analysis, but it alone cannot be dispositive on whether the search is constitutional. As noted by the Colorado Supreme Court:

> the nature of the offense of arrest is clearly intended to have significance, and in some cases it may virtually preclude the existence of real or documentary evidence, but a broad rule automatically authorizing searches incident to arrest for all other offenses cannot be reconciled with the actual holding of *Gant*.

People v. Chamberlain, 229 P.3d 1054, 1057 (Colo. 2010). An "offense of arrest" interpretation with no regard to the particular facts is a functional continuation of the blanket rule of *New York v. Belton,* 453 U.S. 454 (1981) – the rule expressly rejected in *Gant*. Giving effect to all the language in the *Gant* rule, courts must analyze the nature of the offense in conjunction with all the other facts to see whether they give rise to a reasonable belief that evidence would be in a car.

The state complains that review of the facts and circumstances in each case would be redundant to the automobile exception to the warrant requirement, which requires a showing of probable cause. (Resp. Br. at 16). But these doctrines have always been interrelated. *See United States v. Paige,* 870 F.3d 693, 702 (7th Cir. 2017) (citations omitted) ("the searches predicated on the 'search incident to arrest' theory and those predicated on the 'automobile exception' 'are interrelated, but not identical'"). At least one court has stated that the "'reasonable to believe' standard referred to in *Gant* equates with a probable cause standard." *United States v. Grote*, 629 F. Supp. 2d 1201, 1203 (E. D. Wash. 2009) (relying on *United States v. Gorman,* 314 F.3d 1105, 1111 (9th Cir. 2002) ("'the reason to believe,' or reasonable belief, standard ... embodies

the same standard of reasonableness inherent in probable cause"). In fact, *Carroll v. United States*, 267 U.S. 132, 157, 161, (1925), the source of the automobile exception, repeatedly referred to "reasonable grounds for belief in guilt" when describing the probable cause standard necessary for an automobile search. The fact that particular facts may also meet the higher standard of probable cause does not justify ignoring the facts altogether.

Because of "circumstances unique to the vehicle context," the *Gant* rule permits evidence-gathering searches that had been ruled unconstitutional in *Chimel v. California,* 395 U.S. 752 (1961). *Gant,* 556 U.S. at 343. Just as the constitutionality of an evidence-gathering search before *Chimel* turned on a case-by-case reasonableness analysis, so do the evidence-gathering vehicle searches authorized by *Gant*. In the concurrence in *Thornton v. United States,* 541 U.S. 615 (2004) (whose rationale was expressly adopted by *Gant,* 556 U.S. at 343), Justice Scalia reviewed the broader pre-*Chimel* evidence-gathering rule epitomized by *United States v. Rabinowitz,* 339 U.S. 56, 63, (1950) (overruled by *Chimel,* 395 U.S. at 768) and compared it to the narrower officer-safety / evidence preservation rule pronounced in *Chimel.* Despite *Chimel*'s rejection of the evidence-gathering *Rabinowitz* rule, in Justice Scalia's view, "both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires." *Thornton,* 541 U.S. at 631 (Scalia, J. concurring). In recommending the *Rabinowitz* "broader police authority" rule for search-incident-to-arrest in the automobile context, however, Justice Scalia noted that *Rabinowitz* did not treat "the fact of arrest alone

as sufficient." *Id.* at 632. The search was upheld "only after noting that it was 'not general or exploratory for whatever might be turned up' but reflected a reasonable belief that evidence would be found." *Id.* (quoting *Rabinowitz,* 339 U.S. at 62-63).

Indeed, the evidence-gathering approach taken in *Rabinowitz* (and endorsed in the vehicle context by *Gant*) was far from a categorical exception to the warrant requirement and certainly did not create a rule for "broader police authority" in every case regardless of the facts. Rather, the evidence-gathering authority bestowed upon police was a fact-intensive, case-by-case inquiry into the reasonableness of the search under the facts presented. *Rabinowitz* explained:

> The relevant test is … whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment.

Rabinowitz, 339 U.S. at 66. The *Gant* rule, an outgrowth of *Rabinowitz,* applies the same test.

The state's attempt to place the search of a vehicle incident to arrest under the umbrella of search incident of a person is inapposite. (*See* Resp. Br. discussion of *United States v. Robinson*, 414 U.S. 218 (1973) (the seminal Supreme Court case on the search-incident-to-arrest-of-a-person doctrine) at 19-20). *Robinson* recognized the search-incident-to-

arrest rule is comprised of two distinct propositions: "The first is that a search may be made of the person of the arrestee by virtue of the arrest. The second is that a search may be made of the area within the control of the arrestee." *Id.* at 224. *Robinson* dealt only with search of the person and held that the search of the inside of a cigarette pack found on the arrestee was permissible even though the officer had not articulated any particular facts that lead him to have concerns for his safety or evidence destruction. *Id.* Thus, the state is correct that case-by-case adjudication of the question of whether an arresting officer had the authority to carry out a search of the *person* has been repudiated, but this categorical rule has never been extended to searches of the area in the arrestee's control. *South Dakota v. Birchfield*, 136 S. Ct. 2160, 2176 (2016).

The reason a search of a person in every circumstance regardless of the facts is permissible is because the *Chimel* justifications of officer safety and evidence preservation are at their highest when police take full custody of an arrestee. *Robinson,* 414 U.S. at 234-35 ("the peace officer empowered to arrest must be empowered to disarm") (citations and quotations omitted). Justice Scalia explicitly recognized the distinction between searches of the person and searches of surrounding areas, and the "far less compelling" government interest in the latter searches in his *Thornton* concurrence: "When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interest that might justify any overbreadth

are far less compelling." *Thornton,* 541 U.S. at 632 (Scalia, J. concurring).

Notably, even the categorical rule permitting the search of the person incident to arrest has limits. As in every Fourth Amendment analysis, constitutionality turns on balancing "the degree to which [the search] intrudes upon an individual's liberty and … the degree to which [the search] is needed for the promotion of legitimate governmental interests." *Birchfield,* 136 S.Ct. at 1276 and *Riley v. California,* 573 U.S. 373, 386 (2014) (both quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). *Birchfield* (involving the search of a person's blood) and *Riley* (involving search of the cell phone found on the person) both weighed the competing governmental and privacy interests, and both determined the searches were unconstitutional notwithstanding the categorical approach to searches of persons incident to arrest.

To be sure, the privacy interest in one's vehicle is less than that in one's blood or one's cell phone, but so too is the governmental interest in any evidence of an OWI that might be found in a car after the driver is in the custody of the state. The issue is not simply whether there might be any relevant circumstantial evidence in the car. Rather, the critical question is whether the governmental interest in that potential evidence justifies the intrusion. Because of the marginal value of any possible evidence to an OWI prosecution, the intrusion cannot be justified under the balancing test.

Furthermore, a categorical rule permitting searches in all OWI arrests would permit vehicle searches even when it is wholly unreasonable to believe evidence would be found. For example, if a police officer were to witness a bar patron consume several drinks in a short period of time and then get in his car and drive off, the officer would have probable cause to arrest that patron for driving while intoxicated. *See* discussion in *U.S. v. Reagan,* 713 F. Supp. 2d 724, 732 (E. D. Tenn. 2010). But by the very fact that the officer saw the patron in the bar, he would have specific facts indicating that there was no evidence of OWI to be found in the vehicle. *Id.*

Contrary to the state's assertion, Mr. Coffee did not assert that chemical blood testing typically occurs before the arrest. (Resp. Br. at 24). Such tests always occur after the state takes custody of the driver, whether through consent, a warrant or exigent circumstances. The point is that once the state takes custody of the driver, it is in possession of the critical evidence in an OWI prosecution. If the state fails to comply with the warrant requirements, the testing is somehow botched, or the test reveals the driver was not in fact intoxicated, any other evidence found in the car will not save the prosecution. Indeed, in a case like Mr. Coffee's, where there was no observed bad driving, it is unlikely the state would pursue OWI charges without blood alcohol test results indicating intoxication.

The state cited a Dane County study (Resp. Br. at 24, n. 5) for the proposition that a large portion of OWI arrestees are under the influence of both alcohol and drugs. *See* Lorrine D. Edwards, Katherine L.

Smith, and Theodore Savage, *Drugged Driving in Wisconsin: Oral Fluid Versus Blood*, 41 Journal of Analytical Toxicology, 523 (2017). This isn't what the study says. It wasn't designed to measure this, it involved a relatively small sample size over a short time frame and was comprised of self-selected subjects. *Id.* at 524. The study does reveal, though, that there is a policy between the Wisconsin State Laboratory of Hygiene and law enforcement where testing for drugs is routinely cancelled when the BAC comes back in excess of the legal limit. *See id.* (explaining the "LCP" – the "laboratory drug testing cancellation policy"). This illustrates there is very little governmental interest in gathering superfluous evidence, even if it is readily available.

In this case, not only is there little governmental interest in seeking evidence in Mr. Coffee's car—there was also no reason to think evidence would be present. And while in many cases "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended," *Thornton*, 541 U.S. at 630 (Scalia, J. concurring), this is not always true. The facts of a particular arrest will determine what is logical to believe, and what is not. In cases where searches have been upheld, both pre- and post-*Chimel,* there were particularized facts supporting a reasonable belief that evidence of the crime of arrest would be found in the particular place searched.

For example, in *Rabinowitz,* the defendant was in the business of selling stamps and his crime was selling, possessing and concealing forged stamps. *Rabinowitz,* 339 U.S. at 58. When he was arrested in

his one-room place of business, it was not illogical to assume that evidence of his crime would be in the place of arrest – officers had a particularized belief that forged stamps would be there. The same is true of *Belton* and *Thornton*. In both these cases, the officer was aware that arrestees had committed the crime of possessing illicit drugs while they were in their cars. Law enforcement either saw and smelled evidence of drugs in the car (*Belton,* 453 U.S. at 456) or found contraband on the driver (*Thornton,* 541 U.S. at 618). It is logical – reasonable – given these particularized facts that the officer believed more contraband was in the car. But in a case such as Mr. Coffee's, where no evidence was found on him or in his vicinity, and when we know that most people consume alcohol at home or in bars or restaurants, without particularized facts indicating otherwise, law enforcement did not have a reasonable belief that there would be evidence of the OWI in the car.

Importantly, even if possessing open intoxicants or drugs that caused the intoxication was a frequent occurrence (which it is not), this alone is not enough to justify a search. A similar issue arose in *Richard v. Wisconsin*, 520 U.S. 385, 393 (1997), where the state argued for a categorical exception to the knock-and-announce requirement for felony drug investigations. The unanimous Court held that "Wisconsin's blanket rule [excepting police from the knock-and-announce requirement in all felony drug investigations] impermissibly insulates these cases from judicial review." *Id. Richards* explained that "the fact that felony drug investigation may frequently present circumstances warranting a no-knock entry cannot remove from the neutral

scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case." *Id*. Just as the "frequently present circumstances warranting a no-knock entry" did not justify an exception to the knock-and-announce requirement, the (alleged) frequency of relevant circumstantial evidence of OWI cannot, alone, justify a search of the car. The Constitution requires particularized facts and none were present here.

The only articulable fact law enforcement had was the fact of Mr. Coffee's OWI arrest. Under *Gant* and the Constitution, this is not enough to justify the search of his vehicle. This court should uphold the Fourth Amendment protections against unreasonable searches and join the other jurisdictions around the country who have also rejected a categorical rule for OWI search incident to arrests. *See e.g. U.S. v. Taylor*, 49 A.3d 818, 827 (D.C. Cir 2012) (holding that because "there was nothing in particular - no tell-tale sign - to suggest that [the defendant] had been drinking in his vehicle," it was not reasonable for the police to believe "that evidence of the offense of arrest would be found there."); *Reagan,* 713 F. Supp. 2d at 732 (finding "it is not reasonable to believe that evidence of DUI is inside the passenger compartment of a vehicle based solely upon the nature of the charge or the existence of evidence that the vehicle's driver is intoxicated."); *U.S. v. Grote*, 629 F. Supp. 2d 1201 (E. D. Wash. 2009). Because there are no other facts in this case that give rise to a reasonable belief that evidence of the OWI was in the car, the search was unconstitutional.

CONCLUSION

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

Dated this 23rd day of December, 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 2,869 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 23rd day of December, 2019.

Signed:

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